EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103605/2020 (A)

Held by telephone conference call on 29 October 2020

Employment Judge I McFatridge

Mr Daniel Linney	**Claimant** **Represented by:** **Mr Thornber,** **Consultant**
Stuart Niven & Son	**Respondent** **Represented by:** **Mr Muirhead,** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant's application to amend his claim lodged on 6 October 2020 is accepted.

2. The claim of unfair dismissal is dismissed following withdrawal.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that the respondent had breached his contract of apprenticeship by dismissing him. He also claimed unfair dismissal. The respondent lodged a response in which they denied the claim. They pointed out that the claimant did not

have sufficient qualifying service to make a claim of unfair dismissal. It was unclear whether or not he was making any claim of automatic unfair dismissal which the Tribunal would have had jurisdiction to hear notwithstanding the lack of qualifying service. A preliminary hearing was held on 22 September and reference is made to the note issued following that hearing. During the course of the hearing the claimant's representative indicated that he had only recently been instructed in the case and that the claimant had submitted his ET1 himself. He indicated that he would be seeking leave to amend the claim so as to include a claim of indirect age discrimination. This related to the allegation that the respondent had decided to restrict the redundancy pool to apprentices and not to place any fully qualified employees at risk of redundancy.

2. On 6 October the claimant lodged an application to amend. This was opposed by the respondent. A further preliminary hearing took place on 29 October. At the previous preliminary hearing the Employment Judge had indicated that this would primarily be for case management purposes but that in the event that the application to amend had not been decided on the papers that the application would be dealt with at this hearing. At the start of the hearing I advised the parties that it was not normally my practice to deal with a substantive application to amend at such a case management preliminary hearing on the telephone however in this case I was prepared to do so provided both parties were in agreement with this. Both parties indicated that they were perfectly happy for the matter to be dealt with on the telephone. I did not consider rule 56 to be engaged since the application I was hearing did not fall within rule 53 (1) (b) or (c). I then heard submissions from each of the parties. I gave each of them the opportunity to comment on the other's submissions.

3. The claimant's representative submitted that the claimant had issued his ET1 without legal representation. He had first instructed Mr Thornber on 14 September. The claimant had been unaware until he received the ET3 that the respondent was claiming that the reason for dismissal was redundancy. The claimant's understanding of the position was that at the time he had been told that his dismissal was due to money issues and also his poor standard of work. The addition of a new head of claim would

not significantly extend the hearing which would require to proceed in order to deal with the breach of contract claim. It would be just and equitable to have extended the time limit given that there was no substantive prejudice to the respondent and given the serious prejudice to the claimant if he was not permitted to pursue this claim.

4. The respondent's representative addressed the various factors set out in the well-known case of ***Selkent v Moore***. He pointed out that the claimant was making an entirely new claim with a new cause of action. He was alleging new facts particularly in paragraphs 11 of his application to amend. The respondent did not accept that the claimant was unaware at the time that the reason for dismissal was redundancy. The claimant refers in his ET1 to the fact that the respondent was saying that he was redundant. Mr Muirhead had also lodged text messages which indicated that the claimant knew at the time that he was being dismissed essentially because of the respondent's financial difficulties due to Covid. The text was sent on 22 June and represented his state of mind at that point. Mr Muirhead pointed out that the claimant would appear to have some familiarity with Tribunal procedures. Having been dismissed on 3 July he was able to commence ACAS early conciliation that day, obtain his certificate and lodge his claim virtually immediately. Mr Muirhead's position was that there would be substantial prejudice to the respondent if the application to amend was permitted. He referred to the fact that if the respondent was found to have discriminated against the claimant they would have to pay compensation for injury to feelings which was not currently part of the risk they were facing. He believed that this was already a fairly substantial claim and would become an even more substantial claim which the respondent would have to face if the application to amend were permitted.

5. In commenting on Mr Muirhead's submissions Mr Thornber made the point that he did not consider that it was appropriate to consider the fact that to allow the amendment would make the claim of higher value was a relevant consideration. He also made the point that in his view no significant additional evidence would require to be heard as a result of allowing the amendment.

6. Finally, Mr Muirhead referred the Tribunal to the case of ***Harvey v Port of Tilbury London Limited UKEAT 663/98***. In this case it appeared that the EAT accepted the fact that an employer might face having to pay a larger sum in compensation might well be a relevant consideration. In that case, which was primarily about how the issue of time bar should be dealt with when considering an application to amend, the EAT stated:-

> "Next Ms Bather argues that there is no significant prejudice to the employers if leave is granted. However, it is quite plain that if leave is granted then the employer loses what is at the moment a sound defence to what the Chairman called a free-standing claim for disability discrimination. It is not simply that the employer may be liable in respect of unfair dismissal for a larger sum than would otherwise be the case. The amendment adds a wholly new cause of action for direct discrimination leading to compensation, if it is successful, of a kind not possible in unfair dismissal cases, injury to feelings for example can be compensated."

7. I considered the matter I advised parties that I would be granting the application to amend and I gave brief reasons. Essentially I considered that I had to approach the matter in the way suggested in the well-known case of ***Selkent Bus Co Ltd v Moore***. Looking at the various factors which were important here I accepted that this was an entirely new cause of action and that some new facts had been pled albeit I considered that many of these facts would cover matters which would be relevant in dealing with the breach of contract claim still before the Tribunal. With regard to the claimant's state of knowledge at the time I did not consider it was particularly relevant what he was aware that the respondent was saying that the reason for his dismissal was redundancy. It appeared to me that the claimant did have some awareness that the primary reason they were dispensing with his services was that they were under financial pressure but that they had chosen him rather than other employees because of his work performance. He may not have known that only apprentices were going to be in the redundancy pool until he received the ET3. I accepted that the letter of dismissal was not as clear as it could have been but even if the claimant had received a crystal clear letter

setting out exactly what the reason for dismissal was and setting out exactly the grounds on which the respondent said individuals had been selected for redundancy and placed in the redundancy pool I do not think this would have made all that much difference to the claimant. The claimant is a 24 year old apprentice roofer. Whilst I agree with the respondent that he was able to submit his claim quickly the fact that he has included a straightforward unfair dismissal claim when he patently did not have sufficient qualifying service to make such a claim would suggest that he is not particularly familiar with employment law. I considered that in the circumstances it would not be at all unreasonable for me to assume that he was unaware of the possibility of making a claim for age discrimination until after he took legal advice on 14 September.

8. With regard to the timing and manner of the application I note that having first taken on the case on 14 September the claimant's representative advised the Tribunal on 22 September that he intended to make an application to amend. I feel the application could have been put in slightly quicker but at the end of the day the delay from 22 September to 6 October is not sufficiently long as to make much of a difference to the parties. It does mean that if the claim had been submitted as a free-standing claim on 6 October it would have been out of time however it was not submitted as a free-standing claim but as an application to amend and, as pointed out in the ***Harvey*** case, the existence of time limits is only one of the matters which is required to be considered by the Tribunal when dealing with an application to amend.

9. On the question of balance of prejudice, I do accept that the respondent will suffer a prejudice as a result of having to deal with a discrimination claim when at the moment they do not. I accept that on the basis of the EAT's judgment the possibility that they will require to pay compensation under a heading which at present they would not require to do is a consideration albeit that damages for breach of contract may potentially include this in a case such as this where the claimant is claiming loss of apprenticeship and loss of career advantage. At the end of the day however the respondent will only require to pay additional compensation if they have been guilty of behaving unlawfully and indirectly discriminating

against the claimant. On the other hand the prejudice to the claimant is more severe in that if the application is not permitted then he loses the right to be compensated for unlawful treatment even if the facts of the case are such that he would have been entitled to it.

10. At the end of the day I consider that the factors in favour of me granting the application outweigh the factors suggesting that the application should be refused. I therefore advised the parties that the amendment would be accepted.

Employment Judge: **Ian McFatridge**
Date of Judgment: **29 October 2020**
Date sent to parties: **30 October 2020**