



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4105932/19**

**Held on 21 November 2019**

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**Employment Judge N M Hosie**

**Mr S Charlesworth**

**Claimant  
In Person**

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**The Moray Council**

**Respondent  
Represented by  
Mr B Caldow,  
Solicitor**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that:-

1. the claim is struck out as having no reasonable prospect of success in terms  
of Rule 37(1)(a), in Schedule 1 of the Employment Tribunals (Constitution  
and Rules of Procedure) Regulations 2013; and
2. the claimant's application to amend is refused.

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## REASONS

### Introduction

1. The claimant, Steven Charlesworth, submitted a claim form on 19 April 2019.  
5 At para. 8.1 he provided the following *“Type and details”* of his claim:-

*“I have been suspended from duties without pay and removed from the Teacher’s Supply List in Moray since 12/12/2018. Payments have been withheld and my ability to work as a teacher had been restricted.”*

- 10 2. On 20 May, the respondent’s solicitor submitted a response form in which, he maintained, amongst other things, that:-

*“There are no competent claims narrated in the ET1 or accompanying documentation for which this tribunal has jurisdiction. The claimant’s claims are, in any event, denied.*

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*Furthermore and corresponding to the claimant’s craves for remedy at section 9 of the ET1:-*

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*(a) The claimant has not been dismissed. No order for re-engagement can be made.*

*(b) No compensation is due.*

*(c) No discrimination is pled; no discrimination has occurred, the claimant having been properly investigated further to the Disciplinary Procedures due to his alleged conduct.*

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*(d) The claimant has been paid in full for all wages owing.*

*(e) The claimant has no recoverable losses for which the respondent has any liability.*

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*(f) The tribunal has no power to investigate further; or to censor any person; or order that suspension be lifted; or to order that the claimant be able to continue work in other schools in Moray.”*

3. On 24 May 2019, the claimant sent an e-mail to the Tribunal in which he said this: *“The details of the disciplinary matter remain unresolved and it is the respondent’s handling of those matters that form the substance of my claim.”*

35 **Contract**

4. It was common ground between the parties that the claimant was engaged by the respondent as a “Supply Teacher”. He was not employed under a permanent contract of employment.

5. On 11 June 2018, the respondent wrote to the claimant to, *“formally offer the post of Supply Teacher on the principle (sic) terms and conditions contained in this letter and the attached statement.”* He was also advised in the letter that: *“You will work under a series of temporary contracts on an as and when required basis. Supply work is categorised as either “short-term supply” or “fixed-term temporary”. Teachers will be employed on a “short-term supply” basis where the period of work that they are engaged for is two days or fewer. Where the period of work is known at the outset to be greater than two days in duration the work will be categorised as “fixed-term temporary”. The range of duties that can be undertaken in these two categories of engagement are set out in the Scottish Negotiating Committee for Teachers Handbook. Each contract will be triggered by an offer of work from the appropriate Head Teacher.”*
6. The offer was accepted by the claimant.
7. So far as the claim was concerned, it related to an offer to work at Milne’s High School, Fochabers between 12 December 2018 and 14 and 20 December 2018. The claimant was suspended from work on 12 December due, it was alleged, to misconduct on his part.

### **Case Management Preliminary Hearing on 31 July 2019**

8. This hearing was conducted by means of telephone conference call. The claimant was unrepresented. The respondent was represented by a solicitor, Mr B Caldow. I issued a Note following that hearing. The following are excerpts:-

#### ***“The claim***

2. *The claimant is a “supply teacher”. As I understand it, in terms of the contract between the parties there is no obligation on the respondent to offer work to the claimant, no obligation on him to accept work if offered and he is only paid when he works. He was suspended on 12 December 2018 but*

*remains “employed” by the respondent. He advised that, although paid late, he had received all of the wages due to him for work done.*

- 5 3. *It was difficult to identify the nature of the claim he wishes to bring and there was an issue as to whether or not the Tribunal has jurisdiction as a claim for breach of contract can only be brought on termination of employment. It was not without significance that in the claim form under the heading “Type and details of claim” at para. 8 he had not ticked any of the boxes at para. 8.1 although he did make reference to “another type of claim”, relating to his suspension and his ability to work being restricted.”*
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### **Respondent’s strike-out application**

9. The respondent’s solicitor continued to maintain that the Tribunal had no jurisdiction to consider the claim and he requested that it be struck out on the ground that it had *“no reasonable prospect of success”*, in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the “Rules of Procedure”).
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- 20 10. In the circumstances and having regard to the “overriding objective” in the Rules of Procedure, it was agreed that I would consider and determine the prospects of the claim succeeding on the basis of the parties’ written submissions and that I would issue a written Judgment to that effect with reasons.

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11. I directed the claimant, therefore, to make written submissions in respect of the complaints he wished to bring and for the respondent’s solicitor to reply in writing.

### **30 Claimant’s submissions**

12. The claimant responded to my direction by way of an attachment to an e-mail on 1 August 2019. I had understood that the claim was one of breach of contract. However, he detailed several additional complaints.

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**Respondent's submissions**

13. On 21 August, the respondent's solicitor sent an e-mail to the Tribunal, copied to the claimant, with his submissions in response.

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14. He maintained that many of the complaints now being advanced by the claimant had not been foreshadowed in the claim form. He continued to maintain that the claim should be struck in its entirety on the basis that it has "*no reasonable prospect of success*".

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15. On the basis of ***Ezsias v. North Glamorgan NHS Trust*** [2007] ICR 1126, at paras 25 and 26, he submitted that the test is whether it has a "*realistic*", as opposed to a merely "*fanciful*", prospect of success.

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16. He also referred to ***Ahir v. British Airways Plc*** [2017] EWCA Civ132 and the Judgment of Underhill LJ at paragraph 16: "*Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of facts if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established.*"

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17. The respondent's solicitor submitted that in the present case many of the basic facts were undisputed. He then proceeded in his written submissions to address each of the eight complaints which had been intimated by the claimant in his written submission.

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**Claimant's response**

18. The claimant responded by way of an attachment to an e-mail on 27 August in which he commented on the complaints he wished to advance which he listed: -

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- (1) *“Suffer a detriment and/or a dismissal resulting from a failure to allow an employee to be accompanied or to accompany a fellow employee at a disciplinary/grievance hearing;*
- (2) *Breach of contract;*
- 5 (3) *Failure to provide a written statement of terms and conditions and any subsequent changes to those terms;*
- (4) *Suffer less favourable treatment and/or dismissal as a fixed-term employee, than a full-time employee;*
- (5) *Suffer less favourable treatment and/or dismissal as a result of being a*
- 10 *part-time employee by comparison to a full-time employee;*
- (6) *Suffer less favourable treatment and/or dismissal as a temp, employee than a full-time employee;*
- (7) *Failure of employer to pay or unauthorised deductions have been made;*
- (8) *Complaint by worker that employer has failed to allow them to take or pay*
- 15 *them for statutory annual leave entitlement;*
- (9) *Failure to provide a written statement of reasons for dismissal or the contents of the statement are disputed;*
- (10) *Blacklisting.”*

20 **Claimant’s “dismissal”**

19. On 11 September the claimant sent an e-mail to the Tribunal to advise that: -

25 *“On 4 September 2019 Moray Council confirmed that effective from 22nd August 2019 I have been dismissed and removed from Supply Teacher List.*

30 *This does not change my position that I am not employed between contracts and as such cannot be dismissed. After a series of contracts covering three schools in Moray ending on 21 December 2018 in Milne’s High School the contract was not renewed. This end of contract amounts to and is equivalent to dismissal.*

35 *In summary my position remains that on the 12 December 2018 I was summarily dismissed with final contract payments withheld until May 2019, well after this Tribunal process was started. Essentially to avoid the scrutiny of the tribunal. In act and deed Moray Council ended the contract on the 12 December 2018 and ever since Moray Council have tried to assert that I am still employed.*

40 *If like me the Tribunal thinks that there is no contract then the act of not allowing the opportunity to be represented on 12 December amounted to a breach of contract. What did they want to achieve on that date? The statutory right to be represented is extended to the whole disciplinary process in the teacher terms and conditions of employment. Further there is no right to suspend without pay or suspend without review in all disciplinary*

45 *circumstances. The teacher terms and conditions of employment are*

*designed to present the worst excesses of a monopoly employer and applied to all teachers.*

*If on the other hand the tribunal believes I am employed then list (sic) of breaches is quite long in terms of the Moray Council's failure to respect the teacher contract of employment. My own statement has been ignored, evidence collected has not been shared and those that have are redacted. Some of the evidence is anonymous. There is no right to suspend without pay in any circumstance and no right to suspend without review in any circumstance. In this situation it is impossible for me to defend myself and this is why I have turned to the employment tribunal."*

### **Claimant's application to amend**

20. On 23 September, the claimant sent an e-mail to the Tribunal, copied to the respondent's solicitor, in which he applied to amend the claim form. He maintained that he was employed by the respondent from 2 May 2018 to 22 August 2019 and sought to advance a number of complaints as follows:-

*"Box 8.1 amended*

*8.1 Please indicate the type of claim you are making by ticking one or more of the boxes below.*

*I was unfairly dismissed (including constructive dismissal).*

*I am owed*

*notice pay*

*holiday pay*

*other payments*

*Box 8.2 amended to include*

*I was an "employee" under a fixed-term temporary contract up to 21 December 2018. Suspended on 12 December 2018 without pay until 22 August 2019. Arguments are as per previous submissions.*

- Breach of contract. ETA 1996 Sec 3.*
- Suffered less favourable treatment and/or dismissal as a fixed-term employee, than a full-time employee. FTE 2002 Reg 7 ERA 1996 s105.*
- Suffer less favourable treatment and/or dismissal as a result of being part-time employee by comparison to a full-time employee. PTW 2000 Reg 5-8.*
- Suffered less favourable treatment and/or dismissal as a temp. employee than a full-time employee. FTE Regs 2002.*
- Failure of employer to pay or unauthorised deductions have been made. ERA 1996 Sec 13-27 or CEC 1975 Reg 42.*
- Complaint by a worker that an employer has failed to allow him to take or to pay them for statutory annual leave entitlement. WTR 1998c Regs 13,14(2) or 16(1).*

- *Failure to provide a written statement of reasons for dismissal for the contents of the statement are disputed. ERA 1996 Sec 93.*

21. The claimant also intimated that he was seeking an award of compensation.

5 *“Payment in full for recoverable losses incurred to date and ongoing, via normal payroll. In essence 2/3 days per week from 21 December 2018 to 11 March 2019 and from 25 April 2019 to August 16 2019.*

*Box 15 amended*

10 *I reserve the right to pursue issues related to:*

- *Suffer a detriment and/or dismissal resulting from a failure to allow an employee to be accompanied or to accompany a fellow employee at a disciplinary/grievance hearing. ERA 1999 Secs 11-12.*
- *Failure to provide a written statement of terms and conditions in any subsequent changes to those terms. ERA 1996 Sec 11(1).*
- *Blacklisting. ERA 1999 (Blacklist Regs 2010).”*

### **Respondent’s response**

20 22. The respondent’s solicitor intimated his objection to the claimant’s amendment application by way of e-mail on 4 October 2019. The following are excerpts: -

*“We ask that the Tribunal consider the following:-*

- 25 *1. We rely on all existing representations made seeking strike-out.*
- 30 *2. We observe that the claimant’s correspondence of 23 September is an e-mail with two attachments. The first attachment is a covering e-mail with explanation to the amendment sought. The second is a list of amendments to be inserted into the original ET1.*
- 35 *3. The claimant now seeks to introduce a claim of unfair dismissal. He does not have requisite service, having supplied to the ET his dates of employment as 2 May 2018 to 22 August 2019. He has not provided any narrative in his amendment whatsoever to explain on what basis he has a claim for unfair dismissal. Any such claim is patently hopeless for want of jurisdiction and no such amendment should be allowed.*
- 40 *4. The claimant now seeks to introduce a claim for notice. He has not provided any narrative in his amendment whatsoever to explain on what basis he has a claim for notice. As he seeks to make this claim by way of amendment we can only observe the ticking of box to say he has such a claim is deficient to understand on what possible basis he contends that he has such a claim, or on what basis any such claim could succeed. The*



*Judge can, however, rely on his own experience and the knowledge gathered to date, of the nature of the relationship between the parties. There is no notice claim pled and no such amendment should be allowed.*

- 5           5. *The claimant now seeks to introduce a claim for holiday pay. He has not provided any narrative in the amendment whatsoever to explain on what basis he has a claim for holiday pay. As he seeks to make this claim by way of amendment we can only observe the ticking of box to say he has such a claim is deficient to understand on what possible basis he contends*  
10 *he has such a claim, or on what basis any such claim could succeed. There is no holiday pay claim pled and no such amendment should be allowed.*
- 15           6. *The claimant now seeks to introduce a claim for “other payments”. He has not provided any narrative in his amendment whatsoever to explain on what basis he has a claim for “other payments”. As he seeks to make this claim by way of amendment we can only observe that ticking a box to say he has such a claim is deficient to understand on what possible basis he contends that he has such a claim, or on what basis any such claim should succeed. The Judge can, however, rely on his own experience and the knowledge garnered to date, of the nature of the relationship between the parties. There is no notice claim pled and no such amendment should be allowed.*  
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- 25           7. *For the avoidance of doubt it has already been discussed and the subject of comment by the parties that the nature of the contract that the claimant had with the respondent, did not operate so as to entitle the claimant to be paid beyond December 2018. The claimant has not explained or pointed to any part of the contract he knows of to explain on what basis he had any such entitlement. He has simply repeated a bland, baseless, statement.*  
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- 35           8. *Thereafter, the claimant simply listed by way of seven bullet points statutory references for box 8.2. He specifies what he contends to be recoverable losses and further ‘reserves the right’ to pursue issues listed under ‘box 15 amended’. The claimant is merely repeating what he has outlined in prior documentation and in doing so he has provided no narrative of offered, contended, facts and he has provided no basis to suggest on what basis any such claims could succeed. There are no facts already substantially alleged, either in the existing ET1 or the proposed amendment, to support any of these labelled claims.*  
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- 45           9. *Judge Hosie can identify that whilst the respondent may well have terminated the claimant’s contract with the respondent (it is admitted that the contract was terminated – the claimant was repeatedly invited to attend a hearing; he did not; it took place in his absence) that single factual variation to the original facts and matters pled in the ET1, does not suddenly provide any more strength to a set of claims, and requested amendments, that are otherwise hopeless (as presented). The Judge will*

5 *be familiar with the principle of considering amendments flowing from **Selkent Bus Co. v. Moore 1996 UKEAT/0151/96**, but would remind the Judge that authority does exist which empowers Judges to not permit amendments if to do so would be pointless in all of the circumstances (**Woodhouse v. Hampshire Hospitals NHS Trust (UKEAT/0132/12/DM para. 15** – ‘In other words, there is no point in allowing an amendment to add an utterly hopeless case’).*

10 10. *The claimants sought amendments in reality add nothing to these proceedings as they provide no explanation of claims sought to be brought by mere label, claims which have already been the subject of debate, comment and criticism and which the Tribunal is on strong grounds to refuse and thereafter dismiss the claims previously brought.”*

### 15 **Claimant’s response**

23. The claimant responded by e-mail on 18 October. He commented on each of the respondent’s numbered submissions. He submitted that: -

20 *“Since the case has been brought the respondent has acted in such a way the material facts and status of the case have changed. I thought the easiest way forward was to amend the existing application. The clock is running from the dismissal date to bring a new case. Should the Tribunal rule that I was in fact still employed beyond the 21 December 2018. I refer the respondent to my previous argument on the contract issues.”*

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### **Discussion and decision**

24. Rule 37(1)(a) in Schedule 1 of the Rules of Procedure is in the following terms:

#### 30 **“37 Striking Out**

*(1) At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds –*

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*(a) that it is scandalous or vexatious or has no reasonable prospect of success.”*

25. When considering the prospect of the claim in the present case succeeding, I was mindful of the guidance in such cases as ***Ezsias v. North Glamorgan NHS Trust*** [2007] ICR 1126 and ***Balls v. Downham Market High School and College*** [2011] IRLR 217 that a cautious approach is required in striking  
5 out discrimination claims, particularly where there are crucial facts in dispute and there has been no opportunity for the evidence in relation to those facts to be considered.
26. I also remained mindful that the claimant is unrepresented and has no  
10 experience of Employment Tribunal proceedings.
27. However, as the respondent's solicitor drew to my attention, in ***Ahir*** the Court of Appeal asserted the Tribunal should not be deterred from striking out claims, even those that involve disputes of fact, if they are entirely satisfied  
15 that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored. The Court in ***Ahir*** concluded that the Employment Judge had rightly described the allegations as "fanciful" and struck out the claims as  
20 having no reasonable prospect of success.
28. The respondent's solicitor also drew to my attention in his written submissions the guidance in ***Ezsias*** that in determining whether a claim has a reasonable  
25 prospect of success the issue is whether it has a "realistic" prospect of success.
29. I was also mindful of the guidance in ***Kaur v. Leeds Teaching Hospitals NHS Trust*** [2018] EWCA Civ 978 in which Lord Justice Underhill reiterated the sentiment he had previously expressed in ***Ahir***. He had observed that  
30 "*whether [striking out] is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed.*"

**The original claim**

30. The respondent's solicitor maintained in his ET3 Response Form that the claimant had not advanced a competent claim.
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31. I also recorded in my Note following the case management preliminary hearing on 31 July 2019 that it was difficult to identify in the claim form a claim in respect of which the Tribunal has jurisdiction.
- 10 32. The claimant's complaint related to his suspension and how the respondent had gone about it. He submitted that: -
- "The details of the disciplinary matter remains unresolved and it is the respondent's handling of those matters that form the substance of my claim..... The Moray Council have in fact suspended me without pay and removed me from the supply list since the 12 December 2018 meaning that I cannot teach in Moray."*
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33. I concluded that the claimant was seeking to advance a claim of breach of contract. I was required to consider, therefore, the terms and conditions of contract between the parties. Indeed, the nature of the contract was pivotal to all my deliberations as to the prospect of the claim succeeding and the claimant's application to amend.
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34. There was no dispute that the claimant was engaged as a Supply Teacher on a so-called "Fixed-Term Temporary Contract". Significantly the respondent was not obliged to offer the claimant work and he was not obliged to accept.
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35. The relevant contract was due to expire on 20 December 2018. The claimant was suspended from the "Supply Teacher List" on 12 December 2018 allegedly on the ground of misconduct.
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36. The claimant was not entitled to be paid beyond 20 December 2018. Although I understand there was a delay, it was not disputed the claimant had been paid in full in terms of the relevant contract.

5 37. The contractual jurisdiction of Employment Tribunals is governed by s.3 of the Employment Tribunals Act 1996, together with the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

10 38. However, an employee can only bring a claim for damages for breach of contract if the claim "*arises or is outstanding on termination of the employment*".

15 39. While the respondent removed the claimant from the Supply List, that was several months later on 22 August 2019. At the time the claimant submitted his claim his employment (using that term in a neutral sense) had not been terminated. He had not been served with notice in terms of the contract.

20 40. The Employment Tribunal does not therefore have jurisdiction to consider his claim, as pled.

25 41. Nor, in any event, having regard to the terms of the contract, does the claimant have a claim for damages as the contract was due to end on 20 December and the claimant has been paid all that was due to him up to that date.

30 42. The claim, as pled, therefore, has no reasonable prospect of success and it is struck out.

**Claimant's application to amend**

43. When considering this issue, I was mindful that the claimant was not represented and has no experience of employment tribunals. However, the somewhat scatter gun nature of the numerous complaints the claimant now seeks to advance by way of amendment suggested to me a reaction to a realisation that his claim, as pled, was likely to be struck out.

44. As far as the application to amend was concerned, I was mindful of the guidance provided by LJ Mummery in **Selkent**, to which I was referred by the respondent's solicitor.

**Nature of the amendment**

45. The claimant advised that the reason for the amendment was that he was "dismissed" by the respondent on 22 August 2019. However, confusingly, he continued to maintain that he was "summarily dismissed" on 12 December 2018.

46. In his e-mail of 4 October 2019, the respondent's solicitor intimated his objection to the application to amend and addressed separately each of the complaints listed by the claimant. In my view his submissions are well-founded. A recurring theme was that not only were these new complaints not foreshadowed in the claim form, but also, as the respondent's solicitor put it: "*he has not provided any narrative to explain why he has such a claim*". In other words, the claimant seeks to bring a number of new complaints by way of amendment but has failed to provide proper specification of the factual basis for these complaints.

47. As far as the unfair dismissal claim is concerned, the nature of the contract was once again material. The respondent was not obliged to offer the claimant work and he was not obliged to accept any offer of work. There was

no “mutuality of obligations”. Indeed, the claimant himself said that he was not employed between contracts. That has been said to have been an aspect of the “irreducible minimum” necessary to create a contract of employment (per Lord Irvine of Lairg in ***Carmichael v. National Power*** [2000] IRLR 43).

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48. The claimant was not an employee, therefore, in terms of s.230(1) of the Employment Rights Act 1996. The right not to be unfairly dismissed, in terms of s.94) of the 1996 was given to a “employee”. Unless the claimant is admitted to be, or found in law to be, “an employee” the complaint of unfair dismissal cannot proceed.

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49. In any event, leaving aside, whether or not I should grant the application to amend, the claimant does not have the requisite two years’ continuous service to enable him to bring a claim of unfair dismissal.

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50. So far as the other complaints listed in the application to amend, are concerned, as there are no factual averments to support them, as with the unfair dismissal complaint, these claims have no reasonable prospect of success.

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51. As the respondent’s solicitor submitted, *“there are no facts already substantially alleged, either in the existing ET1 or the proposed amendment, to support any of these labelled claims”*.

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52. The claimant also listed along with his application to amend, by way seven bullet points, references to various statutory provisions and intimated that he *“reserved the right”* to pursue these complaints. That is a matter for him. It does not form part of the application to amend.

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**Prejudice/hardship**

53. In addition to the nature of the amendment, LJ Mummery suggested in **Selkent** that consideration should be given to the relative prejudice and hardship which would be caused by granting or refusing the application.

54. I am in no doubt that the balance of prejudice/hardship favours the respondent. Were I to grant the application, the claimant would be required to defend a multitude of complaints which, as matters stand at present, have no reasonable prospect of success, and thereby incur considerable expense. On the other hand, were I to refuse the application the claimant would only be prevented from pursuing claims which appear to have no merit.

**Timing and manner of the application**

55. There was a delay of many months in the claimant making his application to amend. While the catalyst may have been the claimant's "dismissal" and while no dates have been provided in the application, in all likelihood, some of the complaints which the claimant now seeks to advance, particularly the "less favourable treatment" complaints will be out of time. I am not aware of any impediment to him including these in the claim form. It seemed to me that the amendment application was something of an afterthought.

56. While mindful that the claimant was unrepresented, I had little difficulty, therefore, arriving at the view that the application to amend should be refused. In arriving at this view I also had regard to the "overriding objective" in the Rules of Procedure, "*to deal with cases fairly and justly*".



57. Accordingly, the claim is struck out as having, “*no reasonable prospect of success*”, in terms of Rule 37(1)(a) in Schedule 1 of the Rules of Procedure and the application to amend is refused.

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25	<b>Employment Judge:</b>	<b>Nicol Hosie</b>
	<b>Date of Judgment:</b>	<b>14 January 2020</b>
	<b>Date Sent to Parties:</b>	<b>15 January 2020</b>