EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Nos: 4109212/2021 and 4113686/2021

Held in Glasgow on 23 and 24 May 2022

Employment Judge Ian McPherson
Tribunal Member Mr G Doherty
Tribunal Member Ms M McAllister

Ms Kara Scobie	**Claimant** **Represented by:** **Mr Neil MacDougall** **Advocate** **(instructed by:** **Ms Sacha Carey** **Solicitor)**
The Scottish Ministers	**1st Respondent** **Represented by:** **Mr Kenneth McGuire** **Advocate** **(instructed by:** **Mr Robin Turnbull** **Solicitor)**
Allan Wells	**2nd Respondent** **Represented by:** **Mr Kenneth McGuire** **Advocate**
Pauline McFarlane	**3rd Respondent** **Represented by:** **Mr Kenneth McGuire** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(1) The **majority** judgment of the Employment Tribunal, Ms McAllister being in the minority, having considered the claimant's opposed application by email of 23 May 2022 @ 16:10 to be allowed to amend the paper apart to the ET1 claim form in claim

4113686/2021, by adding new text to the end of paragraph 30, and add a new paragraph 31(a)(iv), at page 90 of the Joint Bundle, is to **refuse** the claimant's application, on the basis that it is not in the interests of justice to allow that amendment, nor is it in accordance with the Tribunal's overriding objective to deal with this case fairly and justly to allow that amendment ; and that for the following reasons.

(2) The **unanimous** judgment of the Tribunal thereafter, having heard both parties' counsel, after delivering the oral judgment (now committed to writing as below), and adjournment for further private deliberation in chambers, was as follows: Given Mr McDougall's intention to appeal against the Tribunal's majority judgment to refuse leave to amend, and counsel for the respondents not objecting to the claimant's application to adjourn the listed Final Hearing, **the Tribunal adjourned the Final Hearing, to be relisted before the same Tribunal, in due course,** after conclusion of any appeal to the Employment Appeal Tribunal ("EAT"), and directs the claimant's solicitor to intimate to the Tribunal, and to the respondents' solicitor, when application is made to the EAT, and to update the Tribunal as to progress of that appeal.

REASONS

Introduction

1. This case called before the full Tribunal on Monday, 23 May 2022, for the start of an 11-day Final Hearing in person before a full Tribunal, as per Notice of Final Hearing issued on 24 February 2022. The full Tribunal panel had a reading day on Friday, 20 May 2022, following which certain matters were raised by the Tribunal for parties to consider in advance of the start of the Hearing.

2. When the case called on Monday morning, the claimant was in attendance, represented by Mr Neil MacDougall, advocate, instructed by Ms Sacha Carey, solicitor with Ergo Law, Edinburgh. The respondents were represented by counsel too, Mr Kenneth McGuire, advocate, instructed by Mr Robin Turnbull, solicitor with Anderson Strathern, Edinburgh.

3. The first day was spent addressing miscellaneous preliminary matters, including housekeeping matters relating to the Joint Bundle, attempting to finalise the List of Issues, and timetabling / scheduling of witnesses, but in the course of the afternoon, Mr MacDougall made an oral application to the Tribunal for leave to amend the claim.

Claimant's application to amend the ET1 claim form

4. Mr MacDougall articulated that application to amend orally, which the Tribunal noted, as being to introduce a new paragraph 31(a)(iv) to the paper apart in the second claim, **4113686/2021**, to read: *"***That I have been automatically unfairly dismissed within the meaning of section 103A of the ERA 1996."**

5. After objection by counsel for the respondents, it was agreed that Mr MacDougall would reflect, and advise the respondents' solicitors and counsel, with copy to the Tribunal by 6pm that evening, whether he was proceeding with his intimated application for leave to amend, or making another application for the Tribunal to consider.

6. By email from the claimant's solicitor sent to the Tribunal, and copied to the respondents' solicitor, at 16:10 on 23 May 2022, the claimant's application for leave to amend was expressed as follows:

> *"The Claimant motions the Tribunal to allow the following amendments to be made to the paper apart of the ET1 to claim 4113686/2021. At the end of paragraph 30 [page 90 of the joint bundle] insert the following:*
>
> *"I believe the Respondents carried out all the acts and omissions hereinbefore described that led to my resignation because of my initial protected disclosures to the Second Respondent made in the period between 2 October 2020 and 7 October 2020. The detail of these disclosures is contained in section 1(a) of the Further and Better Particulars at pages 33 and 34 of the bundle."*
>
> *Add a new section 31(a)(iv) in the following terms:*

"That I have been automatically unfairly dismissed within the meaning of section 103A of the ERA 1996."

7. When the case called again this morning, Tuesday, 24 May 2022, counsel for the claimant provided a 4-page, typewritten submission, with six numbered sections, in support of his application for amendment, together with excerpts from **IDS Employment Law Handbooks,** Volume 5, Chapter 8, in particular paragraphs 8.17 to 8.22, and 8.23 to 8.37. He cited from **New Star Asset Management Holdings Ltd v Evershed [2010] EWCA Civ. 870**, and Pruzhanskaya **v International Trade and Exhibitors (JV) Ltd EAT 0046/18.**

8. From 10:08 am until 10:21, Mr MacDougall adopted his written submission, and addressed the Tribunal on its headline points about the relevant factors to take into account: the nature of the amendment; the applicability of time limits; timing and manner of the application; balance of hardship; and interests of justice.

9. The Tribunal then heard from Mr McGuire, until 10:40, opposing the application, for the reasons he advanced orally to which Mr MacDougall replied until 10:49, when the Tribunal adjourned to allow both counsel to consider the recent judgment in **Hesketh** by Lord Fairley in the EAT, which the Judge drew to both counsel's attention, inviting their comments, after a break to read that EAT judgment.

10. Further submissions then ensued where the Tribunal heard from each counsel, and they addressed further matters put to them by the Judge, on behalf of the full Tribunal, enquiring about other relevant matters to take into account.

Oral Judgment given by the Tribunal

11. The Tribunal adjourned at 11:24am into chambers for private deliberation, estimating that we would be maybe 45 minutes. In the event, our private deliberation took much longer, and the public Hearing did not resume until 13:04pm, when the Tribunal delivered its majority judgment orally, by the

Judge reading out *verbatim* from the text agreed by members of the Tribunal in chambers, and reading as follows:

Reasons

"The Tribunal has carefully considered, in chambers, during its private deliberation, all that has been said by counsel for both parties, Mr MacDougall speaking to his written application, and Mr McGuire opposing the amendment, for the reasons advanced orally by him.

We have come to a majority decision, recognition of the fact that the issues involved in considering this opposed amendment application are complex and finely balanced, resulting in a 2:1 split across the full Tribunal.

After careful scrutiny of the arguments advanced for and against the amendment, the majority (EJ McPherson and Mr Doherty) have decided to ***refuse*** *the claimant's application, on the basis that it is not in the interests of justice to allow that amendment, nor is it in accordance with the Tribunal's overriding objective to deal with this case fairly and justly to allow that amendment.*

As is made clear in ***Selkent,*** *an application to amend should not be refused solely because there has been a delay in making it, and there are no time limits for considering an application to amend. Of paramount consideration is the relative injustice or hardship involved in refusing or granting the application.*

In our view, the claimant has had extensive time and ability to particularise her claim, throughout the case management process, and this application to amend, presented on day 1 of an 11-day Final Hearing, falls to be refused for the following reasons:

(1) We do not accept Mr MacDougall's categorisation that the absence of a ***Section 103A*** *claim in the ET1 claim form is one of it is a simple omission, or an administrative error. As Mr McGuire highlighted, it beggars' belief that it was presented only yesterday. Mr MacDougall*

*tried valiantly to argue that the fact that **a Section 103A** claim was flagged up in the Scott Schedule in February, and in the updated Schedule of Loss earlier this month, meant that even if an amendment application was not expressly made then, it was implicit, and the respondents were therefore on notice from that earlier stage.*

*(2) On that point, while noting Lord Fairley's recently reported decision in **Hesketh v GCU [2022] EAT 33**, published on the EAT decisions website on Gov.Uk on 23 February 2022, as brought to parties' counsel's attention by the Judge, where, at paragraph 22, Lord Fairley stated that "**Whilst no formal application to amend was made at that time, the inclusion of that claim in the November 2018 Scott Schedule can be taken, by implication, to be an application to amend to introduce the new claim.",** the Tribunal agrees with Mr McGuire that that view, which he described as bold, and <u>per incuriam</u>, sits at odds with the familiar and well known authority from the then President of the EAT, Mr Justice Langstaff, in the case of **Chandhok v Tirkey 2015 ICR 527 EAT**, and the comments of Mr Justice Langstaff at paragraphs 14 – 18, particularly, paragraph 18 where the learned EAT President stated that a Tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings.*

*(3) The Tribunal is dealing here not with an unrepresented, party litigant, but with a claimant who has throughout these two combined claims been legally represented. That is a relevant factor for us to take into account, as agreed by both counsel. In considering all of the relevant matters placed before us, by counsel for both parties, we have considered the well-known **Selkent** factors, but also borne in mind the real practical consequences of allowing or refusing the proposed amendment.*

(4) While Mr MacDougall argued that the balance of hardship is neutral, given the absence of any new factual material being relied upon by the

claimant, who relies on the case as otherwise pled, we agree with Mr McGuire that granting the proposed amendment does weigh against the respondents, and that their exposure to a potentially higher liability in compensation, if an automatically unfair dismissal head of claim succeeds, should be viewed as a hardship, but equally we can see (as does the minority member, Ms McAllister) that if the amendment is refused, the claimant will suffer potential hardship by not being allowed to run an automatically unfair dismissal case with the potential of uncapped compensation.

(5) The timing and manner of the application support it being refused. While an amendment can be proposed at any stage, and the lateness of the application in itself is not a good ground for refusing the amendment, it is that, taken together with its practical consequences, which makes the majority of the Tribunal refuse the application. No real or satisfactory explanation has been provided, on the claimant's behalf, as to why the application has only been made at this late stage, and why it was not made much earlier. When the Scott Schedule and Schedule of Loss were prepared, referring to ***Section 103A****, that should have set alarm bells ringing that an application to amend should be progressed without delay.*

(6) The Tribunal has also required to consider whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs whether because of the delay or because of the extent to which the 11-day listed Final Hearing will be lengthened if the new issue is allowed to be raised. Delay may, of course, in an individual case have put a respondent in a position where evidence relevant to the new issue is no longer available or is of lesser quality than it would have been earlier. Mr McGuire stated that, if allowed, he would require time to reply, and to consider further witnesses for the respondents. That puts the listed Hearing in jeopardy, as he says he would require some weeks to do that.

(7) It seems to the majority of the Tribunal that this case is not a case very much in its early stages, where, if an amendment were allowed, both parties would have reasonable time to reflect before the evidential Hearing, and prepare accordingly, as regards necessary witnesses, productions, etc, but a case where an 11-day Final Hearing has already been ordered following extensive, earlier case management. The parameters of the factual and legal dispute between the parties have been set in the ET1 and ET3 to date, and to open up the claimant's pled case, and allow her to also run an automatically unfair dismissal head of complaint is very likely to require further enquiry, and thus time and expense to the respondents, impact on evidence to be led, and time for questioning of witnesses, and all that at a relatively late stage in the proceedings.

(8) While we appreciate that refusing the amendment will be disappointing to the claimant, the majority reminds her that she still has her existing pled case to pursue against the respondents, and that at this assigned Final Hearing. In the majority's view, there would undoubtedly be a greater hardship to the respondents if the claimant was allowed to add to her heads of claim as proposed by this amendment application, and we consider that the injustice to the claimant in refusing her proposed amendment is less than the hardship and injustice to the respondents, if we allowed the amendment, given the claimant can still pursue her existing, pled case."

Adjournment of the Final Hearing pending outcome of appeal to EAT

12. Prior to reading out that oral Judgment, the Judge indicated that, for the convenience of parties, he would have it issued in written format. After the oral decision had been given, at about 13:14pm, Mr MacDougall stated that, in anticipation of such a ruling, he had taken instructions from the claimant, and the claimant would be appealing to the EAT as soon as possible after receipt of the Tribunal's written reasons, and he sought adjournment of the proceedings pending conclusion of the appeal to the EAT.

13. Mr McGuire, counsel for the respondents, was asked for comment, and he advised that the application for adjournment was not opposed, and perhaps the EAT could arrange for an expedited appeal hearing.

14. Having heard from both counsel, the Tribunal again retired into chambers, for further private deliberation, at 13:20pm, returning at 13:26pm, and the Judge then reading out *verbatim* from the text agreed by members of the Tribunal in chambers, and reading as per paragraph (2) of the Judgment above.

15. The remaining assigned dates for the Final Hearing are accordingly discharged as unnecessary.

Further Procedure

16. Without making any formal application on behalf of the respondents, Mr McGuire asked that it be noted that the respondents may make an application for expenses against the claimant. His point has been noted, as also the Judge's response that any such application can be dealt with in due course as per the **ET Rules of Procedure 2013, rules 74 / 84** refer. He suggested that, subject to the outcome of the appeal, rather than proceed to relisting, there might be a further Case Management Preliminary Hearing.

Employment Judge: Ian McPherson
Date of Judgment: 24 May 2022
Entered in register: 25 May 2022
and copied to parties