Appeal No. UKEAT/0046/18/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 June 2018
Judgment handed down on 17 July 2018

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MISS M PRUZHANSKAYA — APPELLANT

INTERNATIONAL TRADE & EXHIBITORS (JV) LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MISS MARIA PRUZHANSKAYA (The Appellant in Person)
For the Respondent	MS KATE BALMER (of Counsel) Instructed by: Clyde & Co The St Botolph Building 138 Hounsditch London EC3A 7AR

SUMMARY

PRACTICE AND PROCEDURE - Amendment

The Claimant brought an in-time claim of unfair dismissal. She sought permission to amend her complaint to allege that the principal reason for dismissal was that she had made protected disclosures. The Employment Judge held that this involved a significantly changed case and added "a substantial new issue which plainly is brought considerably out of time". He found that there was prejudice to the Respondent and refused permission to amend.

Held. (1) An application to amend an existing complaint of unfair dismissal to allege a new reason did not involve bringing a new complaint outside the time limit. **New Star Asset Management Holdings Ltd v Evershed** UKEAT/0249/09 and [2010] EWCA Civ 870; and **Conteh v First Security (Guards) Ltd** UKEAT/0178/17 considered. (2) The Employment Judge had not given sufficient reasons for his decision - it was not possible to see how he had applied the approach required by **Selkent Bus Co Ltd v Moore** [1996] ICR 836 and how he had weighed in the balance the time limit issue.

NB - in another respect the appeal was also allowed without objection.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Miss Maria Pruzhanskaya ("the Claimant") against two aspects of an Order of Employment Judge Smail dated 17 October 2017 whereby he refused in part an application which she had made to amend the Particulars of Claim attached to her ET1 claim form. She had brought Employment Tribunal proceedings against International Trade and Exhibitors (JV) Limited ("the Respondent") claiming unfair dismissal and discrimination on the grounds of pregnancy or maternity.

2. The first aspect relates to Claimant's existing complaint of maternity discrimination: she sought to add a new paragraph 96.1 which alleged as a complaint of maternity discrimination that she missed out on a particular promotion. The appeal in this respect is not opposed. The second aspect relates to the Claimant's unfair dismissal claim: she sought to add new paragraphs 98.1 to 98.16 arguing that the principal reason for dismissal was the making of protected disclosures (which, if established, would render the dismissal automatically unfair by reason of section 103A of the **Employment Rights Act 1996**). The appeal in this respect is opposed.

The Original Claim

3. The Respondent carries on business in the organisation of trade exhibitions and conferences in approximately 18 countries around the world. The Claimant was employed by the Respondent with effect from 20 June 2007 as an events co-ordinator. On 1 June 2011 she became a sales executive. Between 16 January 2014 and 24 March 2015 she was on maternity leave and then annual leave. On her return to work she was appointed to a new role as a senior

A sales executive. On 31 May 2016, however, her employment was terminated, ostensibly on the grounds of redundancy.

B 4. The Claimant commenced Employment Tribunal proceedings on 25 October 2016. She attached to her ET1 claim form a document entitled Particulars of Claim. This was a substantial document, running to some 97 paragraphs, prepared with the assistance of a legal advisor. This document was divided into four sections; the second, third and fourth sections C were said to be claims.

5. The first section was entitled "background". It set out a detailed narrative of the D Claimant's employment, no doubt selecting the facts thought to be relevant to her claims. This section ran from paragraphs 1 to 66. It is relevant to mention two features of this section.

E 6. Paragraphs 43 and 44 dealt with a position as portfolio director for beauty events. It was asserted that the position had been vacant and had been filled without advertising it. It was said that the Claimant had been "duped" out of a job which potentially had more longevity than her current post.

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7. At other points there are references to complaints by the Claimant about the disorganisation of the department (paragraph 45), incompetent management and lack of G communication (paragraph 52) and professional incompetence of certain members of management (paragraph 59). It was part of her case that she was or may have been marked down in a redundancy exercise because she was disliked (paragraph 85).

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8. The second section was entitled "unfair dismissal by reason of redundancy". It ran from paragraphs 67 to 91. It set out detailed criticisms of the redundancy decision and process.

9. The third section was entitled "maternity discrimination". Paragraph 92 acknowledged that the claim was out of time and said that there would be an application for an extension on the basis that it was just and equitable to extend time "as both the unfair dismissal and maternity discrimination fall on the same facts".

10. The final section was very short: a complaint that the Claimant had continually to ask for addenda and job descriptions whenever she changed role.

The Proposed Amendments

11. On 24 May 2017 the Claimant, now acting without any assistance from the legal advisor, applied to amend her claim. I am concerned with two aspects of the amendment.

12. The first is paragraph 96.1. The Claimant described this as a detailed particular to the discrimination claim. It provided:

> **"96.1. The Claimant will claim that she … missed out on promotion at the end of April 2015. Though she was promised a prospect to become Healthcare and Beauty Portfolio Director during her teleconference on 18 March 2015, she was not informed about the position being available and did not have a chance to apply and be considered for the … appointment. Was not the Claimant's new position a sham and was not she just back from maternity leave, the Claimant would be considered for the promotion and have a chance for professional development and career progression."**

13. The second was a much lengthier passage - paragraphs 98.1 to 98.16. In her application the Claimant said that she had been keen from the beginning to add a whistleblowing claim because her unfair dismissal was "heavily attributed also to my raising concerns about wrongful

business practices and financial irregularities". She said that her former legal advisor had given her mistaken advice about whistleblowing.

14. The new passage was headed "whistleblowing unfair dismissal". In general terms it said that her dismissal was "heavily attributed to her raising concerns with the Directors about financial irregularities and questionable business practices …". The succeeding paragraphs set out some detail. To some extent the complaints read as complaints about incompetence and inefficiency; but they include complaints about a system said to have been "wrong from the tax point of view" and about paying commissions to agents for clients they did not sign up.

The Employment Judge's Reasons

15. The Employment Judge had originally declined the application for permission to amend on paper. He had, however, acceded to the Claimant's application to consider the matter at a hearing. This took place on 30 August 2017. The Claimant was in person; the Respondent was represented by counsel.

16. The Employment Judge allowed other amendments to spell out aspects of the maternity discrimination claim, but he refused the application in respect of the proposed paragraph 96.1. He summarised paragraph 96.1 and said (paragraph 14 of his Reasons):

> **"14. … This seems to me to add a material new allegation which could have been made before and which if allowed to proceed could cause genuine evidential prejudice to the Respondent."**

17. The Employment Judge turned to the proposed new paragraphs 98.1 to 98.16. He dealt with this in paragraphs 18 to 20 of his Reasons. He began as follows:

> **"18. At paragraphs 98.1 to 98.16 of the proposed amendment, the Claimant wishes to argue that she was dismissed for having raised matters with directors about financial irregularities, questionable business practices, all of which led to the company's bad**

> **financial performance. The Claimant submitted that she had referred to matters of whistle blowing in the first particulars of claim served. …"**

18. He then summarised passages in the original Particulars of Claim concerning complaints and queries she had made and the reaction of her managers to them. He concluded in paragraph 19 that, in his judgment, "none of those matters amount to an allegation of a qualifying disclosure within section 43B of the **Employment Rights Act 1996**". He set out passages from section 43B(1).

19. He then continued as follows:

> **"20. Accordingly, I refuse this amendment. It amounts to a significantly changed case and adds a substantial new issue which plainly is brought considerably out of time. I accept that the Respondent would be prejudiced in having to deal with this allegation at this stage having collated its disclosure in respect of the matters identified at the January 2017 preliminary hearing. I exercise my discretion not to make this amendment."**

The Legal Background

20. There is an appeal to the Employment Appeal Tribunal only a question of law. Case management decisions - such as whether to permit an amendment to a claim - 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 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. It may also be challenged for insufficiency of reasons; the Tribunal must give sufficient reasons to explain to the parties how it reached its decision and to enable an appellate court to see that it applied correct legal principles. This does not, however, mean that reasons for a case management decision need be lengthy; they should be "proportionate to the significance of the issue and for

decisions other than judgments may be very short": see Rule 62 of the **Employment Tribunals Rules of Procedure 2013**.

21. The law relating to what is commonly known as whistleblowing in connection with employment is found in the **Employment Rights Act 1996**. Part IVA makes provision for certain disclosures by a worker to be protected. Within Part V, which is entitled "protection from suffering detriment in employment", section 47B provides a right not to be subjected to any detriment on the grounds of such a disclosure; and sections 48 and 49 provide a remedy for contravention of that right.

22. Dismissal for "whistleblowing" is, however, not dealt with in Part V but in Part X as an aspect of the right not to be unfairly dismissed. Section 94 provides that an employee has the right not to be unfairly dismissed. Section 98 sets out the general framework of unfair dismissal law; but section 98B to section 107 set out specific provision for certain kinds of dismissal. Section 103A is one such provision: it enacts that a dismissal shall be regarded as an unfair dismissal if the sole or principal reason for dismissal was that the employee made a protected disclosure. Section 111 then provides the right to complain to an ET of unfair dismissal: it is a single composite right. It is subject to a three-month time limit unless it was not reasonably practicable for the complaint to be brought in that time: see section 111(2). Sections 112 to 125 deal with remedy; there is generally a cap on compensation but the cap does not apply in the case of section 103A.

23. 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 Ltd 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, section 67 of the Employment Protection (Consolidation) Act 1978.**
>
> ***(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."**

The Appeal

24. Although the grounds of appeal were originally wider, only certain grounds were permitted to proceed to a Full Hearing: see the Judgment of Choudhury J given at a Rule 3(10) Hearing on 21 February 2018.

Paragraph 96.1

25. Grounds 1 and 4 of the Notice of Appeal challenge the Employment Judge's conclusion in respect of paragraph 96.1. The Claimant argues that he was wrong to say that the amendment added a materially new allegation: in substance the matter had already been pleaded in paragraph 43 of the Particulars of Claim. She further argues that he did not carry out

the exercise required by **Selkent Bus Co Ltd v Moore** [1996] ICR 836. There was no consideration or balancing of relative prejudice and no consideration of the Claimant's explanation about the timing. Alternatively there was no reasoning on these points.

26. On behalf of the Respondent Ms Kate Balmer, who did not appear below, does not oppose the appeal in respect of paragraph 96.1. She accepts that there is a great deal of overlap between the proposed amendment and material already pleaded.

27. I can state my conclusions quite briefly in respect of paragraph 96.1. I have no doubt that the Employment Judge fell into error in considering this claim. When he said that there was a "material new allegation which could have been made before" in respect of the loss of an opportunity for promotion he must have overlooked paragraph 43, which had already raised the same matter. His assessment that there could be genuine evidential prejudice to the Respondent was made on this flawed basis. The appeal in respect of paragraph 96.1 must therefore be allowed.

Paragraphs 98.1 to 98.16

28. Grounds 2 and 4 of the Notice of Appeal challenge the Employment Judge's conclusion in respect of paragraphs 98.1 to 98.16.

29. I consider that the Claimant's argument may be summarised in the following three ways. I will take them in turn.

Merits Based Assessment

30. Firstly, in reliance on paragraphs 18 and 19 of his Reasons, she submits that the Employment Judge effectively decided on the merits whether there were protected disclosures; this was not appropriate. To this submission Ms Balmer replies that the Employment Judge was doing no more than considering whether the matters currently pleaded were capable of amounting to qualifying disclosures.

31. I have no doubt that Ms Balmer is correct in her submission. The Employment Judge had noted, in paragraph 18 of his Reasons, that the Claimant was saying she had "referred to matters of whistle blowing in the first particulars of claim served". This was the argument he was addressing in paragraphs 18 and 19 of his Reasons. It is why he referred to passages in the existing Particulars of Claim, not to the amendments. Paragraphs 18 and 19 were a proper exercise for him to undertake, not only in order to deal with the Claimant's submission but also as background to any discretionary decision about amendment. I therefore reject the Claimant's first submission. Paragraphs 18 and 19 only address the question how far the existing claim encompassed the issue of protected disclosures.

32. The balance of the Employment Judge's reasoning is in paragraph 20. On any possible view it is short; and must carry much of the weight of the Employment Judge's decision to refuse the amendment. The Claimant's second and third arguments are concerned with the question whether paragraph 20 is legally correct and sufficient. For reasons which I will explain, I think the arguments overlap; but I will take them separately for the purpose of exposition.

"A new significant issue brought out of time"

33. The Claimant's second argument relates to the Employment Judge's conclusion that the allegation significantly changed the case and added a significant new issue which was brought out of time. She argues that this overstated the position: there was an in-time complaint of unfair dismissal; the amendment, while substantial, was not subject to any time bar and added an issue to the existing unfair dismissal claim, where it was in any event always for the Respondent to prove the reason for dismissal.

34. Ms Balmer argued that the Employment Judge did not misunderstand the position; the amendment added a quite different kind of complaint of unfair dismissal involving significant new factual and legal issues. She submitted that the Employment Judge was correct to find that the amendment involved a new cause of action brought outside the time limit. She relied on the special place of automatic unfair dismissal within Part X of the **Employment Rights Act 1996** with the potential for uncapped compensation. She sought to derive support from passages in **New Star Asset Management Holdings Ltd v Evershed** UKEAT/0249/09 and [2010] EWCA Civ 870; and **Conteh v First Security (Guards) Ltd** UKEAT/0178/17. I should add that Ms Balmer also argued at first that the Employment Judge meant no more than that the proposed amendment was late; I do not think she withdrew this argument, but she made it plain that her preferred submission was that the Employment Judge was correct to find that the amendment involved a new cause of action brought outside the time limit.

35. The Employment Judge was certainly entitled to say that the proposed amendment added a significant new issue by raising the question whether the principal reason for dismissal was the making of protected disclosures. But I have real difficulty with the words "which plainly is brought considerably out of time". One would expect an Employment Judge, dealing

with an application for amendment, to consider whether it introduced a new complaint out of time and if so whether the time limit should be extended: see paragraph 5(b) of **Selkent** which I have already quoted. Was the Employment Judge addressing this question, and if so was he right?

36. I will first consider whether Ms Balmer is correct in her submission that the amendment involved a new cause of action brought outside a relevant time limit. I do not think she is correct. I have already explained how section 103A finds its place in unfair dismissal law. It does not create a separate head of complaint to which a separate time limit applies. It is an aspect of the right not to be unfairly dismissed under Part X of the **1996 Act**. The Claimant had brought an in-time complaint of unfair dismissal; I do not think that alleging a further potential reason for dismissal, whether it be an "ordinary" reason such as conduct or an "automatic" reason such as the making of a protected disclosure, involves a new complaint with a new time limit.

37. I turn to the cases on which Ms Balmer relies.

38. The first is **New Star Asset Management Holdings v Evershed**. In that case it was sought to add to an existing unfair dismissal claim an allegation that the principal reason for dismissal was the making of protected disclosures. The Employment Tribunal had refused permission to amend; but the Claimant's appeal was allowed in the Employment Appeal Tribunal by Underhill P. The Court of Appeal confirmed his decision.

39. Underhill P said the following (paragraph 15):

> **"15. It is clear that the amendment does indeed raise a new basis of claim, since there is nothing in the original pleading to indicate that the Claimant intended to rely on s.103A of the 1996 Act. (It might be possible to quibble with the phrase "cause of action", since**

> **s.103A is a form of unfair dismissal; but that is not a point of any significance.) However, the weight to be attached to that fact depends on the extent of the difference between the original and the new bases of claim. It is well-established that a "mere re-labelling" is much more likely to be permitted than an amendment which introduces very substantial new areas of legal and factual inquiry: see, e.g., para. 13 of my judgment in *Transport and General Workers Union v Safeway Stores Ltd* (UKEAT/0092/07). The Judge does not attempt any explicit analysis of this; but that does not matter if and to the extent that his views, and the basis for them, appear from the remainder of his reasoning."**

40. This passage is not in any way conclusive, but it makes the point that section 103A is simply a form of unfair dismissal. The appeal was allowed because the Employment Judge had wrongly found that the amended claim would involve the adducing of wholly separate evidence: see paragraphs 16 to 22 of the Employment Appeal Tribunal decision. Underhill P considered and granted the amendment on the assumption that a new claim would have been out of time without deciding the point: see paragraphs 35 to 36. The question was not separately considered by the Court of Appeal.

41. **Conteh v First Security (Guards) Ltd** was a further decision concerning a proposed amendment seeking to add allegations concerning protected disclosure to an existing claim which included unfair dismissal. It is important to note, however, that the proposed amendment involved allegations of whistleblowing detriment as well as a new basis for putting the unfair dismissal claim. So on any view the proposed amendment involved a new cause of action outside the time limit. Although the Appellant's argument at least in part involved a submission that the Employment Judge ought to have distinguished the unfair dismissal claim from the detriment claim (see paragraph 19), the decision of the Employment Appeal Tribunal was that the Employment Judge "did not overly focus" on the question whether there was a new cause of action but correctly concentrated on the question of substantive prejudice: see paragraphs 31 to 36.

42. I do not, therefore, consider that either of these authorities provides support for the proposition that amending an existing complaint of unfair dismissal to assert that the true reason for dismissal was the making of a protected disclosure involves a new complaint brought outside the time limit.

43. I must then consider whether the Employment Judge was really meaning to say that a time limit issue was involved in the amendment. Did he mean only to say that if it had been a new claim it would have been outside the time limit; or that the claim was late? I have concluded the Employment Judge meant to say that a time limit issue was involved; this is what his words mean at face value; and if he was not addressing time limits here then he did not address them at all, as one might expect him to do in the light of the familiar **Selkent** principles. If he thought that a time limit issue was involved it would also explain why he otherwise dealt with **Selkent** issues so briefly, a point to which I will come in a moment. Even if, contrary to my view, he did not mean to say that a time limit issue was involved in the amendment, his reasoning would be open to criticism: at this point it is not possible to tell with confidence what principle of law he was applying.

Selkent *and balance of hardship*

44. The Claimant's third argument is that the Employment Judge did not apply **Selkent** principles in determining the application. No account was taken of her explanation for amendment, which rested to a significant extent on legal advice which she said was incorrect. There was no balancing of hardship or prejudice; indeed no recognition that the decision caused her any hardship or difficulty. Alternatively, if he applied **Selkent** principles, he did not give sufficient reasons for his decision.

45. Ms Balmer submits that, while it is true that the Employment Judge did not expressly address **Selkent** principles or expressly balance the prejudice on either side, it can be seen that he applied the correct principles. He was entitled to give brief reasons for a case management decision. Overall Ms Balmer submitted that the Employment Judge had made a permissible case management decision and given proportionate reasons for it.

46. I have reached the conclusion that the Employment Judge has not given sufficient reasons for his decision. Although he did not mention **Selkent** in his Reasons, it is a well known authority and it is difficult to suppose that he was not intending to apply it. But a certain minimum amount of reasoning is required when doing so. Above all there must be some proper reasoning about the balance of injustice and hardship. In this case the Employment Judge has referred to the prejudice the Respondent would incur by the need to consider further disclosure; that is a fair point for him to make. But he has not made any assessment of the prejudice to the Claimant whose case, while it had not involved "whistleblowing" as such, had always included assertions that her complaints and queries had rendered her unpopular with managers. Nor has he made any assessment of the explanation she gave for the application to amend.

47. I recognise that, as Underhill P said in **Evershed**, a time limit issue need not necessarily be important; that will, I think, particularly be the case where the time limit may be extended on the relatively broad "just and equitable" ground. Whether it is just to allow the amendment will then be closely allied to the question whether it is just and equitable to extend time. In this case, however, if the Employment Judge thought that a time limit was in play it would be the more restrictive time limit applicable by virtue of section 111(2). He appears to have thought the time limit point was important, but beyond this it is impossible to see what he thought about its application and how if at all it figured in the balance of justice and hardship.

Remission

48. It follows that the appeal will be allowed both in respect of paragraph 96.1 and paragraphs 98.1 to 98.16. The question whether to grant permission to amend must be considered afresh in both respects.

49. If paragraph 96.1 had stood alone I might well have been prepared with the consent of the parties to decide the question of amendment myself; it would have been relatively straightforward. But the issue relating to paragraphs 98.1 to 98.16 is less straightforward: I do not think a decision on a broad discretionary matter of this kind should simply be tacked on to a hearing which was dedicated to the narrower question whether the Employment Judge erred in law. I would have required a second round of submissions dedicated to the general discretionary question; and for listing and personal reasons that will not be practicable. The matter will be remitted for consideration by an Employment Judge.

50. Whether a decision is remitted to the same, or to a different, Employment Judge is a discretionary matter for the Employment Appeal Tribunal. The discretion is guided by the overriding objective and by considerations set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. I have no doubt about the professionalism of the Employment Judge; but I think it is best if the matter is considered afresh by a different Employment Judge. The argument will be relatively short, so there will not be any great saving if a new Judge is involved; it is some time since the Employment Judge was concerned with the matter; and the decision under appeal was his second consideration of amendment.