



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000068/2023

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Held via Cloud Video Platform (CVP) on 27 October 2023

Employment Judge McManus

10 Ms H Lee

Claimant

Inverloch Castle Limited

Respondent

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### PRELIMINARY HEARING DECISION

#### Decision

1. The claimant's application to amend her claim to include a claim of disability discrimination is refused.
2. The claimant's proposed amendment to provide details of further alleged comparators in her claim of race discrimination under section 13 of the Equality Act 2010 is taken as further particulars of that claim.
3. A Final Hearing is arranged to take place on 5 & 6 February 2024 and a Notice of Hearing will be issued separately.

#### Background

- 25 1. This Preliminary Hearing ('PH') was for the purpose of considering whether or not the claimants' application to amend the ET1 should be allowed. The respondent's representative prepared a Bundle for today's PH, with page numbers from 1 – 110. The page numbers in this decision refer to page numbers in that Bundle.
- 30 2. There have been two previous PH in this case. Following the first PH, which was for the purpose of case management, EJ d'Inverno made certain Orders. In those Orders (made on 18 April 2023), EJ d'Inverno identified the nature of

the claims which had been set out in the ET1 claim form. He identified the claims as being in respect of:

- Constructive unfair dismissal
  - Constructive wrongful dismissal
  - 5       • Race discrimination under section 13 of the Equality Act 2010, based on the respondent's treatment of the claimant (being of Asian origin) and an identified comparator (a French woman), with the less favourable treatment complained of being non approval of the claimant's requested holiday dates in the month of September 2022;
  - 10       • Unauthorised deductions from wages
  - Breach of contract.
3. EJ d'Inverno made Orders that that ET1 did not bring claims for discrimination based on either the protected characteristic of sex or the protected characteristic of disability.
- 15 4. The third Order made by EJ d'Inverno was to record what the claimant sought to rely on in respect of a claim for harassment under section 26 of the Equality Act 2010, in respect of the protected characteristic of race. EJ d'Inverno's decision was that if the claimant wished to amend her claim to include a claim for harassment under section 26 of the Equality Act 2010, based on the
- 20 protected characteristic of race, then the claimant would require to make an amendment application to do so.
5. No appeal was lodged in respect of the decision on those Orders.
6. The case proceeded to a PH on time bar. Following that hearing, EJ Meiklejohn decided that the Tribunal did not have jurisdiction to hear the unfair
- 25 dismissal claim. EJ Meiklejohn decided that that the race discrimination claim was allowed to proceed. The race discrimination claim which was allowed to proceed was the claim of direct discrimination under section 13 of the Equality Act 2010. In his decision EJ Meiklejohn referred to EJ d'Inverno's previous Order that an application to amend should be made if the claimant sought to

include a claim of harassment on the grounds of her race ( a claim under section 26 of the Equality Act 2010). At paragraph 63 of his Judgement, EJ Meiklejohn set out the terms of section 26 of the Equality Act 2010.

- 5 7. The claimant made an application to amend her claim. The terms of her proposed amendment are at page 56 of the Bundle for this PH. The substantive terms of the proposed amendment do not relate to a claim of harassment under section 26 of the Equality Act 2010. The proposed amendment has headings of (1) Harassment and (2) Discrimination of the Race'. The paragraphs under the heading of 'Harassment' refer to alleged failure by the respondent to make reasonable adjustments, related to the claimant's Carpel Tunnel Syndrome. These are allegations of disability discrimination ie. Unlawful treatment under the Equality Act 2010, based on the protected characteristic of disability.
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- 15 8. The paragraphs in the proposed amendment under the heading 'Discrimination of the Race' relate to the claimant's position that she was refused holidays in September 2023 because of her race. In respect of that treatment, the claimant now seeks to rely on additional non-Asian comparators, in addition to the previously identified French comparator.
- 20 9. The respondent's reasons for objecting to the proposed amendments are set out in the document at pages 58 – 60.
10. In order to ensure that the claimant understood what was being said, the proceedings at this PH were translated by the booked Interpreter from English to Korean, and from Korean to English.

### Relevant Law

- 25 11. Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Rules'), which states:

*"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly.*

*Dealing with a case fairly and justly includes, 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.*

10 *A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.”*

12. The duty to deal with cases fairly and justly is a duty of the Tribunal towards all parties before it.
- 15 13. The time limit for raising claims under the Equality Act 2010 is set out in section 123 of that Act, as follows:

*‘(1) Proceedings on a complaint within section 120 may not be brought after the end of –*

- (a) *the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) *such other period as the employment tribunal thinks just and equitable.*

(3) *For the purposes of this section –*

- (a) *conduct extending over a period is to be treated as done at the end of the period;*
- (b) *failure to do something is to be treated as occurring when the person in question decided on it.*

14. The key test for considering amendments has its origin in the decision of the National Industrial Relations Court in *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR650, 657B\_C:

5 *“In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused.”*

10 15. The leading authority in respect of amendment applications is *Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore* [1996] IRLR 661, [1996] ICR 836. There the EAT confirmed that 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, and set out the factors to be considered as including:

15 (ii) *The nature of the amendment, which can be varied, such as correction of typing errors, the addition of factual details to existing allegations, the addition or substitution of other labels for facts already pled, or the making of entirely new factual allegations which change the basis of the existing claim;*

20 (iii) *The application of time limits, and in particular where a new claim is sought to be added by way of amendment whether that complaint is out of time and if so whether the time limit should be extended under the applicable statutory provisions;*

(iv) *The timing and manner of the application.*

25 16. In *Selkent*, Mummery J, as he then was, set out at paragraph 26:

30 *“...an application for amendment made close to a hearing date usually calls for an explanation as to why it is being made then, and was not made earlier, particularly when the new facts alleged must have been within the knowledge of the applicant at the time he was dismissed and at the time when he presented his originating application.”*

17. The approach taken in Selkent was followed by the EAT in Vaughan v Modality Partnership 2021 ICR 535, where in a claim for unfair dismissal and alleged detriment as a result of making protected disclosures, the ET had refused to allow amendment to add two further disclosures. The EAT held:

5 *“..in deciding whether to exercise the discretion to allow an amendment, the employment tribunal had to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it; that, in doing so, it should take into account all the relevant circumstances, and, while it was impossible and undesirable to list all the relevant circumstances, they*  
10 *included consideration of the nature of the amendment, the applicability of time limits and the timing and manner of the application; that, however, the real practical consequences of allowing or refusing an amendment should underlie the entire balancing exercise; and that the employment judge had directed herself as to the relevant law, applied it on the basis of the*  
15 *submissions made to her and reached a permissible conclusion when deciding to refuse the amendment.”*

18. Lady Smith summarised the relevant law in respect of amendment applications (at paragraphs 20 – 26) in *Margarot Forrest Case Management V Miss FS Kennedy UKEATS/0023/10/BI*. That decision was made with  
20 reference to the 2004 Tribunal Procedure Rules, but remains relevant, as follows:-

25 *“20. An Employment Tribunal has power to grant leave to amend a claim at a hearing (see: Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 Rules 10(2)(q) and 27(7)). Thus, if a claimant’s representative seeks permission to alter, add to or subtract from what is written in the claimant’s form ET1, the Tribunal may, in its discretion, allow the representative to do so. The Tribunal does not have power itself to amend a claim.”*

19. In *Ladbrokes Racing Ltd v Traynor UKEATS/0067/06MT*, the EAT helpfully  
30 set out the normal procedure which should be followed by a Tribunal when considering an amendment to an ET1. That case made reference to *Ali v*

*Office of National Statistics [2005] IRLR 201*, where LJ Waller commented on the importance of giving fair notice to an employer in the form ET1 of the case that the claimant alleges against him. He stated:

5 “39... ...a general claim cries out for particulars to which the employer is entitled so that he knows the claim he has to meet. An originating application which appears to contain full particulars would be deceptive if an employer cannot rely on what it states.”

20. The position set out in paragraph 20 of *Ladbroke's Racing Ltd v Traynor* [2006] UKEATS/0067/06MT, is relevant to the issues in this PH:

10 “20. When considering an application for leave to amend a claim, an Employment Tribunal requires to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. That involves it considering at least the nature and terms of the amendment proposed, the applicability of any time limits and the timing and manner of the application. The latter will involve it considering the  
15 reason why the application is made at the stage that it is made and why it was not made earlier. 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  
20 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  
25 new issue is no longer available or is of a lesser quality than it would have been earlier. These principles are discussed in the well known case of *Selkent Bus Co Ltd t/a Stagecoach Selkent v Moore* [1996] IRLR 661.”

21. In *E v X, L & Z* [2020] UKEAT/0079/20/RN(V) & [2020] UKEAT/0080/20/RN(V), the EAT gave a useful summary of relevant case law and then set out the principles to  
30 be applied when dealing with issues of time bar, amendment and strike out.

## Decision

22. I took into account the relevant law as set out above and applied the approach set out most recently by the EAT in *Vaughan v Modality Partnership 2021 ICR 535*). With regard to each section of the proposed amendment, I balanced the injustice and hardship of allowing it against the injustice and hardship of refusing it. I took into account all the relevant circumstances. That included consideration of the timing and nature of the amendment and the applicability of time limits. I took into account the procedural history of the case and the decisions made by EJ d’Inverno and EJ Meiklejohn.
23. In respect of the proposed amendment terms under the heading ‘Harassment’, I accepted the respondent’s representative’s submissions as set out in their objections to the amendment application at page 58 - 69.
24. The proposed terms under the heading ‘Harassment’ do not relate to a claim for harassment under section 26 of the Equality Act 2010. These terms seek to bring a claim under the Equality Act 2010 based on the protected characteristic of disability.
25. EJ d’Inverno had explicitly found that the ET1 claim form did not include a claim based on the protected characteristic of disability. The claimant did not appeal EJ d’Inverno’s decision.
26. In the circumstances of this case, for the reasons relied upon by the respondent in their objections under the heading ‘Harassment’, where the claim for disability discrimination is timebarred, where it had been ordered by EJ d’Inverno that that ET1 claim did not include a claim for discrimination based on the protected characteristic of disability, and where that Order was not appealed it is not just and equitable to now allow the claim to be amended to bring a claim based on the protected characteristic of disability. The claim is not allowed to be amended to include the terms of the section of the proposed amendment under the heading ‘Harassment’.
27. I making this decision, I take into account the claimant’s reliance on her lack of knowledge of applicable law and that she ‘made a mistake’.



28. As stated at the PH, I note that if it is the claimant's position that her Carpel Tunnel Symptoms were caused by the respondent's fault then she should take legal advice on a personal injury claim. The Employment Tribunal does not hear claims in respect of alleged physical injury at work.
- 5 29. In respect of the proposed amendment terms under the heading 'Discrimination of the Race', I accepted part of the respondent's representative's submissions set out in their objections to the amendment application. Some of what is set out in that section of the proposed amendment is statement on how the claimant considers the claim should be assessed, and her comment, rather than allegations which she seeks to rely on.
- 10 30. Within the section under the heading 'Discrimination of the Race', is what I consider should properly be considered as further particulars of the race discrimination claim under section 13. The respondent's representative accepted this position. The section 13 claim is in respect of the respondent's refusal to allow the claimant holidays in September 2022. The claimant now seeks to rely on additional comparators. The relevant part of the proposed amendment is the sentence *'The respondent approved a week holidays and three weeks holidays for 4 other employees for the same month, whereas rejected my two days holiday.'* The terms of the proposed amendment at under the heading 'Discrimination of the Race' did not specify who those '4 other employees' were.
- 15 20 31. At this PH, the claimant's position was that the comparators she wished to rely on were (1) the French woman previously identified (2) 3 members of the Housekeeping team who the claimant believed to be Bulgarian, are not of Asian origin & who were allowed to take holidays in August or September 2022. Her position was that she did not know those individuals names because she hardly ever saw them. They reported to a different Manager. The claimant's explanation for not having mentioned these individuals previously was that she had forgotten that a colleague had mentioned to her that those individuals had been allowed holidays.
- 25 30

32. I considered the balance of hardship between the parties. I took into account that the part of the proposed amendment relating to the respondent's refusal of the claimant's holiday request for 2 days holiday in September 2022 do not bring a new head of claim and are in relation to the same narrow point i.e. the claimant's claim that she was refused holidays in September 2022 because of her race. The claimant seeks to be allowed to rely on additional allegations of fact in respect of 3 additional comparators in respect of this alleged discrimination.
33. I took into account that a claim based on the respondent's different treatment of the claimant compared to 4 non-Asian comparators is likely to have greater prospects of success than a claim based on the treatment of the claimant and one non-Asian comparator. I also took into account the claimant's position being that these individuals were in a different team (Housekeeping) and noted that there may be issues as to whether or not they are true comparators to the claimant.
34. I took into account that this part of the proposed amendment terms do not relate to an entirely new factual basis. The section 13 claim remains based on a narrow point, being the respondent's refusal to allow the claimant to take 2 days holiday in September 2022. Information on the comparators relied upon could have been requested in an Order for Further Particulars, or could have been identified only at a case management PH.
35. I considered the balance of prejudice to each party should the amendments be allowed. It was not suggested that the length of the hearing would be significantly extended.
36. In all the circumstances, I considered that it is in the interests of justice for the Tribunal to hear evidence on the allegations set out by the claimant in the proposed amendment in respect of details of the additional comparators now sought to be relied upon by the claimant in her section 13 claim of race discrimination based on the respondent's refusal to allow her holidays in September 2022. The sentence *'The respondent approved a week holidays and three weeks holidays for 4 other employees for the same month, whereas*

*rejected my two days holiday.*” is further particulars of the claimant’s claim under section 13 of the Equality Act, alleging race discrimination. In making this decision I have particularly taken into account that details of comparators are often given through case management, without requiring amendment.

- 5 37. The claim proceeds as a claim of race discrimination under section 13 of the Equality Act 2010. There is no claim under section 26 of the Equality Act (harassment) and no claim of disability discrimination,

### **Case Management**

- 10 38. A Final Hearing (‘FH’) is now scheduled to take place on **4 & 5 February 2024**. This will take place in person at the Glasgow Tribunal Centre.

39. Standard Case Management Orders will be issued in respect of that FH.

- 15 40. If any further case management orders are considered by a party to be required, that party will make an application to the Employment Tribunal setting out the terms of the requested case management order and why it is considered to be necessary.

41. By **17 November 2023** the respondent’s representative will provide the claimant with their proposed List of Issues, identifying the issues which are to be determined by the Tribunal at the FH.

- 20 42. Within 21 days of her receipt of the respondent’s proposed List of Issues the claimant will inform the respondent’s representative of any suggested changes to that List.

43. At the start of the FH, the Tribunal will confirm the issues which will be determined at the FH.

- 25 44. At that FH, evidence will be heard from the claimant. For the respondent, evidence will be heard from Kerry Watson & Eleanor Goater. Evidence will only be heard on matters relevant to the issues which are for the Tribunal’s determination. The Tribunal will make its’ findings in Fact, based on the evidence heard and its decisions on credibility and reliability of witnesses. The relevant law will then be applied to those facts.

45. The claimant's position is that she sent an email to the owner of the business (Kerry) asking for holidays and that she received a reply refusing her request. Her position is that at the end of September, she found out that the French woman she relies on as her comparator had been allowed to take holidays.

5 The claimant's position is that she emailed Kerry in respect of that and that in that email she alleged that she had been discriminated against because of her race. The claimant will provide the respondent's representative with a copy of the email correspondence she seeks to rely on in her claim. Her position is that she raised a grievance but that was in relation to allegations

10 of disability discrimination, which are not before the Tribunal.

**Employment Judge: C McManus**  
**Date of Judgment: 2 November 2023**  
**Entered in register: 6 November 2023**  
15 **and copied to parties**