THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Mr A B Conteh	**AND**	First Security (Guards) Limited

PRELIMINARY HEARING

HELD AT: London Central **ON:** 2 June 2017

EMPLOYMENT JUDGE: Miss A M Lewzey

Representation

For Claimant: In Person

For Respondent: Ms D Grennan of Counsel

JUDGMENT having been sent to the parties on 5 June 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1 This is a preliminary hearing to consider Mr Conteh's application for leave to amend to add protected disclosure claims under section 47B and section 103A of the Employment Rights Act 1996 as set out in the case management summary of the preliminary hearing before Employment Judge Baty on 12 November 2015 at paragraphs 16-19 because no leave was given at that time.

Issues

2 The issue that is before me today was originally refused on 28 January 2016 by Employment Judge Stewart. That decision was reconsidered by Employment Judge Davidson on 17 March 2016 and upheld. Mr Conteh appealed the decision of Employment Judge Stewart.

3

History and Submissions

4 By a judgment of Singh J in the Employment Appeal Tribunal dated 28 February 2017 the appeal was granted and the issue was remitted to be reheard by a differently constituted Tribunal. There is a reference in the judgment of the Employment Appeal Tribunal to the previous Tribunal hearing having heard evidence, which the parties have confirmed to me was the case when I enquired earlier today. I have explained to Mr Conteh that this is a rehearing. No recordings are taken in the Employment Tribunal. I do not have the cross-examination which took place on the last occasion before Employment Judge Stewart, although Mr Conteh's statement is within the bundle. I asked Mr Conteh if he wished to give evidence again and be cross-examined which was a matter for him. He had that opportunity but he decided not to take it. He said he did not wish to give evidence and would rely on submissions only and the documents contained within the bundle.

5 I have an agreed bundle, to which I refer by reference to the page numbers, to which Mr Conteh has added certain additional documents (pages 174-194). I also have Mr Conteh's written submission which he has supplemented orally and the oral submissions which have been made to me by Ms Grennan on behalf of the Respondent.

Chronology

6 On 25 February 2015 Mr Conteh was suspended at the behest of the Respondent's clients who requested his removal from site.

7 On 3 March 2015 Mr Conteh was invited to an investigation meeting, which took place on 10 March when he was told of the client's decision and that there was a risk of dismissal should no alternative employment be found. The initial redeployment period was 30 days. The Respondent asked the client to reconsider the situation on 12 March, but that was refused.

8 On 1 April 2015 Mr Conteh attended a disciplinary and hearing at which he received a verbal warning.

9 Mr Conteh was granted extensions of time for the redeployment period up to 7 May 2015, when he was dismissed with effect from 17 June 2015. The dismissal letter was dated 7 May 2015 (page 167)

The Law

10 Rule 29 of the Employment Tribunal Rules of Procedure 2013 give the power to permit amendments. The test for time in relation to a claim for protected disclosures was one of reasonable practicability as set out in section 111(2) of the Employment Rights Act 1996. In cases of amendments the guidance given by Mummery J, as he then was in **Selkent Bus Company Limited -v- Moore [1996] IRLR 661 EAT** is important. He said:

> "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."

He goes on to deal with the relevant circumstances which are the nature of the amendment, the applicability of time limits and the timing and manner of the application. The other important authority is **Abercrombie -v- Rangemaster Ltd [2014] 1All ER 1101 CA**. In that case Underhill LJ considered the **Selkent** test and stated:

> "Consistently with that way of putting it, the approach of both the EAT and missed court in considering applications to amend which arguably raise new causes of action has been to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old the less likely it is that it will be permitted. It is thus well recognised that in cases where the effect of a proposed amendment is simply to put in different legal label on the backs which are already pleaded, permission will normally be granted. …..
> …..
> As to point (b), it is true that fresh proceedings under s 34 of the 1996 Act would have been out of time. Mummery J says in his guidance in the *Selkent* case that the fact that a fresh claim would have been out of time (as will generally be the case, given the short time limits applicable in ET proceedings) is a relevant factor in considering the exercise of the discretion whether to amend. That is no doubt right in principle. But its relevance depends on the circumstances. Where the new claim is wholly different from the claim originally pleaded, the claimant should not, absent perhaps some very special circumstances, be permitted to circumvent the statutory time-limits by introducing it by way of amendment. But where it is closely connected with the claim originally pleaded – and a fortiori in a re-labelling case, justice does not require the same approach."

Submissions

11 Mr Conteh has argued that this is a relabelling. He refers me to the factual background and to his claim form, in particular to paragraph 3 (9), which states:

> "On 25 February 2015 allegedly, I ("the Claimant") complained of a data violation by email (B3 – B4) sent to the 2nd Respondent with "two processed CCTV PHOTO STILLS" (B6 & B7) and of which one of the CCTV the still was of the Claimant's true likeness (B7) and the other CCTV still was of the Claimant's team mate's true likeness namely, a Mr Jalak Rai (B6). …."

I note that this section of the claim form is under the heading: "The Data Protection Violation Claim". The next section (14) is headed: "Racial Discrimination/Harassment/Victimisation claim/ for Removal and Suspension by the 1st Respondent." The final section of the particulars of claim is headed, "The unfair termination or breach of a 17 year on-going TUPE covenant".

12 I note that Employment Judge Baty struck out the data violation claims at the preliminary hearing before him. Mr Conteh also refers me to **Selkent** says that this is just a relabelling exercise and that the facts are already pleaded. In relation to the manner and timing of the application he says this was reasonable because it was made at the preliminary hearing before Judge Baty on 12 November 2015. In relation to timing he relies on section 207B of the Employment Rights Act and section 33B of the Limitation Act 1980, which I will deal with later. He argues that section 207B gives him an extra month and submits that there should be a further period of eight weeks by virtue of section 33B of the Limitation Act.

13 Ms Grennan submits that the claims are out of time. She relies on the Employment Appeal Tribunal case of **The Commissioners for HM Revenue and Customs -v- Serra Garau UKEAT/0458/16/LA,** which held that if more than one early conciliation certificate was issued, a second or subsequent certificate is outside the statutory scheme and has no impact on the limitation period. She says that the last possible day from which time could run is 17 June. She accepts that Mr Conteh raised the matter on 12 November 2015. She argues that he has not produced any evidence that it was not reasonably practicable for him to make his protected disclosure claims earlier. She analyses the existing claims and issues and argues that the Respondent is prejudiced because of the broader evidence that will be required to defend a protected disclosure claim. She also points to the fact that Mr Conteh will need to deal with the evidence concerning his reasonable belief that the production of the CCTV stills could be a breach of the Data Protection Act in a protected environment and also with the public interest issue.

Conclusions

14 This is an application for leave to amend to add section 47B and section 103A Employment Rights Act 1996 claims for detriment and dismissal for making protected disclosures. Those claims are new causes of action, distinct from the existing claims of harassment on the grounds of race, direct race discrimination and unfair dismissal. The protected disclosure claims for which amendment is sought raise different issues from the other causes of action. Mr Conteh must be able to demonstrate that a protected disclosure has been made, that the disclosure is in the public interest, and that it was reasonable for him to believe that an employer who shows CCTV stills to an employee is in breach of the Data Protection Act. That may be some considerable task. Mr Conteh says that the matter is already in his claim. He refers me to the Data Protection Violation section. That claim was struck out by Judge Baty. The rest of the claim is divided up in relation to the balance of the causes of action before the Tribunal. The detriments that Mr Conteh seeks to rely are as for the other claims. He alleges this is just relabelling, but it is my decision that it is a new cause of action and it is wider than a simple relabelling exercise.

15 In relation to timing Mr Conteh argues that the matter is in time. Timing of itself will not prevent leave to amend being granted, but it is a factor. Taking Mr Conteh's best position that time runs from the effective date of termination, which may or may not be the actual position if the matter came to a hearing, that would mean time ran from 17 June. The primary three-month time limit would expire on 16 September. There are two early conciliation certificates in the bundle. Mr Conteh cannot rely on both because of the decision in **The Commissioners of HM Revenue & Customs -v- Serra Garau.** The first of those early conciliation certificates shows a date of receipt by ACAS of 5 May 2015 and an issue of the certificate on 4 June 2015, which is a period of 29 days. The second certificate shows the date of receipt by ACAS as 1 August 2015 and the date of issue of the certificate is 6 August. In relation to that certificate. Day A would be 1 August and Day B would be 6 August giving six days extra time. Section 207B Employment Rights Act 1996 deals with these matters. Section 207B provides:

> "(2) In this section
> (a) Day A is the day on which the complainant or applicant concerned complies with the requirement of subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before proceedings are brought) in relation to the matter in respect of which the proceedings are brought, and
> (b) Day B is the day on which the complainant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
> (3) In working out when a time limit set by a relevant provision expires the period between the day after Day A and ending with Day B is not to be counted.
> (4) If a time limit set by a relevant provision would (if not extended by this subsection) expired during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period".

16 If the effective date of termination was 17 June 2015 applies that takes the time limit to 16 September 2015. Adding six days for the early conciliation certificate takes it to 22 September so that the application for leave to amend would be out of time. The first early conciliation certificate pre-dates the dismissal. I have also looked at the detriments as set out by Judge Baty at paragraphs 14.2.1 to 14.2.7 of his orders. Of those that pre-date dismissal the latest would have been 7 May. The first early conciliation notice was given to ACAS on 5 May which pre-dates that date. Even if the May early conciliation certificate related to the protected disclosures it would still only add 29 days to the time limit from 17 June which would thus make it expire on 15 October.

17 I have no evidence before me but it was not reasonably practicable for Mr Conteh to have raised his claim for protected disclosure at an earlier date.

18 As far as the Limitation Act 1980 is concerned section 33B is headed: "Extension of time limits because of alternative dispute resolution in certain cross border or domestic contractual disputes". This is not a cross border dispute, nor is it a domestic contractual dispute. That provision of the Limitation Act does not apply in the Employment Tribunal.

19 I have also considered the manner of making the application. It was made early in the proceedings at the first preliminary hearing on 12 November, which is not unreasonable.

20 Finally, I have considered the prejudice or hardship to both parties. If the amendment is granted the Respondent will have to introduce new evidence to address the protected disclosures and to respond to the Claimant's public interest arguments. This is likely to substantially extend the evidential burden and, in this respect I take into account that the matters that have been complained about all took place in 2015 or earlier. Mr Conteh still has his existing claims of harassment, direct race discrimination and unfair dismissal.

21 Having considered all these factors and in the light of the guidance in **Selkent** and in **Abercrombie -v- Rangemaster,** the balance of prejudice falls on the Respondent and, in those circumstances I refuse the application for leave to amend.

Employment Judge Lewzey
23 June 2017