Appeal No. UKEAT/0503/13/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 29 April 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MRS L MAKAUSKIENE — APPELLANT

RENTOKIL INITIAL FACILITIES SERVICES (UK) LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JOE SYKES (Representative) Employment Law Centres 107 Fleet Street London EC4A 2AB
For the Respondent	MS JUDE SHEPHERD (of Counsel) Instructed by: Rentokil Initial Facilities Services UK Ltd Legal Services Ebony House Castlegate Way Dudley DY1 4TA

SUMMARY

PRACTICE AND PROCEDURE - Claim – Amendment

The Claimant applied to add (1) a section 103A claim to an existing unfair dismissal claim and (2) a claim of detrimental treatment by reason of public interest disclosure. The Employment Judge refused both. In his initial reasons he did not give separate consideration to the section 103A claim. When asked to reconsider he confirmed his earlier decision. **Held**: (1) The Employment Judge ought to have given separate consideration to the section 103A claim, which was closely linked to the existing unfair dismissal claim – appeal allowed in this respect and permission to amend granted; (2) the Employment Judge did not err in law in refusing permission to amend to add a claim of detrimental treatment by reason of public interest disclosure – appeal in this respect dismissed.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mrs Liudmila Makauskiene ("the Claimant") against a judgment of Employment Judge Goodrich in the Employment Tribunal at the East London Hearing Centre, refusing an application for leave to amend and then, upon reconsideration the same day, confirming that decision.

The background facts

2. Rentokil Initial Facilities Services (UK) Limited ("the Respondent") is a provider of contract cleaning and related services. The Claimant was employed by the Respondent from 8 May 2007 until 10 September 2012 as a cleaning operative, working at the site of one of the Respondent's clients, Thomson Reuters, at the Thomson Reuters building. She describes her racial and ethnic origins as Eastern European, Lithuanian. She speaks some English but Russian is her first language. She was afforded a translator by the Respondent at some meetings and was given some training by a translator.

3. Although there had been earlier disciplinary proceedings and grievances involving the Claimant it was a major disagreement in 2012 which led to the Claimant's dismissal. She had been working 40 hours per week. Apparently as a result of a reorganisation her hours were reduced by half. There was a consultation meeting on 3 August 2012 at which the Claimant expressed her dissatisfaction. It is her case that at this meeting she also put in a grievance that she was being bullied and harassed. It is part of the Respondent's case that she said she would contact the client, Thomson Reuters direct and that she was expressly forbidden to do so. At all events, on 12 August 2012 the Claimant did contact the head of Human Resources at Thomson Reuters. For this reason the Respondent suspended her on full pay with effect from 15 August 2012 and dismissed her with effect from 10 September 2012.

4. The Claimant appealed against her dismissal. In the course of the appeal she produced a letter dated 2 October 2012 from solicitors, KM Legal, whom she had instructed. The letter said that she wished to appeal and that she wished to raise a grievance against her supervisors. The letter is too lengthy to set out in full, but it is important to describe it in general terms. It set out a timeline of events from 9 March 2010 to 12 September 2012 under the heading "Background facts - Course of events leading to ill health". The timeline referred to grievances in which the Claimant had participated as an individual complainant or as one of a group of employees. It referred also to performance reviews and disciplinary proceedings instituted by the Respondent against her.

5. It is relevant to quote items 32 to 34 on the time line:

> **"32. 1/8/12 – Letter of invitation to a formal meeting (3rd August) to discuss our client's continued employment where our client is notified of a reduction in her hours of work as well as other changes to structure of work. Our client responded with a grievance of being bullied and harassed and left with no answers as to why hours have been cut or not contract has been presented.**
>
> **33. 12/8//12 – Our client wrote to client Thomas Reuter with concerns. Company respond with suspension. A disciplinary hearing is held on 29th August 2012: bringing the company name into disrepute and failure to carry out direct management instruction.**
>
> **34.12/9/12 – Our client was summarily dismissed."**

6. The letter then contained a section entitled "Legal facts". This section clearly alleges breach of a duty of care, bullying and harassment, wrongful and unfair dismissal and breach of the **Equality Act 2010**, although that breach of the **Equality Act 2010** appears only to concern refusal of access to training at a convenient time. It is right to say, in addition, that one of the grievances mentioned in the timeline related to differential treatment of Eastern European and Brazilian workers. On 22 October 2012 the Claimant was informed that her internal appeal was dismissed.

The Tribunal proceedings

7. On 1 November 2012 the Claimant lodged an ET1 claim form. She ticked boxes to indicate that she was bringing claims for unfair dismissal and race discrimination. She did not have a representative. In handwriting she made just two points. She referred to her dismissal for contacting the client, saying that other colleagues had done so without being dismissed; and she also complained that she was given training by a translator by reason of weak English at a time which she regarded as inconvenient because the office was crowded. However, in addition to these handwritten comments the Claimant incorporated in the ET1 substantially the whole of the letter dated 2 October 2012, to which I have referred, including its timeline.

8. The Tribunal, after receiving the Respondent's ET3 form, listed the case for a two-day hearing. There was no prior case management discussion, as there certainly should have been in this case to identify the issues. The Claimant attended the hearing in person with a translator. The Respondent was represented by counsel. It is not surprising that the hearing was ineffective as a final hearing. A substantial amount of time was spent defining the issues.

9. As regards unfair dismissal, it was identified that the Respondent said the true reason was conduct whereas the Claimant disputed that reason and said that the dismissal was an act of race discrimination. As regards direct race discrimination, it was identified that the Claimant said she and other employees of Eastern European origin were less favourably treated than employees of Brazilian origin. The less favourable treatment related to overtime, corrective action sheets for reduction of her hours, excessive workload, failure to take corrective action in response to the Claimant's complaint about a supervisor, suspension on three occasions, dismissal and the dismissal of the internal appeal. As regards indirect race discrimination, the allegation as now put by the Claimant related to the requirement to speak English at meetings where there was no or no adequate interpreter. Finally there were issues as to whether some or

all of these complaints were out of time and, if so, whether time should be extended. Having identified these issues, the Employment Judge gave further case management directions and listed the case for hearing between 15 and 18 October 2013.

The application for leave to amend

10. On 31 July 2013 an organisation known as Employment Law Centres wrote to the Tribunal with an application for permission to amend the ET1 claim form. The letter stated:

> **"We apply to amend the ET1 to add the label of detriment and dismissal on the ground of having made protected disclosures by s43B(1)(b), 43C, 47B(1), 103A Employment Rights Act 1996. The addition of the label relies on the facts already pleaded."**

11. The letter then contained a table which identified as disclosures six grievances or complaints which were mentioned in the timeline to which I have referred. The letter then contained a second table which identified 20 detriments which it was said the Claimant had suffered by reason of the disclosures. Again, these were mentioned in the timeline to which I have referred. The letter then set out some argument in support of the Claimant's case for leave to amend.

The Employment Judge's decision

12. The Respondent having objected to the application, it was listed for hearing before Employment Judge Goodrich sitting alone. He had dealt with the case management in April 2013. As I have said, he refused the application for reasons given orally but then reduced to writing in a judgment with written reasons dated 30 September 2013.

13. The Employment Judge, having set out the background, made explicit reference to the leading case on amendment, **Selkent Bus Company v Moore** [1996] IRLR 661, and structured his decision to reference to considerations identified in that case: the nature of the amendment,

the applicability of statutory time limits, the timing and manner of the application, and injustice and hardship to the parties.

14. As to the nature of the amendment, he said the following:

> **"27. Is the amendment a minor matter, or substantial alteration?**
>
> **28 The facts relied on for the assertions of protected disclosures and detriments have been pleaded to in the sense that the Claimant and her legal representatives described making a number of complaints. Before hearing submissions, I expressed the view that what was lacking was both a reference from the Claimant's representatives to the Claimant having made a qualifying disclosure; and there was an absence of a link in the pleaded case between the complaints made and allegations that the Claimant suffered unfavourable treatment because of those complaints. Nor, in his submissions to me, did Mr Sykes identify such explicit links.**
>
> **29. If the Tribunal vetting team who received ET1 claim forms had understood the claim to include a protected disclosure claim they would have marked it as such. I would also have expected 5.1 to have contained a tick for 'other complaints' rather than only the unfair dismissal claim and race discrimination boxes.**
>
> **30. I would also have expected that it would have been identified that the Claimant was making a protected disclosure claim during the course of the discussion of the issues between the parties. A lengthy discussion was conducted. I appreciate that the Claimant was acting for herself. It was possible, however, with time and patience to identify the nature of the Claimant's direct and indirect discrimination claims.**
>
> **31. I consider, therefore, that the amendment sought to bring a protected disclosure claim is the bringing of a new claim, although a claim that refers to events already pleaded."**

15. As to time limits, he said the claim was "a long way out of time". As to the manner and timing of the application, he said that the application was very late, some months after a hearing at which a considerable amount of time had been spent seeking to analyse the Claimant's case and draw up a comprehensive list of issues and after the date of exchange of witness statements. He then dealt with what he had described as prejudice. He said there would be prejudice to both sides depending on the result. He said that the prejudice to the Respondent would be at least as much as that to the Claimant. It is sufficient to quote one paragraph of his Reasons:

> **"40. So far as prejudice to the Respondent is concerned I consider that they would suffer prejudice if I were to allow the claim. I would not go so far as Mr Newman's submission that it would be like starting the case again, but they would suffer substantial additional costs. Numerous protected disclosures have been asserted, which would need analysing. Consideration would need to be given as to whether any allegation of bad faith was being made. The listing of a case includes time for the Tribunal to deliberate on and deliver its decision. The Tribunal's length of time to do this would be significantly extended if having to consider approximately 6 assertions of protected disclosures and approximately 20**

detriments. This is a great expansion on the relatively limited number of race discrimination claims. There is a difference to something being by way of a detail forming part of the background of a case and being an allegation that needs to form part of the issues for decision."

16. The Employment Judge concluded by saying that, after balancing all the factors, he refused the application for leave to amend.

17. At this point Mr Sykes made an application to the Employment Judge to reconsider in respect of the items at paragraphs 33-34 of the timeline, which I have already quoted above. It had been a factor in the Employment Judge's decision that there was no causal link shown between disclosure and unfavourable treatment. As we have observed, there is no dispute about the causal link between the email to Thomson Reuters and the dismissal.

18. On reconsideration the Employment Judge acknowledged the explicit causal link. He acknowledged some similarity to authorities to which he had then referred, in particular **New Star Asset Management v Evershed** [2010] EWCA Civ 870. He set out his essential reasoning in paragraphs 55-56:

"55. There are some similarities between this case and those of *Transport and General Workers Union* and *New Star Asset Management* and also some differences. There is some link between the facts pleaded and the issue of protected disclosure detriment, although far less apparent than that in the other two cases. As in those cases, the Respondent in this case will need, even if I refuse leave to amend, to prove the reason or principal reason for the Claimant's dismissal. There is already a race discrimination claim in respect of the Claimant's suspension and dismissal. If I grant leave, therefore, the Respondent will not have to adduce wholly different evidence. Only one disclosure would need to be considered, rather than the six in the original application; and only two detriments (including dismissal), both of which form part of the race discrimination claims, rather than 20 allegations of detriment. The implications of the length of the Hearing would be minor, rather than major. There are also differences between this case and other two cases, particularly that the application in this case is made at such a late stage; and longer after a list of issues had been completed at a lengthy discussion of the issues in this case.

56. On balance, and by a narrow margin, I have decided to confirm my original decision. With the additional information I have obtained, partly through my own inquiries, partly through Mr Sykes' additional points in his further submissions, the question of the more limited application to amend is finely balanced. It still remains an out of time application made at a very late stage. He had produced a typed skeleton argument, then oral submissions; and did not identify the link in paragraphs 33 and 34 until after I had given my judgment on the application for leave to amend; neither did he produce the 12 August e-mail as part of his application. I accept Mr Newman's submission that it is an attempt to have a 'second bite of the cherry' and attempting to produce better arguments after the first submissions had failed.

It also remains the case that if the Claimant's dismissal was an act of race discrimination, or that it was unfair to dismiss her for raising concerns with the Respondent's client, her unfair dismissal will succeed; and if her suspension was an act of race discrimination, she would succeed on this as well."

The legal context

19. At this point it is convenient to set out some essential legal background. The law relating to what is commonly known as whistleblowing in connection with employment is mainly found in the **Employment Rights Act 1996**. Part IVA makes provision for those disclosures by a worker which are to be protected. Section 47B provides a right not to be subjected to any detriment on the grounds of such a disclosure. Sections 48-49 provide a remedy for contravention of that right. Section 103A provides that a dismissal shall be regarded as an unfair dismissal if the sole or principal reason for dismissal was the making of such a disclosure. Section 103A finds its place within Part X of the **Employment Rights Act 1996**, which provides the remedy of unfair dismissal. The remedy itself is contained in section 111.

20. The Employment Tribunal's power to grant leave to amend the claim is an exercise of the wide general power to make a case management order contained in rule 29 of the Employment Tribunal Rules of Procedure 2013. In **Selkent Bus Co v Moore** [1996] ICR 836 Mummery J gave general guidance as to how applications for leave to amend should be approached. The **Selkent** principles, as they are generally known, include the following:

"(4) 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.

(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:

(a) The nature of the amendment

Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the additions of factual details to existing allegations and the addition or substitution of other labels for 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 the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits

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 that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions e.g., in the case of unfair dismissal, S.67 of the 1978 Act.

(c) The timing and manner of the application

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 on discovery. Whenever taking any factors into account, the 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."

21. There is an appeal to the Employment Appeal Tribunal only a question of law. Case management decisions are entrusted to the discretion of the Tribunal at first instance. Appellate courts must recognise that in such decisions different courts may disagree without either being wrong or having made a mistake of law. So the decision of a Tribunal at first instance, on a case management question, is capable of challenge only where the decision has been made under a mistake of law or in disregard of principle or under a misapprehension of the facts or where irrelevant matters were taken into account or essential matters omitted or where the decision was outside the generous ambit within which reasonable disagreement is possible.

Submissions

22. Mr Sykes' first submission concerned the claim of unfair dismissal. He submitted that the amendment did no more than add the label of section 103A to a claim which already pleaded unfair dismissal and which already pleaded the disclosure on which the Claimant wished to rely. He referred me to **New Star Asset Management Holdings v Evershed** (see especially paragraphs 51-53) for a case where a claimant who had pleaded ordinary unfair dismissal was allowed to amend to plead section 103A where the material on which he relied was within the original claim form. He submitted that, insofar as the Employment Judge

considered the unfair dismissal claim separately in his reasons, he erred in approaching the application on the basis that there was a new claim and failed to identify that the Claimant was purely putting a new label on facts already pleaded.

23. Mr Sykes' second submission concerned the claim of detrimental treatment. He submitted that the Employment Judge erred in a variety of ways, which may be summarized as follows: (1) The Employment Judge attached weight to the absence of any reference to a qualifying disclosure whereas this was merely the addition of a label to facts already pleaded and therefore not of importance. (2) He attached importance to the absence of any pleaded causative link, whereas causation was a matter which could only be determined at trial depending on findings of primary fact. (3) He attached importance to the Claimant's failure to articulate the claims in April, whereas the Claimant was at that time acting in person and could not be expected to know English employment law concerning whistleblowing. (4) He attached importance to the application being made late when in fact it was more than two months prior to the hearing. (5) He attached importance to the expansion of the length of the case whereas he could and did expand the listing from four days to six. (6) In deciding the Respondent would suffer prejudice, the Employment Judge attached importance to the need to consider whether disclosures were made in bad faith, whereas this would not require substantial further evidence. (7) The Employment Judge attached importance to the claim of reinstatement when there was no reason to suppose the Respondent had the slightest intention of reinstating the Claimant. (8) His conclusion that the prejudice was evenly balanced was wrongly weighted and in error. He ought also to have considered, in line with **Selkent**, the relative injustice and hardship to the parties.

24. Mr Sykes' final submission related to the Employment Judge's reconsideration. He submitted that this was flawed in various ways including, in particular, taking into account that his application for reconsideration was "a second bite at the cherry".

25. On behalf of the Respondent Ms Shepherd submitted that the Employment Judge correctly applied the **Selkent** test as regards unfair dismissal. Ms Shepherd accepted that the Employment Judge's initial reasoning did not explicitly consider the unfair dismissal claim. But she argued the Employment Judge's reasoning on reconsideration was proper and sufficient. She argued that paragraphs 55 and 56 of the Employment Judge's reasons contained no error of law.

26. As regards the detriment claim Ms Shepherd answered Mr Sykes' submissions as follows: (1) The absence of reference to qualifying disclosure was not irrelevant. It was part of the background to the making of the application. (2) The absence of reference to causation was important, for causation was a necessary ingredient of any detriment claim. There was a direct parallel with **The Housing Corporation v Bryant** [1999] ICR 123. (3) It was relevant that there had been a case management discussion in April, at which the issues had been carefully considered with the Claimant. (4) The application *was* late and the Employment Judge was entitled to take this factor into account. (5) The expansion of the issues and the time required for the hearing was a relevant factor. (6) The need to consider a range of issues concerning protected disclosures long prior to the commencement of proceedings was a relevant factor. (7) The claim for reinstatement was not of major significance but it was not irrelevant. (8) The conclusion that prejudice to the Respondent was "at least as much as that to the Claimant" was properly open to the Employment Judge.

27. I should finally mention, on the question of submissions, that Ms Shepherd sought to argue in her skeleton argument that the proposed amended case put forward on the Claimant's behalf had little if any prospect of success. However the Respondent's argument was not put in this way before the Employment Judge nor was any such argument put forward in the Respondent's answer on appeal. It would not be right today to decide the case on the basis that the amendment had little if any prospect of success and I do not have all the materials that would be required to do so.

Discussion and conclusions

28. I think it is important to draw a distinction between the claim of unfair dismissal and the claims of detriment by reason of public interest disclosure. I will take them in turn.

Unfair dismissal

29. It is noticeable that the Employment Judge's primary reasons for deciding the application made no reference at all to the unfair dismissal claim. The application for permission to amend had specifically referred to section 103A of the 1996 Act; and there were elements of the timeline which were of obvious relevance to the unfair dismissal claim.

30. It was, I think, essential to give specific consideration to the unfair dismissal claim. Significant parts of the Employment Judge's primary reasoning did not apply to that claim in the same way as they applied to the claim of public interest detriment. Unfair dismissal was already an extant claim. A claim for unfair dismissal, whichever provisions of the 1996 Act are relied on in support, is a claim under section 111 of the 1996 Act and had been brought in time. There were, as the Employment Judge later acknowledged, clear links between the alleged disclosures and the detriment. Indeed the dismissal was expressly connected by the Respondent with the e-mail to Thomson Reuters.

31. As to prejudice, the factors which the Employment Judge relied on do not apply with the same force to the unfair dismissal claim. The reason for dismissal is bound to be in play at the final hearing. As in the case of **New Star Asset Management Holdings v Evershed**, allowing the amendment will not materially increase the amount of evidence required for the unfair dismissal claim.

32. The Employment Judge only addressed amendment in respect of the unfair dismissal claim in his reconsideration reasons. I do not think the reconsideration reasons save his decision. Once granted that the Employment Judge had left out of account the unfair dismissal aspect of the amendment, his reconsideration should have been on **Selkent** principles. The factors in the last two sentence of paragraph 56 of his reasons were really irrelevant to those principles, yet they seem to have been factors which tipped the decision in favour of the Respondent.

33. The question arises, granted that I consider the Employment Judge to have erred in law, whether I should allow the appeal and grant permission to amend the unfair dismissal claim. On well-established principles, I can do so only if, given a correct statement of the law and the appropriate factual material, the answer is inevitable. In this case, to my mind, the answer is inevitable. Permission to amend ought to have been given in respect of the unfair dismissal claim. It was an existing claim. The matters alleged to be disclosures in paragraphs 33 and 34 were always part of it. There was little if any prejudice to the Respondent in allowing the Claimant to argue that those matters were protected disclosures and that dismissal was wholly or mainly by reason of them. I make it clear that, in granting leave to amend the unfair dismissal claim, I reach no finding that any part of the section 103A claim will succeed. It will be a matter for the Employment Tribunal to decide.

34. I then turn to the claim of public interest detriment. This is the claim which the Employment Judge did address in his main set of reasons. It involves taking grievances from the timeline, asserting that they were public interest disclosures and asserting that other matters complained of in the timeline were detrimental treatment by reason of the public interest disclosure. The claim of public interest detriment, if allowed, would go back a very long time prior to dismissal.

35. To my mind, the Employment Judge did not err in law in rejecting the application to amend in respect of a public interest detriment claim. In essence I agree with the submissions of Ms Shepherd, which I have already summarized. The Employment Judge considered the **Selkent** principles in the round and reached conclusions which are, to my mind, free from any legal error. I do not think it necessary to address each individual point which Mr Sykes has made. I have expressed my agreement with Ms Shepherd's answers to them. But I will say something about two particular points.

36. First, Mr Sykes submitted that the Employment Judge placed undue weight on the absence of any causative link in the ET1 between grievance and detrimental treatment. He sought to restrict the reasoning of the Court of Appeal in **Housing Corporation v Bryant** to a victimisation case. I do not think the reasoning can be restricted in this way. It is one thing to say in an ET1 "I was ill-treated and I complained about it", another thing to say "I complained and, because of my complaint, I was ill-treated". If the ET1 says the latter, there may at least be the clear implication of a victimisation or public interest detriment claim, depending on what else is pleaded. If it only says the former, that implication is not plain. I see no basis for restricting **Housing Corporation v Bryant** to a victimisation case.

37. Secondly, Mr Sykes complained that the Employment Judge referred to the concept of prejudice whereas the principles in **Selkent** refer to the balancing of injustice and hardship. I have no doubt that the Employment Judge, who had given himself a correct self-direction in terms of **Selkent**, intended his use of the word "prejudice" to cover injustice and hardship.

38. In the result, the appeal will be allowed in part. I will grant permission to amend so that section 103A may be relied on in respect of the alleged disclosures on 3 August 2012 and 12 August 2012, items 32 and 33 in the letter dated 31 July. In all other respects the appeal will be dismissed.