THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

CASE REFS: 16/20FET
589/20FET

CLAIMANT: **Conrad Philip Davidson**

RESPONDENT: **Mallaghan Engineering Limited**

JUDGMENT ON A PRELIMINARY ISSUE

The application to amend the claim is refused and the matter will proceed to hearing as directed.

CONSTITUTION OF TRIBUNAL

Vice President (sitting alone): **Mr N Kelly**

APPEARANCES:

The claimant appeared in person and was unrepresented.

The respondent was represented by Mr McDonald of Walker McDonald Solicitors.

1. The claimant was employed by the respondent as a welder for approximately six months, ending on 17 October 2019, when he resigned. He did not have 52 weeks continuous service to allow a claim of ordinary unfair dismissal.

2. The claimant lodged two claims alleging unlawful discrimination contrary to the Fair Employment and Treatment (Northern Ireland) Order 1998.

3. Neither of those claims, or the agreed list of issues, had mentioned any Health and Safety issue.

4. In the course of the interlocutory process and during a Case Management Preliminary Hearing on 12 March 2021, the claimant had raised issues concerning Health and Safety but had not identified the type of claim or claims which he wished to make in this respect. This tribunal has no jurisdiction to police alleged breaches of Health and Safety legislation. That is a matter for the Health and Safety Executive and the criminal courts. This tribunal's jurisdiction in relation to issues of Health and Safety is limited.

5. The claimant was directed to clarify any proposed amendment in writing. He did so in a letter dated 14 March 2021.

6. This Preliminary Hearing was listed to determine the following issue:

> *"To consider the applicant's application to amend his claim as set out in his letter of 14 March 2021."*

7. The letter of 14 March 2021 again did not refer to any specific proposed amendment. He simply wanted to *"include a Health and Safety aspect to the Unfair Dismissal element of the complaint*." However, after protracted discussion in this Preliminary Hearing, it was clear that the amendment sought by the claimant could only have been an amendment to include an unfair dismissal claim under Article 132(1)(d) of the Employment Rights (Northern Ireland) Order 1996 on the basis that the claimant alleged that he had left his employment *"in circumstances of danger which (he) reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert".*

8. The claimant stated that he had raised a health and safety issue with his supervisor when he left his employment or when he was leaving his employment. There was no record of any prior health and safety complaint. The claimant had not been at any stage a health and safety representative and the claimant had had no particular role in that regard in the course of his employment. There were no grounds for a claim under Article 132(1)(a), (b), (ba), (c) or (e) of the 1996 Order and it is clear that the claimant did not intend to make any such claim. Apart from a potential Article 132(1)(d) claim, the only possibility is a protected interest or Health and Safety disclosure detriment claim under Part VA or Article 68 of the 1996 Order.

9. There is no basis on which the claimant could allege that there had been a protected interest or Health and Safety disclosure detriment because he had already decided to resign and had in fact resigned when making any such alleged disclosure. He had not suffered any detriment as a result of any such alleged disclosure.

10. The application to amend is therefore an application to amend to include a claim of unfair dismissal pursuant to Article 132(1)(d) of the 1996 Order.

RELEVANT LAW

11. In ***Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327,*** Sedley LJ stated:

> *"There is no principle of law which indicates how generously or sparingly the power to enlarge time is to be exercised."*

12. Langstaff J stated in ***Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13*** that a claimant applying for an extension of time must provide an answer to two questions:

> *"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and, insofar as it is distinct, the second*

is the reason why after the expiry of the primary time limit, the claim was not brought sooner that it was."

13. Where the claimant relies on ignorance or a lack of complete understanding of the right to make a specific claim, the assertion of ignorance on the part of the claimant must be genuine and must be reasonable. The tribunal must address specifically the alleged lack of knowledge. (See ***Bowden v Ministry of Justice UKEAT/0018/17*** and also ***Averns v Stagecoach Inn Warwickshire UKEAT/0065/08***)

14. In ***Selkent Bus Company Limited v Moore [1996] IRLR 661,*** the EAT discussed the principles applicable when assessing an application to amend a claim by bringing what is essentially a new claim. In that case Mummery J set out various general principles. Those included the nature of the amendment, the applicability of time limits, the timing and manner of the application and all other relevant circumstances in balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. It is clear that in the present case, the application to amend is an application to bring an essentially new claim. The contents of the claim form were entirely related to allegations of discrimination on the ground of religious belief and political opinion. To bring an entirely new claim (and an entirely new type of claim) is not a simple relabelling exercise.

    That does not, in itself, prevent the tribunal granting such an amendment. There is a danger in all of this of adopting an unnecessarily and inappropriately rigid approach based on the various pieces of case law accumulated over the years. This is a simple and relatively straightforward matter. The tribunal has to weigh all the circumstances; including in particular the prejudice that might be caused to the claimant and to the respondent. The tribunal then has to consider the relevant statutory test to extend the time limit for lodging a claim; the *"reasonably practicable" test.*

15. The time limit for lodging a claim of unfair dismissal is three months from the effective date of termination. That period of three months can only be extended where the Industrial Tribunal is satisfied that it had not been reasonably practicable for a complaint of unfair dismissal to have been presented before the end of that period of three months and where the tribunal concludes that the complaint had been lodged within such further period as the tribunal considered reasonable.

DECISION

16. The two claims lodged by the claimant on 7 November 2019 and 26 January 2020 contained no mention whatsoever of any Health and Safety issue, either as a free standing allegation or as a reason for the claimant's resignation.

17. The claimant sought no advice from any source before lodging those claims.

18. The claimant sought no advice from any source before the issue of Health and Safety was raised on 12 March 2021, in a Case Management Preliminary Hearing. He sought no proper advice before the Preliminary Hearing and did not specify the proposed amendment. The clarification of the proposed amendment involved a great deal of prompting and charitable guesswork on the part of the tribunal.

19. The delay in bringing any such claim is substantial; at least 14 months.

20. The proposed amendment would involve an entirely new claim with significant inevitable delays to the tribunal timetable resulting in additional costs and disruption to both parties.

21. In the circumstances of this case, where the claimant had obtained new employment one day after leaving his employment with the respondent, the benefits to that claimant of an additional claim of unfair dismissal would be minimal and would not justify the disruption to both the tribunal and to the parties of a further substantial delay and preparatory work.

22. The current claims before the tribunal are claims of alleged discrimination on grounds of religious belief and/or political opinion and include claims of discrimination, harassment and victimisation.

23. Part of the claimant's allegations are that, as a result of raising complaints about the alleged discrimination/harassment on the grounds of religious belief and/or political opinion, he had been allocated additional work of a particular type which was designed as an act of victimisation. Those matters are already therefore before the tribunal in any event.

24. Applying the principles set out in ***Selkent,*** the application to amend is refused because

    (i) The proposed amendment raises an entirely new claim and would be a substantial amendment.

    (ii) The time limit has been exceeded by a significant period and no evidence has been provided which would justify the extension of that time limit using the *"reasonably practicable"* test.

    (iii) The claimant did not seek advice from any source until after the Case Management Preliminary Hearing on 12 March 2021.

    (iv) The potential benefit to the claimant of the addition of a new claim at this stage would be minimal.

    (v) The proposed amendment would cause substantial delays to the hearing of the claim at a late stage in the proceedings.

    (vi) The proposed amendment would require additional investigations and evidence from the respondent.

Further Directions

25. The hearing will now take place between ***11 September 2021 and 13 September 2021 in Killymeal House.*** The additional dates ***of 14 and 15 September 2021*** are vacated. Three days will be sufficient for this hearing.

26. Reading time on the first day will be between ***10.00 am and 11.00 am.*** The hearing will therefore start ***at 11.00 am*** *on the first day* and ***10.00 am*** *on subsequent days.*

27. The procedure at the hearing was explained to the parties.

28. The claimant will provide a further witness statement by email to the respondent's solicitor ***no later than 5.00 pm on 6 August 2021.***

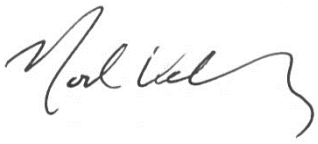
29. The respondent's solicitor shall provide witness statements to the claimant *by email* ***no later than 5.00 pm on 20 August 2021***.

30. The respondent's solicitor shall provide ***four copies*** of the exchanged witness statements and ***four copies*** of the exchanged documentation to the Tribunal Office in Killymeal House ***at least five working days*** before the commencement of the hearing. The respondent solicitor will also provide a copy of same to the claimant.

31. The parties will address all allegations properly before the tribunal in their witness statements. The jurisdiction of the tribunal to determine allegations which postdate the claim will be addressed in the course of the hearing.

32. The respondent's solicitor queried the allegation by the claimant that he had suffered medical injury as a result of the alleged victimisation. The claimant referred to *"lung problems"* which were unspecified. He stated that he had been to his GP and that two sick notes have been provided to cover a period of sick leave. Mr McDonald pointed out that the one sick note (there should be two) in the bundle referred to *"viral infection"* and not to any alleged medical injury caused by noxious fumes during welding.

33. It is for the claimant, if the claimant is alleging medical injury as part of his victimisation claim, to bring medical evidence to support that claim. Any such medical evidence must be disclosed to the respondent's solicitor in good time before the hearing.



Vice President:

Date and place of hearing: **23 July 2021, Belfast.**

This judgment was entered in the register and issued to the parties on: