EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102684/2020

CVP Final Hearing converted to PH
Tuesday 24 November

Employment Judge: R McPherson

Mr J Fennell	**Claimant** **Represented by** **S Maclean** **Solicitor**
Arnold Clark Automobiles Ltd	**Respondent** **Represented by** **S Jones** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that

1. Paragraphs 2 and 3 of the claimant's proposed amendment intimated **Monday 23 November 2020**, there being no objection, are allowed; and

2. Paragraph 1 of the claimant's proposed amendment intimated Monday 23 November 2020, which is objected to, is allowed; and

3. The **CVP Final Hearing** scheduled to commence today **Tuesday 24 November** and **Wednesday 25 November** and conclude **Thursday 25 November 2020** is converted to a case management **Preliminary Hearing** in terms of Rule 48 of the Employment Tribunal Rules 2013; and

4. A further case management **Preliminary Hearing** is appointed for 10 am on **Tuesday 15 December 2020** to consider further procedure.

REASONS

Introduction

Preliminary Procedure

1. At the outset of today's hearing, both parties confirmed that all directions issued 26 October 2020 and 16 November 2020 for the CVP scheduled to start today, had been complied with, including; preparation of Joint Bundle for use at this scheduled CVP Final Hearing, preparation of a Joint Statement of Agreed Facts, issue of List of Witnesses, draft Timetable for the Hearing and draft List of Agreed issues.

2. The agreed timetable set out that the initial part of today's scheduled CVP Final Hearing was to consider preliminary matters.

3. As background I note that on Friday 20 November 2020 the claimant's now representative had provided a List of witnesses for the claimant which included the claimant and one other person (the second claimant witness).

4. Further I noted that the claimant intimated a proposed (3 paragraph) Amendment (the 23 Nov 2020 Proposed Amendment) by email **Monday 23 November 2020** at **11.21am** indicating that "*we would request that the amendment be dealt with as part of Preliminary Matters".*

5. The claimant had additionally provided a witness statement, although not directed to do so for any witnesses, from the second claimant witness.

6. The respondent by e-mail **2.54 pm** on **Monday 23 November 2020** by e-mail confirms no objection to Paragraphs 2 and 3 of the 23 Nov 2020 Proposed

Amendment. However, **Para 1** was objected to, the respondent setting out that in their view it raises new matter of inconsistent treatment. However, and entirely properly in my view in accordance with the overriding objective, the respondent intimated that it was accepted that the claimant had raised at the appeal hearing (on Wednesday 10 June 2020, by reference to the index to the Joint Statement of Agreed Facts) that he felt he had been treated differently to that of an ex-employee not identified as the second claimant witness.

7. The Joint Statement of Agreed Facts did not include any reference to alleged previous inconsistent treatment.

8. As further background, I noted that the claimant had presented his claim on Wednesday 20 May 2020 following ACAS date A Thursday 9 April 2020 and ACAS date B Wednesday 22 April 2020. The ET1 identified a representative, however, I was advised by the claimant's present representative, that the representative in the ET1 is a relative of the claimant rather than a professional representative.

9. I understand that the claimant's present representative was instructed around Tuesday 20 October 2020.

10. In accordance with the agreed timetable, the initial part of the CVP Final Hearing dealt with Preliminary Matters.

11. For the claimant, I was advised by the claimant's representative, that essentially due to a coincidence the claimant had come into contact with the second claimant witness around **Wednesday 18 November 2020**, it being indicated that this person was asserted to have worked with the claimant. Although was not someone who the claimant had maintained contact with subsequently, and in particular certain alleged events (which the claimant asserts are relevant to his claim) occurred at the workplace in 2016.

12. I was advised that following the claimant contact on Wednesday 18 November 2020, the claimant's representative arranged direct contact with

this second claimant witness around **4pm** on **Thursday 19 November 2020**, with this providing a witness statement which was thereafter provided to the Tribunal and the respondents, following the provision of the claimant's list of witnesses on **Friday 20 November 2020.**

13. The 23 Nov 2020 Proposed Amendment paragraph 1 sets out that *"The respondent was inconsistent in its decision to dismiss the Claimant. The Claimant raised at his appeal hearing that there had previously been an employee in the same Job with a driving licence?"*

14. For the respondent it was argued that **Friday 20 November 2020** was the first time the respondent had heard of the claimant's intention to argue that he had been treated differently to the second witness and had only been provided with in effect general detail of the allegation. The respondent further referred to **Chandhok v Tirkey** [2015] ICR 527 (**Chandhok**) which I refer to below arguing that inconsistent treatment had not been pled in the ET1. It was argued that there was no factual basis in the pleadings for allegation of inconsistent treatment and the claimant was seeking to introduce an entirely new basis for challenge. It was argued that amendment would prejudice the respondent who would require a fair opportunity to investigation the allegations. Further, and if the amendment was to be allowed this CVP Final Hearing would require to be adjourned and the respondent would be put to significant additional expense to investigate the allegations. It would not be possible as at today to confirm to the Tribunal what time frame would be required to investigate such alleged (historic) allegations which would appear to date to 2016.

15. For the respondent I understand that their position on any cost order is presently reserved while they consider matters including against the coincidental circumstances outlined above. I understand that the respondent will reflect on the position, including having regard to this being a CVP Remote Hearing and whether a further Full Hearing by way of CVP would result in material additional costs and having regard to the terms of Rule 76

of the 2013 Rules. For the respondent, the position is essentially reserved to the next hearing.

16. For the claimant it was argued that there was no prejudice, the respondent knew from the Appeal Hearing of the inconsistent treatment. In the alternative, it was argued that the amendment should be allowed, the evidence of the second witness being adduced and the Tribunal considering the relevancy of same at the conclusion of this Final Hearing.

Relevant Law

The 2013 Rules

17. **Rule 2** of the 2013 Rules sets out that:

"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."

18. Rules **29** and **30** of the 2013 Rules provide general case management powers including the power to allow an amendment. Rule 30 identifies that an application may be made either in writing or in a hearing.

19. **Rule 41** of the 2013 Rules provides

"*41. The Tribunal may regulate its own procedure and shall conduct the hearing in the manner it considers fair, having regard to the principles contained in the overriding objective. The following rules do not restrict that general power. The Tribunal shall seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts.".*

20. **Rule 48** of the 2013 Rules provides

"***Conversion from preliminary hearing to final hearing and vice versa***

48. A Tribunal conducting a preliminary hearing may order that it be treated as a final hearing, or vice versa, if the Tribunal is properly constituted for the purpose and if it is satisfied that neither party shall be materially prejudiced by the change"

Relevant Case Law

Amendment

21. I reminded myself that the EAT in **Selkent Bus Co Ltd v Moore** [1996] IRLR 661 (**Selkent**) identified, that in relation to amendment, 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".*

22. In addition, I have reminded myself that the EAT in **Ladbrokes Racing v Traynor** UKEATS/0067/06 (**Traynor)** indicated that the precise wording to be introduced should be set out.

23. The EAT in **Selkent** were considering an appeal which arose from an application to amend an existing unfair dismissal claim, where the application had been made a fortnight before the date fixed for the hearing. The amendment sought to introduce a **new allegation** that the dismissal related to the claimant's trade union membership or activities and was thus

automatically unfair. The Tribunal had allowed the amendment but was overturned on appeal, the EAT commented that that factors which had influenced its decisions were:

"(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, e.g., 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."

24. I further reminded myself that the EAT observed in **Khetab v AGA Medical Ltd** [2010] 10 WLUK 481 (**Khetab**) that the purpose of pleadings *"…is so that the other party and the Employment Tribunal understand the case being advanced by each party so that his opponent has a proper opportunity to meet it",* and further , as the respondent identified **Chandhok** Langstaff J, commented at para 18 the parties should set out the essence of their respective cases and "*… a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it".*

25. In **Chandhok** the EAT considered an appeal by a respondent against a decision of an Employment Tribunal to allow an amendment to expand an existing 64 paragraph claim of race discrimination to include explicit reference of what the claimant asserted was "*her status in the caste system*". The respondents in the appeal contended that "caste" was not an aspect of race as defined by section 9 of Equality Act 2010. The appeal was dismissed. At para15 J Langstaff commented that the *"judge identified the claimant's case … not from what was asserted in the claim, lengthy though it was, but from material which could only have come from either her witness statement (which was brief) or what he was told."* Although the appeal was dismissed at para 16 J Langstaff criticised this approach and expressly stated the importance of the ET1 and commented "*The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but is free to be augmented by whatever parties choose to add or subtract merely on their say so. Instead, it serves not only a necessary but useful 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 witness statement, nor a document, but the claims made….* "and at para 17 commented that Employment Tribunals were "*not at the outset*

designed to be populated by lawyers, and the fact that law now features so prominently before employment tribunals does not mean those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principal by which reference to any further document (witness statement or the like) could be restricted."

Discussion and Decision.

26. For the claimant I consider that there is risk of material prejudice to the claimant in the event that paragraph 1 of the 23 Nov 2020 Proposed Amendment is not allowed. There is a cogent explanation for the late (written) amendment which was prompted by a coincidence of contact with the second claimant witness, the claimant and his representative acted promptly thereafter.

27. For the respondent, however, I agree that they have not been provided with an opportunity to respond to a new pled factual aspect of the claimant's claim.

28. It would not be fair to the respondent to require to proceed with scheduled CVP Final Hearing after allowing the paragraph 1 of the 23 Nov 2020 Proposed Amendment.

29. In accordance with the overriding objective I have therefore directed that this Final Hearing be postponed and converted to a Preliminary Hearing in terms of Rule 48 of the 2013 Rules and, and that in accordance with the guidance set out above including in **Selkent** and **Chandhok** I have allowed the whole of the 23 Nov 2020 Proposed Amendment to include paragraph 1.

30. The respondent, however, requires to be given an opportunity to investigate the terms of the amendment. The respondent has fairly confirmed that they are not presently able to confirm what period they would require to respond to the amendment by way of Further and Better Particulars at today's hearing.

As such and rather than appoint a specific period for such responsive Further and Better Particulars I have issued separate directions in relation to the appointment of a case management Preliminary Hearing to consider further procedure.

31. In coming to this view the Tribunal have applied the relevant case law.

32. Separate Directions for further procedure were issued at this now converted Preliminary Hearing

Employment Judge: **Mr R McPherson**
Date of Judgment: **24 November 2020**
Sent to Parties: **25 November 2020**