EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr D Brooke	and	Sanders Polyfilms Limited

REASONS OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 9th June 2017

EMPLOYMENT JUDGE Coaster
Representation
For the Claimant: Mr J Wallace
For the Respondent: Ms F O'Neill

REASONS

1. The claimant requested written reasons for the judgment of the Tribunal made on that the application by the claimant to amend his claim by adding a new cause of action under S12 Employment Relations Act 1999 is out of time and that the claim be dismissed.

Background

2. The claimant presented his claim on 26th September 2016. For unexplained reasons (unrelated to the claimant), the judicial administration did not serve the claimant's ET1 on the respondent until 7th December 2016. A response was filed in time on 17th January 2017.

3. On 15th March 2017 the claimant put the tribunal and the respondent on notice that an amendment would be required to the claimant's claim form. He formally submitted an application to amend his claim on 24th March 2017.

4. At a preliminary hearing on 9th June 2017 the claimant sought to amend his ET1 and particulars of claim by adding two more heads of claim under the Employment Relations Act 1999:

(i) a claim for detrimental treatment done on the ground that the claimant accompanied another worker to a disciplinary hearing 12(1)(b); and

(ii) a claim of automatically unfair dismissal for accompanying a co-worker to a disciplinary hearing S12(3)(b).

Submissions – respondent

5. The respondent submitted that there are three classes of amendments under **Selkent**:

(a) trivial alteration of existing claim;

(b) a relabelling of facts which remain the same but are mislabelled or addressed in a different manner;

(c) wholly new claims.

5.1 This case is a minor relabelling – the facts are there and already pleaded. There are no new facts;

5.2 The respondent could have anticipated from the ET1 that from these facts a S12 claim would be made;

5.3 The respondent accepts that the claimant was dismissed as a result of things said at Mr N Sheehan's disciplinary hearing;

5.4 It would be unjust to deprive the C of his claim;

5.5 Prejudice to the respondent is dealt with a para 12 of the claimant's skeleton argument – the factual basis for the claims have not changed and the respondent will not need to make further inquiries to response to the additional claims;

5.6 the parties are at the beginning of proceedings and there is time for the respondent to deal with the claims;

5.7 the respondent has requested further and better particulars. *[EJ note particulars requested of public interest disclosures].*

5.8 The additional pleadings under S12 do not alter facts and present no problem;

5.9 They can be allowed as a relabelling amendment.

Submissions - respondent

6. Ms O'Neill for Respondent submitted:

6.1 this is not a relabelling exercise - the claimant is applying to add two new substantive claims;

6.2 although the respondent accepts that the claimant was in attendance at Mr Sheehan's disciplinary hearing, the basis for the claimant's disciplinary hearing was not because of any public interest disclosure or that he was a companion, it was for subsequently making misleading statements.

6.3 These are new allegations. Dealing with the section 12 claims of detriment and dismissal would need to engage managerial time. These misleading statements for which the claimant was disciplined were made at the end of the Sheehan disciplinary hearing and after the alleged public interest disclosures were made.

6.4 There are two misleading statements in particular:
(i) in relation to the claimant claiming that he overheard a conversation instructing statements to be made or collected as part of the Sheehan investigation, meaning the disciplinary process was not being carried out in a fair manner;

(ii) in relation to the claimant's statement in relation to his training record which he said he had been told to sign off although he had not received the training – which is factually incorrect.

6.5 In addition, the respondent takes extreme issue with the lateness of the application – the same solicitors have acted on behalf of the claimant throughout. It is abundantly clear that they could have submitted the S12 amendments in September 2016 they rely on an administrative error in the tribunal system (late service of the ET1 on 7th December 2016, 2 ½ months later) which is irrelevant.

6.6 The claimant's solicitors have realised they made an error and they are trying to rectify it based on a mere "relabelling". It is clear from the original pleadings that the focus was entirely on public interest disclosures and alleged detriment following those disclosures. There is no reference detriment as a result of attending as a companion to Mr Sheehan – the respondent was not put on notice until 15th March 2017.

6.7 It is disingenuous to re-plead the claim at such a late date. The claimant needs to spell out why attending as a companion resulted in unfavourable treatment and how dismissal was a result of attending as a companion to Mr Sheehan.

6.8 The public interest disclosures were not made by the claimant – he was a mouthpiece [for Mr N Sheehan at his disciplinary hearing].

7. Mr Wallace requested permission to respond to the respondent's submissions which was permitted. Mr Wallace pointed out that although the respondent says that the issue of the claimant being a companion was not sufficiently clear, it was in fact referred to by the respondent at paragraph 16 of its response. The hearing disciplinary hearing was chaired by Mr Roome who advised the claimant that as Mr Sheehan's companion he could participate but not answer questions.

8. Mr Wallace further submitted that if I was not minded to find the claimant's application to amend a relabelling exercise, the application should be heard in open PH with witness evidence.

Decision on relabelling

9. After a short adjournment I made the following decision:

9.1 the claimant brings an application to amend his particular of claim to include a claim for detriment under S12(1)(b) Employment Relations Act 1999 and also for dismissal under S12(3)(b). The original ET1 complained of detriment under S43A ERA 1996 and dismissal under S103A ERA 1996

9.2 On 15th March the claimant put the Tribunal and the respondent on notice that an amendment would be required.

9.3 On 24th March 2017 a formal application to amend was made.

9.4 I take no account in these proceedings today of the delay between the ET1 being filed on 26th September 2016 and the service of the ET1 by the tribunal administration on the respondent on 7th December 2016. That delay was caused by administrative office error and not the claimant.

9.5 The ET has a general discretion to grant leave to amend under schedule 1 of the Tribunal Rules of Procedure.

9.6 The leading authority is set out in **Selkent Bus Co Ltd v More 1996 IRLR 661 & IC 836** which provides guidance on:-

(i) Judicial discretion
(ii) Types of amendments
(iii) Requirement to take account of the circumstances
(iv) The balance of hardship between the parties.

9.7 I have heard submissions of both parties and taken both into account. The claimant submits that the respondent could have expected a claim such as now pleaded to be brought on the facts in his ET1. It is submitted that the facts

are already clearly set out and this is a relabelling exercise only – a minor trivial amendment. The respondent says it is an addition of two new heads of claim.

9.8 Having considered the proposed amendments and taken into account all of the parties' submissions, I do not agree that they are a minor relabelling exercise despite a substantial number of relevant facts being already pleaded in the ET1. A response to the two new heads of claim will incur additional management time.

9.9 The new claims are completely different in nature to the existing public interest disclosure claims for detriment and dismissal under different legislation. It cannot be reasonably said they are a minor amendment.

9.10 The claimant was fully appraised of the relevant facts at the time he filed his ET1. The particulars of complaint focussed entirely on public interest disclosures despite containing a recital of the claimant's role as companion to Mr Sheehan.

9.11 The two S12 claims are new substantive heads of claim which are not trivial, they are more than a relabelling; they are category three of **Selkent**. They are also out of time.

Was it reasonably practicable to have filed the complaints in time?

10. Mr Wallace informed me that he had no instructions and no witness statement from the claimant and he was therefore in difficulty in giving submissions on whether it was not reasonably practicable for the claimant to file his claims under S12(1)(b) and S12 (3)(b) in time.

11. I observed that the claimant's instructing solicitors were on notice since the tribunal's letter of 5th May 2017 that the application to amend would be dealt with at the PH today. I adjourned the hearing to permit Mr Wallace to take instructions.

12. After a short break, the parties' representatives returned. Mr Wallace submitted:

12.1 that there was disclosure of material documents at a later stage which prompted the amendment application. This was a disclosure from Mr Sheehan. If there has been a finding that the contractual matrix has changed the claimant could only have been made aware of the new facts after ET3 was filed on 17th January 2017 and before 24th March 2017.

12.2 The matter should be adjourned to a full open PH at which witness testimony would be heard.

13. I found this unsatisfactory. There has already been one adjourned PH; If the matter is adjourned today, then a third PH will need to be listed to deal with an amendment application - which is entirely disproportionate.

14. The respondent confirmed that it was willing to proceed on the basis of submissions only without hearing evidence. I therefore adjourned for a second time for Mr Wallace to take instructions from his instructing solicitors as to when they received the new material at a later stage from Mr Sheehan. Mr Wallace commented that the claimant accepts that the tribunal may make a finding in respect of an amendment today.

15. On reconvening the claimant made the following submissions:

15.1 The claimant instructed his solicitors on 18th July 2016 and he instructed them to make a Data Subject Access Request (SAR) request on 12th September 2016.

15.2 The respondent sent a letter on 11th October 2016 requiring the payment of a £10 fee and that when it was paid they would send the documents;

15.3 The SAR documents were lacking in substance but identified that there may be a witness - Nick Sheehan who was contacted.

15.4 Mr Sheehan was not fond of email so the claimant's solicitors contacted him by letter and email – as he was not forthcoming with the requested documents they then telephoned him. It is difficult to pinpoint the date of when this was done. Mr Wallace submitted that he also had no instruction on the content of the Sheehan documents.

15.5 Mr Wallace submitted that his instructing solicitors 'internal procedure' is to return relevant documents and release irrelevant docs to the person who provided them. He did not believe that in respect of the disciplinary proceedings, instructing solicitors were able to say what documents had been disclosed or when.

16. I questioned whether the claimant's solicitors would be unable to provide a date when information was supplied to them by Mr Sheehan because they would have had a file note, or attendance note recording the time that was spent looking at the documents?

17. Mr Wallace submitted that:

17.1 the SAR was made on 12th September 2016;

17.2 A response was received on 11th October 2016 outside the Early Conciliation notice – time limitation was 26th September 2017;

17.3 The SARS request was complied with by the respondent after 11th October 2017;

17.4 The claimant's solicitors contacted Mr Sheehan on or around 13th January 2017;

17.5 Mr Sheehan was slow to provide information and also slow to provide approval of use of the material;

17.6 Once the claimant's solicitors had Mr Sheehan's approval, they notified the Tribunal and the respondent of the requirement to amend the ET1. There was a month between notice and the actual amendment – it is not unreasonable

17.7 Lack of information made it not reasonably practicable to file an application to amend sooner and the chronology justifies extending the date on which the amendment application was made.

18. Miss O'Neill on behalf of the respondent replied:

18.1 On 6th May 2016 the claimant requested the minutes of Mr Sheehan's disciplinary hearing and on 9th May 2016 a letter from the respondent to the claimant confirmed that it enclosed a copy of the typed minutes of Mr Sheehans' disciplinary meeting;

18.2 when the claimant's solicitors were given the disciplinary documents from Mr Sheehan following contact made with him on 13th January 2017, the claimant was already in possession of the minutes of Mr Sheehan's disciplinary hearing. The respondent will also place reliance on the Sheehan disciplinary notes already in the claimant's possession.

18.4 There was no reference to these new documents from Mr Sheehan on 15th March 2017 when the claimant's instructing solicitors requested a postponement of the first PH – they said the reason was "diary commitments" and "late receipt of the ET3".

18.5 Again in the email of 24th March 2017 making the application to amend, there is no mention of new documents/ crucial information.

18.6 It is worthy of note that the proposed amendment merely adds reference to the claimant accompanying Mr Sheehan to his disciplinary meeting and sets out the text of S12(1)(b) and S12(3)(b) making no reference to an application to amend on the basis of new documents / facts disclosed by Mr Sheehan. The respondent could reasonably have expected that new relevant information,

arising out of the [new] documentation would also have been referred to in the application to amend to justify the S12 new claims being added for the first time at that point.

18.7 The pertinent point is that C was represented by the same solicitors throughout – it was perfectly feasible for the tracked amendments in the amendment application of 24th March 2017 to have been included when the claim was filed originally. The claimant is attempting to have a second bit of the cherry.

19. Mr Wallace confirmed that the claimant was criticising the respondent for the delay as a result of the SAR being complied with after the limited date.

20. I observed that the SAR was made on 22nd September 2016, 4 days before the ET1 was presented to tribunal on 26th September 2016. The claimant instructed solicitors on or around 18th July 2016, two months before SAR was submitted when the application for the SAR could have followed through swiftly afterward filing the ET1 and before limitation. I also observed that the respondent has a 42 day response time on receipt of an SAR. I asked Mr Wallace whether he knew when the SAR information was sent by the respondent? Could I presume it was sent soon after the £10 fee was paid?

21. Mr Wallace confirmed that he had just received a message on his mobile phone, whilst apologising for the fact that he had his mobile phone on during the hearing. He submitted that the instructions from his instructing solicitors were that crucial documents were provided by Mr Sheehan and on receipt of those documents from him, the claimant's solicitors notified the Tribunal of his intention to amend; so it is reasonable to assume that the documents from Mr Sheehan were received just before 24th March 2017. His instructing solicitors could not find the covering letter to establish the date of receipt of the documents from Mr Sheehan.

Decision on not reasonably practicable to file in time

22. After an adjournment and careful consideration of the facts and submissions my decision is as follows:

23. I have found that the amendment is a "category three amendment" under the **Selkent** guidelines.

24. The issue now before me is whether it was not reasonably practicable for the claimant to plead his entire claim (including the S12 claims) at the commencement of proceedings rather than apply to amend six months after filing.

25. The claimant's application to amend his claim to include a claim for detriment and dismissal under S12 Employment Relations Act 1999 was made on 24th March 2017. The original claim form was filed on 26th September 2016.

26. The respondent agreed that the hearing of the not reasonably practicable issue should proceed on submissions only and Mr Wallace has been given time to take instructions from his instructing solicitors. I have heard submissions of both parties.

27. For the avoidance of doubt the chronology for the purposes of this preliminary hearing, taken from the documentation and submissions, is as follows:

27.1 On 14th April 2016 Mr Sheehan the claimant's work colleague for whom the claimant had been a companion under s12 of the Employment Relations Act 1999 was dismissed

27.2 On 6th May 2016 the claimant requested the minutes of Mr Sheehan's disciplinary meeting which were provided under cover of a letter by the respondent to the claimant on 9th May 2016

27.3 On 12th May 2016 the claimant was dismissed

27.4 On 18th July 2017 the claimant instructed his solicitors

27.5 on 26th August 2016 Early conciliation was completed

27.6 on 22nd September the claimant filed a Data Subject access request

27.7 on 26th September 2016 the claimant filed his complaint form ET1

27.8 on 11th October 2016 the respondent requested the fee for compliance with the SARs and then sent documents to the claimant – there is no confirmed date for when they were sent but it can be assumed that they were received on a timely basis following the payment by the claimant of the £10 fee as no complaint has been made that they were sent late with a date of them being sent established by the claimant

27.9 on 7th December 2016 the ET1 was served on the respondent by the tribunal for unknown reasons which are not relevant to the proceedings

27.10 on 13th January 2017 the claimant solicitors contacted Mr Sheehan, whom the claimant had accompanied under the Employment Relations Act 1999 to Mr Sheehan's disciplinary proceedings in April 2016 to request documents related to Mr Sheehan's dismissal

27.11 on 17th January 2017 the ET3 was filed

27.12 on 3rd February 2017 the preliminary was listed by the Tribunal

27.13 on 15th March 2017 the claimant made an application to postpone the Preliminary hearing stating two grounds:

(i) Existing diary commitments of the claimant's counsel rendered it impossible for him to represent the claimant and the solicitor acting for the claimant had also become unavailable.
(ii) Having received the claimant's claim form and received further instruction from the claimant following receipt of the response form, it has become clear that an application to amend the claim would be required. The application to amend will rely on the same facts but add additional detrimental and automatic unfair dismissal claims.

27.14 On 16th March 2017 the preliminary hearing was adjourned.

27.15 On 24th March 2017 a formal application to amend the particulars of claim were made.

27.16 On 7th April the tribunal notice of a preliminary hearing was sent the parties

27.17 On 20th April 2017 the respondent objected to the amendment application cc'd to the claimant's solicitors and indicated that the respondent would expand on the objections to the application to amend at the preliminary hearing

27.18 On 5th May 2017 the Tribunal sent notice to the parties that the application to amend would be dealt with at the preliminary hearing o 9th June.

28. Having found that the application to amend falls squarely in the **Selkent** "category 3" as a substantial amendment being a new head of claim, the tribunal must then have regard to the timing and manner of the application. Although delay in itself should not be the sole reason for refusing an application, the tribunal should nevertheless consider why it was not made earlier and why it is now being made, for example, whether it was because of the discovery of new facts or new information appearing from documents disclosed on discovery.

29. It is a two stage test:

(1) it was not reasonably practicable for the claim to have been presented in time – the onus is on C and requires him to show why he did not present his compliant in time; and
(2) that it was then presented within a reasonable time.

30. Whether it was reasonably practicable to present the claim in time is a question of fact for the tribunal taking into account the circumstances of the case. Reasonably practicable means reasonably feasible.

31. Mr Wallace took instructions from his instructing solicitors by phone during two adjournments granted for the purposes of doing so. He had initially not been instructed beyond the submissions he made on the nature and category of the amendment (according to **Selkent**).

32. The claimant's submissions are that the SARs documents were not provided until after the limitation date of 26th September. Crucial documents were provided by Mr Sheehan and on receipt of those documents the solicitors notified the tribunal of the intention to amend the claim. Mr Wallace therefore submitted that it was reasonable to deduce that the (Sheehan) documents were received just before 24th March 2017. The delay in submitting the application to amend was caused by the delay in Mr Sheehan providing documents and his late consent.

33. I note that if there were crucial or important facts unknown to the claimant which later came to his knowledge and led him to believe that he had a claim, that could lead to a finding of not reasonably practicable to file complaint in time. Unknown facts must be related to right to claim, not value or whether it is advisable to bring claim.

34. The claimant's solicitors did not provide any evidence (or submission) of the date on which they received documents from Mr Sheehan nor when they returned the original documents provided by him, to him. On a matter of such importance it is surprising that specific detail as to when the documents were received from Mr Sheehan and also what information these new documents contained which prompted an amendment, was not provided to the tribunal.

35. Clearly the SAR documents provided by the respondent had no relevance to the amendment application as none was made immediately after receipt of the SAR documentation and no complaint at the time was made about non-compliance with SAR time limits.

36. The claimant then took three months before contacting Mr Sheehan. There has been no explanation for this. The claimant cannot blame the tribunal for not progressing the proceedings by serving the ET1 on the Respondent for two months (effected on 7th December 2016). It is for the claimant to prepare his case on a timely basis – in any event the claimant did not follow up with the tribunal for over two months as to progress of his claim.

37. The burden of proof on the balance of probabilities falls on the claimant to show the reason for the delay in pleading the S12 elements of his complaint.

38. Importantly, the claimant's solicitors did not refer to the reason for seeking the adjournment on 15th March being related to the receipt of new documents/information, and in the actual application to amend on 24th March 2017 the claimant's solicitors state *"it will be clear from the attached that additional claims are being added but these are based on the same facts and issues as already pleaded".*

39. There is no mention (on 15th or 24th March 2017) of new information, now described as "*crucial documents*" from Mr Sheehan just having been received which prompted the amendment application. Different reasons were given.

40. I have taken some time to consider the application as it is important to the claimant and I am conscious of the need to do justice to both parties, weighing the hardship and the justice to both parties on allowing or refusing the documentation.

41. Looking at the documentation before me and also taking into account the submissions of the parties, the claimant has not shown why it was not reasonably practicable to have included the S12 claims in his original claim form, especially as he had in his possession in May 2016 the minutes of Mr Sheehan's disciplinary meeting.

42. The claimant has not established that the delay in the application to amend lay at the feet of Mr Sheehan as the claimant did not approach Mr Sheehan for three months after the SARS request produced little information of any value. There has been no explanation of what crucial information Mr Sheehan provided and no accurate statement as to when the information was received which allegedly caused the late application.

43. The claimant was represented throughout and his solicitors as professional representatives must have been aware of Rule 31 of the Tribunal Rules on disclosure – when they could have made an application for Mr Sheehan to provide documents or information.

44. The claimant has not established that it was not reasonably practicable for the claimant to have applied to amend his claim earlier, in fact on 26th September 2016.

45. On the facts pleaded in the ET1 it was clear that he blamed detriment and his dismissal solely on alleged public interest disclosures made during his acting as a S10 companion under the Employment Relations Act 1999. It was reasonably practicable for him to have included that application (on S12 claims) at the time.

46. I am not satisfied the claimant has shown good reasons for making the application six months later. It was reasonably practicable for him to have made

the application in September 2016 and he has not established why there was a six month delay in then making the application and I find that that was not a reasonable period of time for presentation of the application.

Signed by _____ on 3rd July 2017

Employment Judge Coaster

Judgment sent to Parties on

__ 3 July 2017_____

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