EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100212/2020

Held via Cloud Video Platform (CVP) on 17 November 2020

Employment Judge P O'Donnell

Mr P McLaughlin	**Claimant** **Represented by:** **Mr C Grant - Friend**
Miscarriages of Justice Organisation (Scotland)	**Respondent** **Represented by:** **Mr Jenkins - Counsel (instructed by Ellis Whittam)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:-

1. The claim under s103A of the Employment Rights Act 1996 is struck-out as having no reasonable prospects of success.

2. The application to amend the ET1 under Rule 34 to add an additional respondent to the disability discrimination claim is refused.

REASONS

Introduction

1. This hearing was held by way of cloud video platform (CVP) on 17 November 2020.

2. The hearing was listed to consider two applications:-

    a. An application by the Respondent to strike-out the claim under s103A of the Employment Rights Act 1996 (ERA) under Rule 37(1)(a) on the

basis that it had no reasonable prospects of success (failing which for a deposit order under Rule 39 on the basis that the claim under s103A ERA had little reasonable prospect of success).

b. An application by the Claimant to add additional Respondents to the claim for disability discrimination.

Preliminary issues

3. During the CVP tests, Mr Grant had indicated an intention to call witnesses at this hearing. At the outset of the hearing, the Tribunal queried why witnesses were being called in light of the nature of the applications; it was explained that for the purposes of the strike-out application no findings in fact would be made and the Claimant's case would be taken at its highest (that is, it would be assumed that he would successfully prove the facts which he was offering to prove).

4. Mr Grant explained that the witnesses would give evidence as to the status of the person to whom the Claimant made his disclosure at the time it was made and, in particular, the workings of the Respondent's management committee, how it came to be and its status at the relevant time.

5. In response, Mr Jenkins stated that he did not see why witness evidence was necessary; if there was a matter of fact on which the Claimant relied such as set out by Mr Grant then his case would be taken at its highest.

6. The Tribunal did not consider that witness evidence was required given that this was not a hearing at which findings in fact would be made and that the facts relied upon by the Claimant would be taken at their highest. Mr Grant indicated that, in light of that explanation, he was not insisting on witnesses being heard.

7. A joint bundle of documents and a supplementary bundle from the Claimant were provided for the hearing. Page references below starting "J" are references to pages in the joint bundle and those starting with "C" are references to the supplementary bundle.

Application for strike-out/deposit order

Introduction

8. The application for strike-out only relates to the claim under s103A ERA that the Claimant was dismissed for making a public interest disclosure.

9. The disclosure on which the Claimant relies is a communication from him to a Mr Billy McAllister made on 5 June 2019 consisting of the forwarding of certain email. This is set out in the Claimant Further & Better Particulars starting at J89 with further details at J96.

10. The disclosure is said to be made in accordance with s43C or s43G ERA.

Respondent's submissions

11. The Respondent's agent relied on a skeleton argument lodged in advance of the hearing and supplemented this orally. Reference was also made to the grounds set out in the application itself (J112).

12. Mr Jenkins set out the factual background to the disclosure:-

    a. The disclosure was made in an email from the Claimant to Mr McAllister.

    b. At the time of the email, Mr McAllister had been removed from his official position with the Respondent.

    c. Reference as made to "Point D" of the Claimant's further particulars at J96 which confirms to whom disclosure was made and to "Point E" on the same page which confirms that disclosure was not made to the Respondent.

13. It was noted that the Claimant relied on s43G(2)(b) ERA (J96) and that this required two elements; there must be no prescribed person in terms of s43F; the worker must reasonably believe that it is likely that evidence will be concealed or destroyed.

14. In this case, there was a prescribed person in terms of s43F and that is the Office of the Scottish Charity Regulator. It was submitted by Mr Jenkins that that is sufficient for the claim under s103A to fail.

15. However, he went on to submit that it failed on the second limb as well. He stated that there was no more than a bare assertion from the Claimant that evidence would be concealed or destroyed. He asked the Tribunal to consider what was said in the ET1 (J18) and the Further Particulars (J95) as to the Claimant's reasons for making the disclosure to Mr McAllister (that is, that he believed that Mr McAllister had a right to the information being disclosed and that he believed that Mr McAllister could take action about what has happening, respectively). It was submitted that these contradict what was being said now and that he has not pled any evidential basis for a belief that evidence would be concealed or destroyed.

16. In rebuttal of what was said on behalf of the Claimant, Mr Jenkins noted that the Claimant sought to rely on s43C on the basis that he reasonably believed that Mr McAllister was still a part of the Respondent. It was submitted that s43C is not a matter of reasonable belief but a matter of fact as to whether the disclosure was made to the employer.

17. He also submitted that the submissions made on behalf of the Claimant at the hearing are not consistent in terms of the reasons why he made the disclosure to Mr McAllister; there requires to be a reasonable belief that evidence would be concealed and this not part of the Claimant's case.

18. He noted that the Claimant did not dispute that there was a prescribed person in terms of s43F.

Claimant's submissions

19. Mr Grant made the following submissions on behalf of the Claimant.

20. He started by noting that he was the third person to represent the Claimant, the others being a trade union and a solicitor. It was submitted that the ET1 was a superficial example of the Claimant's case and that the Claimant's disability prevented him from expressing himself clearly. It was only when

Mr Grant had taken time to investigate the Claimant's case fully with the Claimant that the present position had been set out.

21. Mr Grant then went on to set out the detail of the Claimant's substantive case including various accusations against the Respondent and people within the Respondent's organisation such as Mr McIlvride. The Tribunal has not repeated this in detail as much of it was not directly relevant to the issues to be determined in hearing the strike-out application. However, the position can be summarised as follows:-

    a. The Claimant, in his role as co-project manager, became aware of emails and other information which caused him concern in relation to both references to Mr McAllister (which the Claimant considered disclosed personal data or could be considered defamatory) and the impact on the Respondent more broadly.

    b. He shared these emails with Mr McAllister (that is, he made the disclosure on which the s103A claim is founded) because he felt it was his duty to do so in order to *"protect the Respondent from the enemy within".*

    c. He considered that he had done nothing wrong in sharing these emails.

22. It was submitted that this fell within the scope of s43C(1) ERA because the Claimant reasonably believed that Mr McAllister was still a member of the Respondent's management committee.

23. In relation to s43G ERA, it was submitted that the conditions set out in s43G(1) were met and reliance is placed on s43G(2)(b)&(c) as satisfying s43G(1)(d). In particular, in the context of s43G(2)(c), it was said that the Claimant had previously made the same disclosure to the Respondent that he made to Mr McAllister but this was ignored.

Relevant law

24. The Tribunal has power to strike-out the whole or part of claim under Rule 37:-

"At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

25. A Tribunal should be slow to strike-out a claim where one the parties is a litigant in person (*Mbuisa v Cygnet Healthcare Ltd EAT 0119/18*) given the draconian nature of the power.

26. Similarly, In *Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391*, HL, the House of Lords was clear that great caution must be exercised in striking-out discrimination claims given that they are generally fact-sensitive and require full examination of the evidence for a Tribunal to make a proper determination.

27. In considering whether to strike-out, the Tribunal must take the Claimant's case at its highest and assume she will make out the facts she offers to prove unless those facts are conclusively disproved or fundamentally inconsistent

with contemporaneous documents (*Mechkarov v Citibank NA 2016 ICR 1121, EAT*).

28. The Tribunal has the power to make a deposit order under Rule 39:-

> *(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party') to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*
>
> *(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*
>
> *(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*
>
> *(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.*
>
> *(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*
>
> > *(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*
> >
> > *(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),*
>
> *otherwise the deposit shall be refunded.*

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

29. Section 103A of the Employment Rights Act 1996 (ERA) deems any dismissal to be unfair where the reason for the dismissal is that the employee made a "protected disclosure".

30. A disclosure is a protected disclosure if it meets the definition set out in s43A ERA read with ss43B-H:-

43A Meaning of 'protected disclosure'

In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any sections 43C to 43H.

43B Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).]

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …—

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person

other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

43D Disclosure to legal adviser

A qualifying disclosure is made in accordance with this section if it is made in the course of obtaining legal advice.

43E Disclosure to Minister of the Crown

A qualifying disclosure is made in accordance with this section if—

(a) the worker's employer is—

(i) an individual appointed under any enactment [(including any enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament)] by a Minister of the Crown [or a member of the Scottish Executive], or

(ii) a body any of whose members are so appointed, and

(b) the disclosure is made … to a Minister of the Crown [or a member of the Scottish Executive].

43F Disclosure to prescribed person

(1) A qualifying disclosure is made in accordance with this section if the worker—

(a) makes the disclosure … to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b) reasonably believes—

(i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and

(ii) that the information disclosed, and any allegation contained in it, are substantially true.

(2) An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the descriptions of matters in respect of which each person, or persons of each descriptions, is or are prescribed.]

43G Disclosure in other cases

(1) A qualifying disclosure is made in accordance with this section if—

…

(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

43H Disclosure of exceptionally serious failure

(1) A qualifying disclosure is made in accordance with this section if—

…

(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.]

31. The Public Interest Disclosure (Prescribed Persons) Order 2014 states that the Office of the Scottish Charity Regulator is a prescribed person in terms of s43F ERA in relation to the administration of charities and funds given for charitable purposes.

Decision

32. The Tribunal reminded itself of the draconian nature of the power to strike-out and the high test of "no reasonable prospects of success". It also reminded itself that it had to take the Claimant's case at its highest.

33. In effect, the Tribunal had to be satisfied that, assuming that the facts of the case were found in the Claimant's favour, he would not be able to establish that he had made a protected disclosure as defined in s43A ERA. In particular, that he had made a disclosure in accordance with either s43C or s43G ERA (being the sections pled by the Claimant).

34. Dealing with s43C first, there are two limbs to this section; a disclosure made to the employer; a disclosure made to some other person where the relevant failure being disclosed relates to the conduct of that person or that person has legal responsibility for the failure.

35. The Tribunal agrees with the submission made on behalf of the Respondent that this section does not take account of whether the worker has a reasonable belief in relation to whether someone is their employer or whether someone has legal responsibility for the relevant failure.

36. The disclosure on which the Claimant relies was clearly not made to his employer; the Claimant's employer is the Respondent and not Mr McAllister. The Claimant cannot, therefore, satisfy the first limb in s43C.

37. As regards the second limb, it is not part of the Claimant's case that the relevant failure related to the conduct of Mr McAllister (that is, it is not being said that he was the person committing a criminal offence or a miscarriage of justice) or that he had legal responsibility for this. The Claimant cannot, therefore, satisfy the second limb of s43C.

38. In these circumstances, the Tribunal is satisfied that, even taking the case at its highest, the Claimant would not be able to establish that the disclosure relied upon was made in accordance with s43C ERA.

39. Turning to s43G, the Tribunal notes that the Respondent did not make submission that the Claimant could satisfy s43G(1)(b), (c) & (e). The Tribunal, therefore, proceeds on the basis that, in taking the Claimant's case at its highest, the conditions in those sub-subsections would be met.

40. The real issue is whether the Claimant could satisfy s43G(1)(d) which requires one of the conditions in sub-section 2 to be met. The Claimant, in his Further and Better Particulars, relies on s43G(2)(b).

41. The fundamental difficulty for the Claimant is that s43G(2)(b) can only be relied upon where there is no person prescribed for the purposes of s43F in relation to the relevant failure and, as submitted by the Respondent, the 2014 Order prescribes the Office of the Scottish Charity Regulator (OSCR) for the purposes of disclosures regarding the administration of charities and charitable funds.

42. The Claimant did not seek to argue that his disclosure was not one which within the scope of the purposes for which OSCR is a prescribed person.

43. The Tribunal considers that OSCR is a prescribed person for the purposes of s43F in relation to the disclosure made by the Claimant and so the Claimant cannot satisfy s43G(2)(b) which means that, in turn, the disclosure relied upon is not made in accordance with s43G.

44. In submissions, Mr Grant also sought to rely on s43G(2)(c) (that is, that the Claimant had previously made the same disclosure to his employer) for the very first time. This was not set out in the Claimant's ET1 or Further Particulars. Indeed, the further particulars expressly and unambiguously rely on s43G(2)(b).

45. It could be said that the Claimant cannot seek to rely on this provision where he has not pled it. However, the Tribunal was conscious that neither the Claimant nor Mr Grant are legally qualified and would not appreciate how the pleadings in a case could restrict the arguments that were made.

46. The Tribunal, therefore, reviewed the pleadings (that is the ET1 and Further Particulars) to see whether there was an assertion that the disclosure made to Mr McAllister had been made to the Claimant's employer (that is, the Respondent) previously.

47. The Tribunal could find nothing in the pleadings which set out any factual basis for the assertion that the disclosure made to Mr McAllister had been made to the Respondent previously. In other words, the Claimant has not offered to prove facts from which a Tribunal could conclude that s43G(2)(c) had been satisfied.

48. Even taking the Claimant's case at its highest, there was no basis on which the Tribunal could conclude that the Claimant would prove that s43G(2)(c) had been met and so the Claimant could not establish that his disclosure to Mr McAllister was made in accordance with s43G.

49. In these circumstances, the Tribunal holds that the claim under s103A ERA had no reasonable prospects of success on the basis that there are no reasonable prospects of success of the Claimant proving that he made a

protected disclosure as defined in s43A ERA, in particular, that he made the disclosure relied upon in accordance with either s43C or s43G.

50. The claim under s103A ERA is, therefore, struck-out under Rule 37.

Application to add respondents

Introduction

51. The Claimant made an application to add two individuals as Respondents to his disability discrimination claim. The liability of these individuals arose under s110 of the Equality Act 2010 which makes employees and agents liable where they carry out a contravention of the Act for which their employer or principal is liable under s109.

52. The application, in its original form, sought to add two respondents, Patrick (Paddy) Hill, a director of the Respondent who dealt with the Claimant's appeal, and Caroline Dixon, a consultant whom the Respondent engaged to carry out the disciplinary process which led to the Claimant's dismissal.

53. However, after hearing the submissions made on behalf of the Respondent, Mr Grant withdrew the application to add Mr Hill. He accepted the submission made by Mr Jenkins that the application in respect of Mr Hill was fundamentally flawed on the basis that none of the actions of Mr Hill formed part of the factual matrix giving rise to the disability claim.

54. In these circumstances, the Tribunal proceed to only consider the application to add Ms Dixon as a respondent to the disability discrimination claim.

55. In considering this matter, the Tribunal took account of the application to amend (J124-127), the objection lodged by the Respondent (J128-130), the skeleton argument lodged on behalf of the Respondent in advance of the hearing as well as the submissions made on behalf of the parties at the hearing.

Claimant's submissions

56. Mr Grant made the following submissions on behalf of the Claimant.

57. The reason for the application was that the Claimant had a grave concern that Mr Hill would shut down the Respondent in order to avoid making payment. It was said that Mr Hill would often threaten to shut down the organisation and walk away when he did not get his own way.

58. The Claimant sought to add Ms Dixon because she failed to take account of evidence that the Claimant had a disability. Reference was made to a letter from the Claimant's GP produced at C12 which it was said was seen by Ms Dixon and that, instead of finding out what was wrong with the Claimant, she pressed ahead with a disciplinary hearing which led to the Claimant's dismissal, a hearing which his disability prevented him from attending.

59. It was submitted that the Respondent was saying that "it was not us, Caroline Dixon did it" and so she should be held responsible.

60. In rebuttal to the Respondent's submissions, it was said that Mr Grant only became involved in the case in July 2020 and that the application was made promptly in September.

61. Despite the fact that the Respondent continues to operate, it was said that Mr Hill would fly off the handle at the slightest provocation and that his attitude would be different once any judgment is made.

62. It was submitted that it would be just and equitable and in keeping with the overriding objective for Ms Dixon to bear some of the costs of the case.

Respondent's submissions

63. The Respondent's agent relied on the objections to the application and the skeleton argument which he supplemented orally.

64. He submitted that the relevant rule was Rule 34 which required the Tribunal to consider what was in the interests of justice and the overriding objective. Reference was also made to Presidential Guidance.

65. It was submitted that, in relation to the *Selkent* case, consideration had to be given to whether the amendment was a re-labelling or a fundamental change.

It was said that this was the same cause of action albeit against a new individual.

66. If Ms Dixon was added as a respondent then this would cause disruption and delay; she was acting as an agent, not an employee, and so would be entitled to her own representation. This would push the amendment into being a fundamental change leading to additional costs and delay.

67. Mr Jenkins asked the question of whether the application was made promptly and submitted that there had been no explanation why Ms Dixon had not been added from the outset of the case. It was being said that everyone knew how Mr Hill reacted to setbacks. The application was not made until 10-11 months after the claim was lodged and after there had been a case management hearing. There was no explanation as to why there was a need to add Ms Dixon identified at that point and it appeared that the application was a response to the Respondent's strike-out application.

68. There had been no Early Conciliation in relation to Ms Dixon although it was recognised that this was not an automatic bar to her being added but it was a relevant factor.

69. In relation to the reason for adding Ms Dixon, this appears to be solely the concern that Mr Hill would shut down the Respondent, something which has not happened. It was submitted that people often say things in the heat of the moment which are not followed through. There was no detail of when these alleged threats were made. Even if there was such evidence then this would not be a reason to allow the amendment where the issue is one of enforcement for which there are other remedies.

70. It was submitted that the Respondent was not seeking to place the blame for any alleged discrimination on Ms Dixon; they accept that they would be liable for any discriminatory act carried out by her as their agent.

71. It was said that the Claimant gains nothing from the amendment; if it is refused, the claim remains the same and there is no prejudice to him.

Relevant Law

72. Rule 34 of the Employment Tribunal Rules of Procedure provides as follows:-

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.

73. In addition to this specific provision, the Tribunal has a general power to make case management orders which includes the power to allow amendments to a claim or response in terms of Rule 29.

74. The case of *Selkent Bus Co Ltd v Moore* [1996] ICR 836 confirms the Tribunal's power to amend is a matter of judicial discretion taking into account all relevant factors and balancing the injustice and hardship to both parties in either allowing or refusing the amendment. The case identifies three particular factors that the Tribunal should bear in mind when exercising this discretion; the nature of the amendment; the applicability of any time limits; the timing and manner of the amendment.

75. In relation to time limits, the case of *Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07* confirms that this is a relevant factor in the Tribunal's discretion and can be the determining factor. However, time bar does not apply, in the context of an application to amend an existing claim, to automatically bar a new cause of action in the same way as it would if the new cause of action was being presented by way of a fresh ET1.

76. The case of *Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650* addresses the procedure to be adopted by the Tribunal in dealing with an amendment to substitute a respondent. It confirms that the application of the statutory time limit does not depend on when a respondent first becomes a party to the proceedings but when the proceedings were originally presented to the Tribunal. In that case, it was held that the claim as originally presented and

as amended was the same, that is, that the claimant had been unfairly dismissed by his employer. Given that that complaint had been lodged timeously then the Tribunal had the discretion to allow an amendment that was necessary to hear that claim. In exercising such discretion, the Tribunal should proceed as follows (per Sir John Donaldson at pp656 & 657):-

1 They should ask themselves whether the unamended originating application complied with [rule 8(1) of Schedule 1 to the 2013 Regulations]: see, in relation to home-made forms of complaint, Smith v Automobile Pty Ltd [1973] 2 All ER 1105, [1973] ICR 306.

2 If it did not, there is no power to amend and a new originating application must be presented.

3 If it did, the tribunal should ask themselves whether the unamended originating application was presented to the [tribunal] within the time limit appropriate to the type of claim being put forward in the amended application.

4 If it was not the tribunal have no power to allow the proposed amendment.

5 If it was the tribunal have a discretion whether or not to allow the amendment.

6 In deciding whether or not to exercise their discretion to allow an amendment which will add or substitute a new party, the tribunal should only do so if they are satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause reasonable doubt as to the identity of the person intending to claim or, as the case may be, to be claimed against.

7 In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties,

including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused.

Decision

77. The Tribunal considers that it is appropriate to address each of the specific factors highlighted in Selkent, consider any other relevant factors and then take all of those into account in balancing the injustice and hardship to all sides.

78. First, there is the nature of the amendment itself which is to add a new respondent.

79. The Tribunal considers that this is an amendment which does give rise to a new claim albeit one which is intrinsically and inherently related to the existing claim given that it arises from the same factual matrix.

80. The Tribunal does not consider that this is a re-labelling of the claim in the way in which it would be if, for example, the Claimant sought to say that the same facts gave rise to another type of discrimination or if the Claimant sought to substitute a new respondent because of a confusion over the identity of his employer.

81. Rather, the amendment seeks to add a new party to the claim whose legal liabilities flow from a separate legal provision from the existing Respondent. However, the Tribunal also acknowledges that the facts giving rise to these liabilities are fundamentally the same.

82. Second, there is the issue of the applicability of time limits. There is no question that if the claim against Ms Dixon was brought by way of presentation of a fresh ET1 then it would be out of time.

83. The fact that a fresh claim lodged now would be out of time is not fatal to the application to amend for a number of reasons.

84. First, the issue of time limits is only a factor for consideration (albeit an important and potentially determinative factor) in the Tribunal's consideration of its discretion.

85. Second, there is the question of any "escape clause" which applies to the issue of time limits may have seen the Tribunal allow a claim to proceed out of time. The relevant statutory provision (s123(1)(b) of the Equality Act 2010) states that a Tribunal can hear a claim presented within any period which it considers to be just and equitable.

86. In considering that issues, the Tribunal would take account of the reason for the delay and the balance of prejudice between the claimant and respondent (in this context, this would be Ms Dixon and not the present Respondent).

87. In the Tribunal's view, there has been no real explanation for the delay in the attempt to add Ms Dixon other than the fact that Mr Grant has only become involved more recently. However, the claim "belongs" to the Claimant, not Mr Grant, and there has been no explanation why the Claimant did not seek to add Ms Dixon or instruct his previous representatives to do so. The reason for the application (that is, the concern about Mr Hill closing the Respondent due to his previous utterances) is one which was clearly known about from the outset. If the addition of Ms Dixon had been done by way of fresh ET1 and the Tribunal had had to address the test under s123(1)(b) then it would not have considered there to have been an adequate and satisfactory explanation for the delay.

88. The Tribunal would also have considered that the balance of prejudice in assessing the test under s123(1)(b) would have fallen in favour of Ms Dixon. If a claim against her lodged by way of a fresh ET1 was not allowed to proceed then there would have been little prejudice to the Claimant as he could continue with the claim against the present Respondent (in circumstances where they did not seek to avoid liability for Ms Dixon's actions as their agent). On the other hand, Ms Dixon would face a potential legal liability in circumstances where she would have considered that any claim against her was out of time.

89. In these circumstances, had the Tribunal have had to address the question of whether a claim against Ms Dixon lodged by way of a fresh ET1 should be

heard out of time, it would not have considered that it was just and equitable to do so.

90. However, as stated above, this is not conclusive in the context of an amendment application and is only one of the factors which the Tribunal takes into account.

91. Third, there is the factor as to the timing and manner of the application. In this regard, the Tribunal notes that the application does come some months after the claim was lodged.

92. It was also made after the case management hearing at which the Claimant was directed to set out further particulars of his case and after those particulars were provided. Although the Claimant was not specifically directed to add any respondents (there being nothing in the ET1 as originally pled which suggested that other respondents were contemplated), if there was a need to name further respondents then this is something which was likely to be identified when the claim was being fully particularised.

93. On the other hand, the case is still at a relatively early stage and no substantive hearings have been listed which might have to be postponed because of the application.

94. There is also the manner of the application which was made in email correspondence which also included the objections to the Respondent's application to strike-out, complaints about the Respondent's revised grounds of resistance (which were lodged in response to the Claimant's further particularisation) and a costs application against the Respondent's agent.

95. There is no obvious reason why the need to add Ms Dixon as a respondent arose at this time. It is not, for example, the case that the Respondent's revised grounds of resistance sought to avoid liability for Ms Dixon's actions in terms of s109(4) of the 2010 Act. Indeed, it is the Respondent's clear position, repeated by Mr Jenkins at this hearing, that the Respondent accepts the liability under s109.

96. It is very difficult to resist drawing the inference that the application to amend was a reaction to the revised grounds of resistance and the strike-out application as opposed to a genuine concern about the Respondent seeking to avoid liability, either in legal terms or practical terms.

97. Having addressed the specific factors identified in Selkent, the Tribunal considered whether there were any other relevant factors.

98. The Tribunal was not being asked to assess the prospects of success at this hearing and did not consider that the merits of the case was a factor which should feature heavily in its consideration given that there was a clear dispute of fact between the Claimant and the Respondent which required to be resolved after the Tribunal sitting in the final hearing had heard all the evidence.

99. The Tribunal also notes the submission made by Mr Jenkins that the reason given for the application being made is one which relates to the enforcement of any judgment the Claimant may ultimately obtain and that there are other options for a claimant who has such concerns. The Tribunal agrees that there are methods by which a party to legal action can seek to prevent the other party alienating their assets with the intention to prevent any sums awarded being recovered which do not involve adding other parties to the legal action.

100. Turning to the balance of injustice and hardship between the parties, the Tribunal considered that there would be very little prejudice to either side; if the application is refused then the Claimant would proceed with the very same claim and face no difficulty or hardship in pursuing that claim arising from the refusal of the application; if the application is granted then the Respondent is in exactly the same position as they are now in relation to their ability to defend the claim.

101. The only prejudice which could identify is one which applies equally to both the Claimant and the Respondent, that is, delay. At the very least, if the application were granted, there would be a delay whilst Ms Dixon is given the opportunity to lodge her ET3 to the case. There may then need to be further

case management or hearings relating to her involvement in the case which would occasion further delay. This would mean that the present parties would not see any progress toward any substantive hearing whilst these matters were dealt with.

102. In these circumstances, taking account of all the matters set out above, the Tribunal refuses the application under Rule 34. The Tribunal has taken particular account of the fact that the claim against Ms Dixon is out of time and that it would not have exercised its discretion under s123(1)(b) of the 2010 Act if that was the test which it had to apply, the fact that the application is made some time after the claim was lodged in circumstances where there is no adequate explanation why it was felt that Ms Dixon needed to be added to the claim now and the fact that granting the application would lead to additional delay for the present parties.

Employment Judge: P O'Donnell
Date of Judgement: 2 December 2020
Entered in register: 15 December 2020
And copied to parties