EMPLOYMENT TRIBUNALS

Claimant: Mr James Iorizzo

Respondent: Wm Morrison Supermarkets Plc

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds (in private by telephone) **On: 8 October 2021**

Before: Employment Judge R S Drake

Appearances
For the Claimant: In person
For the Respondent: Mr S Swain (Solicitor)

JUDGMENT

1 The Claimant's application for leave to amend his Originating Application (by adding a claim of unlawful detriment contrary to Section 47B of the of the Employment Rights Act 1996 as amended ("ERA") because of making a protected disclosure as defined by Part IVA ERA, and a claim of automatically unfair dismissal as prescribed by Section 103A is refused and is therefore dismissed.

2 Further, the Claimant's remaining complaint of unfair dismissal as set out in his ET1 filed 15 July 2021 is struck out under Rule 27 of Schedule 1 to the Employment Tribunals (Constitution and Rules) Regs 2013 ("the Rules") as having no reasonable prospect of success in that the Claimant did not have as at the effective date of employment sufficient service (two years) as required by Section 108 ERA.

3 The Claimant's claims are dismissed in entirety.

Reasons

Introduction

(1) Today's hearing was listed as a Preliminary Hearing to determine whether the Claimant should be permitted to amend his Originating Application ("ET1") filed 15 July 2021, and to consider whether any further Case Management Orders were necessary.

(2) I heard detailed submissions from the Respondent's representative Mr Swain, and I also heard in considerable detail from the Claimant acting in person. I took his representations on board as being his testimony in support of his application to amend his ET1 by in effect adding a second pleading dated 25 September 2021 to his original pleading as well as in opposition to the Respondent's application to strike out his claim.

(3) The issues before me were therefore as follows:

(i) Did the Claimant's proposed amendment in the September ET1 -
   a. amount only to clarification and expansion of a cause of action already pleaded in the July ET1; or -
   b. was it in effect the pleading of a new head of claim not set out in such a way in the July ET1 as to amount to a clear free-standing pleading?
   c. If it were a new claim, could the Claimant show it was not reasonably practicable for him to have issued his claim within three months of the last date on which he had been subjected to detriment or dismissed because of making a protected disclosure?

(ii) If the answer to (a) were positive, then an amendment could be allowed and the claim could proceed to listing after further directions, but if the answer were negative and the answer to (b) were positive instead, then all that remained was a simple unfair dismissal claim which stood in jeopardy because the Claimant did not have two years qualifying service as required by Section 108 ERA and therefore his remaining claim as such should be dismissed as having no reasonable prospect of success.

Findings of Facts

(4) My relevant findings of fact are as follows:

(i) The Claimant's employment commenced on 21 October 2019 and ended on 19 March 2021, so he did not have two years' service as at the effective date of termination of his employment;

(ii) The Early Conciliation process intervened from 9 May to 17 June 2021 extending the running of time to commence proceedings by 32 days expiring on 20 July 2021. Before that date on 15 July 2021 the Claimant issued his July ET1;

(iii) In this ET1, the Claimant ticked box 10 which says -
"if your claim consists of or includes a claim that you are making a protected disclosure under the ERA 1996 (otherwise known as a whistleblowing claim) please tick the box if you want a copy of this form or information from it to be forwarded on your behalf to a relevant regulator"

My interpretation of this text is that it is a request to the Claimant asking if he wishes his claim to be made known to a regulator but not necessarily whether he is actually making a claim as such, and it presupposes that a claim is already or will be set out in greater detail in the latter part of the ET1 and in any other Grounds of Complaint which it is open to a Claimant to append to an ET1;

(iv) There is a very detailed two-page multi-paragraph statement of the Claimant attached to the ET1 setting out the details surrounding his claim. On my reading of that document however, I cannot find any reference to the making of any disclosure by the Claimant or any assertion by him that any such disclosure gave rise to any detrimental treatment of him let alone dismissal of him;

(v) A notice of preliminary hearing for case management by telephone set for 21 September 2021 was sent to the parties on 21 July 2021. In the meantime, on 18 August 2021 the Respondents filed their ET3. Its terms clearly show that the Respondents did not take the claim to be a complaint of detriment caused by the making of a protected disclosure or automatically unfair dismissal because of making a protected disclosure;

(vi) The Tribunal wrote the Claimant 27 August 2021 to say that upon review of his claim, it was considered that the Tribunal does not have jurisdiction to consider his claim as it has no reasonable prospect of success because he did not have two years qualifying service under section 108 ERA, and that although he had ticked the box 10 in the ET1, he had not made a complaint of having made a protected disclosure and therefore his claim was in jeopardy; he was given an extension of time to provide a response and the preliminary hearing was postponed from 21 September ultimately to today's date;

(vii) On 25 September 2021 the Claimant filed his September ET1 to which is attached a further Grounds of Complaint annex which for the first

time in these proceedings sets out a complaint of having made a protected disclosure and being treated detrimentally because of it and being automatically unfairly dismissed because of it;

(viii) The Claimant was advised 5 October 2021 by the Tribunal that he had not as yet been granted leave to amend his claim in accordance with his revised September ET1 and it is that the issues including the grant of permission to amend the July ET1 and any consequent amendment remained to be clarified at today's hearing;

(ix) At today's hearing the Claimant put before me in a very candid and honest way his chronology of events from before dismissal up to today's date in his effort to explain why he thought he had expressed a protected disclosure claim in his July ET1 and why therefore his September ET1 amounted merely to clarification of it;

(x) Further he sought to explain why, though he had to accept that the time limit for setting out such a claim expired on 20 July 2021, and that therefore the claim he was expressing in his September ET1 was out of time, it had not been reasonably practicable for him to issue within time. His explanation was that he thought the by ticking box 10 in the July ET1 that alone was enough to show that he was claiming he had made a protected disclosure, whether or not he had expressed it as a claim for having been treated detrimentally or dismissed for having done so. He sought to rely upon the argument that he had been advised by ACAS and others at the time that all he need do was lodge a claim within time;

(xi) He said he was not told and did not realise he had to express his complaint with sufficient clarity for it to be treated as a clear claim of detriment or automatically unfair dismissal. Further he argued that he had found it difficult to obtain legal advice because of cost, and that insurance cover for legal cost had not come into place until after he had left the Respondent’s employ and he couldn’t get in contact with previous insurers, and that he had changed address but had not advised the Tribunal and therefore not received much of the correspondence he had needed to be able to lodge a claim in time;

(xii) On examination of the two differently pleaded claims, I find that the main thrust of the Claimant's complaint in the July ET1 was that he had requested home working in December 2020 but had been refused, and that he should not have been put on a performance plan, should not have been scored poorly in pursuance of that plan, that he raised a grievance about this scoring process/outcome, and that he should not have been made redundant;

(xiii) By contrast, the thrust of the September ET3 is that this new pleading is itself the making of a protected disclosure, that he had raised health and safety issues, that he had been treated differently to others in the redundancy process (but without specifying how or why), that not

being allowed to work amounted to discrimination but for unspecified reasons, that opening facilities at the Respondent's HQ exposed employees to Covid risks, that he had faced a disciplinary hearing in January 2021 (though he had not referred to this before and it predated the dismissal by several months, that his selection for redundancy was unfair generally but without relating it to any form of disclosure which might remotely be regarded as a protected disclosure.

(5) I also drew guidance from the Statute and Case law and from Mr. Swain's oral submissions. I satisfied myself that the Claimant was aware that his application was for determination today and that the possible outcome would be dismissal of his claim since if he were not to be permitted leave to amend, his simple unfair dismissal claim as expressed in his July ET1 was doomed as he did not have sufficient qualifying service. I will refer where necessary in this Decision to relevant sources of law.

Law and Findings

(6) My findings here are as follows: -

(i) Pursuant to the overriding objective prescribed in Rule 2 of the Employment Tribunals Regulations 2013 Schedule 1 Rules, I have power/discretion to permit amendment of a claim under Rule 30. I do not set out the content of the Rule below as it is readily accessible elsewhere;

(ii) Similarly, Section 33 of the Limitation Act 1980 which is applicable here also sets out guidelines which I do not repeat here but which I have considered. From all these sources, I recognise that it is clear that the power to grant leave to amend an ET1 is qualified and clarified by case law and is subject to judicial application, in other words by considering all the circumstances put before me;

(iii) Mummery J, then sitting in the EAT in the case **of Selkent Bus Company v Moore [1996] ICR 836**, held: -

"The Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment sought against the injustice and hardship of refusing it".

(iv) I accept Mr Swains submission that the Tribunal must carry out a careful balancing exercise all the relevant circumstances and exercise its discretion in a way consistent with the requirements of relevance, reason, justice, and fairness as required in all instances of the exercise of judicial discretion;

(v) In **Chandhok v Tirkey [2015] ICR 527**, the EAT said:

"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement, nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."

(vi) All the authorities show that distinction must be made between an amendment which adds a new or different claim, and that which merely amends the factual or legal basis of an existing claim. I have carefully examined the July ET1 and compared/contrasted it with the draft proposed amendment.

(vii) The former expresses only an unfair dismissal claim pure and simple, but makes no reference whatsoever to the making of a protected disclosure let alone to any assertion of being subjected to detriment and unfair dismissal because of this;

(viii) I contrast the current case where there is a substantial difference between the original claim and the draft proposed amended claim with the circumstances which existed in the case of **Patka v BBC [2017] EAT0190**. In this latter case the EAT refused an application to amend a direct discrimination claim to include an indirect discrimination claim which in terms of weight and substance is a much less substantial amendment than is sought in the current case;

(ix) When considering whether an amendment should be permitted, exercise of discretion under Section 48(3)(b) is subject to consideration of whether the Claimant can show it was not reasonably practicable to amend or raise his claim within the limitation period prescribed by Section 48(3)(a) ERA – Both **Selkent** and **Chandok** make this clear.

(7) Applying the law to the facts my findings are as follows:

(i) The July ET1 and September ET1 are markedly different and express two quite different sorts of claim. The former expresses an unfair dismissal claim pure and simple and the ticking of box 10 is not enough to show there is a disclosure claim being made bearing in mind the wording of that box which is that the claim is itself the making of a disclosure, not that the claim is about a disclosure;

(ii) The latter is a claim about the alleged making of a protected disclosure, but it comes conveniently and only after the Tribunal had

alerted the Claimant to the complete absence of the making of such a claim in the July ET1;

(iii) The July ET is in time, but the September ET1 is not, indeed it is well out of time and without explanation. It was expressed on prompting whereas the former was expressed after the taking of advice from ACAS about which I cannot comment but which I have to note shows that the Claimant was not without a respected source of advice and not unable to set out his claim as it was then in some considerable detail. He did not explain to me satisfactorily why he could not have made his disclosure claim if he felt he had one more clearly the first time;

(iv) Having considered all the circumstances explained to me and noting that now defending a claim for protected disclosure causes prejudice to the Respondents(in having to amass evidence and prepare a defence at cost) but that the Claimant's lack of explanation should be set against the effect on the Claimant if his claim is dismissed and finding the former prejudice to the Respondent outweighs the latter, and that the balance here favours the Respondent.

(v) Further I cannot find on the facts as found that the Claimant has shown that he raised his disclosure claim fully as late as he did but that he did so because it was not reasonably practicable for him to have done so before, bearing in mind he says he had disclosure in mind when he issued the July ET1 but did not particularise it.

(vi) If he thought he knew he had a claim then it would not have been difficult for the Claimant to express it fully, given he was capable of and did express his unfair dismissal claim very fully. It could not be concluded that it was not reasonably practicable for him only to have done so in September;

(8) In all the circumstances I conclude that it is not appropriate to exercise my discretion to thus permit the amendment of the original claim as sought by the Claimant now and therefore his application in this respect fails and is dismissed.

(9) The Claimant has been aware throughout that he faced the jeopardy of his claim as expressed in the July ET1 faced potential strike out under Rule 27 – he was warned of this possibility by the Tribunal's letter dated 27 August 2021. His only response has been his attempt in effect to recast his claim as a protected disclosure claim but this has been unsuccessful.

(10) There is nothing before me which explains why I should not strike out his July ET1 claim which is the only extant claim now that leave to amend has been refused.

(11) Therefore, for precisely the reasons advised in the letter dated 27 August, I have no alternative but to strike out that claim as it has no reasonable

prospect of success, there being a finding that the Claimant has less than two years qualifying service as prescribed as necessary by Section 108 ERA.

Employment Judge R S Drake

Signed 8 October 2021