



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102240/20 (P)

Held on 7 October 2020

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Employment Judge N M Hosie

Mr T Aitchison

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**Claimant
Represented by
Ms M Javed,
Solicitor**

Common Thread Limited

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**Respondent
Represented by
Mr J Lee,
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's application to amend is allowed.

REASONS

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Introduction

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1. The claim in this case comprises a complaint of automatic unfair dismissal for making protected disclosures (the claimant does not have the required two years' continuous service to bring a "standard" unfair dismissal claim). The disadvantage which the claimant alleges he suffered as a result of making such disclosures is his "*unfair dismissal from employment on 13 January 2020*". The respondent denies the claim in its entirety. The respondent

E.T. Z4 (WR)

admits the dismissal, but claims that the reason was the claimant's conduct, a decision which was taken following a "probationary review".

2. In a Note, which I issued following a case management preliminary on 1 July 2020, I ordered the claimant to provide further and better particulars of the claim.
3. These were provided by the claimant's solicitor, by way of an attachment to her e-mail of 14 August 2020. The following are excerpts: -

"In terms of Regulation 30 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, the claimant makes an application to amend his originating application by providing further and better particulars of his originating application and adding a complaint of automatic unfair dismissal in terms of Section 103A of the Employment Rights Act 1996.

The amendment is in accordance with the principles laid down in the case of New Star Asset Management Holdings v. Evershed [2010] EWCA Civ 870. The amendment does nothing more than add a label of Section 103A of the 1996 Act to a complaint already pled by the Claimant of unfair dismissal. In the material upon which the Claimant relies for a complaint in terms of Section 103A of the 1996 Act is within the original claim form.

It is clear from the terms of the Claimant's ET1 that he made protected disclosures as set out in the ET1 and the further and better particulars provided to the Tribunal.

The Claimant also sets out a causative link between the termination of his employment and the protected disclosures where the Claimant states inter alia at paras 23 and 32.

The Claimant respectfully submits that it is clearly in the public interest that vulnerable children are protected and looked after, and no criminal activities take place, that health and safety of vulnerable children is safeguarded, that vulnerable children are not subjected to harassment due to their race contrary to the Equality Act 2010 and the Respondent complies with their legal obligations.

We also respectfully submit that as the Claimant has set out the matters he intends to rely upon for his Section 103A complaint in terms of the 1996 Act, that if the Tribunal were minded to allow the amendment it would not extend the time it would take to determine the Tribunal complaints to the Tribunal. The Claimant also respectfully submits that in terms of the overriding objective of the 2013 Regulations the granting of the application will enable the matter to be dealt with justly and fairly.

4. By e-mail on 21 August 2020, the respondent's solicitor intimated his objection to the claimant's amendment application in general terms. The following are excerpts from his e-mail: -

5 *"We act for the Respondent in this matter and refer to the Claimant's representative's application to amend the Claim by the acceptance of Further and Better Particulars and the addition of s.103a claim.*

10 *We write to confirm our client's opposition to this application (the latter in part only subject to further processing clarification of the claims). Put broadly, these are on the following grounds:*

15 *1. The application amounts to the substitution of an entirely new, broader claim, reliant upon wholly distinct alleged protected disclosures than those relied upon within the originating application, and in some cases adding to the terms of the originating application rather than expanding upon the terms already pled;*

20 *2. Contrary to the ET's directions giving rise to the application certain of the grounds remain opaque and confusing: in short they neither clarify the existing claim nor provide notice themselves of the claim they purport to plead;*

25 *3. If accepted, the claims as amended would give rise to preliminary arguments potentially but subject to further clarification as to their terms."*

5. On 25 August 2020, the respondent's solicitor sent an e-mail to the Tribunal with detailed objections. These are referred to for their terms.

- 30 6. It was agreed that I would proceed to determine the issue of the claimant's application to amend "on the papers". In other words, based on the parties' written submissions.

Discussion and decision

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7. In ***Cocking v. Sandhurst (Stationers) Ltd & Another*** [1974] ICR 650, Sir John Donaldson, when delivering the Judgment of the NIRC, laid down a general procedure for Tribunals to follow when deciding whether to allow substantial amendments. These guidelines have been approved in several

subsequent cases and were re-stated in **Selkent Bus Co. Ltd v. Moore** [1996] ICR 836. In that case, the EAT emphasised that the Tribunal, in determining whether to grant an application to amend, must carry out a careful balancing exercise of the relevant factors, having regard to the interests of justice and to the relative hardship that will be caused to parties by granting or refusing the amendment. Useful guidance on this issue was also given by EAT in, **Argyll & Clyde Health Board v. Foulds & Others** UKEATS/0009/06/RN and **Transport & General Workers' Union v. Safeway Stores Ltd** UKEAT/0092/07/LA.

8. In both these cases, the EAT referred, with approval, to the terms of paragraph 311.03 in Section P1 of Harvey on Industrial Relations and Employment Law: -

“(b) Altering Existing Claims & Making New Claims [311.03]”

A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action which is linked to, or arises out of the same facts, as the original claim; and (iii) amendments which add or substitute a wholly or new cause of action which is not connected to the original at all.”

9. Valuable guidance was also provided by Mummery LJ at pages 843 and 844 in **Selkent**. -

“.....
 (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 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 have 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 substituting a

5 *further label for facts already pleaded to, to the other hand, the making of entirely new factual allegations which change the basis of the existing claims. 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*

10 *If the 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 could be extended under the applicable statutory provisions e.g. in the case of unfair dismissal s.67 of the Employment Protection (Consolidation) Act 1978.*

15 (c) *The timing and the manner of the application*

20 *An application should not be refused wholly because there has been a delay in making. There are no time limits laid down in the Regulations of 1993 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 and 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 amendments. Questions of delay, as a result of adjournment and additional costs particularly if they are unlikely to be recovered by the successful party are relevant in reaching a decision.*

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Present case

“The nature of the amendment”

35 10. I was not persuaded, as the respondent’s solicitor submitted, that the amendment introduced a new cause of action. There is reference, for the first time, in the proposed amendment to s.103A. However, as the claimant’s solicitor submitted, there is set out at paragraphs 23 and 32 in the paper apart, annexed to the claim form “a causative link” between the termination of the
40 claimant’s employment and the alleged protected disclosures.

11. In my view, the proposed amendment does not seek to change the basis of the existing claim. It is the addition of, “*a further label for facts already pleaded to*”. If allowed, it would not require “*the adducing of wholly different evidence*” (***New Star Asset Management***).

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12. The respondent’s solicitor also raised a number of issues in relation to the specification of the alleged protected disclosures and the corresponding detriments and submitted that the claimant had failed to comply with my direction in my Note following the preliminary hearing on 1 July 2020 to provide further and better particulars.

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13. One of the difficulties I found is the way in which the claim was set out originally in the paper apart annexed to the claim form. It is not clear which protected disclosures are relied upon. That is now clearer from the proposed amendment. However, in my view, there is merit in the submission by the respondent’s solicitor (pages 2 and 3 of his e-mail of 25 August) that the claimant’s position regarding the various alleged disclosures and detriments is still not as clear as it requires to be, having regard to the requirement to provide “fair notice”, and the proposed amendment is still lacking in specification.

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14. I was mindful of my clear direction to provide further and better particulars and that the claimant had legal representation; I was also mindful of the views expressed by The Honourable Mr Justice Langstaff at para.16 of his Judgment in ***Chandhok v. Tirkey*** [UKEAT/0190/14/KN that: -

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“*The claim, as set out in the ET1, is not something just to set the ball rolling, as the 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. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. The Respondent is not required to answer a witness statement, nor a document but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1.*”

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15. However, having regard to the guidance in the case law, the “overriding objective” in the Rules of Procedure and the interests of justice, having decided to allow the amendment, I decided, albeit with some hesitation, that the claimant’s solicitor should be afforded one final opportunity of providing the required specification. I give my directions in this regard below.

“The applicability of time limits”

16. As I am of the view that the amendment does not introduce a new cause of action and that the amendment is a “re-labelling exercise”, this is not a material factor.

The timing and the manner of the application/prejudice and hardship

17. There was delay in submitting the application to amend and there will be further delay caused by the claimant being required to provide further specification. However, I was satisfied that these delays will not affect the cogency of the evidence in the event of the case proceeding to a final hearing.

18. So far as prejudice/hardship is concerned, any additional expense which may be incurred by the respondent might be addressed by an award of expenses.

19. On the other hand, were I to refuse the application to amend there is a possibility of the claim being struck out as having “no reasonable prospect of success” and the claimant will be left with no remedy.

20. In my view, the balance of prejudice and hardship favours the claimant.

21. I decided, therefore, in all the circumstances, to allow the application to amend but to direct the claimant to provide further specification.

Direction

22. I direct the claimant, within 21 days from the date of receipt of this Judgment, to send to the Tribunal, copied to the respondent’s solicitor, written further and better particulars of the claim. Specifically, the claimant is directed to address in these particulars, the issues raised by the respondent’s solicitor in his e-mail of 25 August 2020 at pages 2 and 3 in respect of the various alleged disclosures (starting with “Alleged disclosure on 23.6.19”) and the alleged detriments.

23. I further direct the respondent, if so advised, to respond in writing to the Tribunal, copied to the claimant’s solicitor, within 14 days of receipt of the further and better particulars from the claimant.

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| Employment Judge | Nick Hosie |
| Date of Judgement | 19 October 2020 |
| Date sent to parties | 20 October 2020 |