EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107380/2020

Held on 19 August 2021 (By Cloud Video Platform)

Employment Judge: P O'Donnell

Mr B Kennedy	**Claimant** **In Person**
Lookers Plc	**Respondent** **Represented by:** **Mr Francis (Counsel)** **Instructed by** **Actons Solicitors**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is:-

1. The Respondent's application for strike-out is refused.

2. The Order made on 26 January 2021 for the Claimant to provide further and better particulars of his claim (along with any response by the Claimant to that Order) is hereby set aside.

3. In accordance with the power set out in rule 29 of the Employment Tribunals Rules of Procedure 2013, the Tribunal, of its own motion, makes the following Order:-

    a. Within 28 days of the date on which this Judgment is sent to parties, the Claimant will:-

i. Confirm whether or not he relies on any protected disclosures other than those already pled at paragraphs 4-7 and 11 of the Paper Apart to his ET1.

ii. If so then the Claimant to provide the following specification in relation to each additional alleged disclosure:-

1. When was it made?
2. What information was disclosed?
3. The basis on which it is said that this information tends to show one or more of the matters in section 43B(1)(a)-(f) of the Employment Rights Act 1996.
4. To whom was it made?
5. If this was not the Respondent then provide the following information:-
    a. The basis on which it is said that the Respondent was aware of the disclosure.
    b. The basis on which it is said that the person to whom the disclosure was made falls into one of the categories in sections 43C-G of the 1996 Act
6. Why the disclosure was said to be in the public interest?

b. Within 28 days of receiving the Claimant's specification, if he does rely on additional disclosures, the Respondent will, if so advised, provide further and better particulars of their Response in relation to the additional disclosures.

4. The Claimant's application to amend the claim to add a second respondent is hereby refused.

REASONS

Introduction

1. The Claimant has brought complaints of "ordinary" unfair dismissal in terms of s98 of the Employment Rights Act 1996 (ERA), "automatic" unfair dismissal

under s103A ERA (protected disclosure) and detriment under ss47B and 48 ERA (again, relating to protected disclosures). The claims are resisted by the Respondent.

2. The present hearing was listed to determine a number of preliminary issues and applications raised by the Respondent and the Claimant.

3. At the outset of the hearing, the Tribunal went through the issues to be addressed at the hearing and the parties respective positions.

4. The first issue on the Notice of Hearing was the issue of time bar which related to the detriment claim. The Tribunal had noted that, at a case management hearing in January 2021, the Employment Judge at that hearing had directed that the issue of time bar should be held over for determination at the final hearing. The basis for this was that the Claimant's position was that there were a series of detriments with the ET1 having been lodged within three months (or any period extended by ACAS Early Conciliation) of the date of the last act in the series and so the Tribunal would have to hear evidence about all of the detriments to be able to assess if there was a series and such evidence significantly overlaps with the evidence to be heard in determining the substantive issues in the case. This was a case, therefore, where it was better for all the evidence and issues to be determined at a final hearing.

5. The present Tribunal had not identified anything in the papers which suggested this position had changed and was concerned that it would not be appropriate or possible to deal with the issue of time bar at this hearing.

6. Mr Francis, for the Respondent, put forward this very position and, with the caveat that the Respondent was making no concessions on the issue of time bar, submitted that this issue should be held over to be addressed at any final hearing. The Claimant made no objection to this course of action.

7. The Tribunal agreed with that position and so the issue of time bar was not an issue to be dealt with at this hearing. It will remain an issue for determination at any final hearing.

8. The second issue was the Respondent's application to strike-out. Mr Francis clarified that the application was only advanced under Rule 37(1)(c) on the basis of the alleged failure to comply with the Order of the Tribunal made at the January hearing that he provide further and better particulars of his claim. The application under Rule 37(1)(a) relating to prospects of success was not insisted upon.

9. The final issue was the Claimant's application to add a second respondent, Mr Muir.

10. The Tribunal indicated that it would deal with the strike-out application first and then the amendment application.

11. This was not a hearing at which evidence was heard or findings of fact made.

12. There was an agreed bundle of documents prepared by the parties. References to page numbers in this bundle are reference to pages in the bundle.

Respondent's submissions

13. The Respondent's agent made the following submissions.

14. He identified that the relevant rule for the application was Rule 37(1)(c) and that the Order which had not been complied with could be found at p45 in the first paragraph of Note of the Preliminary Hearing held in January 2021. Reference was also made to pp63 and 64 which also form part of the Note and set out that the purpose of the Order is to meet the overriding objective and allow for a fair hearing.

15. In this case, it is said that the Claimant has failed to comply with the Order and this impacts on the chances of their being a fair hearing.

16. Mr Francis noted that the date for compliance was 9 February 2021 and referred to the email at p43 of that date from the Claimant's solicitor. It was submitted that this email did not comply with the Order and there was no prior

warning of this. Rather the email informed the Tribunal and Respondent that the solicitor is coming off the record. It also indicates that the Claimant has been made aware of the Orders made at the January hearing and Mr Francis specifically referred to the Order that the Claimant provide further and better particulars of the protected disclosures on which he relies, noting that this is not what the Order actually says.

17. Reference was made to p73 which is an email of 23 February 2021 from the Claimant in response to the January Order. The Tribunal was invited to read the email which continues to p75.

18. Mr Francis submitted that the first page of the email deals with the protected disclosures with the first line being inconsistent with the understanding that this is what the Claimant was to provide. The latter pages deal with other Orders relating to a Schedule of Loss and the amendment application by the Claimant.

19. It was submitted that what is seen in the email are not further particulars of protected disclosures. Rather, these were described by Mr Francis as a list of misconduct by the Respondent which the Claimant says he has identified setting out obligations which the Claimant says the Respondent is under. It is submitted that this does not comply with the terms of the Order and does not set out disclosures which the Claimant has made. It simply says that are "many" but this is far too vague and can't be sensibly responded to with the Respondent in no better position that when they saw the ET1 which set out some disclosures.

20. The Respondent replied to this by email dated 4 March 2021 (p74) stating that they could not respond to this and provide an updated response.

21. The Claimant sent a further email dated 5 April 2021 (pp79-82) and Mr Francis took the Tribunal through this email, making submissions as to why the contents did not provide sufficient particularisation and did not comply with the Order. For the sake of brevity the Tribunal does not intend to set out these submissions in detail but it notes that these fall into a number of broad themes

relating to being too vague (for example, no date being identified when a disclosure was made or those to whom disclosures are said to be made being described in terms such as "*many senior managers"* rather than identifying the individuals concerned) or matters being raised which are not foreshadowed in the ET1.

22. Mr Francis then noted that the next correspondence is the Respondent's email of 4 May 2021 (p85) which states the position that the further information from the Claimant still does not comply with the Order and that the Respondent cannot undertake investigations into the allegations being made. The Claimant sent a further email dated 13 May 2021 (pp92-94) but, it was submitted, this simply repeats what has already been said.

23. Mr Francis then took the Tribunal to the Note of the Preliminary Hearing held on 17 June 2021 (pp97-102) at which the present hearing was listed. He made reference to the Claimant's assertions regarding a subject access request which he had made to the Respondent to which a response was awaited. It was submitted that the data protection laws stand separate from the Tribunal Rules of Procedure and that this did not prevent the Claimant from pleading his case.

24. It was submitted that there had been multiple case management hearings with no progress being made and the Respondent did not know the case against them. The Claimant had had the opportunity to plead the protected disclosures not in the ET1 and had not done so. In those circumstances, that part of the claim should be struck out. The Tribunal asked which part and Mr Francis clarified that it would be the claims under ss48 & 103A ERA.

25. The Tribunal sought clarification as to what it was in the ET1 that the Respondent says it does not have fair notice and why further particulars were sought. The Tribunal explained that it was struggling to see the basis on which it could be said that the Respondent could not know the case it had to meet from the terms of the ET1, particularly in relation to the protected disclosures which are clearly pled. It was the claims in the ET1 which the Tribunal was

being asked to strike-out and it considered it needed to be satisfied that there could be no fair trial of these claims.

26. Mr Francis replied that he could not explain why further particulars had been sought. He speculated that it may have been said that further disclosures than just those pled in the ET1 may be relied upon but he could not say for certain.

27. He accepted that the ET1 is clear other than not providing precise dates for the disclosures pled. Even then he accepted that the information provided would be sufficient for the Respondent to be able to identify a period in which it is said that the disclosures took place and investigate appropriately. It was the inadequate specification of the disclosures in the further particulars which was the problem.

28. The Tribunal asked Mr Francis for his comments on the question of whether "part of claim" in Rule 37 would allow it to strike-out averments relating to just the protected disclosures and not just causes of actions. He replied that it did and that, technically speaking, the further particulars could be treated be treated as an application to amend which the Tribunal could reject and restrict the protected disclosures which form the basis of the claim.

29. In relation to the amendment application, Mr Francis clarified that he did not act for the party whom the Claimant sought to add as a respondent. Any submissions which he made were, therefore, made only on behalf of the present Respondent and to assist the Tribunal.

30. The application to amend was first mentioned in an email from the Claimant's solicitor on 19 January 2021. The email is not produced in the bundle but is referred to in the Note of the January hearing at p48. It is made under Rule 34.

31. An ACAS Early Conciliation Certificate for the proposed respondent is produced at p90 and it was noted that this is dated after the ET1 was presented. Reference was made to caselaw set out in the Note of the January

hearing which states that one factor is whether ACAS Early Conciliation is done at the time of the claim.

32. It was noted that the Claimant was legally represented at the time the ET1 was lodged.

33. There will be a final hearing in this case for the Respondent in this case in any event and so no prejudice to them whether the application is granted or not. There would be very little prejudice to the Claimant if the case proceeds to a hearing against only the present Respondent.

34. Finally, it was submitted that the proposed respondent is not a proper respondent to the unfair dismissal claims.

Claimant's submissions

35. The Claimant made the following submissions.

36. Much of the submissions by the Claimant regarding the strike-out application related to what he perceived to be failures by the Respondent or its staff to comply with FCA Rules which gave rise to his disclosures rather than addressing the issue of whether he had, in fact, complied with the Order or issues such as whether the Respondent has had fair notice of his case. This is not intended as a criticism of the Claimant who the Tribunal recognises is a party litigant. Rather, it is the explanation was not set out those elements of the Claimant's submissions which are not relevant to the issues to be determined.

37. The Claimant submitted that he did not ask for further particulars; it was the Respondent who asked for this and he provided these. He has given all the further particulars other than dates. He referred to p92 and submitted that this accords what the court said it wanted him to do.

38. In relation to the amendment application, the Tribunal asked where the formal application was actually made. Mr Francis sought to assist by making

reference to the Note of the January hearing at p48, paragraphs 12 and 14 but that there was no formal application.

39. The Claimant referred to his email of 13 May 2021 at p92 where it sets out the amendment application. He submitted that after he received a job offer, he was confident in adding the proposed respondent. The reason this party was not named in the ET1 because the individual in question was "blackballing" the Claimant from getting a job.

40. The Claimant then went on to effectively give evidence about the alleged detriments to which he says he was subject by the proposed respondent rather than addressing the issues to be determined in the amendment application. Again, the Tribunal recognises that the Claimant is a party litigant and so only sets out those submissions which are relevant to the application.

41. The Tribunal asked the Claimant to which claims he seeks to add the proposed respondent and he replied that it was all of them. The Tribunal sought to understand what statutory provisions the Claimant said made the proposed respondent liable for the different claims and the Claimant made reference to s48 of the ERA which he said also applied to the unfair dismissal claim.

42. The Tribunal also asked the Claimant to address it on the issue of time limits. He explained that he was worried about getting a job and when he got one then he engaged ACAS Early Conciliation within the time limit. He made reference to p92 and said that he had brought in the proposed respondent in plenty of time.

Relevant Law

43. Section 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), (b)…

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

(d), (e)

44. 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.* When dealing with party litigants, strike-out may only be appropriate after a reasonable attempt has been made by the Tribunal to identify the claims and issues (*Cox v Adecco & ors* UKEAT/0339/19).

45. 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. The Tribunal considers that this principle can be extended to claims regarding protected disclosures.

46. 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*)

47. The approach to be taken by the Tribunal in addressing the issue of strike-out was summarised by Burton J, in *Bolch v Chipman* [2004] IRLR 140. That case involved an application under under Rule 37(1)(b) but the Tribunal considers that the principles apply to applications under the other grounds in Rule 37. The approach identified is:-

a. The Tribunal must reach a conclusion whether [there has been a failure to comply with an Order and the extent of any non-compliance].

b. Even if there is such conduct, the Tribunal must decide whether a fair trial is still possible.

c. If a fair trial is not possible, the Tribunal must still consider whether strike-out is a proportionate remedy or whether a lesser sanction would be proportionate.

d. If strike-out is granted then the Tribunal needs to address the effect of that and exercise its case management powers appropriately.

48. In relation to non-compliance with Orders, the Tribunal needs to address the magnitude of the non-compliance and whether strike-out is a proportionate response to that (*Baber v Royal Bank of Scotland plc* UKEAT/0301/15).

49. 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.*

50. 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.

51. 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.

52. 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.

53. 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):-

    a. *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.*

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

    c. *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.*

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

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

f. 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.

g. 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 – strike-out

54. Before turning to the specific issues to be addressed in determining this application, the Tribunal considers it would be helpful to make some preliminary comments which apply across the issues it has to determine.

55. In the Tribunal's view, the problems in this case have arisen from attempts to have the Claimant particularise his case in circumstances where there was, on the face of it, no need for any further particularisation. The Tribunal considers that the ET1 set out the Claimant's case in clear and succinct terms and there is absolutely no basis on which it could be said that the Respondent had not been given fair notice of the case it had to meet in terms of the protected disclosures, the detriments to which the Claimant said he was subject and why it was said his dismissal was unfair.

56. For some reason, the Respondent requested further particulars. Although the bundle did not contain any correspondence which identified how the issue of further particulars arose, the Tribunal has noted from the case papers that the Respondent's Case Management Agenda contains a request for further particulars about the protected disclosures and this is clearly what raised the issue of further particulars.

57. However, the Agenda does not set out why these were being requested or what it was that the Respondent considered they had not had fair notice in the ET1. Further, there is no discussion of these issues recorded at the January hearing which might have given some insight into what was being sought and why. It is difficult to avoid the impression that this is a case of a "boilerplate" request being made rather than something to which the Respondent or its agent has applied its mind.

58. These issues are compounded by the terms of the Order which simply asks the Claimant to provide *"clarification of the factual and legal basis of the claimant's claim"*. It is noted that this is broader than just the issue of protected disclosures; it is that narrower point that the Claimant's previous solicitor understood to be what was sought and that would accord with the terms of the Respondent's Case Management Agenda. Certainly, the strike-out application has not been advanced on the basis that the Claimant should have provided further particulars about matters beyond the issue of the disclosure. In any event, the Order as worded gives no indication of what it is that is deficient in the ET1 and what information will fix any such deficiencies.

59. In these circumstances, the Tribunal makes no criticism of the Claimant in his responses to the Order. He has clearly made his best efforts to comply with the Order in circumstances in which the Tribunal considers a qualified lawyer would struggle to understand what was to be provided, let alone a party litigant.

60. With these comments in mind, the Tribunal turns to the specific issues to be addressed in determining the strike-out application and the first of those is whether the Claimant has, in fact, failed to comply with the Order.

61. This is not a case where there has been no compliance at all. The Claimant has sought to satisfy the calls being made upon him on multiple occasions. The fact that the contents of the correspondence from the Claimant does not set out matters in the way in which the Respondent would like it to is not something for which the Tribunal is prepared to criticise the Claimant; he is a

party litigant and so cannot be expected to plead his case in the way in which a lawyer would and he was trying to respond to a very broad request.

62. Further, the Tribunal notes that there was no attempt by the Respondent to set out in its correspondence what information it considered the Claimant needed to provide in order for the Respondent to have what it considered to be a proper response. It is not, therefore, surprising that the Claimant did not provide such information. The Tribunal considers that the proper approach would not be to immediately move to strike-out but, rather, for the Respondent to make a focussed request for further information about the particulars of the claim that set out what was required.

63. The Tribunal does accept that the particulars provided by the Claimant do not provide fair notice of the case which the Claimant seeks to set out in those particulars. As explained above, this is not intended as a criticism of the Claimant but it is the case that the Respondent does not have sufficient detail of any protected disclosures which are set out in the Claimant's further particulars. The Tribunal will return to this point below when it deals with how this issue is to be addressed.

64. In these circumstances, the Tribunal is not prepared to find that the Claimant has failed to comply with the Order made in January 2021. He has responded to that and the worst that can be said is that he has not set out the further particulars in sufficient detail but that is not surprising given the terms of the Order he was seeking to answer.

65. This would be enough, on its own, to dispose of the strike-out application but the Tribunal considers that, even if it had found a failure to comply by the Claimant, it would not have struck-out the claims on the basis of the second issue to be addressed, that is, whether it is still possible to have a fair trial.

66. It is the claims set out in the ET1 which the Tribunal is being asked to strike-out and, as set out above (and as Mr Francis rightly accepted), the claims in the ET1 are perfectly well pled with no question that the Respondent has fair

notice of the case it has to answer. In these circumstances, there is no doubt in the Tribunal's mind that a fair trial of the claims pled in the ET1 is possible. On that basis, the application for strike-out would be refused even if there had been a failure to comply.

67. The difficulty now facing all those involved in the case is that, the Respondent having asked for them, they have further particulars of the claim in relation to protected disclosures which they say are not sufficiently well pled for them to prepare a response.

68. Having considered the matter, the Tribunal has come to the decision that the way to resolve this problem is to, of its own motion, set aside the January Order and issue a revised Order. In doing so, the Tribunal directs that the Claimant's replies to the now defunct January Order should also be disregarded and form no part of his pled case.

69. The purpose of the revised Order is to seek clarification of whether or not the Claimant relies on protected disclosures in addition to those set out in his ET1 and, if so, for him to provide information about those disclosures so that the Respondent has fair notice of them.

70. The Tribunal considers that it would assist the Claimant if it is explained that he will only be able to lead evidence at any final hearing in his case about those disclosures which are set out in either his ET1 or in the response to the revised Order.

71. The revised Order is framed as a series of questions and the Claimant should focus an answering those questions. If he does so then he will provide the necessary information for the Respondent to have fair notice. At this stage, he does not need to provide evidence (that is a matter for the final hearing) and simply needs to set out what his case is.

72. Where dates are requested, if the Claimant does not have a precise date then he should give sufficient information from which the time period in which any disclosure was made can be identified.

73. If the Claimant needs any example of how to frame his reply to the Order then the Tribunal commends the terms of his ET1 to him which is a very good example of how to set out the information needed to give fair notice of protected disclosures.

74. The Tribunal considers that a period of 28 days from the date on which this judgment is sent to the parties should be sufficient for him to respond to the Order.

75. The Tribunal also makes an Order that, within 28 days of the Claimant providing his response to the Order, the Respondent, if so advised, provides further particulars of its Response dealing with any additional disclosures relied on by the Claimant.

Decision - amendment

76. To the extent that the application seeks to add a second respondent to the claims of unfair dismissal who is another employee of the Claimant's employer then that application is not competent because such claims cannot be pursued against such a person.

77. Section 111 ERA states that a claim of unfair dismissal can be pursued in the Employment Tribunal against the claimant's "employer". In other words, the person with whom the claimant has a contract of employment. In the present case, the Claimant has a contract of employment with the current Respondent and not the proposed second respondent. The application to amend the claim to add that person as a respondent to the unfair dismissal claims is, therefore, not competent and is refused for that reason.

78. The position is different for the claim of detriment under ss47B & 48 ERA. Under s47B(1A)(a), a worker can bring a claim that they have been subject to a detriment by another worker of their employer in the course of employment. It is, therefore, competent to add the proposed second respondent and it is then a question of whether the Tribunal chooses to exercise its discretion in deciding whether or not to allow the amendment.

79. 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.

80. First, there is the nature of the amendment itself which is to add a new respondent. The amendment does not seek to change the claims being pursued or the basis of the existing claims against the existing Respondent.

81. However, if the amendment is allowed then does mean that there is a new cause of action against a respondent who was not previously subject to any claim.

82. To put it another way, as far as the existing Respondent is concerned then they do not face any new or different case from that which they have faced from the outset but the proposed respondent does face an entirely new case that they did not face before.

83. Second, there is the issue of the applicability of time limits and these would apply as far as the proposed respondent is concerned. However, the application to amend was made within the time limit (starting from the date of the last alleged detriment on 7 October 2020) as extended by the provisions relating to ACAS Early Conciliation so this is not a case where it could be said that a claim lodged against the proposed respondent presented by way of a fresh ET1 on the same date as the amendment application was entirely.

84. There is, however, the same time limit issue for the proposed respondent as for the current Respondent in relation to whether earlier detriments form a series of acts culminating with the alleged detriment on 7 October 2020. It would, therefore, be correct to say that no issue of time limits exists at all in respect of the proposed respondent.

85. Third, there is the factor as to the timing and manner of the application. The Tribunal notes that the application was made very early in the case management process and before the first case management hearing.

86. The Tribunal did have some difficulty in following the logic of the Claimant's reason why the proposed respondent was not named on the ET1 when it was first lodged. The position advanced at the hearing is that the Claimant was concerned that the proposed respondent would prevent him from securing a new job and so did not want to prompt such action by bringing a claim against this individual until such time as he had obtained new employment. However, the most recent alleged detriment is that this individual was that he had prevented the Claimant from securing a new job and so was already allegedly engaged in the very conduct which the Claimant was seeking to avoid.

87. There is also the fact that the proposed respondent was already named in the ET1 as the person who subjected the Claimant to the alleged detriments for which the current Respondent is said to be liable. The proposed respondent is, therefore, already involved in the claim.

88. However, the Tribunal does consider that, despite the fact that it may not make sense when viewed objectively, this is clearly the genuine reason which operated on the Claimant's decision when to seek to add the proposed respondent.

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

90. 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 present Respondent which required to be resolved after the Tribunal sitting in the final hearing had heard all the evidence. The same would apply to the proposed respondent.

91. Turning to the balance of injustice and hardship between the parties, the Tribunal considered that there would be no injustice or hardship to the current Respondent who faces the very same potential liabilities whether the amendment is allowed or not.

92. The proposed respondent was not present at the hearing and so had no opportunity to comment on any prejudice to him. The Tribunal does consider that the proposed respondent may say that there is a hardship in that they would now have to deal with a claim (and face a liability) that they did not previously. However, the Tribunal does not consider that this is a significant hardship; the proposed respondent has the opportunity to defend the claim and there was no suggestion that they are somehow prevented from doing so or that their ability to do so was prejudiced by the fact that they have not been a party to the case.

93. Indeed, the Tribunal observes that the proposed respondent is likely to be one of the prime witnesses for the current Respondent and so is likely to already be aware of the claim.

94. The Tribunal considers that there is very little prejudice to the Claimant if the application to amend was refused. In those circumstances, he would be in the exact same position as he is now and his ability to pursue his claims against the current Respondent would not be affected at all.

95. It is noted that this is not a case where the Respondent has sought to rely on the defence under s47B(1D) ERA to escape liability for any alleged detriments to the Claimant done by other workers of the Respondent. If they had then the Tribunal would consider that there was a prejudice to the Claimant if the individual worker was not added as a respondent who could be held liable.

96. However, the present Respondent does not seek to rely on that statutory defence.

97. The only real disadvantage to the Claimant would, in fact, arise if the application is granted as there would then be a delay in the claim being progressed whilst the ET1 is served on the proposed respondent and he is given a chance to lodge his defence.

98. In these circumstances, taking account of all the matters set out above and, in particular, the lack of any prejudice to the Claimant if the amendment is not

allowed balanced against the delay to progressing the case if it is allowed, the Tribunal refuses the application under Rule 34.

NOTES ON ORDERS

1 You may make an application under Rule 29 for this Order to be varied, suspended or set aside. Your application should set out the reason why you say that the Order should be varied, suspended or set aside. **You must confirm when making the application that you have copied it to the other party(ies) and notified them that they should provide the Tribunal with any objections to the application as soon as possible.**

2 If this order is not complied with, the Tribunal may make an Order under Rule 76 (2) for expenses or preparation time against the party in default.

3 If this order is not complied with, the Tribunal may strike out the whole or part of the claim or response under Rule 37.

Employment Judge: Peter O'Donnell
Date of Judgment: 03 September 2021
Entered in register: 06 September 2021
and copied to parties