



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000123/2023

5

Held in Glasgow on 7 January 2025

Employment Judge P O'Donnell

10 **Mr P Hanton**

**Claimant
In Person**

15 **Scottish Enterprise**

**Respondent
Represented by:
Mr R Alexander -
Solicitor**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's application to amend is refused.

REASONS

Introduction

- 25 1. The present hearing was listed to determine the claimant's application dated 13 November 2023 to amend his claim. This application was opposed by the respondent.
2. There was a joint file of productions prepared for the hearing and a reference to a page number below is a reference to that file.
- 30 3. During the course of the hearing, the claimant made reference to a claim of unfair dismissal being part of the proceedings. The Tribunal pointed out that this claim had been dismissed for want of jurisdiction by a judgment of EJ Doherty dated 2 August 2023.

4. In reply, the claimant stated that he wished the Tribunal to reconsider that judgment and reinstate the unfair dismissal claim. It was explained to him that the present hearing was not listed to deal with any reconsideration application. In any event, there was no extant application; the claimant had
5 made a reconsideration application in August 2023 and this has been refused by EJ Doherty on 13 September 2023.
5. The present hearing proceeded on the basis that the claim as pled was one of direct sex discrimination and harassment on the grounds of sex in respect of the three allegations identified at paragraph 10 of EJ Whitcombe's Note of
10 the case management preliminary hearing held on 1 September 2023 (pp39-40).

Submissions

6. Both parties made oral submissions at the hearing. For the sake of brevity, the Tribunal does not intend to set out the submissions in detail. These have
15 been noted and the Tribunal will refer to any point raised that requires to be specifically addressed in its decision below.

Relevant Law

7. The Tribunal has a general power to make case management orders which includes the power to allow amendments to a claim or response in terms of
20 Rule 30.
8. The case of *Selkent Bus Co Ltd v Moore* [1996] ICR 836 confirms the Tribunal's power to amend is a matter of judicial discretion taking into account all relevant factors and balancing the injustice and hardship to both parties in either allowing or refusing the amendment. The case identifies three
25 particular factors that the Tribunal should bear in mind when exercising this discretion; the nature of the amendment; the applicability of any time limits; the timing and manner of the amendment.
9. In relation to time limits, the case of *Transport and General Workers Union v Safeway Stores Ltd* UKEAT/0092/07 confirms that this is a relevant factor in
30 the Tribunal's discretion and can be the determining factor. However, time

bar does not apply, in the context of an application to amend an existing claim, to automatically bar a new cause of action in the same way as it would if the new cause of action was being presented by way of a fresh ET1.

Decision

- 5 10. The Tribunal considers that it is appropriate to address each of the specific factors highlighted in *Selkent*, consider any other relevant factors and then take all of those into account in balancing the injustice and hardship to all sides.
- 10 11. First, there is the nature of the amendment. The Tribunal had to seek some clarification from the claimant as to what amendment he was seeking to make. The application of 13 November 2023 consisted of the claimant completing a case management agenda which appears at pp45-62. EJ Whitcombe had suggested using the agenda as a template to assist the claimant in ensuring that he provided the relevant information.
- 15 12. On the face of it, the claimant was asking the Tribunal to allow the whole of the agenda as an amendment. However, in the course of submissions, this was not how the application was being framed and so the Tribunal asked the claimant to clarify what he was seeking to amend.
- 20 13. In reply, the claimant explained that he was seeking to add a claim that he had been subject to detriments because he had made protected disclosures. The detriments in question were set out at p52 and p59:
- a. At p52 the claimant alleges that on 26 May 2021 he raised a grievance about his line manager and another employee but that HR only accepts a single complaint about the claimant's line manager. The claimant alleges that his line manager and the other employee had sent a malicious report to the Extended Leadership Team which contained erroneous conclusions and misleading information.
 - b. At p59 the claimant alleges that the outcome of his appeal issued on 10 November 2022 amounts to a detriment.
- 25

14. When asked by the Tribunal to identify where the protected disclosures were specified in the amendment application, the claimant confirmed that they were not set out in the application and, instead, made reference to a document prepared for the purposes of the hearing at p74. This sets out information the claimant says he disclosed although the document does not set out dates for these alleged disclosures.
15. Towards the end of the hearing, there was a discussion between the Tribunal and the claimant about the issue of time limits. The claimant made repeated references to the time limit running from 6 January 2023. The Tribunal pointed out that none of the existing allegations of discrimination nor the allegations the claimant sought to add by way of amendment occurred on this date. It was explained to the claimant that the time limit ran from the date of the alleged acts of discrimination or detriment.
16. In reply, the claimant referred to his ET1 which contains a reference at p16 to a discussion between him and the records manager about his freedom of information request. The Tribunal explained that he may have pled this fact but he has not, at any point, pled this as an unlawful act.
17. The claimant then stated that he wished to amend his claim to add this matter as an act of direct sex discrimination.
18. The Tribunal proceeded on the basis that the claimant's application was to amend his claim as clarified at the hearing.
19. On this basis, the Tribunal agreed with the submissions on behalf of the respondent that the claimant was seeking to add entirely new causes of action by way of the amendment application. Although the claimant had set out a chronology of events which mention that he raised a grievance on 26 May 2021, had his appeal refused on 10 November 2022 and had a discussion about his freedom of information request on 6 January 2023, the Tribunal considers that the ET1 does not, on even the most generous reading, plead a case that these amount to unlawful detriments or discrimination. The plain reading of the chronology is that this was setting out the sequence of events

leading to his resignation. There is nothing in the ET1 which suggests that these matters give rise to any claim in themselves.

20. Further, there is absolutely nothing in the ET1 that suggests that the claimant believed that he had been subject to any detriment because he had made a protected disclosure. Indeed, there is nothing in the ET1 that can be read as an assertion that the claimant made a protected disclosure.
21. Similarly, there was no suggestion until the hearing today that the claimant sought to argue that the discussion on 6 January 2023 was an act of sex discrimination. This was not said in the ET1 nor was it suggested as an act of discrimination at the case management hearing in September 2023 when EJ Whitcombe identified what the acts of discrimination were said to be. Indeed, even the document forming the original application to amend makes no reference to the events of 6 January 2023 being an act of discrimination.
22. The Tribunal considers that the claimant has fallen into the common error of assuming that his case is whatever he says it is and has not understood that it is only the case that is pled in the ET1 claim form that the Tribunal will determine. The Tribunal appreciates that the claimant is a party litigant and it will give some leeway in terms of reading any pleadings. However, the requirement for proper pleadings giving fair notice cannot be ignored entirely as this would prejudice the respondent.
23. In these circumstances, the Tribunal considers that the nature of the amendment is to introduce wholly new causes of action.
24. Second, there is the issue of the applicability of time limits. This arises as a result of the nature of the amendment.
25. The new claims are wholly out of time; the amendment application was made in respect of the protected disclosure detriments on 13 November 2023 which is 18 months and 12 months respectively after the dates on which the detriments are alleged to have occurred; the application in respect of the 6 January 2023 allegation has only been made at the present hearing which is 2 years after the date of the alleged discrimination.

26. The claimant has given no explanation why he did not set out these claims in his ET1 as originally pled. He was clearly aware of the facts giving rise to the claim when he presented his ET1 and there is nothing to suggest that he was in any way impeded from setting out these claims at that time.
- 5 27. In these circumstances, the Tribunal does not consider that there would be any basis on which it would be prepared to exercise its discretion to hear the claims for protected disclosure detriments out of time. The relevant test is whether it was not reasonably practicable for the claim to have been lodged in time and there is absolutely no basis on which the Tribunal could conclude
10 this was the case.
28. In respect of the new allegation of sex discrimination, the test is whether it would be just and equitable to hear this claim out of time. This involves a very similar exercise in balancing the respective hardship and prejudice to each party as applied to considering the application to amend. The Tribunal
15 will address these issues further below.
29. Although the issue of time limit is not determinative in considering an amendment application, the Tribunal does consider that, given the passage of time involved and the absence of any explanation why the amended claims were being presented so late, this is a significant factor which weighs against
20 the claimant's application being allowed.
30. Third, there is the factor as to the timing and manner of the application. The original amendment application came several months after the claim was presented and only when EJ Whitcombe had required the claimant to make such an application. The application in respect of the January 2023 allegation
25 was only made at the present hearing after the claimant had provided clarification of the basis of his amendment and as a result of the Tribunal pointing out that he was making reference to time limits running from a date on which no discrimination was being alleged.
31. The Tribunal considers that this lends weight to its view that the claimant does
30 not appreciate that only the claim that has been pled will be determined by the Tribunal.

32. Having addressed the specific factors identified in *Selkent*, the Tribunal considered whether there were any other relevant factors.
33. The Tribunal was not being asked to assess the prospects of success at this hearing and did not consider that the merits of the case was a factor which should feature heavily in its consideration.
34. However, the Tribunal does note that the amendments are not wholly specified. For example, it is not clear at all as to the basis on which the claimant says that the outcome of his appeal was because he had a protected disclosure nor is it clear why the claimant says that the discussion on 6 January 2023 amounted to direct sex discrimination.
35. Although these issues could be addressed by requiring the claimant to provide further specification, he has already had more than ample opportunity to properly set out the basis of his claims in the nearly 2 years since he lodged his ET1. The Tribunal does not consider that he is likely to be able to provide this if given yet another opportunity to do so and, indeed, it is more likely that the claimant will seek to raise new issues in such circumstances.
36. Turning to the balance of injustice and hardship between the parties, the Tribunal recognises that there would be a hardship to the claimant in refusing the application as this would prevent him from pursuing claims in respect of the matters in question.
37. However, this hardship is limited given that the claimant will not be prevented from pursuing his existing claims. Further, this hardship arises from the claimant's own failure to set out these claims in his ET1 in circumstances where all the relevant facts were in his knowledge.
38. The Tribunal does consider that the respondent will face a significant prejudice in having to defend entirely new claims in respect of events which occurred between two to four years ago. Such a passage of time will inevitably impact on the recollection of witnesses.
39. Further, both parties will be prejudiced by the fact that allowing the amendment will effectively put the proceedings back to "square one". The

respondent would have to be allowed the opportunity to investigate and reply to the new claims. This would delay any progress and mean that proceedings lodged 2 years ago would be no closer to reaching a conclusion despite the considerable passage of time since the claim was lodged. This is not in the interests of either party.

5

40. In these circumstances, taking account of all the matters set out above, the Tribunal considers that balance of prejudice and hardship falls in the respondent's favour. In particular, the new claims are being introduced significantly out of time with no basis on which the Tribunal could consider hearing the claims out of time in circumstances where the case has been live for nearly two years and there is a need to avoid further delay in bringing the proceedings to a conclusion.

10

41. For these reasons, the claimant's application to amend is refused.

Postscript

42. The Tribunal does consider that the case is now ready to be listed for a final hearing. The claims have been identified at the case management hearing in September 2023 and the Tribunal does not consider that a further case management hearing is required. Date listing stencils will be issued to parties to provide their availability and Orders for the preparation for the final hearing will be issued in due course.

15
20

25 **Date sent to parties**

13 January 2025