

3. The respondents produced a set of productions which helpfully contained most of the case papers to which the Tribunal was referred. The claimant also produced a set of documents to which he referred the Tribunal.
4. The Tribunal did not hear any evidence. The Tribunal understood that the following facts were undisputed.

Background

5. Around 12 December 2016 the claimant contacted ACAS and started Early Conciliation with the first respondent and second respondent following which Early Conciliation Certificates were issued.

10 6. On 21 February 2017, the claimant presented a claim form to the Tribunal's Manchester office.

7. In Section 8.1 of the claim form the claimant indicated the type of claim that he was making by ticking the boxes that he was unfairly dismissed and that he was owed notice pay, holiday pay and arrears of pay. He also indicated that the other type of claim which was asking the Tribunal to deal with was National Minimum Wage.

8. In Section 8.2 of the claim form the claimant set out the details of his claim which included the following:

20 *"The claimant accordingly seeks compensation for unfair dismissal, loss of notice pay, loss of holiday pay and loss of National Minimum Wage entitlement and/or redundancy payment in the event that it is considered that the claimant has been made redundant.*

25 *If the Tribunal considers the claimant to have been a worker rather than an employee then the claimant seeks payment of his notice pay, holiday pay and National Minimum Wage entitlement.*

In either case the claimant seeks payment for the loss of his guaranteed days which he should have been given in September, October and

November to the date of termination and in the amount of £1,200 per month.”

9. In Section 9 of the claimant form the claimant indicated that he was seeking compensation only and in Section 11 the claimant provided details of his representative.
10. The respondents presented a detailed response on 5 April 2017. The respondents said that the Tribunal had no jurisdiction to hear the claimant’s claims as he was a self-employed contractor. Additionally, the claimant was brought out of time and should not be allowed to proceed.
11. On 1 May 2017, the claimant sent an email to the Manchester Tribunal office attaching a document headed “*Claimant’s Answers in respect of 1st and 2nd Respondents Response*” (the claimant’s Answers). In paragraph 7 of that document the claimant said, “*Believed to be true that the respondents employment policy is complex and discriminatory.*”
12. On 10 May 2017, the case was transferred to the Glasgow Tribunal office. The respondents were asked to provide objections or comments on the Claimant’s Answers.
13. The respondents’ representatives replied by email sent on 5 June 2017, “*In paragraph 7 he uses the word, ‘discriminatory’ but does not make clear if he is raising a discrimination claim and, if so what sort of claim he is raising.*” If the claimant was seeking to amend his claim by adding ‘discrimination’ as a ground of claim a further jurisdictional question arises. The claimant had not sought leave to amend or explained why this should be allowed to happen.
14. The claimant confirmed in an email sent to the Tribunal’s office on 8 June 2017 that he wished to incorporate a claim for discrimination against the respondents (8 June Email).
15. The 8 June Email includes the following:
- “I believe that my claim 2401498/17 before the Tribunal against the First and Second Respondents arises in large part, out of and in relation to the*

5 *Respondents' discriminatory employment practices as an employer. I have already stated in 'Answers' that notwithstanding the fact of my having worked for the Respondents throughout an extensive period in excess of 5 years the Respondents elected not to offer me a contract of employment in any shape or form. I believe the main reason for this was due to my age and that because of this the Respondents were aware that it was more likely that I would remain in their employment for a longer period of time than the other younger pilots whose main goal was to pursue an airline career using their employment with the Respondents to gain experience in furtherance of that aim. I believe that the Respondents wished to avoid incurring any legal obligations to me arising out of my possible status either as a worker or employee."*

16. The 8 June Email also refers to the claimant having asked the respondents for details of the contracts of other pilots. If they were employed on a self-employed basis then the claimant accepted he had not age discrimination claim. The claimant also stated that he received minimal legal advice because of financial constraints.

17. The claimant sent a further email on 15 June 2017 (15 June Email). The claimant set out that he believed the respondents operated an employment policy which positively discriminated against him. The respondents had failed after a reasonable time to offer the claimant a contract of regular employment. The claimant stated that he believed that an averment in the respondents' response that all pilots providing work to the first respondent were self employed was misleading and false. He had called upon the respondents to provide contractual documentation relating to other pilots and this had not been provided. The claimant said that his claim form did not specifically include a head of discrimination because he considered that in the essence of his claim overall it was one which turned around the issue of discrimination. He was unaware that he required to specifically state such a head of claim. Until the respondents revealed the information which had been requested he was not in a position to specify the particular nature of the discrimination he had subject to although he "*believes it to be age*

related". The claimant explained that currently he has no legal representation and that he only received "skeletal" legal advice at the outset and that it was in the Tribunal's overriding objective to allow the application to amend.

- 5 18. The respondent sent an email to the Tribunal on 22 June 2017 intimating that the application to amend was resisted and the basis of the objection.

Deliberations

10 19. The Tribunal referred to Rule 29 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 (the Rules). The Tribunal has a broad discretion to allow amendments at any stage of the proceedings either on its own initiative or on the application by a party. However such discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly under Rule 2.

15 20. An application to amend must set out the terms of the proposed amendment in the same degree of detail as would be expected if it had formed part of the original claim form. Where amendments to the claim form are concerned the discretion conferred on the Tribunal is to grant leave to a claimant to allow the claimant to amend the original claim form in the terms that he proposes if appropriate.

20 21. The Tribunal was mindful that in deciding whether to grant the claimant's application to amend it must carry out a careful balancing exercise of all the relevant factors (including the nature of the amendment, the applicability of time limits and the timing and manner of the application) having regard to the interest of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment.

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22. The Tribunal looked at the nature of the amendment. This involved referring to the original claim form. The claimant had not ticked the box indicating that he was pursuing a discrimination claim. Even when considering all the original claim form a discrimination claim was not foreshadowed.

23. The Tribunal then referred to the application to amend contained in the 8 June Email and 15 June Email. It appeared that the claimant was raising a claim age discrimination. He did not rely on the facts set out in the original claim form. To further complicate matters the proposed amendment did not specify facts from which the Tribunal could conclude that the claimant was treated less favourably because of his age rather than any other reason nor does it specify whether a provision, criterion or practice exists which indirectly discriminates against him because of his age. The amendment was in the Tribunal's view seeking to introduce a new claim of age discrimination.

24. Having concluded that the amendment was seeking to introduce a new claimant the Tribunal considered that applicability of time limits. There was a dispute about when the arrangement between the claimant and the respondents came to an end. The earliest date was 7 August 2016. The latest date was 7 December 2016. Any alleged discriminatory act must have taken place before the arrangement came to an end. The Tribunal concluded that any new complaint was out of time. Accordingly the just and equitable test which applies to discrimination claims has to be considered. The Tribunal noted that while the fact that the relevant time for presenting a claim has expired will not exclude the discretion to allow the amendment it did not mean that it was not a significant factor to be weighed in the balance when considering how to exercise its discretion.

25. The Tribunal then turned to consider the timing and manner of the application for amendment. The case had not been listed for a hearing. The Tribunal understood that the application was now being made because of a statement in the response about other pilots being engaged on a self-employed basis. The claimant has access to legal advice before presenting the original claim form. The suggestion was that at no time before this did the claimant consider that any treatment he received was because of his age or any provision, criterion or practice place someone of his age at a disadvantage to people of another age.

26. Allowing the amendment will cause delay and there is likely to be additional costs. As explained the claim is not fully particularised. The claimant will need to obtain and provided further information. This will involve the respondent making enquiries and amending the response. There was no suggestion that the delay would place the respondents in a position that they were no longer able to obtain evidence relevant to the new issue or that it would be of lesser quality than it would have been earlier. It would however involve the respondent in further expense and if the case proceeded to a full hearing it would lengthen the hearing.
27. The Tribunal appreciated that parties can and do present alternative arguments. However the new claim appeared to contradict the claimant's position in the original claim form that he was an employee of the respondents or alternatively a worker.
28. The Tribunal considered that in exercising its discretion it had to have regard to all the circumstances of the case. In particular any injustice or hardship which would result from the amendment or the refusal to make it.
29. The amendment comprised of a new course of action which was out of time. The amendment in its present form did not consist of sufficient facts. Further information would be required. This would undoubtedly result in parties having to make new and additional lines of enquiries and that would expand on the documentary and oral evidence. At the time of making an application to amend and when considering issues of discrimination the claimant was unrepresented. He does not appear to have sought any legal advice on this issue albeit that the Tribunal was referred to certain advice online provided by the Citizens Advice Bureau. There was no information why the issue of age discrimination did not arise until after the respondents presented a response. It was not clear to the Tribunal why the information which the claimant was now obtaining could not have been obtained prior to the raising of the proceedings.
30. If the amendment is permitted there will be further case management and the resultant expense to the respondents. The respondents' potential

5 liability might increase. It is highly likely that it will cause a delay in the preparation and presenting of the response to the claim for age discrimination particularly when as at present it is not particularised and not known to be alleged direct or indirect discrimination or both. Refusing the application will not prevent the claimant from pursuing the issues raised in the original claim form.

31. In all the circumstances the claimant's delay and the new factual and legal issues introduced by a claim of age discrimination militate strongly against the application being granted.

10 32. The Tribunal therefore concluded that the application should be refused.

15 Employment Judge: Shona MacLean
Date of Judgment: 07 August 2017
Entered in register: 08 August 2017
and copied to parties

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