THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		***Respondent***
Mr M Caracota	**AND**	Mizuho Bank Ltd.

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON:** 24 November 2017

EMPLOYMENT JUDGE: Mr N Deol (Sitting alone)

Appearances

For the Claimant: Mr D Brook (Counsel)

For the Respondent: Ms R Azib (Counsel)

PRELIMINARY HEARING JUDGMENT

The Judgment of the Tribunal is that:

1. **The claims for Unfair Dismissal [section 98(4) Employment Rights Act 1996 ("ERA")] and Automatic Unfair Dismissal on the grounds of making a protected disclosure (Section 103A ERA) will proceed to the full merits hearing.**

   (i) The Respondent's arguments that these claims should be struck out on the basis that they have no reasonable prospect of success fail.

(ii) The Respondent's arguments that the Claimant should pay a deposit on the basis that these claims have little prospect of success fail.

2. The claims for unlawful detriments on the grounds of making a protected disclosure (Section 47B ERA) are struck out as having no reasonable prospect of success.

EMPLOYMENT JUDGE Deol on 24 January 2018

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REASONS OF THE EMPLOYMENT TRIBUNAL

Background

1. The Claimant pursues claims of unfair dismissal, both under Section 98 of the Employment Rights Act 1996 ("ERA") and Section 103A of the ERA (automatic unfair dismissal for making a protected disclosure). He also says that he has been subjected to detriments for the same reason (Section 47B of the ERA).

2. The Respondent's position is that the Claimant's pleaded claims are limited to his complaints of unfair dismissal and that these claims have little or no reasonable prospect of success. It seeks a strike out or, at the very least, a deposit order in respect of them.

3. The Respondent makes the same arguments in relation to the Claimant's claim of unlawful detriment, if these claims should be allowed to proceed at all. The Respondent suggests that these are new claims introduced by further particulars supplied by the Claimant, and should therefore be the subject of an amendment application, an application that the Respondent says, must fail.

4. A case management hearing was conducted on 19 September 2017 at which further detail of the Claimant's claims was sought, specifically what the alleged protected disclosure and detriments were. Insofar as any detriments could not be cross referenced to the original pleadings the Claimant was invited to make an application to amend his claim.

5. An Order was also made for disclosure of documents (and possibly witness evidence) relevant to any of the further particulars provided by the Claimant and the Respondent was given leave to apply for a hearing to determine preliminary issues if it so wished, leading us to the preliminary issues to be determined today.

6. The Respondent's position, at today's hearing, is best summarised by reference to paragraph 4 of the written submissions prepared by Ms Azib. In short the Respondent's aims were as set out at paragraphs 2 and 3 above, with the additional point that the alleged claims for detriment, that had now been particularised, were also substantially out of time, if part of the Claimant's claim at all. In addition, the Respondent set out detailed argument as to why the Claimant's alleged disclosures fell short of the statutory definition of "protected disclosures," and why his unfair dismissal claim was hopeless.

7. The Claimant's position was that today's applications were entirely premature and misconceived. It urged the Tribunal to dismiss the applications and allow the case to continue to a full merits hearing at which all of the arguments could be properly considered. The Claimant did not seek to amend the Claim to include the complaints of detriment, arguing instead that this was unnecessary as these were part and parcel of the Claimant's original claim.

The issues

8. The first issue is what is in the Claimant's claim, specifically; does it include his claim of detriment based on making a protected disclosure? Is an amendment application required to include these detriment claims?

9. Secondly do any of the Claimant's claims (including the detriment claim if it has been pursued at all) have no reasonable prospects of success such that they should be struck out, or little reasonable prospect of success such that the Claimant should be ordered to pay a deposit to continue with them. The Respondent's arguments are based on the merits of the Claimant's substantive case and limitation issues.

Relevant Legal Principles

The Scope of the Claim

10. Employment Tribunals have a general discretion to grant leave to amend a claim. This is a judicial discretion to be exercised 'in a manner which satisfies the requirements of relevance, reason, justice and fairness inherent in all judicial discretions'. **Selkent Bus Co Ltd v Moore [1996] ICR 836**

11. In this case however the Claimant does not pursue an amendment, he argues that the claim is as he has already set out, including the allegations of detriment. In the absence of an amendment application the Claimant's claim either stands or falls on this argument and what he has included in his ET1.

12. A party's case should be set out in its original pleading – his ET1. In **Chandhok v Tirkey [2015] ICR 527**, in which an issue as to the scope of the claim arose, the EAT said:

> *"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose*

to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."

13. In principle, it is not permissible to expand the scope of a claim or a response through, for example, further particulars, inter-party correspondence, a list of issues or witness statements.

14. Some useful guidance as to what level of clarity is required can be found in the authority of **Baker v Commissioner of Police of the Metropolis UKEAT/0201/09** in which, the EAT found that an ET1 form contained no recognisable complaint of disability discrimination. Although the claimant ticked the "disability" box, the details he provided of his complaint did not refer to disability.

15. One must look at the whole claim to decide the full extent of what is being pursued. In **Ali v Office of National Statistics [2004] EWCA Civ 1363**, the Court of Appeal held that whether a claim form already contained a specific claim could only be judged by looking at the document as a whole and considering the name given to the claim as well as the factual details accompanying it. If the claim was put very generally, its particulars would need to be specific enough to enable the employer to be clear about what allegations were being made against them.

16. In **Tattersall v Liverpool Women's NHS Foundation Trust UKEAT/0276/16**, a respondent had failed to make an application to amend to introduce entirely new grounds of defence to an unlawful deduction from wages claim. However, it had explained those new grounds in correspondence and it was clear that the claimant understood them and had been able to respond to them. In those circumstances, the EAT dismissed an appeal by the claimant against the tribunal's decision to treat the correspondence as amended pleadings.

17. In making this assessment the Tribunal must have regard to the overriding objective to deal with cases fairly and justly, which includes:

    (i) Ensuring that the parties are on an equal footing.
    (ii) Dealing with a case in ways which are proportionate to the complexity and importance of the issues.
    (iii) Avoiding unnecessary formality and seeking flexibility in the proceedings.
    (iv) Avoiding delay, so far as compatible with proper consideration of the issues.
    (v) Saving expense.

18. Even in cases where an amendment application is pursued a Tribunal should have regard to all the circumstances of the case and in particular, any " injustice or hardship which may be caused to any of the parties .." **Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650.** Likewise the EAT in **Selkent Bus Company**

Ltd (trading as Stagecoach Selkent) v Moore [1996] IRLR 661, held that, when faced with an application to amend, a tribunal must carry out a careful balancing exercise of all the relevant circumstances and exercise its discretion in a way that is consistent with the requirements of "relevance, reason, justice and fairness inherent in all judicial discretions."

19. Ultimately, however, it is not for the Tribunal to draft an amendment on behalf of a party. In the case of **Margarot Forrest Care Management v Kennedy UKEAT/0023/10** the EAT held that it was appropriate for the tribunal to draw the claimant's attention to the fact that the description of her dismissal given appeared to raise a new matter, and that an application to amend would be required to include that new matter in the case before the tribunal. However, the tribunal had erred in law as it has no power to draft an amendment on a party's behalf.

Strike Out

20. The Respondent argues that certain parts of these proceedings have no reasonable prospect of success and should be struck out and other parts of these proceedings have only limited prospect of success and a deposit order should be made against the Claimant.

21. The relevant part of the 2004 Rules states that strike out can be ordered where there is no reasonable prospect of success. The power to strike out a claim under Rule 18(7)(b) on the ground that it has no reasonable prospect of success may be exercised only in limited circumstances. In **Balls v Downham Market High School & College [2011] IRLR 217, EAT**, the nature of the test to be applied was described as follows:

> *"[T]he tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects."*

22. As a general principle, cases should not be struck out on the ground of no reasonable prospect of success when the central facts are in dispute **(North Glamorgan NHS Trust v Ezsias [2007] EWCA Civ 330, [2007] IRLR 603**, On a striking-out application (as opposed to a hearing on the merits), the tribunal is in no position to conduct a mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence. Such an exception might be where there is no real substance in the factual assertions made, particularly if contradicted by contemporary documents, or where the

facts sought to be established by the claimant were *'totally and inexplicably inconsistent with the undisputed contemporaneous documentation.'*

23. Where a case is fact-sensitive, a claim should be struck out only in the most exceptional circumstances.

24. That said the Court of Appeal has recognised that Employment Tribunals should not be deterred from striking out claims, even where there are disputed facts if they are satisfied there is indeed no reasonable prospect of the facts necessary to liability being established. **Ashok Ahir v British Airways Plc.** In that case the Court noted that;

> *"where there is on the face of it a straightforward and well documented innocent explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the Claimant being able to advance some basis…"*

Deposit Order

25. If the Tribunal considers that contentions put forward by a party in relation to any matter to be determined by a tribunal have little reasonable prospect of success, he may order that party to pay a deposit of an amount not exceeding £1000 as a condition of being permitted to continue to take part in the proceedings relating to that matter. In relation to the Primary Claim the maximum limit is £500. Before making an order, the judge must take reasonable steps to ascertain the ability of the party to comply with the order, and take account of any such information in determining the amount of the deposit.

26. When determining whether to make a deposit order a tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party being able to establish the facts essential to his case, and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward **(Van Rensburg v Royal Borough of Kingston-upon-Thames UKEAT/0095/07, [2007] All ER (D) 187 (Nov)**. That said the tribunal *'must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response'.*

27. In relation to Respondent's arguments that the Claimant's claims should be struck out or be the subject of a deposit order reference was made by the Respondent's representative to the law on unfair dismissal and whistleblowing, including arguments as to whether alleged disclosures were protected disclosures at all, and causation. The Tribunal will not repeat these principles here as they are set out in full in the submissions and are not in dispute.

Time limits

28. The issue of time limits arose in two ways. Firstly in relation to the Respondent's arguments about whether an application to amend should be permitted, as per the guidance set out in **Selkent Bus Company v Moore (1996 IRLR 661).** In

the absence of such an application these submissions were of less value than the Respondent envisaged.

29. Of more relevance was the argument the alleged detriment claims were simply out of time on the basis that there was no continuing course of conduct. The Respondent's focus was on whether there had been a continuing course in respect of the Claimant's alleged disclosures when the focus should be on the alleged detriments.

30. The Respondent submitted that the Claimant could not show that it was not reasonably practicable for him to bring claims within time or offer an explanation for submitting the claims late.

31. An important question for the Tribunal here, and one which the Claimant invited the Tribunal to consider carefully, was whether this determination could be made in the absence of evidence. The Claimant's representative preferred that the Tribunal adopt an approach not dissimilar to that taken in **Galilee v Commissioner of Police of the Metropolis UKEAT/0207/16**, where the limitation issues were postponed to the substantive proceedings recognising that it this might be necessary in cases that require significant evidence in order to determine time points, such as whether there are any continuing acts or whether time should be extended in discrimination claims

32. There will of course be cases where it is more appropriate to determine limitation issues at a preliminary stage, where for instance time and cost can be saved. This would include cases where the limitation issues are likely to have an influence on the question of whether a claim has reasonable prospects of success or little prospects of success. Nevertheless the Tribunal has to carefully consider whether, on the basis of the arguments from both sides, that assessment can be, and should be, made at this preliminary stage.

33. In the case of **Accurist Watches Ltd v Wadher UKEAT/0102/09**, it was accepted that it was not an absolute requirement of the rules that evidence should be adduced in witness statement form on the issue of whether it is just and equitable to extend a time limit. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents.

34. The Tribunal also considered the guidance set out in the case of **Aziz v FDA [2010] EWCA Civ 304** and in particular the fact that at this stage of proceedings, before evidence has been considered, the claimant only need have a reasonably arguable basis for the contention that the various complaints are so linked that they amount to continuing acts or constitute an ongoing state of affairs.

35. In **Commissioner of Police of the Metropolis v Hendricks [2002] EWCA Civ 1686; [2003] ICR 530**, a case involving a number of allegations of race and sex

discrimination over a period of 11 years, the Claimant was allowed to pursue her claim beyond a preliminary stage in the proceedings on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'. The Court noted that she may not succeed in proving that the alleged incidents actually occurred or that, if they did, they add up to more than isolated and unconnected acts of less favourable treatment by different people in different places over a long period and that there was no 'act extending over a period' for which the Respondent can be held legally responsible but at a preliminary stage it was too soon to say that the complaints had been brought too late.

36. In the case of **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548** the question of time bar was dealt with at a pre-hearing review. The test to be applied at the pre-hearing review was to consider whether "the claimant had established a prima facie case" and the Tribunal must ask itself "whether the complaints were capable of being part of an act extending over a period" rather than deciding firmly that they were.

Conclusions

37. The Claim Form was submitted on 4 July 2017 with detailed particulars. The allegation made in the introductory paragraph was that:

> " the dismissal was automatically unfair pursuant to the provisions of Section 103A of the Employment Rights Act 1996 and in any event procedurally and substantively unfair".

38. The Claimant sought a "declaration of unfair dismissal, compensation and reinstatement," but reserved the right to plead further.

39. The background, as set out in the Particulars of Claim, is detailed and sets out a number of events that pre-dated the Claimant's dismissal including reference to matters that are now relied upon in support of his detriment complaints such as complaints of bullying, harassment and intimidation.

40. The Respondent addressed these matters in Section 4 of the Grounds of Resistance under the heading "Bullying and Intimidation." The precise extent to which these complaints were being relied upon to run a detriment claim may have only become obvious to the Respondent at the point the Claimant's voluntary particulars were provided on 29 September 2017 but it has to be said that there was sufficient factual information in the original pleadings for the Respondent to recognise that the complaint was more than an unfair dismissal claim and extended over a period of time.

41. The Respondent made its position clear in a Response to the Claimant's Further Particulars dated 17 October 2017. It raised concerns that the "new" detriment claims had not been set out in the original particulars of claim, nor the amended list of issues sent to the Respondent on 14 September 2017. It also pointed out

that there had been no application to amend and in any event the claims are now out of time.

42. The Claimant sidestepped these arguments by arguing that his complaints were clear from the original particulars of claims, and that the further particulars simply clarified the legal heads of the claim, a position that the Tribunal accepts. Employment Tribunals will be familiar with complex claims where the factual matters are set out in some detail but the precise legal issues are only settled at a subsequent point in the proceedings.

43. In conclusion the Claimant's original claim includes both of his unfair dismissal complaints and the claims that he has been subjected to a detriment for making a protected disclosure.

44. The Respondent's alternative argument is that the claims should be struck out or subject to a deposit order on the basis that they have no or little prospects of success.

45. In relation to the unfair dismissal claims, the Respondent essentially submits that the reason for the Claimant's dismissal is obvious. It is because of alleged misconduct, and given the nature of the disciplinary allegation, the decision to dismiss must fall comfortably with the range of reasonable responses open to it. The Respondent also argues that the attempts to link the dismissal to alleged protected disclosures are simply disingenuous, although it argues the Tribunal shouldn't get to this point because there had been no whistle blowing to start off with.

46. To assist the Tribunal the Respondent made references to a number of documents in the bundle, relating to alleged whistle blowing and the disciplinary process that eventually led to the Claimant's dismissal.

47. The Claimant's position was that the Tribunal could not properly assess the prospects of his claims succeeding without considering evidence and before full disclosure had taken place. This was illustrated by identifying a number of inconsistencies in the Respondent's arguments regarding the whistle blowing claims and process and consistency issues that remained unanswered but could clearly be relevant to the unfair dismissal claims.

48. The Respondent made a significant attack on the alleged protected disclosures arguing that there had obviously been no disclosure of information, that the Claimant could not legitimately argue that he held a "reasonable belief" and that any disclosures were not in the "public interest".

49. The Claimant argued, and the Tribunal accepts, that it is difficult to determine these issues at this stage. The burden of proof will be on the Claimant to establish that he had made protected disclosures, something that he should have the opportunity to do through his own evidence and through challenging the Respondent's evidence, after disclosure has taken place.

50. The Claimant's ET1 and further particulars set out the outline of his case that he had made protected disclosures and that he had been dismissed and subjected to various detriments, arguments that could not be said, at this early stage of the proceedings, as having no reasonable or little prospect of success.

51. This takes us to the limitation issues pursued by the Respondent in relation to the alleged detriment claims. The Claimant again argues that it would be premature to address this issue at this stage, where there may be evidence that suggests that there has been a continuing series of events that bring all the issues complained of in time.

52. The first of the Claimant's alleged detriments was in March 2015, followed by a further cluster between April 2016 and August 2016. The most recent was the decision to put the Claimant into a disciplinary process in January 2016 (which is presumably a reference to January 2017). He was dismissed on 17 February 2017 and the Claim was eventually submitted in July 2017.

53. A Tribunal must exercise caution in deciding that claims are likely to fail on limitation issues, and indeed other issues, where evidence has yet to be considered. That said it is not uncommon to deal with time limit considerations at a preliminary stage and quite often the overriding objective is achieved by doing so. This is case where it would be appropriate to do so.

54. It is of course open to a Claimant to put forward some evidence or argument to overcome a limitation issue at a preliminary hearing, perhaps enough to suggest that there could potentially be a continuing series of events or omissions or to explain the delay in submitting a claim. Indeed the parties were expressly invited to do so in the Order from the Case Management Hearing in September 2017. A Claimant that does not do so takes some risk, even at this preliminary stage.

55. In a case like this, where there are a number of distinct and seemingly unconnected alleged detriments, involving different people with lengthy gaps between them, including a gap of around 5 to 6 months between the last of the alleged detriments and the instigation of the claim, a Claimant would be well advised to advance some argument or evidence as to why the detriments were connected or why a claim was submitted late.

56. In this case no arguments were advanced by the Claimant on the limitation issue, other than that it was premature to make any sort of determination at this stage. The Tribunal's view is that the Claimant has failed to even indicate the link between his various detriment claims or provide an explanation as to why he had not pursued these claims at an earlier stage. In summary, he has been unable to demonstrate that there was a reasonably arguable basis for overcoming the limitation issues before him, in relation to his detriment claims.

57. In the absence of an explanation from the Claimant, his detriment claims are likely to fail on limitation issues alone whether on a continuing act basis and/or a time limit. Accordingly these claims are dismissed as having no reasonable prospect of success. Both of his unfair dismissal claims were pursued in time and will proceed to the full merits hearing.

EMPLOYMENT JUDGE Deol on 24 January 2018