EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105949/2019

Held in Dundee on 29 August 2019

Employment Judge I McFatridge

Mr R Warren	**Claimant** **In person**
Dundee Voluntary Action	**Respondent** **Represented by** **Mr Edward** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant's application to amend his claim so as to include a claim of automatic unfair dismissal under section 103A of the Employment Rights Act 1996 dated 27 August 2019 is accepted.

2. The claim of unfair dismissal in terms of section 98 of the Employment Rights Act 1996 is dismissed.

REASONS

1. The claimant submitted a claim to the Tribunal in which he claimed that he had been unfairly dismissed by the respondent. In his ET1 he indicated that he had been employed between 6 March 2017 and 31 January 2019. The respondent submitted a response in which they denied the claim. They took the preliminary issue that the claimant was not entitled to make a claim of unfair dismissal since he appeared to have insufficient qualifying service. A preliminary hearing was fixed for the purpose of deciding this matter which was to take place on 29 August 2019. On 27 August 2019 the claimant forwarded to the Tribunal and to the respondent an application to amend his original statement of claim so as to include a claim of automatic unfair dismissal under section 103A of the Employment Rights Act 1996. He set out the particulars of this claim in his letter.

2. At the commencement of the hearing I asked the claimant what his position was in relation to the issue of qualifying service. The claimant indicated that he accepted that he did not have sufficient qualifying service to bring a claim of ordinary unfair dismissal in terms of section 98 of the Employment Rights Act 1996. It was however his position that his dismissal was automatically unfair in terms of section 103A of the Employment Rights Act and there is no requirement for a two year period of qualifying service in relation to such a claim. I indicated to the claimant that given he was withdrawing the claim of ordinary unfair dismissal I would be dismissing it. The question arose as to whether or not the Tribunal was prepared to accept his application to amend. The respondent's representative confirmed that they had only received the application to amend the day before. That having been said, having canvassed the matter with both parties, both parties indicated to me that they were happy to proceed to make submissions in relation to this issue so that a decision could be made as to whether or not to accept the amendment without the necessity for fixing a further preliminary hearing. The claimant then gave brief evidence on oath regarding the circumstances which led to his amendment. Both parties then made submissions. A bundle of documents was lodged by the respondent but since this related primary to the issue of qualifying service none of these

were referred to. On the basis of the claimant's evidence I made the following factual findings in relation to the matter I had to decide.

Findings in fact

3. The claimant was dismissed on 31 January 2019. Immediately after his dismissal he contacted his union to try to get advice. He spoke to a full time local official of the union. They advised him that because he did not have two years' qualifying service he did not have a case. The claimant felt strongly that he did have a case and submitted his claim. He accepts that it is lacking in detail. He does refer to having lodged a grievance about the way the review of staff salaries and grades had been dealt with. He makes reference to the first hearing of his grievance on 28 January 2019. He also notes in section 8.2

"It was clear that I was being sacked for taking out the grievance."

The claimant completed the ET1 himself. When submitting it he also completed a supplementary form which is designed for use by whistleblowers. I understood this to be a form which a claimant alleging whistleblowing completes so as to authorise the Tribunal to send a copy of his ET1 complaint to any relevant statutory regulator. The claimant received an acknowledgement of this form and a leaflet advising him of various websites which he could contact for advice and assistance. The claimant's position is that none of these were of any great assistance to him. The claimant subsequently complained to the union about what he saw as a lack of helpfulness from the local official. Eventually the union got back to him and the week prior to the Tribunal hearing the claimant was given the opportunity to speak to a trade union lawyer on the telephone. The claimant did so and was advised that he should seek to amend his claim so as to include a claim under section 103A. The claimant confirmed in evidence that his claim was that the protected disclosures were made in his written grievance and in remarks which he made at the grievance hearing. It was his position that the respondent had not complied with their duty to provide an agreed written note of the meeting however it was his understanding that the person who accompanied him to the grievance meeting had a note of what had taken place.

The amendment document makes reference to a number of matters including an allegation that the outcome of the regrading and salary review was that the Chief Executive gained a substantial increase in her salary while he was expected to agree to an almost 10% reduction in salary. He complained that the Chief Executive had inappropriately profited from the review. He summarises the case as being

> "I, therefore, present my case that Christine Lowden, supported by her two lead offices, knowingly manipulated the DVA regrading and salary review for their own personal gain, disregarding internal policies and procedures to profit from a substantial reduction in my own salary and that of others, thereby failing in their legal obligations in the management of the public and charitable resources granted to DVA."

In evidence he indicated the first time he had made this allegation was to his union official after the date of his dismissal. The timetable of relevant events was that the effective date of termination was 31 January 2019. The ACAS notification was dated 20 February and the ACAS certificate was issued on 20 March. The ET1 was received by the respondent on 21 April and the ET3 lodged by the respondent on 22 May. The claimant sent in an additional response to the ET3 dated 23 August. This did not make any reference to a request to amend. The notice of preliminary hearing in relation to the issue of length of service was issued on 28 May 2019.

Observations on the evidence

4. I accepted that the claimant was trying to assist the Tribunal by giving truthful evidence to matters as he saw it. During the course of cross examination the claimant indicated that the first time he had raised the issue of Ms Lowden's inappropriately profiting personally from the review was when he raised it with his trade union official. If that is the case then clearly this particular aspect of the alleged disclosure is not something that could be relied upon. That disclosure could clearly not have caused his dismissal if his dismissal happened before the disclosure. The claimant did not appear to realise this at the time albeit Mr Edward quite fairly pointed this out to him and gave him an

opportunity to consider his position. It was not until after the claimant's evidence had concluded and the claimant was in the process of making submissions that the claimant sought to resile from this evidence. He asked if he could go back on oath in order to change the evidence. I did not see that there would be any particular advantage in doing this and did not allow it.

Discussion and decision

5. Both parties made submissions. Mr Edward for the respondent went through the timeline of events. It was his position that the application came very late in the day. If this were a stand-alone application rather than an application to amend it would be time barred and there would be very little possibility of the Tribunal willing to extend time on the basis that it had not been reasonably practicable to make the application during the initial three month period. As it was, this was an application to amend and Mr Edward accepted that delay is simply one of the factors which I am required to take into account. Mr Edward characterised the reasons for delay as being somewhat vague. Applying the usual ***Selkent*** principles the Tribunal should not accept the amendment. In addition to this Mr Edward stated that there was a further reason for not allowing the amendment. The key matter which the Tribunal requires to take into account is the balance of hardship. In this case the claimant's own evidence was that his section 103A claim had very little reasonable prospect of success. The claimant's position was that he had made a protected disclosure and that this was the sole or principal reason for his dismissal. The disclosure which the claimant appears to be seeking to rely on as per his letter is along the lines that the Chief Executive was behaving improperly in obtaining a pay rise for herself whilst staff such as him were getting a pay cut. When Mr Edward had asked the claimant about the first time he had made this allegation the claimant had said that it had been made to his union official after dismissal. It therefore followed that the claimant's claim had little reasonable prospect of success and there was little hardship to the claimant in not permitting such a claim to proceed. On the other hand there would be hardship to the respondent in requiring to expend funds defending a hopeless claim.

6. The claimant's position was that the terms of the amendment did not radically alter what was said in the ET1. He accepted the timeline. The crucial fact was that up until he had spoken to the union appointed lawyer the previous week he had been unaware that he would require to lodge an application to amend. The difficulty in obtaining legal advice had not been his doing but due to the shortcomings in the advice he initially received from the local representative of the union. As noted above he sought to resile from his evidence that the first time he had raised this issue was after his dismissal. His position was that the disclosures were made in his written grievance to the union and in what he said at the grievance hearing. He pointed out that his union official had kept detailed notes of this. He was averring that these would show he had in fact made the allegation about the Chief Executive at the meeting.

Discussion and decision

7. The case of ***Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT*** gave some guidance as to how Tribunals should approach applications for leave to amend. It approved the general procedure laid down in the case of ***Cocking v Sandhurst (Stationers) Limited and another [1974] ICR 650 NIRC***. The key principal is that in exercising discretion a Tribunal must have regard to all of the circumstances and in particular to the injustice or hardship which would result from the amendment or a refusal to make it. I considered that Mr Edward was correct in referring to the overriding principal as being the balance of hardship. The ***Selkent*** case states that the Tribunal must always carry out a careful balancing exercise of all the relevant factors having regard to the interests of justice and the balance of hardship. Lord Justice Mummery explained that relevant factors would include the nature of the amendment, the applicability of time limits and the timing and manner of the application has all been basic factors.

8. In this case I considered that the claimant was correct in saying that the nature of the amendment was not such as to radically alter the terms of what was pleaded in the ET1. I required to take into account the fact that the claimant is not legally qualified. He completed the ET1 himself without legal advice. At

section 8.2 he makes a clear statement that "My dismissal had clearly nothing to do with my work record, which had been highly productive. It was clear that I was being sacked for taking out the grievance." It is also clear to me that at this stage the claimant considers himself to be a whistleblower because he filled out the supplementary whistleblower's form. It is also clear that at this stage he had been advised of the two year time limit but still clearly had some residual feeling that the law permitted him to make his application nonetheless. The ET1 does not anywhere refer to the term protected disclosure or section 103A. It does however speak of the claimant being "sacked for taking out the grievance". The missing link in the claim is provided for in the first few lines of the claimant's application to amend where he clarifies that he is claiming automatic unfair dismissal in terms of section 103A. From this statement, taken with his original ET1 it appears to be clear that the claimant is now saying that "taking out a grievance" amounted to making a protected disclosure the claimant also clarified at the outset of the hearing that the only protected disclosures he is relying on are those made in his written grievance and in what he said at the grievance hearing. It does look to me as if once one has been supplied with the additional information that the claimant is making a claim under section 103A it becomes clear that taking out a grievance referred to in his ET1 amounts to the making of protected disclosures and this is essentially what the claim is all about. Unfortunately, the claimant, not being legally qualified, has still not addressed the issue of precisely what disclosures were in any clearly discernible way. Much of what he says in his letter is quite simply irrelevant such as the allegation that the respondent has not followed their own procedure by producing proper notes of the meeting, albeit this may be of evidential value later on.

9. In terms of the timing of the application I accept the respondent's position that if the claimant had been making a stand-alone claim under section 103A that claim would have become time barred around 28 May. That having been said I accepted the claimant's evidence as to the difficulty he had had in obtaining correct advice through his trade union. The overriding objective includes ensuring that parties are on an equal footing. I considered that the claimant

took reasonable steps to obtain advice timeously and that this again reflects in his favour.

10. I would however agree with Mr Edward's point that in balancing respective hardship and injustice to the parties by granting or refusing the amendment it is clearly a relevant consideration if the claim is, as Mr Edward put it, unstateable.

11. The difficulty for the claimant is that whilst it is now tolerably clear reading his ET1 together with the amendment that the claimant is relying on "taking out a grievance" as amounting to the making of protected disclosures the amendment itself does not go much further in providing reasonable notice as to what these disclosures are. The claimant being an unrepresented person has not addressed the detailed terms of section 43B of the Employment Rights Act 1996 in any way. In order to succeed in his case the claimant has to show that he has made a disclosure of information which he reasonably believed showed one or more of the matters set out in sections 43B(1)(a) to 43B(1)(f) of the Employment Rights Act 1996. In going through the letter in which the claimant has applied to amend I would tend to agree with Mr Edward that the allegation which is most likely to fall within the terms of sections 43B(1)(a)-(f) is the allegation that the Chief Executive had awarded herself a substantial pay rise while substantially reducing the claimant and others' pay and that it was wrong to hide this behind a caveat of commercial sensitivity to avoid having to account for this. It was this belief that clearly fuelled Mr Edward's questioning of the claimant and it was against that background that the claimant's statement that he first made the allegation that the Chief Executive had behaved improperly in this way was at the meeting with his trade union official after he had been dismissed which clearly causes the claimant some difficulty.

12. I advised however that although Mr Edward may have felt this was the best candidate for being a protected disclosure there are other allegations set out in the letter including the allegation that "I raised further matters in respect of the failure to follow DVA's own policies and practices of involvement and openness." I also note that the claimant states that at the dismissal meeting

"when I challenge Christine Lowden and confronted her with the suggestion that I was being dismissed because of my grievance she was evasive."

13. At the end of the day and weighing up all matters I feel that the balance comes down in favour of allowing the amendment in this case. It is clear to me that the claimant feels very strongly that he was dismissed because of things he said in his grievance and during the grievance procedure following this. He now asserts that these are protected disclosures and that as a result his dismissal was automatically unfair in terms of section 103A. I consider that the hardship to the claimant of not allowing him to proceed with this claim outweighs the hardship to the respondent in permitting the amendment. At the end of the day the reason the respondent's original ET3 did not contain a statement that the claimant was claiming under section 103A is down to the fact that the claimant's trade union official initially gave defective advice. Had the claimant been put in touch with the trade union lawyer at that stage rather than when he was then the respondent would have no issue. I will therefore allow the amendment.

14. I am conscious that in so doing the respondent may well feel that there is a further preliminary issue in this case as to whether in fact the claimant did make protected disclosures. It may well be that the appropriate course of action is to have another preliminary issue on this point however this is not a matter which I wish to decide at the present time. It may be that there would be little overall time saved in having a separate preliminary hearing on this point and it may be better for the Tribunal to hear all of the evidence at once. I also make no decision as to whether it is appropriate for the claimant to be asked to provide further and better particulars of exactly what was the information which he allegedly disclosed during the grievance process and which of the six categories in section 47B(1)(a)-(f) he alleges it falls under. I will not make such an order today. The claimant has clearly stated that he believes he made his disclosures by taking out a grievance which I take to mean either in the grievance process itself or at the grievance hearing. Given that the respondent will no doubt have a copy of the grievance and their witnesses were present at the hearing this probably gives them sufficient fair notice. I have to balance

their requirement for fair notice against requesting the claimant to carry out what is essentially a technical legal exercise of categorising what he alleges was said into one of the six categories of 47B. That is however simply my preliminary view and if the respondent feels they require this information and wish to apply for an order then it will have to be looked at again. In all the circumstances I would ask the parties to write in within the next two weeks to indicate whether they wish the case to proceed straight to a final hearing or whether there are any preliminary issues which they feel should be dealt with at a further preliminary hearing.

Employment Judge: **Ian McFatridge**
Date of Judgment: **04 September 2019**
Date sent to parties: **05 September 2019**