Neutral Citation Number: [2024] EAT 13

Case No: EA-2022-SCO-000051-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 9 February 2024

Before :

THE HONOURABLE LADY HALDANE

- -

Between :

Mr Jerzy Lawrynowicz	**Appellant**
- and -	
Bidvest Noonan (UK) Limited	**Respondent**

- -
- -

Mr Jerzy Lawrynowicz, the **Appellant**
Mr Charles Crow (instructed by Fieldfisher LLP) for the **Respondent**

Hearing date: 30 November 2023

- -

JUDGMENT

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SUMMARY

TOPIC NUMBER 11 – Unfair Dismissal

THE HONOURABLE LADY HALDANE:

Introduction

1. This matter came before me for a full hearing on 30th November 2023. I shall refer to parties as the claimant and respondent, as they were below. The full hearing was allowed following a Rule 3(10) hearing at which the claimant had the benefit of representation by counsel through the auspices of the SEALAS scheme. Counsel tendered a skeleton argument on the day of the hearing which was in large part accepted by the Judge and formed the basis upon which the matter was allowed to proceed to a full hearing.
2. Between the date that the hearing was allowed, and the date of the hearing itself, the claimant, acting on his own behalf, submitted an application to admit fresh evidence to the EAT. He had not sought reconsideration of the Judgment appealed nor otherwise complied with the procedural requirements to allow such fresh evidence to be brought at this stage. The fresh evidence consisted of screenshots, and copies of a selection of emails passing between the claimant and those at the Tesco shop where he formerly worked. Having given consideration to the terms of the relevant practice direction, the appropriate approach to an application of this kind at this stage as set out in **Korashi v Aberawe Bro** [2012] IRLR 4, and the test for admitting fresh evidence as enunciated in **Ladd v Marshall** [1954] 1 WLR 1489, I concluded that the application should be refused. In so doing, I explained to the claimant that in the event that his appeal was successful on any basis that allowed

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his claim to continue, he would not be precluded from seeking to lodge any relevant documentation with the Employment Tribunal in due course.

3. The skeleton argument lodged for the purpose of the Rule 3(10) hearing developed the grounds of appeal which had been drafted by the claimant and focussed on two areas: the refusal of an amendment following a CVP Preliminary Hearing on 3rd March 2022, and the decision following the same hearing to strike out the claimant's claim under Rule 37(1)(b) and (c). However, as Mr Crow, who appeared for the respondent, rightly pointed out, there was in fact no ground of appeal directed to the decision to strike out. This had apparently not been observed either by counsel or the Judge who conducted the Rule 3(10) hearing. Mr Crow very properly did not seek to suggest that he was ultimately prejudiced by this procedural error, and confirmed that he would be able to deal with an argument in relation to the decision to strike out, but that there would require to be an application to amend the grounds of appeal to reflect that oversight.

4. Having explained the situation to, and obtained the views of, the claimant, Mr Lawrynowicz confirmed he would be content were I to accept the skeleton argument tendered at the Rule 3 (10) hearing as an application to amend his grounds of appeal, and to substitute his existing grounds for that skeleton. I indicated that I would be willing to do so, under deletion of paragraph 7 of same. That was because, again as Mr Crow helpfully pointed out, having regard to the terms of the written reasons produced in support of the Order allowing a full hearing, it did not appear as though the Judge had engaged with, or unequivocally allowed the case to proceed in respect of the arguments advanced in that particular paragraph. Therefore whilst I was satisfied that it was in that interests of justice and consistent with the overriding objective to allow the skeleton to take the place of the existing grounds of appeal, I was not satisfied that the same approach ought to follow so far

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as paragraph 7 was concerned, for the reasons advanced by Mr Crow. I therefore allowed amendment as set out above, under deletion of paragraph 7 of the skeleton argument. For the avoidance of doubt, in reaching that decision I had in mind the guidance on the question of amendment to grounds of appeal at a late stage as expressed by Underhill J (as he then was) in **Readman v Devon Primary Care Trust**, UKEAT/0116/11/ZT in paragraph 5 in particular and applied it to this slightly unusual set of circumstances. For the avoidance of doubt I am of the view that the principles and considerations enunciated in that case can apply equally in a case such as the present one, although Underhill J made his observations in the context of a Rule 3(10) hearing.

5. The appeal thereafter proceeded on the grounds of appeal as amended.

Background

6. The claimant intimated a claim against the respondent by way of at ET1 dated 30th March 2021. In that part of the form headed ‘Type and details of claim’, the claimant did not tick any of the pro forma boxes but rather set out in the box at the foot of the page his claims as being ‘Personal Injury’, ‘Compensation for loss of wages’ and ‘Unpaid Income Tax for year 2018/2019’. He then went on to provide background and details of his claim which related to events during the course of 2020 which occurred during his employment with the respondent based at a Tesco store. In very brief terms, the dispute centred on alleged treatment at the hands of the store manager when the claimant wished to wear protective equipment including a mask and was told he could not do so. There was a separate dispute arising out of a request for leave denied to the claimant but given to another employee instead. The combined effect of these behaviours was said to have led the claimant to a mental breakdown and resulted in him resigning.

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7. The case called before Employment Judge Hendry on 7th June 2021 for a Preliminary Hearing for the purpose of case management to consider questions of apparent time bar and the nature of the claimant's claims. EJ Hendry provided a note of this hearing setting out his conclusions and orders. This discloses that Judge Hendry advised the claimant that his apparent claims for personal injury and unpaid income tax were not within the jurisdiction of the Employment Tribunal. He further advised the claimant that he had not made a claim for unfair dismissal, to which the claimant responded and explained that he wished to claim for constructive dismissal. Judge Hendry concluded that there was no claim for constructive dismissal made out in the claim form and that in any event such a claim was, on the face of it, out of time. Having self-directed on the applicable law, EJ Hendry ordered the claimant to provide further and better particulars of his claims, and the reasons why these were not brought within the applicable time limits.

8. There was then a further Preliminary Hearing before EJ Hosie. By this time the claimant had submitted a letter giving further details of the background to his claims and stating that he wished to claim in respect of discrimination and unfair dismissal. EJ Hosie 'directed' that the claimant make an application to amend his claim to include these heads, giving details of each, on the basis that these claims did not feature in his original claim form. So far as the time bar question was concerned, EJ Hosie did not feel he had enough information to consider this against the criteria in **<u>Selkent Bus Co v Moore</u>** [1996] IC 836 and directed that further enquiries be made of the claimant's medical consultant in this regard.

9. The claimant then provided an 'amendment request' dated 4th October 2021, further information in writing on 7th October (erroneously referred to as November in the Note mentioned in this paragraph) and 31st October 2021 and the matter came

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again before EJ Hosie for a case management hearing on 11th November 2021. EJ Hosie remained dissatisfied with the level of detail provided and made a further order for 'Further and Better Particulars' of the claimant's claims for discrimination and constructive unfair dismissal. I pause to observe at this point that the terms 'amendment' and 'further and better particulars' are used apparently interchangeably in the various notes following case management hearings and, looked at objectively, such an approach may give rise to the risk of confusion in the mind of a party litigant in particular as to what is being asked of him.

10. On 3rd March 2022 the matter came again before EJ Hosie to consider the claimant's application to amend (treated as constituted by his correspondence referred to in the foregoing paragraph), as well as an application for strike out under Rule 37(1)(b) made by the respondent. EJ Hosie refused the application to amend, and granted the motion to strike out. Indeed he went further and indicated that he would have struck out the claim under Rule 37(1)(c) as well, although he was not in fact invited to do so. It is against this decision that the claimant appeals.

Claimant's submissions

11. The claimant was content, in large part, to adopt his amended grounds of appeal as described above. He amplified those grounds by emphasising that from his perspective the key point was his argument on disability, as that explained why he had not been able to comply with the relevant time limits. The claimant also provided more background information as to how his dispute with the respondent had come about, and the effect that these events had, and continue to have, on him.

Respondent's submissions

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12. Mr Crow, for the respondent, adopted his skeleton argument. In so doing Mr Crow made clear that, as he put it, 'most of his eggs were in the amendment basket.' In other words the main focus of his submissions related to the decision to refuse the claimant permission to amend his grounds of claim. The submission had two aspects to it: firstly that there had been no in time appeal against prior decisions that the claims in question were new claims, and secondly that even if this court were able to resolve that question, there was in any event no error of law or perversity in the decision following the hearing on 3rd March 2022.

13. Dealing firstly then with the question of a lack of in time appeal, Mr Crow turned first to paragraph 6 of the judgment of the ET, where Judge Hosie had characterised the claims for constructive dismissal and discrimination as new claims. This, Mr Crow accepted, was a fundamental plank to his decision to refuse to exercise his discretion in the claimant's favour. That decision was also a factor when it came to addressing the 'balance of hardship' test as discussed in **Selkent**. That these claims were new claims was in any event by 3rd March 2022 a fixed factor, it having already been determined by EJ Hendry at the hearing over which he presided. By the time the matter came before EJ Hosie for the first time, the claimant was saying that in addition to constructive dismissal, he also wanted to pursue a discrimination claim. EJ Hosie determined, in agreement with EJ Hendry, that constructive dismissal had not been pleaded at the outset and that the claimant should submit an application to amend to introduce these new claims. Mr Crow submitted that these decisions were very clear preliminary findings which said in terms that an application to amend was necessary, not just particularisation, because these were new claims.

14. Therefore, Mr Crow said, these determinations by two Employment Judges that the claims sought to be pursued were new claims were clear, and at no stage had the

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claimant sought reconsideration of these earlier decisions, nor had he sought to appeal them. In short, absent such an application or appeal, these decisions were fixed and it was not possible to go behind them. That being so, any appeal to this court on the basis that the Tribunal had erred in March 2022 in concluding in the first place that these were new claims was bound to fail. That was a matter already determined by that stage.

15. In making that submission, Mr Crow recognised that in **Chaudry v Cerberus Security and Monitoring Services Ltd** [2022] EAT 172 the court accepted that there was a broad power to vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, but that such a power could only be used where there was a ‘material change of circumstances’. In this case, there was no such material to allow EJ Hosie to go behind the decisions that had already been taken. Even if one were to argue that the balance of hardship test in **Selkent** is wider and broader and could be applied in the present case, Mr Crow submitted such an approach would be flawed as the relevant test in **Selkent** has to be applied to factors present at the time the determination in question was made. Here the determination by both Judges was that these were new claims not pleaded. Mr Crow very fairly conceded that there might be an element of unattractiveness in this submission since it required a litigant in person to realise that the decisions made in June and September could be significant and that if he thought they were wrong, there was the possibility to appeal, or ask for more detailed reasoning. He recognised further that there was a careful line to be drawn with litigants in person but that nevertheless there were rules to be followed which applied to represented and unrepresented litigants alike.

16. The second part of Mr Crow’s submissions began by reiterating that this Court cannot conduct a merits review of the decision complained of. Only if an error of

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law could be demonstrated or there was some type of Wednesbury unreasonableness to the decision, could the challenge succeed (**O'Cathail v Transport for London** [2013] EWCA Civ 21; **Medallion Holidays Ltd v Birch** [1985] IRLR 406; **Adams and Raynor v West Sussex County Council** [1990] IRLR 215). If a Judge applies the correct test and can show that the right factors have been applied then this Court will be slow to interfere because there will be no error of law, and therefore no discretion to interfere.

17. Applying those considerations to the present case, Mr Crow submitted that it was evident from paragraph 8 of the judgment that EJ Hosie had, in relation to the question of amendment, identified the right test, whilst properly recognising that it is not a failsafe simply to state the test and that the court must be satisfied the test had in fact been applied, but that this court could be so satisfied in this case. EJ Hosie had then gone on to consider the question of the applicable time limits and the proper approach to the question of the exercise of discretion to extend time limits. In similar vein he had gone on to consider questions of prejudice, and delay and had appropriately weighed the relevant factors in the balance before arriving at a permissible conclusion in paragraph 25 that the new claims were so out of time and the reasons given for the delay insufficient to engage the equitable discretion available to him. Mr Crow submitted that the discretion available on a question of amendment is a wide one, and that the test was not prescriptive. This appeal he contended was an invitation to dress up as error of law what was in fact the permissible exercise of a discretion by EJ Hosie.

18. I invited Mr Crow to address what had been set out by EJ Hosie in paragraph 18 of his judgment, namely that the claimant would still be able to pursue the clams which he was minded to pursue in the first instance. Since these were claims which EJ Hendry had held the Employment Tribunal had no jurisdiction to consider, it was

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difficult to understand what claims EJ Hosie had in mind. Mr Crow accepted that paragraph must be seen as erroneous having regard to the decisions in this case as a whole.

19. Turning to the question of strike out, Mr Crow conceded that the reasoning on this aspect of matters was lacking. He accepted, as set out in the amended grounds of appeal, that EJ Hosie had failed either explicitly or implicitly to address the test set out in **Blockbuster Entertainment Ltd v James** [2006] IRLR 630. In the event that the respondent's submission on the proper approach to amendment was not upheld, then Mr Crow accepted it would be hard to argue that the case should not be remitted on the question of strike out.

20. Finally, Mr Crow dealt with the approach to the claimant's claim for discrimination on the basis of disability relatively succinctly. He submitted that the reasoning on this point was adequate, in the sense that it was 'Meek' compliant but that in any event the Tribunal did not require to give detailed reasoning on this point as it formed part of the application to amend which had been refused. In any event, the claimant would know why it was this claim was rejected, that being due to the lack of medical evidence to establish his claim to have been disabled at the material time. If that primary submission were not accepted, then this aspect of matters could be remitted back to the Tribunal for additional reasoning under the 'Burns/Barke' procedure, or alternatively for reconsideration.

Reply for the claimant

21. In a brief reply, the claimant reminded me of the various health difficulties from which he has suffered that he considered underpinned his claim. He submitted that he had only pursued the route of amendment because that was what EJ Hosie had suggested he should do. The claimant was of the view that he had pursued every

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path suggested to him by EJ Hosie and did not accept that the claim set out in the amendment was a new one. Having followed the advice of EJ Hosie he could not understand why 'everything had been refused.'

Analysis and decision

22. An appeal in this forum must be based on there being an identifiable error of law in the decision complained of, as opposed to a review of the merits of the claim. Although the claimant was representing himself, and doing so in a second language, he was able clearly to explain that he believed at all times he was simply following procedure directed, in effect, by EJ Hosie. Given that the various notes described above do employ language such as 'directing' the claimant to amend, it is not hard to understand why he might have come to that view.

23. However, at the same time, there is some force in the principal submission made by Mr Crow to the effect that by the time the question of amendment was being considered, the fact that these were new claims, as opposed to amplification of existing claims, was a matter already judicially determined. That is to say both EJ Hendry and EJ Hosie had expressed that view on different occasions and indicated that substantially more detail and, in the case of EJ Hosie, amendment to the notice of claim, would be required. The claimant was encouraged by EJ Hendry to seek advice on how to take matters forward. He did not, at that time, do so, nor did he seek in relation to any of these relevant decisions, reconsideration or seek to appeal the conclusion(s) that the claims he wished to advance were new claims. However, given that these earlier decisions were largely either advisory (that the claimant should seek advice, or that his purported claims for personal injury and the like were out with the jurisdiction of the Tribunal) or directive (that he must provide further and better particulars, or an amendment) it is difficult on one view to discern

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precisely what 'decision' the claimant should have appealed. I have concluded therefore, that despite the initial attractiveness of Mr Crow's submission, having regard to the language employed by the Tribunal and the directions given by it, looked at objectively the question of whether or not the claims sought to be advanced were entirely 'new' as opposed to a relabelling of an existing claim was not immutably fixed.

24. Even if I am wrong in that assessment, by the time the matter came before EJ Hosie in March 2022 he had before him an application to amend the claimant's case. He required to consider that having regard to the claim as initiated by the claimant, the further details provided, as requested by the Tribunal following the various hearings detailed above and against well accepted principles, most conveniently encapsulated in **Selkent Bus Co V Moore** 1996 ICR 836. Judge Hosie correctly identified from that case the relevant principles and set them out in his judgment. However he did so having also set out, at paragraph 11:-

> '*The claimant's application was a substantial alteration. It sought to introduce new causes of action. I recorded that that was so, in the Note which I issued following the case management Preliminary Hearing on 10th September 2021.'*

However, on 10th September 2021, EJ Hosie stated that both further and better particulars and an application to amend would be required, the claimant's additional letter of 25th June 2021 being, in his view, insufficient particularisation of his claims. Since that date the claimant provided letters on 4th October, 7th October and 31st October 2021 giving more information in addition to the information set out in his claim form in March 2021. EJ Hosie recognises that this information was provided

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in paragraph 6 of his judgment and describes the letter of 4th October 2021 in particular as seeking to 'add' (the Tribunal's emphasis) complaints of constructive unfair dismissal and discrimination. Looked at fairly, that language was employed because by that time the claimant had been told by the Tribunal that that was what he was seeking to do. He was directed to provide an amendment in consequence of that conclusion.

25. That is the background against which the purported application of the test in **Selkent** was carried out. The relevant passages from the opinion of Mummery J at pages 843 and 844 are set out in paragraph 9 of the judgment. However in focusing on his earlier decision of 10 September 2021 as the point in time at which the determination that these claims were new claims became fixed, and in apparently failing to have full regard not only to what was set out in subsequent correspondence and, perhaps more importantly, what was set out in the original claim form at p7 (p 41 of the core bundle) the Tribunal has fallen into error. In the original claim form, certainly in imperfect, non-legal language, there is a narrative describing an earlier (unrelated) assault at work which led to the claimant developing PTSD, his resulting health concerns and his consequent desire to wear a mask at work during the coronavirus pandemic, which was overruled by management. There is an allegation of shouting and aggression at the hands of a manager in his workplace, and a lack of support from his employer. There is a further explanation that these events led to a mental breakdown, and resulted in the claimant tendering his resignation.

26. These claims are repeated and to some extent amplified in later correspondence. I make no observation as to whether or not the claimant's claims, or any of them, are ultimately well-founded, however in apparently characterising the various documents submitted as 'entirely new factual allegations which change the basis of

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the existing claims', as opposed to 'a further label for facts already pleaded' (to employ the language of Mummery J in **Selkent**), I consider that the Tribunal has fallen into error. I therefore accept, as is set out in the amended grounds of appeal at paragraph 9, that this error in law skewed the balance of interests that the ET required to consider when determining the exercise of its discretion. I therefore uphold this limb of the appeal.

27. So far as the question of strike out is concerned, I consider that the concession made by Mr Crow was appropriate. There is an absence of explicit or implicit recognition of the appropriate test to be applied in an application for strike out, as set out in **Blockbuster Entertainment Ltd v James** [2006] IRLR 630. It is not clear that correct approach has in any event been applied (that the conduct involved deliberate and persistent disregard of required procedural steps or has made a fair trial impossible). Further it is not clear why the Tribunal provided a view in relation to strike out under Rule 37(1)(c) when there does not appear to have been an application under that provision before it. This ground of appeal therefore also succeeds.

Decision and disposal

28. It follows from the above that the appeal succeeds, and I will set aside the orders of the Tribunal in its Judgment dated 28th April 2022 firstly refusing the claimant's application to amend, and secondly striking out the claim in terms of Rules 37(1)(a) and (b) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013**.

29. Thereafter, I will remit the matter back to the Tribunal. In so doing, I would stress that this appeal was focussed on the issues of whether or not the amendment contained new claims, and the question of strike out. That should not obscure the

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fact that the questions of the failure to adhere to the applicable time limits and the whole question of delay in general may still weigh against the claimant. In other words, he should appreciate that his claim may yet fail to proceed having regard to those not insignificant factors. However, those issues, along with the application of the other **Selkent** principles will require to be considered afresh, at a Case Management hearing, along with any fresh application for strike out by the respondent, if so advised.

30. I also consider that the approach to dismissal of the claimant's claim in respect of disability status, in light of the foregoing decision, ought to be reconsidered and I remit that aspect of matters for reconsideration also.

31. Finally, and for the avoidance of doubt, given that this case remains at a procedural stage, there is no necessity for the same Tribunal to consider the matter, and it may therefore be remitted to a differently constituted Tribunal.

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