



was the subject of an appeal to the Employment Appeal Tribunal by the claimant. It was agreed that while the Tribunal would draft a provisional view a final decision would not be made until the appeal was concluded.

5. On 17 March 2017, the Tribunal was provided with a copy of the Employment Appeal Tribunal's decision dated 13 March 2017 that the appeal has no reasonable prospects of success. No further action was being taken.

### **Findings in Fact**

6. The respondent is a partnership operating a hotel which is owned by Keith Bettis and Christine Bettis. Mr and Mrs Bettis manage, run and live in the hotel.
7. The claimant commenced employment with the respondent on 20 October 2014. Her last working day was 20 March 2016 following which she raised a grievance against her colleague the Head Chef.
8. On 31 May 2016, the claimant presented a claim form to the Tribunal's office (case no: 4102638/2016). The claim form provided detailed information about the complaint, which was in respect of unauthorised deduction of wages. The Hearing was adjourned from a date on 3 August 2016 until 10 October 2016.
9. In August 2016, there was correspondence between the parties about meetings to discuss their ongoing working relationship. The respondent wished to discuss the fact that the claimant had indicated in her schedule of loss that she wished to find a mutual way to end her employment contract; the respondent was unable to offer work owing to lower occupancy and reorganisation; the claimant had accused Mr Bettis of lying about her terms and conditions which suggested that she had not trust in her employer. The claimant declined to attend. She expressed concern about doing so given the tenor of a previous meeting in June 2016. She said that she did not have sufficient notice. The claimant's position was that if the respondent unilaterally terminated her employment before the conclusion of the tribunal

proceedings in case no: 4102638/2016 she would have no alternative but to lodge “a separate and additional claim for Unlawful Dismissal”.

10. By letter dated 9 September 2016 the respondent terminated the claimant’s employment. It contained the following:

5           *“I have decided to base my decision on the simple fact that we do not have any work for you at the moment and have not for quite some time. I know you disagree with that and consider that you have been victimised because you complained against the Head Chef and more recently you have suggested the reason may be connected to your decision to bring a tribunal claim, however, in my view that simply isn’t the case.*

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*The issues relating to the Head Chef were addressed during the course of your grievance initiated in the letter dated 9 March 2016 and so I will not rehearse those discussions here. In relation to the suggestion that any of this is connected to the tribunal claim it is only connected in this way. Your claim is that you are on a guaranteed 40 hours per week contract. We fundamentally disagree with that. However, what this potentially means for us, as is clear from your schedule of loss, is an ongoing loss of several hundred pounds a month which we can simply not afford. We had hoped the Tribunal originally listed for 3 August 2016 would resolve that uncertainty.*

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*However, as you know it was postponed. The fact is that we have no hours for you because our recruitment of duty managers, the re-organisation which took Keith back into the kitchen and my own increased availability. Perhaps we should have taken this decision earlier, however, and to be frank, our concern was that you might add termination to your list of claims,*

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*as you now seem intent on doing.*

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*I have no wish to end this relationship by placing a blot on your reputation and your ability to work in the future. That is why dismissal is on these grounds and I have not come to a view on other issues. We have no view on whether or not you are in fact an employee as opposed to a worker,*

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*however, for all intents and purposes you are now redundant.*

*This reason means that you do not need to disclose to future employer our other issues and that we will be able to provide you with a reference should you want one.*

*As a consequence, your employment with the company is terminated. Under the terms of your contract you would normally be entitled to one month's notice. However, I have decided to terminate your employment with immediate effect and so your last day is 9 September 2016. As you have not worked for quite some time now we have taken the average of the last 12 weeks you worked in assessing your lieu of notice payment.*

*You may appeal against this decision.”*

11. The claimant appealed against the decision by letter dated 14 September 2016. The claimant stated in the appeal that the comment about Mr Bettis was *“directly connected to the fact my claim at the employment Tribunal mentions the copy of the employment contract I was given on the 30<sup>th</sup> of March 2016 is not the one I signed. subsequently I have no alternative but to conclude that your attempts to dismiss me are a consequence of me exercising my statutory rights”*.
12. The claimant did not attend the appeal hearing on 30 September 2016. She was aware that a decision would be taken in her absence. The claimant was advised that her appeal was unsuccessful.
13. On 10 October 2016 at the hearing in case no: 4102638/2016 the judgment was reserved.
14. On 24 October 2016, the claimant presented a claim form in respect of this case (4105225/2016). The claim form was sent by post. The claim was notified to ACAS on 20 September 2016 and the Early Conciliation Certificate was issued on 5 October 2016.
15. In the claim form the claimant stated that the type of claim that she was making was that she was unfairly dismissed. The page which included the section where the claimant was invited to state the nature of the claim was

not enclosed. The claimant indicated in paragraph 9 of the claim form that she was seeking compensation only. She stated that the compensation she was seeking was (production 7):

5 *“Payment of my wages since 9 Septembre to date of the Hearing based on my Full Time Contract.*

*Holiday pay for 2016.*

*The balance of the correct redundancy payment”.*

16. On 2 November 2016 Mr Lyons emailed to the Tribunal’s office in the following terms (production 12):

10 *“Having checked today with the tribunal office it appears that there are no missing pages from the ET1 and so we are struggling to understand why the claim has been accepted. Section 5 indicates that the claimant does not have sufficient service to make a claim of unfair dismissal. Section 8 identifies unfair dismissal as the sole claim. Based on the absence of any*  
15 *dialogue to explain why a jurisdictionally challenged claim should be accepted there seems to have been no reason to have accepted it.”*

17. The claimant replied by letter 7 November 2016 advising that her claim for “automatic unfair dismissal” was relevant because she was dismissed during an unresolved employment dispute and she was dismissed because  
20 she was exercising her “Statutory Rights” (production 15). Although it was stated that she was dismissed for redundancy the redundancy dismissal rules were not followed.

18. By letter dated 10 November 2016 the Tribunal advised the claimant that if she intended to pursue a claim of automatic unfair dismissal for exercising a  
25 statutory right she would have to ask the Tribunal for leave to amend her claim (production 16).

19. On 14 November 2016, the Judgment in case no: 4102638/2016 was issued to the parties. The claimant’s claim failed and it was dismissed (production 59). The Employment Judge found that the claimant’s contract  
30 of employment did not provide her with any guaranteed hours and she was

entitled to be paid only for hours that she worked. The judgment stated (production 63):

“25. *The claimant became unwell and had a number of absences from 1 March 2016 onwards.*

5       26. *Prior to her absence on sick leave, the claimant had received less pay owing to the reduced need for the respondent to call upon her services. From April 2015, the respondent appointed a salaried duty manager Edward Bonnar, whose presence meant there was less demand for the claimant’s services in early 2016 when the occupancy rate of the hotel was lower; Mrs Bettis who had been suffering from an*  
10       *illness, began in early 2016 to feel better and as result was able to take on some of the duties which might otherwise be provided by the claimant.”*

20.     The respondent sent a response to the Tribunal in case no: 4105225/2016  
15     in which it denied that the claimant was unfairly dismissed. In paragraph 6 the following was included (production 20):

“*Insofar as the claimant may be claiming automatic unfair dismissal for exercising a statutory right the Respondent seeks further and better particulars of which statutory right is in issue, the circumstances surrounding*  
20     *the same and notes that the claimant will need to amend her claim accordingly. In any event the Respondent denies that the claimant was automatically unfairly dismissed.*

*The claimant was dismissed on grounds of redundancy because there was no longer any work for her and/or for some other substantial reason.”*

25     21. By letter dated 1 December 2016 Employment Judge Robert Gall advised that he had considered the file and had not dismissed the claim or response on initial consideration. He found that the claim should proceed and ordered as follows (production 26):

*“Within 14 days the claimant is asked to set out the statutory right she says she asserted, when, where and to whom she asserted it and why she alleges her dismissal was due to the assertion of this right.*

5        *The claimant should also seek leave to amend her claim if she wishes to proceed on this ground.*

22.     On 6 December 2016, the claimant replied as follows (production 29):

*“Please find following the principal reasons why I am claiming for Unfair Dismissal:*

10       *I was dismissed by Recorded Delivery letter while a claim (case Number 4102638/16 was lodged by me before an Employment Tribunal in Glasgow to ascertain the status of my Employment Contract. Though the Hearing was on 10 October 2016 I was dismissed on 9 September 2016.*

15       *My employer did not follow the procedure for redundancy dismissal. The first time redundancy was mentioned was in the dismissal letter dated 9 September 2016.*

*I was personally victimised. My employers did not mention what other employees were considered in the process.*

20       *My employer specified in correspondence to me that my dismissal was related to their loss of confidence in me because of my claim against them (me exerting my statutory rights).*

23.     In January 2017, the claimant appealed the judgment in case no: 4102638/2016.

## Submissions

### *The Respondent*

24. My Lyons referred to rule 29 of the Employment Tribunals (Constitution and Rules of Procedure) Regulation 2013 (the Rules).
- 5 25. The Tribunal was reminded that while it has discretion to allow leave to amend it was for the claimant to amend in terms that she proposes (see *Margaret Forrest Case Management v Kennedy EAT/0023/2010*). Further the onus is on the claimant to satisfy the Tribunal that the amendment should be made (see *Newsquest Ltd v Keeping UK/EATS/0051/09*).
- 10 26. The Tribunal was referred to the claim form. Ticking a box is but one feature in construing whether a claim form contains a particular claim. The Tribunal was reminded to exercising its discretion it must have regard to all the circumstances and any injustice or hardship which could result in an amendment or a refusal to make it.
- 15 27. The Tribunal was referred to the proposed amendment. It did not identify which statutory right the claimant was asserting only that she was dismissed for raising a Tribunal claim. It is for the claimant to amend in the terms that she proposes.
- 20 28. The proposed amendment is a substantial alteration and not relabeling. It is a new claim. The claim form has no detail. Given the claimant's previous experience of the Tribunal system, the fact that she had been taking legal advice and she had earlier provided a detailed claim form, it was difficult to understand why she would neglect to complete this detail. There was nothing in the claim form where it would allow the respondent to understand  
25 the claim is based on asserting a statutory right.
29. The time limits are only relevant if there is a new cause of action. If the letter of 6 December 2016 is accepted as a request to amend and a proper amendment, then the amendment is in time. Arguably that is not the case. There is no request to amend in it nor does it identify the statutory right.



30. If it is a regularly submitted amendment, then the claimant has no excuse for this given that she has taken legal advice and been put on notice by the Tribunal on two occasions of what she needs to do. It was reasonably practicable to make the amendment in time.
- 5 31. As regards the timing and manner of the application the claimant had all the facts when she submitted the claim form on 24 October 2016. There is no new information or facts. Her failure to make any effort to outline the real basis of her claim particularly when she has threatened dismissal throughout the process shows a contempt for the Tribunal process.
- 10 32. The purported amendment is absent of detail and is unclear lacking real specification and appears to show a lack of willingness to engage. It was suggested that the claimant was being vexatious. The Hearing today was an additional expense and could have been avoided had she properly particularised her amendment on time.
- 15 33. If the amendment is allowed, then further particulars will require to be given as the decision made at a future Hearing is likely to be appealed. The respondent has complied with every order and attended every Hearing except this one on Mr Lyons advice and are entitled to some peace and finality in litigation. Ms Bettis suffers from depression and has been especially traumatised by these events and is particularly fearful of appearing to give evidence.
- 20 34. In contrast the claimant has already had three days in court. One of those found her evidence was found wanting. The Tribunal was referred to the Judgment in case no 4102638/2016 (production 67).
- 25 35. In terms of the merits to the case, this is a fact the Tribunal can take into account. The Tribunal was referred to *Woodside v Hampshire Hospital* which aligns with this at paragraph 15. There should be a light touch to this and the assumption should be that the case is arguable. However, this case is unique in the sense that the Tribunal has a good sense of the arguments that will be advanced. From these it is evident that the respondent knew that
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the claimant said that she would raise proceedings if her employment was terminated while her claim was outstanding. There was no work for the claimant, the relationship was toxic. There were potential grounds for dismissal. The respondent chose redundancy in the knowledge that the sword of Damocles hung over the decision that she would present a claim should be dismissed. In other words, the claimant's threats put the respondent in a Catch 22 position. If it decided to dismiss the respondent knew that it would face even more litigation. What were they to do? Retain the claimant indefinitely because of her threats? Retain the claimant who presence and lack of trust had become so toxic.

36. The respondent knew that if they based a dismissal on the fact that the claimant had brought a claim it would mean facing a claim that they would lose so why would they. They took the decision in the full glare of that knowledge. They had perfectly good reasons to dismiss long before the first claim was presented. Her last day of work was 29 March 2016. Before that her work was minimal. The first claim was presented on 31 May 2016. Her accusations against Mr Bettis made even earlier during the grievance process. The redundancy reasons were supported by the findings in fact in the Judgment. The claimant has not worked since 29 March 2016. There are no hours for the claimant and there had not been for some time.

37. All things considered there it was suggested that a decision on the merits can be made and realistically this was a truly hopeless case and it means that there is no prejudice to the claimant if it is denied.

38. Finally on the issue of prejudice the Tribunal was invited to consider another factor: compensation. There will be none. If there is a finding in fact that the claimant was on a zero-hours contract her hours were reduced to nil in March 2016 and therefore even if she remained an employee there would be no wages and therefore no loss. This has brought the respondent inconvenient harassment and expense out of all proportion to any gain likely to accrue to the claimant.

39. The respondent has been through enough and deserves finality. The scales of justice weigh heavily on the respondent with no end in sight, if this amendment is allowed.

5 40. The respondent asked that the application to amend is refused. In the circumstances the claim is struck out because the claimant does not have sufficient length of service to make an ordinary claim of unfair dismissal and therefore the Tribunal does not have jurisdiction to hear the claim.

#### *The Claimant*

10 41. The claimant explained that she had worked in the UK for three years. She was not legally qualified and her experience is based on her first application to the Tribunal in May 2016.

42. She was confused by all the emails. The claimant had not had legal advice. She could not explain why she did not provide full details in the claim form. The claimant did not realise that it was important.

15 43. The claimant understood that she could not be dismissed while she had an outstanding complaint with the Tribunal. Despite this she was dismissed and the reason given of redundancy was raised for the first time in the letter terminating her employment. At that stage there was still to be a hearing in her Tribunal case. Redundancy was not the real reason.

20 44. The claimant said that she was acting on her own. She made mistakes but was not being vexatious.

45. The Tribunal was invited to allow the amendment so that she could proceed with her claim.

#### **Deliberations**

25 46. The Tribunal noted that there was no issue that under rule 29 of the Rules it had a broad discretion to allow amendment at any stage of the proceedings. However, such discretion must be exercised in accordance with the

overriding objective of dealing with cases justly and fairly under rule 2 of the Rules.

47. The Tribunal agreed with the respondent's submission that in exercising any 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. This involves a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Relevant factors include the nature of the amendment, the applicability of time limits and the timing and manner of the application.
48. The Tribunal considered the nature of the amendment. In her letter dated 7 November 2016 the claimant stated her claim of "automatic unfair dismissal" was relevant because she was dismissed during an unresolved employment dispute and she was dismissed because she was exercising her "Statutory Rights". In the claimant's letter of 6 December 2016, she provided details. She did not however specify "the statutory right she says she asserted, when, where and to whom she asserted it and why she alleges her dismissal was due to the assertion of this right."
49. At this stage the Tribunal considered that the amendment relabeled the existing claim of unfair dismissal to dismissal for asserting a statutory right. It also added facts as the original claim form provided no none. All the facts were known to the claimant before the original claim form was presented. The Tribunal considered that the amendment was substantial.
50. As the amendment included facts and allegations not previously pled the Tribunal considered that it was likely to involve the respondent making new and different lines of enquiry. It would expand on the documentary and oral evidence as the claimant did not have sufficient qualifying service for Tribunal to have jurisdiction to hear an "ordinary" unfair dismissal claim.
51. Turning to the timing and manner of the amendment the Tribunal considered when it was made and why it was not made earlier. The

amendment application was made as the claimant was advised by the Tribunal that she needed to do so if she wished to pursue a claim of automatic unfair dismissal. The application was made within the time. It however lacked detailed despite an employment judge and the respondent specifically asking for the relevant information.

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52. In relation to the introduction of new facts there was no suggestion that the reason for the amendment was due to ignorance of the facts themselves or delay in any response from the respondent. The claimant knew about the facts and they were within her knowledge at the time. The claimant was not legally represented. She was however familiar with the tribunal process. She had previously completed a claim form. She was aware of what was required when setting out her claim. She offered no explanation why the original application form was not completed when it was presented or why she did not respond in the amendment to the specific questions posed by the employment judge and the respondent. The response had been presented in reply to the original claim form but a hearing on the merits had not been fixed.

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53. The Tribunal then turned to consider the interests of justice and the relative hardship of granting and refusing the amendment. If the amendment is permitted there will be further case management and expense. The amendment does not state clearly what statutory rights were asserted and to who. This will need further clarification before the respondent can reply to the amendment. This will result in further delay and additional expense for the respondent in amending the response and attending a merits hearing. Further the Judgment issued in case 4102638/2016 clarified the claimant's contractual terms. The claimant has not worked since 29 March 2016 as there were no hours available. The findings in fact in the Judgment support the redundancy reason. Even if successful at a merits hearing the claimant is likely to have little or no compensatory award.

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54. If the amendment is refused the claimant will not be able to advance an unfair dismissal claim as she does not have sufficient qualifying service.

The claimant has been given every opportunity to rectify any omission on the original claim form but even when she attempted to do so she did not fully address the issues.

- 5 55. Looking at the whole surrounding circumstances and balancing the hardship and injustice to both parties the Tribunal concluded that amendment should not be allowed.

#### **Further Procedure**

- 10 56. The application to amend having been refused the Tribunal does not have jurisdiction to hear the unfair dismissal claim as the claimant does not have sufficient qualifying service. Accordingly, the claim is dismissed.

15 Employment Judge: Shona MacLean  
Date of Judgment 17 April 2017  
Entered in register: 19 April 2017  
and copied to parties