EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000624/2023

Held in Glasgow on 30 December 2024

Employment Judge D Hoey

Ms L Stirling	**Claimant** **In Person**
Hamill Homecare Limited	**Respondent** **Represented by:** **Mr G Millar - Solicitor**

ORDERS

Made pursuant to the Employment Tribunals Rules of Procedure 2013

The Tribunal decided it was in the interests of justice and pursuant to the overriding objective to refuse the claimant's application to amend her claim to include a claim for non payment of wages.

REASONS

Background

1. By ET1 presented on 27 November 2023 the claimant ticked the boxes to indicate that her complaint was for unfair dismissal and discrimination. The narrative made it clear that the claimant believed the termination of her employment was unlawful. The claim was disputed.

2. A case management preliminary hearing took place (with prior agendas having been issued) and the Note issued following that hearing made it clear that the claim would proceed to determine the disability discrimination complaint (unfair dismissal having been withdrawn).

3. On 13 May 2024 the Hearing was scheduled to commence but had to be postponed due to the claimant being unable to proceed having received

documents late. The Hearing was postponed but case management took place and the case was focussed with the complaints being analysed and the issues to be determined set out.

Claimant raises issues of non payment of wages

4. On 31 July 2024 the claimant sent an email to the Tribunal, copied to the claimant in which she said (amongst other things): "On another note, it has been brought to my attention that Hamill Homecare have also broken the Employment Rights Act 1996 by withholding a weeks wage. See first attachment from Cara Cleland. Since Hamill Homecare terminated my employment, the uniform has been washed, dried and placed in the tote bag amongst other items and been in the boot of my car. I have not been sent an envelope to return every piece of uniform requested. I had intended to bring the bag with me on the tribunal date on 13 May 2024, however as I was uncertain if the meeting would go ahead due to lack of data requested, I did not bring it. Due to the current tribunal case I am not sure if it is appropriate to return the uniform in person in exchange for my last week's wage. How should I proceed here to return the uniform and gain my last week's wage?"

5. The respondent said that if the claimant was seeking to amend her claim such an amendment would be objected to given the time that had passed.

6. On 10 September 2024 the claimant replied saying: "Referring to my email sent on 31 July 2024, regarding the email sent by Cara, requesting the return of my uniform in exchange for my week's wage. I would like to add the weeks wage that has been withheld from me to be included in the calculations for the statement of remedy, however as I have not yet been sent my payslips that I have requested several times, I am unable to estimate what that missing weeks wage would have been".

7. On 11 September 2024 the claimant was told by the Tribunal that if she wished to amend her claim to include a further complaint (about non payment of wages) she required to set out in writing what sums she said were due to her (and why) and why the complaint had been raised out of time.

8. Absent any response from the claimant, the Tribunal wrote to the claimant on 2 October 2024 and asked that she set out in writing the details of the specific complaint she wished to make, which failing it would be assumed no amendment was being sought.

Claimant wishes to pursue wages but fails to give specific details

9. On 16 October 2024 the claimant replied, apologising for the delay which she said was due to having had "a bad reaction to the medication resulting in having to come off this medication and a review". She asked "If it is still possible, I would like to add withholding wages for the uniform to the case. What should I do with the bag of uniform still in the boot of my car."

10. On 6 November 2024 the claimant said: "Yes, the case will proceed and will include the Respondents withholding the payment my last weeks wage in exchange for the uniform that has been cleaned and in the Hamill Homecare bag, in the boot of my car for over a year now".

Application to be considered in chambers

11. The parties were asked whether they were content the application to amend be considered in chambers.

Respondent says no merit and out of time

12. The respondent replied on 12 November 2024 confirming they were content the matter be determined in chambers. The respondent's agent noted the application was out of time and the claimant had not specified exactly what the alleged deduction was.

13. The respondent submitted that there had been no unauthorised deduction from wages. In terms of the respondent's policy, and the claimant's contract of employment, which the claimant signed, the respondent was said to be entitled to retain monies unless and until their property (which includes uniform) had been returned. This was confirmed to the claimant by email of 14 September 2023, which had an attachment of her end of employment

letter. The respondent's agent noted the claimant confirmed the uniform had not been returned. There was therefore no merit to the claim.

14. In any event the respondent's agent submitted that the claimant had known, since 14 September 2023 that money would be withheld until she fulfilled her duty to return her uniform. The final wage was paid on 28 September 2023 and that is the key date in considering when any claim should have been lodged. Section 23 of the Employment Rights Act 1996 states that a claim must be brought within three months beginning with the date of payment of the wages from which the deduction was made. If the claimant, despite the correspondence that she had received, considered that there had been an unauthorised deduction from wages, then it would have been reasonably practicable for her to have included that claim within her Form ET1, which was received by the tribunal on 27 November 2023. As this was not included originally, in terms of Section 23, the claimant could and should have raised this claim by 27 December 2023 at the latest.

15. It was noted that section 23(4) of the Employment Rights Act 1996 states that the tribunal should only consider the amendment where it is satisfied that it was not reasonably practicable for the claimant to have lodged this particular claim on time. Whilst the claimant is not legally represented, so may not have been aware of the particular claims, or the relevant time limits for the bringing of these claims, the claimant was able to engage in the ACAS Early Conciliation process, then complete and submit her Form ET1. The claimant had not ticked the box in section 8.1 of Form ET1 for "I am owed arrears of pay" and one for "I am owed other payments". It ought to have been obvious to the claimant that either of those boxes should have been ticked if she wanted to bring a deduction from wages claims, regardless of the fact that she is not legally represented.

16. The respondent's agent said the claimant had not explained why it was not reasonably practicable for her to have lodged the claim in time. The claimant has not set out any reason explaining why there was such a delay in the application being presented. Without that explanation or reason, the tribunal

cannot conclude that it would not have been reasonably practicable for the claimant to have lodged her claim on time.

17. The respondent did not agree that an order in the terms requested would assist the tribunal in dealing with the proceedings efficiently and fairly and in accordance with the overriding objective, as the respondent would be prejudiced by facing this additional claim.

Claimant asks matters be considered

18. On 14 November 2024 the claimant said that she was happy the Judge review matters and make a decision on this issue. No further information was given.

Tribunal confirms matters will be considered

19. The parties were told that matters would be considered in chambers on 7 January 2025. The parties had previously been told that the hearing would proceed on 8 January 2025. Given the proximity of the hearing, the Tribunal decided to determine the matter as soon as possible and has done so today.

The law

20. A Tribunal must have regard to the overriding objective, which is found in the Rule 2: “The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—(a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense.”

21. It is firstly important to determine the type of amendment sought. An amendment can either be to amend the basis of an existing claim, introduce a new cause of action already linked to facts pleaded or to introduce a wholly new claim not linked to existing facts.

22. Matters of amendment are a part of the Tribunal's general case management powers under Rule 29, which require to be exercised having regard to the overriding objective in Rule 2. Earlier iterations of the Tribunal Rules of Procedure did contain a specific rule on amendment, and the changes brought into effect by the current Rules, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 require consideration when addressing earlier case law where there had been a specific rule in relation to amendment.

23. An amendment is not automatically to be allowed and the established test summarised by Mummery J (as he then was) in **Selkent Bus Co v Moore** 1996 IRLR 661 **("Selkent")** is to be applied. The prejudice and hardship to the parties is to be considered and carefully balanced. This would include assessing whether any new evidence would be needed and the impact of the amendment on the parties. No one factor is conclusive. Ultimately the matter is to be determined judicially.

24. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to address that, save in respect of additional respondents in Rule 34.

25. In **Selkent,** Mummery J sets out the criteria for a Tribunal's exercise of discretion in relation to amendment commenting that the Tribunal *"should take into account all the circumstances and should balance the injustice and hardship of refusing it".* The Employment Appeal Tribunal commented that that factors which had influenced its decisions were:

"(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

If a new complaint or cause of action is proposed to be added by way of amendment, it is 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.

c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, ***the paramount considerations are 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."*

26. In a number of cases distinctions are drawn between firstly cases in which the amendment application provides further detail of facts in respect of a case already pleaded, secondly those cases where the facts essentially remain as pleaded but the remedy or legal provision relied upon is sought to be changed, often called a change of label, and thirdly those cases where there are both new issues of fact and of legal provision on which the remedy is sought. The third category is where the amendment introduces a new claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time.

27. In **Abercrombie v Aga Rangemaster Ltd** 2014 ICR 204 the Court of Appeal said this in relation to an amendment which arguably raises a new cause of action, suggesting that the Tribunal should *"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."

28. Underhill LJ also stated (at paras 47-50) that even if a claim is out of time, that is only one factor (albeit an important one) to be put in the balance. It is not a decisive factor and the extent to which the new claim would involve new evidence and prejudice should again be considered.

29. In **Newstar Asset Management v Evershed** UKEAT/249/09 and 2010 EWCA 870 Underhill LJ and the Court of Appeal look at the law in relation to amendments and emphasised that it is important not to make assumptions about hardship and look at the precise effect an amendment would have. Thus any new claims being advanced should be considered together with the evidential impact and hardship created and then the specific factors put into the balance.

30. Where the new proposed amendment arises out of facts that have already been pleaded in relation to the original claim, the proposed amendment will not be subjected to scrutiny in respect of the time limits but will be considered under the general principles applicable to amendments, as summarised in **Selkent.** In **Jesuthasan v Hammersmith** 1998 IRLR 372, the Court of Appeal allowed a part time worker to add claims for unfair dismissal and a redundancy payment to his existing (timeous) racial discrimination claim (following a change in the law as then understood). Granting the amendment, Mummery LJ said: *"No further factual inquiry on this point is required. The proposed amendments are not futile. They do not plead any new facts, but simply attach two more labels to the facts already pleaded in an originating application issued within three months of his dismissal. It would be unjust to refuse the amendment, as it would deprive the [claimant] of the opportunity to succeed on the proposed claims. The amendment does not prejudice the council. The delay in making the application is a relevant factor, but it is of little weight in this case."*

31. The Tribunal must apply the **Selkent** principles. The Employment Tribunal has a discretion to determine any amendment application and must take into account all the relevant circumstances and then balance the injustice and hardship of allowing an amendment against the injustice and hardship of refusing it. The **Selkent** principles are not, however, a checklist and the full facts should be properly considered and balanced.

32. In **Vaughan v Modality Partnership** 2021 IRLR 535 the Employment Appeal Tribunal set out the up to date position in respect of amendment emphasising that the core test is the balance of injustice and hardship. The Employment Appeal Tribunal concluded that there was a balance of justice and hardship to be struck between the parties. There was further commentary on the process to follow in such cases in **Chaudhry v Cerberus** [2022] EAT.

33. Amendments should not be denied punitively where there is no real prejudice done by allowing them: **Sefton MBC v Hincks** 2011 ICR 1357. It is important to balance all the circumstances. It is ultimately a balancing exercise taking all relevant factors into account. No one factor is conclusive.

34. Where an amendment is altering the basis of an existing claim, there is no issue of time limits and the Tribunal should have regard to the whole of the claim form to see what has been said and where the balance lies. All relevant factors should be considered, including whether new evidence is needed, the explanation for delay and the impact upon the parties.

35. If the amendment is seeking to put a new label upon facts already pled, the proposed amendment would not be subject to issues of time limits – **British Newspaper Printing v Kelly** 1989 IRLR 222. A similar issue arose in **Street v Derbyshire Unemployed Workers Centre** 2005 ICR 97 where a claim for automatic unfair dismissal was allowed to be amended to include a claim for ordinary unfair dismissal on the basis that the claim “simply needed particularisation”. McMullen J noted that there was a single channel of complaint the sole basis of which was the right not to be unfairly dismissed (under section 94 of the Employment Rights Act 1996).

A decision regarding amendment is a case management order

36. In terms of paragraph 1 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, a "judgment" is defined as a decision which finally determines a claim or part of a claim or any issue which is capable of finally disposing of a claim or part of a claim. A "case management order" is an order or decision of any kind in relation to the conduct of the proceedings, not including any issue which would be the subject of a judgment.

37. Given the proposed amendment is seeking to introduce a claim, it cannot be determining or disposing of a claim and so the decision in relation to the amendment application is a case management order.

Decision

38. The Tribunal considered this matter carefully in light of the information before it taking account of the fact that the claimant is not a lawyer together with the facts as set out above.

Nature of the amendment

39. The amendment was clearly an entirely new complaint that had not been foreshadowed in the claim form. The claimant had the opportunity to tick the box about payments due but had not done so. The claimant also had the chance to raise the issue when the nature of the claim was discussed prior to or at the preliminary hearings but had not done so. The complaint raises matters that are entirely different to the issues to be determined at the Hearing which pertain to disability discrimination, disability having been conceded.

Time limits

40. The complaint is out of time. The claimant was aware of the tribunal and requirement to contact ACAS. The claimant has not explained why she had not raised her complaint in time (nor said that she could not have done so). There is no information to suggest that it was not reasonably practicable for the claimant to have raised her claim in time. That is an important consideration which is placed in the balance. The claimant should be aware

that she still retains the right to raise a claim in the Sheriff Court for payment of sums due to her (where the time limits are longer).

Timing

41. The claimant has not explained why she raised her complaint late. The respondent set out their position clearly and gave the claimant the chance to set out anything with which she disagrees or any other issues arising. No further information has been provided by the claimant.

Balance of hardship and prejudice

42. The Tribunal balanced all the relevant factors. In assessing whether or not to allow the claimant to amend her claim the Tribunal took into account that the amendment would introduce a new complaint in respect of which different evidence would be needed. A key issue the Tribunal took into account was the timing and manner of the application. The general position in relation to this is set out above. No explanation has been given for the claimant's decision not to raise the issue sooner nor suggesting the claimant was not aware of time limits.

43. The scope of the hearing would change if the complaint is permitted since the hearing would require to consider the terms of the claimant's contract and the position. It is relevant to note that it appears to be the case that the claimant accepts she has retained the respondent's property. It is suggested by the respondent that upon return of the property, the sums due to her would be repaid. That gives rise to 2 issues. Firstly if the claimant is able to return the property and receive the sums due to her, the issue is resolved. Secondly, the facts (which do not appear to be in dispute) suggest that the claim is not likely to succeed, which is a relevant consideration.

44. The paramount consideration was the relative injustice and hardship. Having balanced the hardship in this case the Tribunal finds that it is not in the interest of justice to permit the amendment. The hardship to the respondent is greater than to the claimant if the amendment were permitted. The claimant is able to have her existing complaints determined, whilst returning the respondent's

property and dealing with matters in that way. In the event the respondent refuses to return sums the claimant says are due, despite their suggestion the claimant would be entitled to the sums upon return of the uniform, the claimant would be able to raise a small claims action in the Sheriff Court. The claimant is not deprived of a remedy if the application is refused, whereas if it is granted, the nature of the Tribunal's enquiry at the Hearing is prolonged (and no explanation has been provided for raising the new claim so late despite a number of opportunities having existed to do so). There was no information to suggest that it was not reasonably practicable to have lodged the claim in time.

The decision

45. The Tribunal had regard to all the circumstances and balanced all of the factors as set out in terms of the legal tests. The Tribunal found that it was just, and consistent with the overriding objective to refuse the claimant's application to make any amendment to the claim.

46. The Hearing shall proceed on the basis of the issues set out in the Note of 13 May 2024, namely the complaints made under section 15 and section 20 of the Equality Act 2010.

Parties to liaise

47. The parties are expected to liaise with each other in respect of a number of issues.

48. Firstly the parties should discuss return of the respondent's property from the claimant and release of sums due to the claimant. Given what the respondent's agent said about the reason for non-payment, that issue ought to be readily capable of being resolved with discussion.

49. Secondly the parties should ensure that they are fully prepared to deal with the outstanding issues as to the claim that will proceed.

50. A draft list of issues has been appended to his Order. The parties should ensure that this is completed and comprehensive prior to commencement of the Hearing.

51. The respondent should set out in writing a statement of the key facts it says are necessary to determine the issues under the 2 complaints that are proceeding (in respect of the issues appended to this Order).

52. The claimant should consider the draft statement and be in a position to set out her response to these issues at the Hearing (with particular focus on what facts are disputed and what her position is in relation to them).

D Hoey

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Employment Judge

30 December 2024
Date

Date sent to parties **03 January 2025**

Annex to Order: Proposed list of issues

Discrimination arising from disability (Equality Act 2010 section 15)

1. It is conceded that the respondent treated the claimant unfavourably by dismissing her.

2. Was the claimant dismissed because of her attendance at a medical appointment (and her non attendance at work)?

3. Was the attendance at a medical appointment something arising in consequence of her disability?

4. Was the treatment a proportionate means of achieving a legitimate aim? The respondent should set out its aim.

Failure to make reasonable adjustments (section 20 Equality Act 2010)

5. The respondent concedes it knew of the disability at the material times.

6. The "PCP" was the requirement staff work their rostered shifts and that applied to the claimant.

7. Did the PCP put the claimant at a substantial disadvantage compared to someone without the claimant's disability, in that the claimant was at risk of dismissal.

8. Did the respondent know that the claimant was likely to be placed at the disadvantage.

9. What steps could have been taken to avoid the disadvantage? They include adjusting her shift or not dismissing.

10. Was it reasonable for the respondent to have to take those steps and when?

Remedy

11. What financial losses has the dismissal caused the claimant?

12. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job? If not, for what period of loss should the claimant be compensated?

13. Did the ACAS Code on Disciplinary and Grievance Procedures apply?

14. Did the Respondent or the Claimant unreasonably fail to comply with it?

15. If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

16. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

17. What interest should be awarded?