



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4105807/2022**

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**Held in Glasgow on 14 August 2023**

**Employment Judge L Wiseman**

10 **Ms Kimberley Martin**

**Claimant  
Represented by:  
Mr S Smith -  
Solicitor**

15 **Greens Retail Ltd**

**Respondent  
Represented by:  
Mr B Nicol -  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The tribunal decided:

- (i) to refuse the respondent's application to strike out the claim and
  - 25 (ii) to refuse the claimant's application to amend the claim to include complaints of detriment for having made a protected disclosure (section 47B Employment Rights Act), automatically unfair dismissal for having made a protected disclosure (section 103A Employment Rights Act) and disability discrimination (section 19 Equality Act).
- 30 The claim will proceed as one of unfair constructive dismissal and will be listed for a 4 day final hearing in person.

### **REASONS**

1. The claimant presented a claim to the Employment Tribunal on the 30 October 2022 in which she indicated she was making a claim of “bullying and intimidation”. The claimant subsequently instructed a legal representative who, by email of the 28 April 2023, made an application to amend the claim to introduce complaints of disability discrimination and detriment for having made a protected disclosure.  
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2. The respondent entered a response in which it set out some background to the claim and asserted the claim of “bullying and intimidation” had no legal basis and should be struck out as having no reasonable prospect of success. The respondent objected to the application to amend made by the claimant’s representative.  
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3. A case management preliminary hearing took place on the 23 May 2023 at TG which an Employment Judge ordered there be a preliminary hearing to determine (i) whether the claimant’s application to amend the ET1 should be allowed; (ii) if the application to amend is not allowed, whether the case should be struck out or a deposit order made on the grounds of no (or little) reasonable prospect of success and (iii) if the application to amend is allowed, to fix a hearing and make any other arrangements required.  
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4. The claimant’s representative, by email of the 14 August, sent an adjusted application to amend the claim, which sought to introduce claims of constructive dismissal and automatically unfair dismissal for having made a protected disclosure.  
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5. The claimant’s representative did not call the claimant to give evidence. Accordingly, the tribunal heard submissions from the representatives regarding the claimant’s application to amend the claim and the respondent’s application to have the claim struck out.  
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### **Claimant’s submissions**

6. Mr Smith accepted the ET1 had not indicated the claimant was making a claim of unfair dismissal, but submitted that on the basis of the authorities, it was clear that that was the claim from the outset. Accordingly, the application to  
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amend the claim to include this complaint was a “relabelling” exercise. The same factual basis was relied upon insofar as the events took place over the 14, 15 and 16 August 2022, and the application to amend provided further particulars of what occurred on those days.

- 5 7. The protected disclosure (the phone call to Ms Strain, HR) had also been referred to in the ET1 and in the further particulars provided in the application to amend. Mr Smith submitted this was no more than a “relabelling” exercise
8. Mr Smith accepted the application to amend the claim to include a complaint of disability discrimination (section 19 Equality Act) was a new claim and there had been nothing in the claim form to alert the respondent to there being a claim of this nature. Mr Smith invited the tribunal to grant the application to amend because the amendment was proportionate and tribunals should avoid unnecessary formality.
- 10 9. Mr Smith referred to the Presidential Guidance for England and Wales and to the cases of ***Cocking v Sandhurst 1974 ICR 650***; ***TGWU v Safeway UKEAT/0092/07***; ***Mechkarov v Citibank UKEAT/0119/17***; ***Office of National Statistics v Ali 2005 IRLR 201*** and ***Ennever v Metropolitan Police UKEAT/001/06***. Mr Smith invited the tribunal to draw from these cases that it should take a generous look at what is in the ET1, and not a forensic look at what is pled. Mr Smith submitted the only thing the claimant could have been claiming in the claim form was constructive dismissal.
- 20 10. Mr Smith submitted it would be just and equitable to allow the disability discrimination claim to proceed because the claimant only added this after she had received legal advice.

## 25 **Respondent’s submissions**

11. Mr Nicol responded to Mr Smith’s submissions by disagreeing that the application to amend was a relabelling exercise. Further, if the claimant believed the ET1 claim included a complaint of constructive dismissal and automatically unfair dismissal for having made a protected disclosure, there would have been no need for the application to amend.
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12. Mr Nicol referred to the cases of ***Chandhok v Tirkey 2015 ICR 527*** and ***Scottish Opera Ltd v Winning UKEATS/0047/09*** as authority for the submission that the essential nature of the claim should be set out in the ET1 claim form. He also referred to the case of ***Selkent Bus Ltd v Moore 1996 ICR 836*** where the EAT summarised the practice and procedure governing amendments. It was said the circumstances to be considered by the tribunal included the (i) nature of the application to amend; (ii) time limits and (iii) the timing and manner of the application.
13. Mr Nicol submitted the application to amend sought to introduce new claims which were out of time. Further, and with regard to the claim of suffering detriment/dismissal because of having made a protected disclosure, there was no evidence to suggest the “disclosure” was in the public interest. There had been a telephone call to HR regarding the individual right to be accompanied and the claimant’s health and safety. These disclosures were not capable of forming public interest. In addition to this, the events about which the claimant complained were already in train and there was no suggestion of any difference made by the fact of the phone call to HR.
14. The application to amend sought to introduce a new claim of indirect disability discrimination in terms of section 19 of the Equality Act. The information provided did not disclose the nature of the provision, criterion or practice said to have been applied by the respondent, or how it applied to all staff or how it put the claimant at a particular disadvantage. The claim, it was submitted, was bound to fail.
15. Mr Nicol submitted the amended application to amend sought to introduce complaints of constructive dismissal and automatically unfair dismissal for having made a protected disclosure. These were new claims, not foreshadowed in the claim form, and were out of time. There was no explanation from the claimant why they were out of time.
16. Mr Nicol acknowledged the events relied upon by the claimant were said to have occurred on the 14th, 15th and 16th August 2022. The claimant had a period of three months in which to either present a claim to the Employment

Tribunal or contact ACAS for early conciliation. The ET1 claim form had been presented in time, but the new claims contained in the application to amend dated 28 April 2023 and 14 August 2023 were out of time. There was nothing to explain why the application to amend had not been made earlier, and no evidence before the tribunal regarding the just and equitable extension.

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17. Mr Nicol also referred to the cases of *Unilever UK plc v Hickinson 2009 WL 2946913*; *Marks and Spencer plc v Williams-Ryan 2005 WL 1078583*; *Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53*; *Bexley Community Centre v Francis Robertson 2003 EWCA Civ 576* and *British Coal Corporation v Keeble 1997 WL 1104672*.

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### Discussion and Decision

18. I had regard firstly to the ET1 claim form presented by the claimant. I noted the claimant had ticked a box at 8.1 of the form, which indicated she was “making another type of claim which the Employment Tribunal can deal with”. The claimant had described the claim as “bullying and intimidation”. The claimant went on at box 8.2 to give details of her claim as follows:

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“ ..... I resigned from my job of 14+ years after being tuded over to Greens. I was bullied and intimidated over a 3 day period by phone 14th August 2022, shopfloor I was threatened with disciplinary action because I asked for someone else to be present in the office on the 15th August 2022. The following day 16th August I was intimidated again and had to exit the office under the arm of Shazzad a superior. This happened over a three day period and resulted in me having to take time off work with doctors sick line. When I contacted HR they told me it was a difficult one and not to speak to anyone about it. I never heard back from them about the situation. My previous work ethic and character was brought into question when an area manager Omar asked staff members if I am prone to taking time off. I have since handed in my resignation as I felt I would not go back. I gave up my job of 14+ years because of this....”

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30 **Respondent’s application to have the claim struck out**

19. The respondent made an application to have the claim struck out because a complaint of “bullying and intimidation” has no statutory basis and therefore no reasonable prospect of success. I decided to refuse that application because whilst I acknowledged the claimant had not ticked the box indicating she was bringing a claim of unfair dismissal, I considered the details set out by the claimant to describe her claim (14+ years’ service, bullying and intimidation, felt she could not go back) supported a conclusion that the claimant (who at that time was an unrepresented party) was complaining about being put in a position of having to resign: she was complaining of unfair constructive dismissal.
20. I further concluded that if I have erred above, I would have allowed the application to amend to introduce a claim of unfair constructive dismissal because it is no more than a relabelling of facts already set out, and relied upon, in the claim form.

15 ***Claimant’s application to amend the claim***

21. I had regard to the cases referred to by the representatives, and in particular the key case of ***Selkent*** (above). I considered the nature of the amendment in respect of each claim.
22. The claimant applied to amend the claim to introduce a complaint of detriment because of having made a protected disclosure. The application to amend included details of the alleged protected disclosure relied upon. I acknowledged the fact the claimant contacted HR was referred to in the claim form, but I could not accept the claimant’s submission that it could be discerned from this that a “whistleblowing” claim was being made or that the respondent would have expected such a claim. There was nothing in the claim form to support that submission. The mere fact of a phone call being made to HR is not a sufficient basis to suggest a disclosure has been made. I therefore considered the application to amend in this respect sought to introduce a new claim.
23. I noted, with regard to considering the issue of time limits, that the key date was 16 August 2022. The application to amend was made on 28 April 2023.

The claim is late. I acknowledged I have discretion to extend time if it was not reasonably practicable to present the claim in time. There was no evidence regarding this issue. I concluded from the information before me that the claimant was not only aware of her right to bring a claim to the Employment Tribunal, but also aware of the time limits for doing so and the ability to take legal advice (ACAS provided a note of sources of advice). I decided, based on that information, that the claimant had all the facts necessary to bring a claim and that it was reasonably practicable to present the claim on time.

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24. I next had regard to the timing and manner of the application to amend. I noted the application to amend had been made on 28 April 2023 and there was no explanation why it could not have been made sooner. I also noted there were issues regarding the nature of the amendment insofar as the alleged disclosures related to personal rights/matters which could not be said to be in the public interest. Furthermore, the events about which the claimant complained took place over three days (14, 15 and 16 August). The (alleged) disclosure took place after the events of the 14 and 15 had occurred. The claimant was already not happy with the behaviour of the respondent and there was nothing to explain why the claimant linked the behaviour on the 16 August to the disclosure, rather than it being a continuation of the behaviour on the 14 and 15 August.

25. I next had regard to the amendment to introduce a claim of disability discrimination. This was a new claim not foreshadowed in the claim form. The events said to have been discriminatory took place in August 2022. The application to amend was made on the 28 April 2023. The claim is late and there was no evidence upon which to make a decision regarding a just and equitable extension.

26. The amendment sought to introduce a complaint of indirect discrimination in terms of section 19 Equality Act. I noted (as above) there was no explanation why the application could not have been made earlier. I also noted that in terms of a complaint of indirect discrimination there was no mention of the provision, criterion or practice said to have been in place.

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27. I next had regard to the amendment to the application to amend sent on the 14 August. The claimant, in that document, sought to amend the claim to include a complaint of unfair constructive dismissal. I have dealt with this issue above and confirm the claim as set out in the ET1 is a complaint of unfair constructive dismissal and accordingly no amendment is required to include it.
28. The application to amend also sought to introduce a complaint of automatically unfair dismissal in terms of section 103A Employment Rights Act. This is a new claim which is being made out of time. The same points regarding the nature of the alleged disclosure (set out above) apply to this claim. I also had regard to the point that at the time of making the claim the claimant knew of the facts necessary to have included this as part of the claim.
29. I finally had regard to the balance of prejudice. I acknowledged that if the application to amend is refused, the claimant will be unable to proceed with claims of detriment/dismissal for having made a protected disclosure and disability discrimination. I, however, balanced, this with the fact that the claimant will be able to proceed with a complaint of unfair constructive dismissal.
30. I also acknowledged that if the application to amend is allowed, the respondent will be put in the position of having to defend new, out of time, claims.
31. I next stood back to regard all of the above points, and, having done so, decided to refuse the application to amend.
32. I confirm, for the sake of clarity, that the claim which will proceed to a final hearing is one of unfair constructive dismissal. The application to amend the claim to introduce complaints of detriment/dismissal for having made a protected disclosure (sections 47B and 103A Employment Rights Act respectively) and disability discrimination (section 19 Equality Act) is refused.
33. Mr Nicol confirmed the respondent no longer insisted upon the application for a deposit order.



**Case management***The Hearing*

- 5 34. The claimant will (likely) call 2/3 witnesses in addition to herself. The witnesses are currently employees of the respondent. It was agreed the names of the witnesses and the matters to which they will speak will be disclosed to the respondent at the time documents are produced.
35. The respondent will (likely) call 2/3 witnesses. Mr Nicol agreed to confirm the names of the witnesses by 22 August.
- 10 36. It was **agreed** a 4 day final hearing (in person) should be arranged. Both parties are to confirm their availability by 22 August.
37. Witness statement will not be used.

*Documents*

- 15 38. The respondent will prepare the joint folder of documents for the hearing. A preliminary folder will be produced 6 weeks prior to the hearing. The names of the claimant's witnesses will then be confirmed. The final folder of documents for the hearing will be produced 4 weeks prior to the hearing.
39. The claimant agreed to provide a schedule of loss by 29 August 2023.

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**Employment Judge: L Wiseman**  
**Date of Judgment: 17 August 2023**  
**Entered in register: 22 August 2023**  
**and copied to parties**

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