



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 1803582/2019 (V)

5

Held via Cloud Video Platform (CVP) 11 February 2021

Employment Judge M Sangster

10 **Mr C Tosh**

**Claimant
In Person**

15 **JM Hall Couriers Ltd**

**Respondent
Represented by:
Ms L Robertson
HR Manager**

20

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's application to amend his claim,
25 to include a claim under s47B Employment Rights Act 1996, is refused.

REASONS

Background

1. The claimant submitted an ET1 on 27 June 2019, claiming unfair dismissal
30 and various monetary amounts. A case management preliminary hearing
took place on 28 February 2020 before Employment Judge McFtridge. The
claim of unfair dismissal was dismissed due to lack of qualifying service. At
the case management preliminary hearing the claimant indicated that he
considered himself to be a whistleblower and that he had a claim under this
35 heading which the Tribunal had jurisdiction to deal with. Employment Judge
McFtridge noted that it was unclear from the ET1 what the public interest
disclosure claim was. The claimant was informed that if he wished to seek

E.T. Z4 (WR)

to amend his claim to include a claim relating to public interest disclosure, then he should do so within 14 days. The claimant subsequently confirmed that he wished to amend his claim to include a claim of detriment contrary to section 47 of the Employment Rights Act 1996 (ERA).

- 5 2. A further case management preliminary hearing took place on 2 April 2020. At that hearing it was noted that the claimant had applied to amend his claim and some details of that claim were set out in the further particulars. Employment Judge McFatridge explained to the claimant that the definition of a protected disclosure is a technical one and, before the Tribunal could
10 consider whether or not to accept the claimant's application to amend, full specification of this claim would be required. The claimant was advised that he required to provide full details of when the disclosures were made, to whom and in what form. He was informed that he should also set out information which he considers to have been disclosed in the public interest
15 and which of the categories in section 43(B)(1) ERA applies. He confirmed that, to assist the claimant, the matters would be set out in more detail in orders. Orders were then issued requiring the claimant to provide the following information within 14 days

*'In respect of the proposed claim under section 47B of the Employment
20 Rights Act*

- a) (i) *what was the content of the disclosure which was made,*
(ii) *which of the categories in subparagraphs (a)-(f) of section 43B(1) is said to be applicable,*
(iii) *in what form, when and to whom was the disclosure made,*
25 b) *in relation to any complaint under section 47B (detriment) what was the act or the nature of any failure to act on the part of the respondent said to have been done on the ground that a protected disclosure had been made*
(i) *What was the nature of the detriment said to have been
30 suffered as a result*
(ii) *in the view of the claimant what factor or factors are said to establish or tend to show any causal connection between the making of the disclosure and any act or failure to act on the part of the employer.'*

3. Further information was provided by the claimant, in response to the order.
4. In response to a)(i) of the order, he stated '*Various disclosures regarding malpractice and deliberate falsehoods to the direct financial detriment of drivers and infringement of basic human rights, all with a reasonable belief that the disclosure was in the public interest.*'
5
5. In response to b)(i) of the order he stated '*When attempting to work for another company, I was informed that "Amazon" would not employ me and I was effectively "blacklisted" from the depot, with no explanation or right of appeal. It is my belief that there had been a communication in respect of this from JMHC logistics, preventing me from obtaining work with another company, directly due to my concerns regarding their conduct.*' This
10 allegation did not appear in the original ET1.
6. A preliminary hearing took place on 21 October 2020 to deal with the issue of the claimant's employment status. Employment Judge Jones decided
15 that the claimant was a worker.
7. A further case management preliminary hearing took place on 3 December 2020. At that hearing the claimant confirmed he wished to proceed with his application to amend his claim, so as to include a claim under section 47B ERA. The respondent's representative confirmed that the respondent
20 objected to the claimant's application to amend. Employment Judge McFatridge directed that a preliminary hearing be held to determine whether or not the claimant's application to amend should be accepted. The parties were referred to in the case of **Selkent Bus Company Ltd v Moore** 1996 ICR 836.
- 25 8. The case then called for a preliminary hearing to determine whether the claimant's application to amend his claim should be allowed. At the preliminary hearing each party made a short submission setting out their position.
9. The claimant submitted that the facts he relies upon in his detriment claim
30 were contained in the ET1, the detriment claim was simply a relabelling of those facts. He stated that the respondent was aware of the disclosures and these were made were in the public interest. The application to amend was submitted at the earliest opportunity. Any delay in bringing this matter

forward was simply due to the respondent challenging that he was not a worker. If the application was refused, he would be deprived of a suitable remedy.

- 5 10. The respondent submitted that the first indication they had that the claimant wished to add a whistleblowing claim was at the case management preliminary hearing on 28 February 2020. No explanation has been provided by the claimant to indicate why he did not raise this matter previously, or why the facts relating to this claim were not mentioned in the ET1. Despite the fact that the claimant has been asked to provide details of his claim, the respondent remained unclear as to the basis for the claim. 10 The application to amend should therefore be refused.

Relevant law

- 15 11. Employment Tribunals have a broad discretion to allow amendments at any stage of proceedings, either on the Tribunal's own initiative or on the application by a party. Such a discretion must be exercised in accordance with the overriding objective (which is set out in the Employment Tribunals Rules of Procedure) of dealing with cases fairly and justly. Although various principles apply specifically to the assessment of an application to amend, the need to comply with the overriding objective underlies the application of those principles. 20
12. In ***Selkent Bus Company Limited v Moore*** 1996 ICR 836 guidance was given as to how Tribunals should approach applications to amend. The EAT confirmed that any application to amend a claim must be considered in light of the actual proposed amendment, so that the Tribunal may understand and give consideration to the purpose and effect of the amendment. It is important therefore that the application sets out the terms of the proposed amendment in the same degree of detail as would be expected had it formed part of the original claim, that is to say, such as to give fair notice to the other party of the case which it is to meet. 25
- 30 13. In approaching the question of whether to allow an application to amend, Tribunals must have regard to all the relevant circumstances and in particular to any injustice or hardship which would result from the

amendment or a refusal to allow it (***Cocking v Sandhurst (Stationers) Limited and another*** 1974 ICR 650, NIRC).

14. Accordingly, when determining whether to grant an application to amend Tribunals should carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the levels of hardship that would be caused to the parties by granting or refusing the amendment. In ***Selkent*** the then President of the EAT, Mummery P, explained that relevant factors would include:-

(i) **Nature of the amendment** - i.e. is the amendment, for example, one involving the correction of clerical or typographical errors, the addition of factual details to existing allegations and or the addition or substitution of other labels for facts already pled? Alternatively, is the amendment one which involves the making of entirely new factual allegations that change the basis of the existing claim? In other words, whether the amendment sought is a minor matter, or a substantial alteration pleading a new cause of action.

(ii) **Applicability of time limits** – if a new claim or cause of action is proposed to be added by way of amendment, the Tribunal should consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended.

(iii) **Timing and manner of the application** – an application should not be refused simply because there has been delay in making it, as amendments may be made at any stage of the proceedings. Delay in making the application is however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the identification of new facts or new information from documents disclosed on discovery.

15. The above is not an exhaustive list. There may be additional factors to consider in any particular case, but the above basic factors should form part of the Tribunal's consideration.

16. The hardship and injustice test is a balancing exercise. As noted by Lady Smith in ***Trimble and another v North Lanarkshire Council and***

5 *another* EATS0048/12 it is inevitable that each party will point to there being a downside for them if the proposed amendment is allowed or not allowed. It will therefore rarely be enough to look at the downsides or 'prejudices' themselves. These need to be put in context, and that is why it is important to look at all the surrounding circumstances.

Discussion & Decision

17. In considering the application to amend, the Tribunal considered each of the factors set out in Selkent and reached the following conclusions.

Nature of the amendment

10 18. The claim which the claimant seeks to introduce by way of amendment is that he was subjected to a detriment, contrary to s47B ERA, as a result of making a protected disclosure under s43B ERA. The detriment asserted is that *'When attempting to work for another company, I was informed that "Amazon" would not employ me and I was effectively "blacklisted" from the depot, with no explanation or right of appeal. It is my belief that there had*
15 *been a communication in respect of this from JMHC logistics, preventing me from obtaining work with another company, directly due to my concerns regarding their conduct.'* This factual allegation did not appear in the original ET1.

20 19. The amendment accordingly seeks to substantially change the basis of the existing claim, making new factual allegations and pleading an entirely new cause of action.

Applicability of time limits

25 20. The proposed new claim was brought substantially outwith the normal time limits for raising that claim. The amendment seeks to introduce a new cause of action in relation to events which occurred in or around April 2019, approximately a year before the application to amend was made.

30 21. Claims under s47B ERA should be brought within 3 months of the date of the act complained of or, where this is not reasonably practicable, within such further period as the Tribunal considers reasonable.

22. The Tribunal concluded that it was reasonably practicable for a claim under s47B ERA to have been submitted timeously. An ET1 was lodged on 27 June 2019. That ET1 could have included a claim under s47B ERA.

Timing and manner of the application

5 23. The Tribunal considered why the application was being made at this stage.

24. The Tribunal did not receive any satisfactory explanation as to why the detriment claim was not raised in the ET1 submitted on 27 June 2019. In addition, the Tribunal did not accept that the advancement of this claim was dependent upon the Tribunal's judgment in relation to worker status, particularly given that the possibility of this claim was mentioned at the first
10 case management preliminary hearing in February 2020.

25. The Tribunal also noted that, despite the direction and orders of the Tribunal following the case management preliminary hearings which took place on 28 February and 2 April 2020, the claimant had not provided the specification which would be required to pursue his claims: in particular
15 the precise terms of the disclosure(s) which the claimant states he made, and the basis upon which he asserts he had a reasonable belief that the disclosure was made in the public interest, are not clear from the terms of the proposed amendment. As a result the claims are not set out in the
20 degree of detail which would be required to give the respondent fair notice of the case it may be required to meet. If the application were permitted, further particulars and/or case management preliminary hearings would be required to determine the precise terms of each disclosure the claimant asserts he made, and the basis upon which he asserts he had a
25 reasonable belief that each disclosure was made in the public interest.

Conclusions re Application to Amend

26. The Tribunal noted that, whilst the claimant would be prejudiced if he is not able to proceed with this element of his claim, the respondent would also be prejudiced if the claim was allowed to proceed, given that the
30 length of the hearing would necessarily increase, as would the documentary evidence and number of witnesses required. The claim the claimant seeks to add by way of amendment is an entirely new claim which is considerably out of time. No satisfactory explanation was advanced for

5 why it was not brought sooner. The claimant has been given ample
opportunity to properly particularise his claim and was informed that full
specification of this claim would be required before the Tribunal could
consider whether or not to accept the claimant's application to amend. The
respondent would be prejudiced if the claims were allowed to proceed at
this stage: further case management would be required before the claims
can proceed, so that the precise terms of the disclosures the claimant
relies upon are identified prior to any final hearing, as well as the basis
upon which he asserts that he had a reasonable belief that each disclosure
10 was made in the public interest. Taking into account the above factors,
and considering the balance of hardship and injustice between the parties,
the Tribunal conclude that the application to amend the claim to include a
claim under s47B ERA should be refused.

15 27. The case should now be set down for a one day final hearing in respect of
the claim of unauthorised deductions from wages in respect of the van
bond and the claim for holiday pay.

20

25	Employment Judge:	M Sangster
	Date of Judgment:	02 March 2021
	Date sent to parties:	08 March 2021