Appeal No. UKEAT/0051/17/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 17 May & 6 June 2017

Before

THE HONOURABLE MR JUSTICE SOOLE

(SITTING ALONE)

MISS T GILLETT — APPELLANT

BRIDGE 86 LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TOM GILLIE (of Counsel) Instructed by: Plumstead Community Law Centre 36 Wellington Street Greenwich London SE18 6PF
For the Respondent	MS ALICE MAYHEW (of Counsel) Instructed by: Magrath LLP Solicitors 66-67 Newman Street London W1T 3EQ

SUMMARY

PRACTICE AND PROCEDURE - Amendment

The Claimant, with less than two years' service, brought a claim for unfair dismissal by reason of disability and disability discrimination. Within three months of dismissal she applied to amend by addition of a claim of unfair dismissal for whistleblowing. The application was refused on the basis, which included the Employment Judge's assessment, that the proposed claim contradicted or diluted the existing claim based on disability; that its merits were weak; and that the balance of hardship/injustice favoured the Respondent. The appeal was allowed on the basis that it was wrong to refuse the amendment in circumstances where the application was in time; the merits were not such as to have no reasonable prospects of success; and so that the balance of hardship/injustice favoured the Claimant.

THE HONOURABLE MR JUSTICE SOOLE

Introduction

1. This is an appeal from the Decision of Employment Judge Wallis dated 14 December 2016 whereby the Appellant, Miss Gillett, was refused permission to amend her claim form to add a claim of unfair dismissal because of an alleged protected disclosure.

2. The Appellant was employed by the Respondent charity as a Support Worker to individuals with mental health problems. Her employment began on 17 November 2014. She was dismissed on 22 April 2016. By her ET1 dated 24 May 2016, at a time when she was not represented, Miss Gillett brought claims of unfair dismissal and disability discrimination. As Employment Judge Wallis noted, she did not tick the box on the form that followed the words:

> **"10.1. If your claim consists of, or includes, a claim that you are making a protected disclosure under the Employment Rights Act 1996 ["ERA"] (otherwise known as a 'whistleblowing' claim), please tick the box if you want a copy of this form, or information from it, to be forwarded on your behalf to a relevant regulator … by tribunal staff."**

Background

3. The Particulars of her claim included reference to a panic and anxiety disorder from which she suffered. The chronology of events began with an incident on 12 June 2015 that had allegedly exacerbated her disorder. In August 2015 she had made an informal complaint against her Deputy Manager. Her claim continues, "*As a result of this complaint both my managers started to treat me unfairly*". The narrative continued with her being signed off work on 5 October 2015, and on 4 February 2016 receiving an email from the Human Resources manager that she had been suspended:

> **"… on the grounds of an allegation made five months prior and [which] had never been brought to my attention."**

No Particulars of that allegation were set out in the claim form.

4. However, the narrative continued with a reference to her receipt on the following day, 5 February 2016, of three statements. One was from a work colleague, Kerry Warren, and two from Managers, "*which were used to warrant disciplinary action*".

5. On 15 February 2016 she raised a grievance "*for discrimination arising from [my] disability*". She was ultimately dismissed on 22 April 2016.

6. In its ET3 form of 12 July 2016, the Respondent noted that the Appellant did not have the necessary two-year qualifying period to bring an unfair dismissal claim. It also included reference to an incident on 5 September 2015 when a vulnerable client ("B") had lodged a complaint that her Support Worker, Ms Warren, had allegedly spoken to her in offensive terms. The complaint had subsequently been withdrawn. In the subsequent investigation Ms Warren had alleged that the Appellant may have encouraged B to make the complaint "*as she and the [Appellant] did not get on well*" (paragraph 15 of the Grounds of Resistance).

7. On 18 July 2016, having taken legal advice, the Appellant emailed the Employment Tribunal and stated amongst other things that:

> **"… I have now taken legal advice and attach a draft list of issues, clarifying my complaints. I wish to apply to amend my claim to include these complaints.**
>
> **I indicated on the ET1 that I was claiming unfair dismissal. I can clarify that my complaint is that I was automatically unfairly dismissed due to making a protected disclosure, contrary to section 103A [ERA]. The facts relating to my protected disclosure are addressed by the Respondent at paragraph 15 of the Grounds of Resistance.**
>
> **I also allege that I suffered detriments due to making a protected disclosure, contrary to section 47B ERA … These detriments relate to the same facts already pleaded as disability discrimination claims.**
>
> **I submit that these amendments amount to putting a new 'label' on the facts already pleaded in the ET1. There is no prejudice to the Respondent as the new pleading will not involve substantially different areas of inquiry than the original pleading, and the Respondent itself has complained that the claims were not properly particularised."**

8. The draft list of issues included, under the heading "*Dismissal and detriments as a result of a Protected Disclosure*":

> **"10. Did the following amount to a protected disclosure:**
>
> **10.1. Informing Hasan Farhi of the client complaint of abuse on 5 September 2015.**
>
> **…**
>
> **12. Was the reason, or principal reason, for the dismissal on 22 April 2016 that the Claimant had made a protected disclosure."**

9. At a Preliminary Hearing on 9 August 2016 (Employment Judge Self) the Appellant was represented by counsel. It was noted that she did not have the qualifying period for an "ordinary" unfair dismissal claim and that she wished to amend her claim so as to bring it within the protected disclosure provisions. It was noted that the alleged protected disclosure was on 7 September 2015 and that the amendment application should be considered at a Preliminary Hearing. The Appellant was ordered to file and serve "*an amended Rider to her Claim Form detailing the precise basis of her amended claim*".

10. On 30 August 2016 the Appellant served the draft amendment. This inserted - after reference to the email dated 4 February 2016 that suspended her - Particulars of the "*allegation made five months prior*" that had led to the suspension. The Particulars referred to the offensive remarks allegedly made by Ms Warren to B and stated what the Appellant had allegedly told her manager, Mr Farhi, on 5 and 7 September 2015. The draft amendment concluded with the contention that the information given by her to Mr Farhi on those dates amounted to a protected disclosure and that this was the reason or principal reason for her dismissal.

11. Following the Preliminary Hearing on 1 December 2016 Employment Judge Wallis dismissed the application to amend. She began by noting that the relevant test to be applied in

exercising the discretion to grant or refuse an amendment was set out in **Selkent Bus Co Ltd v Moore** [1996] ICR 836 and that relevant factors included the nature of the amendment, the applicability of the time limit, and the timing and manner of the application. She then noted that:

> (1) The application was made within the time limit and that this was "*an important factor*".
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> (2) The original claim form could not be read as presenting a protected disclosure claim and that there had been no such suggestion in the Appellant's grievance or appeal against dismissal. Even without representation, a Claimant was usually able to set out in the claim form what had happened and why he/she thought the treatment or dismissal was unfair.
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> (3) No new facts or information had come to light after presentation of the claim form.
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> (4) The new claim contradicted or diluted the old claim that her treatment and dismissal were due to her disability and/or the complaint she had made about her manager, thus it was not a mere relabelling exercise but an entirely new cause of action.

12. Employment Judge Wallis then considered the merits of the new claim:

> **"18. I noted that the proposed claim contradicted, or at least diluted, the claim that the dismissal was an act of disability discrimination. I noted that the focus of the original claim form, the grievance and appeal against dismissal was disability discrimination. I recognised that I had not heard any evidence, but I concluded on what I had seen in the documents that it looked like a weak claim, particularly because the Claimant had not mentioned the circumstances now relied upon at all until she received some advice. I noted that in *Woodhouse v Hampshire Hospitals NHS Trust* [UK]EAT/0132/12 it was recognised that there is no point in allowing an amendment to add 'an utterly hopeless' case. I could not conclude that it was 'utterly hopeless' but I found it difficult to see how it would succeed when the Claimant herself, when writing the narrative in the original claim form, did not think it important enough to include those details or make such a claim."**

13. Employment Judge Wallis then turned to consider the balance of hardship and injustice, stating:

> **"19. … If I refused the application, the Claimant would still be able to continue with her disability claim. I had found that she was a disabled person at the material times and I had granted the amendment (if amendment was necessary) to add a claim of victimisation; in addition to the victimisation claim there were claims pursuant to sections 13, 15, 20 and 26. In fact, a refusal would mean that a protected disclosure claim would not distract attention from the disability claim. I concluded that there was no significant hardship or injustice in refusing the application.**
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> **20. If I granted the application, I considered that there would be some hardship and injustice to the Respondent in facing a new claim which had not been raised until July, relating to events in September 2015. I recognised that some of that history might be necessary as background to the extant claims."**

14. She concluded:

> **"21. I balanced all of these factors and decided that the interests of justice indicated that the application should be refused."**

The Appellant's Submissions

15. On behalf of the Appellant Mr Tom Gillie in particular submitted that:

(1) the amendment was not an entirely new cause of action but was a relabelling of an extant unfair dismissal claim ("relabelling");

(2) the merits of the proposed claim should not have been taken into account in circumstances where the Judge had not found it to be hopeless or, alternatively, to have no reasonable prospect of success ("merits");

(3) the Judge was wrong to consider that the proposed claim contradicted or diluted the original claim that the dismissal was an act of disability discrimination, given in particular the different causative tests for those two claims ("different claims"); and

(4) the hardship/injustice test had been wrongly evaluated in all the circumstances ("hardship/injustice").

Relabelling

16. Mr Gillie submitted that:

(1) Unfair dismissal was an extant claim at the critical date (18 July 2016), namely when the application to amend was made.

(2) Although the amendment did plead new facts, i.e. the disclosures of 5 September 2015 and 7 September 2015, most of what was necessary was already pleaded.

(3) The cause of action was the same, i.e. unfair dismissal (see e.g. **Makauskiene v Rentokil Initial Facilities Services (UK) Ltd** UKEAT/0503/13 at paragraph 33).

(4) Accordingly, the Judge was wrong to describe it as an entirely new cause of action, and it was in substance a relabelling exercise.

(5) In any event, where the application was in time there was no need to search for a sufficient connection between the original and new claim. The effect would be to require a Claimant in these circumstances to have gone to the trouble and expense of issuing a fresh claim and applying to have it heard together with the first claim. By analogy, he cited **Prakash v Wolverhampton City Council** UKEAT/0140/06, where in the context of a cause of action that had accrued after the presentation of the original claim form, HHJ Serota QC observed:

> **"63. … In our opinion, a claim can be "presented" as well by amendment as by the issue of a separate originating application. If this were not so, in very many cases amendments adding new causes of action would require to be initiated by the presentation of a fresh originating application rather than by amendment. In our opinion, such is neither current practice nor in accordance with common sense nor the law as we understand it."**

Merits

17. Mr Gillie first submitted that the merits were a factor that could be taken into account, but only where the legal merits were hopeless. In support of this proposition he cited **Selkent** at pages 843A-844C and **Woodhouse** at paragraphs 15 and 16. He cited **Cooper v Chief**

Constable of West Yorkshire Police UKEAT/0035/06 as an example where an amendment was refused on the basis that the proposed new claim was unsustainable in law. He submitted that there was no true analogy with the test for striking out a claim on the basis that it has no reasonable prospects of success (Rule 37(1)(a)). In the alternative, if the strike out test of no reasonable prospects of success did apply, the Employment Tribunal should take the proposed pleaded case at its highest unless contradicted by plainly inconsistent documents (see **Ukegheson v London Borough of Haringey** [2015] ICR 1285 per Langstaff P (as he then was) at paragraph 21). Employment Judge Wallis had not approached the application on that basis. The finding that the proposed claim was weak or that it was "*difficult to see how it would succeed*" evidently fell short of a conclusion that it did not have a reasonable prospect of success.

Different Claims

18. Mr Gillie pointed to the contrast between the causative test for a claim of unfair dismissal by reason of a protected disclosure (section 103A **ERA**) and for a claim of discriminatory dismissal (section 39(2)(c) of the **Equality Act 2010** ("EqA")). He submitted that this undermined the Judge's statement that the new claim contradicted or diluted the old.

Hardship/Injustice

19. On the same theme Mr Gillie submitted that the Judge was wrong to conclude that the Appellant would suffer "*no significant hardship or prejudice*" in circumstances where she would still be able to pursue her claims based on the disability that she alleged and the Judge had found. The claim based on protected disclosure was a distinct claim, and the inability to pursue it was a disadvantage of substance. Furthermore, the reasons for dismissal would have to be considered in any event under the **EqA** claim. Conversely, the finding of "*some hardship*

and injustice" to the Respondent in facing a new claim could not be supported in circumstances when (1) that claim would have been faced if Miss Gillett had issued a new claim rather than made an in-time application to amend, and/or (2) the references in the Respondent's ET3 to the events of September 2015 concerning client B would require them to be considered at the Full Hearing in any event.

The Respondent's Submissions

20. Ms Alice Mayhew submitted that the Appellant had taken a gamble that the amendment application would be allowed and had thus not issued a new claim. Employment Judge Wallis was right to conclude that it was not a relabelling exercise. The claim depended on a new set of facts and satisfaction of the ingredients of a qualifying disclosure within sections 43A and 43B **ERA**, which included a Claimant's reasonable belief that the disclosure was made in the public interest and that a person has failed, is failing or is likely to fail to comply with a legal obligation.

21. Turning to the nature of the amendment as considered in **Selkent**, this was "*a substantial alteration pleading a new cause of action*" (page 843G); see also **Kuznetsov v Royal Bank of Scotland plc** [2017] EWCA Civ 43, [2017] IRLR 350 at paragraph 26. Furthermore, the new facts went further than those set out at paragraph 15 of the ET3, which did not concern what the Appellant had told Mr Farhi.

22. As to the Judge's consideration of the merits, **Selkent** established that: (1) if the proposed amendment had no reasonable prospects of success the Employment Tribunal can refuse the application without inviting representations from the parties (page 843B at paragraph 3(a)), and (2) if the amendment is arguable but the merits are weak this may be one of the

A circumstances that can be taken into account when the Tribunal exercises its discretion in deciding whether it is in the interests of justice to allow or refuse the amendment (page 843F at paragraph 4). As to the first category, **Woodhouse** was wrong to apply a threshold of "utterly hopeless" rather than "no reasonable prospects of success". The practice under Rule 29 should be consistent with the practice on strike outs (Rule 37), as was the case between **Civil Procedure Rules** Rules 17 and 24. **Woodhouse** was also wrong to treat "all the circumstances" as in effect qualified by the words "except for the merits of the amendment". The provisions of Rule 39 (Deposit Orders) led to Employment Judges being adept at assessment on the pleadings of whether a claim had "little reasonable prospects of success", and the same applied to the assessment of the merits on an application to amend, nor for these purposes was there a distinction between the merits on the law and on the facts. Ms Mayhew cited **Olayemi v Athena Medical Centre and Anor** UKEAT/0613/10 as an example of a case where the EAT upheld the refusal of an amendment to add a claim under section 103A for reasons that included the Employment Judge's assessment that its prospects of success "*did not appear good*" (paragraph 16).

23. Applying these principles to the case, Employment Judge Wallis had: (1) expressly taken account of the fact that the application was in time (at least in respect of dismissal) and described it as an important factor, but that factor was not to be treated as decisive; (2) rightly concluded that it was not a mere relabelling exercise; (3) had rightly taken account of the absence of prior reference to the alleged disclosures of September 2015; (4) rightly concluded that the existing claims were at least diluted by the proposed new claims; and (5) appropriately assessed the balance of hardship/injustice and in doing so evidently had in mind that the Appellant would not be able to pursue the whistleblowing claim.

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24. The Respondent's written submissions, prepared by different counsel, contended that the amended claim was in any event hopeless and bound to fail in the absence of any pleading of the further ingredients set out in section 43B **ERA**. However, there was no cross-appeal on this or any other point. Ms Mayhew submitted that if I were to consider it right to exercise the discretion afresh, I should conclude that the new claim had no reasonable prospects of success. Ms Mayhew of course emphasised the heavy burden on an Appellant in an appeal against the exercise of the discretion (**Selkent** at page 843B-C) and the general principle that the Employment Tribunals are the best judges of case management decisions (e.g. **Olayemi** at paragraph 57).

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Conclusions

25. Whilst keeping that appellate restraint firmly in mind, I have concluded that in this case the discretion was exercised wrongly and that the amendment should have been allowed. In reaching this conclusion I do not accept Mr Gillie's submission that the proposed amendment was a mere relabelling exercise. Whilst it included a claim of the same type (unfair dismissal) as had been withdrawn, it depended on critical new facts as to the statements (disclosures) made by Miss Gillett on 5 and 7 September 2015.

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26. In addition, those statements were not already referred to at paragraph 15 of the existing ET3. Nor do I accept his submission that an Employment Judge considering an application to amend can only take account of the merits if she considers that the proposed new claim is bound to fail as a matter of law. Whether at the initial paper stage or at a hearing with representation from the parties, I consider that the Employment Tribunal must be entitled to consider whether the proposed claim has reasonable prospects of success. If a presented claim could be struck out on that basis, it would be inconsistent and anomalous if an application to

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amend could not be refused on the same basis. Nor do I accept that as a matter of principle the Employment Tribunal must never take account of its assessment of the merits of the claim. **Selkent** refers to "*all the circumstances*", and **Olayemi** is an example where the prospects of success "*did not appear good*" and were taken into account.

27. Furthermore, and consistent with the Employment Tribunal's powers under Rule 39, I can see no reason why the Tribunal could not require a Deposit Order as a condition of permission to add a claim that it considers to have "little reasonable prospects of success". If and to the extent that HHJ McMullen QC's observations in **Woodhouse** support a bar against the consideration of merits, save where the proposed new claim is "obviously hopeless", I respectfully disagree.

28. All that said, I find it difficult to concede a case where a pessimistic view on merits falling short of "no reasonable prospects of success" could provide support for the refusal of an amendment application that has been brought in time, for if the Claimant had taken the alternative course of issuing a fresh claim within the relevant time limit the Employment Tribunal would not be entitled to strike out the claim. At most there could be a Deposit Order under Rule 39. If the practice on amendment were otherwise, a Claimant would have to take the alternative course - inconvenient and costly for the parties and the Tribunal - of issuing a fresh claim and applying to have it managed and heard with the existing claim.

29. This leads to the weight to be given to the fact that an application to amend is made in time. I accept of course that factor may not be decisive. However, it must be a factor of considerable weight, as Employment Judge Wallis acknowledged when identifying it as an "*important factor*". This factor is relevant to the **Selkent** balance of hardship and injustice.

A The Judge concluded that the Respondent would suffer some hardship and injustice if required to deal with the new claim. However, the Respondent would have been in just the same position if the Appellant had taken the alternative course on 18 July 2016 of issuing a fresh claim. Once again, the logic of this conclusion would require a Claimant to take that course rather than to make a timely application to amend.

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C 30. On the other side of the balance, I do not think that the fact that the Appellant can pursue her other claims is a reason to conclude that there is no significant hardship or injustice if she is prevented from pursuing the distinct whistleblowing claims. Again, the consequence is to place her in a worse position than if she had taken the alternative course of issuing a fresh

D claim on 18 July 2016.

31. In my judgment, the circumstances of this application compel the grant of permission to amend. In particular: (1) the application was in time, (2) the Employment Judge's assessment

E on the merits of the proposed claim was not such that it did not have "reasonable prospects of success", and (3) the balance of hardship/injustice was firmly in favour of the Appellant. I consider that the wrong conclusion was reached because the Tribunal (1) wrongly took account

F of its assessment that the merits were "weak" and (2) in substance gave no weight to the fact that the application was in time.

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