



EMPLOYMENT TRIBUNALS

Claimant: Mr J Newall

Respondent: 1) Oxford Coversis Ltd, 2) Ruxley Holdings Ltd & 3) Mr A M Muddyman

OPEN PRELIMINARY HEARING

Heard at: London South, Croydon

On: 22 July 2019

Before: Employment Judge Tsamados (sitting alone)

Appearances

For the claimant: Mr R Buch of Counsel

For the respondent: Ms L Amartey of Counsel

JUDGMENT

1. The claimant is granted leave to amend his particulars of claim.
2. The respondent is granted an order that the claimant provide further particularise his claim.

REASONS

My decision and reasons were given orally at the hearing but in truncated form so as to expeditiously use the remaining hearing time available to further case manage the claim to its full hearing commencing on 2 December 2019.

Background

- (1) This is a claim of unfair dismissal and detrimental treatment for making protected disclosures. It is brought against Oxford Coversis Ltd, the claimant's former employer, Ruxley Holdings Ltd, his ex-employer's parent company and Mr A M

Muddyman, the Executive Chairman of Oxford Coversis Ltd and Managing Director of Ruxley Holdings Ltd. The respondents deny the claim in its entirety.

- (2) A preliminary hearing was held on 1 November 2018 in front of Employment Judge Baron at which he identified the claims, made various case managements order for further preparation of case and he listed it for full hearing for five days commencing on 2 December 2019.
- (3) At paragraph 7 of the record of that hearing (the notes and orders document), in the context of agreeing a list of issues, Mr Buch (who also appeared for the claimant at that hearing), agreed to provide to the respondents by 16 November 2018 details of the information alleged to have been supplied by the claimant on each occasion when he said he made a protected disclosure, exactly what criminal offence had been committed or legal obligation it is alleged he believed had been breached. The parties were then directed to seek to agree a list of issues by 21 December 2018 and to provide a copy to the tribunal.

This hearing

- (4) This open preliminary hearing was directed by Employment Judge Andrews in her the tribunal's letter to the parties dated 21 February 2019 to deal with the claimant's application to amend and for further directions as required. The claimant's application was contained in a letter to the tribunal from his solicitors dated 16 November 2018. The date of 22 July 2019 was fixed and notified to the parties by letter dated 1 March 2019.
- (5) The claimant's solicitors provided the further and better particulars in accordance with the notes and order of EJ Baron at the preliminary hearing held on 1 November 2018 and in that same letter made the request for leave to amend the claimant's claim.
- (6) The respondents' solicitors wrote on 7 December 2018 stating that the further and better particulars deficient and objecting to the application for leave to amend.
- (7) On 12 December 2018, the claimant's solicitors provided its draft list of issues to the Respondents' solicitors for agreement.
- (8) Also on 12 December 2018, the claimant's solicitors wrote to the tribunal seeking to bring the hearing dates forward and to vary the date on which exchange of witness statements was scheduled to take place.
- (9) On 21 December 2018, the respondents' solicitors made an application for an order compelling the claimant to provide fully particularised information given certain claimed deficiencies within his further and better particulars.
- (10) On 4 January 2019, Employment Judge Cheetham rejected the application to vary the hearing date on the basis that the tribunal was unable to list the hearing any earlier.

- (11) On 17 January 2019, the respondents' solicitors made an application to postpone the orders for disclosure of documents and preparation of the hearing bundle following the claimed deficiencies within the claimant's further and better particulars and the knock-on effect on finalising the list of issues. On 28 January 2019, the claimant's solicitors wrote objecting to this application.
- (12) It was at this point on 21 February 2019, that the file was referred to EJ Andrews who directed that there be an open preliminary hearing to deal with the claimant's application to amend and consequent case management.
- (13) On 27 February 2019, the claimant's solicitors made an application to strike out the respondents' response for failure to comply with the orders relating to disclosure of documents and production of the hearing bundle. On 11 March 2019, the respondents' solicitors wrote objecting to this application. On 28 March 2019, the claimant's solicitors wrote a further letter replying to the respondents' solicitors' objections.
- (14) The case was referred to Employment Judge Balogun who on 20 June 2019 refused the claimant's application for a strike out of the respondents' response. She also reminded the parties of their obligations under the overriding objective to assist the tribunal by co-operating with each other in preparing the case for hearing. She stated that case management orders had been made and that the parties were expected to comply with them without recourse to the tribunal. If for any reason the parties are unable to do so then they can explain why at the scheduled preliminary hearing. She also indicated that there was insufficient space on the list to bring the hearing forward or extended as had been requested.

Documents

- (15) At the hearing today I was provided with a list of issues for the preliminary hearing, a substantive list of issues for the final hearing and a bundle of documents running 122 pages by the respondents' Counsel.

Agenda

- (16) The agenda for today's hearing is as follows: firstly, to consider the claimant's application for leave to amend; secondly, to consider the respondent's application for an order that the claimant provide further information of its further and better particulars; and, thirdly, to determine any further case management required (which is dealt with in a separate record of the preliminary hearing on case management which followed this hearing).

Comment

- (17) I did express my extreme concern at the beginning of the hearing that there was such a level of argument between two professionally represented parties in correspondence and that matters had been allowed to drift so far, so that potentially the dates set for the final hearing were in jeopardy. However, I hastened to acknowledge that the tribunal had not assisted matters by listing this hearing is so far ahead and not dealing with the substantive applications,

particularly when the application for leave to amend had been made on 16 November 2018 and the application for further particularisation on 21 December 2018.

- (18) Unfortunately, this is indicative of the volume of work faced by the administration and the limited judicial resources available as a result of the substantial increase in the number of claims made following abolition of the employment tribunal fees.
- (19) I did say that it was imperative that this case was back on course for the listed final hearing dates. I pointed out to the parties that we are now listing five-day cases for the end of November 2020 and beyond.

The claimant's application for leave to amend

- (20) The claimant's application for leave to amend is that R1 62 – 63 and his amend the particulars of claim are at our R72 – 80 particularly at paragraphs 13 and 31.
- (21) In essence, Mr Buch submitted as follows:
 - (i) The application is to add an additional allegation of protected disclosure made by the claimant to Mr Gary Muddyman (the first respondent's Managing Director).
 - (ii) The disclosures themselves are the same as those alleged in the allegations already pleaded and a breach out of the same legal obligations pleaded. These are clearly set out in the further and better particulars.
 - (iii) They are entirely related to the claim as it now stands although Mr Buch accepts that there is now a new factual allegation;
 - (iv) Mr Buch relies on the principles set out in **Selkent**. The amendment does not raise a new cause of action. It is a new factual allegation. It will involve an enquiry to a new set of allegations, but the legal issues are the same.
 - (v) It is likely that Mr Gary Muddyman will be called as a witness to the existing claim in any event because he was part of the decision-making process that led to the claimant's dismissal. There is simply an additional part of evidence to be covered i.e. the claimant's meetings with him.
 - (vi) With regard to time limits, the claim as a whole is in time. If this was a new claim brought at the time of the application, it would have been out of time. It was brought up as a consequence of drafting the further and better particulars required at the hearing with EJ Baron. But the time issue is not an answer in itself to the question whether to allow the amendment to be made. All the circumstances should be taken into account. The test is injustice and hardship.
- (22) In essence, Ms Amartey made the following submissions:
 - (i) The proposed amendment involves a significant change. Paragraph 10 of the further and better particulars (relating to the amended paragraph 13 of

the particulars of claim) indicates that there are five new disclosures made to Mr Gary Muddyman, without indication of the dates of those meetings or whether they were made at one meeting or more than. If the amendment is granted the claimant would have to provide further and better particulars of this. These disclosures involve factual allegations not foreshadowed in the claim form. At paragraph 11 there are two new legal obligations and so Mr Buch is incorrect when he says is the same five legal obligations (Mr Buch subsequently apologised for this).

- (ii) If the application for leave to amend was granted the respondents would be required to take further instructions from its clients and to make further enquiries as to those matters set out in the further and better particulars. In addition, further witnesses may have to be called.
- (iii) The list of issues would be added to substantially and there is a real chance that the five days listed for liability and remedy would be put in jeopardy.
- (iv) The claimant was dismissed on 5 April 2018, the tribunal claim was in contemplation in May 2018 when early conciliation commenced, and the application was presented on 16 July 2018. Whilst the claimant's Counsel suggested that the amendment was triggered by the request for further and better particulars, if the claimant knew he had these discussions with Mr Gary Muddyman, then why were they not included his claim. No explanation has been given for not including them.

The respondent's application for an order for further information of the claimant's further and better particulars

- (23) The respondents seek an order that the claimant be compelled to fully particularise information regarding how the alleged protected disclosures were made in the public interest. The original application dated 21 December 2018 is at R1 92 – 93.
- (24) Ms Amartey submitted that it was clear that the claimant needs to say how the alleged protected disclosures were made in the public interest. In his further and better particulars at R1 88 – 89 he simply repeats what he set out in his claim in paragraph 32 at R1 23. Unless he does so, the respondent does not know what case it has to meet and how to prepare for it.
- (25) Mr Buch submitted that this was not a matter that EJ Baron considered necessary because otherwise he would have mentioned it at paragraph 7 of the notes and orders. The claimant is not required to plead how it meets the legal test. He simply has to set out the factual basis and to plead a legal case. His factual basis is that the disclosures were made in the public interest.
- (26) Ms Amartey responded that there was no basis on which to say that EJ Baron did not think this matter was important. Just because the matter was omitted does not mean the parties should not deal with it.
- (27) I made the point that I could not go behind EJ Baron's written decision but of course if I thought it was a matter of importance then there was nothing to stop me dealing with it as part of my case management powers.

(28) I then adjourned to reach a decision.

My decision

The claimant's application for leave to amend

- (29) An employment tribunal claim can be amended at any time, but the claimant needs the tribunal's permission. The Tribunal has a broad discretion to consider amendments under rules 29 and 30 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.
- (30) In deciding whether to allow an amendment, the tribunal must take account of all the circumstances and balance the hardship and injustice of refusing the amendment against that of allowing it (**Selkent Bus Co Ltd v Moore** [1996] IRLR 661, EAT; **Transport and General Workers Union v Safeway Stores Ltd** UAEAT/0092/07).
- (31) Where the amendment is to add new facts and grounds, the tribunal must decide if the new claim is in time and, if not, whether the amendment should now be allowed. If the claim arises out of the same facts as the original claim but simply adds factual details or attaches a new legal label, the tribunal should more readily allow the amendment even outside the time limit.
- (32) On the other hand, if the amendment is to introduce an entirely new cause of action dependent on quite different facts, it is more difficult. The greater the difference between the factual and legal issues raised by the new claim and the old, the less likely it is that an amendment will be allowed, but it is always a matter for the tribunal's discretion.
- (33) Factors to consider include, whether the new claim would be out of time if it were a free-standing claim (including whether the test for extending time for the relevant claim would be satisfied); why the new claim was not originally included; how late in the day the amendment is now sought; whether the respondent would be surprised by the new allegation or prejudiced by its late addition and, the balance of hardship to each party.
- (34) I accept that the amendment does not raise a new cause of action but raises new factual allegations as to disclosures made to Mr Gary Muddyman based on the same five legal obligations raised in the original claim and two new legal obligations.
- (35) Whilst the application, even at 16 November 2018, was out of time and no explanation was given as to why these particulars were not raised within the Claim Form, it is a matter which arose in response to the direction made at the hearing with E J Baron for the provision of further information as to the alleged protected disclosures. In as much as the claimant was aware of these conversations earlier, it follows that if they happened, so was Mr Muddyman. If the application had been dealt with closer to the time it was made it would not have caused undue hardship in itself.

- (36) I accept that the amendment is as to new matters and sets out a discrete set of allegations which essentially require the respondents to take further instructions from Mr Gary Muddyman, who was part of the decision making process as to the claimant's dismissal and so involved in any event, to draft a witness statement or an additional witness statement for him and perhaps also take instructions/draft witness statements from/for any others implicated and to disclose any documents relevant to this issue, if it has not already done so (the respondents' Counsel having said that it had carried out the disclosure exercise). But I do not see this is an unduly onerous or disproportionate exercise and I do not believe that with further timetabling that it will impact upon the overriding objective of ensuring that cases are dealt with fairly and justly and so that the hearing in December 2019 can proceed.
- (37) It is of course regrettable that a matter raised on 16 November 2018 has only come before the Employment Tribunal today, but this is not a matter for which the claimant is responsible.
- (38) Whilst there is hardship to the respondent in terms of the additional work that is involved in preparation of its case in respect of the amendment this is outweighed by the hardship that would be caused to the claimant if he were denied the opportunity to amend his claim.
- (39) I therefore allow the claimant's application for leave to amend as set out in its amended particulars of claim and with his further and better particulars.
- (40) The claimant will need to provide further and better particulars as to the dates on which the disclosures were made but this will be dealt with separately in the case management discussion which follows this hearing.

The respondent's application for further particularisation

- (41) Section 43B of the Employment Rights Act 1996 defines a qualifying disclosure as "any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following..."
- (42) It follows that the claimant must give sufficient particulars as to his reasonable belief that the disclosures were made in the public interest and at present beyond reciting the test, the claimant has not done so.
- (43) Whilst the interpretation of whether that belief is reasonably held to be in the public interest is a submission point, the claimant will have to lead some evidence of his belief and the respondent is entitled at this stage to at least know the particulars of the belief which are relied upon.
- (44) The respondent's application is therefore granted and the order itself will be dealt with in the case management discussion following this hearing.

**Employment Judge Tsamados
25 July 2019**