EMPLOYMENT TRIBUNALS

Claimant		Respondents
Ms A Samokhvalova	**v**	**1. Petropavlovsk Plc** **2. Mr M Kharin**

OPEN PRELIMINARY HEARING

Heard at: **London Central (By CVP remote videolink)**

On: **14 January 2022**

Before: **Employment Judge Brown**

Appearances

For the Claimant: **Mr J Cohen QC**
For the Respondents: **Ms D Sen Gupta QC**
Ms E Plews

JUDGMENT AT AN OPEN PRELIMINARY HEARING

1. The Claimant has permission to amend her claim to join Mr M Kharin as Second Respondent and to allege that he subjected her to protected disclosure detriments under s47B(1)(A) ERA 1996 as set out in paragraphs [24.e, 24.f & 24.j] of her Amended Particulars of Claim.

REASONS

1. This Preliminary Hearing ("PH") was listed to consider the Claimant's application to amend her claim and to make case management orders.

Background

2. By a claim form presented on 19 October 2020 the Claimant brought a claim for interim relief against the First Respondent on the grounds that she had been automatically unfairly dismissed for making protected disclosures.

3. That claim attached Particulars of Claim which included the following original paragraphs:

"8. The four directors appointed by virtue of the voting rights exercised by UGC (Plc's largest shareholder), Everest and their partners at the AGM on 30 June 2020 were Maxim Kharin (was nominated by UGC), James Cameron, Katia Ray and Charlotte Phillips ("the Elected Directors"). Katia Ray has since left Plc and Malay Mukherjee was appointed on 24 August 2020.

….

16 (amended paragraph 24) The Claimant's protected disclosures were a direct criticism of the independence of the Elected Directors and the lawfulness of the actions of UGC, Everest and their partners, for whom the Elected Directors were nominees. They alleged, in essence, unlawful market abuse of the most serious kind. This created very considerable animosity towards the Claimant. That animosity manifested itself in various ways as follows:

…

(e) From 1 September 2020, offensive and deeply upsetting posts began to appear on the social media and networking site Telegram and thereafter Facebook and Vkontakte "VK" ("the Social Media Posts"). The Social Media Posts were publicly accessible and those made on Telegram were published on "channels" specifically aimed at Russian business professionals. ..

(f) The Social Media Posts were totally false in every respect. In particular, the Claimant has a long term partner and her relationship with Mr Maslovskiy was entirely proper and professional. Though she did take a loan from one of the Plc's Russian subsidiary companies, it was fully approved by the Board, properly documented and interest bearing. The Claimant infers that the person responsible for the Social Media Posts is Kharin. …

(g) By emails dated 4 and 7 September 2020, the Claimant complained to Plc about the Telegram Posts. No investigation has been carried out by Plc into them. The Claimant infers that this is because one of the Elected Directors of Plc, Mr Kharin, is the perpetrator."

4. On 8 January 2021 the Claimant presented amended Particulars of Claim, adding the Second Respondent to the claim and alleging that both Respondents had subjected her to protected disclosure detriments. The Claimant asked for permission to amend her claim, to include the new amended Particulars of Claim.

5. The amended Particulars of Claim pleaded, at new paragraph 24 (previously 16) that the Claimant had been subjected to protected disclosure detriments. Paragraphs 16 (now 24) (e) and (f) were included as examples of those detriments. A new subparagraph 24(j) also pleaded

"(j) On a date to be identified, the Elected Directors decided to procure the Claimant's dismissal by reference to false disciplinary allegations. The nature of those allegations is addressed at sections J and K of this ET1. Further, Plc carried out no investigation into the false disciplinary allegations and afforded the Claimant no procedurally fair rights."

6. At amended Particulars of Claim paragraphs 34 and 35 the Claimant alleged,

"34. Each of the acts set out in Section I of this ET1 was detriment on the ground of the protected disclosures described in sections C to H of this ET1, within the

meaning of Section 47B(1) of ERA. For the purposes of Section 48(3)(a) of the Employment Rights Act 1996, the acts set out in Section I of this ET1 all formed part of a series of similar acts.

35. Further, Kharin is individually liable for the acts of detriment set out at paragraphs 24(e) and (f) of Section I of this ET1 pursuant to Section 47B(1)(A) of ERA."

7. The First Respondent (R1) consents to the following amendments in the amended Particulars of Claim: the new claims for alleged detrimental treatment against R1, contrary to s. 47B(1) ERA 1996 (paragraphs [24(a), (b), (c), (d), (g), (h), (i), (j)]); and a new claim for ordinary unfair dismissal against R1, contrary to s. 94 ERA 1996 paragraph [37], subject to R1 being given the opportunity to file Amended Grounds of Resistance.

8. The Second Respondent (R2), however, opposes the application to join him and to the addition of paragraphs [24(e)] & [24(f)] and [35]. He contends that the claim against him is a new claim, which was presented out of time against him and that time should not be extended for it.

The Parties Submissions

9. At this hearing, the Claimant contended that the test for joining a Respondent to a claim is one of general discretion.

10. Mr Cohen QC, for the Claimant, pointed out that R1 had consented to the claim against it being amended to include, amongst others, the following allegations of protected disclosure detriment:

"24 (j) On a date to be identified, the Elected Directors decided to procure the Claimant's dismissal by reference to false disciplinary allegations. The nature of those allegations is addressed at sections J and K of this ET1. Further, Plc carried out no investigation into the false disciplinary allegations and afforded the Claimant no procedurally fair rights."

11. He said that Mr Kharin, the putative R2 was pleaded as being one of the Elected Directors. He said that, pursuant to *Timis v Osipov* [EWCA] Civ 2321, it was open to the Claimant to bring a claim under section 47B (1A) ERA 1996 against Mr Kharin, as an individual co-worker, for subjecting her to the detriment of dismissal, i.e. for being a party to the decision to dismiss; and to bring a claim of vicarious liability for that act against the employer under section 47B (1B).

12. Mr Cohen sought, if it was necessary, a further amendment, to add [24j] as one of the detriments for which Mr Kharin was said to be liable, so that para [35] of the amended Particulars of Claim would now read, "35. Further, Kharin is individually liable for the acts of detriment set out at paragraphs 24(e) and (f) and (j) of Section I of this ET1 pursuant to Section 47B(1)(A) of ERA."

13. Mr Cohen said that the Claimant's dismissal was on 12 October 2020 and the application to amend the ET1 was made by letter dated 8 January 2021. Even were time limits in issue, the proposed amended ET1 was filed within three months of the unlawful conduct alleged against him.

14. Mr Cohen said that it would be an error of law for the ET to apply time limits to an application to join a new Respondent. He relied on *Gillick v BP Chemicals Ltd* [1993] IRLR 437.

15. Mr Cohen said that, pursuant to *r34 ET Rules of Procedure 2013*, there is clearly an issue between C and R2 "falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings".

16. He said that, applying the balance of hardship test in *Selkent Bus Company Ltd v Moore* [1996] IRLR 836 per Mummery J at 843E, the Tribunal should grant the amendment because:

    a) The claim is at its inception. There have been no case management directions. There would be no prejudice and no additional cost to R2 who is represented by the same solicitor as R1.

    b) There has already been a defence filed to the allegations against R1 including the allegations regarding Social Media, for which instructions must have been taken from R2, given that he is alleged to be the perpetrator. He is likely to be the principal witness in respect of the Social Media allegations

    c) C indicated in advance that she intended to bring a claim against R2. She did not name him at the outset because she did only enough to advance the interim relief claim.

    d) C suffers critical prejudice if she cannot name R2. C is unable to obtain a disclosure order against him as a non-party who is domiciled outside the jurisdiction, under *r31 ET Rules of Procedure 2013*. On the other hand, if R2 is a party, he has a disclosure obligation, *Sarnoff v YZ* [2021] ICR 455 per Underhill LJ at 14. He holds the evidence of wrongdoing, should it be so, in his own hands. To deprive C of her ability to obtain disclosure from him would be an affront to justice.

    e) There had been no delay in making the application. C could not have been more straightforward in setting out her stall.

17. Ms Sen Gupta QC, for R2, contended that the Claimant proposes to add an entirely new claim for whistleblowing detriment contrary to *s47B(1A) ERA 1996* against an additional new individual respondent, Mr Kharin. She contended that that claim is out of time. She said that the statutory time limit for claims under *s. 47B(1A) ERA 1996* is 3 months and that the Claimant was therefore required to obtain an ACAS early conciliation certificate by 2 December 2020 and present her claim by one month afterwards. However, the Claimant obtained an early conciliation certificate on 7 January 2021, more than one month late.

18. Ms Sen Gupta said that the Claimant had not pleaded that Mr Kharin bore any particular responsibility for the acts taken by R1 as corporate respondent, including the decision to dismiss her. The latest alleged act pleaded against Mr Kharin in his personal capacity is on 3 September 2020 (paragraphs [24(e) & (f)], after which the time for bringing the claim started to run. She said that the Claimant could, and should, have presented a claim against Mr Kharin before 8 January 2021. The Claimant had specifically said, in paragraph 2 of her original Grounds of Complaint, that she "intends to make further claims including but not limited to detriment claims pursuant to ERA Section 47(B) against [R] and certain other named

individuals including in particular Maxim Kharin", and that she "will file such further claims separately".

19. Ms Sen Gupta said that, in deciding whether to permit the amendment, the Tribunal should take into account the fact that the Claimant would be able to pursue her allegations concerning the social media posts in the claim against R1 in any event. Thus, this is not an issue which risks going unheard or undetermined if the amendment is not made and the Claimant would not suffer prejudice if she is not permitted to advance the *s. 47B(1A)* claim against Mr Kharin personally.

20. Conversely, Ms Sen Gupta said that Mr Kharin would suffer substantial hardship and prejudice if he were added as an individual respondent to the claim. Mr Kharin is no longer a director of R1 and is based in Moscow. Although he remains a potential witness, he will not necessarily be involved in defending the claims against R1. Being added as an individual respondent brings with it potential personal liability, and significantly greater stress than being a potential witness for a corporate respondent. She said that, although Mr Kharin is represented by the same solicitors and counsel as R1 for the purposes of this hearing, if he were to be personally added as an individual respondent to the claim, he would need to be provided with the opportunity to seek independent legal advice before filing grounds of Resistance. This would necessarily lead to increased legal costs and further delay in this matter, which would be contrary to the overriding objective which requires matters to be dealt with proportionately, avoiding delay and saving expense. Given that there has already been substantial delay in this matter, that would be undesirable.

The Law

21. *Rule 29 ET Rules of Procedure 2013* provides for the Tribunal's general power of case management: "The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order…"

22. *Rule 34 ET Rules 2013 provides*: "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..."

23. *S. 48(3) ERA 1996* provides: "An employment tribunal shall not consider a complaint under this section unless it is presented – (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them; or (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

24. In *Gillick v BP Chemicals Ltd* [1993] IRLR 437 Lord Coulsfield said at [8], "It seems to us to be clear that the approach set out in Cocking does, as counsel for the appellant submitted in the present case, require the Industrial Tribunal to treat an application to amend an originating application by the addition of a new respondent as a question of discretion and not as one to be settled by the application of the rules of time-bar. The 'time-bar approach', which formed the basis of the decision of the Industrial Tribunal in Cocking, and which was essentially the same as the

reasoning of the Industrial Tribunal in the present case, was expressly disapproved by the National Industrial Relations Court. It seems to us that it follows, on these authorities, that there is no time limit which applies as such when it is proposed to add a new or substitute respondent to an application which has been lodged timeously with the Office of the Industrial Tribunals. The question whether an amendment should or should not be allowed becomes, as the appellant submitted, one of the exercise of discretion in the whole circumstances of the case."

25. Regarding the joinder of parties, *Harvey*, Division P1 Practice and Procedure I. The Claim at [314], states:

"In Kelly the Court of Appeal endorsed the injustice/hardship test set out in para 7 of the above passage, and held that, as there are no statutory time limits for applying for leave to amend, tribunals ought not to refuse leave simply on grounds of delay. Thus the tribunal in that case was held to have exercised its discretion wrongly where it refused an application because it was 'reasonably practicable' to have made it earlier. The absence of time limits was again emphasised by two different divisions of the EAT when allowing appeals from tribunals which had refused to allow new respondents to be added or substituted on the ground that the claims against the new respondents would be time-barred (*Gillick v BP Chemicals Ltd* [1993] IRLR 437, *Linbourne v Constable* [1993] ICR 698). As Lord Coulsfield said in *Gillick*, questions of delay are merely matters to be taken into account by the tribunal in the exercise of its discretion. This point was further endorsed by the EAT in *Drinkwater Sabey Ltd v Burnett* [1995] IRLR 238, [1995] ICR 328, when rejecting an argument that the joinder of a respondent after the time limit for making a claim against him has expired should only be permitted on grounds of misnomer—where the claimant has misnamed or misdescribed the party whom he intended to sue—and not where he has mistakenly decided to sue the wrong party, in the same way as the High Court exercises its analogous jurisdiction. The EAT concluded that the High Court rules have no application to the exercise of the tribunals' power to add or substitute parties, a power that is exercisable, in accordance with the principles in Cocking, at any time, even after the relevant time limits have expired."

26. In *Selkent Bus Company Ltd v Moore* [1996] IRLR 836 Mummery J said at 843E: "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 allowing the amendment against the injustice and hardship of refusing it."

Decision - Amendment

27. R1 has already consented to the claim being amended to bring complaints of protected disclosure detriment against it. There is no issue of time limits in respect of that amended claim.

28. The Claimant applies also for permission to add the Second Respondent as a respondent to protected disclosure detriment claims. At this hearing, Mr Cohen asked that the amendment application include the detriment pleaded at new paragraph [24j] as an allegation against R2.

29. Paragraph [24j] had already been pleaded against R1, so the additional amendment simply sought to add R2 as a Respondent to a paragraph which had already been pleaded. While that part of the application had only been made at

the hearing on 14 January 2022, Ms Sen Gupta was able to respond to it on behalf of the Second Respondent. It was fair and in accordance with the overriding objective to deal with the whole amendment application as presented at the hearing.

30. The inclusion of paragraph [24j] in the claim against the Second Respondent meant that there were no issues concerning time limits in the amendment application against the Second Respondent. The Claimant's dismissal had occurred well within the three month time limit and was the last detrimental act which was alleged against the Second Respondent.

31. In any event, I agreed with Mr Cohen that, where there was an existing claim of protected disclosure detriment against the First Respondent which had been presented in time, time limits did not apply to the amendment application to join the Second Respondent to it, *Gillick v BP Chemicals Ltd* [1993] IRLR 437.

32. I considered the balance of hardship and injustice which might be caused to the parties in allowing or refusing the amendment and the relevant circumstances, including the timing of the amendment application and any delay therein.

33. I considered that the balance of hardship and injustice clearly favoured granting the amendment.

34. The amendment application was made at the outset of the proceedings and before any case management orders had been made. The application was made at the same time as the application to add the protected disclosure detriment claim against the First Respondent, which was also in time. The Claimant therefore acted promptly in bringing the amendment. She had even presaged the claim against the Second Respondent in her original Particulars of Claim, so there was little conceivable prejudice to the Second Respondent in the timing and manner of the amendment application.

35. There would be no delay occasioned by allowing the amendment against the Second Respondent; the First Respondent will also be given permission to present an amended Response to the claim, so time will be needed for the presentation of that Response in any event.

36. More generally, the same facts had been pleaded against the First Respondent, which would necessitate the same factual enquiry by the ET. I agreed that the Second Respondent would be a likely witness to the claim. It would not put the parties to significant additional expense and would not cause significant delay to include the Second Respondent as a party.

37. I agreed with the Claimant that refusing the amendment would significantly prejudice the Claimant, in that, she would be unable to obtain a disclosure order against him as a non-party who is domiciled outside the jurisdiction, under *r31 ET Rules of Procedure 2013*. On the other hand, if the Second Respondent is a party, he has a disclosure obligation, *Sarnoff v YZ* [2021] ICR 455 per Underhill LJ at 14. On the Claimant's pleaded case, it is the Second Respondent who was responsible for the "social media" detriments and so the Claimant is likely to seek disclosure primarily against him in that matter.

38. I did not consider that the Respondent would be prejudiced by allowing the amendment, save that he would be exposed to potential personal liability and greater stress than being a potential witness for a corporate respondent.

39. However, if I did not allow the Claimant to add the Second Respondent, the Claimant would not be able to obtain disclosure from him and a fair trial on the detriments alleged to have been perpetrated by him might not be possible at all, even against the First Respondent.

40. The Claimant has permission to amend her claim to join Mr M Kharin as Second Respondent and to allege that he subjected her to protected disclosure detriments under s47B(1)(A) ERA 1996 as set out in paragraphs [24.e, 24.f & 24.j] of her Amended Particulars of Claim.

41. I conducted a case management hearing after this Open Preliminary Hearing.

EMPLOYMENT JUDGE BROWN
On: 14 January 2022

SENT TO THE PARTIES ON
25/01/2022

FOR SECRETARY OF THE TRIBUNALS