Neutral Citation Number: [2025] EAT 177

Case No: EA-2024-SCO-000087-JP

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street Edinburgh EH3 7HF

Date: 24 November 2025

Before :

THE HONOURABLE LORD COLBECK

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Between :

JERZY LAWRYNOWICZ **Appellant**

- and –

BIDVEST NOONAN (UK) LIMITED **Respondent**

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- -

Jerzy Lawrynowicz, the **Appellant**
David James (instructed by Fieldfisher LLP) for the **Respondent**

Hearing date: 13 November 2025

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JUDGMENT

SUMMARY

Practice and Procedure; Proposed Amendment; Application of an Earlier Decision of the EAT; Striking Out

An Employment Tribunal erred (i) by failing to give effect to an earlier decision of the EAT on the proper characterisation of a proposed amendment; and (ii) by failing to have proper regard to (a) the reasons for delay; and (b) the position in respect of the availability of witnesses when considering whether the proposed amendment should be permitted.

Had the Employment Tribunal permitted amendment, it would also have erred (i) by failing to have proper regard to (a) the reasons for delay; and (b) the position in respect of the availability of witnesses when considering whether to strike out the amended claims on the ground that it was no longer possible to have a fair hearing in respect of the claims; and (ii) by indicating that it would have struck out the amended claims on the ground that they had no reasonable prospect of success, where it had also indicated that if amendment had been allowed the claimant would have been required to provide further specification of his claims.

The Honourable Lord Colbeck:

Introduction

1. The appellant was employed by Cordant Security (whose business was acquired by the respondent), as a security officer (team leader) at a Tesco store in Inverness, from November 2017 until 5 July 2020.

2. The appellant (who is unrepresented) initially brought claims for personal injury; compensation for loss of wages; and unpaid income tax. Unsurprisingly, he sought permission to amend his claims. From that point in time, this case has had, what the Employment Tribunal ("ET") properly described as, "a long and complicated history".

3. By way of a judgment dated 28 April 2022, the ET (Employment Judge Hosie, sitting alone) refused the appellant's application to amend and struck out the claims in terms of rules 37(1)(a) and (b). The appellant appealed to this tribunal ("EAT"). By way of a judgment dated 9 February 2024 (see **Lawrynowicz** v **Bidvest Noonan (UK) Ltd** [2024] EAT 13), the EAT (Hon. Lady Haldane, sitting alone) allowed his appeal, set aside the orders made by the ET on 28 April 2022 and remitted it back to the ET.

4. Following the return of the case to the ET, by way of a judgment dated 13 September 2024, the ET (again, Employment Judge Hosie, sitting alone) refused the appellant's application to amend and dismissed the claim. In its judgment, the ET determined that had the amendment been allowed, the claim would have been struck out in terms of (the then applicable) rules 37(1)(e) and (a) respectively.

5. The appellant appeals against the decision of the ET. Four of the grounds advanced by him were allowed to proceed. For the appeal. both the appellant and counsel for the respondents provided detailed skeleton arguments and supplemented those with oral submissions. I am grateful to parties for their respective submissions. In the particular circumstances of this case, it is not necessary to set

out the terms of those submissions. It is also unnecessary to address the third and fourth grounds of appeal that were allowed to proceed.

Ground 1

6. The appellant contends that the ET erred in law by disregarding the "guidance" provided in the EAT's decision of 9 February 2024 (see paragraph 3 above), by wrongly characterising his proposed amendments as introducing "entirely new claims". This mischaracterisation was said to have led the ET to improperly refuse the amendment and apply an incorrect legal test, contrary to the principles established in **Selkent Bus Co Ltd** v **Moore** [1996] ICR 836. The EAT had already acknowledged that the amendments sought to amplify existing claims, and the ET's failure to follow this "direction" constituted a significant procedural error.

7. At paragraph [26] of the earlier decision of the EAT in this case, Lady Haldane said this:

"I make no observation as to whether or not the claimant's claims, or any of them, are ultimately well-founded, however in apparently characterising the various documents submitted as 'entirely new factual allegations which change the basis of the existing claims', as opposed to 'a further label for facts already pleaded' (to employ the language of Mummery J in **Selkent**), I consider that the (ET) has fallen into error."

8. This passage of Her Ladyship's judgment relates to the same (amended) claims that the present ground of appeal is directed to. For reasons that are not readily apparent, it was not referred to in the decision of the Employment Judge, who allowed himself to be "persuaded that Counsel's submission that the amendment sought to introduce new causes of action was well-founded" (see paragraph [28] of the decision of the ET).

9. The nature of the proposed amendment had already been considered and determined by the EAT. It was not open to the ET to re-consider this issue. In doing so, the ET erred.

10. In considering where the balance of prejudice and hardship lay, at paragraph [53] of its decision, the ET placed reliance on two factors. First, the passage of time ("over four years") and,

second, the availability of witnesses.

11. On the issue of time, no regard appears to have been given to the fact that almost 2½ years of that period (I calculate 2½ years on the basis of the period of time between the two dates upon which the ET has issued decisions in this case – 28 April 2022 and 13 September 2024) was taken up by the appellant being compelled to appeal (successfully) to the EAT. It is surprising that no regard appears to have been had to that issue when considering the question of time. The ET erred in failing to do so.

12. On the issue of availability of witnesses, there was no evidence before the ET upon which it was entitled to reach the conclusion it did. The ET only heard evidence from the appellant. The ET proceeded on the basis of an "assertion by the respondent's Counsel that the respondent no longer has witnesses of fact remaining in its business that can speak to the allegations" (see paragraph [53] of the ET's judgment). To a degree, that assertion runs contrary to what is subsequently said by the ET in that paragraph, in which it states that "that if these witnesses can't be traced, or are unwilling to give evidence, the respondent would be prejudiced and significantly limited in its ability to present evidence of fact before the Tribunal." It does not appear to have been represented to the ET that the witnesses could not be traced or were unwilling to give evidence. That being so, the ET erred in proceeding as it did.

13. Standing the decision of this tribunal in relation to the issue of amendment, the question arises as to how that should now be dealt with. I consider this issue below at paragraphs [18] – [23].

Ground 2

14. By way of his second ground of appeal, the appellant contends that the ET also committed a legal error in its decision to strike out his claim, it having failed to apply the appropriate legal test, as outlined in **Blockbuster Entertainment Ltd** v **James** [2006] IRLR 630. The ET failed to consider whether the appellant's conduct constituted a "deliberate and persistent disregard of required procedural steps" or whether a fair trial was rendered impossible by such conduct. The lack of explicit

recognition of this test or any meaningful assessment of its criteria undermined the validity of the strike-out decision.

15. The respondent's argument for strike out in terms of (the then) rule 37(1)(e) proceeded on the basis of the passage of time and the availability of witnesses. These matters are addressed above in paragraphs [11] and [12]. For the reasons set out therein, the ET erred in its consideration of each of these issues. The basis upon which it would have proceeded to strike out the amended claims (had amendment been allowed) was misconceived. The ET erred in this regard.

16. In relation to strike out in terms of (the then) rule 37(1)(a), the Employment Judge correctly observed that "the power of strike out is a draconian one and should only be exercised in rare circumstances" (see paragraph [74] of the ET's judgment). He also recognised that, if amendment had been allowed by him, further specification of the claims would have been required (see paragraphs [47] and [51]). That being so, it is difficult to reconcile that position with a decision to then exercise the power of striking out on the hypothesis of amendment being allowed and further specification to be provided, without having that further specification (if any), by way of affording the appellant the opportunity to provide it. The ET erred in this regard also.

Disposal

17. In terms of disposal, the appeal succeeds. I will set aside the orders of the ET of 13 April 2024.

18. For the purpose of disposing of an appeal, the EAT may exercise any of the powers of, or it may remit the case to, *inter alia* the ET (see **Employment Tribunals Act 1996**, s.35(1)(a)) or remit the case back to the ET.

19. The ET's failure to follow the earlier ruling on the issue of amendment has, for the second time in this case, resulted in an appeal to the EAT. Were it not for that earlier appeal, I would have been minded to remit the case back to the ET to consider the issue of amendment, of new, directing the ET to follow the earlier decision of the EAT (which, it must be stressed, is only part of the issue

in relation to amendment and has no bearing on the decisions to strike out, save insofar as those decisions would have proceeded upon matters that were also relevant to the question of amendment).

20. The overriding objective of the **Employment Tribunals (Constitution and Rules of Procedure) 2013** is to enable the ET to deal with cases fairly and justly. Amongst other things, that includes, so far as practicable, dealing with cases in ways which are proportionate to the complexity and importance of the issues; avoiding delay, so far as compatible with a proper consideration of the issues; and saving expense. Such an overriding objective is also present within the **Employment Appeal Tribunal Rules 1993**.

21. In the application of the EAT's overriding objective, I have determined that it is appropriate that I exercise the powers of the ET and determine the application to amend. Too much time has already been spent on this aspect of the case. Full submissions were made on this before the ET (and EAT) and I have the added benefit of the submissions made and documents submitted in relation to the present appeal. I need not repeat these.

22. The 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. Standing the earlier decision of the EAT on the nature of the amendment, the appellant's health issues, the fact that English is not his first language and the absence of any actual (as opposed to potential) hardship on the part of the respondent in relation to witnesses, I am satisfied that the amendment should be allowed by the EAT, prior to remitting the case back to the ET and so order.

23. For the avoidance of any doubt, I am not deciding whether the amended claims are out of time (see **Galilee v Commissioner of Police of the Metropolis** [2018] ICR 634). It will be for the ET to consider how and when the issue of time limits should be determined, once the appellant has been afforded the opportunity of providing further specification of his now amended claims (see paragraph [16] above).

24. The case will be remitted back to a differently constituted ET.