EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000205/2023

Held via Cloud Video Platform (CVP) in Glasgow on 4 July 2023

Employment Judge M Kearns

Ms Trudi Spence	**Claimant** **Represented by:** **Ms L Jordan - Solicitor**
Scotia Gas Networks Ltd	**Respondent** **Represented by:** **Mr P Grant-Hutchison - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal following the Preliminary Hearing was that:-

Claimant's Application to Amend

(1) The claimant's application to amend the ET1 dated 1 June 2023 is allowed with the exception of the following paragraphs, in respect of which, amendment is refused:

a. Paragraphs 1 and 37;

b. Paragraph 38d – claim of indirect discrimination; and

c. Paragraph 44 in so far as it relates to a claim of indirect discrimination.

(2) Within 14 days of the date this Note is sent to the parties, the claimant is ordered to lodge a fresh amended paper apart to the ET1 omitting the paragraphs in respect of which amendment is hereby refused.

(3) Within 28 days of the date the respondent receives the fresh paper apart under paragraph (2) above, the respondent has leave to amend the ET3 in response if so advised.

Respondent's Application to Amend

(5) The respondent's unopposed application dated 19 June 2023 to amend the ET3 is allowed.

(6) Within 28 days of the date this Note is sent out to the parties, the claimant has leave to amend the ET1 in response to the respondent's amendment if so advised.

ORDERS OF THE EMPLOYMENT TRIBUNAL

Under Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the Tribunal makes the following case management Orders:

Respondent's application for a separate Preliminary Hearing on time bar

(7) The respondent's application for a separate Preliminary Hearing on time bar is refused.

Full Hearing

(8) A Full Hearing – time bar, merits and remedy (if appropriate) - will be fixed to take place in person in the listing period October, November, December 2023. Date Listing Stencils will be sent out to the parties.

Agreed List of Issues

(9) Not later than 14 days prior to the first day of the hearing, parties are directed to lodge with the Tribunal an agreed list of issues for determination at the hearing.

NOTE

1. The claimant was employed by the respondent from 10 July 1989 until 24 February 2023, originally as an account manager and latterly as a depot clerk. On 24 February 2023 the claimant was medically retired.

The claimant's application to amend the ET1

Background

2. As stated above, the claimant's employment terminated on 24 February 2023. On 27 February 2023 the claimant notified ACAS of her prospective claim for the purposes of early conciliation. The ACAS early conciliation certificate was issued on 10 April 2023. The ET1 was presented to the Employment Tribunal on 3 May 2023. On 1 June 2023, the claimant's solicitor made an application on her behalf to amend the ET1. The 'stop the clock' provisions of the early conciliation rules (section 207B(3) Employment Rights Act 1996 etc) provide in relation to time limits that when determining whether a time limit has been complied with, the period beginning the day after the early conciliation request is received by ACAS (in this case, 28 February 2023) up to and including the day when the EC certificate is received (in this case 10 April 2023) is not counted. In other words, the 'limitation clock' stops in this case on 28 February and starts running again on 11 April 2023. Thus, not only was the ET1 in time in respect of the termination of the claimant's employment on 24 February 2023, the claimant's application to amend dated 1 June also fell within the primary limitation period in respect of any claim arising from the termination of the claimant's employment on 24 February 2023. The claimant's application to amend was opposed by the respondent.

Facts

3. In relation to the question of whether the claimant had had legal advice prior to presenting her ET1 claim form, the claimant gave evidence on her own behalf and the respondent led Janey Lawson, HR Manager. A supplementary bundle of documents was also lodged by the respondent. Having considered the evidence, I make the following brief findings in fact:

a. Prior to May 2023, both the claimant and her husband represented to the respondent that the claimant had received legal advice about her claim. However, these representations were not correct.

b. At the time when the claimant presented her ET1 claim form to the Employment Tribunal on 3 May 2023, she had received some advice from ACAS and had researched the law online, but she had not, in fact received advice from a lawyer.

Submissions for Claimant

4. In support of the claimant's amendment application, Ms Jordan submitted (and I have accepted) that when the claimant presented her ET1 on 3 May 2023 she had not received legal advice. Ms Jordan said the claimant had been aware of the time limit and had panicked. After lodging the ET1, the claimant had contacted Ms Jordan for advice. An application to amend had been quickly made. Ms Jordan said that the claimant had not properly particularised her legal claims in her ET1, and that she, (Ms Jordan) had written to the respondent's solicitors on 9 May giving full particulars of the proposed application to amend, 19 days before the respondent's ET3 was due. Ms Jordan submitted that the respondent had therefore had an opportunity to cover the claimant's full case their ET3 response.

5. Ms Jordan submitted that the amendment simply gave more details of claims which were already in the original ET1. She stated that it already contained the claims of unfair dismissal and disability discrimination in essence and there was no prejudice to the respondent in getting clearer detail of the case against them. She submitted that it was in the interests of justice to allow the claimant to fully plead her case and in any event the respondent was already aware of the various issues raised. Ms Jordan stated that the amendment would not require further evidence to be led by the respondent because the evidence would be the same as required in relation to the original claim. She submitted that the amendment would assist the Tribunal in dealing efficiently and fairly with the case. Any prejudice to the respondent in allowing the amendment would be minimal, whereas the prejudice to the claimant in

refusing it would be extreme as the claimant would be unable to continue with her claims. The respondent was already in possession of all the facts and has largely responded to the claims in its existing ET3. Ms Jordan submitted that the claim was at a very early stage, having only just been presented.

Submissions for Respondent

6. Opposing the application, Mr Grant-Hutchison stated that the respondent's restructure at the end of 2020/ beginning of 2021 (referred to by the claimant in her original ET1) was radically time barred and had very little connection with what was later complained about in her ET1 – that the respondent could have done more for her instead of dismissing her. He stated that had there not been an application to amend, the respondent would have been requesting a separate Preliminary Hearing on time bar. Indeed, if the amendment was accepted, he would be seeking this. He said that any act or omission prior to 28 November 2022 would be time barred. Mr Grant-Hutchison was at pains to make clear that he would not normally suggest a separate PH on time bar because the factors relevant to time bar are normally interlinked with the merits of the case; ordinarily, there may be a question of whether earlier acts form 'conduct extending over a period' with acts that are in time. However, he submitted that that was not the case here and that the earlier events were discrete and not capable of being conduct extending over a period with the claimant's dismissal. He submitted that since this could not be conduct extending over a period, we were thus in the territory of the claimant requiring a just and equitable extension of time. He cited the case of Miller v The Ministry of Justice UKEAT/0003/2015 unreported, which, he said, forcibly reminds us that the discretion to extend time limits is the exception and not the rule. In Miller, a number of claimants appealed against the refusal by an Employment Tribunal to extend the time limit for making part time worker claims. At paragraph 12 of the judgment, the EAT said this: *"There are two types of prejudice which a Respondent may suffer if the limitation period is extended. They are the obvious prejudice of having to meet a claim which would otherwise have been defeated by a limitation defence, and the forensic prejudice which a Respondent may suffer if the limitation period is extended*

by many months or years, which is caused by such things as fading memories, loss of documents, and losing touch with witnesses."

7. Mr Grant-Hutchison referred to the case of British Coal Corporation v Keeble 1997 IRLR 336. That case is also concerned with the exercise of the just and equitable extension of time provision. Although the case relies on the English Civil Procedure rules, it contains an extended version of the test of justice and equity. He reminded me that the Keeble factors are: (i) the length of and reasons for the delay; (ii) whether the cogency of the evidence is likely to be affected; (iii) the extent to which parties have co-operated with requests for information; (iv) the promptness with which the claimant acted once she knew of the facts giving rise to the action; and (v) the steps taken to obtain professional advice. He submitted that the ratio of Miller extends that of Keeble and that when looking at prejudice in the context of this test, the two forms of prejudice to the respondent should be considered; not only the prejudice to the respondent in losing the time bar element of their defence; but also the material or forensic prejudice that occurs with the passage of time, which may affect the way that the respondent can meaningfully respond to the claim. He stated that this is a case where the time limits would require to be radically extended. With regard to the balance of prejudice, Mr Grant-Hutchison submitted that if the amendment was refused, the claimant would still have a claim for unfair dismissal and maybe some element of her discrimination case which could be particularised in a further application to amend which was genuinely a relabelling exercise.

8. With regard to the amendment itself, he submitted that this was not a simple relabelling exercise and that paragraphs 14, 17, 28, 29, 30 and 34 were new. He said that most of the amendment was concerned with matters which are clearly time barred. He referred to pages 22 and 23 of the PH bundle in relation to the restructure at the end of 2020 and beginning of 2021. He stated that if the amendment were to be accepted then this would all have to be investigated and it would result in additional responses assuming that it could be adequately investigated at this stage. Mr Grant-Hutchison stated that Caroline Lindsay, the senior HR Manager who dealt with the restructure was

no longer with the respondent and she would have the most insight into the complaints now made. Maybe she could be found. Nighean Shields referred to by the claimant at paragraph 29 of the Amendment was not on the respondent's envisaged list of witnesses when they first saw the claim and the claimant's agenda.

Discussion and Decision

9. Applying the Selkent test, having regard to the interests of justice, I considered the submissions of the parties and all the relevant circumstances of the case. I considered the relative injustice and hardship that would be caused to the parties by allowing or refusing the amendment application. The relevant circumstances are these:

   (i) With regard to the nature of the claimant's proposed amendments, they do not, in my view change the basis of the claims. Even the paragraphs specifically listed by Mr Grant-Hutchison appeared to me to mainly give further particulars of matters already adverted to in the ET1. Paragraph 34 refers to the appeal but the other paragraphs listed are all part of the case set out in the ET1 in which the claimant alleges that she made various requests for adjustments; that these were rejected leading to her sickness absence, which in turn led to dismissal. With the exception of the claim for indirect discrimination, the proposed amendment did not, in my view, add new heads of claim. I agree with Ms Jordan that it largely provides further particularisation of claims that are already within the ET1. The amendment contains more detailed averments about the events leading up to the termination of the claimant's employment which are not new to the respondent, having been raised in the appeal against dismissal. It appears that the averments in the amendment appear to have been answered to some extent in the ET3.

   (ii) In relation to the claim for indirect discrimination, I agree with Mr Grant-Hutchison that that head of claim should not be permitted to be added by amendment. It would involve an entirely new head of claim that is

not foreshadowed in the original ET1. A claim for indirect discrimination involves a great deal of additional investigation by a respondent and is likely to add layers of complexity. I agree that a claim of indirect discrimination is a discrete claim which would not form part of conduct extending over a period in the circumstances of this case. As a clearly distinct claim it appears to be significantly time barred. I do not consider that it would be just and equitable to extend time for it. Ms Jordan did not make any submissions about the length of and reasons for the delay in relation to this head of claim or any of the other Keeble factors in relation to it. For these reasons, I have concluded that it should not be permitted to be added by amendment. I also agree that the paragraphs relating to the appeal being outstanding should not proceed as the claimant conceded in evidence that the appeal outcome is no longer outstanding.

(iii) With regard to the applicability of time limits, my understanding of the case set out in the ET1 and particularised in the proposed amendment is that the acts complained of are said to be conduct extending over a period for the purposes of section 123 Equality Act 2010. The last act complained of is said to be the termination of the claimant's employment on 24 February 2023 (or possibly the appeal). With the exception of the claim for indirect discrimination, the claims in the amendment are foreshadowed in the ET1. The claimant's dismissal is said to be part of the 'unfavourable treatment' for the purposes of the section 15 claim. Because the amendment particularises the ET1, the time bar issues it raises mirror those in the ET1. There will need to be a determination by the Tribunal of whether or not the acts referred to by the claimant are conduct extending over a period and if not, whether it would be just and equitable to extend time. (See below).

(iv) With regard to the timing and manner of the application, the claimant's amendment application comes very early in the case. The amendment application was received by the Tribunal less than a month after the ET1 was lodged. In relation to the unfair dismissal claim, the

amendment is within the primary limitation period. Because it was received prior to the case management PH it has been possible to discuss it at that PH. Thus any delay to these proceedings is minimal. (The details are set out in paragraph 2 above.) Otherwise, the passage of time is relevant and I have considered that. Mr Grant-Hutchison submits that Ms Lindsay no longer works for the respondent, which is also a relevant matter I have taken into account in balancing the prejudice to the respondent.

10. Taking all the above considerations into account, I have concluded that the injustice and hardship that would be caused to the claimant in refusing the amendment outweigh the injustice and hardship to the respondent in allowing it. If the amendment were refused, the claimant would be unable to particularise a large part of her claim and would be unable to have the 'conduct extending over a period' issue determined. With regard to the respondent, I have specifically reserved the time bar issues raised by the original claim and also present in the amendment to be determined at the full hearing. The respondent's limitation defence can still be argued in light of the full facts. I have weighed the points made by Mr Grant-Hutchison in relation to the passage of time and the necessity of locating a possible witness but even taking his submissions into the balance, it appears to me that the balance of injustice and hardship favours allowing the amendment. It appears to me that the respondent would have required further particulars of the ET1 in any event. For all these reasons, the claimant's application to amend is allowed subject to the exceptions set out above.

Respondent's application for a separate Preliminary Hearing on time bar

11. The respondent's application for a separate Preliminary Hearing on time bar is refused. It appears to me that this would not be in line with the over-riding objective. The issue of whether the acts and omissions complained of are conduct extending over a period is inextricably linked with the merits of the case. The same evidence is likely to be required to determine the issue and a separate Preliminary Hearing on time bar would be likely to involve duplication and unnecessary expense.

Respondent's Application to Amend

12. The claimant did not oppose the respondent's application to amend the ET3 and this is granted.

Case Management

13. The Notice of Hearing for today's PH had four items on the agenda:

    a. Claimant's opposed application to amend;

    b. Claimant's opposed application to sist proceedings (withdrawn by Ms Jordan at today's hearing);

    c. Respondent's application to amend response; and

    d. To discuss what other case management orders may be required and list the case for a hearing.

14. The claimant's disability status is accepted by the respondent in the ET3. I do not think it would be in accordance with the over-riding objective to fix a further PH on time bar for the reasons given above. It follows that the case should now be set down for a full hearing, whilst reserving the issue of time bar in relation to all acts or omissions pre-dating 28 November 2022. The claimant argues that these are part of 'conduct extending over a period', failing which that it would be just and equitable to extend time, so those issues are reserved. Date listing stencils will be sent out to parties.

15. The respondent has drafted a list of issues for discussion with the claimant. This should be finalised and agreed between the parties not later than 14 days prior to the hearing. Otherwise, since parties are both represented, it is hoped that parties' representatives will liaise with each other regarding preparations for the hearing including the joint bundle of documents.

Employment Judge: **M Kearns**
Date of Judgment: **07 July 2023**
Entered in register: **11 July 2023**
and copied to parties

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I confirm that these are my Judgment and Orders in the case of Trudi Spence v Scotia Gas Networks Ltd 8000205/2023 and that I have signed them by electronic signature.