EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001085/2024

Held in Glasgow via Cloud Video Platform (CVP) on 27 November 2024

Employment Judge I McFatridge

Mr D Gibson	**Claimant** **Represented by:** **Mr G Woolfson - Solicitor**
Fares4Free	**First Respondent** **Represented by:** **Ms F Gorry - Solicitor**
M Crombie	**Second Respondent** **Represented by:** **Ms F Gorry - Solicitor**
L Fisher	**Third Respondent** **Represented by:** **Ms F Gorry - Solicitor**
B Smith	**Fourth Respondent** **Represented by:** **Ms F Gorry - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's application to amend dated 7 November 2024 is allowed in part namely paragraph 1 is allowed. The remaining parts of the application are refused.

REASONS

1. The claimant's application to amend was dated 7 November 2024. The respondent wrote to the Tribunal setting out their objections in an email dated 14 November 2024. At the hearing on 28 November 2024, both parties made oral submissions.

Claimant's Submissions

2. The claimant's representative by saying that as a matter of practicality, he noted that the amendment was brought within three months of the acts complained of. The hearing was taking place within three months of all of the acts complained of apart from the receipt of the letter on 21 August 2024. If the amendment were not allowed, then it would be open to the claimant to raise early conciliation for a fresh claim and thereafter lodge a fresh claim and seek to have it conjoined. It was his view that this showed that the balance of prejudice favoured granting the amendment. It was the claimant's view that in terms of the usual Selkent principles, there was no issue in respect of the timing and manner of the claim. The claimant was responding to events which had taken place. He could not have anticipated these at the time he lodged his ET1. The claimant had not been able to lodge the claim before he had received the various letters referred to and before he had his conversation with the representative of ACVC on 10 September 2024. It was his view that the effect of these new averments on whether or not there was a course of conduct and was something which would require to be dealt with at any hearing on timebar. It should not form part of any decision in relation to whether or not to allow the amendment.

Respondents' submission

3. The respondent's representative noted that the claimant's original claim form related to circumstances in 2022 culminating with the termination of his employment by resignation on 31 December 2022. The claim had been raised in July 2024 and was therefore substantially out of time. The amendment was seeking to introduce an entirely new claim. The respondent's position was that if the amendment were allowed, it would

considerably prejudice the respondent. She made the fundamental point that nothing in the new factual averment relating to receiving mail contained anything which were acts of the respondent. The respondent's position was that they could not control when other parties continued to send mail to an old address.

In regard to the second factual averment, what was stated was that comments were made by a representative of another charity. There was no specification whatsoever as to what the respondents were supposed to have done. The only factual averment was that the claimant was told by some-one else that "Leon Fisher had made it clear that the actions of the claimant in bringing these proceedings were having an impact on the respondent to the extent that it would not be in a position to enter into a shared office agreement with the other charities." It was clear that the claimant was seeking to use this averment to say that discrimination had continued into the period of three months before the claim was lodged. The statement could not be used for this purpose as it did not specify what the respondent had done or when they did it.

Claimant's further submissions

4. The claimant's representatives then clarified a number of points. It was his view that paragraph 1 required to be read as a continuation of paragraph 45e of the paper apart to the claim form. It was the claimant's position that there was an ongoing state of affairs of a failure to advise third parties of a change of address. With regard to the second new factual allegation, the claimant could provide further particulars in due course of what exactly it was that Leon Fisher was supposed to have said, when he said it, who he said it to etc. He indicated that he had not as yet spoken to the representative of the other charity himself but he could do so. He also indicated that he could seek additional information from the respondent in relation to what Mr Fisher had said.

Discussion and decision

5. I considered that although both parties skirted around the subject, it was clear that at least part of the motivation behind this amendment related to timebar. Paragraph 4 of the amendment sought to replace paragraph 57 of the ET1 paper apart. The existing paragraph 57 states:

"Although ACAS early conciliation was started and the claim has been raised outwith the statutory timeframe, it would be just and equitable to allow the claim to proceed."

Paragraph 4 seeks to replace this with

"there has been a continuing course of discriminatory conduct over a period up to and including more recent events set out above in paragraph 45. Esto there has not been such a course of conduct under ACAS early conciliation was started and the claim has been raised outwith the statutory timeframe it would be just and equitable to allow the claim to proceed."

6. It is also clear that paragraphs 2 and 3 relate to a completely new claim of victimisation which was not foreshadowed in the original claim form. The allowing or refusal of an application to amend is a matter where the Tribunal requires to be guided by the overriding objective. It is a case management function where the Tribunal requires to exercise a discretion. The well known case of Selkent Bus Company Limited v Moore [1996] ICR 836 sets out the general approach the Tribunal should take which is a multifactorial one considering all of the relevant factors. In the recent case of Chaudhry v Cerberus Security and Monitoring Services Limited, Judge James Taylor helpfully reviews the law on the subject and confirms that the Tribunal requires to balance the injustice and/or hardship of allowing or refusing the amendment or amendments. The balance of prejudice is therefore something which is important in such a decision.

7. In this case, the amendments being sought were clear and set out in writing. I considered that it was appropriate to deal with each individual paragraph of the application to amend since it may be in the interests of justice to allow the amendment in part.

8. With regard to the issue of timebar, it was not for me to pre-empt the decision of any future tribunal dealing with the question of whether the claim as it stands is timebarred or not. I did not agree with the respondent's representative that it was a relevant consideration (or indeed true) that as matters stood, there was a pretty good chance the claim would be struck out. I required to look at each part of the amendment taking into account the balance of prejudice in allowing or disallowing the amendment.

9. With regard to the first paragraph, the respondent's representative had pointed out that there is absolutely nothing in this which constitutes an act or omission of the respondent. The claimant's representative indicated that this is because it was to be read as a continuation of paragraph 45e which does contain within it a statement that "the respondent however did not change the correspondence address."

10. It appeared to me that on a proper reading, paragraph 1 of the application to amend was doing no more than stating that further mail had been received at the claimant's home address in the latter part of 2024 after the claim had been raised. There was no new allegation of any further omission or action by the respondent. Given that the earlier part of paragraph 45e refers to mail still being received in 2023, it is clear that the respondent's initial failure to advise of the change of address must be said to have occurred in 2023. Section 123 (3) (b) of the Equality Act 2010 provides that "failure to do something is to be treated as occurring when the person in question decided on it." As matters stand, it appears to me that paragraph 1 is doing no more than adding some further instances of mail arriving. There is no new allegation against the respondent of a fresh action or omission. On that basis, paragraph 1 is no more than a tidying up exercise and I can see no reason why it should not be allowed. There is nothing wrong with the timing or manner of the application. It is not making any substantial change and indeed on my reading is fairly inconsequential. The claimant's representative indicated that in his view, there was some kind of ongoing failure which constituted a course of conduct because the respondents continued to fail to intimate the change of address.

That is for a future tribunal to decide but given the terms of paragraph 45e (as amended), I do not see this advancing the time bar argument at all..

11. With regard to paragraph 2, this is an entirely new factual averment. The respondent's representative was critical in that it is by no means clear what the respondent is supposed to have done. With respect to the claimant's representative, I would agree with that position. If the respondent is making a claim of victimisation then he has to set out in clear terms what it is that the respondent has done and when he did it. If he is relying on something that Leon Fisher has said, he is required to set out the usual detail of what he said, who he said it to and in what circumstances. He would also require to say when it was said.

12. The date in paragraph 2 is the date on which the representative of another charity is said to have related this information to the claimant. There is no date given as to when Mr Fisher is supposed to have actually said this. The matter is important since it is quite clear from the terms of paragraph 4 of the amendment that this is something the claimant is seeking to rely upon. Once again, I have no difficulty with the timing and manner of the amendment. It is a significant amendment since it brings in an entirely new head of claim and it is significant in that it changes the basis on which the Tribunal is said to have jurisdiction when read together with paragraph 4.

13. My view is that if the amendment were allowed, there would be considerable prejudice to the respondent. In my view, the respondent would require to seek further and better particulars of this aspect of the claim. As it stands, it is entirely impossible for them to respond to as there is no detail at all given as to what Mr Fisher is supposed to have said, done or written. In my view, there would be delay in the current proceedings if this amendment were allowed. On the other hand, the prejudice to the claimant if the amendment is not allowed is relatively slight. The claimant's representative himself said that if the amendment is not allowed, then it is open to the claimant to submit a fresh claim. The claimant could do so and depending on when it is that Mr Fisher is said to have "made it clear", then it may be that this claim is still in time. There will undoubtably be some additional work in submitting a fresh claim

however if this is done there is at least the advantage that the claimant will require to refine the claim and make a proper allegation about what the respondents are supposed to have done and precisely how this links back to the protected act.

14. In my view, the interests of justice would suggest that this part of the amendment not be allowed. This deals with paragraphs 2 and 3. With regard to paragraph 4, I consider this to be a significant amendment. It only makes sense if there are new facts pled which allege discrimination was continuing. I have not allowed the second new factual allegation to be included by amendment. I disagree that the new facts I have allowed (that mail continued to be delivered after August 2024) permit the claimant to argue there was a continuing act. Any reading of the new claim does not contain an averment of the respondent having carried out any discriminatory act at all within the prescriptive period far less one which could arguably be described as a continuing act.. I have allowed paragraph 1 which as I note does not contain any fresh allegation of any omission by the respondent after the initial omission which must have taken place back in 2023. I have not permitted the claimant to amend so as to include the further factual allegations set out in paragraph 2. On this basis, I am not prepared to allow paragraph 4.

15. I was not addressed in any specific way as to why paragraph 5 was required. As it stands, it appears to be no more than a statement of what is the standard legal position in any event. It is not in any way controversial that section 109 makes employers liable for things done by an employee in the course of their employment or by an agent. This does not require to be stated. As I mentioned during the hearing, I consider that what is required in this case is a clear statement by the claimant as to why they consider the three individuals who are not the claimant's employer are liable. The claimant's initial position was that at least two of them were employees however he subsequently indicated one may not have been an employee at the relevant time. In any event, the Tribunal will require to know prior to the hearing whether they are said to be liable in terms of section 110, 111 or 112. Given that I do not find

there to be any point in paragraph 5 of the amendment, I did not consider it appropriate to allow this either.

16. The end result is that paragraph 1 of the amendment is allowed and that paragraphs 2, 3, 4 and 5 are not allowed.

I McFatridge
Employment Judge

3 December 2024
Date of Judgment

Date sent to parties **04 December 2024**