EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms Deborah Conn	AND	Oaklands Residential Care Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY BY CVP **ON** 27 September 2021

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In person**
For the Respondent: **Miss G Crew of Counsel**

JUDGMENT ON APPLICATION TO AMEND

The claimant's application to amend the originating application is refused.

RESERVED REASONS

1. This judgment should be read together with a separate judgment of today's date which ultimately dismissed the claimant's claims because they were presented out of time.
2. In this case the claimant seeks leave to amend the claim which is currently before the Tribunal, and the respondent opposes that application. I have heard from the claimant, and I have also heard from Mr Daniel Agoye who gave evidence on behalf of the respondent. I have also heard factual and legal submissions on behalf of the respective parties.
3. The claim as it currently stands:
4. The general background and procedural history of the claim as it stands before the determination of this application is as follows. The claimant brings claims of automatically unfair dismissal and for detriment on the ground of having made protected public interest disclosures. The effective date of the termination of the claimant's employment was 4 May 2020. The normal time limit of three months therefore expired on 3 August 2020. The claimant commenced the Early Conciliation process with ACAS on 28 August 2020 (Day A). ACAS issued the Early Conciliation Certificate on the same day, 28 August 2020, (Day B). The

claimant presented these proceedings on 1 September 2020. In circumstances where the normal time limit of three months had already expired before the claimant commenced the Early Conciliation process with ACAS, the claimant does not benefit from an extension of time under the relevant provisions. The claims were therefore presented just under one month out of time.

5. In her originating application the claimant complained of dismissal for whistleblowing, and being subject to "bullying, abusive and derogatory behaviour". There were no specific particulars, nor any allegation at that stage of any detriment said to have arisen after the claimant's employment had ended. In any event there was a case management preliminary hearing on 26 May 2021, and the claimant clarified that her claims were for automatically unfair dismissal, and for detriment which was described to be "bullying". There was no suggestion at that stage that these allegations included allegations of detriment after the termination of the claimant's employment. The claimant was ordered to provide further and better information of her allegations of detriment.
6. In compliance with that order the claimant provided detailed particulars of her alleged disclosures and detriments, albeit that much of the content was of an evidential nature. These particulars did not refer to an alleged detriment post termination of employment to the effect that the respondent had reported the matter to the Police and/or the Information Commissioner's Office (ICO). A preliminary hearing was listed today to determine whether the claimant had made protected public interest disclosures; whether her claims should be dismissed as being out of time; and to determine an application from the respondent that the claimant's claims should be struck out and/or subject to a deposit order on the basis that they had no reasonable prospect of success, or little reasonable prospect of success.
7. The claimant prepared a detailed written statement for the purposes of the preliminary hearing which did not refer to an alleged detriment post termination of employment to the effect that the respondent had reported the matter to the Police and/or the ICO.
8. I questioned the claimant closely on the nature of the alleged disclosures and the alleged detriments during this preliminary hearing, by reference to her originating application, her further particulars and her statement, to ensure that the claimant was clear as to exactly what disclosures she had made and which were said to be protected public interest disclosures, and what detriments, other than dismissal, were said to have been caused by these disclosures.
9. The claimant confirmed that she was relying on six protected public interest disclosures, the last of which was on her last shift on 27 April 2020. These were all said to have caused detriment in the sense that she was alienated and bullied by fellow staff, and these were all said to have contributed to her dismissal which was communicated on 4 May 2020.
10. The claimant also suggested for the first time that she wished to rely on a detriment post termination of employment namely that the respondent had reported her to the Police on 12 June 2020 (and possibly the ICO). Mr Agoye of the respondent confirmed the fact that that had happened, namely that he had made a report to both the Police and the ICO on 12 June 2020. Mr Agoye explained that the respondent had received statements from a number of other members of staff to the effect that the claimant was disclosing confidential information relating to patients via Facebook, and because of an email to the Secretary of State for Health, and her MP, which was copied to the respondent, and which appeared to

suggest that the respondent was responsible for "murder" of its residents as a result of its practices in the COVID 19 pandemic.

11. Mr Agoye explained that it was standard safeguarding procedures in circumstances where the confidential information of vulnerable adults appeared to be compromised to report the matter to the safeguarding authorities. In circumstances where it related to a former employee and the safeguarding authorities could not deal the matter with the respondent home internally, it was also standard procedure to report the matter to the Police and the ICO. Mr Agoye confirmed that this is why he reported the circumstances relating to the claimant to the Police and the ICO and that it was not because of any alleged disclosures which the claimant had previously made.
12. I accept Mr Agoye's evidence that the reason he reported the claimant to the Police and the ICO on 12 June 2021 it was because of his understanding that the standard safeguarding procedures in these circumstances required him to do so, and that the alleged protected disclosures played no part whatsoever in his decision (applying Fecitt and others v NHS Manchester [2012] ICR 372 CA).
13. The nature and detail of the application to amend:
14. The claimant's application is as follows. She applies to amend her claim to include an allegation of detriment that the respondent reported her to the Police and the ICO on 12 June 2021. This is an allegation of detriment post termination of her employment which ended on 4 May 2020. The respondent objects to the claimant's application on the grounds that: (i) it is a new allegation which had not been mentioned in the originating application, the case management order, the claimant's further particulars, nor her statement for today's hearing; (ii) the application is out of time; (iii) the entirety of the claimant's detriment claims must be out of time but for this late proposed amendment which is sought to bring these other matters into time; (iv) in any event the allegation has no reasonable prospect of success bearing in my Mr Agoye's clear evidence.
15. The applicable law:
16. An Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of Chapman v Simon [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.
17. In Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA.
18. In Transport and General Workers' Union v Safeway Stores Limited EAT 0092/07 Underhill P as he then was overturned a Tribunal's refusal to allow an amendment because there was no attempt to apply the Cocking test, and, specifically, no review of all the circumstances including the relative balance of injustice.
19. The EAT held in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be

caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors would include:

20. 1 - The nature of the proposed amendment - applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action; and
21. 2 - The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended [the word "essential" is considered further below]; and
22. 3 - The timing and manner of the application - an application should not be refused solely because there has been a 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 discovery of new facts or new information appearing from documents disclosed on discovery.
23. These factors are not exhaustive and there may be additional factors to consider, (for example, 4 - The merits of the claim). The more detailed position with regard to each of these elements is as follows, dealing with each of them in turn:
24. 1 - The nature of the proposed amendment: A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim (often called "relabelling"); and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.
25. Mummery J in Selkent suggests that this aspect should be considered first (before any time limitation issues are brought into the equation) because it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from "relabelling" the existing claim. If it is a purely relabelling exercise than it does not matter whether the amendment is brought within the timeframe for that particular claim or not – see Foxtons Ltd v Ruwiel UKEAT/0056/08. Nevertheless whatever type of amendment is proposed the core test is the same: namely reviewing all the circumstances including the relative balance of injustice in deciding whether or not to allow the amendment (that is the Cocking test as restated in Selkent).
26. In my judgment the proposed amendment comes under the first category, namely it is one which seeks to alter the basis of an existing claim without raising a new distinct head of complaint. As confirmed in the case management order, the claimant already has a claim for detriment arising from the alleged public interest disclosures, and the application only seeks to add another example of alleged detriment to this existing claim.
27. 2 - The applicability of time limits: This factor only applies where the proposed amendment raises what effectively is a brand new cause of action (whether or not it arises out of the same facts as the original claim). Where the amendment is simply changing the basis of, or "relabelling", the existing claim, it raises no question of time limitation – (see for example Foxtons Ltd v Ruwiel UKEAT/0056/08 per Elias P at para 13).

28. 3 - The timing and manner of the application: This effectively concerns the extent to which the applicant has delayed making the application to amend. Delay may count against the applicant because the Overriding Objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment - see Martin v Microgen Wealth Management Systems Ltd EAT 0505/06. However, an application to amend should not be refused solely because there has been a delay in making it, as amendments may properly be made at any stage of the proceedings. This is confirmed in the Presidential Guidance on General Case Management for England and Wales (13 March 2014).
29. The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in Ladbrokes Racing Ltd v Traynor EATS 0067/06: the Tribunal will need to consider: (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.
30. The proposed amendment is a new allegation which had not been mentioned in the originating application, the case management order, the claimant's further particulars, nor in her statement for today's hearing. The respondent does not argue that this is a case in which it would be prejudiced by any delay in the sense that the delay would affect the cogency of the respondent's evidence required to deal with the claim. However, because the claimant's claims would otherwise be out of time in their entirety, it does raise a significant matter of prejudice for which see further below.
31. 4 - The Merits of the Claim: It may be appropriate to consider whether the claim, as amended, has reasonable prospects of success. In Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06, one of the reasons the EAT gave for upholding the Tribunal's decision to refuse the application to amend was that it would have required further factual matters to be investigated "if this new and implausible case was to get off the ground". However, Tribunals should proceed with caution because it may not be clear from the pleadings what the merits of the new claim are: the EAT observed in Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12 that there is no point in allowing an amendment to add an utterly hopeless case, but otherwise it should be assumed that the case is arguable.
32. For the reasons explained above, reliant upon Mr Agoye's evidence, in this case I find that the allegations introduced by the proposed amendment do not enjoy reasonable prospects of success.
33. Judgment:
34. Applying these legal principles above to the current application, I find as follows.
35. This case involves balancing hardship, prejudice and injustice between the parties which are significant on both sides. If the amendment is not allowed, then the claimant's unfair dismissal and detriment claims are all out of time for the reasons explained in the attached judgment of today's date on that point. The result is that the claimant's claims will be at an end and she will not be in a position to pursue her claims to a full hearing. That will be a windfall for the respondent.

36. On the other hand, the respondent asserts that the potential prejudice against it is equally if not more significant. It argues that the claimant's claims should be dismissed in their entirety as being out of time. The proposed amendment itself is out of time and has no reasonable prospect of success. Allowing the amendment would therefore have the effect of reintroducing an otherwise dismissed claim on the basis of an allegation which was out of time and has no reasonable prospect of success. The respondent will be put to even further time, trouble and expense of defending what it sees as an unreasonable claim, and which will prejudice the respondent significantly and be an even bigger windfall for the claimant.
37. On balance in my judgment the greater prejudice would lie against the respondent in allowing the application in the circumstances. The claimant's claims are out of time and the proposed amendment has no real prospects of success. In these circumstances I refuse the claimant's application to amend her proceedings as sought.

Employment Judge N J Roper
Dated: 6 October 2021

Judgment sent to parties: 21 October 2021

FOR THE TRIBUNAL OFFICE