



EMPLOYMENT TRIBUNALS (SCOTLAND)

5 Case No: S/4105707/16 Held at Aberdeen on 11 July 2017

Employment Judge: Mr N M Hosie (sitting alone)

10 Mr John Gillespie

Claimant
In Person:

15 GE Oil & Gas Limited

Respondent
Represented by:
Ms K Norval -
Solicitor

20 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Tribunal is that the claimant's application to amend to include a complaint of unfair dismissal in the claim is granted.

25 **REASONS**

Introduction

1. The claimant, John Gillespie, submitted a claim form on 27 November 2016 in
30 which he intimated at para. 8.1 that he wished to make a claim of disability
discrimination. On 11 January 2017 the respondent submitted a Response Form
resisting the claim.

2. There then followed a Preliminary Hearing on 6 February when the issue of
35 whether or not the claimant wished also to bring a complaint of unfair dismissal

was discussed and he was advised by EJ Hendry that if he did he would require to set out the basis for such a complaint. EJ Hendry's note dated 7 February is referred to for its terms.

5 3. There then followed a further Preliminary Hearing on 13 April when the issue of a possible complaint of unfair dismissal was discussed and I directed the claimant to provide specification in support of such a complaint within a period of 14 days. My note dated 18 April 2017 is referred to for its terms.

10 4. On 4 May 2017 the claimant wrote to the Tribunal with an application to amend his claim to include a complaint of unfair dismissal. His letter of 4 May is referred to for its terms.

15 5. On 19 May the respondent's solicitor sent an e-mail to the Tribunal in which she intimated an objection to the application.

6. There then followed a further Preliminary Hearing on 6 July when it was agreed that I would proceed to determine the application to amend on the basis of the parties' written representations. My note of 10 July is referred to for its terms.

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Discussion & Conclusion

7. In **Cocking v. Sandhurst (Stationers) Ltd & Another [1974] ICR 650**, Sir John Donaldson delivering the Judgment of the NIRRC laid down a general procedure
25 for Tribunals to follow when deciding whether to allow substantial amendments. These guidelines have been approved in several subsequent cases and were re-

stated by the EAT in **Selkent Bus Co. Ltd v. Moore [1996] ICR 836**, to which I was referred by the respondent's solicitor.

8. In that case the EAT emphasised that the Tribunal, in determining whether to grant an application to amend, must carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that will be caused to parties by granting or refusing the amendment. Useful guidance on this issue was also given by the EAT in **Argyll & Clyde Health Board v. Foulds & Others UKEATS 0009/06/RN** and **Transport & General Workers' Union v. Safeway Stores Ltd UKEAT/0092/07/LA**. In both these cases the EAT referred, with approval, to the terms of paragraph 311.03 in section P1 of Harvey in Industrial Relations and Employment Law:-

“(b) Altering Existing Claims & Making New Claims [311.03]

A distinction may be drawn between:

(i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint;

(ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts, as the original claim;

and

(iii) amendments which add or substitute a wholly or new claim or cause of action which is not connected to the original claim at all.”

9. Valuable guidance was also provided by Mummery LJ at pages 843 and 844 in **Selkent:-**

“

(4) *Whenever a 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.*

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(5) *What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*

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(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.

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(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

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limit should be extended under the applicable statutory provisions, e.g. in the case of unfair dismissal section 67 of the Employment Protection (Consolidation) Act 1978.

5 (c) *The Timing and The Manner of the Application*

10 *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 Regulations of 1993 for the making of amendments. The amendments may be made at any time – before, at, even after the hearing of the case. Delay 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*

15 *information appearing from documents disclosed on discovery. Whenever taking factors into account the Parliament considerations are relative injustice and hardship involved in refusing or granting an amendment. The question of delay, as a result of adjournment, and additional costs, particularly if they*

20 *are unlikely to be recovered by the successful party are relevant in reaching a decision.”*

The Present Case

Nature of the Amendment

5 10. This issue was, in my view, the most significant of all. It had a material bearing on my conclusion.

11. The respondent's solicitor maintained in her written submission with reference to:-

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Ali v. Office of National Statistics [2005] IRLR 201;

Chandok v. Tirkey [2015] IRLR 195;

Abercrombie & Others v. EJA Rangemaster Ltd [2013] IRLR 953

15 that the claimant was seeking to introduce a new claim of unfair dismissal which constituted a "substantial alteration. In other words, it was submitted that the claimant was seeking to add a "wholly or new claim".

12. After consideration of the claim form, I was not persuaded that that submission was well-founded.

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13. While the claimant did not tick the box at para. 8.1 to indicate that he wished to bring a complaint of unfair dismissal and while the thrust of the details in support of his claim at para. 8.2 and the "additional information" which he provided on page 12 relate to his disability discrimination complaint and an alleged failure to make reasonable adjustment and also tick the box at para. 8.1 to intimate that he

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wished to make “another type of claim which the Employment Tribunal can deal with” namely “unfair selection for redundancy bordering on unfair dismissal”.

14. Further at para. 8.2 he made the following averments:-

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“4 May 2016 I am told I have been selected for redundancy. I appeal this but to no avail.

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4 May Paul attempts my appraisal again and again we clash as I disagree with everything he says and I refuse to sign my appraisal off.

8 July 2016 I am made redundant.

I am making a claim because:-

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I rated poor for 2015 and when I challenged why I wasn't on a PIP I have them on record saying 'they didn't have time'. Three others in the planning department are on PIPs.

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Roxanna transferred to MRP Dec 2015 and scored better than me even though I have been in planning three years.”

15. He also made the following averments under the heading “Additional Information at para. 15:-

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“They couldn’t provide hard evidence on why they scored me so poorly and I truly believe that not only was this predetermined starting with me being phased out of my MRP role, but because I clashed with Paul Kennedy and I was one of the highest earners as well.

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How can a colleague who went from being a good contributor to a strong contributor suddenly become so poor without being placed on a PIP.

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The three guys that were on PIPs in the planning team were Lewis Crawford, Andrew Brown and Agnes Spisak.

Agnes scored higher than me as well and she was demoted and placed on a PIP which is incredible.

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In the meeting where I was told I was selected for redundancy I asked what did I score from my appraisal from 2015 and I was told I scored 0 as I was signed off as a poor performer. This was untrue as my appraisal was never signed off and when I asked Bianca Reynolds who was HR Manager at the time and Anton Hoang, Materials Manager they said that Paul had already decided I was a poor performer so what’s the point in having a discussion if he’s already decided what I am.”

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16. These averments, in my view are relevant to and supportive of a complaint of unfair dismissal in terms of s.94 of the Employment Rights Act 1996.

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17. I arrived at the view, therefore, while, in a sense, the claimant was raising a new head of complaint he had not ticked the box at para. 8.1 to indicate that he wished to bring a complaint of unfair dismissal, with reference to the paragraph in Harvey referred to above this was a cause of action “which is linked to, or arises
5 out of the same facts as the original claim”. I was also of the view that the amendment sought to add or substitute “another label” for facts already pleaded to.

18. As I was of the view that the claimant was not proposing to bring a new complaint
10 or cause of action by way of amendment, the unfair dismissal complaint is not out of time.

“The Timing & The Manner of the Application”

15 19. There is no doubt that the claimant delayed making the application, the matter having been raised initially at the Preliminary Hearing on 6 February.

20. However, I was mindful that the claimant is not represented and has no
experience of Employment Tribunal proceedings.

20 21. The lateness of the amendment application did impact on the issue of prejudice and hardship, but I did not consider, in all the circumstances, that this factor alone meant that the balance of hardship favoured rejecting the amendment.

25 22. I considered the whole surrounding circumstances and carried out the exercise in relation to the balance of hardship and injustice, I was not persuaded that the

amendment application should be refused. I concluded that justice required that the amendment be allowed.

23. In arriving at this view I was satisfied that while the respondent will now have to carry out some additional investigations, these will not be significant as the two complaints are linked and I anticipate the same witnesses will be giving evidence not only in respect of the discrimination complaint, but also in respect of the unfair dismissal complaint.

24. For all these reasons, I arrived at the view that the claimant's application to amend should be granted. His claim form is amended, therefore, in terms of the further and better particulars narrated in his letter of 4 May 2017.

25. The respondent will also now be afforded the opportunity of responding in writing to this additional information and, if so advised, the respondent's solicitor should do so within the next 14 days.

Future Procedures

26. As I recorded in my note of the Preliminary Hearing on 6 July it was agreed that if the claimant's application to amend was allowed that the claim would proceed to a Final Hearing. A Preliminary Hearing by way of telephone conference call should now be fixed as soon as possible, therefore just to discuss fixing dates for the Final Hearing and any other relevant case management issues.

Employment Judge: Nicol M Hosie

Date of Judgment: 12 July 2017

Entered in register and copied to parties: 12 July 2017