EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104615/2024

Preliminary Hearing Held in Chambers (Parties not in attendance) on 11 November 2024

Employment Judge J M Hendry

Mr K Simpson	**Claimant** **Represented by,** **Solicitor**
Baker Hughes Limited	**Respondent** **Represented by,** **Ms C Low,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's application to amend is refused and that the claims for unfair dismissal and non-payment of holiday pay are dismissed.

REASONS

1. The claimant raised employment tribunal proceedings in April 2024. The claimant indicated that he was making a claim for unfair dismissal and holiday pay. The claims were out of time and being presented outwith the primary

time limits and the one month's grace allowed by the Early Conciliation process.

2. In a written Judgment dated 23 September 2024 Judge Whitcombe noted that "by consent the complaint of unfair dismissal was presented outside the time limit defined by s.111 of the Employment Rights Act 1996" but he declined to dismiss the claim until the application for permission to add a complaint of disability discrimination had been decided.

3. Parties agreed that it would be in accordance with the overriding objective for the application to amend to be dealt with on written submissions and a hearing for that purpose was set down for 11 November.

Background

4. The essential procedural background facts of the case were not in dispute and are as follows.

5. The claimant resigned on the 7 November 2023. He entered into early conciliation on the 2 February 2024 and a certificate was issued by ACAS on the 12 March. An application was submitted to the Tribunal for constructive dismissal and holiday pay on the on 15 April 2024. The box for unfair dismissal was 'ticked' as was the one indicating that a claim for holiday pay was being advanced. The claim also had ''secondary claim-injury to feelings''.

6. The application appears to have been submitted by the claimant's solicitors.

7. The claimant sought to amend his claim on 16 September 2024. The respondent's lawyers wrote to the claimant and the Tribunal objecting to the application. A Preliminary Hearing took place on 23 September 2024 to consider whether the original claim was submitted in time and whether the Tribunal had jurisdiction to determine it.

8. The Judge concluded that the original claim was presented outside the relevant time limits and as such the Tribunal did not have jurisdiction to determine the claim. This is reflected in Judge Whitcombe's Judgment.

9. Following this the claimant's solicitors submitted a revised application to amend with accompanying submissions on 7 October 2024. That amendment was opposed by the respondents in their e-mail of 21 October 2024 with attached submissions.

Parties' respective legal position

10. The claimant's solicitor acknowledged that the claim for harassment was time-barred/reasonable adjustments. However, they took the position that the question of time-bar should be dealt with at this stage when the Tribunal came to consider whether or not to allow the amendment. In relation to the factors the Tribunal had to consider they made reference to the well-known case of ***Selkent Bus Co. Ltd v. Moore*** [1996] ICR 836 EAT and urged the Tribunal to take account of all the relevant circumstances balancing the injustice and hardship of allowing or refusing the amendment (***McFarlane v. Commissioner of Police of the Metropolis*** [2023] EAT 111.

11. They argued that the amendment did not introduce any significant new facts and was a re-labelling exercise which would normally be permitted (***Newstart Management Holdings Ltd v. Evershed*** [2010] EWCA Civ 870. They also made reference to the Presidential Guidance for England and Wales.

12. In relation to whether or not the issue of time-bar should be reserved they submitted that the Tribunal should follow the case of ***Amey Services Ltd v. Aldridge*** UKEATS (007/16) which suggested time-bar should not be held over and that time-bar is a factor to take into account when deciding whether or not to allow amendment.

13. In response the respondent's solicitors raised a number of objections to the amendment. Their position was that the revised application was not competent as the Tribunal did not have jurisdiction to determine the original claim. They also argued that the claimant was now seeking to raise a brand new claim and to do so would have to submit a new ET1 and go through the ACAS Early Conciliation process. In short, their preliminary position was that the claimant could not seek to amend a claim that does not exist.

14. They then turned to whether or not the Tribunal should allow the amendment if it came to the view that amendment was competent. They reviewed the various legal authorities in relation to amendment including ***Selkent*** and the more recent guidance given in the case of ***Vaughan v. Modality Partnership*** EAT 0147/2020. Their position was that the core test in considering the amendment was the balance of injustice and hardship in allowing or refusing the application and that the Tribunal had to look at the practical consequences. In this case, the respondent would face a new claim. They made reference to the Judgment of Mr Justice Langstaff in ***Chandok v. Tirkey***. In that Judgment the then President of the EAT strongly indicated that raising a claim was not simply something done to "*get the ball rolling*" and that "*parties must set out the essence of the respective cases on paper.*" He indicated that such a restriction was needed to keep litigation within sensible bounds and that "*a degree of informality does not become bridled licence*".

15. The respondent's lawyers also made reference to the case ***Remploy Ltd v. Abbott & Others*** UKEAT/0405/14. The EAT in that case confirmed that in deciding whether or not to allow an amendment to a claim Judges must consider issues such as the reason for the delay and the impact of the amendment. They also stressed "*it is essential before allowing an amendment it must be properly formulated, sufficiently particularised, so the respondent can make submissions and know the case it is required to meet.*" They argued that the amendment sought did not live up to this standard.

16. Their position was that the amendment was not a re-labelling exercise. It was a wholly new claim and would be prejudicial to the respondents if amendment was to be granted which would increase the scope of the claim. The claimant lodged the original claim on 15 April and had ample opportunity to make the application then. The amendment comes very late in the day. They also stressed that reserving time-bar to a final hearing was not accepted as appropriate by the respondent. Their position was that it was a preliminary matter and had to be dealt with at this stage. They pointed to the fact that that there was no basis to extend time under s.123(1) of the Equality Act given in the application. They then took the Tribunal to the primary time-limits, the alleged date of harassment was 7 November 2023, the proper time limit for raising the claim was 6 February 2024. The claimant contacted ACAS 2 February 2024 and was issued a Certificate on 12 March 2024. ACAS extended the time to 16 March 2024.

17. Finally, they argued that it was not just the norm to allow a claim to be received late citing ***Humphries v. Chevler Packaging Ltd*** UKEAT/0024/06/DM and ***Robertson v. Bexeley Community Centre*** [2003] EWCA Civ576 and ***British Coal Corporation v. Keeble*** [1997] IRLR 336. The claimant has not provided a detailed commentary on the reasons for the significant delay. He waited over five months to submit the application. The claimant has been legally represented throughout and yet the application was made late. He has had ample opportunity to make the application to amend earlier.

Discussion and Decision

18. The Tribunal has wide powers of amendment and this includes allowing an amendment that brings in a claim that is otherwise out of time. I agree that the matter should be determined at this stage and not left over to be determined at a final hearing. It seems in accordance with the overriding objective, in particular the saving of expense, for the respondent not to be put

to the expense of a hearing when the matter can be determined as part of the amendment process.

19. The respondent's solicitors argued that the claimant could not seek to amend a claim that was out of time. A claim was properly made to the Tribunal and was thus a 'live' claim. It would have been open to the claimant to argue that it had not been reasonably practicable for him to lodge the claim for unfair dismissal and holiday pay on time but he did not do so accepting that the claim was out of time. At that point it fell to be dismissed for want of jurisdiction but before it an application was made to amend. The amendment was on the face of it to add claims for disability discrimination. Such claims themselves can be heard out of time if the Tribunal accepts that it is just and equitable to do so (Section 123 Equality Act). If, here, the application is refused then the claim would once more fall to be dismissed as there would be no live claim. The question of undertaking early conciliation could be a factor in the Tribunal's consideration of a late amendment but it is not a bar to amendment per se. I accordingly reject the preliminary arguments.

20. In considering amendment the starting point as parties have indicated the leading authority is still that of ***Selkent*** supra. The approach set out there has since been affirmed by the Court of Appeal, for instance in the case of ***Hammersmith and Fulham London Borough Council v Jesuthasan*** [1998] ICR 640.

21. In ***Selkent,*** the EAT confirmed that the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. While the court observed that it was impossible and undesirable to attempt to list all the circumstances the EAT considered the following to be relevant:

> *"(a) The nature of the amendment which can cover a variety of matters such as:*
> *i) The correction of clerical and typing errors;*

ii) The additions of factual details to existing allegations;
iii) The addition or substitution of other labels for facts already pleaded; or
iv) The making of entirely new factual allegations, which change the basis of the existing claim.

(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 – it is relevant to consider why the application was not made earlier and why it is now being made: e.g. the discovery of new facts or new information appearing from documents disclosed on discovery."

22. The claimant's solicitors argue that the amendment is a relabelling exercise. I cannot see the basis for that submission. The ET1 that was lodged is silent in relation to disability discrimination. The only claims made, presumably after taking legal advice, related to unfair dismissal and holiday pay. The ET1 makes reference to two incidents in 2022 when the claimant was signed off work because of work related stress and a further two incidents in 2023 which caused him ''significant distress''. The ET1 then says as follows in paragraph 4:

"*…the claimant was invited to a disciplinary hearing.*
This again caused significant distress to the complainer, and he was subsequently signed off work with work related stress. The claimant felt very low at this point, and this was the worst his mental health had been. He did not go to two occupational health appointments due to this on the 30th of October 2023 and the 7th of November 2023. He then received an e-mail from the employer which he felt he was being reprimanded. Due to this last chain of events the claimant felt there was no good faith left between the parties and due to the health difficulties coupled with the work difficulties he had no option but to resign."

23. Even a generous reading of the incidents does not suggest discrimination on the grounds of disability or how the alleged disability interacted with these events. It is up to the claimant to convince the Tribunal that the equitable power should be invoked. There is also no explanation as to why the claim for disability discrimination comes at this stage some months after the submission of the ET1 and crucially no pleadings to support an application under Section 123 of the Equality Act (EA) as to why it is just

and equitable to hear the claims out of time. Granting an extension is not a foregone conclusion. It has been observed that time limits exist for a reason (***Humphries v Chevler Packaging Limited*** UKEAT/0024/06/DM and ***Robertson v Bexley Community Centre*** 2003 EWCA Civ).

24. The claimant also faces a number of difficulties not least the form of the proposed amendment. There are a number of essential matters that must be pled when making a claim for disability discrimination. The most obvious is how the claimant can demonstrate he is disabled in terms of Section 6 of the Equality Act and the criteria there. Saying that his 'adverse mental health' amounted to a disability is wholly insufficient. The second crucial step is to set out what the employer's knowledge of the condition was and when they became aware or could have reasonably become aware of it as this triggers the obligation to make reasonable adjustments. The respondent's solicitors, observed correctly in my view that the proposed amendment was both difficult to respond to and did not contain sufficient detail.

25. For these various reasons I am not persuaded that the Tribunal should exercise it's discretion to allow amendment and the claims are now dismissed.

Employment Judge: J M Hendry
Date of Judgment: 21 November 2024
Date Sent to Parties: 21 November 2024