EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101977/2020 (P)

Preliminary Hearing held on written submission on 8 July 2020

Employment Judge A Kemp

Mr M Turner	**Claimant** **Represented by:** **Mrs J Barnett -** **Representative**
Scottish Triathlon Association Limited	**First Respondent** **Represented by:** **Mr B Caldow -** **Solicitor**
Mrs J Moncrieff	**Second Respondent** **Represented by:** **Mr B Caldow -** **Solicitor**
Mrs F Lothian	**Third Respondent** **Represented by:** **Mr B Caldow -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application to amend his claim by adding three further respondents, namely Duncan McRae, Penny Rother and Dougie Cameron, is refused.

REASONS

Introduction

1. The claimant has presented a claim to the Tribunal in relation to his dismissal from the employment of the first respondent, which he alleges was on account of his having made protected disclosures in breach of section 103A of the Employment Rights Act 1996, and his having suffered detriments for the same reason in breach of section 48 of the said Act. His claim has also been presented against two individuals, as the second and third respondents.

2. By email dated 17 June 2020 the claimant made an application to amend his claim by adding three further respondents, namely Duncan McRae, Penny Rother and Dougie Cameron. The reason for that application is given as "following the first respondent's assertion that the aforementioned individuals made the decision to terminate the Claimant's employment." It is later asserted that the "the balance of injustice and hardship in not allowing the amendment would bear heavily on the claimant in that he would be prevented from seeking natural justice against those responsible in the event a full merits hearing determines that his dismissal amounted to a detrimental act."

3. The solicitor for the respondents has objected to that application by email dated 25 June 2020. The basis of the objection includes that the proposed further respondents did not make the decision to terminate the claimant's employment, with that decision having been made by "the Board", as was set out in the paper apart to the Response Form. Whilst that board is not further specified, it is assumed to be a reference to the board of directors of the first respondent.

4. In that email the respondents confirms that he is content that a decision on the application be made on the basis of the written submission, and the claimant confirmed similarly through his agent that he was also content, and that the decision should be made on the basis of the application and response, by email dated 3 July 2020.

Law

5. The question of whether or not to allow the amendment is a matter for the exercise of discretion. The nature of that exercise was discussed in the case of ***Selkent Bus Company v Moore [1996] ICR 836***, which was approved by the Court of Appeal in ***Ali v Office for National Statistics [2005] IRLR 201***. All of the circumstances must be considered. There are three particular issues that require consideration, being the nature of the amendment, the applicability of time-limits and the timing and manner of the amendment.

6. There is a particular rule in relation to amendments to add new parties, in Rule 34, found in Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, which provides as follows:

> **"34 Addition, substitution and removal of parties**
> The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included."

7. That Rule, by the use of the word "may", clearly provides a discretion, as was made clear in ***Drake International Services Ltd v Blue Arrow Ltd [2016] ICR 445***, and is itself subject to the overriding objective set out in Rule 2.

8. A claim can competently be brought against a fellow worker. Section 47B(1A) of the Employment Rights Act 1996 provides that a worker has the right not to be subjected to a detriment on the ground of having made a protected disclosure by a fellow worker, and in the case of such a detriment by a fellow worker the employer has a potential defence if it can show that it took all reasonable steps to prevent that other worker from acting as alleged (Section 47B(ID). An illustration of such a claim against

fellow workers is ***Timis v Osipov [2019] IRLR 52.*** There the employer had become insolvent, and there was a practical reason to pursue the individuals.

Discussion

9. I consider the factors referred to in ***Selkent.*** Firstly the nature of the amendment. The context in which it is made is that the claimant set out his claim in the Claim Form and a paper apart, which is directed to the respondent, in the singular, and does not differentiate between the first, second and third respondents in particular detail. It appears likely that the paper apart can only be referring to the first respondent when it uses the term respondent. The basis on which the claim is directed against the second and third respondents is not as clear as it might be, to use relatively neutral language. The paper apart to the Response Forms which is common to all three respondents seeks the dismissal of the claims directed to the second and third respondents. As yet no application to do so has been presented. There is at least some indication within the Claim Form of what may be said to be acts of the second and third respondents that could amount to a detriment, and there is a paragraph in which detriments are listed, although no dates for the same are there given. In relation to the application to amend to add proposed fourth, fifth and sixth respondents, summarised above, it is not I consider accurate to state, as the application does, that the first respondent stated that they made the decision to dismiss. The Response Form is clear that that decision was made by the Board, again as commented upon above. It is not set out within the Response Form who is on that Board but, as the response to the application states, such information is publicly available at Companies House. It is not made clear in the application to amend what basis in fact the three prospective new respondents may be held to have a liability either for a detriment, or so far as relevant for a dismissal that is said to be unlawful (which can be a detriment in the context of a claim against fellow workers), under the terms of section 47B(1A).

10. The first respondent accepts that there was a dismissal decided upon by the Board, and alleges that the reason for that was not any protected disclosure that the claimant seeks to rely upon, but because of a

breakdown in trust and confidence. That is a factual dispute between the claimant and his former employer, the first respondent. It is not set out on what legal basis any individual is said to have responsibility. The argument that the claimant would be denied natural justice against those responsible for the dismissal is not, I consider, correct. Firstly, it is not set out why it is alleged that they were responsible for the dismissal. The suggestion that that is what the respondent stated appears misconceived. Secondly the claim is not made as one of natural justice, but for a breach of the terms of the Employment Rights Act 1996 in respect of the claimant being dismissed for allegedly having made a protected disclosure. The remedy is more naturally directed against the party which was the employer, being the first respondent, as the party which dismissed him. Whilst it is possible to seek a remedy against individuals, there must I consider at the least be facts set out which give fair notice of the argument made on the basis of the statutory provisions referred to above. That is not found within the application to amend. I consider that that is a strong factor against the application being allowed, on the basis that there is no reasonable prospect of the claim against those prospective respondents being successful on the basis currently put forward.

11. It is also not made clear what material prejudice would be suffered if the claimant does succeed with the claim, as any award will be made against the first respondent. It is not, as I understand the Response Form, seeking to rely on the statutory defence referred to above. The primary issues will be whether the claimant made a protected disclosure, and if so whether that was the reason, or principal reason if more than one, for his dismissal. If they are decided in favour of the claimant, then subject to any other relevant issues the Tribunal will consider the issue of remedy. Nothing is said in the application to amend to explain the basis on which the claimant would have a benefit, financial or otherwise, from adding three further respondents. These are all factors that strongly favour the refusal of the application.

12. Secondly, the applicability of time limits is a further factor to consider, but not one relevant in the circumstances of this application.

13. Thirdly the timing and manner of the amendment is to be considered. The amendment application was made reasonably promptly, but that of itself does not add a great deal to the argument in favour of the claimant.

14. These are not exhaustive factors, and these principles apply more directly to the amendment of a claim which adds a new cause of action but I have not been directed to any other issue by the claimant's representative. I do however consider that the overriding objective is relevant. If new respondents are added to the claim, that is almost certain to add to the time taken to deal with the case, both as to case management and the hearing itself, and additional time is almost certain to add to the cost. In the absence of clarity over the benefit to the claimant, these factors also favour the refusal of the application.

Conclusion

15. Having regard to all the circumstances, I consider that the application should be refused, at least on the basis on which it has been presented. That is not to say that it is not possible that a further application which sets out both the facts relied upon, and why the amendment ought to be allowed in the exercise of discretion including the basis on which it is said that that will be of benefit to the claimant, would not be capable of being allowed.

Employment Judge: **Alexander Kemp**
Date of Judgment: **08 July 2020**
Date sent to parties: **09 July 2020**