EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4110538/2019

Heard in Glasgow on the 10 September 2021

10 **Employment Judge L Wiseman**

Mr E McClung	**Claimant** **In Person**
Doosan Babcock Ltd	**First Respondent** **Represented by:** **Ms L Miller** **Solicitor**
NRL Ltd	**Second Respondent** **Represented by:** **Mr Livingston** **Director**
Mr Donald Ross	**Third Respondent** **Represented by:** **Ms L Finlayson** **Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided:-

(i) the claim presented to the Employment Tribunal on the 2 September 2019 does not include a complaint under section 104 Employment Rights Act;

(ii) the claimant's application to amend the claim to include a complaint under section 104 Employment Rights Act is refused and

(iii) the respondents' application to have the claim (or any part of it) struck out for having no reasonable prospect of success, or to have a deposit ordered is held over to a later date to give the claimant time to prepare.

REASONS

This preliminary hearing was arranged to determine the following issues:

(i) does the claim presented on the 2 September 2019 include a complaint under section 104 Employment Rights Act;

(ii) if the claim does not include a complaint under section 104 Employment Rights Act, should the claimant's email of the 25 February 2020 be treated as an application to amend the claim to include such a complaint;

(iii) if the email of the 25 February 2020 is to be treated as an application to amend the claim, should that application be accepted or rejected;

(iv) whether the claim, or any part of it, should be struck out as having no reasonable prospect of success and

(v) if not struck out, should a deposit order be made in respect of the claim or any part of it.

Background

1. The claimant presented a claim to the Employment Tribunal on the 2 September 2019. The claimant indicated in box 8 of the claim form that his claim was for unfair dismissal and discrimination because of religion or belief. The claimant, at box 9, set out the details of his claim which made reference to alleged direct discrimination and harassment.

2. The first respondent entered a response to the claim in which it explained the first respondent operates in the area of supply of skilled labour and supervision within the power generation business, petrochemical plants and refineries. The first respondent asserted the claimant was engaged as a self

employed contractor via a limited company (McClung Strategy and Projects Ltd) which was paid via an employment agency, NRL Ltd (the second respondent). The first respondent argued the claimant, as a self employed contractor, and as a person who had only worked between the 21 January and 8 June 2019, could not proceed with a claim of unfair dismissal. The first respondent denied the allegations of discrimination and requested further specification of that complaint.

3. The second respondent entered a response to the claim in which it explained the claimant was not an employee of the second respondent, and that he had been engaged via his company, on a contract for services to work on a short term contract for their client, the first respondent. The contract ended and the claimant's services were no longer required.

4. The third respondent entered a response to the claim denying the allegations of discrimination.

5. The case was considered by an Employment Judge at Initial Consideration, following which the Employment Judge directed that a letter be sent directing the claimant to set out (i) the date, nature and perpetrator of each and every allegation of discrimination or harassment; (ii) the basis on which he alleged he is entitled to claim unfair dismissal given that he has less than 2 years service and (iii) whether he accepts that he was not employed by NRL Ltd and the basis upon which he alleges they are liable for breaches of the Equality Act 2010. The letter concluded by inviting the unrepresented parties to seek legal advice.

6. The claimant responded to that direction by letter of the 18 December 2019 and attached a table with "each event listed for ease of understanding".

7. A case management preliminary hearing took place on the 10 January 2020. The Note issued after the hearing clarified the claimant relied on section 10 Equality Act (religion or belief). The claimant relied on both religion (being a protestant Christian) and his philosophical belief in support for Rangers Football Club. The claimant's primary case was against Doosan Babcock as

a principal under section 41 Equality Act (contract workers); alternatively he argued that Doosan Babcock was his employer for the purposes of section 39 of that Act. Either way, he argued he was employed by the recruitment agency NRL Ltd for the purposes of section 39 of the act.

8. The Note also confirmed the claimant accepted he did not have 2 years' service necessary to proceed with an unfair dismissal claim, and did not allege he fell within any of the listed exceptions to that requirement as set out in section 108(3) Employment Rights Act. The Employment Judge decided a preliminary hearing should be arranged to determine whether any or all claims should be struck out under section 37 of the ET Rules of Procedure 2013 as having no reasonable prospect of success, or whether a deposit order should be made under rule 39 of the ET Rules of Procedure on the basis that some or all of the allegations or arguments in the claim have little reasonable prospect of success.

9. The claimant sent an email to the tribunal on the 25 February 2020 in the following terms: "*For clarity of case to be passed to another office/judge I confirm the following claims that are on the ET1 and further and better particulars will be taken forward: section 104(5) of ERA as Principal; section 39 (1 and 3) of Equality Act; section 41 (1a,b,c,d,2,3,5,6,7 but not 4) of Equality Act. I trust this lets all know the case before the tribunal".*

10. A second telephone preliminary hearing took place on the 29 June 2020 at which I confirmed an in person preliminary hearing would be arranged to determine the points identified at the previous preliminary hearing.

11. The claimant, by email of the 29 June, confirmed his claim included a section 104 Employment Rights Act.

12. There has been delay in progressing this matter to an in-person preliminary hearing because of Covid restrictions and the fact the claimant appealed the President's decision not to grant his application to have the case transferred from Glasgow.

The preliminary hearing

Point 1 – does the claim presented on the 2 September 2019 include a complaint under section 104 Employment Rights Act?

5 13. The claimant argued that he was an unrepresented layperson and that he had not, in his claim form, referred to any section of either the Employment Rights Act or the Equality Act. In his experience the bones of the claim were set out in the claim form, and preliminary hearings were used to flesh out the details. This is what he expected to happen. He had ticked the box to indicate
10 a claim of unfair dismissal was being brought and he had attached his email of the 3 June 2019 to Drew Halley entitled "Complaint and Facts". The email set out (alleged) details of an interaction between the claimant and Donald Ross where Mr Ross challenged the claimant about the length of the breaks he had been taking and was alleged to have said "*are you calling me a*
15 *fucking liar? I will bag you!..."* The claimant went on to say he had been "bagged" as he had been given his notice on the Friday after this event. The claimant submitted this fleshed out his unfair dismissal complaint. He had been told by the previous Employment Judge to seek legal advice and this is what he had done. The claimant suggested the Employment Judge had erred
20 in making reference to section 108 Employment Rights Act when he should have referred to section 104. The claimant believed he had been given a chance to include it and it would now be perverse to deny it.

14. Ms Miller, for the first respondent, submitted the claim as presented did not
25 include a claim that the claimant had been dismissed for asserting a statutory right. There was reference to alleged direct discrimination and harassment, but no reference to a statutory right being asserted. Ms Miller referred to the Note issued following the first preliminary hearing, and to paragraph 12(a) of that Note where the Employment Judge briefly set out his reasons for
30 ordering a preliminary hearing to determine strike out of the claim or ordering a deposit order. It was said "*the claimant accepts that he lacks 2 years' continuous service, does not argue that he falls within any of the exceptions in section 108(3) ERA 1996, but argues that he is nevertheless entitled to claim unfair dismissal on a basis which has no clear legal foundation."*

15. Mr Livingston for the second respondent reiterated his position that the claimant was not an employee of the second respondent, had only worked for a period of 5 months, and could not therefore proceed with a claim of unfair dismissal.

16. Ms Finlayson, for the third respondent, submitted a complaint of unfair dismissal was not a valid complaint against an individual respondent who was not his employer.

Point 2 – if the claim does not include a complaint under section 104 Employment Rights act, should the claimant's email of the 25 February 2020 be treated as an application to amend the claim to include such a complaint?

17. The claimant referred to his email of the 25 February and submitted it had made clear the claim was section 104 Employment Rights Act and none of the respondents had questioned at the time whether this was an application to amend the claim. The claimant further argued that he did not need to amend the claim because the complaint was already in it (as confirmed by his email of the 29 June). In short, the claimant argued the section 104 ERA claim was in the claim form, but if I disagreed, then the email of the 25 February should be taken as an application to amend the claim to include it.

18. Ms Miller submitted the email of the 25 February was not an application to amend the claim to introduce a complaint under section 104 ERA. The email referred to "*section 104(5) of ERA, as Principal Is as per 63a".* Ms Miller submitted section 104(5) ERA was a reference to an "employer" being defined to include a principal as defined by section 63 ERA. This was something which had been discussed at length during the first preliminary hearing (that is, whether the claimant regarded the first and/or second respondent as his employer or as principals).

19. Ms Miller submitted the email had gone on to refer to sections 39 and 41 Equality Act, which deal with the liability of an employer and principal

respectively in the context of discrimination. Ms Miller had not read or understood the email to be an application to amend his claim.

20. Mr Livingston and Ms Finlayson adopted what had been said by Ms Miller.

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21. Mr McClung submitted the respondents had not been right to "assume". He had had legal advice by the time of writing this email.

Point 3 – if the email of the 25 February is to be treated as an application to

10 **amend the claim, should that application be allowed or refused?**

22. The claimant submitted the application to amend should be allowed: it had been in for months before the respondent challenged it and it would not now be fair to deny it. The claimant considered he had provided more fleshing out

15 of the claim in his email of the 29 June. The claimant confirmed that when asked by Employment Judge Whitcombe regarding the basis upon which he said he was able to proceed with a claim of unfair dismissal, he had refused to answer and this was the reason he was given time to seek legal advice.

20 23. Ms Miller referred to the cases of **Cocking v Sandhurst (Stationers) Ltd 1974 ICR 650; Selkent Bus Company Ltd v Moore 1996 ICR 836; Ali v Office of National Statistics 2005 IRLR 201** and **Chandhok v Tirkey 2015 ICR 527**. Ms Miller noted that in the ***Chandhok*** case the EAT said "*the claim as set out in the ET1 is not something just to set the ball rolling as an initial*

25 *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. A respondent is not required to answer a written statement, nor a*

30 *document but the claims made (meaning under the Rules of Procedure 2013, the claim as* set *out in the ET1). It followed that* if *a claimant wished to argue a claim which was not set out in the ET1 they should make an application to amend. In principle, it is not permissible to expand the scope of a claim or response through for example further particulars or party to party*

correspondence, a list of issues or witness statements, although it is accepted the tribunal has a degree of discretion."

24. Ms Miller referred to the case law and submitted the tribunal is required to carry out a careful balancing act of all the relevant factors having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment requested. In the ***Selkent*** case, it was said these factors would include:
    - the nature of the amendment;
    - applicability of any time limits and
    - the timing and manner of the application.

25. Ms Miller submitted the nature of the amendment was an attempt to introduce a completely new claim: it was not simply the addition of factual details to an existing claim or the substitution of labels for facts already pled. If the application to amend was accepted there would need to be further details provided by the claimant regarding the nature of the statutory right alleged to have been breached by the respondent, and the factual basis for that allegation. This would cause further delay in an already much delayed case.

26. There would clearly be hardship to all respondents if the application was permitted and further delay in this case.

27. The issue of time limits would also require to be considered and the 25 February 2020 is far outside the timescale for lodging a complaint in this case, where dismissal was said to have occurred on the 7 June 2019. The test to be applied by the tribunal is that of reasonable practicability and whilst Ms Miller acknowledged the claimant had not had the benefit of legal advice until after the 10 January and may not have been aware of automatically unfair dismissal claims, he was specifically asked by EJ Whitcombe on the 10 January if he sought to bring himself within any of the exceptions in section 108(3) ERA, and said no at that time. The claimant did not submit his email of the 25 February for around a further 6 week period, raising the question whether, once he had had the chance to take legal advice, he acted within a

reasonable period to notify his claim. Ms Miller submitted 6 weeks was not a reasonable timeframe and was excessive.

28. Ms Miller submitted the application had been made late in the day, despite having previously confirmed there was no such claim. The application was devoid of any detail of the new claim and further details would be required to enable the respondents to understand the claim and respond to it, thus leading to further delay in this case.

29. Ms Miller submitted that for all of these reasons any application to amend the claim should not be accepted or permitted by the tribunal.

30. The second and third respondents adopted Ms Miller's submission.

Point 4 – whether the claim, or any part of it, should be struck out as having no reasonable prospect of success

31. Mr McClung noted that he was unsure of the test for whether there is a reasonable prospect of success: he had simply followed the Employment Judge's guidance at all times. Mr McClung reiterated he was an unrepresented claimant and had taken legal advice and then clarified the basis of his claim.

32. Mr McClung, having heard the submissions of the respondent, noted he was surprised the issue of employee status had been raised because he had not appreciated it was a matter for today's hearing. He also noted he was not prepared to deal with the issue of strike out of the discrimination claim because he had not understood it was an issue for today.

33. Ms Miller submitted the issues in respect of the unfair dismissal claim were (i) whether the claimant had two years' service to bring the claim or whether he fell within one of the exceptions to the requirement to have two years' service under section 108(3) ERA; (ii) whether the claimant was employed by the first respondent or whether he was a self employed contractor and

therefore whether he was entitled to bring a claim for unfair dismissal against the first respondent and (iii) whether the claimant was ever employed by the second respondent.

5 34. The claimant accepts he had under two years' service with any of the parties including the first respondent.

35. The first respondent's position was that they did not ever employ the claimant. The claimant was engaged as a third party contractor via NRL Ltd, 10 an agency. The first respondent had no contract with the claimant direct and any contract they did have was with NRL Ltd. Ms Miller directed the tribunal to pages 46, 47, 48, 49, 50, 51, 52, 53, 54, 55 and 56 of the bundle.

36. Ms Miller submitted the claimant did not have qualifying service to bring a 15 claim of unfair dismissal. None of the exceptions in section 108(3) ERA applied to the claimant and he did not appear to argue that they applied to him. Further the claimant was not employed by the first respondent: he had no contract of employment with the first respondent, but rather was a self employed contractor. The claimant was unable to bring a claim for unfair 20 dismissal against the first respondent and accordingly the claim should be struck out as having no reasonable prospect of success.

37. Ms Miller also invited the tribunal to strike out the discrimination claim. Ms Miller referred to the claim form and questioned whether there was 25 sufficient reference to religion or philosophical belief in the pleadings, and consequently whether there was sufficient material upon which an Employment Tribunal could conclude that the allegations of direct discrimination and/or harassment were because of (or related to) a protected characteristic. Could support for Rangers Football Club ever amount to a 30 philosophical belief and taking the claimant's case at its highest, what was the link between the alleged treatment and the alleged discrimination?

38. The claimant was ordered by the tribunal to expand upon his pleadings and to identify his claims of discrimination. The claimant did this in his letter of the 35 18 December and in the attached table (pages 58 – 64). At the preliminary

hearing which took place on the 10 June there was extensive discussion about this and when asked by the Employment Judge, the claimant confirmed on several occasions that the table at pages 62 – 64 represented all of the matters about which he wished to complain.

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39. The pleadings (ET1 and the table referred to) make no reference at all to religion, nor to Protestant or Christian. There is only one specific reference to the claimed philosophical belief and that was a comment that Ian Chisholm was "unusually ok for a Rangers fan". This was a comment made to and not
10 about the claimant. It was submitted there was sparse reference to the claimed protected characteristic or any link between the treatment described in the table and the protected characteristic itself.

40. Ms Miller submitted that when considering whether to strike out a claim a
15 tribunal must consider whether any of the grounds set out in rule 37(1)(a) to (e) have been established and having identified any established grounds, the tribunal must then decide whether to exercise its discretion to strike out. Ms Miller referred to the points set out above and invited the tribunal to strike out the unfair dismissal claim.

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41. Ms Miller referred to the cases of **Ezsias v North Glamorgan NHS Trust 2007 EWCA Civ 330** and ***Anyanwu v South Bank Students' Union 2001 IRLR 305*** where it had been held that discrimination claims should not be struck out except in the plainest and most obvious cases. The EAT in
25 ***Mechkarov v City Bank NA 2016 ICR 1121*** summarised the approach to be taken by a tribunal when faced with an application to strike out a discrimination claim. It was said that only in the clearest case should a discrimination claim be struck out; where there are core issues of fact that turn to any extent on oral evidence they should not be decided without
30 hearing oral evidence; the claimant's case must be taken at its highest and the tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputes of fact.

42. Ms Miller submitted that for the reasons set out above the discrimination
35 claim had no reasonable prospect of success and should be struck out.

43. Mr Livingston, for the second respondent, submitted the claimant had at no time been employed by the first or second respondent. He had been engaged via a contract for services via his own company and the second respondent. He was not an employee and had no right to claim unfair dismissal.

44. Mr Livingston adopted the submissions of the first respondent regarding striking out the discrimination claim. He noted there were no allegations of discrimination made by the claimant against the second respondent.

45. Ms Finlayson, for the third respondent, invited the tribunal to strike out the claim of unfair dismissal against the third respondent because it was not competent. Ms Finlayson adopted Ms Miller's submissions regarding strike out of the discrimination claim, and added that even if the claimant was successful in his position that support for Rangers Football Club was a philosophical belief, that still did not get him home with his claim. The claimant asserted the third respondent subjected him to a detriment (not offering sub contract work) but the claimant had not explained the causal link between the treatment and the protected characteristic, particularly when the issue of offering sub contract work was not a decision for the third respondent.

Point 5 – if not struck out, should a deposit order be made in respect of the claim or any part of it

46. The claimant had prepared an Income and Expenditure statement which demonstrated he did not have funds to pay a deposit order.

47. Ms Miller invited the tribunal to make a deposit order should the claims not be struck out. The test for whether a deposit order should be made was not as rigorous as the no reasonable prospects of success test (***Jansen Van Rensburg v Royal Borough of Kingston upon Thames EAT/0096/07)***. Ms Miller referred to her earlier submissions and relied on the same points to justify why a deposit order should be made.

48. Mr Livingston and Ms Finlayson adopted the submissions of the first respondent.

Decision and Discussion

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49. I firstly considered the question of whether the claim form presented on the 2 September 2019 included a complaint under section 104 ERA. There was no dispute regarding the fact the claimant had, at box 8 of the claim form, ticked the box to indicate his claim was one of unfair dismissal and discrimination because of religion or belief. The claimant set out details of his claim: there was one reference to unfair dismissal and a reference to two incidents involving Donald Ross, in the following terms:

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"*7/6 I left Doosan. DD (direct discrimination). Unfair Dismissal."*

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"22/5 DR said take lunch 1 til 1.30 not fucking 45 minutes. I said I do not taken break in morning. I had done this for previous 4 months no issues. Harassment and DD.

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29/5 11.15am DR called me over to car and torrent of abuse "ripping the piss … are you calling me a fucking liar … I will bag you … don't you call me a fucking liar" all shouted at the top of his voice. I merely defended his wrong accusations. See full email breakdown sent 3/8. DD and Harassment."

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50. I was satisfied the claim did not include a complaint of automatically unfair dismissal for asserting a statutory right in terms of section 104 ERA. I say that because there was no hint of any such complaint in the claim form. There was nothing to suggest the claimant had asserted a statutory right or that he believed he had been dismissed for doing so. I acknowledge the email dated 3 June 2019 which was attached to the claim form did make reference to Mr Ross saying he would "bag" the claimant and that that subsequently

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happened. However, this incident was described in the claim form as direct discrimination and/or harassment and there was nothing in the claim form or in the email to point to this being a section 104 ERA claim.

51. The claim form and responses were considered by Employment Judge Whitcombe at Initial Consideration, and he directed that a letter be sent to the claimant directing him to set out in writing the date, nature and perpetrator of each and every allegation of discrimination or harassment; the basis upon which he alleges he is entitled to claim unfair dismissal given that he has less than 2 years' service and whether he accepts that he was not employed by NRL Ltd and the basis upon which he alleges that they are liable for breaches of the Equality Act. This letter was sent to the claimant because he did not have 2 years' qualifying service to bring a claim of unfair dismissal. The claimant was asked to explain the basis upon which he alleged he was entitled to proceed with an unfair dismissal claim in order to establish precisely whether the claimant sought to argue a case of automatically unfair dismissal for which he did not require 2 years' qualifying service.

52. The claimant did not reply to that letter to say either that he was bringing a claim under section 104 ERA, or that such claim was set out in the claim form. In fact the claimant, in his response (letter of the 18 December 2019) responded to question 2 as follows:

> "*On question 2, I have the right to claim unfair dismissal with less than 2 years' service when it is discrimination. The Equality Act 2010 has the clear purpose to deny an employer who treated an employee less favourably than others on grounds of their perceived religion or belief and lack of holding the recruiting manager's religion/belief from using a sham, "fair" reason claim when in fact they have unfairly dismissed the employee within the first 2 years of a contract".*

53. I considered my conclusion that the claim form did not include a section 104 ERA complaint was supported by the above points which demonstrate the claimant, when given the opportunity to explain he was claiming automatically

unfair dismissal under section 104 ERA, did not do so but instead made reference to his dismissal being unfair because it was discriminatory.

54. I next considered whether the claimant's email of the 25 February 2019 should be treated as an application to amend the claim to include a section 104 ERA complaint. The email was in the following terms:

> "*For clarity of case to be passed to another office/judge I confirm the following claims that are on the ET1 and further and better particulars will be taken forward:*
> *Section 104(5) of ERA, as Principal Is as per 63a …"*

55. I did not consider this email was an application to amend the claim form to include a complaint brought under section 104 ERA. The email does not say it is an application to amend the claim form; it does not provide details of the statutory right said to have been asserted and it does not provide details of the causal link said to demonstrate that any assertion of the statutory right led to dismissal. I also had regard to the fact there was discussion at the preliminary hearing on the 10 January 2020 regarding the issue of whether claims were being pursued against the first and second respondent in their capacity as employer or principal. I noted the claimant referred to section 104(5) ERA and made reference to "principal". No further clarification of why this had been done was provided by the claimant.

56. I decided, having had regard to the above points, that the email of the 25 February was not an application to amend the claim form.

57. I however recognised that whilst the email may not have been an application to amend the claim form, it was clear that the claimant wished to make such an application. His position was that either the claim form included a section 104 ERA complaint, or that there should be an amendment to allow this claim to be included. I therefore considered it appropriate to proceed to determine whether an application to amend the claim form to include a section 104 ERA complaint should be allowed.

58. The tribunal has a broad discretion to allow amendments, and such discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly. I was referred by Ms Miller to the case authorities which have provided tribunals with guidance regarding the approach to be adopted to applications for leave to amend. In the case of ***Cocking v Sandhurst (Stationers) Ltd*** (above) it was said that the key principle was that in exercising their discretion, tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved by the EAT in ***Selkent Bus Company Ltd v Moore*** (above) and by the Court of Appeal in ***Ali v Office of National Statistics*** (above).

59. An employment tribunal must, when determining whether to grant an application to amend, carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. In the ***Selkent*** case it was said that relevant factors to consider would be:-

- the nature of the amendment – whether it is an application to add factual details to existing allegations, or relabel facts already pled or introduce entirely a new cause of action;
- the applicability of time limits – if a new claim is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim is out of time and if so whether the time limit should be extended;
- the timing and manner of the application – it is relevant to consider why the application was not made earlier and why it is now being made.

60. The first point to which I had regard was the fact that when considering an application to amend, the tribunal should have before it the terms of the proposed amendment. The information which I have before me is that the claimant made reference to section 104(5) ERA in his email of the

25 February. The claimant was informed, at the preliminary hearing on the 29 June, that if he wished to introduce a section 104 ERA complaint, he could seek permission to amend his claim. The claimant responded to confirm he did not consider an amendment was necessary because of his email of the 25 February. The claimant subsequently sent a further email on the 29 June in which he confirmed he was making a claim under section 104(1)(b) ERA as his rights to a peaceful work break were infringed by Donald Ross.

61. I next had regard to the nature of the amendment. I have set out above the fact the claimant did, in the claim form, refer to the alleged conversation with Donald Ross on the 29 May where Mr Ross was alleged to have said "..are you calling me a fucking liar …ripping the piss …I will bag you … don't you call me a fucking liar .." The claimant described this as direct discrimination and harassment. The claimant did also attach a copy of his email of the 3 June where he set out details of this conversation.

62. I have also set out above my conclusion that the claim form did not include a complaint under section 104 ERA. I considered there was no hint of any such claim in the claim form. The thrust of the claim form was that there had been discrimination and harassment. I, in the circumstances, could not accept the application to amend was a relabelling of facts already pled. I say that because there was nothing in the claim form or the claimant's email to suggest the issue was one of asserting a statutory right and being subjected to a detriment because of having done so. This was not a situation where the claimant was being denied the right to a break: it was a situation where there was alleged to have been a discussion about when the claimant took his breaks and the length of those breaks. I concluded, in the circumstances, that the application to amend sought to introduce an entirely new claim.

63. I next had regard to the applicability of time limits. The claimant's position was that his contract ended on the 7 June 2019. The claimant presented a claim to the Tribunal on the 2 September 2019. The question of whether a new cause of action contained in an application to amend would be time barred falls to be determined by reference to the date when the application to

amend is made. I decided, above, that the claimant's email of the 25 February 2020 was not an application to amend. I further decided it would be appropriate to treat the claimant's email of the 29 June 2020 as the application to amend.

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64. The application to amend (email of the 29 June 2020) was made over a year after the termination of the claimant's contract, and some 8/9 months after the time limit for bringing such a claim. I must accordingly consider whether time falls to be extended under the appropriate test, which is that of reasonable practicability. The onus of proving that presentation of a section 104 ERA claim was not reasonably practicable rests on the claimant. This means it is for him to show precisely why he did not present his complaint.

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65. The claimant made a number of points in connection with this matter: (a) he is an unrepresented party; (b) the complaint was in his claim form; (c) the purpose of case management discussions is to flesh out claims; (d) the Employment Judge should have identified this and (e) he was told to take legal advice and did so.

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66. The claimant is indeed an unrepresented party, but he is someone who has had experience of taking a case to an employment tribunal. I accept the claimant, as an unrepresented party, may not have included reference to the statutory basis of the complaints being brought, but he was well able to provide details of the complaints and explain why he believed the dismissal to have been unfair. The claimant did not however do so.

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67. The claimant argued the original claim included the section 104 ERA complaint, but I have dealt with this point above and do not repeat it here. Suffice to say the claimant had every opportunity to include details of a section 104 ERA complaint in the claim form but he did not do so.

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68. The claimant also argued the purpose of the case management discussion is to flesh out the claims, and that the Employment Judge should have identified the section 104 ERA complaint at the first preliminary hearing. The claimant is correct in stating the case management preliminary hearing may be used

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as an opportunity to flesh out the complaints which are being made and to, for example, confirm the statutory basis of the claims and whether any further information or specification is required. This however is different to an Employment Judge suggesting to a party what their claim may be (which is what the claimant appeared to suggest ought to have happened).. There was nothing in the claim form to hint at a section 104 ERA claim and no criticism can be made of the Employment Judge or the respondents for failing to identify this. The claim is being made by the claimant and it is for him to set out and identify the complaints being made.

69. The claimant was given ample opportunity to explain why he believed he could proceed with an unfair dismissal claim when he did not have 2 years' qualifying service. The claimant provided no explanation and it was for precisely this reason that Employment Judge Whitcombe directed that a preliminary hearing be arranged to determine whether the unfair dismissal claim should be struck out.

70. Employment Judge Whitcombe did encourage the unrepresented parties to seek legal advice. The claimant asserts he did so, and it was after receipt of that advice that he sent the email of the 25 February. I make two points regarding that position: firstly, it supports the earlier conclusion that there was no section 104 ERA complaint prior to the claimant taking legal advice and secondly, it raises the question why the claimant did not take advice regarding the making of an application to amend the claim.

71. I, having addressed the points raised by the claimant, concluded the section 104 ERA complaint could have been included in the claim form. If the claimant was ignorant of the right to bring a complaint of automatically unfair dismissal then it is reasonable to expect he could have investigated his rights or sought advice, within the time limit and claimed in time. I decided it was reasonably practicable for the claim to have been made in time. The fact the new claim (section 104 ERA) is out of time is not fatal to the amendment application: it is but one of the factors to be considered.

72. I next considered the timing and manner of the application, and in particular why the application was not made earlier. I had regard to the fact the Employment Judge who carried out the Initial Consideration of the claim, asked the claimant to explain why he believed he could proceed with a claim of unfair dismissal when he did not have 2 years' qualifying service. The claimant's response to this (18 December) was to suggest the dismissal was discriminatory. The claimant's focus in the claim form, and at this time, was very much on the alleged discrimination and harassment. The claimant's correspondence at about this time emphasised his desire for a preliminary hearing to determine whether support for Rangers Football Club was a philosophical belief.

73. The terms of the claimant's email of the 25 February are set out above and referred to here. The claimant's position was that this email made it clear what he was claiming. I, for the reasons set out above, could not accept that.

74. The claimant sent the email of the 29 June because I had explained to him (at the preliminary hearing that day) that if he wished to introduce a section 104 ERA complaint, he could seek permission to amend his claim. The claimant's response to this had been to confirm he considered an application to amend the claim was a duplication of work for him because he had already "told" the tribunal of this claim in his email of the 25 February.

75. The email of the 29 June was the first time the claimant made reference to a claim under section 104(1) ERA and the first time he suggested the statutory right which had been asserted was the "right to a peaceful break". I do not know why the claimant had not previously explained the nature of the alleged statutory right which had been asserted. This must have been information known to him.

76. The claimant took issue with no-one having told him his email of the 25 February was not an application to amend the claim. I could not accept this because the claimant's position clearly was that there was no need to make an application to amend because the complaint was in the claim form.

The email of the 25 February was not described as an application to amend the claim.

77. I concluded that it was not until the 29 June email from the claimant that it became clear that he wished to argue he had asserted a statutory right (right to a peaceful break) and to proceed with a section 104 ERA claim. I considered all of that information could have been clear to the tribunal and the respondent at a much earlier stage.

78. I next had regard to the relative hardship caused to the parties by the granting or refusing of the application to amend the claim. The hardship to the claimant of refusing the application to amend is that he will not be able to pursue the section 104 ERA complaint. I balanced this with the fact the claimant has brought other complaints which may proceed to be heard by a tribunal (at either a preliminary or substantive hearing).

79. The hardship to the first and second respondent is that they will require to seek further information, interview additional witnesses and amend their response to the tribunal. In addition to this, it is likely there would need to be another preliminary hearing to determine the employment status of the claimant. The right to proceed with a complaint under section 104 ERA applies to an "employee". The first and second respondents deny the claimant was an employee, and assert he was an independent contractor. The respondent referred me to a number of documents which appear to support their position. The claimant's position on this was unclear; and, he also made reference to section 104(5) ERA. The issue of the employment status of a person is an issue for a tribunal to determine.

80. I concluded the balance of hardship lay with the respondents because allowing the amendment would mean not only having to defend the claim, but also having the time and expense of another preliminary hearing to determine the issue of employment status.

81. I next stepped back to consider overall the interests of justice and the above factors. I concluded above that the application to amend sought to introduce

a new claim, which was time barred. I further concluded the balance of hardship, if I allow the amendment, lay with the respondents. I had regard to the fact the claimant is an unrepresented party, but I balanced this with the fact he is a litigant with some experience of making and pursuing a claim to 5 the Employment Tribunal. I decided, having balanced these factors, to refuse the application to amend to introduce a section 104 ERA complaint.

Point 4 – whether the claim, or any part of it, should be struck out as having no reasonable prospect of success

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82. I have decided (above) not to allow the claimant's application to amend the claim to introduce a section 104 ERA complaint. I accordingly did not consider it necessary to determine the respondents' application to have the unfair dismissal claim struck out. I should make clear that if I had not decided 15 to refuse the application to amend the claim, I would have (a) continued the application of the first and second respondent to have the unfair dismissal claim struck out pending a determination of the employment status of the claimant and (b) struck out the unfair dismissal claim against the third respondent because the third respondent was not the employer of the 20 claimant.

83. The claimant had not understood from the above wording that consideration could be given to striking out any part of the claim. The claimant had focussed on the striking out of the unfair dismissal claim. I acknowledged the 25 focus, from the time the preliminary hearing was ordered, was on the unfair dismissal claim and whether it should be struck out. I understood why the claimant had not come prepared to address the tribunal on why the discrimination claim should not be struck out. I decided, in all fairness to the claimant, that he would require time to prepare to address the tribunal on this 30 point. I accordingly decided to hold over consideration of whether the complaints of discrimination should be struck out and to reserve to the respondents the right to seek strike out of the discrimination claim at a later date.

Point 5 – whether a deposit order should be made in respect of the claim or any part of it

5 84. I also decided it would be appropriate to hold over consideration of this point because the claimant had not been prepared for the respondents' arguments that this should apply to the discrimination claims.

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Employment Judge: Lucy Wiseman
Date of Judgment: 05 October 2021
Entered in register: 05 October 2021
15 and copied to parties