Claim No: 2302727/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH EMPLOYMENT TRIBUNAL**

BEFORE: **EMPLOYMENT JUDGE WEBSTER**

BETWEEN:

Mr R Neale **Claimant**

AND

Hyline Security (UK) Ltd (1)

Study Group (UK) Ltd (2)

Respondent

ON: **22 November 2019**

Appearances:

For the Claimant: **In person**

For the Respondents: **Ms Brown (Solicitor for Second Respondent)**

Ms Jennings (Counsel for First Respondent)

PRELIMINARY HEARING JUDGMENT

1. The claimant's claims against the Second Respondent are struck out.

WRITTEN REASONS

The Hearing

2. The hearing today was listed to consider the Second Respondent's application for the claimant's claims against it to be struck out. This is a long running claim that has had 3 separate case management discussions. In the most recent discussion on 3 July 2019 before EJ Hyde the claimant asserted that although his claim was solely in relation to his dismissal, he ought to also be able to pursue that claim against the second respondent even though the second respondent was not his employer. This preliminary hearing was listed to consider whether he could bring a claim about his dismissal against the second respondent or whether such a claim ought to be struck out because it had no prospects of success.

3. Since that hearing the claimant has provided more details of what he says his qualifying disclosures were and how he says he was treated badly because of them by the second respondent. This was ordered by EJ Hyde and took the form of answers given in response to written questions provided by the second respondent. In that document, the claimant raises for the first time the assertion that he is a worker for the purposes of s47B Employment Rights Act 1996 ('ERA') and that the dismissal was a detriment by the second respondent.

4. At the hearing before me the second respondent provided written submissions and I heard oral submissions from the claimant. The first respondent did not make any submissions.

5. I gave an oral decision at the hearing and the claimant requested written reasons at the conclusion of the hearing.

Background

6. The claimant was employed by the first respondent. This is not disputed. He was asked to work by them on the premises of the Second Respondent. The claimant states that he was dismissed by the First Respondent because the Second Respondent asked them to remove him from their site following concerns he raised about potential breaches of the Data Protection Act. The claimant was dismissed by the first respondent on 7 July 2017.

7. In his original ET1 (5 October 2017) the claimant made no reference to the second respondent. However he then applied for the Second Respondent to be added and this was allowed by the tribunal.

8. The claimant states that his claim against the second respondent ought to be allowed to proceed because he was a worker for them as well as an employee for the first respondent. He states that this was the case because he worked there on site, under their control for the best part of 7 years. He states that the second respondent's decision to dismiss was caused by the first respondent's demand that he be removed from the premises and that their demand was motivated by his disclosure about CCTV footage and the Data Protection Act. The claimant does not dispute that he was dismissed by the first respondent but states that the second respondent was the root cause of that dismissal and therefore he ought to be able to pursue a claim against them as well.

9. He states that as he was a 'worker' for the second respondent under s43K ERA 1996 he can therefore claim unfair dismissal against the second respondent as well as the first respondent.

10. The second respondent states that they have never been the claimant's employer and therefore cannot be responsible for his dismissal. Unfair dismissal claims brought under the ERA 1996 whether under s98ERA or s103ERA can only be brought against someone's employer. They also state that the claims are in any event time barred as it was reasonably practicable for the claimant to have submitted the claim against them in time. They assert that any attempt to now bring a claim that the dismissal was a detriment under s47B ERA has only been advanced today for the first time, and that if taken as an application to amend (which it has not been submitted by the claimant to be) makes the claim even further out of time.

The Law

Employment Rights Act 1996

10. s43K ERA - Extension of meaning of "worker" etc. for Part IVA.

(1)For the purposes of this Part " worker " includes an individual who is not a worker as defined by section 230(3) but who—

(a)works or worked for a person in circumstances in which—

(i)he is or was introduced or supplied to do that work by a third person, and

(ii)the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them,

(b)contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall within section 230(3)(b) if for

> “personally” in that provision there were substituted “(whether personally or otherwise)”
>
> ……
>
> (2)For the purposes of this Part “ employer ” includes—
>
> (a)in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged,

11. s47B (1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a)by another worker of W's employer in the course of that other worker's employment, or

(b)by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a)from doing that thing, or

(b)from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a)the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b)it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).**]**

(2) This section does not apply where—

(a)the worker is an employee, and

(b)the detriment in question amounts to dismissal (within the meaning of Part X).

(3)For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K.

12. s103A Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Discussion and Conclusions

13. I accept that it is arguable that the claimant was a worker under s43k ERA 1996 although the claimant did not address me on why he satisfied that definition. I am not making a finding on that issue today – my task is to see if any claim against the second respondent has no reasonable prospects of success and should therefore be struck out. However I believe it is arguable that the claimant could satisfy the definition of 'worker' under s43K ERA and this must therefore be considered as part of the overall basis for the claimant's claim against the second respondent and forms part of my consideration regarding the prospects of success of the claimant's claim against the second respondent.

14. If the claimant does satisfy this definition then I also accept that, as a worker, he could potentially bring a claim that he has been subjected to a detriment by the second respondent under s47B ERA 1996.

15. Where someone is an employee, they cannot claim that dismissal is a detriment (s47B(2) ERA). Any such claim must be brought against their employer under s103 or s98 ERA. However, where someone is a worker, then it is possible to argue that a dismissal amounts to a detriment under s47B ERA.

16. The claimant refers to the case of Day v Health Education England and others [2017] IRLR 623 and states that this establishes that someone can 'work' for more than one entity. In that case, the Tribunal at first instance concluded that the claims against the Second respondent had no realistic prospect of success and struck them out. This decision was upheld by the EAT, which held that since the Claimant was employed by the Trust, he could not take advantage of the extended definition with respect to the second respondent, and that would be so even if the equivalent second respondent did substantially determine the

terms of his engagement. The Claimant appealed on the basis that the ET had wrongly analysed the question it had to determine submitting that it focused on which body, as between the two respondents, played the greater role in determining the terms of engagement and thereby failed to appreciate that both may do so. The appeal was allowed because they held that, in that case, the second respondent could in principle fall within the scope of section 43K(2)(a) notwithstanding that the Claimant had a contract with the First Respondent and the ET had applied the wrong test because it was asking itself which party, as between the two respondents played the greater role in determining the terms on which the Claimant was engaged. It did not properly consider the possibility that both could substantially determine the terms of engagement. However the matter was then referred back down to the ET as the Court of Appeal found that if the proper test had been applied, it did not mean that the claimant was definitely a worker for both respondents at the same time.

17. Although neither party took me to it, I have also considered the case of *Timis v Osipov [2018] EWCA Civ 2321* as it deals with who the valid respondent may be in whistleblowing detriment and dismissal claims. In that case, two non-executive directors decided to dismiss Mr Osipov (who was an employee) after he had made protected disclosures. He brought an unfair dismissal claim against his employer and a detriment claim against the directors who tried to avoid liability relying on s47B(2) of the ERA 1996. As already discussed, s47B(2) states that an employee cannot pursue a claim for detriment where the detriment amounts to dismissal. The directors in Osipov asserted that the claim had to be brought as an unfair dismissal claim which could only be brought against the employer. The EAT and the Court of Appeal disagreed, drawing a distinction between dismissal within the meaning of the unfair dismissal provisions of the ERA 1996 and dismissal which is not within the meaning of those provisions (and so which could form the basis of a detriment claim). The directors' actions fell within the latter category and so the claimant could pursue them in a detriment claim.

18. Both the above cases have been helpful in establishing the possibility that a claimant can bring dismissal as detriment claims against people directly involved in their work who are not necessarily their employer. However, in my view, neither case addresses the fundamental problem that the claimant has before me which is the factual basis for the claim he says he is bringing against the second respondent.

19. The claimant is solely complaining about the fact of his dismissal. He has never sought to complain about the events that led up to his dismissal or assert that they give rise to separate causes of action. The claimant accepts that it was the first respondent that dismissed him and that it was their decision alone. His complaint against the second respondent is that the second respondent asked for him to be removed from their premises and that this subsequently led to his dismissal by the first respondent who could not (in their case) find him alternative employment at a different site. He does not assert that the second

respondent actually dismissed him or asked the second respondent to dismiss him. However, he is advancing a claim that is purely about dismissal against an entity that did not dismiss him and he does not try to suggest dismissed him.

20. He has not, despite 3 previous case management hearings at which he has been expressly asked whether he wants to advance a claim about something other than his dismissal actually stated that he wants to complain about something other than the actual decision to dismiss him. He has steadfastly maintained that his claim is solely about his dismissal.

21. Therefore whilst I accept that in theory it is possible that

    (i) An individual could be a worker for more than one 'employer' where an individual is a worker; and
    (ii) A worker can bring a claim asserting that dismissal is a detriment

    I do not accept that this is the claim that the claimant has advanced against the second respondent either before me today or previously.

22. Instead, the factual basis for his complaint against the second respondent is that they asked for him to be removed from their premises and that this ultimately led to his dismissal by the first respondent. He has not however brought a claim stating that their behaviour in the lead up to the dismissal was a detriment. Instead he is asserting that he must be able to bring an unfair dismissal claim against the second respondent.

23. He has not before me or at any of the three previous hearings, sought to apply to amend his claim to include a detriment claim under s47B ERA. He has now mentioned it in his response to the questions asked about his claim but he is still stating that the action that the second respondent took that he is complaining about is the dismissal itself. The case management records of those hearings indicate that he was asked on all three occasions what the basis for his claim was and he stated that he was complaining about his dismissal only, not the events that led up to it or the second respondent's request that he be removed from working on their site.

24. The claimant confirmed that he had received some advice from Protect the organisation which specialises in advising whistleblowers. Therefore whilst he was unrepresented before me and at the previous hearings, and I am mindful of the need to put the parties on an equal footing, I do not accept that he could not have considered advancing a detriment claim about something other than his actual dismissal as opposed to a purely 'dismissal as detriment' claim against the second respondent.

25. The second respondent may have taken action that contributed to the first respondent's subsequent decision to termination his contract but they did not, under any version of the claimant's claims, actually dismiss him as they had no

power to do so under the terms of his contract. The claimant has been given several opportunities to state whether his claim is about anything more than his dismissal and he has clearly stated that it is not.

26. I therefore strike out the claimant's claims against the second respondent because a claim for unfair dismissal under either s103 or s96 ERA can only be brought against the claimant's employer. Although the claimant might have been able to argue that he was a worker for the second respondent and his dismissal amounted to a detriment, this is not the factual basis for the claim he has brought against the second respondent. He does not allege that the second respondent actually dismissed him, he simply states that they asked for him to be removed from their premises. He has not advanced an argument that the decision to remove him from the premises was a detriment and he has not sought to apply to amend his claim to include any such claim. I therefore consider that the claimant's claim whether it be for unfair dismissal or dismissal as a detriment against the second respondent has no reasonable prospects of success and strike it out.

27. Even if I am wrong in that conclusion, I find that the claimant's claim against the second respondent is out of time.

28. Section 111(2)(b), ERA 1996 provides that a tribunal can only extend time in either an unfair dismissal claim or a whistleblowing detriment claim if:
    (i) It was "not reasonably practicable" for the complaint to be presented in time.
    (ii) The claim was nevertheless presented "within such further period as the tribunal considers reasonable.

29. The claimant has had a series of opportunities to submit his claim or claims against the second respondent. The claimant was dismissed on 7 July 2017. The date on which he was asked to leave the second respondent's premises predated this. The claimant's original ET1, dated 5 October 2017 made no reference to the second respondent. The claimant's application to add the second respondent was made on 4 March 2018 but with no substance to that application. An amended ET1 setting out some of the detail of the claim was provided on 3 September 2018.

30. Whilst the second respondent has already been joined as a respondent this does not necessarily mean that the claims are not time barred against them. The second respondent is asking me to strike out the claimant's claims against them on the basis that they are out of time as it was reasonably practicable for the claimant to have brought either an unfair dismissal claim (under s103 or s96 ERA) or as a detriment claim under s47B against the second respondent within the normal 3 month less a day deadline (subject to ACAS Early Conciliation extensions).

31. On a generous reading of the timeline it could be said that the claim against the second respondent was presented on 4 March 2018 when he applied for them to be joined as a respondent. However the application to join them did not include details of his claim against them until 3 September 2018. In any event, either date is well outside the normal deadline for bringing a claim.

32. Whilst the claimant has cited lack of legal representation and advice as a reason for not including the second respondent on his original claim he has been speaking to Protect and receiving their advice about his claims hence his knowledge and understanding of the Day v Health Education England and others [2017] IRLR 623 case.

33. Whilst I have sympathies with the claimant's struggles to find legal representation, he has clearly had some advice regarding his claims and lack of accessible legal advice is only one factor in assessing whether it was reasonably practicable to submit a claim in time.

34. I find that it was reasonably practicable for the claimant to have submitted his claim against the second respondent in time and in any event before 4 March 2018 which was some 8 months after his dismissal. I reach this conclusion because the claimant knew at all times that he was dismissed by the first respondent following his removal from the second respondent's premises. There is no reason that he could not explain the facts that led up to his dismissal or name the second respondent in his ET1 but he made no reference to them at all. Once he did become aware that he might want to consider adding the second respondent (either through advice or further consideration) he did not submit the basis for that claim until several months had passed on 3 September 2018. This lapse in time is also important given that there was a case management discussion in January 2018 with EJ Harrington at which the claimant was given an opportunity to discuss the situation and at which it is recorded he said that he was not in a position to confirm whether he had a whistleblowing claim. He has given no explanation for his delay in particularising the claim against the second respondent between January 2018 and March 2018 followed by the then not insignificant delay until 3 September 2018 when he actually sets out the basis for his claim. He also does not explain the length of the delay save for lack of legal advice. Given that the facts of the claim appear to be relatively clear and he has known about the role of the second respondent within the factual basis for his claim throughout, he has offered no reason for not explaining that in any detail until almost a year after his original ET1 was submitted. He has also not explained the repeated delays including, the delay that is apparent today where it appears he is, for the first time, advancing the argument that he was a worker under s47B ERA and that his claim against the second respondent is a detriment claim. This claim was not put forward at all at previous hearings or in the document detailing his claim against the second respondent on 3 September 2018.

35. In the absence of any explanation for the original failure to name the second respondent and the subsequent repeated delays in firstly applying for the second respondent to be joined and then in particularising his claim against the second respondent, I find that it was reasonably practicable for him to bring his claims against the second respondent firstly within the original time limit and if not then within a far shorter period of time than has lapsed between his first tribunal hearing in January 2018 and the actual detail of his claim on 3 September 2018 or today's apparent application to amend to include the detriment claim. It was therefore not submitted within such further period as I consider reasonable either.

36. The claimant's claims against the second respondent are therefore out of time and are struck out.

Employment Judge Webster
21 December 2019