



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110369/2021

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Held via Cloud Video Platform (CVP) on 21 February 2022

Employment Judge: A Strain (sitting alone)

10 **Mr I Major**

**Claimant
In Person**

Morton Rolls Limited

**Respondents
Represented by:
Ms P Cunningham –
Snr Litigation Consultant**

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JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

The judgement of the Tribunal is:

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1. the application to amend the claim is refused; and
 2. the claim is dismissed.

Background

3. The Claimant presented his ET1 on 11 July 2021. The Claimant asserted a claim of unfair dismissal.
- 25 4. The Respondent submitted an application for strike-out on 26 August 2021 on the basis that the Claimant had less than 2 years' service with the Respondent and accordingly the tribunal had no jurisdiction to hear the complaint.
5. The Claimant submitted an amendment in response to the application for strike-out asserting claims of automatic unfair dismissal, disability discrimination, harassment and victimisation on 30 August 2021.
- 30 6. By letter of 2 September 2021 the Claimant was ordered to confirm the protected characteristic relied upon by him. The Claimant responded by

email of 3 September 2021 confirming that the protected characteristic relied upon was perceived disability (on the basis of what the Claimant described as mental health issues and being described as “illiterate”).

5 7. The Respondent opposed the application to amend by email of 10 September 2021.

8. Following a Case Management Preliminary Hearing on 22 November 2021 this Open Preliminary Hearing was fixed to consider the following issues:

- (a) the Claimant’s application to amend; and
- 10 (b) the Respondent’s application for strike out.

9. The Parties had lodged an agreed Joint Bundle of Documents with the Tribunal.

15 10. The Claimant represented himself and made submissions on his own behalf. The Respondent was represented by Ms P Cunningham, Senior Litigation Consultant.

Findings in Fact

11. The following facts were not in dispute:

- (1) The Claimant had been employed by the Respondent from 22 December 2019 – 6 June 2021.
- 20 (2) The Claimant presented his ET1 on 11 July 2021. The only claim the Claimant asserted was a claim of unfair dismissal. He makes reference to bullying and unfair treatment for incidents that predate his dismissal and were the subject of a complaint to senior management and ACAS on 16 April 2021.
- 25 (3) The Claimant submitted an amendment in response to the application for strike-out asserting claims of automatic unfair dismissal, disability discrimination, harassment and victimisation on 30 August 2021. The amendment was in the following terms:

5 “Could I ask you to consider that the case be heard on the grounds of allegations of harassment, victimisation and direct discrimination, in which case the 2 year continuous service would not apply and "automatic" unfair dismissal could be heard by the tribunal.”

- (4) Following being asked to do so by the Tribunal the Claimant confirmed that the protected characteristic relied upon was perceived disability (on the basis of what the Claimant described as mental health issues and being described as “illiterate”).
- 10 (5) The Claimant has not been in receipt of legal advice in connection with his claims and has submitted his ET1 and proposed amendment following conducting his own research online.

The Relevant Law

Unfair Dismissal

- 15 12. The right not to be unfairly dismissed in terms of section 94 of the **Employment Rights Act 1996 (ERA)** is dependent upon an employee having sufficient qualifying period of continuous employment in terms of section 108 of ERA which provides:

108 Qualifying period of employment.

- 20 (1) *Section 94 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination.*

Amendment

- 25 13. The Claimant seeks to amend his application to include discrimination, victimisation and harassment and automatic unfair dismissal which are new grounds of claim.

Overriding Objective

14. The starting point for the Tribunal in considering any such application is the “overriding objective” which provides:

Overriding objective

- 5 2. The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable—
- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the
10 complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- 15 (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

20 Applications to Amend

15. In the context of applications to amend the Tribunal should have regard to the case of ***Selkent Bus Company Ltd v Moore [1996] IRLR 661*** (which was followed by the EAT in Scotland in ***Amey Services Ltd and another v Aldridge and others UKEATS/0007/16***). The EAT held that,
25 when faced with an application to amend, a Tribunal must carry out a careful balancing exercise of all the relevant circumstances, weighing up the balance of injustice or hardship that would be caused to each party by allowing or refusing the application. This would include the nature of

the amendment, the applicability of time limits, and the timing and manner of the application.

Time limits

- 5 16. In this case the amendment purports to introduce claims which may be time barred. The time limit for a discrimination claim to be presented to a Tribunal is 3 months starting with the act complained of (section 123(1), Equality Act 2010). Section 123(3)(a) of the Equality Act 2010 provides for continuing acts of discrimination, where acts of discrimination extend over a period are treated as having occurred at the end of that period.
- 10 The question a Tribunal should ask is whether the employer is responsible for an “an ongoing situation or a continuing state of affairs” in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (***Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686***). There must be facts and
- 15 circumstances which are linked to one another to demonstrate a continuing discriminatory state of affairs. The Tribunal should consider the nature of the conduct and the status or position of the person responsible for it.

Just and equitable extension of time

- 20 17. If a claim is out of time the Tribunal has the discretion to extend the time limit for a discrimination claim to be presented by such further period as it considers just and equitable (section 123(1)(b)).
18. ***British Coal Corporation v Keeble & Others [1997] IRLR 336*** sets out a checklist of factors which a Tribunal should consider when deciding
- 25 whether to refuse or grant an application to extend the time limit:
- a. The length of and reasons for the delay.
 - b. The extent to which the cogency of the evidence is likely to be affected by the delay.

- c. The extent to which the party sued had co-operated with any requests for information.
- d. The promptness with which the Plaintiff acted once he or she knew of the facts giving rise to the cause of action.
- 5 e. The steps taken by the Plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

Knowledge of the Claimant

19. In the case of ***Mensah v Royal College of Midwives UKEAT/124/94***, Mummery J said that knowledge is a factor relevant to the discretion to extend time. Tribunals are therefore entitled to ask questions about a Claimant's prior knowledge, including: when did the Claimant know or suspect that they had a claim for discrimination; was it reasonable for the Claimant to know or suspect that they had a claim earlier; and if they did know or suspect that they had a claim, why did they not present their complaint earlier.
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Submissions

20. Both Parties made submissions orally and the Respondent submitted written submissions.

Discussion and Decision

20 *The Claimant*

21. At the outset of his submissions the Claimant accepted that his claim for unfair dismissal could not succeed as he had insufficient qualifying service (less than 2 years required under section 108 of ERA).
22. This concession effectively dealt with the jurisdictional point that was the subject matter of the application for strike-out.
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23. The tribunal accordingly dismiss the original claim within the ET1 which was a claim of unfair dismissal.

Amendment

24. The tribunal sought to clarify with the Claimant what his claims were that he proposed to introduce by the amendment.

25. After discussion it was identified that he sought to pursue claims of discrimination, victimisation and harassment and automatic unfair dismissal.

26. The tribunal dealt with the claims in turn.

Automatic Unfair Dismissal

27. The Claimant considered that he had the right not to be dismissed whilst he was on sick leave. He stated he was on sick leave at the point of dismissal. He was unable to say on what legal basis this constituted automatic unfair dismissal or to elaborate any facts which may support such an application.

Claims of Discrimination, Victimisation and Harassment

28. The Claimant relied upon the perceived protected characteristic of perceived disability. This was on the basis of what he described as mental health issues. He elaborated, referred to and relied upon a statement he claimed was made to him by the Respondent in which he was described as an "illiterate cunt". He believed he was discriminated against, victimised and harassed as a consequence of the perceived belief that he was illiterate.

29. The Claimant then suggested that he was suffering from anxiety and depression, that this was a potential disability and he had not thought to put this in his claim form as he had not had the benefit of legal advice when he submitted his claim. This also did not appear in his proposed amendment.

30. The amendment did not detail the dates or details of the act(s) of discrimination, harassment or victimisation. He stated these acts

occurred on a frequent but not daily basis but was unable (when asked) to provide details beyond what was in the paper apart to his ET1.

31. His ET1 contained details of incidents he described as bullying and unfair treatment which predated the termination of his employment. In fact, the incident were the subject of a grievance email from him to management and ACAS on 16 April 2021.

32. He had not been able to obtain legal advice and had drafted the amendment on the basis of his own research from the Respondent's representatives website.

10 *The Respondent*

33. The Respondent did not see that there was any basis for a claim of automatic unfair dismissal on the facts the Claimant offered to prove.

34. In so far as the discrimination, victimisation and harrsment claims were concerned being "illiterate" was not a qualifying disability under section 6 of the Equality Act 2010 and the Claimant had not given any detail regarding the anxiety and depression in his proposed amendment. Further specification would be required but the Claimant had not, in any event, given any detail upon which such a claim could be supported.

35. Beyond the comments and the dimissal no sufficient detail had been given regarding alleged act(s) of discrimination, victimisation or harassment.

36. The Respondent relied upon the case of **Selkent** and submitted that the proposed amendment should not be allowed, lacked sufficient detail, had no legal basis, was potentially time barred and that there would be prejudice to the Respondent if it were allowed.

37. The Respondent referred to **Cocking v Sandhurst Stationers Ltd 1974 ICR 650** and submitted the Tribunal should consider the injustice and hardship that the Respondent might face if the amendment was allowed. The Respondent submits that they would suffer a prejudice and hardship

if the application was allowed. There would be additional costs incurred by the Respondent in defending the additional claims which was prejudicial when considering that the additional claims lack merit.

5 38. The Respondent submitted that the claim in relation to perceived discrimination was misconceived and lacked merit. If the amendment were allowed then the Respondent would incur the financial burden of amending their ET3, the cost of a hearing to determine whether being “illiterate” is a disability and then the cost of the final merits hearing.

10 39. The Respondent submitted that ultimately the claim was destined to fail and it would not be in line with the overriding objective to allow the application.

Decision

15 40. In light of the Claimant’s concession that he had insufficient service the tribunal dismiss the original claim within the ET1 which was a claim of unfair dismissal.

41. The tribunal then considered the Parties submissions and the content of the amendment only in relation to the question before it which was whether or not to allow the application to amend.

20 In this context the Tribunal adopted and followed the approach of the EAT in **Selkent**.

Nature of the Amendment

25 42. The Claimant’s amendment seeks to add in additional complaints of automatic unfair dismissal, disability discrimination, victimisation and harassment. If allowed, the amendment would add add vague claims which clearly required considerable further specification and appeared to lack any legal basis in the absence of any relevant supporting facts as currently pled.

43. The amendment gave no detail of the facts supporting the purported claims of discrimination, victimisation and harrasment or automatic unfair dismissal.

5 44. The claim of automatic unfair dismissal was asserted by the Claimant to be on the basis that his employment was terminated whilst on sick leave. The tribunal consider this does not provide a legal basis for an automatic unfair dismissal claim and that this claim has no merit, is misconceived and has no prospect of success.

10 45. The remaining claims have as their foundation the allegations of bullying which predate the Claimant's email of 16 April 2021 to senior management and ACAS. The allegations of bullying make no reference to disability (perceived or actual) and provide no detail of any facts that support a claim of direct discrimination, victimisation or harrasment.

15 46. There is no reference to and the Claimant did not give any information with regard to a "protected act" in support of a victimisation claim without which such a claim could not succeed.

47. The allegations of bullying were not pled as relating to a disability or perceived disability such as to constitute harrasment.

20 48. It was not clear from the Claimant's submissions as to whether he was insisting on the "perceived disability" of illiteracy and a new actual disability of anxiety and depression on his part. Leaving aside the question as to whether or not "illiteracy" constitutes a qualifying disability under section 6 of the Act there was no information regarding the Claimant's anxiety and depression and how this may constitute disability and form the basis of any new claims.

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Claims out of time

49. The tribunal considered that the claims (other than that of automatic unfair dismissal) contained within the proposed amendment were also out of time. Whilst the Tribunal accepted and acknowledged that the Claimant did not have the benefit of legal advice the fact that he had not

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obtained such advice did not mean that he could not have presented such claims in his original ET1.

50. On the Claimant's own submissions he had researched the position online and put forward these claims himself. There was no good reason presented why he could not have done so in his original ET1. It did appear to the tribunal that there was merit in the Respondent's submissions that these claims appeared to have little factual basis and were misconceived.

51. The tribunal could find no reason to justify an extension of time on just and equitable grounds.

Overriding Objective

52. The Tribunal considered that refusal of the application to amend was in accordance with the overriding objective.

53. The amendment seeks to introduce new and vague claims. Further, the claims would require considerable further specification which would entail delay and expense.

54. The claims appeared to have little or no factual basis and little or no prospect of success.

55. The claims (apart from the automatic unfair dismissal claim which had no basis in law) were time barred and it would not have been just nor equitable to have extended the time limits

56. The Tribunal considers that there would have been considerable prejudice to the Respondent in allowing the amendment given the passage of time, the vagueness of the allegations that would be required to respond to and the further case management the case would be subject to. There would undoubtedly have been delay and considerable further expense.

57. The application to amend is accordingly refused.

Employment Judge: Alan Strain

Date of Judgment: 15 March 2022

5 Entered in register: 24 March 2022
and copied to parties