EMPLOYMENT TRIBUNALS

Claimant: Mr D Eveleigh

Respondent: Care Management Group Limited t/a Achieve Together

Heard at: By Telephone On: 3rd December 2021

Before: Employment Judge R F Powell

Appearances

For the Claimant: In person

For the Respondent: Mr Morris, solicitor

Reasons

These reasons are provided consequent to a request made by Mr Morris, at the hearing on the 3rd December 2021, following oral judgment.

Introduction

1. This is the judgment of the Employment Tribunal on the application by the claimant, Mr David Eveleigh to amend his particulars of claim against Care Management Group Limited t/a Achieve Together, his former employer. The application is opposed by the respondent.

The relevant circumstances of the case

2. The relevant history behind this application begins with the presentation of a claim to the employment tribunal on the 21st of February 2021 in which Mr Eveleigh claimed that he had been unfairly dismissed from his employment on 14th October 2020.

3. The particulars of this claim are set out at page 11[1] of the 112-page bundle that I have been provided with. The particulars included; statements such as;

   "I also reported 2 managers for not following policy and procedures on the abuse of the service users ",

   "I also reported another member of staff for abuse to the manager".

4. The essence of his complaint is that the respondent's given reason for dismissal, gross misconduct, was spurious. That the disciplinary allegations were based on falsified evidence and that, along with the decision to dismiss were consequences of his complaints about the conduct of colleagues with whom he worked and which, on his case, amounted to protected public interest disclosures.

5. The respondent submitted its grounds of resistance in due course. The response denied the claims and denied that the claimant had made public interest disclosures. At paragraph 33 (page 26) it pleaded a second line defence; that, prior to the claimant's dismissal the claimant had engaged in posting pictures of other members of staff on his Facebook page and made comments suggesting that :

   "..they had abused and stollen (sic) from supported people within the service, been drinking alcohol on duty in neglect of their duties and that the Respondent had done 'fa' (i.e. 'fuck all') about these matters, whereas he was being punished in relation to the matter involving the receipt for £11.60…".

6. Paragraphs 41 & 42 of the response cited the content of paragraph 33 as its foundation for the respondent's submission that any award of compensation should be subject to a 100% reduction on a "Polkey" or contributory fault basis.

7. The claimant responded to these elements of the grounds of resistance, following receipt of the employment Tribunal's correspondence of the 29th June 2021 and later, on 6th July set out his response in more detail (page 47) is a relevant example:

   "*A manager who worked for Achieve Together asked my colleague to basically spy on me I have evidence sent me via messenger that the manger asked her to look at what I was putting on Facebook and Achieve Together said no action would be taken because she worked in a different house, she was still employed by Achieve Together and SD was her Manager*"

   And, on page 48;

   "*If I would have been dismissed for posting on Facebook then why wasn't SOB dismissed for doing the same thing even though she was on the final warning at the time at this is a case of victimization*."

[1] All page references are to electronic format pages, not the printed page numbers. Unfortunately the electronic bundle included pages which had not been numbered.

8. Shortly after that, on the 12th July 2021 (pages 49 & 50) the claimant sent an email to the tribunal making an application to amend his claim. His application asserted libel and victimization for posting on Facebook against Achieve Together.

9. These matters came before the Employment Tribunal at a preliminary hearing conducted by Employment Judge Howden Evans on the 22nd July 2021. She found that the claim form contained assertions of ordinary unfair dismissal, dismissal contrary to section 103A and a detriment contrary to sections 47 and 48 of the Employment Rights Act 1996[2].

10. In her order she recorded one alleged detriment; moving the Claimant to a different service.

11. At that hearing the claimant repeated that he wished to add to the list of detriment claims and was instructed that, as they were not present within the pleading, it would be necessary for him to make an application for leave to amend his claim. The claimant submitted his application by an email dated the 6th August 2021 (pages 68 to 71).

12. The bundle contains a good deal of evidence and correspondence which is not essential to my reasoning and to which I have not been referred. What is helpful, at page 107 of the bundle, is a clear statement of the three allegations which are the subject of this application.

13. The first of which is an element of the alleged forcible transfer of the claimant. That is an allegation which has already been found to be within the jurisdiction of the tribunal and needs no decision from me.

14. The second, which the claimant says he became aware of in October 2020 is that:

    "A social media post made by SO which was brought to the Claimant's attention on 2nd October 2020 'I was also the subject of abuse on Facebook by Sarah O Brian for whistle blowing. SOB put a photo of me on Facebook with the words across my body calling me a vile pig. On top of the photo, she said screen shot away and send it to the cunt'

15. The third, of which the claimant says he was informed of on 2nd May 2020 is:

    "That the Claimant received a message from a colleague (Elaine Playle) on 2nd May 2020 saying that a manager (Nicole Matthies) had asked Elaine to see what the Claimant had been posting on social media, suggesting he was being 'spied upon'. 'I also complained to Lucy Gin in HR about a message I received from a work colleague saying that she has been asked by the deputy manager Nicole Matthies to look at what I have been posting on Facebook and report back to her'

16. There seems to be, in comments within the earlier documents to which I have referred, some assertion of a managerial connection between Miss O'Brien and her colleague Elaine Playle.

17. The first incident subject to this application, made in July 2021, occurred in May 2020 and the second has a slightly shorter frame; October 2020 to July 2021.

[2] Paragraph 29 of her order.

The Parties submissions

Whether the claims were presented in time

18. The respondent argues that the two amendments were raised after the presentation of the claim and outside the relevant statutory primary time frame set out in section 48 (3) (a) &(b) of the Employment Rights Act 1996. That is doubtless correct as the claimant did not assert that the amendments were part of a "series of similar acts".

The reason for the delay

19. The respondent argues that the period of delay is not sufficiently explained, even after the claimant's opportunity to do so in discussion with myself. The respondent argues that if I accepted the claimant's explanation; that he didn't appreciate the existence of "a detriment" as a distinct claim, that does not explain why he didn't plead the facts when, on the face of the ET1, one of the alleged detriments, the forced transfer, was present within his pleading.

Prejudice to the Respondent

20. The Respondent points out that defending these allegations will require additional preparation which will add to the respondent's legal costs and potentially require an additional witness.

The merits of the proposed amendment

21. The respondent also asserts that, with respect to one of the claims, that it is, as a matter of law, in difficulty because the character of the communication between an employee and the claimant, which was conducted on Facebook, could not be found to be within the jurisdiction of the Employment Tribunal.

22. I was referred to the judgment in Tiplady v City of Bradford Metropolitan District Council, the leading judgment, of Lord justice Underhill, conducted a thorough review of the authorities, which included, for instance; Woodward v Abbey National a case where the alleged detriments occurred some years after the termination of Miss Woodward's employment. The Court of Appeal concluded that a claimant must have suffered the detriment "as an employee". However, that term was not to be construed too narrowly, in particular, it is not necessarily confined to actions at the place of work or during hours of work.

Analysis and decision

The merits of one of the proposed amendments

23. In this case both the claimant and "SOB" were employees of the respondent; an employer which appears to have some interest in its employee's use of Facebook. The claimant's chronology, which I'm sure the respondent will resist, is that Miss O'Brien had been subject to a work-related complaint or complaints, from the claimant. She then posted a picture of the claimant on Facebook[3] , and in the related messages refers to having her reputation damaged by the claimant as her reason for publishing the picture, with a number of swear words.

24. It is clearly arguable that, in the above context, the claim is concerned with the conduct of two employees whose conflict stems from a work-related complaint. Such a complaint is potentially within the Employment Tribunal's jurisdiction. The final determination of this issue lies with the tribunal which hears the relevant evidence.

The explanation for the timing of the application

25. In my judgment the claimant, a litigant in person, who had been a care worker for many years, and so far as I am aware has no relevant prior experience, certainly did not appreciate that there was a freestanding claim of "detriment" under section 47B of the Employment Rights Act 1996.

26. The reference in his ET1 to his "forced transfer" was not set out as a freestanding complaint, it was context to the complaints he makes about the respondent's decision to commence disciplinary proceedings and, thereafter, to dismiss him. I do not find the failure to set out facts, relevant to a cause of action which was unknown to a litigant in person, to be unreasonable.

27. The first time the two matters that are now before me came to light, albeit unclearly, was in response to the grounds of resistance's "Polkey" pleading; to which the claimant put forward an example of the respondent not disciplining somebody for a Facebook post even though that person allegedly had an existing final written warning[4]. The claimant at this time was not asserting a detriment. He was arguing that the pleaded "Polkey" defence shouldn't be given much weight. The proposed second amendment, regarding Elaine Playe, arose in a similar context. The claimant referred to the content of the first proposed amendment as "victimisation" in his application of the 12th July 2021 and following the case management Preliminary Hearing adopted the correct terminology.

Relative Prejudice to the parties

28. With regard to the prejudice to the parties on the one hand the respondent says it will be put to greater effort in terms of preparing and may have to call additional witnesses by reason of this amendment.

29. I am not persuaded by that argument. It seems to me that, before the amendment application was made, the claimant had indicated the basis he would challenge the Respondent's "Polkey" issue ; by reference to Ms O'Brien, in his own claim, without naming

[3] Page 89.

[4] Paragraphs 33 & 41, pages 47-48 of the bundle.

her, he referred to Ms O'Brien; as do the grounds of resistance so her involvement was a matter that was a live issue as a consequence of the claim form and the respondent's own response.

30. In my view Ms O'Brien's participation as a witness is not a matter which would not otherwise be potentially part of a final hearing.

31. With the Elaine Payne, the evidence which is said to a form the basis of the detriment complaint is a series of emails. In the documents before me Miss Playle, in an email, states that there had been an instruction to look at the claimant's Facebook page. There may be a complete rationale and a proper reason for that. Nevertheless, it is a tenable claim and the scope of that argument will probably be limited to whether that instruction was given ,and if so, what was the motivation for that instruction.

32. Ms Playle is still an employee of the respondent and I note there is reference in another part of the respondent's pleadings to this alleged incident.[5] The claimant has stated that Ms Playle had been acting under the instruction "SOB," whether that is true or not is a matter for the final hearing.

33. Taking the above into account, I do not consider that there is any particular prejudice, of the sort asserted, to the respondent. Compared to the loss of an opportunity to bring, what on the face of the proposed amendments, are clearly arguable cases, I find that the balance of prejudice lies in favour of the claimant.

Conclusion

34. On the face of the information I have before me, and having addressed the criteria set out in the case of Selkent Bus Co Ltd v Moore [1996] ICR. I find there was a period of delay which is sufficiently explained. Looking at the pleadings in the round, the first knowledge the respondent had of these issues is prior to this application made. This case is still at an early stage of proceedings and the pleaded amendments, taken at their highest, are clearly tenable. I also consider it would be in accordance with the overriding objective to allow these two applications. For all these reasons the application to amend is allowed.

35. I lastly add that it will be for the Employment Tribunal hearing all the evidence to determine whether these amendments are within the employment field or were presented in time.

Employment Judge R F Powell

26th January 2022

[5] Paragraph 24.e page 24.

Sent to the parties on 27 January 2022

For the Tribunal Office Mr N Roche