



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4105734/2022**

**Held in Edinburgh on 1 and 2 August 2023**

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**Employment Judge: M Sutherland  
Members: L Brown  
A Grant**

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**Mandy Whitelaw**

**Claimant  
In person**

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**Sky Retail Stores Limited**

**Respondent  
Represented by:  
Mr M Leon, Solicitor**

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## **JUDGMENT**

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The unanimous Judgment of the Tribunal is that the Claimant's application to amend to include a complaint of unfair dismissal under Section 98 of the Employment Rights Act 1996 is granted.

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**REASONS****Introduction**

- 5 1. This Judgment is issued following a request for written reasons made after an oral Judgment was promulgated on 2 August 2023.
- 10 2. A final hearing was listed for 1 to 4 August 2023. The Claimant's application to amend was considered at the start of the final hearing.
3. The Claimant appeared on her own behalf. The Respondent had the benefit of professional representation.
4. The Claimant gave evidence.
5. Both parties made oral submissions.

**15 Procedural history**

6. On 9 September 2022 the Claimant commenced ACAS Early Conciliation which ended on 12 September 2022.
7. On 24 October 2022 the Claimant lodged her employment tribunal claim which included a complaint for unfair dismissal (the Claimant had ticked the relevant  
20 box).
8. At a case management hearing on 11 January 2023 the claimant accepted that she had not been dismissed (although anticipated that she would be). She withdrew her complaint for unfair dismissal following which a withdrawal judgment was issued which was dismissed her complaint for unfair dismissal.
- 25 9. The Claimant alleges that she made a protected disclosure in 2018. The Claimant alleges that she suffered various detriments which center around her exemption from mask wearing and related absence. The last act of detriment was said to have occurred in October 2022.
10. A 5 day final hearing was arranged to determine her complaints of  
30 whistleblowing detriment which commenced 1 August 2022.
11. On 16 March 2023 the Claimant wrote to the Tribunal to advise that 'Tm writing to inform you I was contacted by the respondent via letter, and was asked to

attend a conduct meeting held 3 March 2023. This resulted in the respondent terminating my contract with "immediate effect". This was a concern as noted in my original statement, so may I ask this to be noted on file." (This was not copied to the Respondent until 28 March 2023.)

- 5 12. On 23 March 2023 the tribunal wrote to the claimant stating "Your correspondence has been referred to the Legal Officer...who has directed that it be placed on the casefile. The Tribunal has also been directed to state that any application to amend should be made timeously".
13. On 6 April 2023 the claimant asked for correspondence related to her dismissal to be included in the joint bundle (which the Respondent did). (This was the  
10 Claimant's last communication with the tribunal prior to the final hearing).
14. On 25 July the Respondent provided the Claimant with a draft list of issues which did not refer to her claim for unfair dismissal.
15. At 4pm on Friday 28 July 2023 the tribunal emailed the parties requiring the  
15 Claimant to confirm immediately by return whether or not she seeks to make complaints of unfair dismissal and/or automatically unfair dismissal (as explained) and to provide details (again as explained). The Respondent was then to advise whether or not that application was opposed and their proposals for further procedure.
- 20 16. There was no response by the Claimant prior to the start of the final hearing.
17. On 31 July the Respondent advised that they would object to any such application being made so late; this would be a material change at the last minute; the Respondent has prepared on the basis of the detriment claim (and the issues identified at the PH on 11 January); the Claimant has failed to  
25 respond to the list of issues sent 25 July; if the amendment is allowed the hearing requires to be postponed and the Respondent will apply for expenses of that hearing.
18. On 1 August, at the start of the final hearing, the Claimant confirmed the following in response to questions by the Tribunal - she sought to make a  
30 complaint of unfair dismissal under Section 98 of the Employment Rights Act that her dismissal on 3 March 2023 for unauthorised absence was unfair because her absence was in fact authorised (i.e. was not unauthorised) and in any event during the disciplinary investigation and hearing she was not permitted to refer to events arising prior to 22 October which related to the

reason for her absence. She confirmed that she was not seeking to make a complaint of automatically unfair dismissal (she was not asserting that the reason for her dismissal was that she had made a protected disclosure). The terms of her amendment were then set out in writing namely “that her dismissal on 3 March 2023 was unfair (under Section 98 of the Employment Rights Act 1996) because during the disciplinary investigation and hearing she was not permitted to refer to events arising prior to 22 October which related to the reason for her absence and her absence was authorised (i.e. was not unauthorised)”.

19. Having taken further instructions the Respondent confirmed that this application was opposed on the basis in summary that it was out of time, there was a delay in making it, it would result in a postponement of the final hearing which would put the Respondent to an additional cost of £3,500 (in addition to preparing for a longer hearing) which was unlikely to be recovered from the Claimant and which delay might affect the quality of evidence and availability of witnesses (who might leave the Respondent's employment).

### Findings of fact

20. The tribunal makes the following facts -
21. The Claimant had taken advice from Citizens' Advice on her complaints for whistleblowing detriment. She had their assistance in drafting the ET1 claim. Thereafter she spoke to different advisors who gave different advice which she found confusing and contradictory and she elected to proceed without their assistance.
22. On 3 March 2023 the Claimant was dismissed by stated reason of unauthorised absence from work.
23. The Claimant immediately resolved that she wanted to bring a complaint of unfair dismissal in respect of that dismissal. The Claimant was aware that she did not currently have a live complaint of unfair dismissal because it had been withdrawn and dismissed.
24. On 16 March 2023 the Claimant wrote to the Tribunal to advise that 'I'm writing to inform you I was contacted by the respondent via letter, and was asked to

attend a conduct meeting held 3 March 2023. This resulted in the respondent terminating my contract with “immediate effect”. This was a concern as noted in my original statement, so may I ask this to be noted on file.”

- 5 25. This letter referred to the complaint of unfair dismissal that was stated on her original claim. The purpose of this letter was to advise the tribunal that she had now been dismissed and that wished to proceed with her complaint of unfair dismissal.
- 10 26. On 23 March 2023 the tribunal wrote to the claimant stating “Your correspondence has been referred to the Legal Officer...who has directed that it be placed on the casefile. The Tribunal has also been directed to state that any application to amend should be made timeously”.
- 15 27. The Claimant understood that the tribunal were acknowledging her request and were to determine whether her complaint had been made timeously. The Claimant did not understand that this letter was asking her to take any further steps in respect of her complaint of unfair dismissal.
28. The Claimant did not consider the draft list of issues provided by the Respondent on 25 July because she received a number of emails around that time.
- 20 29. The Claimant did not read the Tribunal email of 28 July prior to the final hearing commencing on 1 August which is the reason why she did not reply.

### **The law**

- 25 30. The complaints a claimant wishes to make should be contained in their claim which should set out the essential case (per *Chandhok v Tirkey* [2015] ICR 527, per Langstaff, the EAT). If a claimant wishes to introduce a new complaint they should made an application to amend.
31. Whilst the rules do not prohibit the making of an oral application to amend it would ordinarily be more appropriate to do so in writing.
32. The Tribunal has a broad discretion under Rule 29 to allow amendments at any stage of the proceedings either on its own initiative or on the application by a party.
- 30 33. The EAT in *Selkent Bus Company Ltd v Moore* [1996] IRLR 6 provided the following guidance on amendment: “Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the

circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it".

34. That discretion should be exercised in a way that is consistent with the requirements of "relevance, reason, justice and fairness inherent in all judicial decisions".
35. That discretion also should be exercised in accordance with the overriding objective of dealing with cases fairly and justly including, so far as practicable (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.
36. The following non-exhaustive factors are relevant to the exercise of that discretion: the nature of the amendment; the applicability of any time limits; the timing and manner of the application; and all the circumstances including prospects of success.

#### The nature of the amendment

37. *"Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels of facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of a minor matter or is a substantial alteration pleading a new cause of action" (Selkent).*
38. There are broadly three types of amendment: amendments which add to or alter the basis of an existing claim or defence ("minor"); amendments which add or substitute a new cause of action or defence arising out of facts already plead ("re-labelling"); and amendments which add or substitute a wholly new cause of action ("substantial").
39. The Court of Appeal in *Abercrombie & Others v Aga Rangemaster Ltd [2013] EWCA Civ 1148; [2013] IRLR 953* provided: "the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but

on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted”.

- 5 40. The fact that a claim is affected by a jurisdictional issue (e.g. time bar) is no bar to an amendment that would resolve that issue (*Abercrombie*).

#### The applicability of time limits

- 10 41. *“If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether the complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions” (Selkent)*
- 15 42. The applicable time limits do not ordinarily affect minor amendments or re-labelling exercises. For substantial amendments the tribunal should consider whether the complaint if brought as a separate claim would be out of time and if so whether the time limit should be extended. This is only a factor and not wholly determinative.
- 20 43. The Court of Appeal in England and Wales in *Ali v Office of National Statistics* [2005] IRLR 201 per Lord Justice Waller: “There will further be circumstances in which, although a new claim is technically being brought, it is so closely related to the claim already the subject of the originating application, that justice requires the amendment to be allowed, even though it is technically out of time.”
- 25 44. Lady Smith in *Newsquest (Herald and Times) Limited v Keeping* [2010] UKEATS/0051 stated that:
- 30 “The fact that to allow an amendment would, in effect, enable a claimant to elide a statutory time bar does not necessarily prevent an Employment Tribunal granting the application. It does not operate as an absolute bar ... It is, however...a highly relevant factor ... and "potentially decisive" ... a Tribunal requires to consider why the application was not made at an earlier date, why it is being made at that point in time and what are the whole circumstances of the lateness ... The overall task of balancing the injustice and hardship that will result from granting the amendment against that which will result from refusing

it, must, in the case of an amendment to introduce a fresh claim which would be time barred if presented independently, be carried out in that context."

5 45. In terms of Section 111 of the Employment Rights Act 1996, an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination. Where an Employment Tribunal is satisfied that it was "not reasonably practicable" for a complaint to be presented before the end of the relevant period of three months, Section 111(2) (b) provides that the Tribunal may consider the complaint if it is presented within such further period as the  
10 Tribunal considers reasonable.

15 46. In assessing the "reasonably practicable" element of the test, the question which the Tribunal has to answer is "what was the substantial cause of the employee's failure to comply" and then assess whether, given that cause, it was not reasonably practicable for the claimant to lodge the claim in time. One of the most common reasons why a claimant will not lodge their claim within the normal time limit is either ignorance of, or a mistake regarding, the application of the relevant time limit. The leading case on this is *Wall's Meat Co Ltd v Khan [1978] IRLR 49* where, at paras 60-61, Brandon LJ stated "the  
20 impediment [to a timeous claim] may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable."

25 47. The test for whether it was reasonable for the claimant to be aware of the time limit is an objective one and the Tribunal should consider whether a claimant ought to have known of the correct application of the time limit. Ignorance or mistake "will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the  
30 circumstances have made"

48. Where the Tribunal concludes that it was not reasonably practicable for the claimant to have lodged her claim in time then it must go on to consider whether it was lodged in some further period that the Tribunal considers reasonable.



This is a question for the Tribunal to determine in exercising its reasonable discretion.

49. In assessing the further delay, the Tribunal should take account of all relevant factors including the length of the further delay and the reason for it. It will also be relevant for the Tribunal to assess the actual knowledge which the claimant had regarding their rights (particularly the application of the time limit) and what knowledge they could reasonably be expected to have or investigations they could reasonably be expected to make about their rights.

The timing and manner of the application

50. *“An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made; for example, the discovery of new facts or new information appearing from documents disclosed in discovery. Whenever taking any factors into account, paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.” (Selkent)*
51. Consideration should be given to the effect of any delay on the quality of evidence, additional areas of enquiry, and the stage of the tribunal proceedings.
52. As Lady Smith’s EAT noted in the Scottish appeal of Ladbrokes Racing Ltd v Traynor [2007] UKEATS/0067/07. “It also requires to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if they are unlikely to be recovered by the party who incurs them. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of lesser quality than it would have been earlier.”

All the circumstances

53. “Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it” (*Selkent*).
54. The tribunal should take into account all the circumstances including prospects of success.

**Submissions**

55. Given that the Claimant was a litigant in person the Respondent agreed to give their submissions first to which the Claimant gave a brief reply.
56. The Respondent’s submissions were in summary as follows -
- a. A simple or limited amendment may be made orally but ordinarily the specifics should be provided in writing (*Chief Constable of Essex Police v Mr D Kovacevic UKEAT/126/13/RN*). If a party advises of an intention to amend the Tribunal requires to enquire as to the precise terms of the amendment (*Margarot Forrest Care Management v Miss F Kennedy UKEATS/0023/10/BI*)
  - b. The letter of 16 March does not contain either the terms of an amendment or an application to amend. It does not state that she seeks to make a complaint of unfair dismissal and did not specify the basis on which she considered that dismissal to be unfair.
  - c. The letter of 16 March simply seeks to update the tribunal with the fact that she had been dismissed. It does not intimate an application to amend or an intention to amend. The legal officer shared their view that it did not of itself intimate an application to amend hence her reply.
  - d. If the Claimant did not understand the legal officer’s letter she should have sought clarification with the tribunal.
  - e. The Respondent may not have drawn any inference from the request to include the documents from the disciplinary procedure including the letter of dismissal. It is not unusual to simply include those and deal with any issues of relevance at the final hearing.

- f. The Claimant did not make an application to amend until the start of the hearing on 1 August 2023. That application was made at a very late stage in the proceedings being the start of the final hearing.
- g. The Respondent will incur a cost of £3.5k which would not have been incurred had the application been made timeously and the postponement avoided.
- h. The granting of the application will result in a postponement of the final hearing for 3 to 6 months which may affect the quality of the evidence in respect of issues which are already historic and may affect the availability of witnesses (who may no longer be employed)
- i. It is difficult to comment on prospects but there is clear documentary evidence that the claimant was required to return to work and warned of the risk of dismissal for failure to do so rendering the prospects of the claim poor.
- j. The Claimant was aware of her right to claim unfair dismissal (having ticked that box on her original claim form).
- k. Time limits should be construed strictly and are decisive of the application to amend
57. The Claimant's limited submissions in summary were that she had advised of her intention to claim unfair dismissal on 16 March which the Tribunal had noted on the file.

## **Decision**

### The nature of the amendment

58. Terms of amendment which seek to add a new cause of action in respect of facts not already plead may be considered substantial. That description readily applies to an application to amend to include a complaint of unfair dismissal in respect of a dismissal which occurs in March 2023 where the original claim is in respect of complaints for whistleblowing detriment arising before end October 2022.

59. Formal classification is not always helpful. It is noted that the amendment if allowed would involve substantially different areas of enquiry (albeit there are significant factual issues which overlap). Her unamended claim pertains to alleged detriments arising prior to end October 2022 because of an alleged protected disclosure arising in 2018. The complaint of unfair dismissal pertains to a disciplinary process conducted by different individuals than those who perpetrated the alleged detriments. (Although it is noted that the disciplinary process relates to her absence from work which the Claimant asserts is related to those detriments.)

io The applicability of time limits

60. For substantial amendments the tribunal should consider whether the complaint is out of time and if so whether the time limit should be extended. This a material factor but not necessarily determinative.
61. A complaint of unfair dismissal must be made within 3 months (extended to allow for ACAS Early Conciliation) or where that was not reasonably practicable within such further period as the tribunal considers reasonable.
62. The Claimant's letter of 16 March 2023 considered objectively in context amounted to an application to amend to include a complaint of unfair dismissal. We are fully cognizant that the Claimant does not state in that letter her dismissal was unfair and nor does she state she is making an application to amend. However by that letter she is clearly seeking to reactivate the complaint of unfair dismissal she made in her original complaint. It cannot reasonably be construed that she is simply conveying information about the fact that she was dismissed and this was not the construction adopted by the legal officer who references the making of application to amend in her reply.
63. The legal officer's letter construed by a lawyer would reasonably be that the Claimant requires to submit a formal application to amend and we expect that this is the interpretation the Respondent put upon it. However the Claimant is not legally qualified and she reasonably construed that she was not being asked to do anything. In the absence of any such application in response the Respondent assumed that she was not making one. However the Respondent ought reasonably to have inferred that the issue remained live when the Claimant asked for documents related to the disciplinary process to be

included in the joint bundle. Whilst the Respondent may elect to simply include those documents and address issues of relevancy at the hearing this does not change the fact that they ought reasonably to have inferred this.

- 5 64. When she submitted her original complaint she was concerned that she would be dismissed (because conduct proceedings had commenced). She was concerned that this would be an unfairly dismissal which is why she had ticked the relevant box stating that "I was unfairly dismissed". When she withdrew her complaint for unfair dismissal she was not advised by the Employment Tribunal (either at the preliminary hearing or when she sent her letter of 16 March) of  
10 the procedure required to amend her complaint should she then be dismissed. Her claim was proceeding to final hearing in respect of a claim form that contained a statement that she considered that she had been unfairly dismissed. She was aware that complaint was withdrawn and dismissed and this meant she did not have a live complaint for unfair dismissal. However that  
15 statement on her claim form had not been deleted. When she was dismissed (as she had feared) she wrote to the tribunal to tell them of that fact and she also referred to the concern that was stated on her original claim.
- 20 65. We recognize that she had not articulated why she considered that her dismissal was unfair but that was information that could and would have readily been sought by way of further specification. She had stated the essentials of her complaint - that she had been unfairly dismissed.
- 25 66. Had we formed the view that she did not technically submit her application to amend until the start of the hearing, her complaint would have been out with the statutory time limit by 1 month unless there was an extension of time. In these circumstances we would have formed the view that it was not reasonably  
30 practicable for her to submit it timeously and that she did so within a reasonable period. She was aware of her right to claim unfair dismissal but she was ignorant of the amendment procedure to be followed. She had immediately flagged her concern regarding her dismissal with the tribunal and was not told in response the procedure that she required to follow or that she not followed the correct procedure. She had no reason for seek further advice on the issue. She reasonably understood that she had raised the matter with the tribunal.

The timing and manner of the application

67. Applications to amend may be made at any time. The proceedings are at an advanced procedural stage given that a final hearing had commenced. It is reasonably anticipated that a postponed final hearing on all issues could commence within 3 to 6 months and there is no reason to believe that a delay of this magnitude would materially affect the quality of the evidence. We recognized the possible risk that a Respondent witness may no longer be employed by them but that it is not of itself a bar to them being called to give evidence.

68. We are also of the view that these issues would in any event have arisen had the Claimant simply submitted a separate claim for unfair dismissal which we reasonably anticipate would have been conjoined with this claim given the areas of factual overlap (and the overlap on remedy).

Prospects of success

69. We note that the claimant was advised in September 2022 that her absence was no longer authorized and that her failure to return to work would be considered unauthorized and would result in disciplinary proceedings. However we also note that it appears from the notes of the disciplinary hearing that the claimant was expressly told at the disciplinary hearing that they would not be entering into any discussion about events prior to 1 October 2022. In these circumstances it is not possible at this stage for us to form any view on her prospects.

All the circumstances

70. The amendment if allowed would generate substantial new areas of enquiry in respect of an alleged unfair dismissal and will result in a delay of around 3 to 6 months. However all of these disadvantages would have arisen had the Claimant simply submitted a separate claim for unfair dismissal after she had been dismissed (given the likelihood of the claims being conjoined).

71. The amendment if allowed will result in a late postponement of the final hearing which will put the Respondent to additional costs of £3.5k which are unlikely to be recovered. However these costs arise because of a failure to identify at an

earlier stage that there was an outstanding application for amendment. Had that issue been identified at an earlier stage, particularly when the claimant sought to include documents which related to the disciplinary process, those costs could have been avoided.

- 5 72. The amendment if refused would prevent the Claimant from proceeding with a complaint of unfair dismissal.
73. Taking into account all the circumstances including that there was no delay on the Claimant's part in raising the issue, that the Claimant was not advised by the Tribunal of the procedure to be adopted in making an application to amend, io considering the injustice and hardship of allowing the amendment on the Respondent, considering the injustice and hardship of refusing the amendment on the Claimant, the unanimous judgement of the tribunal is that the application to amend is granted.

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<b>Employment Judge:</b>	<b>M Surtherland</b>
<b>Date of Judgment:</b>	<b>24 August 2023</b>
<b>Entered in register:</b>	<b>25 August 2023</b>
<b>and copied to parties</b>	

