



EMPLOYMENT TRIBUNALS

Claimant: Miss L Harper
Respondent: Teleperformance Limited
On: 21 August 2024
At: Newcastle Employment Tribunal (remotely by CVP)
Before: Employment Judge Sweeney

Appearances
For the Claimant, No attendance,
For the Respondent, Craig Asbury, Solicitor

JUDGMENT having been given on **21 August 2024** and written reasons for the Judgment having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

WRITTEN REASONS

Background

1. The Purpose of today's hearing was set out in three sets of orders following three preliminary hearings before three different judges. The key orders are those of Employment Judge Aspden dated **02 November 2023** and EJ Martin dated **16 April 2024**. The hearing was to have taken place on **22 January 2024** but this was postponed.
2. Today's public preliminary hearing was listed for the following purposes:
 - 2.1. To decide whether the Claimant should be given permission to amend her claim to include claims identified in the schedule prepared by Judge Aspden.
 - 2.2. To decide whether the Claim Form currently contains any complaint about the late payment of wages in **October 2021** and in **January 2022** (complaints 8 and 9 of Judge Aspden's schedule).

- 2.3. If it does not, to decide whether permission should be granted to amend the ET1 to include such a claim.
- 2.4. If the ET1 already contains a complaint about the late payment of wages (or if permission to amend is granted to include it) to decide whether those complaints have been presented out of time and if they have whether it was reasonably practicable to have presented them in time.
- 2.5. If appropriate, to decide whether the Claimant was a disabled person within the meaning of section 6 Equality Act 2010 at the time of alleged acts of discrimination.
- 2.6. To decide whether any claim should be struck out on the ground that it has no reasonable prospect of success.
- 2.7. If not, to decide whether any argument has little reasonable prospect of success and if so, whether a deposit order should be made.
- 2.8. If any claim is permitted to proceed, to make appropriate case management orders.
3. In the evening of **19 August 2023**, the Claimant applied to postpone today's hearing. The Respondent objected to the application and it was rejected by Judge Aspden on **20 August 2023**, with reasons. The Respondent had prepared for the hearing and had sent to the Claimant and the Tribunal a bundle of documents consisting of 153 pages. The Claimant did not attend this hearing and nor did she send written representations. I asked the Tribunal Clerk, to see if he could contact the Claimant to see if she was intending to attend. He called the number provided a few times but it rang off. He also sent an email to the Claimant but received no reply. I was satisfied that, having made such inquiries as were practicable as required under rule 47 ET of the Rules of Procedure, that it was appropriate to proceed with the hearing in the absence of the Claimant. I did not consider it to be in keeping with the overriding objective or the interests of justice to delay the proceedings further. Mr Asbury, solicitor had prepared for the hearing and was ready to proceed.
4. Several judges (me, Judge Loy, Judge Aspden and Judge Martin) have tried to understand and identify what claims the Claimant has brought on her ET1 and what claims she is or may be treated as seeking to bring way of amendment. At a hearing on **06 March 2023**, Judge Loy made some case management orders for the Claimant to provide further information. In my case management summary of the hearing on **09 August 2023**, I stated: *'there is nothing on the Claim Form itself describing what things the Respondent did or failed to do to the Claimant which she says amounts to some form of discrimination.'*
5. On **02 November 2023**, Judge Aspden clearly spent a great deal of time attempting to identify the claims the Claimant appeared to wish to pursue before this tribunal. Judge Aspden identified these claims from a series of lengthy emails sent by the Claimant dated **08 September 2023** (in response to my previous case management orders) [**pages 59 – 74 of the bundle**] and further emails from her dated **15 September 2023** [**pages 76 – 84**].

6. Judge Aspden prepared a schedule of what she understood the complaints to be. She numbered them complaints 1 to 9 [**page 96 to 99 of the bundle**]. She explained and directed that if the Claimant wished to proceed with those claims she required permission to amend the Claim Form. She directed that the claimant was to confirm whether the complaints she had identified were accurate and if so, there would be a preliminary hearing to determine whether the Claimant should be given permission to amend (see paragraph 12 of Judge Aspden’s case management summary).
7. The Claimant has sent a lot of very lengthy emails from which it has not been easy to discern compliance with orders (whether by the directed date or later). It has taken me some time to find what might be considered to be compliance with Judge Aspden’s order to confirm that the claims in the schedule are those that she is seeking permission to add. There is an email from the Claimant on **23 November 2023**. Buried in that email the Claimant says ‘*the claim is for the 6 parts plus wages*’. That is the nearest I can see to a statement that she wishes to amend her ET1 to include those complaints.
8. A firmer statement to that effect was made by the Claimant in response to Judge Martin’s orders. The Claimant emailed on **08 May 2024** (again, a number of lengthy emails were sent on that day). In one of those emails she says she wishes to amend her claim to include those on the schedule. Mr Asbury agreed that the Claimant has therefore confirmed that the claims in the schedule are those she wishes to add by permission of the tribunal. That then was the first matter for me to address.

Relevant Law on amendments

9. There have been a good number of reported cases on applications to amend. When it comes to considering applications for permission to amend claims in the employment tribunal, the relevant line of authority starts with the decision of the National Industrial Relations Court in. The court referred to seven steps in considering amendments “*changing the basis of the claim or... adding or substituting respondents.*” At step number 7, he said that a tribunal should: “*have regard to all the circumstances of the case...and...consider any injustice or hardship which may be caused to any of the parties... if the proposed amendment were allowed, or as the case may be, refused.*” [p.657C].
10. The case of **Selkent** is the most commonly referred to authority – laying down well known guidance and setting out non-exhaustive factors to be considered by tribunals as being:
 - 10.1. The nature of the amendment;
 - 10.2. The applicability of time limits;
 - 10.3. The timing and manner of the amendment;
11. The relevance of time limits is probably the most controversial and difficult of the factors for parties and tribunals alike. In **Selkent**, Mummery J said at 843-844 that it was ‘*essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions*’.

12. In **Transport and General Workers Union v Safeway Stores Ltd** UKEAT/0092/07/LA (23 March 2007) EAT, Underhill J (as he then was) had to consider an application to amend a Claim to introduce a previously unpleaded cause of action which was outside the time limit in which it could have been advanced as a free-standing claim.

13. In paragraphs 6-7, the court said:

“Apart from authority, it might have been thought that there was a strong case for disallowing as a matter of law any amendment which would allow a claimant to bring a fresh claim outside the time within which he could have brought it in free-standing proceedings....It might be thought to be wrong in principle for that discretion [to allow an amendment] to be used so as to allow a claimant to – in effect – get round the statutory limitation period.....

But, however attractive that line of argument may be to a purist, the cases appear to be against it. The position on the authorities is that an Employment Tribunal has a discretion in any case to allow an amendment which introduces a new claim out of time”.

14. The point made in **Selkent** about the applicability of time limits was the subject of further observation in **Ali v Office of National Statistics** [2005] IRLR 201, that this factor was presented only as a circumstance relevant to the overall exercise of the discretion, which turns on the ‘Cocking’ test, rather than the application of an absolute rule (i.e. that if out of time and time not extended the application must be refused). It is ‘essential’ for the tribunal to consider whether a claim is in time because it is a factor – albeit an important and potentially decisive one – in the exercise of the discretion.

15. In **Abercrombie v Aga Rangemaster Ltd** [2014] I.C.R. 209, the CA (Underhill LJ) said at paragraph 48:

“...the approach of both the Employment Appeal Tribunal 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 inquiry 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.”

16. Finally, in **Vaughan v Modality Partnership** UKEAT/147/20, the EAT (HHJ James Taylor) held that the real practical consequences of allowing or refusing an amendment should underlie the entire balancing exercise.

Relevant Law on time limits on unlawful deductions claims

17. Section 23(2) Employment Rights Act 1996 (ERA) provides that:

“subject to subsection (4) an Employment Tribunal shall not consider a complaint under this section unless it is presented to the tribunal before the end of the period of three months beginning with -

(a) In the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made

18. Provision is made for time to run from the last in a series of deductions in subsection (3) and subsection (4) provides that where the employment tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the relevant period, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.
19. Thus, there are two considerations: first, the employee must show that it was not reasonably practicable to present the claim in time; second, if she succeeds in doing that, the employment tribunal must consider the time within which the claim was in fact presented to be reasonable. As regards the first part, the burden is on the employee. As regards, the second consideration, the burden is, so to speak, neutral.
20. It is well recognised that illness may prevent a complainant from presenting a claim in time. Ordinarily a tribunal would expect to see medical evidence supporting the existence of the illness and/or demonstrating that the illness prevented the claimant or impeded the Claimant in presenting the claim in time. The extent of medical evidence necessary will inevitably vary from case to case and will be dependent entirely upon the facts peculiar to the particular case.

Submissions

21. Mr Asbury confirmed that the Respondent objected to the Claimant's application to amend. Mr Asbury referred me to the relevant case law. He cited from **Cocking** that: regard should be had to all the circumstances of the case and in particular, the tribunal should "*consider any injustice or hardship which may be caused to any of the parties... if the proposed amendment were allowed, or as the case may be, refused.*"
22. In **Selkent**, the EAT, Mummery J held that the tribunal should take account of all the circumstances and *balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it*. The relevant circumstances include:
- 22.1. The nature of the amendment
 - 22.2. The applicability of time limits
 - 22.3. The timing and manner of the application and
 - 22.4. The balance of hardship

Discussion and conclusion on the application to amend

23. On the issue of hardship, it is with a view to balance the injustice and hardship of allowing an amendment against the injustice and hardship of refusing. The EAT has given more recent guidance on amendments in the case of *Vaughan v Modality Partnership*. The Selkent factors are factors to be taken into account in conducting the fundamental exercise of balancing the injustice or hardship of allowing the amendment against the injustice and hardship of refusing it. They are not the only factors that may be relevant. Further, representatives should start by considering what the real, practical consequences of allowing or refusing the amendment will be. This requires a focus on reality rather than assumptions.

Nature of the amendments

24. The amendments sought are not minor amendments. They amount to a substantial alteration to the Claim Form. Further, the first two complaints subject to the application to amend concern fleeting events occurring on the very first day of the Claimant's employment on **22 July 2021** relating to an alleged comment by a manager of the centre and where the identity of that manager has not been given. The third proposed complaint relates to events in **October 2021** where the Claimant was given a particular piece of work to do. No one is identified; the work is not identified and it is not clearly set out how this disadvantaged the Claimant in any way connected to a disability. The fourth proposed complaint is about problems the Claimant experienced with I.T. in the period **October to December 2021**, in that having to deal with the I.T. problems caused her stress. The Claimant complains that the Respondent should have arranged for someone to sort out the problem. The fifth complaint is that she was required to speak to a team leader each day during sickness absence in **January and February 2022**. However, the team leader is not identified. The sixth proposed complaint relates to a new team leader who attempted to contact her when on sick leave in or around **April 2022**. The seventh proposed complaint is about her dismissal on **06 June 2022**, a complaint under section 15 EqA. Complaint number 8 was a complaint regarding wages in **October 2021** and complaint number 9 concerned late payment of wages that should have been paid in **January 2022**.

Timing and manner of the application

25. This case first came before Employment Judge Loy on **06 March 2023**. Her case management orders, which by the time the case came before me, on **09 August 2023**, had not been complied with as directed. It appeared to me that the Claimant had tried her best but did not understand what was expected of her, which I observed might have been down to the stress and anxiety of litigation. Her anxiety was clear to me at the time, as I re-read my case management summary. However, I was also satisfied then that she understood what she then had to do and I made some further case management orders.

26. On **08 September 2023** the Claimant wrote in reply to my orders. It was that email and another of **15 September 2023**, that resulted in Judge Aspden preparing the schedule which she attached to her case management orders of **02 November 2023**.

27. Thus far, it has been a very difficult exercise to ascertain what it is that the Claimant appears to be seeking to claim in these proceedings. A great deal of what she says lacks clarity and she has had to be prompted and assisted along the way by several judges. As regards the manner of the application to amend, I can say that it has been slow, difficult to understand and has been difficult for the Claimant to articulate and that the end product of her efforts has been difficult to discern. Nonetheless, she has been given multiple opportunities to express her claims clearly yet has produced lengthy documents which raise as many questions as they seek to answer.

Time limits

28. There are unquestionably issues as to whether the claims which are the subject of the amendment application are out of time. Indeed, the ET1 was presented on **02 November 2022** (after an initial rejection). Even if it not been rejected when first presented on **14 October 2022**, the only reference to an identifiable complaint on the ET1 was to late payment of wages in **October 2021**) about a year before the ET1 was presented.
29. If one treated the Claimant's email of **08 September 2023** (from which Judge Aspden put together the schedule of complaints) as the date of an application to amend the ET1 to include other complaints, the last act complained (complaint 7) of relates to the Claimant's dismissal on **06 June 2022**. Therefore, the application comes approximately a year out of time. The proposed complaints 1 to 6 are even further out of time (unless they are found to extend over a period ending with the date of dismissal).
30. As the case law makes clear, time limits, timing and manner of the application and the nature of the applications are all factors in the overall assessment in the balancing of hardship. As observed by Mummery J in *Selkent* and set out by Mr Asbury in his submissions at para 3.33: *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.*
31. I agreed with Mr Asbury that the Respondent would be subject to significant hardship if the Claimant were allowed to introduce these additional claims. Many of the claims appear to have little prospect of success. Insofar as the Respondent has been able to make inquiries, those whom it believes might be those referred to by the claimant in the complaints (they have not been identified) have moved on from the Respondent's employment. Further, many of the complaints are vague and would require further information and clarity (which has proved difficult to obtain) and are about fleeting comments made years ago. Given the passage of time, I accept Mr Asbury's submission that it would be extremely difficult for the Respondent to have to put together any response. The underlying practical consequence to it of vaguely expressed claims, with little specificity (despite attempts to obtain it) is further legal expenditure and uncertainty. There has been delay after delay in this case all of which makes a fair hearing difficult and very expensive for Respondent.
32. I must, of course, weigh that hardship against the prejudice to the Claimant by refusing the application to amend. I am not at all convinced that the Claimant will see these matters through to a final hearing. It is clear that she is finding the litigation difficult. She has said that the ongoing matters are prolonging her anxieties. If I refuse to permit the amendments, obviously she will be unable to pursue her claims but I have had regard to the fact that those claims are mostly vague and unspecified and have serious time limit issues and many seem of little merit. The proposed dismissal complaint is less vague but there is a serious time issue and any question of extension of time would have to be on a just and equitable basis. In circumstances where much work still needs to be done in these proceedings which appear to be having a deleterious effect on the claimant and an which are taking an unreasonable period of time and effort to understand, causing cost to the respondent at

every stage and creating real difficulties for witnesses to have to recount matters from some time ago, the claimant would have to satisfy a tribunal that it is just and equitable to extend time. Although she has had difficulty in expressing herself clearly, nevertheless, she was able to articulate some kind of claim back in **October 2022** and has (however painful it might have been for her) been able to write very lengthy emails to the tribunal. When considering the justice and equity of extending time, a tribunal is to consider it from the perspective of both parties. I repeat, however, that whether something is in time and whether it requires an extension of time is but a factor in the overall exercise in considering the application to amend.

- 33.** Having regard to all those factors, and weighing matters up, it seems to me that the balance of hardship favours the Respondent. The prejudice to the Claimant in not being able to pursue the claims is outweighed by the prejudice it experiences regarding the passage of time on the availability of witnesses (and ability to recall matters), the vagueness of the claims, the fact of and likelihood of further non-compliance with case management orders, the cost and time involved in responding to complaints that lack specificity and which appear to be weak claims as understood.
- 34.** I refused the application to amend in respect of complaints 1 to 7. I then had to consider whether the ET1 contained complaints of unlawful deduction in respect of complaints 8 and 9 and if not, whether permission to amend should be granted. I was satisfied that there was a claim for unlawful deductions in respect of wages due in **October 2021** but not in respect of wages that were due in **January 2022**. I refused permission to apply to amend the Claim Form to add a complaint of unlawful deduction of wages in respect of the **January 2022** wages. The proposed amendment is vague, in that it is not at all clear what the alleged deduction is. It is out of time and the Claimant would require an extension of time (the test being whether it was reasonably practicable to have presented the claim in time). The need for further information on the claim would mean yet further work and cost for the Respondent despite attempts to get clarity to date. Further, the Claimant appears to be saying that the wages that should have been paid in **January 2022** (whatever they were) were in fact paid on **05 February 2022**. In light of this, and the matters I have referred to, proportionality and the overriding objective mitigate strongly against permitting any application to amend and any hardship to the Claimant is outweighed by the prejudice to the Respondent as outlined.

Unlawful deduction of wages: claim in time?

- 35.** That leaves the question of the claim for unlawful deductions in **October 2021**. This claim, which can be discerned from the ET1, is substantially out of time. If the deduction occurred at the end of **October 2021**, time have expired **30 January 2022**. Even if added to the proposed complaint number 9 (so as to be a series of alleged deductions) time would have expired on **29 April 2022** (more than six months before the ET1 was presented). I was required to decide whether that complaint of unlawful deduction of wages had been presented out of time and if so whether it was reasonably practicable to have presented it in time.

- 36.** Judge Aspden explained that the Claimant would need to explain at this hearing why she did not bring the claims about late payment of wages were not brought sooner. I agreed with Mr Asbury that there is insufficient evidence to enable me to conclude (and the burden is on the Claimant) that it was not reasonably practicable to bring this complaint within three months of the alleged deduction (being the end of **October 2021**). Nothing the Claimant says about the events following initial presentation of her claim form on **14 October 2022** (which was rejected) shows why it was not reasonably feasible to present a complaint by the end of **January 2023** (or by whatever later date EC conciliation would have afforded her in respect of that complaint). I was conscious that she did not attend today's hearing and I can see that the Claimant suffers from anxiety and other issues. However, it is for the Claimant to satisfy the tribunal that it was not reasonably practicable and she has failed to do so. Further, the ET1 was presented on **02 November 2022**, over a year after the alleged deduction. I do not consider that to be a reasonable period of time particularly in a case where the Claimant accepts that the wages due in **October 2021** were paid in **June 2022**.
- 37.** Therefore, I was satisfied that the claim for unlawful deduction of wages in respect of the late payment of wages in **October 2021** was presented out of time; that the Claimant had not shown that it was not reasonably practicable to present that complaint within the statutory time limit and, in any event, the claim was not presented within a reasonable period of time after the expiry of the time limit on **30 January 2022**.
- 38.** Therefore, it being out of time, the tribunal has no jurisdiction to adjudicate on the claim of unlawful deduction of wages which is dismissed.
- 39.** As that was the only claim before the tribunal, it was unnecessary for me to determine whether the claimant satisfies the definition of disability under section 6 or the other matters in paragraph 2.5 to 2.8 above.

Employment Judge Sweeney
Date: 21 October 2024