



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110443/2019

Held on 17 December 2019

Employment Judge J Hendry

Mrs P Pirie

**Claimant
In Person**

Blaze Manufacturing Solutions Limited

**Respondent
Represented by
Ms Y Buckle
Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal refuses leave to amend meantime and orders the claimant to lodge a written amendment of her pleadings within 21 days of the date of the issue of the Judgment, copying same to the respondents agents and to the Tribunal, and allows the respondents 14 days thereafter to respond in writing by adjusting their pleadings if so advised.

1. A Preliminary Hearing took place on the 17 December 2019 in order to determine whether or not the claimant's application to amend her claim, which was opposed, should be granted. The respondent's application for strike out/deposit was not pursued.
2. Parties helpfully prepared a Joint Bundle for the Preliminary Hearing.
3. There was a discussion at the outset about the way in which the hearing should be dealt with. It was agreed that Mrs Pirie would give evidence in relation to circumstances surrounding the lodging of her claim, her state of knowledge of employment related matters and any advice or researches that she had carried out.
4. I found the claimant straightforward and persuasive in her evidence. I found her a credible and reliable witness.

I made the following Findings in Fact:

- (1) The claimant Mrs Patricia Pirie began her career as a Nurse and worked in psychiatry until moving into business. For some years she has been involved in the management of businesses and has held a number of directorships. She was employed by the respondents as a Commercial Director. Her employment began on the 7 January 2019.
- (2) Mrs Pirie had previously owned a business, a company "Journeycall and had taken legal advice when seeking to leave the company and

dispose of her shareholding. This included being advised that she had potentially made protected disclosures. Beyond this the claimant although aware of the term unfair dismissal had not been involved directly in Employment Tribunal proceedings. The claimant understood that any claim for unfair dismissal was time barred.

- (3) The claimant was unhappy at the way she had been treated by the respondents and tendered her resignation at a board meeting on the 29 April 2019. The claimant contacted her local part-time CAB office by telephone and discussed the circumstances of her resignation with an adviser. She was told that because she had less than two years' service she could not make a claim for unfair dismissal but was told that she could make a claim for breach of contract which she resolved to do.
- (4) Thereafter the claimant contacted ACAS on the 20 May and a Certificate was issued by ACAS on the 3 July. The claimant raised Employment Tribunal proceedings on the 28 August.
- (5) In her ET1 the claimant completed box 8 giving the type and details of her claim. She did not "tick" the box relating to unfair dismissal. She ticked she was owed arrears of pay. Under the heading "I am making another type of claim which the Employment Tribunal can deal with" she wrote "Unlawful deductions from wages and compensation for wrongful dismissal and breach of contract by breach of trust and confidence on the part of the employer resulting in loss of future

earnings. In box 9 under the heading "What do you want if your claim is successful?" she wrote: "In consideration of the difficulty and time it takes to find alternative employment of a similar or comparable nature I seek a sum equivalent to three months' salary as compensation of Breaches of Trust and Confidence on the part of the employer leading to loss of employment and future income ...". The claimant lodged a detailed summary of events with the ET1. He wrote (page 1) "I believe the employer Breached the implied term of trust and confidence owed to me during my employment by refusing to honour terms and conditions agreed between us by attempting to reduce my holiday entitlement, not applying agreed salary increase, making false claims to internal and external parties about my professional capability and undermining my credibility, by publicly humiliating me by aggressively demanding my resignation in front of several other employees. I have also reported what I believe to be a forgery to Police Scotland as my signature has been applied to a version of a contract of employment, which also forms the Director's Service Agreement, and I deny signing this document.

- (6) On page 2 she wrote: "I believe the actions of the employer amount to several breaches of contract by breaching the implied trust and confidence expected between an employee and employer. I believe this to have been to my professional and financial detriment as my resignation was demanded of me even though there was no issue with my professional performance, capability or conduct and I have not yet

secured alternative employment. I believe my resignation was demanded because I exerted my statutory right not to have unlawful deductions made from my wages i.e. that I expected the contractually agreed salary increase to be applied and this was withheld by the company.”

(7) The claimant then set out a timeline of events including comments about the 18 April 2019:

- Howard Johnson came to my office at 11am – he was aggressive in tone and body language and he was shouting at me that he wasn't giving me the pay rise as I'd agreed to the bonus proposal and he just hadn't got round to issuing the contract to me I remarked that he'd had six months since he made the job offer to me and three months since I started my employment to get the contract and bonus in place and I'd asked repeatedly for them .. then he repeated I could choose either the bonus or the pay rise but he wasn't paying both and opened my office door. He walked into the main office then he turned back to face my office and shouted “In fact, I expect your resignation on my desk” and stormed from the main office. This remark was overheard by at least four members of staff.

(8) Under the heading “22nd of April 2019” the claimant wrote:

- Subsequent to Howard Johnson's demand for my resignation, and having received no communications from him over the next three days I spoke by phone to Ian Lanaghan, Chairman of the Board of Directors on 22nd April 2019 ... explaining recent incidents and events updating that I still do not have a full contract/service agreement in place and asking him to confirm if my resignation was required as the removal of a Director is a matter for the Board of Directors. He was unaware of the demand for my resignation ...

(9) Under the heading "29th of April 2019" the claimant wrote (bullet point 3)

- I explained we had agreed terms in October 2018 but changes were proposed by the company following my start date, I had rejected these and repeatedly asked for issue of the agreed terms. Ann Johnson then left the room returning her contract of employment and stated it had my signature on it. I denied signing the document and Ann Johnson repeatedly stated "and yet we have a contract with your signature" and when I again stated I had never signed a contract with the company Howard Johnson stated "but we have one
- I vehemently protest that the situation I find myself in as a result of these events and repeatedly stating I had not signed this or

any other contract document. Ian Lanaghan repeatedly stated “this is highly irregular”

- Prior to the meeting and in the absence of any other instruction from Howard Johnson or the Chairman I have prepared a letter of resignation and I now signed it in front of all Board members and handed it to Howard Johnson. He took possession of the letter, asked me what it was and when I said my resignation he stated I accept your resignation but didn't read the letter. I advised I would accept pay in lieu of notice and Ann Johnson stated “We will take advice on that”. I then left the meeting and the premises.
5. The respondents lodged grounds of resistance to the claim. They indicated that the factual position was denied. They pointed out that the claimant did not have sufficient qualifying service to bring a claim under section 94 of the Employment Rights Act. They also sought strike out.
 6. On the 18 October parties received notice that a Preliminary Hearing would take place on the 17 December to determine the issues of qualifying service, unfair dismissal, the respondent's application for strike out and deposit order”. A Preliminary Hearing by telephone conference call was arranged for the 21 November.

7. Prior to the Hearing the claimant emailed the Employment Tribunal, copying her email to the respondent's representative referring to the Notice of Preliminary Hearing. She wrote:

“(1) Qualifying service for unfair dismissal:

- I have not claimed unfair dismissal and so have no intention of offering any support for such a claim

- The respondent's application to strike out:
 - As per point 1, I have not claimed unfair dismissal and it would not be just or fair to strike out my claim based on my inability to defend a claim I have not made. ”

8. The claimant emailed the Employment Tribunal on 29 October when she wrote: *“I advised I have not claimed unfair dismissal but have claimed Wrongful Dismissal”*.
9. The Preliminary Hearing was conducted by Judge Kemp. At the outset he indicated that he had acted for the claimant in private practice 10 years earlier. Parties were content to allow the Preliminary Hearing to proceed on the basis that no substantive decision should be made. He made reference to the claim form in which the claimant indicated that her resignation was demanded because she had exerted her statutory right not to have unlawful deductions. He pointed to section 104 of the Employment Rights Act. He pointed out the claimant had not ticked the

box in relation to unfair dismissal nor referred to section 104. He also referred to the email of the 29 of October in which the claimant confirmed that she had not made a claim for unfair dismissal and noted the claimant wanted to make an application to amend her claim. The amendment was opposed and accordingly he indicated that the matter of the opposed amendment should be dealt with at the hearing on the 17 December by another Judge.

Respondent's Submissions

10. Ms Buckle submitted that the claim was considerably out of time having been served many months after the original ET1 had been lodged. The claimant was an experienced businesswoman who had previously taken advice on employment matters. It was surprising that she did not do so in relation to this matter. It was surprising that she had not discovered that a breach of a statutory right could lead to a claim for unfair dismissal when carrying out her internet researches or in conversation with a CAB or ACAS. There were however further difficulties in that nowhere in the ET1 despite extensive pleadings is there sufficient to found a claim for unfair dismissal. She had noted that nowhere did the claimant say that the resignation was tendered because specifically of the respondent's actions. She speculated that it might have said that she felt she had been unfairly dismissed even although she was not proceeding with such a statutory claim. There was no detailed factual basis around the dismissal for example why it was triggered 11 days after the alleged comments by Mr Johnson. The claimant had attended the Board meeting on the 29 with her resignation. She had not set out the full facts

and it was impossible for the respondents to answer such a claim on the basis of her proposed amendment. The respondents would be prejudiced.

11. If granted they would have to recast their ET3. They would have to carry out further enquiries and instead of a 1/2 day hearing they would be faced with a hearing that would last at least 2 to 3 days. The claimant was she said not reasonably ignorant of her rights. Ms Buckle then made reference to the case authorities and took the Tribunal through those authorities indicating that they was simply insufficient in the pleadings to deal with the case as a straightforward “relabelling exercise”.
12. Mrs Pirie felt that she had sufficiently outlined her position in her oral evidence and did not make any legal submissions.

Discussion and Decision

13. The law in relation to amendment is set out in the seminal case of **Selkent Bus Company Ltd v Moore** (1996) IRLR 661. It is worth quoting once more the passage dealing with some of the common factors the Tribunal should consider when looking at the whole circumstances of the situation and undertaking the necessary balancing exercise between parties:

“4) Whenever the discretion to grant an amendment is invoked, 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.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details

to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(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 eg, in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and manner of the application

An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules for the making of amendments. The amendments may be made at any time - before, at, even after the hearing of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision”.

14. Pleadings have become an issue that have led to a number of recent cases such as **Chandhok v Tirkey** 2015 ICR 527 in which the EAT reminded Tribunals that the ET1 (which in this case was clearly inadequate) was not something “just to set the ball rolling” and should set out the essential case. The issue that the amendment must be in a form that can be responded to was also raised in **Chandok** in which Mr Justice Langstaff stated at paragraph 35:

“The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so ... I readily accept that tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication ... However, all that said the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it ... In summary, a

system of justice involves more than allowing parties at any time to raise the case which best seems to suite the moment from their perspective ... That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings."

15. It is clear then that Tribunals can properly consider the whole circumstances including the impact the amendment is likely to have on the proceedings and the prejudice of granting it especially if it causes the respondents difficulty in responding cogently to it. There is no doubt that Mrs Buckle was correct that the pleadings as they currently stand are not at all clear in this regard. That is however not surprising as the claimant did not frame them with this right in mind.
16. In the present day where internet searches can turn up quantities of information, some relevant and most not, there is a focus on whether a claimant can be said to be reasonably ignorant of their rights. In the recent case of **Perth and Kinross Council v Townsley** EATS 0010/10 a traveller sought to excuse her late presentation of her claim (some 19 Months) though ignorance of employment tribunals. The claim was allowed to proceed by an Employment Judge. That decision was overturned on appeal as the question of whether her professed ignorance was excusable.
17. I would have less sympathy with the claimant had the matter related to 'ordinary unfair dismissal' or some other popularly well-known right such as the right not to suffer race or sex discrimination but I bear in mind that the right to raise unfair dismissal proceedings within the two-year qualifying period because of dismissal for assertion of a statutory right is one that is sometimes overlooked even by experienced solicitors. It is also difficult to criticise the claimant for not carrying out more research into the matter, if as she thought, the advice she had received from the CAB excluded such a course of action. In those circumstances, unaware that such a claim could be made, it is not surprising that she accepted the advice and acted as she did.
18. Considering what is sometimes referred to as the balance of hardship if the amendment is ultimately not allowed then the claimant loses an important statutory

right. I see little practical prejudice to the respondents in any delay as the background issues involve a small number of people and relatively few events covering a short period. There can be no argument that evidence will have been lost or otherwise affected by the delay. The prejudice for the respondents would be to have to meet an otherwise time barred claim.

19. That does not take away the force of some Mrs Buckle's arguments about the form of the pleadings and the difficulty she would have in responding. I accept that the addition of a claim for unfair dismissal is more than a straightforward relabeling exercise but looked at broadly the pleadings strongly suggest that the claimant was treated the way she says she was to the point of preparing and ultimately handing in her resignation because she refused to back down over what she believed to be underpayment of her contractual salary.
20. The balance of hardship in this case favours the granting of the amendment but it requires to be in a proper form. I will therefore give the claimant 21 days to lodge a written amendment, she should consider carefully, given the technical issues that this involves whether it should be professionally drafted and the respondent shall have 14 days thereafter to respond if so advised.
21. For the avoidance of any doubt I am not allowing amendment and if it is not in a proper form then the respondents can renew their objections.

Employment Judge:
Date of Judgment:
Date sent to parties:

James Hendry
14 January 2020
15 January 2020