Can time limit be addressed at final hearing when an application to amend was previously granted?

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Douglas v North Lanarkshire [2024] EAT 194

Summary

1. The EAT considers whether or not, in granting an application to amend, it was an error of law for a tribunal to address the issue of limitation at the final hearing, noting the decisions in ***Amey Services v Alridge and Galilee v Commissioner of Police of the Metropolis***. The decision also briefly addresses a more discrete, secondary point, about the application of ***Sainsbury's Supermarkets Limited v. Hitt.***

Background

2. The Claimant (C) was a driver for the Respondent (R). During the final four years of his employment, he suffered extensive ill health. During consideration of a reallocation of his duties, he raised issues about how over time was allocated among the drivers.

3. Subsequent to that, other drivers learned of his concerns, responding aggressively to him. C was signed off sick as a further response to these events.

4. He was referred to Occupational Health (OH) and in reports provided to R, it was noted that a return to work by C was not assessed to be likely until he believed that all issues raised by him had been resolved to his own satisfaction. The reports provided went on to note that in the absence of a significant intervention the most relevant predictor of future attendance was what had happened in the past. Significant intervention required that C had come to terms with his workplace issues.

5. On that basis, R dismissed him.

Claim before the ET

6. C brought a claim before the employment tribunal (ET) alleging unfair dismissal. He then sought to amend that complaint to include a whistleblowing detriment complaint under s.47B ERA 1996. He was directed to provide further particulars of that complaint, but did not do so. The case was then stayed while C progressed his appeal against dismissal with R.

7. The stay was subsequently lifted. Notwithstanding, that particulars of the whistleblowing complaint had not been provided, the amendment was approved (on the basis that it was in effect a relabelling exercise).

8. At the start of the final full merits, a discussion about the events and particulars relied on took place. That having occurred, the EJ presiding distilled that discussion into a list of issues which was sent to the parties. Notably that list didn't flag the limitation matter, although R asserted that it would address limitation as it now understood the timeline to be.

9. During the final hearing the ET found that while C made disclosures and suffered some detriments, the last of those was 23 March 2019. As the claim was presented 18 May 2020, the ET concluded that it did not have jurisdiction to consider those s47B detriment complaints.

10. The ET also found that C was otherwise dismissed fairly, R having relied on his ill health, and the reports provided by OH advisers.

Appeal to EAT

11. The Claimant appealed against that decision arguing that -

    a. In allowing the amendment the ET implicitly and conclusively determined limitation when allowing the amendment application. As such it was an error of law to revisit the matter on the first day of the hearing; and
    b. The tribunal had failed to properly scrutinise basis for dismissing (see 35).

EAT Decision

12. The EAT's attention was drawn to the decisions in ***Amey Services v Alridge*** *UKEAT/0007/16/JW and* ***Galilee v Commissioner of Police of the Metropolis*** *[2018] ICR 634*. The former decision suggests that it is not open to a tribunal to reserve the time bar issue when allowing an amendment – *Galilee* says it is competent for it to do so. The EAT was invited to resolve the conflict between those two decisions.

Lack of clarity in the pleaded case

13. The EAT noted that the application to amend was unclear, especially as to matters such as timing – and despite an undertaking to provide the necessary detail C, did not comply with directions in that regard. Indeed, clarity in relation to dates and events was only achieved at the start of the final full merits hearing.

14. In such circumstances, said the EAT, it could not reasonably be inferred that the EJ who considered the amendment application applied his mind to the time bar issue. Rather his determination was that the amendment was simply a re-labelling exercise. Given however that the EJ never determined time either expressly or by necessary implication, the panel considering merits was entitled to consider time as it remained a live jurisdictional issue before it.

Amey and *Galilee*

15. The EAT stated that neither *Amey* nor *Galilee* applies where the issue of time has been clearly overlooked at an earlier stage. That can be where there is a lack of clarity (as here). On that basis the EAT did not have to fully consider the decisions in those authorities, however, in his judgement Lord Fairley goes on to observe as follows –

> *"Neither* ***Amey*** *or* ***Galilee*** *applies in a situation where the issue of time bar has clearly been overlooked at the stage when the amendment was considered and allowed. That situation can arise where - as here - there was a material lack of clarity in the claimants pleaded case. Were it necessary to resolve the apparent tension between Amey and Galilee, however, the approach taken in Galilee respectfully seems to me better to reflect the reality of written pleading in the employment tribunals. As was noted in Galilee and as this case illustrates, it will often be difficult or impossible to resolve a potential issue of time bar until*

evidence has been led at the full hearing, even where extensive efforts have been made during case management to bring clarity to the claimants pleaded case. That problem can be particularly acute where what is relied upon alleged is a series of acts or omissions by the employer which are said to amount to a course of conduct."

(Para 42).

Time is a *Selkent* factor

16. Lord Fairely went on to note at para 43 that –

"Where possible a tribunal considering an application should usually examine the issue of time bar as one of the ***Selkent*** *factors. Where the issue of time bar is unclear however it is competent for it to be reserved (****Galilee****). Where as here an issue of time bar has obviously been overlooked at the stage of consideration of the amendment application due to a lack of clarity in the claimant's pleaded case, it remains a live jurisdictional point which any subsequent tribunal considering the evidence has an ongoing duty to address whether or not it has been raised by the respondent."*

17. If overlooked, time remains a live issue for consideration (as a jurisdictional point) whether R has raised it or not.

The ***Hitt*** point

18. The EAT dealt with the ***Sainsburys' v Hitt*** point in short order. It noted first that the ET had considered if the dismissing manager had reasonable grounds for his conclusion that C's attendance was unlikely to improve, having carried out as much enquiry as was reasonable in the circumstances.

19. The EAT said that in applying that test, the ET did not err. R was instructed by past attendance and the content of the advice received from OH advisers. Whilst the ET had noted that another employer might have decided to wait to see how attendance developed, it could not be said that no reasonable employer would have relied on what the OH advice said about future attendance.

20. On that basis, the ET had approached the issue correctly.

21. Having addressed both this and the time point, the appeal was dismissed and the ET's decision stands.

Comment

22. Lord Fairley gives a helpful indication in this case that in his view, the reasoning in *Galilee* is to be preferred over *Amey*, thus leaving it possible for limitation to be considered after amendment has been approved. That certainly makes sense on the facts of this case (especially as C had been directed to provide particulars of his claim, but had not done so).

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