EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4101198/20 (A)

Held on 30 September 2020

10 **Employment Judge J M Hendry**

Mr B Parkinson	**Claimant** **Represented by** **Mr B McLaughlin,** **Unionline Scotland**
Morrison Facilities Services t/a **Mears Facilities Management**	**Respondent** **Represented by** **Ms A Bennie,** **Advocate**

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25 **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgment of the Employment Tribunal is that the claimant should be allowed to amend his claim to include a separate claim arising from s.103A of the Employment
30 Rights Act 1996.

REASONS

1. The Claimant, Mr B Parkinson, raised proceedings against his former
35 employers Mears Group Plc on 26 February 2020. These proceedings were for unfair (constructive) dismissal and arose out of termination of his employment on 16 December 2019.

2. The Respondent lodged an ET3 opposing the claim and the case proceeded to a telephone preliminary hearing on the 14 May 2020. At that hearing the claimant was represented by Mr Javed, Solicitor and the Respondent by Ms Bennie.

3. Because of the Corona Virus Pandemic discussion at that hearing focussed principally on whether the case should proceed to a hearing by CVP or the re-institution of face-to-face hearing.

4. I noted that at paragraph 7 of my Note that Ms Javed had indicated that she had not yet been able to take full instructions and that the Claimant had lodged the ET1 himself. She said that she was likely to lodge Better and Further Particulars seeking to amend the case as currently pled. I indicated that any application would be dealt with once it had been made. The Respondent's agents and the Tribunal awaited the lodging of the Better and Further Particulars. Of interest is the e-mail dated 25 June 2020 sent by the Claimant's solicitor to the Tribunal. The solicitor wrote:

> "*This is a complex whistleblowing and unfair dismissal case that will require a number of witnesses and days for evidence. The Tribunal will need to assess the credibility and reliability of witnesses in such a case and we believe that it would be best facilitated at an in-person hearing. Given the complexity of this case, having a virtual hearing in this case would mean that additional time and days will be required to complete the evidence.*"

5. The Respondent's solicitors reacted by pointing out that the claim was not one of ''whistleblowing'' and that the Respondent would object to any amendment. The Claimant's solicitor's description of the case as being complex was understandably referenced by the Respondent's Counsel when the amendment as moved.

6. On 31 July the Claimant's solicitors wrote to the Tribunal with a formal application to amend the ET1. They explained that the Claimant wanted to rely on s.103A of the Employment Rights Act 1996. No additional text was

sought to be added to the existing pleadings. The application was objected to. Detailed objections were lodged with the Tribunal on 11 August 2020. The case was then set down for a preliminary hearing by telephone conference call on 30 September 2020 to deal with the proposed amendment.

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Submissions

7. Mr McLaughlin took me through the procedural background. He pointed out that the Claimant had completed the ET1 himself and did not have assistance of his firm in doing so. The Claimant had put as his representative the local GMB Union official in the expectation that the Union would support his claim and his firm would be instructed. When they were instructed it was not immediately apparent to the solicitor dealing with the matter that the claimant could found a claim for detriment under s.103A of the Act. Full instructions were taken after that hearing and in reviewing the situation at that point it was apparent that this claim arose from the facts. He accepted that the solicitor acting had been a little slow in identifying the possible alternate claim but she had not at that point had the chance of taking detailed instructions.

8. He suggested that the Respondents had been put on notice that a ‘‘whistleblowing’’ claim was to be made. Mr McLaughlin briefly alluded to the difficulties caused by the current Corona Virus restrictions explaining that it took more time that usual before the amendment could formally be prepared and made.

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9. The Claimant’s solicitor then referred to a number of cases which he believed were in point and of assistance particularly the case of ***New Star Asset Management Holdings Limited v. Evershed*** [2010] EWCA Civ 870. The position was, he submitted, that the proposed amendment did nothing more than add the label of s.103A of the 1996 Act to a complaint already pled as the factual material is within the original claim. In his view if the amendment was allowed it does not open a new factual area of enquiry. The witnesses

involved in the matter would speak to the circumstances set out in the ET1 and ET3. In his view the Respondent would not be put to any significant additional expense or be prejudiced because he does not accept that any hearing would be necessarily be extended if this additional ground was added.

10. Mr McLaughlin then addressed the timing of the application and the circumstances in which his firm came to be instructed. The Claimant did not have legal advice when completing the ET1. A claim under s103A was not one that would be readily apparent to a party litigant who might reasonably assume that making a claim for unfair dismissal would cover all the circumstances he had narrated. The issue of the Claimant identifying health and safety breaches and reporting them ran though the narrative. The Respondent's own position was that he was dismissed for disclosing this situation.

11. Ms Bennie adopted the terms of her detailed written note and also supplemented those submissions. The claim as pled was a claim for constructive unfair dismissal. There was no reference to ''whistleblowing''. It was true that events start with the release of a report by the Claimant and because of this he was facing disciplinary measures but that report was one which originated with the involvement at least two other stake holders. In her submission the terms of that report were not really the issue: that was it's unauthorised release.

12. In order for Section 103A to be engaged there must, Counsel continued, be a protected disclosure. To be a protected disclosure the disclosure has to satisfy various statutory grounds and she was not convinced that it does so. This was not just a relabelling exercise. The claim would become much more complex (and in this regard she referred to the e-mail of the 25 June from the Claimant's own representatives). It would she said require a considerably more detailed enquiry and complex further investigations into these matters with the witnesses. To allow the claim would be prejudicial to the Respondent.

The Respondent company did not accept that the disclosure, if it was a disclosure was the trigger for disciplinary action, it was the unauthorised release of the report. The Tribunal was also entitled to take into account that the claim is out of time and it has come very late in the day. The issue of ''whistleblowing'' was not raised until the end of June. Referring to the ***New Star*** case Counsel suggested that it is important to remember that in that case the additional evidence amounted to simply one e-mail and this is not the situation that the Respondents faced here.

13. Mr McLaughlin responded that the report could not be disentangled from these events. It was clearly intrinsic to them and its significance would be an issue in the 'ordinary' unfair dismissal claim. He accepted that the matter was complex in the sense that there were complex legal issues but he did not accept that the factual basis of the claim had been altered as the issues around the preparation and the disclosure of the report were woven into the fabric of the claim.

Discussion and Decision

14. The Employment Tribunal has wide powers of amendment. In granting or refusing any amendment it must strike a balance between parties competing interests. This is often referred to as the balance of hardship and injustice.

15. The case of **Selkent Bus Co Ltd v Moore** [1996] ICR 836 which has since been affirmed by the Court of Appeal, for instance in **Hammersmith and Fulham London Borough Council v Jesuthasan** [1998] ICR 640 sets out the sort of factors the Tribunal requires to consider.

16. In Selkent, the EAT confirmed that the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The EAT considered that the following are usually relevant:

(a) The nature of the amendment – this can cover a variety of matters such as:

i) The correction of clerical and typing errors;

ii) The additions of factual details to existing allegations;

iii) The addition or substitution of other labels for facts already pleaded; or

iv) The making of entirely new factual allegations, which change the basis of the existing claim.

(b) The applicability of time limits – if a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions.

(c) The timing and manner of the application – it is relevant to consider why the application was not made earlier and why it is now being made: e.g. the discovery of new facts or new information appearing from documents disclosed on discovery.

17. In the present case the Claimant's solicitor argued that the amendment was akin to a relabelling exercise. This was disputed. The timing of the amendment was also an issue. The Respondent's Counsel suggesting that it came very late in the day. There was also a sharp dispute as to the likely effect of granting the amendment and the additional time and cost that would be incurred to the prejudice of the Respondent. All of these are relevant factors for the Tribunal to consider.

18. I was referred to the case of ***New Star Asset Management Holdings*** which is a Judgment of the Court of Appeal in England. In that case the court looked at the issue of whether the new claim would require different evidence from the existing claim. This was one of the issues that was contested in the present case. Crucial to the issue on the New Star case was a reference to

bullying of employees contained in a grievance. The Respondent's argued that these allegations were irrelevant to any claim for 'ordinary' unfair dismissal but if amendment was allowed it would mean considerable additional evidence would be required, further investigations and so forth than would have been the case if the original claim had proceeded. The court concluded that the thrust of the complaints in both sets of pleadings were essentially the same as the allegations had been put in the original claim. In my view that can be said to be the situation here.

19. If the claim is amended then the Respondent's face another statutory claim that would be otherwise unpled and time barred. The right not to be dismissed for making a Protected Disclosure is an important statutory right. A successful claim under s. 103A means that not only is such a dismissal is automatically unfair but also that the cap on compensation provided under s. 124 of the ERA does not apply.

20. I accept that contrary to the Respondent's suspicions it seems as if the Claimant did not get legal advice when framing his application and that his lawyers were only able to take instructions at a much later point after the ET1 had been lodged. This means that I am prepared to accept that the ET1 was framed by him without legal assistance.

21. The Claimant did not make reference to 'whistleblowing' in his ET1. He did, however, narrate a background of concerns expressed to his employers into what he described as 'significant water safety compliance' and then to detail the events around the preparation of a report relating to the danger of Legionella in school buildings. This was prepared by the Claimant and others. The Claimant was suspended. He was disciplined and resigned in the course of that process. The Respondents position is that there was no material breach of contract entitling him to resign. Their position was that the disciplinary process was appropriate as he had wrongly released information without following the correct process by meeting stakeholders and discussing the report that had been prepared into the problem. At this point I would mention that there appeared to be some confusion in the Claimant's initial

position as it was suggested in the application that the disclosures came in an email to the line manager in April but in argument it seemed that the report issued some time later is said to be the Protected Disclosure relied upon. In his ET1 that the Claimant asserts that he believes that he had been 'pushed ''out of the business'' and used as a ''scapegoat'' because of the costs that would be entailed in bringing the schools up to standard for which the Respondent company would be liable.

22. Ms Bennie encapsulated the Respondent's position when she described the contents of the report as not being relevant (at least in any claim for 'ordinary' unfair dismissal as it was the manner in which the Claimant acted that gave rise to the disciplinary process. My difficulty in accepting this submission is that the matter is not obviously so clear cut. As Mr McLaughlin put it the events around the discovery of possible Legionella and what flowed from that seemed to be part of the weft and weave of the situation. It is difficult to judge the relevancy of matters at this stage without evidence. It may be that a Tribunal will accept that these possible disclosures had nothing to do with the disciplinary action but they might not. I noted that the Respondent at paragraph 17 of their ET3 describe the conduct as: *'' bringing the Company's name into disrepute given he had disclosed and distributed to a client and other external sources a report that contained damaging information..*''

23. It would seem to me to be open to the Claimant on the basis of the original pleadings to argue that the real motivation for disciplinary action was the Claimant telling their clients about the problems rather than the release of such information to them. The background circumstances, the detail of these conversations and the contents of the report all appear potentially relevant. I take the view that it is unlikely that the Claimant would be denied the opportunity of exploring the relationship between the apparently serious backgound issues around Legionella (what might be described as the substance behind the allegations) and his suspension.

24. The case may become more complex legally if amendment is allowed but I am unconvinced that it becomes more factually complex. What was said and

done will be canvassed in evidence even if the case remains one of 'ordinary' unfair dismissal and whether the requirements of s103A are met or not will be a matter for submissions.

25. Considering the matter in the round I am of the view that the likely expense and time caused by opening up discussion of these events leading to the suspension and resignation to consider whether there is a breach of s103A is not substantial given that these matters are almost certainly of some relevance and likely to be considered if the case remains one of 'ordinary' unfair dismissal. I consider that the situation here can be regarded as a relabelling exercise.

26. I have some sympathy with the Respondent's frustration over the timing of the application and in a perfect world the ET1 would have contained all the appropriate claims or at least they would be alerted to an additional claim by the Preliminary Hearing. I take account of the fact that the Claimant did not ask his Trade Union lawyers to take instructions from him and then to prepare the ET1 in what might be considered the traditional way of raising proceedings. It should also be borne in mind that the time limits for raising proceedings are short and I cannot criticise the Claimant for getting the proceedings lodged before taking legal advice. The solicitors instructed are instructed though the Trade Union and this process no doubt takes a little time and so I am not unduly critical of them not having taken full instructions by the date of the Preliminary Hearing especially given the current difficulties causes by the Pandemic. We live in unusual and difficult times and although there was a delay between the 14 May and the application being made on the 31 July I do not regard that as particularly significant especially when taking into account the fact that no final hearing date was imminent (or indeed fixed) at present.

27. In all the circumstances I consider that the balance of hardship dictates that the amendment should be allowed and the case proceed as including a claim for 'automatic' unfair dismissal.

28. In closing may I would thank parties for preparing written submissions which I found informative and helpful.

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Employment Judge **James Hendry**
Date of Judgement **30 October 2020**
Date sent to parties **30 October 2020**

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