



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4114755/2019

**Preliminary Hearing on written submissions only heard in Edinburgh on the
15th September 2020**

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Employment Judge Porter

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Mr G Timothy

**Claimant
Absent**

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Dell Corporation Ltd

**Respondents
Absent**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

It is the Judgment of the Employment Tribunal to allow the claimant's amendment in these proceedings, under deletion of the claim of direct discrimination.

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INTRODUCTION

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1. In these proceedings the claimant claims disability discrimination. The claimant's claims are defended and there was a Preliminary Hearing ("PH") heard in the case on the 27th March 2020 at 2pm.
2. In advance of the PH the claimant's solicitor intimated a Minute of Amendment. At that PH Orders were made for the claimant to provide Further and Better Particulars of the claim, and a timeline was set out for the respondents'

response thereto and for parties to provide their views on future procedure in this case. The Orders were duly complied with and the parties agreed that the case should be set down for a PH on the issue of Amendment, to be determined by written submissions only.

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3. The PH on amendment took place on the 15th September 2020. The PH was determined after having sight of (i) the claimant's Minute of Amendment; (ii) the claimant's Further and Better Particulars; (iii) the respondents' response to the claimant's Further and Better Particulars; (iv) the claimant's documents headed 'Amendment to ET1' and 'Amendment to ET1 Further Submissions'; (v) the respondents' documents headed 'The respondents' objections to the claimant's application for leave to amend the ET1' and 'The respondents' responses to the claimant's written submissions on the application for leave to amend the ET1.' The Tribunal also had before it the ET1 and the ET3 together with the Note of the PH of the 27th March 2020, dated the 2nd April 2020.

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SUBMISSIONS

4. The undernoted is a concise summary of the parties' positions on the issue of amendment.
5. The claimant seeks to introduce new claims of direct discrimination, victimisation and failure to make reasonable adjustments in the amendment procedure.
6. In the document headed: "Amendment to ET1 Further Submissions" the claimant withdrew his claim of direct discrimination.
7. Insofar as the claimant's claims of victimisation are concerned, the claimant asserts by amendment that the respondents withdrew his sick pay subsequent to the commencement of these proceedings and, further, that he was subjected to a detriment because he done a protected act by the respondents' failure to deal with his ethics complaint and failure to investigate their initial failure to deal with his ethics complaint.

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8. The claimant submits that these additional acts of victimisation should be viewed as a continuous act flowing from his existing claims of victimisation.

5 9. The claimant's additional claims of failure to make reasonable adjustments are based also around the withdrawal of his sick pay on the 6th of February 2020. The claimant alleges that the respondents' failure to make reasonable adjustments should be viewed as a continuing act following on his existing allegations under s20 and s21 of the Equality Act 2010.

10 10. The respondents' position on the claimant's Amendment are, in short, that the claimant is seeking to bring new, separate claims of victimisation and that there are no averments linking the original acts of victimisation as pled to the new claims of victimisation. The respondents state that the claim relating to the respondents' cessation of sick pay is time barred and his claim of victimisation lacks specification insofar as the issue of the handling of his ethics complaint is concerned.

15 11. Insofar as the insertion of new claims of failure to make reasonable adjustments are concerned, the respondents state that the claimant seeks to bring new, separate allegations of failure to make reasonable adjustments which are time barred and that there are no averments linking his existing claims of failure to make reasonable adjustments with his new claims inserted by amendment. The respondents also state that the claimant's claim of failure to make reasonable adjustments lacks specification in that there is insufficient specification of the comparator group for the purposes of establishing substantial disadvantage and insufficient specification the reasonable adjustments the claimant states should have been made by the respondents.

20 25 30 12. In short, the respondents' position is that the balance of prejudice favours them as the allowance of the Amendment will necessitate substantial further inquiry on their part. The respondents submit that if the Amendment is refused the claimant will still be able to pursue his existing claims as formulated in the ET1.

35 **THE LAW**

13. In considering whether to allow the claimant's Amendment the Tribunal had regard to the well known test set out in the case of **Cocking v Sandhurst (Stationers) Ltd and anor 1974 ICR 650 NIRC** as applied in the case of **Selkent Bus Co Ltd v Moore 1996 ICR 836, EAT**. These cases are authority for the proposition that in exercising their discretion, tribunals must have regard to all the circumstances and in particular to any injustice or hardship which would result from the Amendment or a refusal to make it. In **Selkent**, the then President of the EAT, Mr Justice Mummery stated relevant factors would include the nature of the Amendment, the applicability of time limits and the timing and manner of the application.
14. The Tribunal also had regard to the overriding objective to be found in Rule 2 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1 and in particular the requirement to ensure that the parties are on an equal footing and the requirement to avoid unnecessary formality in proceedings.

DISCUSSION AND DECISION

15. The Tribunal commenced its deliberations by observing that it is now difficult to ascertain what the key facts are in this case. The Tribunal brings to the parties' attention the words of the Employment Appeal Tribunal in the recent case of **C v D UKEAT/0132/19/RN** wherein it was observed: *"Regrettably, I consider that some criticism must be levelled in this case at the manner in which the Claim and Response were set out. I am also well aware that the parties and representatives in this case have adopted a style many choose. A narrative style of Claim Form and Response appears to now be more the norm than the exception. I can understand where the temptation for adopting it has come from: a fear that a relevant fact might not be included and fear that a witness might be challenged in a hearing because a detail was not included within the claim. That can be managed: a document can make it clear that it sets out key facts; requests for further details of factual matters can be made; parties and representatives can remember that the purpose of the Claim Form and Response is not to exhaustively set out factual detail in the way a witness statement does, but to set out the claim"* (para 14). With these words in mind,

it is to be hoped that the parties will consolidate their pleadings in advance of the full Hearing in the Merits so that the key facts are apparent not only to the Employment Judge who has had conduct of this case throughout, but to the Members also.

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16. The Tribunal considered the Amendment and the parties' submissions thereon with regard to the words of Mr Justice Mummery in **Selkent**. The Tribunal considered firstly the nature of the amendment. In this respect, the Tribunal observed that there appears to be little dispute that the Amendment does
10 introduce entirely new factual allegations which change the basis of the existing claim.

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17. With this in mind, the Tribunal then proceeded to consider the applicable time limits. The Tribunal noted firstly that the additional claims of victimisation were timeously made as these claims were included in the Minute of Amendment presented on the 20th March 2020 and arose from actions of the respondents in February and March 2020. The Tribunal also concluded that the additional claims of failure to make reasonable adjustments were timeous, arising as they do from acts of the respondents in February 2020.

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18. In considering the issue of time limits, the Tribunal also observed that at the PH on the 27th March it was determined that the outstanding issue of time bar should be reserved for the full Hearing on the Merits.

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19. The Tribunal then proceeded to give consideration to the timing and manner of the application to amend. To this end the Tribunal observed that the Amendment was presented at an early stage in these proceedings, and was presented within a relatively short time frame from the occurrence of the acts that form the subject matter of the Amendment.

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20. The Tribunal has sympathy with the respondents in that the Amendment does, in certain respects, lack specification. However, it is the view of the Tribunal that the terms of the Amendment do provide fair notice to the respondents of the additional claims advanced. Should additional specification be required

then it is always open to the respondents to seek an Order for Further and Better Particulars.

21. Insofar as the all important issue of the balance of prejudice is concerned, the
5 Tribunal considered that this is weighed in favour of the claimant. In reaching
this conclusion, the Tribunal gave consideration to the fact that the claimant's
Amendment introduces claims that post date the ET1, and that there would be
considerable prejudice were the claimant to be denied the right to pursue such
claims. In these circumstances is the decision of the Tribunal that the prejudice
10 to the claimant outweighs the prejudice to the respondents.

22. It is for all these reasons that it is the decision of this Tribunal to allow the
claimant's Amendment, under deletion of the inclusion of the claim of direct
discrimination. In reaching this decision the Tribunal had regard to the terms of
15 the overriding objective and in particular the need to ensure that parties are on
an equal footing.

FUTURE PROCEDURE

20 23. This case will be set down for a Preliminary Hearing on Case Management at
the earliest available opportunity. At the PH future procedure will be set in the
case, and to this end the parties are requested to attend with details of all
witnesses' availability and ability to participate in a Final Hearing via video
conferencing, namely CVP/Kinly.

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Employment Judge: Jane Porter
Date of Judgment: 15 September 2020
Entered in register: 22 September 2020
30 and copied to parties