RA

EMPLOYMENT TRIBUNALS

Claimant: **Mr F Deda**

Respondent: **London Borough of Newham**

Heard at: **East London Hearing Centre**

On: **27 March 2019**

Before: **Employment Judge Prichard**

Representation

Claimant: In person

Respondent: Ms S Clare, solicitor
(OneSource Legal Services, London)

JUDGMENT

1. The claimant's amendment application to add a claim for post-termination protected disclosure detriments under s 47B of the Employment Rights Act 1996, is refused.

2. The final hearing remains listed for **30 July 2019 for 4 days**, at East London Tribunal Service, 2nd Floor, Import Building (formerly Anchorage House), 2 Clove Crescent, London E14 2BE starting at **10.00am**

REASONS

1. This is a preliminary hearing for case management where I have been asked to deal with an application by Mr Deda, the claimant, to amend his claim to include a claim for post-termination detriment suffered at the hands of his new employer because of an unfavourable telephone call made from one Local Authority Designated Officer (LADO) to another, on 5 March 2018.

2. Nick Pratt is the LADO for Newham. He phoned his opposite number in Haringey who is Sarah Roberts.

3. I have seen a very full email from her, informing the claimant about this call. That was dated 27 November 2018. Shortly, as I understand, after the claimant had been confirmed in the post following a 6-month probation period with Haringey as a Strategy, Safeguarding Partnership Manager.

4. The claimant was initially employed for 12 months; December 2016 to December 2017 on a one-year fixed term. That was then extended for another 3½ months until 31 March 2018 – the end of the financial year. It was not extended thereafter. He was already making moves to find employment which would hopefully start shortly after the end of his previous employment.

5. I accept that DBS could be quite quickly achieved by the claimant because he pays a subscription of £13.00 per year and he was "live" on DBS. It would take 5 working days to run him through a DBS check for a new employer.

6. I also accept that all the pre-employment checks with Havering had been completed by the time he was expecting to start. What was outstanding was a reference from Newham which was delayed. It should have been there by 15 March 2018, but apparently it was not.

7. On 19 March, the claimant emailed his previous Head of Social Work and Principal Social Worker, Beverly Halligan, asking for not just a proforma tick box HR reference, but for a full practice reference. That was on the 19 March but on the same day she replied to him stating that she would complete the Haringey reference tomorrow. That sounds as if it was the simple HR proforma, which I accept. That went out on 22 March 2018.

8. Her instructions to Ms Clare are that she did complete the reference but it went out in the name of HR, presumably with a proforma signature in HR's name. However, she then wrote a second reference on 28 March which was, as has been accepted now, a good practice reference. It is highly favourable to the claimant. What the claimant asserts, without evidence or proof is that, the reason that second reference went out was as the result of a specific request from Haringey for it. There is no evidence of this.

9. Whilst I can accept an unfavourable LADO to LADO phone call was made on 5 March 2018. I cannot accept that it is at all likely that the claimant would show that

the reason Nick Pratt made that call was because the claimant had made a protected disclosure, at all. It is too remote.

10. The claimant had earlier made a potential protected disclosure relating to the Children Missing Education Team that would have criticised the work of Dani Wade and Jenny Moon. It is all extraordinarily convoluted and obscure. It would take a long time to analyse at any final hearing.

11. There were two references from Haringey, 6 days apart. We know that the claimant had specifically asked for a practice reference. It was understandable that a bare HR pro forma reference can sometimes look like an employee left under a compromise agreement, or some such.

12. There is nothing in the detailed email of Sarah Roberts to suggest any hidden agenda or concern about whistle blowing. Mr Pratt's concerns were, first, a problem with the claimant's safeguarding expertise, and second that the claimant was difficult to work with, and was over-ambitious, and wanted to become the Director of Children's Services.

13. Th Pratt phone call does not seem to have impeded the claimant's Haringey employment in any definable way. He makes vague and nebulous allegations that Haringey have been monitoring him in a way that he has not been previously monitored. It is subjective, lacking in detail, and speculative. If this went forward to the final hearing, it would put this respondent in a difficult position as the evidence of an alleged delayed start in Haringey is all in the control of another employer. Again, that is something that I have to take into consideration, when deciding on the balance of prejudice as between the parties whether to allow an amendment.

14. My discretion in deciding a case like this is exercised in accordance with the leading case of *Selkent Bus Co Ltd v Moore* [1996] ICR 836. Under *Selkent*, jurisdictional time limits are an issue, but only one issue and they are not a strict jurisdictional issue in the context of amendment. Nonetheless the time limits on protected disclosure detriments under s.48 (3) Employment Rights 1996 are hard. They are like the unfair dismissal time limits in section 111 of the Employment Rights Act 1996. The only extension is if it was "not reasonably practicable" to present it earlier. Nothing to do with "just and equitable".

15. Ms Clare has much extra familiar caselaw in front of me, relevant of which is probably *Machine Tool Industry Research Association v Simpson CA* [1988] ICR 588, CA. That was a case where an employee was ignorant of certain facts until much later, which cast his dismissal sometime previously into doubt. In that case, the time was extended because it had not been reasonably practicable because he did not know important facts relating to his claim which led him to believe that, after all, he did have a proper unfair dismissal claim. Thus it may help the claimant in this case.

16. I accept the claimant's account for today's purposes. He did not know about the Nick Pratt phone call until the Haringey Assistant Director of Children Services, Sarah Alexander retired in early November 2018. Before she went, she told him

about this and this is what led him rather later to write to Sarah Roberts requesting information about the Nick Pratt phone call because she had been on the receiving end of the call.

17. He did raise it at a preliminary case management hearing, before Judge Jones on 19 November 2018. The allegation first surfaced in his agenda prior to the 19 November case management hearing, on his agenda sent to the Tribunal on 14 November so, he knew by then. I accept his evidence that he did not want to take it up or cause too many waves before he had been in post in Haringey for some more time and passed his probation.

18. The claimant's allegation is that the detriment was that he was due to start work with Haringey on 1 April, and did not start work until the 21 May 2018. He states, based purely on speculation that this was caused by the Pratt telephone call, and that had been known prior to 1 April. The call was on 5 March. He says his line manager Sunita Khattra-Hall knew about it, but that too is supposition.

19. Today the claimant applied and re-applied for postponement of the final hearing in July in order for him to get more information. However, he has known about this for a long time. Directions were made about this at the Jones preliminary hearing and she did not accept it as a good enough reason to postpone to postpone a case that is now listed for a 4-day hearing, starting on 30 July 2019.

20. I do not really understand why the mere fact that he was on probation for 6 months after the 21 May would have stopped him from finding out if there had been any request from Haringey to Newham for a full practice reference.

21. The claimant himself, apparently on his own initiative, on 19 March asked Ms Halligan in Newham for this reference, himself. Ms Halligan obliged.

22. The protected disclosure contention is utterly speculative. My experience this afternoon also suggests it would be disproportionately time-consuming issue at a final hearing.

23. I must consider the balance of prejudice. I consider the balance of prejudice is very much caused to the respondent rather than to the claimant on this speculative amendment claim. It is little more than a hunch and an assertion at this stage.

24. I have seen that Ms Clare has already taken instructions from Ms Halligan who does not suggest in any way that she only provided the 28 March because of a special request from Haringey, after they had received the pro forma HR reference.

25. This new allegation is speculative and convoluted, and would be likely to make the case exceed its allotted 4-day time estimate, I consider that I should not allow this amendment to be made and the case will proceed on the basis of the allegations set out in the ET1 and ET3 as discussed at the preliminary hearing before Judge Jones on 19 November.

26. The above, with some editorial corrections, was dictated live to the parties on 27/03/2019. Since then there has been a volume of correspondence between the parties enclosing emails regarding the production of the full practice report dated 28/03/2018. Reading this I am more, rather than less, convinced that I was right to refuse the amendment.

Employment Judge Prichard

19 June 2019