



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106974/2023

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Held in Glasgow on 10 June 2024

Employment Judge P O'Donnell

Miss R Somerville

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**Claimant
Represented by:
Mr A Drummond -
Lay Representative**

Govan Housing Association

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**Respondent
Represented by:
Ms G White -
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that:

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1. The claims of unfair dismissal and breach of contract, having been withdrawn by the claimant are dismissed under Rule 52 of the Tribunal's Rules of Procedure.

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2. The claimant's application to amend her claim is allowed in respect of allegation 14 of the amendment but is refused in respect of the remaining 15 allegations.

3. The Tribunal, of its own motion, exercises its power under Rule 29 for the claimant to provide to the Tribunal (copied to the respondent) the following particulars with 14 days of the date on which this judgment is sent to parties:

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a. Which type of discrimination does the claimant say her dismissal amounts to.

b. If she says it was direct disability discrimination:

i. Whether the claimant relies on an actual or hypothetical comparator.

1. If an actual comparator, identify who this is.
2. If a hypothetical comparator, set out the circumstances of the comparator.
- ii. The basis on which it was said that her dismissal was done on the grounds of disability.
- c. If she says her dismissal was discrimination arising from disability:
 - i. What was the “something” arising from disability which was the cause of her dismissal and the basis on which it is said this was the cause.
- d. If the claimant says her dismissal amounts to a breach of the duty to make reasonable adjustments:
 - i. Whether the duty is said to have been engaged by one or more of the following:-
 1. A provision, criterion or practice (PCP) applied by the respondent.
 2. A physical feature.
 3. The provision of an auxiliary aid.
 - ii. Specification of the PCP, physical feature or auxiliary aid relied upon.
 - iii. The basis on which it is said that the claimant was placed at a substantial disadvantage by this compared to people who are not disabled (including, but not limited to, the disability or disabilities relied upon).
 - iv. What adjustments the claimant says it was reasonable for the Respondent to have made to overcome the disadvantage.
4. The Tribunal exercises its power under Rule 29 to order that, within 28 days of the claimant providing the further specification of her disability

discrimination claim, the respondent will lodge revised grounds of resistance, as so advised.

REASONS

1. The claimant had lodged an ET1 claim form on 15 November 2023 which identified that she was seeking to bring claims of unfair dismissal and breach of contract relating to her dismissal. The respondent resists those claims; they submit that the claimant did not have the necessary length of service to pursue a claim for unfair dismissal and sought to have the claim for breach of contract struck out as having no reasonable prospects of success.
2. By email dated 20 March 2024 from her representative, the claim applied to amend her claim to add 16 allegations of disability discrimination. The respondent objects to that application.
3. The present hearing was listed to consider the following matters:
 - a. Whether the Tribunal had jurisdiction to hear the claim for unfair dismissal given that the claimant had less than two years' continuous service.
 - b. Whether the claim for breach of contract should be struck out under Rule 37(1)(a) of the Tribunal Rules of Procedure as having no reasonable prospects of success.
 - c. Whether to grant the claimant's application to amend her ET1 to add claims of disability discrimination under the Equality Act 2010.
4. At the outset of the hearing, Mr Drummond confirmed that the claimant withdrew the claims for unfair dismissal and breach of contract. These claims are now dismissed under Rule 52 of the Tribunal Rules of Procedure.
5. As a result of this, the present hearing was only concerned with the application to amend and the Tribunal heard submissions from both representatives in respect of this application.

6. The Tribunal has a general power to make case management orders which includes the power to allow amendments to a claim or response in terms of Rule 29.

5 7. The case of *Selkent Bus Co Ltd v Moore* [1996] ICR 836 confirms the Tribunal's power to amend is a matter of judicial discretion taking into account all relevant factors and balancing the injustice and hardship to both parties in either allowing or refusing the amendment. The case identifies three particular factors that the Tribunal should bear in mind when exercising this discretion; the nature of the amendment; the applicability of any time limits; 10 the timing and manner of the amendment.

8. In relation to time limits, the case of *Transport and General Workers Union v Safeway Stores Ltd* UKEAT/0092/07 confirms that this is a relevant factor in the Tribunal's discretion and can be the determining factor. However, time bar does not apply, in the context of an application to amend an existing claim, 15 to automatically bar a new cause of action in the same way as it would if the new cause of action was being presented by way of a fresh ET1.

9. The case of *Cocking v Sandhurst (Stationers) Ltd* [1974] ICR 650 addresses the procedure to be adopted by the Tribunal in dealing with an amendment to substitute a respondent. It confirms that the application of the statutory time 20 limit does not depend on when a respondent first becomes a party to the proceedings but when the proceedings were originally presented to the Tribunal. In that case, it was held that the claim as originally presented and as amended was the same, that is, that the claimant had been unfairly dismissed by his employer. Given that that complaint had been lodged 25 timeously then the Tribunal had the discretion to allow an amendment that was necessary to hear that claim. In exercising such discretion, it was said by Sir John Donaldson that:

30 *"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. The Tribunal considers that it is appropriate to address each of the specific factors highlighted in *Selkent*, consider any other relevant factors and then take all of those into account in balancing the injustice and hardship to all sides.
11. First, there is the nature of the amendment itself. The Tribunal broadly agrees with the submissions made on behalf of the respondent that this is a substantial amendment introducing entirely new allegations of unlawful discrimination.
12. The ET1 as originally pled sets out a claim about the claimant’s dismissal. It does not, in any way, set out any assertion that the claimant is disabled or make any allegation that she was discriminated against because she is disabled. The terms “harassment” and “bullying” are used but no detail is given of this. The narrative of the claimant is directed to setting out the circumstances in which the claimant came to be dismissed.
13. With one exception, none of the 16 allegations of discrimination in the amendment are foreshadowed in the ET1 and these allegations are entirely new causes of action. The one exception is allegation 14 which is that the claimant was dismissed and that this amounts to disability discrimination. The ET1, as originally pled, is clearly a complaint that the claimant has been dismissed and so allegation 14 is not an entirely new allegation in terms of the facts. It is new in the sense of the claimant’s dismissal being said to amount to disability discrimination.
14. The Tribunal does consider that the new allegations are substantial. Although the claimant’s representative sought to argue that responding to these allegations would not involve significant work for the respondent because the allegations only involved 4 employees, it is not as simple as that. There are 15 allegations to investigate with many of them being said to amount to multiple incidents (for example, the claimant uses terms such as “often”, “constantly” and “continually” in describing the alleged discrimination).

The Tribunal will address this further below when dealing with the relative prejudice to the parties.

15. There is also the question of whether the claimant was disabled (as defined in s6 of the Equality Act 2010) at the relevant time which the respondent has indicated they are unlikely to concede (at least based on the information presently available). This will require additional procedure such as a preliminary hearing to determine this issue.
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16. Second, there is the issue of the applicability of time limits. This arises because the amendment seeks to introduce new causes of action. There is no dispute that the new allegations are being raised out of time.
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17. As noted above, the issue of time limits may not be fatal to an amendment application (although it is a significant factor) and, in particular, the Tribunal has to consider whether it would exercise its discretion to hear any claim out of time.
- 15 18. The relevant test for this is the “just and equitable” test set out in the Equality Act 2010 which requires the Tribunal to assess the prejudice to each side, taking account of all relevant factors.
19. This assessment overlaps, to a significant degree, with the assessment the Tribunal has to carry out in considering the amendment application. The Tribunal will deal with this further below.
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20. Third, there is the factor as to the timing and manner of the application. The Tribunal notes that the claimant first raised the issue of discrimination by email dated 8 January 2024. This was prompted by the Tribunal issuing an Order under Rule 27 proposing to dismiss the claims of unfair dismissal and breach of contract. At this stage there was no application to amend and that was not made until 20 March 2024 after a case management hearing at which the Tribunal had explained to the claimant’s representative (who had recently been appointed) the need for amendment if claims for discrimination were to be pursued.
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21. The Tribunal agrees with the respondent's agent that, on the face of it, the allegations of discrimination have only been raised when the claimant realised that she could not pursue the original claims of unfair dismissal and breach of contract.
- 5 22. This would be an appropriate point to address the submissions made on behalf of the claimant about the reason why she had not raised the allegations of discrimination earlier. This is relevant to the issue of time limits (particularly whether the Tribunal may exercise its discretion to hear any claims out of time), the timing of the amendment and the balance of prejudice.
- 10 23. The explanation advanced on behalf of the claimant is that, as a party litigant, she was not aware of the claims which she could pursue. The Tribunal is conscious of the difficulties faced by party litigants in navigating the Tribunal process and does not hold party litigants to the expectations the Tribunal would have of lawyers in terms of setting out the legal basis of any claim.
- 15 24. However, that has to be balanced against the fact that the ET1 form allows parties to identify the claims they wish to pursue by ticking a range of boxes, one of which identifies a claim of disability discrimination. The Tribunal considers that it is entitled to proceed on the basis that the person completing the form has made a conscious choice as to which boxes to tick and which
20 not to tick. In the present case, the box for disability discrimination was not ticked.
25. Further, whilst the Tribunal may not expect a party litigant to have a detailed knowledge of the law, it is only a claimant who knows the factual basis of their claim. It does not require specialist legal knowledge for a party to set out the
25 facts which they say give rise to their claim. In the present case, with the exception of the allegation relating to her dismissal, the claimant has not, in her ET1, set out the factual allegations she now seeks to advance despite the fact that they were all clearly within her knowledge.
26. Having addressed the specific factors identified in *Selkent*, the Tribunal
30 considered whether there were any other relevant factors.

27. The Tribunal was not being asked to assess the prospects of success at this hearing and did not consider that the merits of the case was a factor which should feature heavily in its consideration given that there was likely to be a dispute of fact between the claimant and the respondent which could only be resolved by hearing evidence.
28. However, it is relevant for the Tribunal to take into account the terms of the allegations being made. As noted above, there are 15 entirely new allegations, many of which suggest that there are multiple incidents of a similar nature. The particular issue with the amendment is that many of the allegations are in vague and unspecific terms; no dates are given for individual incidents and, although four managers are named in the first allegation, the remaining allegations do not identify which of these managers are said to have engaged in the conduct in question.
29. There is also a lack of detail about a number of allegations. For example, allegation 2 states that the claimant's managers "*purposely belittled*" her but no detail is given of what was said or done by the managers. The same issue arises in respect of allegations 3, 5, 9, 11, 15 and 16. Another example is allegation 7 which states that the claimant was given a greater workload than other employees with no detail of who these employees were and why it was said that the claimant had a greater workload. The same issue arises in respect of allegation 8.
30. One way of resolving any prejudice to a respondent in having to respond to unspecific allegations would be to order a claimant to provide further specification. However, in this case, the amendment concludes with a statement that it has not been possible for the claimant to identify each individual incident. In effect, what has been set out in the amendment is said to be as much detail of the facts as the claimant can provide. The Tribunal, therefore, considers that an Order for further particulars would not result in any more detail than has been provided in the amendment.
31. Turning to the balance of injustice and hardship between the parties, the Tribunal considered that there would be a significant injustice and hardship to

the respondent in allowing the amendment as a whole. They would be faced with the prospect of trying to defend substantial additional allegations of discrimination set out in vague and unspecific terms and being raised out of time.

5 32. The amended claims go far beyond what was originally pled which was focussed on the claimant's dismissal. The amended claim would involve the respondent having to address multiple allegations of discrimination in relation to not just comments directed at the claimant but a range of management decisions. This would involve significantly more evidence requiring to be led
10 at any final hearing than there would for a claim which was only concerned with the single act of dismissal.

33. In these circumstances, the respondent would face a very real hardship in investigating the allegations and setting out their response to these. Further, given the lack of specification, they would not have fair notice of the case they
15 have to answer in respect of those allegations.

34. The same is not true in respect of allegation 14 which relates to the specific act of dismissal. The respondent was already on notice that the claimant was pursuing a claim about her dismissal albeit on a different legal basis. This was a decision of the respondent and the reasons for this decision must be
20 within their knowledge. The Tribunal does not consider that the respondent is prejudiced or subject to the same degree of hardship in defending a claim based on the claimant's dismissal that they would if the whole amendment was allowed. The claim about the claimant's dismissal may now be advanced on a different legal basis but, fundamentally, the respondent is being asked
25 to show the reason for that dismissal. The only difference is that they are now having to show that the reason is not one which amounts to unlawful discrimination as opposed to being a fair reason. The Tribunal does not consider this to be a significant hardship.

35. On the other hand, refusing the whole of the amendment is a prejudice to the
30 claimant as she would be deprived of any remedy. If the amendment is allowed in respect of allegation 14 then the claimant is able to seek a remedy

for her dismissal and this minimises the prejudice to her in not being able to seek a remedy for the other matters in her amendment.

36. In these circumstances, taking account of all the matters set out above, the Tribunal considers that the balance of prejudice falls in favour of allowing the amendment in respect of allegation 14 but otherwise the balance falls in favour of refusing the remainder of the amendment.
37. Having allowed the amendment in respect of allegation 14, the Tribunal considers that there does need to be further specification of the legal basis of the claim that the claimant's dismissal amounts to disability discrimination.
38. The Tribunal, therefore, of its own motion, exercises its power under Rule 29 for the claimant to provide, to the Tribunal and copied to the respondent, the following particulars with 14 days of the date this judgment is sent to parties:
- a. Which type of discrimination does the claimant says her dismissal amounts to.
 - b. If she says it was direct disability discrimination:
 - i. Whether the claimant relies on an actual or hypothetical comparator.
 1. If an actual comparator, identify who this is.
 2. If a hypothetical comparator, set out the circumstances of the comparator.
 - ii. The basis on which it was said that her dismissal was done on the grounds of disability.
 - c. If she says her dismissal was discrimination arising from disability:
 - i. What was the "something" arising from disability which was the cause of her dismissal and the basis on which it is said this was the cause.

d. If the claimant says her dismissal amounts to a breach of the duty to make reasonable adjustments:

i. Whether the duty is said to have been engaged by one or more of the following:

5 1. A provision, criterion or practice (PCP) applied by the respondent.

2. A physical feature.

3. The provision of an auxiliary aid.

10 ii. Specification of the PCP, physical feature or auxiliary aid relied upon.

iii. The basis on which it is said that the claimant was placed at a substantial disadvantage by this compared to people who are not disabled (including, but not limited to, the disability or disabilities relied upon).

15 iv. What adjustments the claimant says it was reasonable for the Respondent to have made to overcome the disadvantage.

39. The Tribunal also considers, of its own motion, that the respondent should allowed a period to adjust their response to address the disability discrimination claim.

20 40. The Tribunal exercises its power under Rule 29 to order that, within 28 days of the claimant providing the further specification of her disability discrimination claim, the respondent will lodge revised grounds of resistance, as so advised.

25 **Employment Judge: P O'Donnell**
 Date of Judgment: 14 June 2024
 Entered in register: 14 June 2024
 and copied to parties

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