EMPLOYMENT TRIBUNALS

Claimant: Mr I Appleyard

Respondent: London South Bank University

Heard at: **London South** **On:** **Thursday, 11 July 2019**

Before: **Employment Judge J Nash** (Sitting Alone)

Representation
Claimant: Mr J Cook, Counsel
Respondent: Mr B Fehy, Solicitor

PRELIMINARY HEARING

1. The claimant's application to amend his claim to add three individual respondents is refused.

2. The claimant's application to amend his claim to add a complaint under section 47B Employment Rights Act 1996 in respect of the detriments listed in his Schedule of Alleged Detriments is granted, save in respect of detriments 13 and 14.

REASONS

Procedural History

1. The Claimant's effective date of termination was **9 October 2011**. Following ACAS early conciliation between **13 September** and **11 October 2018**, he presented his application to the Employment Tribunal on **9 November 2018**.

2. This was the second Preliminary Hearing in this matter, following a first Preliminary Hearing in front of Employment Judge Andrews on **30 April 2019**. At that hearing the Employment Judge ordered the Claimant to prepare and revise an application to amend his pleading. This second Preliminary Hearing was listed to consider this application and to consider case management as appropriate.

3. At this hearing the Tribunal heard evidence from the Claimant. In respect of documents, it had sight of a written statement by the Claimant. Both legal

representatives provided skeleton arguments. The tribunal also had sight of a Citizens' Advice website printout provided by and on behalf of the Respondents.

The Claims

4. The claims (all brought against respondent only) were for: –

    a. so-called ordinary unfair dismissal under section 98 Employment Rights Act 1996

    b. section 103(A) Employment Rights Act for unfair dismissal in respect of a public interest disclosure (PIDA).

    c. breach of contract.

The Application to Amend

5. The claimant applied to amend his originating application to include a claim under sections 47(B) and 48 Employment Rights Act in respect of detriment under PIDA. He also applied to amend to bring these claims against the Respondent but also against three individual fellow employees who would become the Second, Third and Fourth Respondents. These individuals were Professors Turner, Haig and Ivey.

6. The Tribunal firstly considered whether the claim under section 47B was made out in the ET1. This was a question of fact for the tribunal.

7. In the originating application (ET1) which the Claimant had prepared himself, having taken some legal advice, he ticked the boxes in respect of unfair dismissal and "other", and in the box beneath he put, "breach of contract". There were no other complaints indicated. The tribunal noted that failure to tick a box is not necessarily determinative of whether or not a claim is included in the ET1. In view of the tribunal in this case, this was particularly the case because there is no dedicated box for a public interest disclosure claim contained in the ET 1 form. However, there was no indication on the ET1 that he was bringing a detriment claim. The tribunal, mindful to consider the ET1 as a whole, and applying the overriding objective to deal with cases flexibly, could find not find sufficient indication in the ET1 to indicate that a claim whistleblowing detriment was made or intended to be made.

8. Further, the tribunal was satisfied that the ET1 did not include any complaints against the putative individual Respondents. There are boxes specifically included in the ET1 to list additional Respondents and these had not been completed by the Claimant. Accordingly, the Tribunal found that an amendment was required to permit the claimant to pursue his whistleblowing detriment complaint.

9. Under rule 34 of the Employment Tribunal Rules of Procedure, the Tribunal has a wide discretion to add, substitute or remove parties to proceedings. This discretion must be exercised in line with the overriding objective.

10. As both parties submitted, the test is to be found in **Selkent Bus Company Limited v Moore 1996 ICR 836 EAT**. The Tribunal must consider all the circumstances in light of the overriding objective, including the balance of hardship and injustice between the parties, the nature of the amendment, and the timing and manner of the application to amend.

11. The Tribunal also had regard to the Presidential Guidance. According to this the Tribunal has power, on the application of a party, to amend to add a party and this may be done,

> '*if there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal and which it is in the interests of justice to have determined in the proceedings'.*

12. One of the examples which may give rise to the addition of parties is given at paragraph 16 .2 as follows: –

> '*where individual Respondents other than the employer are named in discrimination cases on the grounds that they have discriminated against the Claimant an award is sought against them'.*

13. Rule 17 of the Guidance confirms that asking to add a party is an amendment to the claim and states that the Tribunal will have to consider the type of amendment sought and that the usual considerations in the Practice Directions apply in respect of such amendments. Rule 18 states, '*when you apply to add a party you should do so promptly'.*

14. There was no suggestion that the issues between the potential Respondents and the Claimant did not fall within the Tribunal's jurisdiction. Accordingly, the Tribunal considered the test in **Selkent** and firstly considered the nature of the amendment.

15. The Tribunal found that the material facts forming the basis of the proposed whistleblowing claim against the three individual Respondents were to be found on the face of the ET1. The claimant was not seeking to add new material factual allegations. The Presidential Guidance in terms accepts that the adding of individual parties in discrimination claims may, in the right circumstances, be an appropriate amendment. In the view of the Tribunal, the addition of individual Respondents in a PIDA detriment claim was analogous.

16. The claimant explained that he had not originally included the individual respondents because he only later discovered that this was possible. The first indication of his intention to amend was by way of his case management agenda for the first Preliminary Hearing provided on **25 April 2019**. It was then discussed in front of Employment Judge Andrews at the first Preliminary Hearing on **30 April 2019**. Due to an unfortunate delay at the Employment Tribunal, the Order made at the first Preliminary Hearing explaining to the Claimant what he needed to do was not sent to the parties until **17 May 2019**. The claimant sought to comply with the order by **21 May**. Unfortunately, what he provided was not what had been ordered. The

Tribunal accepted that this was because the claimant did not understand what was required. At this time the claimant did not have the advantage of legal advice and preparing an application to amend was not a straightforward matter. The claimant then sought legal advice and attended the Tribunal today with a legal representative. His representative provided a document entitled Schedule of Alleged Detriments which did comply with Judge Andrews's Order.

17. The Tribunal firstly considered whether the addition of the three individual respondents amounted to what is referred to in the Presidential Guidance as relabelling.

18. The Tribunal could not accept that the adding of new parties in these circumstances was relabelling. The addition of parties is a significant step in proceedings. The addition of a party in these proceedings was not due to the Claimant's factual misunderstanding. For instance, the addition of a party was not due to the fact that it had become clear that TUPE might apply or because the Claimant has not recently known whom his or her employer was.

19. This Claimant had originally decided to bring a claim against one respondent, the University, and now wished to bring the claim against three others, his colleagues. Essentially this was because he did not know that he could bring a claim against colleagues when he presented his application. The Tribunal found that the nature of the amendment sought was more than a re-labelling.

20. The Tribunal went on to consider the timing and manner of the amendment, and the issue of time limits.

21. The Tribunal had regard to the statutory test for an amendment or a claim for detriment under PIDA made out of time. In **Argyll and Clydesdale Health Board v Foulds & Others (EATS009/06)** the Employment Appeal Tribunal emphasised that where an application to amend includes a new Respondent and it could properly be regarded as a new complaint or cause of action, the Tribunal is entitled to regard the lateness of the application as an important factor weighing against the grant of the amendment. Nevertheless, it is not the only factor to be taken into account.

22. According to section 48 (3) of the employment rights act 1996,

> (3)An employment tribunal shall not consider a complaint under this section unless it is presented—
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> (a)before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
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> (b)within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

23. There is considerable case law on the meaning of "reasonable practicability". In **Palmer and anor v Southend on Sea Borough Council [1984] IRLR 119** the Court of Appeal suggested that the test is - was it reasonably feasible? The tribunal noted that when a Tribunal considers an application to add an individual Respondent, this is often in a discrimination case under the so-called "just and equitable test", whereas here the test is reasonable practicability.

24. The Tribunal firstly considered the length of the delay. The Tribunal started by considering from what date time started to run. The Respondent reminded the Tribunal that, in deciding whether a detriment complaint is brought in time, the Tribunal must focus on the date of the act giving rise to the detriment and not the consequences that follow. If one adopts the date the decision to refuse the Claimant his new job or to inform him that he was going to be made redundant - which was the crux of the detriments relied upon - time started to run in June/July 2018. Taking in to account a one-month ACAS conciliation period, the complaint should have been presented in or around November 2018.

25. The first time that the claimant indicated he wished to apply to amend was, he told the tribunal, on **25 April 2019** (although unfortunately there was no date on the Tribunal file to confirm this). The tribunal gave the claimant three weeks in which to make a particularised application to amend. Whilst what he provided did not comply with Employment Judge Andrews's order, it did go into his distress at the conduct of the putative individual Respondents. Once the claimant obtained legal representation, he provided an application to amend which complied with the judge's order.

26. The Tribunal did not consider these failings on the Claimant's part following the first Preliminary Hearing to be a significant factor. He was not legally represented until just before the second Preliminary Hearing. The Tribunal was mindful of the overriding objective in seeking to effect an equality of arms between the parties. Taking the most generous approach to the claimant - that he first raised the possibility of an amendment on **25 April 2019** - this was at least four or five months after the expiry of the original time limit. The tribunal viewed this in the context of a statutory three month time limit and bore in mind that the claimant did not fully comply with Judge Andrews's order until more than a further two months had passed. Even if the Tribunal were to consider that time started to run from the effective date of termination on **9 October 2018**, the first suggestion of an application to amend on **25 April 2019** would still have been considerably out of time.

27. The Tribunal did not find that the Claimant was ignorant of any material fact and there was no suggestion of this on his part. The Claimant, it appeared to the Tribunal, set out his stall, so to speak, predominantly on his ignorance of the law. Essentially, he did not know that he could make a claim in the Tribunal against individuals. This was a very plausible explanation and Tribunal accepted the Claimant's word on this.

28. The Claimant is an intelligent and educated person although in no way an

expert on employment law. There was no dispute that the issue of claiming of a PIDA detriment against colleagues, and the consequences of doing so, is a complex and developing area of law. This was not something that a layperson might be expected to understand.

29. However, it is trite law that ignorance of the law does not make it not reasonably practicable to present a claim in time. According to **Walls Meat Company Ltd v Khan [1979] ICR 52,** ignorance of the right to bring a claim will not render it not reasonably practicable to present the claim in time if a Claimant ought to have made reasonable enquiries prior to the expiry of the time limit. This is the case even in situations, such as the claimant finds himself in, where the law is complex. To illustrate, the Court of Appeal in **Biggs v Somerset County Council 1996 ICR 364 CA** held that even where a claimant could not reasonably have been expected to know at the expiry of the original time limit that they had a right to bring an employment tribunal claim (due to a near universal misunderstanding that the domestic legislation was incompatible with European law), they could nevertheless have done so in principle, and their failure to do so did not render it not reasonably practicable for them to have complied with the statutory time limit.

30. There was no suggestion by the Claimant that he was unable to comply with the time limit because of illness.

31. Accordingly, the Tribunal found that it was reasonably practicable for the claimant to have presented his claim against the individuals to the Tribunal in time. Whilst, this was not a determinative factor, it was nevertheless a significant factor to be weighed in the balance.

32. The Tribunal accordingly went on to consider the balance of hardship and prejudice in accepting or refusing the application to amend. The Tribunal agreed with the Claimant that adding the individual Respondents was unlikely to create any delays in these proceedings due to unfortunate delays in listing, in that the final hearing would not be until September 2020.

33. The Tribunal considered the balance of hardship and prejudice parties.

34. The tribunal accepted that there would be prejudice to the Claimant in missing out on the detriment claims. This was because, if he was not permitted to join the three individual Respondents (and to argue that the dismissal was a detriment), he would not be able to (i) take advantage of the different standard of proof as between unfair dismissal and detriment claims, and (ii) recover any compensation for injury to feelings. (The claimant stated that he sought to recover any compensation not from the individual Respondents but from the Respondent.) However, if the amendment were refused the claimant would still be able to pursue his complaint against the respondent for unfair dismissal under PIDA and for detriment for anything other than dismissal.

35. The Tribunal found that there would be little prejudice to the Respondent in permitting the amendment. However, the tribunal accepted that being added as individual respondents would potentially put the three individuals to considerable time and cost. The respondent did not state that it would

necessarily accept vicarious liability in respect of the three putative individual respondents. This might require them to obtain their own legal representation which would be likely to increase the length of the hearing. Accordingly, granting the amendment to include the three individual respondents had the potential to make the proceedings longer, more complex and more expensive.

36. The three individuals would be at a, currently unquantifiable, risk of losing the claim and having a finding made against them personally and being liable for damages. This would put them into a very different position from that of witnesses. In the opinion of the tribunal, the respondent would use its best endeavours to ensure that the three individual respondents were present at the hearing to give evidence, whether or not they were added as individual respondents. However, being present at the tribunal as a party is a different matter from being present as a witness.

37. Accordingly, taking into account all of the circumstances under the **Selkent** test, the Tribunal rejected the application to amend to include the individual Respondents.

38. The Tribunal went on to consider the application to amend against the Respondent, to include a detriment claim.

39. Again, applying the test in **Selkent** to the nature of the amendment, all the material facts upon which the claimant wished to rely in his detriment complaint were present in the ET1. The claimant sought to amend to include a different cause of action based on the same facts and against the same entity.

40. In the opinion of the Tribunal, the balance of hardship and prejudice was in the Claimant's favour. If the application to amend were refused, the claimant would miss out on his detriment complaint. The Tribunal was unable to identify significant prejudice or hardship to the Respondent in allowing the amendment. In the circumstances the Tribunal granted the amendment sought to include the whistleblowing detriment complaint against the respondent, with the following caveat.

41. The Tribunal did not accept that allegation number 13 – that the respondent's employees had made expressions of empathy and sympathy with the claimant - was likely to amount to a detriment. The tribunal could therefore not find that there would be any prejudice or hardship to the claimant in refusing any amendment in respect of this putative detriment. Accordingly, the application to amend in respect of allegation number 13 was refused.

42. In addition, the claimant confirmed that he no longer wished to rely on allegation number 14.

43. The claimant is now legally advised. In view of the tribunal, it may be advisable for him to consider carefully if he wishes to pursue all of the remaining detriments against the respondent alone. A detriment is defined as not including a dismissal. Thus any detriment on which the claimant seeks to rely which formed part of the dismissal would fall under his unfair

dismissal complaint rather than any detriment complaint. The Tribunal did not consider it appropriate to go through each detriment to determine whether or not this would not form part of the dismissal. This would be a matter for the final merits hearing. Although the tribunal did not make a finding, it had particular concerns in respect of detriments which related to selection for redundancy.

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Employment Judge Nash
Date: 14 AUGUST 2019