IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

Determination of the Claimant's Opposed Application Dated 17th July 2024 for Leave to Amend in Dundee based Case No: 4104247/2024, heard on the Cloud Based Video Platform at Edinburgh on the 5th of November 2024

Employment Judge J G d'Inverno

Ms L Clayton	**Claimant** **In Person**
MKP Estate Ltd	**Respondent** **Represented by:-** **Mr I Burke, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(First) The Judgment of the Employment Tribunal is that the claimant's Application for Leave to Amend in a complaint of section 100(1)(e) Employment Rights Act 1996 Unfair Dismissal, in terms of a Proposed Amendment confirmed and recorded on 4th November 2024, is refused.

(Second) Records the claimant's withdrawal made and confirmed orally, in the course of the Hearing, of her previously pled complaints of:- Automatic Unfair Dismissal in terms of section 103A of the Employment Rights Act 1996

and her complaint of Breach of Contract (Wrongful Dismissal) Non Payment of Notice Pay, in terms of Rule 51; and dismisses those claims, in terms of Rule 52, following their withdrawal.

J d'Inverno
Employment Judge

21 November 2024
Date of Judgment

22 November 2024
Date sent to parties

I confirm that this is my Judgment in the case of Clayton v MKP Estate Ltd and that I have signed the Judgment by electronic signature.

REASONS

1. This case called for Open Preliminary Hearing on the Cloud Based Video Platform at 10.30 am on 4th November 2024.

2. Although previously represented before Judge Hosie by her Employment Law Specialist solicitor, the claimant appeared at the Open Preliminary Hearing on her own behalf. The Respondent Company was represented by Mr I Burke, Solicitor.

3. In terms of the Notice of Hearing issued on 6th August 24 the potential issues for Determination at the Hearing upon which parties were to be heard were:-

   (i) the claimant's Opposed Application for Leave to Amend

   (ii) the respondent's Application for Strike Out, if brought forward and insisted upon

(iii) any Application for a Deposit Order sought by the respondent, if brought forward and insisted upon

(iv) any Application for an Award of Expenses in the event that amendment was allowed

(v) Case Management Directions as required following the Determination of the Application for Leave to Amend

4. In the event it was only the issues at (i), the claimant's Opposed Application to Amend and at (v), the requirement for Case Management Directions, which were respectively before and potentially before the Tribunal at the Hearing.

5. As is set out in the Note of Output generated by Employment Judge Hosie following the Preliminary Hearing which proceeded before him for Case Management purposes on the 22nd of May 2024, and which is dated and sent to the parties on the 30th of May 2024, in terms of her initiating Application ET1 (first presented on 22nd March 2024) the claimant gave notice of two complaints:-

(a) a complaint of Automatic Unfair Dismissal in terms of section 103A of the Employment Rights Act offering to prove that she was dismissed by the respondent on 24th January 2024 for reason of her having made a protected and qualifying disclosure, in terms of sections 43A and B of the Employment Rights Act 1996, earlier on the same date in an email sent, at 13.22 pm by the claimant to the respondent's Director Rachel Beaton; and,

(b) a complaint of Wrongful Dismissal (Breach of Contract – Non Payment of Notice Pay)

6. In the course of giving evidence at the Hearing of 4th November the claimant accepted firstly that her entitlement in law, that is to say under statute in

terms of section 87 of the Employment Rights Act 1996 and in contract in terms of her written terms and conditions of service, was to receive one week's notice (or payment in lieu thereof) of dismissal, she having worked for the respondent from 20th November 2023 until 24th of January 2024 that is a continuous period of less than 2 years (in terms of section 86(1)(a)) and, secondly that she had in fact, incorporated within her final pay remittance on 30th January 2024, received one week's pay in lieu of notice.

7. She accordingly withdrew the complaint of wrongful dismissal, in terms of Rule 51, she having already received the whole sums which she would have been entitled to by way of remedy under that claim had it succeeded, and the Tribunal dismissed that claim in terms of Rule 52 following upon its withdrawal.

8. The claimant's Application for Leave to Amend proceeded in terms of her email correspondence to the Tribunal dated 17th July 2024, which was in the following terms:-

> "17th July 2024
>
> Dear Sir
>
> Re: Case Number 4104246/2024
>
> I am writing to apply for an amendment to the ET1, for [sic from] dismissal based on whistleblowing (section 43A and 103A Employment Rights Act 1996) to one based on s100(1)(e) Employment Rights Act 1996.
>
> I consider that the dust and mess I was subjected to at my place of work residence placed me in serious and imminent danger of my health. The "appropriate step" which I took to protect myself was to request my employer to move me to a temporary alternative place of residence whilst the works were ongoing. The respondent dismissed me the day after making this request.

I believe that I have been badly advised by my solicitor to date to plead my case based on whistleblowing, and must advise you that they are no longer representing me and I will be representing myself from hereon.

The facts of the claim are exactly the same as before and there will be no change to evidence or witnesses. This is therefore merely a relabelling exercise resulting in no prejudice to my former employer (the respondent).

I hope that the hearing can proceed with no further delay.

With kind regards

Miss Lisa Clayton

8 The Knowe
Kennoway
Fife
KY8 5JH"

9. The Application was not accompanied by the terms of a Proposed Amendment.

10. In the course of the Hearing the claimant set out orally and the Tribunal here records the terms of the Proposed Amendment which upon a reading back by the Employment Judge to the claimant she confirmed were the terms in respect of which she sought Leave to Amend her initiating Application ET1 first presented to the Employment Tribunal (Scotland) on 22nd of March 2024.; viz:-

"**Terms of the Proposed Amendment**

At page 6 of the initiating Application ET1, section 8.1 in the box headed "**I am making another type of claim which the Employment Tribunal can deal with**", by deleting the words 'Wrongful dismissal claim' and

'Whistleblowing claim under Section 103A claim', where they occur in the first and second lines of that box; and, by substituting therefor the words –

(1) 'A claim of automatically unfair dismissal in terms of section 100(1)(e) of the Employment Rights Act 1996'

(2) In the paper apart to the initiating Application ET1 at page First paragraph 3 thereof by deleting the words – 'Whistleblowing Claim under section 103A' and by substituting therefor the following:-

'A complaint of Automatic Unfair Dismissal in terms of section 100(1)(e)'

(3) On page Second of the paper apart to the ET1 at paragraph 10 by deleting the words – 'made a protected and qualifying disclosure by emailing' and by substituting therefor the following – 'sent an email to' and by inserting after the word 'Beatton' where it occurs in the second line of paragraph 10, the word 'in'; and by inserting at the end of the second line of paragraph 10 the word 'terms'

(4) On page Fourth of the paper apart to the ET1 at paragraph 15 thereof, by deleting in its entirety the whole terms of sub paragraph (i) of paragraph 15; and in sub paragraph (ii) on page Sixth of the paper apart, by deleting the words 'reference and reliance will be made in relation to section 43B(1)(b) and (d) in that'; by capitalising the letter 'n' where it appears in the word 'no' in the second line of sub paragraph (ii) of paragraph 15; and in sub paragraph (iv) by deleting the words 'and in the public interests' where they appear at the end of sub paragraph (iv); and by renumbering the residual sub paragraphs of paragraph 15, as sub paragraphs (i) to sub paragraph (iv) inclusive.

(5) On page Fifth of the paper apart at paragraph 17, by deleting the figures and letters '103A' where they occur in the second line of paragraph 17, and by substituting therefor the numbers and letters '100(1)(e)'."

11. The Application for Leave to Amend was opposed by the respondent.

Sources of Oral and Documentary Evidence

12. The claimant gave oral evidence on affirmation regarding the circumstances in which she came to bring forward her Application for Leave to Amend as at 17th July 2024.

13. Thereafter, parties addressed the Tribunal in support of and in opposition to the Application for Leave to Amend; the claimant making her submission first, the respondent's representative responding, and the claimant exercising a limited right of reply.

14. In the course of evidence and submissions the content of certain documents were placed before the Tribunal including; correspondence passing between the parties on the date of dismissal 24th January 2024, the terms of the claimant's Contract of Employment including in particular the Notice provisions, the Application to Amend of 17th and the intimated Grounds of Objection of 24th, July 2024, the terms of the initiating Application ET1, as unamended, and of the Form ET3 responding thereto, together with the terms of the Proposed Amendment as confirmed and recorded above.

Findings in Fact

15. On the documentary and oral evidence presented, the Tribunal made the following essential Findings in Fact, restricted to those relevant and necessary to the Determination of the Opposed Application.

16. The claimant was employed by the respondent for a 2 month period, from 20th November 2023 until 24th January 2024, on which latter date the respondents determined her Contract of Employment by giving her written notice of dismissal together with payment of one week in lieu of notice being the amount of notice to which the claimant was entitled both under statute

(section 86 of the Employment Rights Act 1996 ("ERA")) and in contract (terms and conditions of employment).

17. On 2nd February 2024 the claimant gave early conciliation notification to ACAS of a prospective claim.

18. On 26th February 2024 ACAS issued an Early Conciliation Certificate to the claimant.

19. On the 22nd of March 2024 the claimant having consulted and instructed a solicitor, holding Law Society of Scotland certification as an Employment Law Specialist, in the raising of proceedings before the Employment Tribunal and who first presented an initiating Application, ET1, on the claimant's behalf on 22nd March 2024 and instructions in terms of which she gave notice of intention to prove amongst other matters that she had been automatically unfairly dismissed in terms of section 103A of the ERA for reason of her having made a qualifying protected disclosure in terms of section 43A and 43B and C of the 1996 Act.

20. The claimant was employed as a Live In Gardener on the Pitcairlie Estate in Fife. She was provided with tied accommodation on the Estate "the Gardener's Flat".

21. On or around the 9th of January 2024 the claimant was asked by the respondent to move out of the Gardener's Flat into another apartment whilst building works were carried out to the Gardener's Apartment and to that adjacent to the temporary accommodation to which she moved.

22. Building work commenced on the 12th of January 2024.

23. The claimant found the noise and dust associated with the building work in the adjacent flat to be disruptive. She considered that it impacted negatively on her physical and mental health.

24. On the 24th of January 2024, the claimant wrote to the respondent's Director Rachel Beaton referring to the circumstance of the ongoing building works as not being "conducive to a healthy living or working environment" and enquiring of the respondent's Director Rachel Beaton as follows, -

> "*Could you consider moving me out of here for a few weeks until the worst of the demolition has been done. It is making me feel unwell and I am exhausted.*
>
> *I did consider this request last week but felt it too big an ask but I really think that it is essential now and needs to be done urgently …..*"

25. Rachel Beaton having refused that request by responding email the claimant sent her a further email on 24th January 2024 at 13:22 setting out in more detail a description of the works which were being carried out in the adjacent building and of the effect that these were having upon the claimant.

26. The claimant offered to prove that her email of 24th January 2024 timed at 13.22 pm and sent to Rachel Beaton constituted a protected and qualifying disclosure for the purposes of section 43A, B and C of the ERA. Later that same day 24th January 2024 the claimant received from the respondent a letter determining her Contract of Employment upon payment of one week in lieu of notice, in exercise of their contractual right to do so.

27. The letter identified no particular reason for dismissal, beyond the exercise by the respondents of their contractual right to bring the Contract to an end upon notice.

28. At paragraph 17 of the paper apart to the initiating Application ET1 the claimant gives unequivocal specification and notice of the nature of the complaint which she presents and under which she seeks to access the Tribunal's Jurisdiction viz:-

"*17 The Claimant is seeking a finding that she was automatically unfairly dismissed contrary to section 103A of the Employment Rights Act and financial compensation flowing from her dismissal."*

29. The effect of the Proposed Amendment, let it be assumed that Leave to Amend were to be granted, would be substitute in place of a complaint of Automatic Unfair Dismissal in terms of section 103A of the ERA (that is a complaint of dismissal by reason of having made a protected disclosure), a complaint of Automatic Unfair Dismissal invoking the Tribunal's Jurisdiction under a separate statutory provision, namely section 100(1)(e) of the ERA that is a complaint of having been unfairly dismissed for reason of the claimant, "in circumstances of danger which she reasonably believed to be serious and imminent, taking appropriate steps to protect herself or other persons from the danger".

30. In terms of her Application for Leave to Amend of 17th July 2024 the claimant identifies as the circumstances of danger which she offers to prove she reasonably believed to be serious and imminent as; the "*dust and mess I was subjected to at my place of work residence*"; and the 'appropriate step', both for the purposes of section 100(1)(e) of the ERA to be her email of 8.24 am of the 24th January in which she states "*Please could you consider moving me out of here for a few weeks until the worst of the demolition has been done. It is making me feel unwell and I am exhausted."* Otherwise, beyond reference to the original statutory provisions founded upon of sections 43 and 103A of the ERA and in substitution therefor of reference to the different statutory provision of section 100(1)(e) of the ERA, and the collateral references to the public interest, the effect of the Proposed Amendment is to leave substantially in place the factual averments which are already contained in the initiating Application ET1.

The Submissions of the Parties

31. Beyond the coincidence of the fact that the respondents wrote to the claimant determining her Contract of Employment (dismissing her) on the 24th of

January 2024 at a time after the claimant had sent to them her email timed at 8.24 am on the same day and which she founds upon as the "appropriate steps" which she took to protect herself from danger, the claimant gives no notice of the basis upon which she offers to prove causal connection between the dismissal on the one hand and her request that she be temporarily removed to another place of residence pending the completing of the building works on the other. Neither does she bear to give notice of an offer to prove primary facts from which, in the absence of another explanation, the Tribunal would be entitled to draw inference (conclude) that the principal reason for the respondent's dismissal of her was the fact that she had, earlier that day, requested that they consider temporarily moving her to alternative accommodation.

The Claimant's Submission

32. In the submission of the claimant the Proposed Amendment fell to be regarded by the Tribunal as a mere "relabelling exercise", that is to say what were substantially the same facts were being "relabelled in law", as constituting circumstances giving rise to her Automatic Unfair Dismissal in terms of section 100(1)(e) of the ERA. She considered that that relabelling exercise resulted in no prejudice to the respondent, the factual averments, upon which the amended in alternative complaint was predicated, remaining the same and all being averments to which they the respondent had already responded from a factual perspective.

33. By way of explanation as to why she had in the first instance and at the time of raising her action given notice of a complaint of Automatic Unfair Dismissal for reason of whistleblowing but now (as of the 17th of July 2024) had departed entirely from that previously intimated claim and now sought to substitute the alternative complaint of Automatic Unfair Dismissal in response to her requesting that consideration be given to moving her to alternative accommodation to protect herself from serious and imminent danger, the claimant blamed her previously instructed solicitors. She stated that they had given her "wrong advice" when advising her that the facts of her case, as

disclosed by her, would support a complaint of section 103A Automatic Unfair Dismissal in March of 2024 and thereafter, in July of 2024 advising her that the facts of her case did not meet the public interest requirements of a section 103A Unfair Dismissal, and of advising her to accept what was at that time an extra judicial offer of settlement.

34. She stated that she had immediately dismissed her previous solicitors and had taken opinions from a number of alternative sources including a number of solicitors, eventually accepting the advice of one in particular which was to the effect that the facts of her claim could potentially support a section 100(1)(e) ERA complaint and that she should seek Leave to Amend her claim by withdrawing the section 103A claim and substituting therefor the section 100(1)(e) ERA complaint but based essentially upon the same factual matrix.

35. In her submission, she had made that Application (on the 17th of July 2024) within a reasonable time of forming the view that her previous solicitors had advised her poorly and of dismissing them, and thereafter representing herself, albeit acting in accordance with legal advice, in bringing forward her Application to Amend.

Submission for the Respondent

36. For the respondent Mr Burke, under reference to the Presidential Guidance in England and Wales relating to the making of amendments, which guidance he commended to the Tribunal as being of assistance, and to the seminal case of "**Selkent**", acknowledged that the terms of the Proposed Amendment did not bear to introduce substantial additional facts. He disputed however the claimant's characterisation of the nature of the Amendment as a mere relabelling exercise. Rather, in his submission, the effect of the Amendment was substantial completely removing the previous Ground of Jurisdiction and Complaint and substituting therefor a wholly different Ground of Jurisdiction and a different complaint.

37. In so doing, whether the Application for Leave to Amend falls to be timed as at 17th of July 2024 or as at the date of the Hearing, 4th November 24, the new claim which in terms of the Proposed Amendment was to be substituted, was one in respect of which, at first instance the Tribunal lacked Jurisdiction to Consider in terms of section 111(2)(a) of the ERA falling, as it did, on any view after the expiry of the ACAS extended primary statutory period.

38. It was his further submission that though accepting that the issue of time bar was not, of itself, to be viewed as determinative of the exercise of the Tribunal's discretion in refusing or allowing Leave to Amend, the circumstances narrated by the claimant in evidence which informed the timing and manner of the Application were such that it could not be said that it was not reasonably practicable for the complaint to be presented before the end of the primary statutory period as extended by the Early Conciliation Regulations.

39. The claimant had had access to expert legal advice (a Law Society certified Employment Law Specialist) from the outset. Those law agents had advised the claimant as to the claim which should be presented on her behalf which advice the claimant had knowingly accepted and further had prepared and submitted on her behalf the initiating Application ET1 giving unequivocal notice of a complaint of section 103A ERA Automatic Unfair Dismissal for asserted reason of whistleblowing, the terms of which Application she had approved without comment. The fact that her solicitors had subsequently advised her to accept an extra judicial settlement on the ground that facts which she offered to prove and upon which she advanced her complaint were likely to fall short of the public interest requirements of "protected disclosure", did not render it "not reasonably practicable" for the claim which she now wished to advance by way of amendment following the taking of several alternative legal opinions to have been raised within the primary statutory period. This was not a circumstance of some new fact or facts becoming available.

40. Separately, and in any event, the respondent's representative submitted the amended claim, let it be assumed that Leave to Amend were granted would not give notice of a relevant and competent complaint in terms of section 100(1)(e), falling short, let it be assumed that the claimant proved all that she offered to prove, of the requirements of that section. To grant Leave to Amend, requiring the respondents to attempt to meet an unstateable claim tipped the balance of hardship and injustice in favour of refusing the Application and would not amount to an appropriate exercise of judicial discretion.

Discussion and Determination

41. In deciding whether to grant an Application for Leave to Amend, the Tribunal seeks to carry out a balancing exercise of all relevant factors having regard to the interests of justice and to the relative injustice and hardship that will be caused to the parties respectively by the granting or by the refusing of Leave to Amend.

42. While there is no exhaustive list of relevant factors those to be considered, will generally include, and in the instant case do include the nature of the Proposed Amendment and its effect, amendments can vary from the correction of clerical and typographical errors at one extreme to the addition of facts, the addition or substitution of labels for facts already described and or the making of entirely new factual allegations which changed the basis of the existing claim. Thus whether the amendment applied for is of a minor matter or amounts to a substantial alteration, for example describing a new complaint is a relevant factor to be considered.

43. If a new complaint or cause of action is intended by way of amendment the Tribunal must consider whether the complaint is out of time and, if so, whether the time limit should be extended.

44. The timing and manner of the Application is also relevant. While an Application can competently be made at any time, even after Judgment has

been promulgated, the allowance of Leave to Amend is an exercise of judicial discretion and a party requires to show why the Application was not made earlier and why it is being made at the particular time at which it is brought forward. An example of a circumstance which may frequently be regarded as justifying the bringing forward of a new claim by amendment late, is the discovery of new facts or information of which the party seeking Leave was not previously and could not reasonably have been previously, aware.

45. A distinction falls to be drawn between amendments which seek to add or to substitute a new claim arising out of the same facts as the original claim, and those which add a new claim entirely unconnected with the original claim.

46. In deciding whether the Proposed Amendment is within the scope of an existing claim or whether it constitutes an entirely new claim the entirety of the claim form must be considered.

47. Where the Grounds of Objection include, as they do in the instant case, an assertion that the Proposed Amendment seeks to add a new ground of complaint, the Tribunal looks for a link between the facts described in the claim form and the Proposed Amendment. If there is no such link, the claimant will be bringing an entirely new cause of action; but something more than a mere link may be required. Where the facts originally set out in the ET1 cannot sufficiently support the claim which it is proposed to amend in, then the party seeking Leave to Amend falls to be regarded as in effect raising a new claim for the first time in which case the Tribunal must consider whether the new claim is presented in time and, where it is not, must go on to consider whether the tests which regulate its discretion to extend time are met.

48. In the case of **Chandhok v Tirkey** [2015] IRLR 195 at paragraphs 16 to 18 of the EAT's Judgment Langstaff P, as he then was, emphasised the importance of the ET1 claim form setting out the essential case for a claimant as follows:-

> "16 … the claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so, instead it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1. ------- the ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits. If a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert their case now put had all along been made, because it was "their case", and in order to argue that the time limits had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands; it ultimately denies that which clear headed justice most needs, which is focus. It is an enemy of identifying, and in light of the identification resolving, the central issues in dispute.
>
> 18. In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so that they can properly meet it; so that they can tell if a Tribunal may have lost jurisdiction on time grounds; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the Tribunal itself ….."

49. Thus, a general complaint in the claim form will not suffice. Claimants must set out the specific act complained of as, the Employment Tribunal is only able to adjudicate on specific complaints. As is made clear by the EAT in **Chandhok**, a respondent is entitled to know the claim which it has to meet.

50. In first presenting her initiating Application ET1 the claimant and her professional legal advisors met that requirement in that while they gave notice of a general factual matrix which, absent further specification might have been capable of being construed as giving notice of differing unspecified claims, at paragraph 17 of the paper apart to the ET1 the claimant and her representatives removed all such ambiguity unequivocally specifying the particular complaint which she presented and which she required the respondents to meet:- viz

> "17. The claimant is seeking a finding that she was Automatically Unfairly Dismissed contrary to section 103A of the Employment Rights Act and financial compensation flowing from her dismissal."

51. That averment is wholly specific giving an unambiguous notice of the particular statutory complaint which is presented and of the particular statutory jurisdiction of the Tribunal which is invoked. Nowhere in the detailed averments is reference made to the facts separately or, jointly or in the alternative, as giving notice of the different statutory complaint of Unfair Dismissal contrary to section 100(1)(e) of the Employment Rights Act 1996, that being the complaint which in terms of her Proposed Amendment the claimant now seeks to substitute for the original. That conclusion is one which also flows from a consideration of the entirety of the claim form as first presented. Whatever potential it might be said retrospectively the factual matrix had to support a different claim, that given notice of in the ET1 as presented is a complaint of Unfair Dismissal under section 103A of the ERA and, by definition, is not a complaint under section 100(1)(e) of that Act.

52. While the Tribunal accepts that a connection can be seen to exist between the facts already pled in the initiating Application ET1 and the claim which it has sought to substitute for the existing claim upon amendment, the Tribunal considers that the proposed exercise of amendment cannot be properly described as one merely of relabelling. The claim which it has sought to be introduced on amendment is one which has a distinct statutory basis and

jurisdiction albeit a claim which seeks to rely, for the first time, upon the same factual matrix. It is in truth a new claim which cannot properly be said to have been given notice of in the pre-existing claim form ET1.

53. While leaving aside for the moment the separate Ground of Objection, namely that the facts given notice as relied upon cannot relevantly support the new claim, it is necessary in such circumstances that the Tribunal consider whether the new claim is in time.

54. As set out above the primary statutory period during which the claimant, of right, might have presented the section 100(1)(e) ERA complaint of Unfair Dismissal, as extended by the operation of the early conciliation provisions, expired at midnight on the 17th of May 2024. The claimant's Application for Leave to Amend is dated 17th July 2024, some 2 months after the expiry of the primary statutory period.

55. While the Tribunal possesses a limited discretion to extend time in respect of complaints of, amongst others, Unfair Dismissal it may consider such late complaints only within such further period as it considers reasonable in a case where it is first satisfied that it was not reasonably practicable for the complaint to be presented before the end of the primary extended period. The Higher Courts have provided clarification that the phrase "not reasonably practicable" means not reasonably feasible.

56. The Tribunal considers that the circumstances placed before it in evidence fail to satisfy that test.

57. This is not a case in which the claimant gave notice of an intention to prove a factual matrix without specifying the complaint in law or the jurisdiction of the Employment Tribunal arising from it, if proved. On the contrary, the claimant and her legally qualified agents gave unequivocal specification of the claim, it being clear from the terms of the ET1 that it was that claim and that claim only that was advanced. It is the claimant's explanation that the reason for notice of a complaint of section 103A Automatic Unfair Dismissal and not a

complaint of section 100(1)(e) Automatic Unfair Dismissal being given notice of was that she had received what she subsequently considered to be poor advice from her professional advisors and law agents which poor advice she had opted to follow in the presenting of her claim but had declined to follow in respect of a proposed settlement of the claim. Further, that having decided to and then removing instructions from her then law agents and having sought a number of alternative legal opinions, she had opted to adopt the advice provided by one of those advisors and seeks to substitute in her initiating Application the claim which she now brings forward in terms of her Proposed Amendment.

58. It is no part of the Tribunal's function to assess and or express an opinion on the legal advice sought and received by the claimant from her then law agents. Indeed such matters would normally be hidden below the veil of client agent confidentiality and the Tribunal expresses no such view, not least because it is not and cannot be privy to the whole circumstances of consultation. Suffice is to say that if the advice obtained by the claimant was given in circumstances which constitute professional negligence then she will have a remedy against her former law agents. Nor can it be said that having the benefit of specialist legal advice from the outset and having within her own possession all of the relevant facts to be set before an advisor, and further let it be assumed that the claim which it is now sought to introduce by amendment is a stateable claim upon the facts which it is said are relied upon, it cannot be said that it was not reasonably practicable for that claim to have been presented timeously.

59. The Tribunal accordingly considers that its discretion to extend time is not awakened in respect of the claim contained within the Proposed Amendment and that it lacks jurisdiction to consider that claim. While the fact that the claim which it is proposed to amend in would be out of time is not, of itself, determinative of the exercise of discretion to grant or refuse Leave to Amend, it is a factor of some weight to be placed in the balance along with other relevant factors in any particular case.

60. Upon an application of the principles set out and approved in Transport and General Workers Union v Safeway Stores Limited UKEAT/009/07 under reference to the guidance contained in **Selkent Bus Company Limited v Moore** [1996] IRLR 661 including, amongst others the factors of; the nature of the amendment, the applicability of time limits and the timing and manner of the Application and while seeking to balance the injustice and hardship associated respectively with allowance or refusal of the Application the Tribunal has determined that the balance of hardship and injustice lies in favour of refusing Leave. The explanation advanced by the claimant in support of her Application to substitute the new claim by way of amendment is that she has relied upon professional advice in raising the claim at first instance on the particular grounds on which it was raised, but declined thereafter to accept advice from the same law agents in relation to settlement of the case. She asserts that she was poorly advised and if it be the case further that the advice upon which she relied in raising her proceedings was negligent, then she will have a remedy against her then law agents, in so far as she is able to establish that the complaint which she now seeks to amend in would have enjoyed a reasonable prospect of success, in the event that the Application for Leave to Amend is refused. On the other hand if the Application is granted, the effect will be to require the respondents who already convened and have incurred the costs of resisting the previously intimated and now withdrawn complaint of section 103A ERA Unfair Dismissal, to now incur the further costs of seeking to respond to new complaint which, arguably on the facts upon which it is said to depend, would have little reasonable prospects of success. While in such circumstances it will on some occasions be possible to seek to address such prejudice to a party by way of an award of expenses in respect of the earlier, now withdrawn proceedings, in the instant case that is not an option the claimant having confirmed that being unable to afford to further instruct alternative legal representation on her own behalf, she is equally unable to meet any award of expenses which may be made against her in the proceedings.

61. Upon a consideration of all of the relevant circumstances, including the fact that the new claim is out of time and the Tribunal's jurisdiction to extend time

is not awakened by the particular circumstances of the late presentation, and upon a balancing of the relative injustice and hardship, the Tribunal refuses the claimant's Application for Leave to Amend.

62. The pre-existing elements of the claim previously given notice of having been withdrawn and dismissed, respectively in terms of Rules 51 and 52, and there being no residual matters requiring Determination, the Tribunal dismisses Claim Number 4104246/2024.

J d'Inverno
Employment Judge

21 November 2024
Date of Judgment

22 November 2024
Date sent to parties

I confirm that this is my Judgment in the case of Clayton v MKP Estate Ltd and that I have signed the Judgment by electronic signature.