EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr D Augeri		**(1) Elephant Family**
		(2) British Asian Trust

HELD AT: London Central (CVP) **ON: 17 July 2020**

BEFORE: Employment Judge Norris (sitting alone)

REPRESENTATION:
Claimant: Mr C Price, Counsel
First Respondent: Mr C Crow, Counsel
Second Respondent: Mr R Fitzpatrick

JUDGMENT

The Claimant's application to amend the claim to include detriment(s) for making protected disclosures is refused.

WRITTEN REASONS

1. These reasons should be read with the observations accompanying the Preliminary Hearing (Case Management) (PHCM) conducted by telephone on 1 June 2020. In light of the Claimant's application for a transcript of this Preliminary Hearing (PH), which is not available because it was not recorded, I have decided to give written reasons. The PH was listed in order to consider any application by the Claimant to amend his claim, together with any time points arising. It had been made abundantly clear to the Claimant at the PHCM on 1 June, through his counsel Mr Price (as the Claimant did not attend), that only a focused and concise application to amend could be considered.

2. The Claimant had submitted the claim form himself on 17 January 2020. He had supplemented this with a document entitled "further particulars", which we had before us at the PHCM. I made it clear at the time and in the subsequent observations promulgated on 3 June that it was insufficient for the Claimant to say, with no degree of specificity, that his case could be found in a 20-page document, rather than in his original claim. I noted indeed that the authorities are clear both that it would be an error to look elsewhere than in the claim form and response for the pleaded case, and that it is not for the Tribunal to compose the allegations on a party's behalf.

3. I made this observation because the Claimant had submitted two further documents, namely an application to amend and a "new" application to amend, which, if anything, served to confuse matters further rather than to clarify the claim that the

Claimant wished to bring. I referred specifically to the following paragraph as an example of the confusion over the legal basis for the complaints notwithstanding that the Claimant had by now appointed a legal representative: "As a result of the Claimant's disclosures [he suffered]… defamation, character attacks, derogatory remarks, sexual and racial harassment… discrimination due to whistleblowing… all due to his protected disclosures". Accordingly, I ordered the production of a Scott Schedule and emphasised both at the hearing and in writing afterwards the need for clarity and concision so that the complaints being pursued could be understood. I listed the PH, reserved to myself, and issued a Judgment dismissing on withdrawal the complaints of breach of contract and breaches of TUPE.

4. On 2 July 2020, the Claimant applied to have the PH converted to take place virtually rather than in person. The application was based on the facts that the Claimant had the right to attend the hearing but was living with an elderly couple who fell into the highest risk categories for contracting COVID-19 and developing life-threatening conditions as a result (and a similar issue arose in relation to his representative). The Respondents made no objection and the PH was accordingly converted to take place via CVP. In the event, the Claimant did not, however, attend but he was represented by Mr Price once more. The Respondents were each represented by their own Counsel.

5. As noted above, the order had been for a clear and concise Scott Schedule, identifying, by reference to the original claim form, the issues with which the Claimant wished to proceed (preferably in chronological order and stating against which Respondent each complaint is brought) and I indicated that if there needed to be an application to amend, it would be dealt with at this PH, which had been listed for two hours. What was produced by the Claimant, however, was a five-page Scott Schedule, a 25-page application to amend and another 22 pages of further particulars. The First Respondent objected to the application to amend in a Reply dated 10 July 2020.

6. The Scott Schedule document started with a more narrative introduction, rather than a Schedule as such. The first two pages carried a number of headings: "Six Legal Statutory Obligations of Charity Trustees", "Misrepresentation", "Breach of the Implied Terms of Trust and Confidence", "UK Advertising Standards Authority Rules", "Fraud", "Breach of TUPE" and "Disclosures qualifying for protection under ERA 1996 s43B(1)(a-f)". Beneath some headings, there were further references, e.g. under "Misrepresentation" there was a reference to section 2(1) Misrepresentation Act 1967 and another to US tort law ("Fraudulent Inducement of Employment"), while under "Fraud" there were references to sections 2-4 Fraud Act 2006. In other words, the headings themselves appeared to be a mixture of provisions said to govern and/or restrict the Respondents (e.g. in relation to the legal obligations of their trustees) and those under which the Claimant had made disclosures.

7. There then followed a more conventional Schedule, in appearance at least. There were ten columns, the first headed "Claimant Aggregated Protected Disclosures". The first row of that column was headed "Introduction of Principal Disclosures" (I was told by Mr Price that this should say "Protected Disclosures"). The only other column completed in that row was column six, headed "Detriment and Unfair Dismissal". This contained the words "All detriments and unfair dismissal" and cross-referred to

ten paragraphs in the application to amend and six in the Further and Better Particulars. There were four further headings in the rows beneath: "Concealment of critical information about the transfer terms of EF to BAT" [the First Respondent to the Second Respondent]; "Misrepresentation of critical information about the transfer terms of EF to BAT"…; "Potentially operating under false pretences relative to the transfer of EF to BAT"; and "Potentially soliciting and taking donations and grants under full pretences relative to the transfer of EF to BAT". This appeared to be conduct of which the Claimant had complained to the Respondent (or of which he is now complaining) as falling under one or more subsections of s43(B)(1) ERA.

8. The second column contained either three or four dates between 13 and 16 August 2019. The third column was headed "Made to which qualifying persons (trustees and senior management staff)" and contained the same five names in each case. I observe that it did seem unlikely that the Claimant had made each of the disclosures on which he relied to each of the persons named; but there was no further clarification in the Scott Schedule itself. The fourth column was headed, "Breaches of laws and regulations" and appeared to be referring back to the first two substantive pages of the Schedule and the headings therein. In the fifth column, there were references to s.43B(1) a, b and/or f, ERA 1996. The six column repeated the words "All detriments and unfair dismissal" in each row. The seventh column contained what purported to be cross references to the ET1 claim form, though in each case merely referring to question 8.1 and paragraphs 1, 2 and 3 therein. One row also referred to paragraph 1 of question 8.2. The next two columns referred to paragraphs in the Further and Better Particulars document and the Application to Amend document respectively. The final column in each case referred to R1, with R2 in brackets beneath (clearly a reference to the Respondents).

9. That was the entirety of the Scott Schedule on which the Claimant now relied as setting out his case clearly and succinctly and on which it was proposed I should make a decision as to whether to allow the application to amend, taking into account the time for which the preliminary hearing had been listed. I was told by Mr Price that those latter two pages of the Schedule, setting out the ten columns referred to above, contained everything that the Claimant wanted to say about whistleblowing.

10. Mr Crow for the First Respondent however pointed out the fallacy of this argument. He asserted that the Schedule was supposed to have set out the detriments on which the Claimant relied, but instead merely contained the catchall phrase "all detriments" as well as referring to the dismissal itself, which as he pointed out, cannot be a detriment. This point had also been raised by me at the PHCM. Mr Crow noted that the same difficulties and confusion with the complaints as had been present on the first occasion had been repeated this time as well, in that the Scott Schedule still did not contain any detriments relied on and further that it instead referred to other documents. He suggested it was wrong, and essentially to go behind my previous indication that I would not compose allegations on the Claimant's behalf, to distil or attempt to distil from a mixture of evidence, argument and pleadings the detriments on which the Claimant relies.

11. While Mr Crow accepted that there was a heading "Detriments" set out in the "Whistleblowing Further Particulars" document (which runs to 22 pages), these are under two subheadings: "A) The failure to afford the Claimant the benefit of a

constructive performance review (or any constructive review or directions from his supervisor during his entire period of employment), grievance procedures, or appeal…;" and "B) Summarily dismissing the Claimant…". Under the heading itself, was a cross-reference to "Detriments contained in the application to amend".

12. Further on in that document, was a heading "New Complaint 1: Detriments". This time there were three subheadings: "A) Breach of signed confidentiality agreement"; "B) Undermining the Claimant's work and relationships"; and "C) Defamatory and derogatory statements". In relation to the second subheading, the Claimant asserted that the Respondents' "actions, defamation, character attacks, derogatory remarks, sexual and racial harassment, discrimination due to whistleblowing and actions resulting from serious conflict of interest all caused significant personal and professional detriment to the Claimant, including to his work and professional relationships while he was still employed by [the First Respondent] as well as after he was summarily terminated, all due to his protected disclosures". In other words, the section of the document previously submitted to me and to which I have referred in paragraph 3 above, remained virtually unchanged and was now styled as a new complaint, whereas in fact it was the same complaint, and continued to be something which the Respondents could not answer, due to its extraordinary vagueness and lack of any legal foundation for pursuing it.

13. Mr Price sought to argue that there were derogatory/defamatory statements set out in paragraph 33 of this document. This refers to emails (of which extracts were set out) suggesting the Claimant was likely to be "a divisive presence". Mr Price also asserted that the emails making reference to the Claimant's sex and race (in relation to which the Claimant wished to rely as founding potential complaints of sex- and race-related harassment, and as to which I had previously permitted an amendment) were in the alternative detriments for whistleblowing.

14. I asked Mr Price where he was saying any actual detriment to the Claimant could be found in just one of the paragraphs (paragraph 30) which comprises quotes from emails sent between senior figures at the Respondents. Mr Crow interjected however to point out that all that had been done had been to add paragraph numbers to a previously unnumbered document and that the position remained that I was being forced to go through the document with Mr Price in order to see what was being pleaded as a detriment and what was not. He asserted it was fundamentally inappropriate to allow the Claimant to clarify his case from that document. Mr Price argued in response that the Claimant had made substantial efforts to clarify his complaints and the essential elements of his claim were in the ET1 claim form, with what was now being argued for amounting in essence to a relabelling and not a substantive alteration. He repeated that the Scott Schedule points to all the detriments and public interest disclosures and represents the Claimant's final position in the claim.

15. I did not doubt the efforts that the Claimant had made, but reluctantly came to the conclusion that I could not permit any further amendment to the claim based on the documentation before me at the PH. I still could not ascertain from the Scott Schedule what disclosures the Claimant said he had made, to whom and on what date, and what detriment or detriments he alleges he suffered as a result. Even if I were to refer to other documentation, I would still have to formulate the precise

complaints myself. I understood that the Claimant would be unhappy about this, and it was regrettable that he was not on the call so that I could hear from him and explain the difficulties to him. I emphasise that I was not in any way criticising Claimant for a lack of effort. It was clear that he had tried to set out his complaints against the Respondents, but in doing so he had nonetheless failed to provide what I had ordered him to provide, which was a document from which a list of issues could be compiled, to which the Respondents could reply and on which findings could be made by the Tribunal.

16. Refusing the amendment would not leave the Claimant without a claim against either or both Respondents. Ultimately, he would still be able to show, assuming his case comes up to proof, that he was dismissed for making protected disclosures and of course he still has the harassment complaints that I permitted him to add on the previous occasion.

17. The remaining issue is the complaint of unfair dismissal for making protected disclosures. It appears to be asserted (in the Scott Schedule) that on 13, 14 and 15 August 2019, the Claimant made protected disclosures to the following: Ganesh, Ramani, Stewart-Cox, Faunt and De La Puente, under section 43(B)(1)(a), (b) and/or (f) ERA 1996 and was dismissed as a result. The Respondents noted however that section 8.1 of the claim form states, "I was in the process of organising the information to notify and discuss these possible fraudulent issues with my superiors so that they could make appropriate changes, but I was locked out of my computer, emails etc and summarily dismissed based on false and grossly exaggerated allegations, without notice, discussion or due process." It was asserted that this suggests the Claimant had not in fact made the disclosures but had only planned to do so, and argued that this is not in fact an amendment to add a new allegation but an example of the Claimant saying something now which is opposite to what he said in the claim form.

18. In light of the continuing confusion, I therefore ordered that the Claimant was to set out in writing to the Tribunal and the Respondents what information he says he disclosed, to whom (and by what means) and when, falling under section 43(B)(1)(a), (b) and/or (f) ERA 1996, that he alleges led to his dismissal. The following hypothetical example may assist him:

    "On 13 August I emailed Ms X and disclosed information (namely xxxx). I reasonably believed this was in the public interest and showed that the [First/Second] Respondent was in breach of a legal obligation (namely yyyy) to which it was subject".

    I ordered that to be done by 14th August but in light of the delay in getting these reasons out to the parties I have of my own motion extended time to 4 PM on 14 September.

19. The Respondents had until 11th September to present their (amended) responses (in the second Respondent's case, it has not yet lodged in ET3). I have extended time for that to 25 September and the list of issues is now to be completed by 9 October, which remains the date on which the parties are to notify the Tribunal if they still require the PHCM listed for 19 October, in the circumstances. If the parties can

agree a coherent list of issues and directions to progress the matter to a full Hearing, they are to send in the list and directions and notify the Tribunal that the PHCM can be vacated.

20. I note for completeness that on the previous occasion I had been informed there has been no provisional listing for the full merits hearing but was subsequently advised that it had been listed for three days (19 to 21 October 2020). Three days would clearly be insufficient to read in, hear evidence from all three parties, deliberate, give judgment and address remedy if appropriate, and we agreed that a listing in the region of seven days would be adequate. Therefore, I have listed the matter for 1-9 July 2021, as I received from the parties no dates to avoid in that month and this was the earliest seven day listing available. As noted in the previous paragraph, I also converted the first day of the original listing (19 October) to be a further PHCM for two hours (before me) unless the parties have been able to agree both a list of issues and case management directions to progress the matter to the full Hearing and require only the ratification of an Employment Judge thereon, in which case the PHCM will be vacated and I will make Orders as appropriate.

21. Finally, I record that I have not dealt with the Respondents' costs applications, which, if pursued, will have to be addressed on another occasion.

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EMPLOYMENT JUDGE

28 August 2020
Order sent to the parties on

.01/09/2020.

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for Office of the Tribunals

NOTES:

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) The Employment Tribunals Rules of Procedure 2013 (to which any reference below to a rule refers) provide by rule 6 that if an Order is not complied with, the Tribunal may take such action as it considers just, which may include waiving or varying the requirement, striking out the claim or response (in whole or in part), barring or restricting a party's participation in the proceedings and/or awarding costs.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.