EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110508/2019 (V)

Preliminary Hearing Held remotely on 28 August 2020

Employment Judge A Kemp

Mr R Gourlay	**Claimant** **In person**
Dundee Science Centre	**Respondent** **Represented by:** **Mr N MacDougall** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal allows the claimant's application to amend his pleadings as set out in his Further and Better Particulars.

REASONS

Introduction

1. This Preliminary Hearing was arranged to address further particulars provided by the claimant following a preliminary hearing on 11 May 2020. They were set out in two documents dated 15 and 17 June 2020, a further

document sent on 10 August 2020 and an email on 13 July 2020. The respondent had provided a Response on 13 July 2020 with an accompanying email.

2. The claimant's dismissal was on 29 June 2019. Early conciliation was commenced on 1 July 2019. The date of the certificate was not to hand for the parties during the hearing, but following its conclusion the claimant sent that to the Tribunal. It confirmed a certificate date of 1 August 2019. The Claim Form was submitted on 31 August 2019.

3. The claims made by the claimant include one for unfair dismissal. No time bar point is taken by the respondent in that regard, and it is clear that it is within the jurisdiction of the Tribunal. The respondent does however take time-bar points in relation to all the claims of disability discrimination. They are made under sections 15, 20 and 21, and 26, of the Equality Act 2010.

4. The claimant confirmed during discussions that he contended that the dismissal was discriminatory under section 15 of the 2010 Act, and that he argued that it had been part of a continuing series of acts from 14 July 2017. His particulars stated that he sought to relabel the issues that had been alleged to be harassment under section 26 in his Claim Form instead to be made as a claim under section 15, save for two particular respects that were set out to remain allegations of harassment, which he confirmed related to events up to December 2017. In relation to the claim under sections 20 and 21 for reasonable adjustments he accepted that they were made for a period up to February 2019.

Issues

5. The issues to be addressed were (i) whether the disputed parts of the particulars were to be treated as an amendment and (ii) if so, whether the amendment should be allowed or refused.

6. The respondent, ably represented by Mr MacDougall, accepted that parts of the Further and Better Particulars could be accepted without challenge, but that some parts, relating to detriments, and a section with a heading

"Continuous conduct up to 25 July 2019" were new factual issues that required an amendment., and that that amendment ought to be refused.

Submission for claimant

7. The following is a very brief summary of the submission made, much of which was within the documentation submitted. The claimant argued that he provided further details arising out of the Claim Form he presented. He had been very unwell at that time, and had produced a document that had a summary of matters up to one point in time that he had not been able to complete. He had sought legal advice twice, once in January 2019, and when a conflict of interest arose again in March 2019 which ended in July 2019. He had been acting as a party litigant since that time. He had carried out research, understood more fully what was required, and responded to arguments over time bar that had been made. He did not consider that the Further and Better Particulars were an amendment, and he argued that they should be accepted.

Submission for respondent

8. The following is again a very brief summary of the submission made, which was based on the terms of the Response to the Further and Better Particulars that the respondent submitted. The respondent argued that the parts of the Further and Better Particulars identified as disputed were new claims, and new facts, not within the Claim Form. Reference was made to the three part test in ***Selkent*** which is set out fully below. It was argued that the nature of the amendment was of a new claim, that the claim was timebarred, and that it was not just and equitable to allow late claims to be introduced, and that the timing and manner of the application was against allowing the amendment as it was late, and followed much earlier procedure in the case. The discrimination claims were over a year out of time. The disputed particulars were provided in an artificial way to answer the time bar point.

The law

(i) *Amendment*

9. The question of whether or not to allow amendment is a matter for the exercise of discretion by the Tribunal. There is no Rule specifically to address that, save in respect of additional respondents in Rule 34, set out below. It falls within the Tribunal's general power to make case management orders set out in Rule 29 which commences as follows:

> "**29 Case management orders**
> The Tribunal may at any stage of the proceedings, on its own initiative or on application to make a case management order."

10. Rule 29 requires to be exercised having regard to the overriding objective in Rule 2. It states as follows:

> "**2 Overriding objective**
> 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 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
> (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."

11. Earlier iterations of the Tribunal Rules of Procedure did contain a specific rule on amendment, and the changes brought into effect by the current Rules, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, require consideration when addressing earlier case law.

12. The nature of the exercise of discretion in amendment applications was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. The EAT stated the following:

> "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.
>
> 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."

13. In a number of cases distinctions are drawn between firstly cases in which the amendment application provides further detail of fact in respect of a case already pleaded, secondly those cases where the facts essentially remain as pleaded but the remedy or legal provision relied upon is sought to be changed, often called a change of label, and thirdly those cases where there are both new issues of fact and of legal provision on which the remedy is sought. The first two categories are those where amendment may more readily be allowed. The third category is more difficult for the applicant to succeed with, as the amendment introduces a new claim which, if it had been taken by a separate Claim Form, would or might have been outwith the jurisdiction of the Tribunal as out of time. The statutory provisions on timebar are set out below.

14. In ***Abercrombie v Aga Rangemaster Ltd [2014] ICR 204*** the Court of Appeal said this in relation to an amendment which arguably raises a new cause of action, suggesting that the Tribunal should

> " … focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

15. In order to determine whether the amendment amounts to a wholly new claim, the third of the categories set out above, it is necessary to examine the case as set out in the original Claim to see if it provides a 'causative link' with the proposed amendment (***Housing Corporation v Bryant [1999] ICR 123).*** In that case the claimant made no reference in her original unfair dismissal claim to alleged victimisation, which was a claim

she subsequently sought to make by way of amendment. The Court of Appeal rejected the amendment on the basis that the case as pleaded revealed no grounds for a claim of victimisation and it was not just and equitable to extend the time limit. It said that the proposed amendment 'was not a rectification or expansion of the original claim, but an entirely new claim brought well out of time'.

16. There are two contradictory lines of authority at the EAT level about how amendment applications should be dealt with where one of the issues is timebar. The more recent line is set out in ***Galilee v Commissioner of Police of the Metropolis [2018] ICR 634***, in which the EAT held that it was permissible to allow amendment but reserving questions of jurisdiction for determination either at a Preliminary Hearing or at a Final Hearing. That results in an amendment being allowed to permit a new claim to be raised, but the issue of whether or not it is in the jurisdiction of the Tribunal is not at that stage determined. The other line of authority is to the effect that questions of jurisdiction on issues of timebar must be addressed at the time of consideration of the amendment, as once accepted the Claim is deemed to have been amended from the date of its presentation initially, rather than when the amendment was sought, on which the authorities include ***Rawson v Doncaster NHS Primary Care Trust UKEAT/022/08, Newsquest (Herald and Times) Ltd v Keeping UKEATS/51/09*** and ***Amey Services Ltd v Aldridge UKEATS/7/16.*** I consider that the Galilee authority is to be followed, for reasons I gave in another case ***Mkwebu v ABC Trust 4114277/2019*** in a Judgment dated 29 July 2020 and for brevity I refer to that Judgment for the reasons why I came to that conclusion.

(ii) *Time bar*

17. Section 123 of the 2010 Act provides as follows

> "**123 Time limits**
>
> (1) [Subject to [sections 140A and [section] 140B],] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

18. This therefore provides that the Tribunal has jurisdiction under the 2010 Act if a claim is commenced within three months of the act complained of, but there are two qualifications to that, firstly where there are acts extending over a period when the time-limit is calculated from the end of that period, and secondly where it is just and equitable to allow the claim to proceed.

19. An act will be regarded as extending over a period, and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant (***Barclays Bank plc v Kapur [1989] IRLR 387***). It was also held in that case that it is only the continuance of the discriminatory act or acts, not the continuance of the consequences of a discriminatory act, that will be treated as extending over a period.

20. The Court of Appeal in ***Hendricks v Metropolitan Police Commissioner [2003] IRLR 96*** stated that terms mentioned in the above and other authorities are examples of when an act extends over a period, and

> "should not be treated as a complete and constricting statement of the 'indicia' of such an act. In cases involving numerous allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what he has to prove, in order to establish a continuing act, is that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period'."

21. The assessment of what is just and equitable, if that stage is reached, involves a broad enquiry with particular emphasis on the relative hardships that would be suffered by the parties according to whether the amendment is allowed or refused.

22. The onus is on the claimant to persuade the tribunal that it is just and equitable to extend time, and the exercise of discretion is the exception rather than the rule (***Robertson v Bexley Community Centre [2003] IRLR 434***, confirmed in ***Department of Constitutional Affairs v Jones [2008] IRLR 128)***

23. In ***Chief Constable of Lincolnshire Police v Caston [2009] EWCA Civ 1298, [2010] IRLR 327***, the Court of Appeal stated the following

> "There is no principle of law which dictates how generously or sparingly the 'power to enlarge time is to be exercised' (para 31). Whether a claimant succeeds in persuading a tribunal to grant an extension in any particular case 'is not a question of either policy or law; it is a question of fact and judgment, to be answered case by case by the tribunal of first instance which is empowered to answer it'."

24. In ***Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** the EAT stated that a claimant seeking to rely on the extension required to give an answer to two questions:

> "The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was."

25. There is a further matter to consider, which is the effect of early conciliation on assessing when a claim was commenced. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014. They provide in effect that within the period of three months from the act complained of, or the end of the period referred to in section 123 above if relevant, EC must start, doing so then extends the period of time bar during EC itself, and time is then extended by a further month from the date of the certificate issued at the conclusion of conciliation within which the presentation of the Claim Form to the Tribunal must take place.

Discussion

26. I gave my decision orally after having heard submissions. Firstly it appeared to me that the parts of the particulars that the respondent disputed ought to be treated as an amendment, as they sought to introduce new facts. They were not the correction of an earlier pleading, or providing detail of a fact already pled, but the provision of new matters.

27. It appeared to me that it was appropriate to treat those particulars as an application to amend. I then considered that application on the basis of the factors identified in ***Selkent,*** and concluded as follows:

(i) Nature of the amendment

The Claim Form stated in terms that a claim of disability discrimination was being pursued. The claim made mention specifically of harassment, but within the context of disability discrimination. The facts relied on were not as clearly expressed as they might have been. The claimant provided what was in reality more of a statement than pleading. Since then the claimant has provided further particulars which in some respects provides the different label in particular of discrimination arising out of disability, and as stated that part so far as re-labelling only is concerned is not opposed. Against that background the amendment application does in my judgment have a reasonably strong causative link to the original pleading. It will not involve an entirely new line of enquiry, but one linked reasonably closely with that set out within the Claim Form. The facts involved are also ones that have at least the potential to be relevant to the claim of unfair dismissal, and therefore cover evidence which is potentially to be led in any event. Essentially the amendment fell into the first of the three categories referred to above in paragraph 12. These were factors I considered favoured the claimant.

(ii) The applicability of time-limits

This is a complex issue, in that it may depend on firstly when an act took place, secondly whether it is part of conduct extending over a period and if so when that ended, and thirdly if the claim is otherwise out of time whether it is just and equitable to allow it to proceed. I do not wish to say a great deal on these issues as they remain live for determination at an evidential hearing, and for detailed submission thereafter. It did however appear to me that there was a material possibility of the claimant arguing, in respect of the section 15 claim that there was conduct extending over a period which lasted at least up to dismissal, and if so that would bring his claim within time. If he was not successful in that, the question was whether it was just and equitable to extend time. The claims under sections 20/21 and 26 were both commenced (with early conciliation) outwith the three month period commencing with the last date that the claimant contended for as relevant under each claim, such that the issue

was solely of whether it was just and equitable to extend the time period to allow the claim to be determined. If the claimant was artificially seeking to construct a series of acts to bring the section 15 claim within the primary period as the respondent contended, and which he disputed, then that would become apparent during the evidence and would entitle the Tribunal to hold that there was not such conduct extending over a period. Separately, it appeared to me from what was before me that the claimant had a reasonable argument as to it being just and equitable to allow the claim to proceed if late, although there are different periods of time and potentially different considerations for each of the three sets of discrimination claims, one for discrimination arising out of disability, the second in relation to reasonable adjustments, and the third in relation to harassment. The claim as to it being just and equitable may be considered in the context that he was now accepted by the respondent to be a disabled person, and had been at material times. It may also be relevant that the claimant had had difficulties with legal advice, and was not legally advised when preparing the Claim Form or thereafter, and that at the time he was preparing the Claim Form was suffering, he said, from an exacerbation of his mental ill health issues. No specific issue of hardship on the respondent was raised before me, although the loss of a timebar point is one of itself, and the passage of time has the risk of an adverse effect on the evidence that can be led. At this stage it appeared to me that the balance of all these factors tended to favour the claimant.

(iii) The timing and manner of the application

The respondent very properly referred to the earlier history of the Claim, the earlier Preliminary Hearings, and the opportunities there had been to address matters earlier. The respondent argued that this factor favoured the refusal of the application. There is force in that. I consider however that the fact that the claimant is disabled, and acting for himself, outweighs that. He explained that when framing his Claim Form he was substantially unwell, having mental health issues including having panic attacks. He has over a period researched the issues that arise, and appreciated that what he considered harassment is more properly described as discrimination arising out of disability, at least in some respects. His

explanations for not including these issues in the Claim Form, and the delay in making the application until this stage, I accepted. Discrimination law is not an easy area for a layman to navigate around, and that is made more difficult still when there is a disability such as that the claimant has experienced. The respondent had challenged his status as a disabled person and a Preliminary Hearing was to have been held to address that, with a Final Hearing still some way off. Whilst the application was made at a fairly late stage of the process, it was not so late as to be a substantial factor against allowing the application, in my judgment.

28. Taking all of these issues in the round, it appeared to me that the balance favoured granting the application. I do have a degree of sympathy for the respondent in a claim which has developed from its initial Claim Form, but it remains essentially within the four corners of where it started, as claims for unfair dismissal and disability discrimination, and it is pursued by a disabled person who is acting for himself.

29. I therefore granted the application. The Issues of case management consequent on that are addressed in a separate Note.

Employment Judge: **Alexander Kemp**
Date of Judgment: **01 September 2020**
Date sent to parties: **01 September 2020**