



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101886/2023

Held in Dundee 27 June 2023

Employment Judge: M Sutherland (sitting alone)

5 **Brett Ferguson**

**Claimant
Represented by
Ms L Beedie**

10 **J&E Shepherd**

**Respondent
Represented by
Ms K Harvie**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the application to amend is refused.

Introduction

1. An open preliminary hearing was arranged to determine the Claimant's application to amend dated 31 May 2023 (which was opposed by the Respondent) and the Respondent's application for expenses dated 14 June 2023 (which was opposed by the Claimant).
2. Both parties had the benefit of professional representation.
3. Following discussion with the parties it was agreed that no evidence would be heard because it transpired there was no dispute on the factual issues on which evidence was to be led.
4. Following discussion at the hearing it was agreed that any applications for expenses would be determined following final judgment (because there was likely to be further applications for expenses dependent upon the outcome of application to amend, the Respondent had not attended

with a breakdown of costs, and the Claimant had not attended with details of the Claimant's ability to pay).

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5. Following discussion the Claimant asserted that his complaint was made within 3 months because it was part of a series of deductions (under Section 23(3) of the Employment Rights Act 1996) and he did not seek an extension of time under Section 23(3) (i.e. he did not seek to assert that it was not reasonably practicable for the claim to be presented within 3 months). The Claimant expressly accepted that if the amendment was not allowed his claim would be time barred.
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6. The parties lodged a joint bundle of documents and the Claimant lodged a supplementary bundle.
7. Both parties made submissions.

Procedural Background

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8. On 22 February 2023 the Claimant commenced ACAS Early Conciliation which ended on 24 February 2023.
9. On 1 March 2023 the Claimant lodged a tribunal claim against the Respondent raising a complaint of unlawful deduction from wages that "I would like paid for the full month I worked - ...Gross=£2,500 (and received a pay slip for)".
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10. On 31 March 2023 the Respondent lodged their response in summary that there was no unlawful deduction because they were contractually entitled to deduct training costs on 31 October 2022 and in any event the claim is time barred because the Claimant ought to have presented his complaint by 29 January 2023 but he did not contact ACAS until 22
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- February 2023.
11. On 4 April 2023 the Claimant was ordered to provide by 18 April the essence of his case on time limits (in response to paragraphs 14 to 16 of the grounds of resistance) and on the contractual power to deduct training costs.

12. On 14 April 2023 the Claimant sought to provide further and better particulars of claim within 7 days.
13. On 24 April 2023 the Respondent noted that the Claimant had not complied with the order of 4 April and that the Respondent is prejudiced by the lack of notice of the claimant's position particularly on time bar and that that they are therefore unable to take proper statements from witnesses.
14. On 25 April 2023 the Claimant provided the following further and better particulars of his complaint namely his last day at work was 31 October; the time worked after 28 October was due to be paid on 28 November; he contacted ACAS within 3 months of the last of a series of deductions; the claim is therefore in time. The Claimant also gave further particulars regarding the deduction of his training costs including that the clause is an unenforceable penalty clause, the sums are not a genuine pre-estimate, failure to pay wages or respond to his queries is a repudiatory breach entitling him to resign and prohibiting enforcement of the penalty clause.
15. A final hearing was listed to determine all issues on 12 May 2023. At the hearing the Claimant asserted that the last date on which wages were due to be paid was 30 November (that there were wages, bonus and holidays due to be paid on that date) and accordingly the claim was not time barred. The Respondent objected on the basis that this assertion did not reflect the Claimant's pleadings. The hearing was adjourned to allow the Claimant to submit any application to amend to include all and any further particulars of the claim.
16. On 31 May 2023 the Claimant provided further particulars of his existing complaint and submitted an application to amend to include complaints for failure to pay holiday pay and failure to pay bonus namely that –
- a. "the Claimant had accrued but untaken holiday entitlement amounting to approximately 1 full working week. The first date

that sum would have been payable given the Claimant's termination of 31st October would have been the November payroll run. The Respondent is called upon to confirm exactly the number of working days accrued but untaken holiday entitlement had accrued to 31st October 2022".

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b. "the Claimant was due to be paid an annual bonus which he was told by Mr Ferguson was circa £2k and told by Mr Jon Thomson was between £2k & £5k. That bonus would have been payable (albeit potentially pro-rated) in December prior to Christmas in the usual way".

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c. "Given that further sums were due to the Claimant in November and December which were never paid, it is submitted that the claim [the original complaint] is in time".

17. On 9 June 2023 the Respondent's payroll providers confirmed that salary payments made on the last working day of each month were for the full calendar month. The Claimant accepted this.

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18. On 14 June 2023 the Respondent opposed the application to amend and submitted an application for costs (expenses). They also provided further particulars of response which stated that:

a. the Claimant had accrued 23.33 days (10/12 x 28 days) and had taken 24 days in the holiday year and accordingly there were no accrued but unused holidays at the termination date.

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b. The Christmas bonus is entirely discretionary and is paid to staff in employment in December following a review of the financial year end accounts.

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19. The Claimant did not provide a substantive response to those assertions.

20. On 20 June it was determined by the Tribunal that the final hearing listed for 27 June 2023 would be converted to an open preliminary

hearing to determine the application to amend and the application for expenses.

Findings of Fact

- 5 21. Following discussion it was determined that the following facts were not in dispute –
22. The Claimant was employed by the Respondent as Chartered Surveyor from 18 June 2018 until 31 October 2022.
23. He was initially employed as a Trainee Surveyor and completed his training in about May 2022.
- 10 24. His salary was £30,000 and he was paid monthly. He was in practice paid on the 28th of each month.
25. His contract of employment provided as follows:
- 15 a. Salary is payable monthly in arrears on the last working day of each month
 - b. Salary is to be reviewed annually but there is no obligation to increase
 - c. The respondent is entitled to claw back of some or all training costs if your employment is terminated within 2 years of completing his training.
 - 20 d. Except on termination, no payment of salary is made in lieu of holidays. If you take in excess of your holiday entitlement payment may be deducted from your final pay.
 - e. The Respondent was authorised to make deductions from wages.
 - 25 f. Written notice was to be given of any variation to its terms
26. The Claimant was unhappy with the amount of his salary. In or around September 2022 looked for and secured alternative employment.
27. The Claimant resigned with notice on 25 October 2022 which was due to expire on 25 November 2022.
- 30 28. On or about 26 October the Respondent advised the Claimant that he was due to repay training costs amounting to £8,602.05.
29. On or about 28 October 2022 he received a pay slip stating he was due payment of gross wages in sum of £2,500 (£1,918.37 net) in

respect of the month to 31 October. The Claimant did not receive payment of those wages. The Claimant was asked to enter an agreement to repay his training costs.

5 30. On either Friday 28 October or Monday 31 October 2022 (the exact date is in dispute) the Claimant advised the Respondent that, because he had not been paid, his last day of employment would be 31 October.

31. On 2 February 2023 the Respondent noted that the Claimant had contributed £1,918.37 from his final salary and asked the Claimant to make a proposal to settle the balance of the training costs.

10 32. On 15 February the Claimant wrote to the Respondent noting that he was made aware that his salary was being withheld until he signed an agreement to repay the training costs monthly for 2 years and that he was given only 48 hours to consider this proposal and noting that he had forfeited his bonus entitlement and holiday pay.

15 33. The Claimant did not have the benefit of professional representation when he submitted his claim. The Claimant has had the benefit of professional representation from 4 April 2023 onwards.

The law

20 34. The Tribunal has a broad discretion under Rule 29 to allow amendments at any stage of the proceedings either on its own initiative or on the application by a party.

25 35. The EAT in *Selkent Bus Company Ltd v Moore* [1996] IRLR 6 provided the following guidance on amendment: "*Whenever the 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*".

30 36. That discretion should be exercised in a way that is consistent with the requirements of "relevance, reason, justice and fairness inherent in all judicial decisions".

37. That discretion also should be exercised in accordance with the overriding objective of dealing with cases fairly and justly including, 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.

38. The following non-exhaustive factors are relevant to the exercise of that discretion: the nature of the amendment; the applicability of any time limits; the timing and manner of the application; and all the circumstances including prospects of success.

The nature of the amendment

39. *“Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels of 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 a minor matter or is a substantial alteration pleading a new cause of action” (Selkent).*

40. There are broadly three types of amendment: amendments which add to or alter the basis of an existing claim or defence (“minor”); amendments which add or substitute a new cause of action or defence arising out of facts already plead (“re-labelling”); and amendments which add or substitute a wholly new cause of action (“substantial”).

41. The Court of Appeal in *Abercrombie & Others v Aga Rangemaster Ltd [2013] EWCA Civ 1148; [2013] IRLR 953* provided: “the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the

greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted”.

42. The fact that a claim is affected by a jurisdictional issue (e.g. time bar) is no bar to an amendment that would resolve that issue (*Abercrombie*).

The applicability of time limits

43. *“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 the complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions” (Selkent)*

44. The applicable time limits do not ordinarily affect minor amendments or re-labelling exercises. For substantial amendments the tribunal should consider whether the complaint is out of time and if so whether the time limit should be extended. This is only a factor and not wholly determinative.

The timing and manner of the application

45. *“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 in discovery. Whenever taking any factors into account, 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.” (Selkent)*

46. Consideration should be given to the effect of any delay on the quality of evidence, additional areas of enquiry, and the stage of the tribunal proceedings.

All the circumstances

- 5 47. *“Whenever the 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” (Selkent).*
- 10 48. The tribunal should take into account all the circumstances including prospects of success.

The Claimant’s submissions

49. The Claimant’s submissions were in summary as follows –
- a. The amendment is not substantial because it is not a new type of complaint
- 15 b. The Claimant resigned without notice and there was accordingly insufficient time to make payment of his accrued but unused holidays on 31 October 2022. Accordingly those holidays fell due to be paid on the next pay day which was 28 November.
- 20 c. The failure to pay wages in October, holidays in November and bonus in December amounted to a series of deductions which are accordingly not time barred. The Claimant does not seek to assert that it was not reasonably practicable.
- 25 d. The time limit depends upon the type of deduction. Where there is an actual deduction the time limit runs from that date. Where there is an underpayment or a complete failure to pay the time limit runs from the contractual due date for payment (*Arora v Rockwell Automation Ltd EAT 0097/06*)
- e. The Claimant did not unreasonably delay in making the application to amend because he did not have the benefit of legal representation until

April 2023. An unduly technical approach should not be adopted where the Claimant is a litigant in person (*Aynge v Trickett t/a Sully Club Restaurant EAT 0264/17*)

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- f. The Claimant would be entitled to pursue these complaints in the Sheriff Court but would incur additional costs in doing so.
 - g. It would be proportionate to the issues, avoid delay and unnecessary formality, and would save expense to allow the amendment.

The Respondent's submissions

50. The Respondent's submissions were in summary as follows –
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- a. Notwithstanding written submissions to the contrary the Respondent accepted in oral submission that an amendment may cure an original complaint which is affected by time bar
 - b. The amendment is substantial and includes new complaints in respect of different alleged deductions for holiday pay in November and bonus
15 in December which do not arise of facts raised in the original claim. No explanation has been given as to why these facts were not included. There was unreasonable delay in including them.
 - c. The new complaints are made out with the statutory time limit. A claim based on a deduction on 28 November 2022 with EC notification on 22
20 February 2023 would require to have been brought by 24 March 2023.
 - d. There had been an unreasonable delay in making this application which could have been made when further particulars were intimated in April and were made subsequently only with a view to resolving an issue of time bar
 - e. The application to amend has no reasonable prospects of success. The
25 claimant's statutory (and contractual) entitlement is to 5.6 weeks (28 days; his written contract provides that the holiday year is the calendar year; he had accrued 28.33 days and had taken 24 days holidays; and accordingly no payment for accrued but untaken holidays falls due. The

Christmas bonus is discretionary and is paid to staff in employment in December.

- 5 f. The new complaints taken together with the original complaint do not constitute a series of deductions and accordingly the original complaint would remain time barred. Further, if any holidays or pro rated bonus fell due it would have been due to be paid on the termination date.
- 10 g. The Respondent has been put to the additional cost of attending a hearing which was aborted because of an application to amend which could have been made earlier. The amendment if allowed will put the Respondent to the substantial additional costs of defending the new complaints which are unlikely to be recovered.
- 15 h. If refused the Claimant would still be able to pursue these complaints in the Sheriff Court, and whilst additional cost would be incurred by both parties, awards of expenses follow success (whereas in the Employment Tribunal they are the exception and different considerations apply)
- 20 i. The Respondent is considering bringing proceedings in the Sheriff Court (in respect of the balance of the training costs) and in these circumstances these tribunal proceedings may require to be sisted pending determination.

Decision

The nature of the amendment

- 25 51. Terms of amendment which seek to add a new cause of action in respect of facts not already plead may be considered substantial. That description could be applied to an application to amend to include complaints for failure to pay holiday pay on 30 November 2022 (the holiday pay amendment) and failure to pay bonus on 30 December 2022 (the bonus amendment). These complaints were not heralded in the original claim- they did not form any part of the essence of the case (per *Aynge*).
- 30 The fact that the Claimant has already made a complaint

of unlawful deduction from wages (in respect of a deduction of training costs from his wages in October 2022) does not prevent the addition of new detriments being considered substantial.

52. Formal classification is not always helpful and it is necessary to also consider whether the amendments are likely to involve substantially different areas of enquiry. His unamended claim pertains to a failure to pay wages in October 2022 because of an alleged unlawful deduction of training costs. The holiday pay amendment would involve substantially different areas of enquiry into what holidays were accrued, what holidays were taken and the due date for payment. The bonus amendment would involve substantially different areas of enquiry into what if any custom and practice there was regarding payment of bonus and whether this amounted to a contractual term which had been breached (including identification of the due date for payment).

The applicability of time limits

53. For substantial amendments the tribunal should consider whether the complaint is out of time and if so whether the time limit should be extended. This a material factor but not necessarily determinative.
54. A complaint of unlawful deduction from wages must be made within 3 months (extended to allow for ACAS Early Conciliation) or where that was not reasonably practicable within such further period as the tribunal considers reasonable. The terms of amendment were intimated on 31 May 2023 (5/6 months after the alleged deduction). Accordingly the complaints of failure to pay holidays and failure to pay bonus are out with the statutory time limit unless it was not reasonably practicable to make the complaint.
55. The Claimant did not have the benefit of professional representation when he submitted his original claim on 1 March 2023 for unlawful deduction from wages but it is apparent that he was aware of his ability to make a claim to an employment tribunal for failure to pay monies due to him when he did so. The Claimant has had the benefit of

professional representation from 4 April 2023 onwards and submitted further particulars on 25 April 2023 but did not submit his application to amend until 31 May 2023.

5 56. Having regard to the above there did not appear to be any real
impediment which prevented the Claimant from including the essence
of the additional complaints (that he had not been paid holidays and
bonus) in his claim as lodged in March 2023. Further there did not
appear to be any real impediment which prevented the Claimant from
submitting his application to amend in April 2023 when he had the
10 benefit of professional representation. It is considered that it was
reasonably practicable for the Claimant to bring the additional
complaints within the original time period and in any event it was not
reasonable for the Claimant to delay making an application to amend
until 31 May 2023. However, whilst these are important factors, they
15 are not necessarily determinative of an application to amend a claim.

The timing and manner of the application

20 57. Applications to amend may be made at any time. Although these
proceedings were only raised in March 2023, they are at a relatively
advanced procedural stage given that a final hearing commenced on
12 May 2023 which was then adjourned to allow the Claimant time to
submit an application to amend. The application to amend was made
shortly thereafter. There is no reason to consider that any delay has
affected the quality of the evidence.

Prospects of success

25 58. As regards the holiday pay amendment, the Claimant asserts an
entitlement to “approximately 1 full working week.” (The Claimant
advised in submissions that this pertained to statutory holiday pay.)
The Claimant did not specify how that entitlement had been calculated
but instead called upon the Respondent “to confirm exactly the number
30 of working days accrued but untaken holiday entitlement had accrued
to 31st October 2022”. The Respondent replied to that call by stating

5 that the Claimant had accrued 23.33 days (10/12 x 28 days) and had taken 24 days in the holiday year (and accordingly there were no accrued but unused holidays at the termination date). The Claimant did not seek to challenge that calculation either by asserting having
10 accrued more holidays or having taken less holidays as at the termination date. The Claimant has failed to set out (either in writing or verbally at a hearing) the factual basis upon which he asserts that he had accrued and untaken holidays as at the termination date. This complaint therefore appeared to have little if any reasonable prospects of success.

15 59. The contract expressly states that wages are paid on the last working day of the month. The contract expressly states that deduction in respect of excess holidays is deducted from final pay which therefore indicates that payment in lieu of holidays is added to final pay. The Claimant accepts that final payment of salary was due to be paid on 31 October 2022. This indicates that any failure to pay holiday pay arose on 31 October 2022 and not on 30 November 2022. It appears this complaint would be affected by, and not remedy, the time bar issue affecting the original claim.

20 60. As regards the bonus amendment, the Claimant asserts that he was entitled to a bonus of “between £2k and £5k”, “potentially pro-rated”, payable in December 2022. The Claimant advised in submissions that he was seeking to rely upon an implied term. The Claimant was then asked to specify the factual basis upon which this could be implied but
25 he was unable to do so other than to state bonuses had been paid previously to staff. He accepted that this applied to staff who remained in employment in December which he had not.

30 61. The Claimant has failed to set out (either in writing or verbally at a hearing) a basis upon which it could reasonably be inferred that there was an implied term entitling an ex-employee to a pro-rated (or full) bonus calculated and payable 2 months after termination. This complaint therefore appears to have little if any reasonable prospects of success.

62. The Claimant clarified at this hearing that he did not seek an extension of time on the basis that it was not reasonably practicable to lodge his claim. Rather he sought to assert that the original complaint was part of a series of acts the last of which was not time barred. It appeared on the face of it that the application to amend was being made primarily for the purpose of rendering the original claim within time rather than because of the merits of these new complaints. In order for there to be a series of acts there requires to be a sufficient similarity of subject matter namely a factual (and temporal) link between each deduction. There are little if any reasonable prospects of asserting such a link between a failure to pay wages and a failure to pay holiday pay and separately a failure to pay bonus.

All the circumstances

63. The amendment if allowed would generate substantial new areas of enquiry in respect of an alleged failure to pay holiday pay and an alleged failure to pay bonus. Additional costs will be incurred by the Respondent in respect of complaints which appear to have little if any reasonable prospects of success. If the complaints are unsuccessful and if an award of costs is made, these costs may not be successfully recovered from the Claimant.

64. The amendment if refused would prevent the Claimant from proceeding with the existing complaint for wages, and the new complaints for holiday pay and bonus, in this forum. It would however be open to the Claimant to raise proceedings in the Sheriff Court in respect of these complaints, but with increased cost, delay and formality and with the material risk of a counterclaim in respect of the full amount of the training costs.

65. Taking into account all the circumstances including the failure to include or indicate complaints for holiday pay and bonus in the original claim albeit when he was unrepresented, the delay in making the amendments once he was represented, the prospects of success of the complaints for holiday pay and bonus, the injustice and hardship of

allowing the amendment on the Respondent, the injustice and hardship of refusing the amendment on the Claimant, the application to amend is refused.

5 **Employment Judge: M Sutherland**
Date of Judgment: 05 July 2023
Date sent to parties: 05 July 2023