EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107643/2021 (P)

Held on 1 November 2021

Employment Judge N M Hosie

Ikemefuna G M Onyia	**Claimant** **In Person**
Maryfield West Care Home	**Respondent** **Represented by** **Mr Z Mo,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's application to amend is granted.

REASONS

Introduction

1. This case has something of a history. The claimant, a litigant in person, submitted his claim form on 14 February 2021. He intimated that he wished to bring complaints of constructive unfair dismissal, for unlawful deduction of wages and for less favourable treatment and victimisation in terms of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations.

2. The respondent's solicitor submitted a response form on 16 March 2021. The claim was denied in its entirety.

3. I conducted a case management preliminary hearing on 14 April 2021. The Note which I issued following that hearing is referred to for its terms. At the preliminary hearing, the claimant advised that he wished to bring complaints of detriment and automatic unfair dismissal for making a protected disclosure(s). I directed him, therefore, to provide further and better particulars, within 14 days.

Claimant's further and better particulars

4. By e-mail on 9 May 2021 at 08:28, the claimant submitted further and better particulars for each of the complaints he wished to advance by way of an "application to amend/particularise claim". He intimated that he wished to withdraw his part-time worker's less favourable treatment complaint; he provided further details of his constructive unfair dismissal complaint and of his complaint of unlawful deduction from wages. He then went on to advance "whistleblowing" complaints: that he had been subjected to detriments and that his dismissal was automatically unfair.

Respondent's response

5. By e-mail on 21 May 2021 at 09:26, the respondent's solicitor intimated that he objected to the claimant's application to amend the claim to include the whistleblowing complaints. He gave a number of reasons for his objection: the claimant had not ticked the 'protected disclosure' box in his claim form; there was only a 'mere single statement of 'health and safety'; this was not a 're-labelling' exercise; the 'further and better particulars are far beyond what had been pled originally'; the amendment was '*a substantial alteration pleading two new causes of action';* there was no explanation why the

application had not been made earlier; the amendment seeks to introduce a 'new claim'; 'the case as pleaded revealed no grounds for a claim of protected disclosure and detriment'; the strength of the amended claim should be considered and 'it remains unclear what exactly are the protected disclosure(s) relied upon'.

6. In support of his submissions the respondent's solicitor referred to the following cases:-

Ali v. Office of National Statistics [2004] EWCA Civ1363;
Abercrombie & Ors v. Aga Range Master Ltd [2014] ICR 204;
Housing Corporation v. Bryant [1999] ICR 123

Preliminary hearing on 3 August 2021

7. Judge Hendry conducted a preliminary hearing on 3 August 2021 to discuss case management and in particular the claimant's application to amend. The Note which he issued following that hearing is referred to for its terms. At the hearing, the claimant intimated that he would not pursue a claim for detriment arising from a protected disclosure. This meant that the complaints he wished to advance were constructive unfair dismissal, automatic unfair dismissal, in terms of s.103A of the Employment Rights Act 1996, for making a protective disclosure and unlawful deduction from wages. Judge Hendry directed the claimant to adjust his further and better particulars, "to detail what he says amounts to protected disclosures (when they were made and to whom and in what circumstances)".

Claimant's response

8. The claimant submitted his adjustments, as directed by Judge Hendry, by e-mail on 9 September 2021 at 00:48.

9. The respondent's solicitor advised that he wished to maintain his objection based on the representations in his e-mail of 21 May. It was agreed that I would determine the issue "on the papers".

Discussion and decision

10. In ***Cocking v. Sandhurst (Stationers) Ltd & Anor*** [1974] ICR 650, Sir John Donaldson, delivering the Judgment of the NRIC laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to a claim form. These guidelines have been approved in several subsequent cases and were re-stated in ***Selkent Bus Co. Ltd v. Moore*** [1996] ICR 836. In that case, the EAT emphasised that the Tribunal, in determining whether to grant an application to amend, must carry out a careful balancing exercise of the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to parties by granting or refusing the amendment. This approach by the EAT was also endorsed by the Court of Appeal in ***Ali***, to which I was referred by the respondent's solicitor.

11. Mr Justice Mummery, the then President of the EAT, gave the following guidance at pages 843 and 844 in ***Selkent*** :-

> *"(4) Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of the amendment against the injustice and hardship of refusing it.*
>
> *(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant:*

(a) *The nature of the amendment.*

Applications to amend are many different kinds ranging, on the one hand from the correction of clerical and typing errors, additions of factual details to existing allegations and the addition or substituting a further label for facts already pleaded to, to on the other hand, making of entirely new factual allegations which change the basis of the existing claims. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) *The applicability of time limits*

If a new complaint or cause of action is proposed to be added by way of amendment it is essential for the Tribunal to consider whether that complaint is out of time, and if so, whether the time limit could be extended under the applicable statutory provisions e.g. in the case of unfair dismissal s.67 of the Employment Protection (Consolidation) Act 1978.

(c) *The timing and manner of the application*

An application should not be refused wholly because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time, before, at, even after the hearing of the case. 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 and information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting amendments. Questions of delay, as a result of adjournment and additional costs particularly if they are unlikely to be recovered by the successful party are relevant in reaching a decision."

12. When considering the issue I also had regard to the guidance of EAT in the recent case of ***Vaughan v. Modality Partnership*** UKEAT/0147/20/BA.

Present case

Nature of the amendment

13. I did not find this at all easy. However, I was mindful of the recent decision of the EAT in ***Dorrington v. Tower Hamlets GP Care Group CIC*** UKEAT/0308/19/BA, to which I was referred by the claimant. In short, the EAT decided that a claim for unfair dismissal is wide enough to encompass a claim for unfair dismissal based on whistleblowing, because the latter is a subset of the former.

14. The claimant had not ticked the box at para. 10.1 to intimate that he wished to bring a "whistleblowing" claim. However, at para.10 in the "factual background" annexed to the claim form, the claimant made the following averments:-

> "*10) The I* (sic) *believe that the suspension was opportunistic and vengeful perhaps for speaking up against some matters concerning health and safety, otherwise there was no reasonable and proper cause to suspend given that no immediate safety or security issues exist. It is vengeful because it did not act as a measure of last resort. Instead it seemed like an automatic response. Alternatively, as stated earlier, an act devised to extract retribution for the audacity to raise concerns about a possible breach of health and safety. I refer to my Email dated August 7, 2020.*"

15. In that e-mail to the respondent's Manager, Mike Cully, the claimant had raised health and safety concerns. Also, in his Agenda for the case management preliminary hearing on 14 April the claimant intimated that he wished to "bring complaints of detriment for making a protected disclosure and also possibly of automatic unfair dismissal for making a protected disclosure" and that was why in my Note following the preliminary hearing I directed the claimant to confirm that he wished to bring discrimination complaints (which he did) and, if so, provide further and better particulars.

16. Albeit with some hesitation, I decided, in all the circumstances, the claimant's application to amend did not seek to introduce a new cause of action, but rather was "the addition or substitution of a further label for facts already

pleaded to", albeit that these facts were brief. I was also mindful that in the proposed amendment (as adjusted) the "protected disclosure" relied upon by the claimant was his e-mail of 7 August 2020 which he had referred to in the claim form. The nature of the "amendment" (using that term in a neutral sense) is, in my view, particularisation of an existing complaint.

Applicability of time limits

17. Having regard to the Judgment of the EAT in ***Dorrington*** and my decision that this was not a new cause of action, I was satisfied that the whistleblowing claim was timeous. In any event, as Mr Justice Mummery said in ***Selkent***, it is but one factor to be considered in the round, albeit an important one.

The timing and the manner of the application/prejudice and hardship

18. I was mindful that the claimant was unrepresented but it is clear that he is well able to articulate his claim and I was concerned that the whistleblowing complaint was something of an afterthought, as there was no specific reference to such a complaint, as such, in either the claim form, the claimant's grievance or his resignation e-mail.

19. However, the key principle in exercising it's discretion is that a Tribunal must have regard to all the circumstances, and in particular, to any injustice or hardship which would result from the amendment or refusal to make it.

20. While there was no apparent reason for the delay in the claimant intimating his application and there would be further delay were I to grant it, I was satisfied that the cogency of the evidence would not be affected.

21. I was also mindful that to grant the application would involve delay and the respondent would incur further expense. However, were I to refuse it the claimant would be denied the opportunity of pursuing a complaint relating to

health and safety issues which he had raised in his e-mail of 7 August 2020 to the respondent and which he had in mind when he submitted his claim form, although he failed to provide suitable particularisation. In my view, that outweighed the prejudice to the respondent having to respond to the amended claim. I arrived at the view, therefore, that the balance of prejudice/hardship favoured the claimant.

22. I decided that the claimant's application to amend, in terms of his e-mails of 9 May 2021 at 08:28, as adjusted by his e-mail of 9 September 2021 at 00:48, should be allowed. I am also satisfied this decision is in accordance with the "overriding objective" in the Rules of Procedure and in the interests of justice.

23. Finally, **the respondent is directed to respond to the claim form, as amended, within 21 days of receipt of this Judgment and at the same time to make representations as to further procedure.**

Employment Judge **Judge N Hosie**

Dated **10 November 2021**

Date sent to parties **10 November 2021**