EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113770/2021

Held via Cloud Video Platform (CVP) on 10 June 2022

Employment Judge A Jones

Mr P Chakraborty	**Claimant** **In person**
Professor K Hion (1) **University of Dundee(2)**	**Respondent** **Represented by:** **Ms L Rankin,** **solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application to amend his claim to include a claim of unfair dismissal against the second respondent is refused.

REASONS

Introduction

1. The claimant lodged a claim of race discrimination on 21 December 2021 against both respondents. The claimant also ticked the box 'unfair dismissal' in his claim form but gave no detail of such a claim. At that time the claimant was still in employment of the second respondent. The claimant resigned on 30 December 2021. A preliminary hearing for the purposes of case management took place on 18 February 2022. At the commencement of the hearing the Employment Judge began to ask the claimant about what he understood to be a claim of constructive dismissal lodged by the claimant. However, it was pointed out the Employment Judge that the claimant had been in employment at the time of the lodging of his claim and therefore could

not have raised a claim of unfair dismissal. The claimant was advised that should he wish to pursue such a claim he would be required to make an application to amend his claim or he would have to lodge a new claim. At that time a final hearing was listed to take place over 10 days from 4 July 2022. Orders in relation to a timetable for the preparations for the final hearing were also made at this hearing.

2. The claimant then lodged an application to amend his claim to include a claim of unfair dismissal on 14 April 2022. The respondent set out its objections to the application in an email of 27 April and a hearing was listed to consider the issue.

Submissions

3. In the first instance I sought to clarify with the claimant that his application to amend his claim to include a claim of unfair dismissal was directed only at the second respondent as his employer at the relevant time. After some discussion, the claimant agreed that the University had been his employer and that the claim of unfair dismissal was directed against it alone.

4. I then heard from the claimant in relation to his application. The claimant took me through what he regarded as the relevant background to his original claim. I asked the claimant whether he had made a decision to resign when he had lodged his claim on 21 December. He said he had not. He said that at that time he was going through personal turmoil, was very unwell and under the care of his GP, was taking medication and knew he needed a job to support his family.

5. The claimant indicated that as an alien and immigrant he was not aware of the law and had no contact with ACAS after he lodged his original claim. He also said that in relation to his original application he was aware of the question of time limits and had discussed this matter with ACAS prior to lodging his claim.

6. The claimant then said that two days after the preliminary hearing had taken place on 18 February he was required to travel to India where his father had

contracted COVID and subsequently passed away. The claimant went to India for three weeks and had to make arrangements for his family including arranging a visa for his mother who was also in India. He also said that at this time he had a temporary job and was looking for other more permanent roles in order to support his family as he was the only earner and had two children.

7. It was submitted that the application to amend the claimant's claim did not introduce any new matters and that he relied on the various acts of discrimination which he had alleged as reasons for his resignation. In his amendment application he set out twenty three grounds which formed the basis of his decision to resign. He said that these were all already included in the thirty seven allegations of race discrimination which had been outlined at the preliminary hearing on 18 February.

8. I then heard from the respondent. I advised Ms Rankin that I had already considered the written grounds of objection and she need only elaborate or highlight matters within that submission. Ms Rankin made reference to the relevant rules in the Employment Tribunal (Rules of Procedure etc) Regulations 2013 and in particular Rules 2 and 29 regarding the overriding objective and case management. She then took me through the limbs of the test set out in the case of **Selkent Bus Co Ltd v Moore** [1996] ICR 836 which should be considered by an employment tribunal when deciding whether to exercise its discretion to grant an application to amend.

9. It was said that this was a new application and not a relabelling exercise. It was also said that if the application were granted then the respondent would be required to amend its grounds of resistance, may require to call further witnesses and would incur significant additional cost. Further, as the final hearing was due to commence soon and during the holiday period of the University, this may cause the respondent difficulty in securing the attendance of any additional relevant witnesses. In addition the final hearing was already lengthy and may require to be extended if the application were granted.

10. In terms of time limits, the respondent had not previously been aware of the bereavement suffered by the claimant. While Ms Rankin expressed

understanding that this would inevitably have caused delay she said that there was still a gap in the chronology between 30 December and the preliminary hearing and then the period when the claimant had returned from India. Making reference to **Porter v Bandridge Ltd** [1978] IRLR 271, **Palmer and Daunders v Southend on Sea Borough Council** [1984] ICR 372, she said that the explanation for the delay put forward by the claimant had not been such as to demonstrate that it was not reasonable feasible for the application to have been made timeously. It was also pointed out that **London Underground Ltd v Noel** [2000] ICR 109 restricted the circumstances in which the requirement to lodge a claim timeously should be disapplied. It was said that the claimant had a PhD, access to the internet and was clearly a highly intelligent individual. He was aware of the time limits for lodging a claim and made reference to these in his claim form, therefore he knew his rights. It was also said that even if he hadn't known his rights, this was not an excuse as was held in **Porter**. Ms Rankin said that the reasons put forward for the delay were not sufficient and as the exercise of discretion should be the exception rather than the rule (**Robertson v Bexley Community Centre** [2003] IRLR 434), there was no basis for exercising discretion in favour of the claimant in the present circumstances.

11. Turning to the timing and manner of the amendment application, it was highlighted that this was made nearly two months after a preliminary hearing, and almost four months after the original claim had been lodged. This did not meet the requirement that litigation should be prompt. Moreover, it was said that there were no new facts which had come to light between the lodging of the claim and the application to amend on which the claimant could rely to explain this delay.

12. On the question of the balance of injustice, it was said that the respondent would be more adversely affected. The claimant could still pursue his claims of race discrimination, but the interests of justice militated against the exercise of discretion.

13. I then gave the claimant an opportunity to respond to these submissions. He said that he was relying on the same events set out in the note of the

Preliminary hearing and was not raising any new issues therefore did not accept that additional evidence would be required. The claimant made reference to the case of **Galilee v the Commissioner of Police of the Metropolis** UKEAT/207/16 in this regard and also to **Hendricks v the Commission of the Police of the Metropolis** [2003] ICR 530.

14. The claimant also highlighted that the respondent had continually failed to meet the time limits set by it in terms of internal proceedings and questions why if they were permitted to miss time limits, he as an immigrant could be expected to meet them.

Discussion and decision

15. As highlighted by the respondent, when considering whether an application to amend a claim should be granted consideration should be given to the principles set out in **Selkent** (above).

Nature of the amendment

16. In relation to the nature of the amendment, I accepted that the application raised a new claim and was not a minor or trivial amendment. While the claimant had ticked the box 'unfair dismissal' in his originating application, at the time he had not been dismissed, resigned or was working under notice of termination of employment. Moreover his position before me was that he had not yet decided whether to resign at the point at which he submitted his application to the Tribunal. This would explain why there was no reference to resignation, consideration of resignation or reasons for resignation in the details of his claim.

17. As point out by the Honourable Mr Justice Langstaff in **Chandhok v Tirkey** EAT/190/14 at paragraph 17, while care must be taken to avoid undue formalism in a Tribunal, the starting point is that parties must set out the essence of their respect cases on paper in respectively the ET1 and the answer to it. The claimant had not resigned and had not yet decided whether he would resign, therefore his claim could not either as a matter of law or logic

include a claim of unfair dismissal. The amendment application therefore sought to introduce a new head of claim.

18. The claimant and respondent disagreed as to whether the claimant was seeking to introduce new allegations on which he would rely in relation to the amendment application. The respondent's position was that the twenty three points set out in his amendment application were not entirely consistent with the thirty seven allegations of discriminatory treatment. The claimant's position is that he was not seeking to introduce any new allegations. I came to the conclusion that although it appeared to me that the points raised by the claimant in his amendment application were very similar to that of his allegations of race discrimination, it was not necessary for me to come to a view on this disagreement. A claim of unfair dismissal is entirely different from a claim of race discrimination. A claimant may well rely on allegations of discriminatory conduct as breaches of contract entitling him to resign and claim constructive dismissal. However, the test as to whether action or inaction of an employer amounted to a breach of contract is wider than asking whether such was an act of race discrimination. It will for instance require evidence as to the extent to which an employer followed its own policies which may overlap with the question of whether a claimant was subjected to less favourable treatment than a comparator, but that would not necessarily be the case. Therefore I accepted the respondent's argument that further evidence and certainly further detailed submissions might be required were the amendment to be granted.

Time limits

19. I then considered the question of time limits. The claimant's employment terminated on 30 December 2021. The application to amend was made on 14 April 2022. On the face of therefore the claim is 15 days out of time. Section 111(2) of the Employment Rights Act 1996 provides that a complaint of unfair dismissal must be brought within three months of the effective date of termination. Notwithstanding this requirement, if a claimant demonstrates that it was not reasonably practicable to have brought the claim within this period

then if a Tribunal is satisfied that the claim was brought with such further period as was reasonable then the Tribunal will have jurisdiction to consider this claim.

20. While the question of time limits should not be determinative of a decision as to whether an application to amend should be granted, it is a relevant factor. In the present case, the claimant proffered no reason as to why he did not amend his claim between the date of his resignation and the preliminary hearing. While his claim would have still been in time as at the date of the preliminary hearing, he waited a further 55 days to lodge the application. While some of that delay was no doubt caused by the very difficult family circumstances of the claimant during that period, the claimant said that he was in India for a period of three weeks from 20 February. He also said that he had obtained temporary work. However, he was aware of the issue of time limits and is clearly a highly intelligent man. While he indicated that he understood issues of science but not law, I do not accept that as rendering it not reasonably practicable to lodge a claim within the requisite time limit, particularly when it has been brought to his attention at a preliminary hearing that he must make an application to amend his claim if he wishes the Tribunal to consider such a claim. Neither did I accept his argument that the respondent had not kept to its own internal time limits as a valid reason as to why he could not lodge a claim within a statutory time limit.

Timing and manner of the application

21. It is also relevant that at the previous preliminary hearing a timetable was set out for preparations for a final hearing. The claimant should reasonably have been aware from the details of that time table that time was of the essence. The final hearing is set down to take place over ten days in a few weeks. It seems to be inevitable that should the application to amend be granted, there is likely to be a delay to that hearing. While that of itself is not a reason for refusing the application, it is part of the overall picture to be taken into account when deciding whether to exercise discretion.

22. In particular when the issue of the balance of injustice and hardship is considered, as it ought to be, it is relevant that the respondent would have a limited period in which to make preparations to answer the claimant's amended claim. Details of its response would require to be drafted and lodged, consideration would have to be given to whether any additional witnesses were required. Additional documents may be required. It may well be difficult to secure the attendance of any additional witnesses at short notice, particularly during the holiday period. The respondent is therefore likely to suffer hardship and further expense or be required to request a postponement of the hearing.

23. It is acknowledged that the claimant will suffer the injustice of not being able to advance a claim of unfair dismissal if the amendment is not accepted. That is indeed a significant injustice. However, the claimant will be able to continue to argue that he was subject to race discrimination at the hands of the respondent.

24. In all of these circumstances, taking into account the factors set out above, balancing them in regard to the injustice to each party and taking into account the interests of justice overall, the application is refused.

Further procedure

25. The respondent indicated that it did not have an up to date schedule of loss from the claimant. The claimant undertook to provide this by 17 June. There was also a brief discussion regarding witnesses. The respondent undertook to advise the claimant of the identity of the witnesses it intended to call as soon as possible. I explained to the claimant that if he wished to call any further witnesses he would be required to make arrangements with them to attend the hearing. If a potential relevant witness was not willing to attend voluntarily he could apply for a witness order to secure their attendance but would have to set out the basis on which any such order ought to be granted.

Employment Judge:	**A Jones**
Date of Judgment:	**10 June 2022**
Date Sent to Parties:	**10 June 2022**