Appeal No. UKEAT/0116/20/LA (V)
UKEAT/0117/20/LA (V)

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal (remotely by Skype for Business)
On 14 October 2020
Judgment handed down on 5 November 2020

Before

THE HONOURABLE MR JUSTICE BOURNE

SITTING ALONE

THE BOARD OF GOVERNORS OF IQRA COMMUNITY PRIMARY SCHOOL — APPELLANT

MS F MANSUR — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR KEVIN McNERNEY (of Counsel) Instructed by: DWF Law LLP 1 Scott Place 2 Hardman Street Manchester M3 3AA
For the Respondent	MR DARREN FINLAY (of Counsel) Instructed by: Direct Public Access

SUMMARY

PRACTICE AND PROCEDURE

WHISTLEBLOWING, PROTECTED DISCLOSURES

An Employment Tribunal erred by permitting the Claimant to amend her claim to add new allegations of whistleblowing detriment and by listing a final hearing without notice to the Respondent, in a case where the Respondent had made no response to the claim. The amendment decision was made without sufficient consideration of the guidance in **Selkent Bus Co Ltd v Moore** [1996] ICR 836. Rule 21 (3) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 required the Respondent to be given notice of the further hearing.

THE HONOURABLE. MR JUSTICE BOURNE

Introduction and factual background

1. This is an appeal by the Governors of the Iqra Academy primary school, who were respondents to a claim to the Employment Tribunal ("ET") by the Claimant, who was a teaching assistant at the school. I will refer to her as "the Claimant", and to the Appellant as "the employers".

2. A number of incidents occurred during the Claimant's employment, which for present purposes can be briefly summarised without going into detail.

3. In May 2017 the Claimant complained about the conduct of another teacher, who I will refer to as Mr X, who she claimed had had inappropriate interaction with a pupil. She was dissatisfied with the employers' response to this complaint, and she wrote an anonymous letter to the Department for Education on 14 June 2017 which repeated some of the details along with some other matters.

4. The letter gave rise to discussions in July 2017 between the Claimant and the headteacher. The Claimant believed the headteacher thought that she was the author of the letter.

5. On 26 September 2017 the Claimant intervened in a fight in the playground and restrained a child. A complaint was made against her about this, and this led to disciplinary action and to a hearing on 6 December 2017, following which she received a written warning.

6. The Claimant appealed against the warning and at an appeal hearing on 30 January 2018 she again made allegations against Mr X.

7. On or around 2 February 2018 it seems that the Claimant received a letter informing her that she would be subject to disciplinary action for making malicious allegations, for lying to the headteacher in their discussions in July 2017 and for failing to protect children.

8. On 12 February 2018 the Claimant received the minutes of the 30 January hearing and immediately emailed the employers taking issue with the record of what she had said.

9. A disciplinary hearing took place on 8 June 2018. On this occasion the dispute about what had been said at the appeal hearing on 30 January 2018 was aired. The outcome of the hearing was that the Claimant was dismissed for making a false allegation and lying during the appeal hearing. There was a further appeal hearing on 11 July, and a decision to uphold the dismissal was communicated to the Claimant by letter dated 17 July 2018.

10. The Claimant made a data subject access request to the employers in October 2018, and some of the material requested was not provided to her until the end of that month.

11. A further request by the Claimant, in a letter dated 10 December 2018, for her dismissal to be rescinded was refused by letter dated 17 December 2018. This was in spite of the employers having been shown evidence supporting the allegation which the Claimant had made against Mr X, from the father of the child concerned.

12. On 4 February 2019 the Claimant presented her ET1 claim form to the Employment Tribunal. Its contents are considered in more detail below. For present purposes I note that section 8 of the claim form stated that the Claimant was bringing claims for unfair dismissal, race discrimination and sex discrimination.

13. Unfortunately the claim did not immediately come to the employers' attention. It was sent to them on or around 12 February 2019, with a notice of a Preliminary Hearing ("PH") to take place on Thursday 4 April 2019, under cover of a letter addressed to the Board of Governors and marked "private and confidential". It seems that meetings of the Board of Governors take place quarterly. The Board has stated that its policy at the time was that letters addressed to the Board were only opened at Board Meetings. A meeting having taken place on 15 January 2019, the next meeting was not until 11 April 2019 and the letter, together with a letter from ACAS dated 6 March 2019 and a further letter from the ET dated 21 March 2019 which referred to the Preliminary Hearing going ahead on 4 April 2019, was not opened until then.

14. In passing, I observe that I find the Board's policy extraordinary. As this case shows, correspondence may be important and urgent. Deliberately not opening letters for several weeks or even months seems a recipe for disaster. Fortunately the policy has now been changed.

15. By the time the employers saw the claim, things had moved on.

16. On 8 March 2019 the Claimant emailed a letter to the ET in which she said that she wished to "add a claim of a 'detriment to whistleblowing' to my original claim of sexual and/or racial discrimination". The letter then referred to the Claimant having sent the anonymous letter, to the meetings which followed and to the request by her to the Chair of Governors on 10 December

2018 "to change my reference in light of the new evidence from the child" and to his response on 17 December 2018 warning her not to contact the school, accusing her of being vindictive, refusing to change the reference and threatening to sue her for defamation.

17. On 31 March 2019, the Claimant submitted a completed Agenda for the upcoming PH. She identified the claims being brought as "1. direct discrimination, 2. Sexual discrimination, 3. Unfair dismissal, 4. A detriment to whistleblowing, 5. Constructive dismissal", and stated that she was withdrawing her race discrimination complaint. In answer to the question whether there was any amendment application, she stated "A detriment to whistleblowing" which in my view was clearly a reference to her letter of 8 March 2019. The same phrase was used in a reference to that letter in the Agenda section listing the issues for the ET to decide.

18. At the PH on Thursday 4 April 2019, EJ Wade noted the absence of any response from the employers and considered whether to give judgment on the claim. She decided that because the claims were subject to time limit issues and in view of the amount of evidence to consider, a further hearing would be necessary. She accordingly directed that there would be a final hearing to dispose of the claim on the following Monday, 8 April, with a time estimate of one day.

19. In addition, presumably in response to the Claimant's email of 8 March, paragraph 3 of EJ Wade's order provided:

> **"Amendment: I give the Claimant permission to add the further allegations of protected disclosure/whistleblowing detriment contained in her chronology for today to her existing whistleblowing (victimisation) complaint."**

20. Those of the amended appeal grounds which have been permitted to proceed focus on the decisions of EJ Wade. By Ground 1 of their amended Notice of Appeal, the employers contend that the EJ erred in law by allowing the amendment to add a claim to have been subjected to a

detriment on the ground of having made a protected disclosure contrary to **Section 47B** of the **Employment Rights Act 1996** (a "whistleblowing detriment claim") when the claim form had contained no such claim. Ground 2 alleges an error of law in listing the matter for a final hearing on 8 April 2019 without giving notice to the employers.

21. On 8 April 2019, the final hearing took place before EJ Buckley. The amendment permitted by EJ Wade proved to be of decisive importance, because the whistleblowing detriment claim was the only part of the claim which succeeded. The claims for unfair dismissal and sex discrimination were dismissed because they were out of time, and the race discrimination claim had already been abandoned by the Claimant.

22. The employers became aware of the claim when the Board met on 11 April 2019. On 12 April they promptly applied for a review of EJ Buckley's judgment under rule 70A of the **ET Rules of Procedure** and for an extension of time to defend the claim.

23. EJ Buckley refused that application by a judgment dated 13 May 2019. She considered the interests of justice and weighed, on the one hand, the possibility that the employers might have a good defence to the claim, and on the other, the importance of finality in litigation. She attached weight to the fact that on 8 April 2019 there had been a hearing at which the claim was proved by evidence, and to the fact that the employers' ignorance of the claim was caused by their "unacceptable and reckless" policy of not opening letters outside Board Meetings.

24. Ground 7 of the amended Notice of Appeal challenged that decision by EJ Buckley, but permission has not been given to advance that ground.

A

The employers' appeal

B

25. The original Notice of Appeal was submitted on 24 June 2019 and only contained grounds which challenged the decision of EJ Buckley. The reasons for that decision had been sent out to the parties on 31 May 2019 and therefore the appeal was in time.

C

26. On 9 August 2019 the employers applied for permission to rely on an amended Notice of Appeal which also challenged the decisions made by EJ Wade on 4 April 2019. The employers' solicitors stated that their clients had not been sent EJ Wade's judgment and only became aware of it on 8 July 2019, when the Claimant disclosed it ahead of a remedies hearing which took place at the ET on 12 July 2019.

D

E

27. On 27 July 2020 Lavender J ordered that the appeal proceed to a full hearing, stating in his reasons that "Grounds 1 and 2 at least are arguable". He also ordered that the application to amend the Notice of Appeal would be considered on receipt of the Respondent's Answer.

F

28. The Answer dated 17 August 2020 took issue with each ground of appeal but did not take issue with the application to amend the Notice of Appeal. No such issue has been taken since. The only amendment which is now material to this appeal is the addition of ground 2. The Claimant does not object to this amendment and I formally grant permission for it.

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H

A

The first ground of appeal

29. By Ground 1, the employers complain that the ET allowed a whistleblowing detriment claim to be made by amendment and heard in their absence, no such claim having figured in the claim form. They contend that EJ Wade erred in law by not subjecting the proposed amendment to the test set out in **Selkent Bus Co Ltd v Moore** [1996] ICR 836.

B

C

30. In response, the Claimant argues that a whistleblowing detriment claim was always "factually at the heart of the claim the Claimant was seeking to bring" (skeleton argument para 5). She disputes that the amendment amounted to a new cause of action, and argues that its effect was instead merely to add further allegations to an existing head of claim.

D

31. To resolve that question, it is necessary to interpret the claim form.

E

32. On her form ET1 the Claimant did not identify any legal representative acting for her. She may have completed the form herself, or she may have been assisted by a trade union representative.

F

33. Section 8 of the claim form is where a Claimant identifies the type or types of claim being brought. In this case the Claimant ticked boxes identifying claims for unfair dismissal, race discrimination and sex discrimination. She did not tick the further box which states "I am making another type of claim which the Employment Tribunal can deal with" and which is followed by a space in which the "nature of the claim" is to be set out.

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H

34. At section 8.2, the Claimant set out the details of her claim. The facts were stated in three paragraphs:

> **"I am a woman of Indian heritage and I was employed as a teaching assistant at Iqra Academy until 8th June 2018 when I was dismissed for making 'malicious allegations' against another member of staff who is white and male. In fact I had complained about an incident in May 2017 when I believe this member of staff had behaved seriously inappropriately towards a female pupil. This was a safeguarding matter. I had reported it to the teacher I worked with. As far as I am aware no disciplinary action was ever taken against the white male member of staff.**
>
> **On the 27th September 2017 I was summoned to the headteacher's office and told of an allegation that had been made against me by a male pupil who had been involved in a violent incident with another child and I had restrained the pupil. I believe that I had acted appropriately in this matter. My union representative told me before my hearing that we were instructed not to bring up the subject of the inappropriate behaviour of the white male member of staff in May. As a result of this incident I was given a level 2 written warning.**
>
> **On 5th November 2018 I was visited by the father of the pupil previously referred to, who asked me if I was prepared to make a statement about the conduct of the white male member of staff referred to above. The statement which he asked for was in relation to the complaint I had made (for which I was dismissed) and he was bringing the matter up due to discussion he had had with his daughter during the summer holiday. On 5th November he also showed me the letter he had written to Iqra Academy dated 12 September 2018 complaining of the treatment of his daughter."**

35. The nature of the claim was summarised in a fourth paragraph which stated:

> **"I believe that I have been treated less favourably on grounds of race and/or sex in respect of the incidents I have outlined above. In respect of the level 2 written warning I compare my treatment with that of the white male teacher against who the employer failed to take action relating to the incident in May 2017. I believe that as a result of this failure I was unfairly and deliberately misrepresented in the disciplinary hearing which led to my dismissal and the subsequent appeal hearing. I therefore believe that my dismissal was not only unfair but also an act of race and/or sex discrimination."**

36. At box 9.2 in answer to the question "What compensation or remedy are you seeking?", the Claimant said:

> **"Injury to feelings for discrimination 2 acts:**
>
> **Comparison of treatment with white male teacher/staff.**
>
> **Dismissal, direct discrimination and or victimisation.**
>
> **Basic Award: £820.92 for 3 years.**
>
> **Compensatory Award. £7711.32 estimated at 29 weeks.**
>
> **Future award."**

37. In my judgment, even making due allowance for the fact that it was completed without the help of a lawyer, the claim form did not disclose any whistleblowing detriment claim.

38. In particular I do not think that any intention to advance such a claim could be detected from the use of the word "victimisation" in the remedies section of the claim form. That section of the claim indicated that the Claimant sought compensation for injury to feelings arising in two ways. The first was the differential treatment of herself and the white male teacher in response to complaints of inappropriate interactions with children. The second was her dismissal, and it was that dismissal which in the remedies section she described as "direct discrimination and/or victimisation". That was therefore not a reference to any allegation of detriment other than dismissal, whether inflicted on the ground of her having made a protected disclosure or on any other ground.

39. Also, whilst one should perhaps not read too much into what is said in correspondence by unrepresented parties, the Claimant's letter to the ET dated 8 March 2019 states unequivocally that she wished to add a whistleblowing detriment claim to her existing discrimination claims. That is, to say the least, consistent with the view that no whistleblowing detriment claim had previously been made.

40. I therefore respectfully disagree with the view of EJ Wade that there was an "existing whistleblowing (victimisation) complaint" to which the amendment would add "further allegations". Instead it seems to me that the amendment added a new cause of action. A new claim based on that cause of action would have been out of time at the date of the EJ's order. The new cause of action was the only one which would succeed at the further hearing on 8 April 2019.

41. For completeness I observe that the original claim did raise the question of whether the Claimant's dismissal was automatically unfair under **Section 103A** of the **1996 Act** because the reason or principal reason for it was that the Claimant had made a protected disclosure. That meaning could be extracted from the Claimant's reference to having been "dismissed for making 'malicious allegations' against another member of staff" quoted above. However, the claim for unfair dismissal did not succeed on this or any other basis and therefore does not affect the determination of this appeal.

42. Mr Finlay on behalf of the Claimant argues that the whistleblowing detriment claim can have come as no surprise to the employers because it was foreshadowed in the letter of 10 December 2018 which (like the later amendment application) referred to the Claimant suffering "a detriment to whistleblowing". However, I do not see the relevance of this. The fact is that the Claimant commenced a claim on 4 February 2019 which did not include a whistleblowing detriment claim. The later addition of that claim necessitated an amendment.

43. In **Selkent** this Tribunal gave now familiar guidance on how an ET should deal with a party's application to amend its case, and on the need for the ET to consider all the circumstances and to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

44. The Record of Preliminary Hearing sets out EJ Wade's reasons for adjourning the case to the further hearing on 8 April 2019, but does not give any reasons for allowing the amendment, save perhaps by implication in recording the EJ's view that the amendment involved the addition of further allegations to an existing complaint.

45. There is therefore no record of how the **Selkent** guidance was followed and of what factors for or against the amendment were given weight. But even if I could assume that the process had been followed, I would be forced to the conclusion that the process was undermined by the wrong assumption that the original claim contained a whistleblowing detriment claim. The prejudice occasioned to the employers by having to face a new claim was not necessarily the same as the prejudice occasioned by having to face further allegations as part of an existing claim. Moreover, whether the addition was of a new claim or merely of new allegations of detriment, its effect was far-reaching because the most recent alleged detriment (the refusal to rescind the dismissal on 17 December 2018) would or could have the effect of denying the employers a time limit defence. There is no record of EJ Wade having considered and given weight to that aspect of prejudice in applying the **Selkent** guidance. Nor did EJ Wade consider whether it would be just to extend time for a whistleblowing detriment claim, no doubt because she took the view that such a claim had already been made.

46. I therefore conclude that the decision to allow the amendment was an error of law. It cannot be said that the application to amend was bound either to succeed or to fail, and the application therefore must be remitted to the ET.

The second ground of appeal

47. By ground 2 the employers complain that EJ Wade listed the case for a further hearing on 8 April 2019 without giving any notice to them.

48. When the respondent to an ET claim makes no or no valid response or a claim is not contested, the ET must apply rule 21(2) and (3) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the ET Rules"), which provide:

> **"(2) An Employment Judge shall decide whether on the available material (which may include further information which the parties are required by a Judge to provide), a determination can properly be made of the claim, or part of it. To the extent that a determination can be made, the Judge shall issue a judgment accordingly. Otherwise, a hearing shall be fixed before a Judge alone.**
>
> **(3) The respondent shall be entitled to notice of any hearings and decisions of the Tribunal but, unless and until an extension of time is granted, shall only be entitled to participate in any hearing to the extent permitted by the Judge."**

49. It is entirely explicit from the reasons given by EJ Wade on 4 April 2019 that she took the second of the two options and fixed a final hearing. Contrary to the suggestion made by Mr Finlay, the hearing of 8 April (before a different judge) was not a mere continuation of the PH of 4 April.

50. Unfortunately the EJ was not reminded of the requirement to give notice of that hearing to the employers, and no such notice was given.

51. Rule 58 requires 14 days' notice of a final hearing and although there is a discretion to shorten time under rule 5, that does not mean that notice can be dispensed with entirely.

52. If 14 days' notice had been given, it would probably have come to the attention of the employers at the Board meeting on 11 April 2019. They would then have been able to ask permission to participate in the hearing under rule 21(3) as quoted above. They were deprived of that opportunity.

53. Mr Finlay argues that this did not cause any prejudice, because EJ Buckley's later decision to refuse to extend time for a response to the claim shows that the employers would in any event

have been refused permission to defend themselves effectively at the final hearing. That, however, is speculation. The decision facing an EJ under rule 21(3) is not the same as the decision facing an EJ who is asked to allow a claim to be defended after judgment has been given. In the latter situation, different issues of finality arise.

54. It follows that, in listing the hearing on 8 April 2019 without notice to the employers, the learned EJ strayed into a second error of law which affected the course of the proceedings.

Conclusions

55. The appeal is allowed.

56. The orders made on 4 April 2019 are set aside.

57. Paragraph 3 of the judgment of 8 April 2019 must also be set aside.

58. Paragraphs 1 and 2 of that judgment stand, because they are adverse to the Claimant, were made following argument and have not been challenged. Having seen a draft of this judgment the Claimant contends that those paragraphs should also be set aside because her stance at the hearing on 8 April might have been different if she had not believed that she was permitted to advance a meritorious whistleblowing detriment claim. It seems to me that EJ Buckley on 8 April 2019 subjected the time limit issues to searching scrutiny and the Claimant, with the advantage of appearing unopposed, had every opportunity to put her case and indeed did so. There is therefore no good reason to unravel the proceedings for unfair dismissal and sex discrimination and for the ET to revisit the time limit issues (or indeed the question of any other defences which the employers might be permitted to put forward).

59. The present position is therefore that the Claimant does not, so far, have permission to amend her claim by the addition of a whistleblowing detriment claim, and does not have the benefit of a judgment.

60. It follows that the further proceedings on this claim were effectively a nullity and must also be set aside, including the decision of EJ Buckley dated 13 May 2019. Although Lavender J did not order the appeal against that decision to proceed to a final hearing, the refusal of an extension of time to file a form ET3 falls away in the absence of an amended claim to which a response could be filed. In the circumstances it is also necessary to set aside the ET's later decision as to remedy (which in the circumstances renders the Claimant's cross-appeal academic).

61. The case will be remitted to the ET for an EJ other than EJ Wade or EJ Buckley to (1) determine the Claimant's application to amend her claim by adding a whistleblowing detriment claim and (2) if any amendment is allowed, to give directions for the filing of a form ET3 and any further directions as appropriate.