EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113683/2021

Preliminary Hearing
Held by CVP on 25 March 2022

Employment Judge Jones

Mr M Geary	**Claimant** **In person**
Haddington Citizens Advice Bureau	**Respondent** **Represented by:** **Mr MacDougall,** **of counsel**

JUDGMENT and ORDERS OF THE EMPLOYMENT TRIBUNAL

1. The claimant's application to amend his claim to include a claim that he was automatically unfairly dismissed in terms of section 103A Employment Rights Act 1996 ('ERA') is refused.
2. The claimant's application to amend his claim to include further particulars of the basis on which he alleges his dismissal was unfair in terms of section 98 ERA, which is unopposed, is granted.
3. The respondent will confirm within 7 days of the date of the hearing whether it wishes to engage in judicial mediation and if so, the case will be referred to the Vice-President for consideration.
4. Date listing letters will be issued to list a final hearing in person before an Employment Judge sitting alone in Edinburgh.

Reasons

Introduction

1. The claimant lodged a claim of unfair dismissal on 10 December 2021 foilowing his dismissal from the respondent with effect from 10 September 2021. The claimant lodged £ schedule of loss as at 21 January 2022 which had a note indicating that the sums being sought exceeded the statutory maximum compensation for unfair dismissal. The schedule made no reference to any claim in terms of section 103A. By letter dated 31 January 2022 the claimant made an application to amend his claim to include a claim in terms of section 103A Employment Rights Act 1996 ('ERA'). The respondent objected to the application by email dated 1 February.
2. Thereafter a hearing was listed to consider the application. The hearing took place on the Cloud Video Platform. The claimant, who is a retired lawyer, represented himself and the respondent was represented by counsel.

Details of amendment application

3. In the first instance I sought to clarify the respondent's position in relation to the amendment application. It appeared to me that the claimant sought to amend his claim to include a claim in terms of section 103A, but also to add further particulars to the basis on which he said his dismissal was unfair in terms of section 98 ERA. The respondent confirmed that it had no objection to this latter aspect of the claimant's amendment application and therefore this is granted. Specifically, paragraphs 1(b) and 2 of the claimant's amendment application are granted.
4. The claimant accepted that the amendment in relation to section 103A was an application to include a new head of claim.
5. The respondent continued to maintain its objection to the claimant's application to include a claim in terms of section 103A ERA.
6. I indicated to the claimant that his application did not provide any specification of the alleged protected disclosures he was said to have made or the basis on which he alleged that the making of such disclosures was the reason or principal reason for his dismissal.

7. The claimant sought to explain that there was a cap on the number of characters tn the ET1 form and therefore much of what was in his original draft had come out. He said that there was no facility to lodge an additional document with the claim form. I expressed some surprise at the claimant's position in this regard and indicated that it was common for claim forms to be accompanied by a paper apart setting out the basis of the claim.

8. The claimant then went on to explain that he was relying on two protected disclosures which were said to be included in a letter of grievance submitted by him on 31 August 2021. The first protected disclosure was said to be a breach of a legal obligation in that a manager in the respondent's operation had refused to accept a referral of a person in relation to homelessness. This was said to have occurred around October 2020. The claimant indicated that this aspect of his grievance was subsequently upheld.

9. The claimant also said that the same manager's failure to engage with him in relation to a draft response to a consultation document which he had prepared amounted to a breach of a legal obligation in that the respondent was legally obliged to liaise with third parties with a view to decreasing homelessness. The claimant could not provide a date when this alleged breach of a iegal obligation had taken place but he said it was not shortly before his dismissal.

10. The claimant's position in general terms was that he was dismissed because he was making trouble for the manager and that as the reason given for his dismissal was, in his view, unfounded, the real reason for his dismissal must have been that he had made protected disclosures.

11. I then sought to explore with the claimant why this claim had not been included in his original claim form. The claimant indicated that employment law was not his area of expertise and that it was an 'oversight' on his part. He said that in an ideal world he would have included it in his original claim but that he was hindered by the limitations of the form. He said that when he received the respondent's ET3 form, he took the opportunity of improving the quality of his pleadings.

Respondent's submissions

12. The respondent had provided submissions in writing shortly before the hearing was due to commence, but counsel was invited to set out the respondents objection to the claimant's application orally,

13. In the first instance it was said that there remained a lack of specification of the exact nature of the claim being made by the claimant. The claimant had not indicated in what way the alleged disclosures amounted to the provision of information or were made in the public interest.

14. Further the question of the merits of any such claim were relevant.

15. Reference was then made to the principles set out in the cases of Selkent Bus Company v Moore [1996] ICR 836 and Cocking v. Sandhurst (Stationers) Ltd & Another [1974] ICR 650.

16. Counsel indicated that it was clear that the application was to include a new cause of action. When one considered the basis of the claimant's claim of unfair dismissal as set out in his claim form it was apparent that the claim in terms of section 103A was fundamentally different from the unfair dismissal claim which had originally been pled. In his original claim form, the claimant made reference to the respondent's failures to take certain matters in to account and failure to follow relevant procedures as rendering his dismissal unfair, together with the decision being outwith the band of reasonable responses. He made no reference to protected disclosures.

17. It was also said that as the potential new claim was so different from the claimant's original claim, it would require significant additional resource, both in terms of seeking to investigate and defend the claim and potential additional witnesses. As the respondent was a small organisation with 16 employees and was a privately funded charity, this would have significant implications for the respondent.

18. In any event, if the amendment were to be accepted further particulars would still be required before the respondent could answer the claim which would delay matters. This would cause further delay.

19. In relation to the question of time limits, the claim was said to be outwith the statutory period set down in section 111(2). if the failure of the claimant to make reference to the claim in his form was an 'oversight' then the claimant

must have known he had a claim at the point at which he lodged it. He could not therefore rely on the oft used reason for delay of ignorance of his rights. Counsel also questioned the credibility of the technical issues raised by the claimant in relation to the limitations of the content of the form. Therefore the respondents primary position was that it had been reasonably practicable for the claimant to have included the claim in his original form and he has failed to discharge the burden which was on him to demonstrate why it had not been reasonably practicable.

20. Turning to the timing and manner of the application it was said that there had been a delay of six weeks. When balancing the factors set out in **Selkent,** it was said that the disadvantage to the respondent in allowing the amendment outweighed the prejudice to the claimant.

Claimant's response

21. The claimant was then given an opportunity to respond.

22. He said that the submission that the amendment would require the respondent to address significant and complex matters was not well founded. All of the directors of the respondent's organisation had been made aware of the claimant's complaint and there had already been an investigation carried out into the issues. Indeed one of the complaints had been upheld.

23. In terms of time limits, the amendment was made 13 days not six weeks after the expiry of the statutory limitation period. It was therefore only briefly outwith the statutory period. It was not reasonable to reject the application on that ground alone.

24. Turning to the question of hardship and injustice, the claimant said that the balance was firmly in his favour. He made reference to **Newstar Asset Management Holdings v Evershed** 2010 EWCA 870 where the Court of Appeal highlighted that a claim in terms of section 103A had no statutory cap to the compensation which could be awarded.

25. Reference **was** also **made to Makauskiene v Rentokil Initial Facilities** Service (UK) Ltd EAT/503/13 which the claimant said had similar facts to his case. In all these circumstances, it was said that the application should be allowed.

Discussion and decision

26. It was accepted by both parties that the application did not relate to minor or administrative matters. It was a substantial amendment. Sir John Donaldson, when delivering the Judgment of the NIRC in Cocking, laid down a general procedure for Tribunals to follow when deciding whether to allow substantial amendments. These guidelines have been approved in several subsequent cases and were re-stated in **Selkent.** 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 will be caused to parties by granting or refusing the amendment. Useful guidance on this issue was also given by EAT in, **Argyll & Clyde Health** Board **v.** Foulds & **Others** UKEATS/0009/06/RN and **Transport & General Workers' Union v. Safeway Stores** Ltd UKEAT/0092/07/LA. 18. In both these cases, the EAT referred, with approval, to the terms of paragraph 311.03 in Section P1 of Harvey on Industrial Relations and Employment Law: - "(b) Altering Existing Ciaims & Making New Claims [311.031 A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action which is linked to, or arises out of the same facts, as the original claim: and (iii) amendments which add or substitute a wholly or new cause of action which is not connected to the original at all."

27. Valuable guidance was also provided by Mummery LJ 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 have many different kinds, ranging on the one hand from the correction of clerical and typing errors, the additions

of factual details to existing allegations and a jition . su . til ing a further label for facts already pleaded to, to the other hand, the 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 the 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 the manner of the application An application should not be refused wholly because there has been a delay in making. 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."

28.1 took into account this guidance, the authorities referred to by the claimant and considered the interests of justice. I considered the following factors to be particularly relevant.

a. The claimant, although unrepresented has a legal background.

b. The claim form which was lodged by him made reference to the dismissal being unfair ‘because it was founded on three predications which, were not addressed at the disciplinary hearing’, that the sanction of dismissal was excessive and disproportionate for a number of reasons. While the claim form made reference io a complaint submitted by the claimant on 31 August and that the

claimant had received a reply exonerating the manager from the cc. p iint, the form gave no detail of the complaint and did not make reference to the complaint being in any way related to his dismissal.

c The claimant's ir - aticr that his failure to make reference to a section 103A claim in his form as being an 'oversight' or because he did not have sufficient characters to set out his complaint in the form was not accepted as credible, in particular, it is noted that the schedule of loss subsequently submitted by the claimant acknowledges that the sums sought are in excess of the statutory cap for compensation for unfair dismissal and makes no reference to section 103A. The Tribunal concluded that if there had been an 'oversight', the claimant would have made reference to a claim in terms of section 103A in his schedule of loss or at least referred to the question of the statutory cap on compensation not being applicable.

d. The claim in terms of section 103A is out of time in that the date of dismissal was 10 September 2021, early conciliation commenced on 5 October and ACAS issued a certificate on 15 November. The amendment application was not made until 31 January 2022 and is therefore out of time albeit not significantly so. Nonetheless, it was reasonably practicable for the claimant to have lodged the claim in time.

e. The claimant did not provide any particulars of the claim until the hearing today. He had not provided any specification of the detail of the protected disclosures he alleges were made, the statutory basis of such disclosures or why he says that the making of the disclosures was the reason or principal reason for his dismissal in his amendment application, if the amendment application were allowed, he would be required to provide specification of these matters in writing.

f. While on the face of it, it was possible that the matters raised by the claimant could amount to protected disclosures in terms of section 43B ERA, it was not obviously so. It was not clear to me why the claimant had not particularised the scope of his amendment

application. The respondent would have to be given the opportunity to respond to any specification, ail of which would delay progress in the case towards a final hearing.

g. While it is noted that the matters raised in the claimant's grievance were investigated and that this will have some bearing on the extent to which the respondent will require to carry out further investigations into these matters, without specification of the detail of the disclosures it is not clear to what extent further investigations would be required. It is noted however that there is a difference between an investigation into the subject matter of a grievance and the question of whether that subject matter amounted to protected disclosures, and whether that was related to the decision to dismiss the claimant.

h. The claimant did not put forward any specific facts as to why his dismissal was related to the alleged protected disclosures. His position was effectively that the reason for his dismissal was not established and therefore it must have been for another reason. However, this was not set out at all in his original claim form which put forward entirely different reasons for his dismissal.

i. The Tribunal hearing on the claimant's claim would be extended if evidence is required in relation to the grievance submitted by the claimant and the investigations carried out by the respondent in that regard.

j. Prejudice to the respondent in defending the claim is outweighed by prejudice to the claimant in not being permitted to advance the claim, given that the claim is of automatically unfair dismissal and any compensation awarded is not subject to the statutory cap.

29. Taking ail these factors into account together with the interests of justice, the application to amend is refused.

Next steps

30- c imant indicated that he is interested in exploring judicial mediation. The respondent did not have instructions on the point and undertook to inform the Tribunal within seven days of their position, in the event that the respondent is interested in judicial mediation, and given that the final hearing is likely to last for at least three days, the case will be referred to the Vice President for consideration.

31. Date listing letters will be issued io the parties to fix a final hearing on the merits in the case which will take place in person in the Edinburgh Tribunal before an Employment Judge sitting alone.

32. Parties did not believe any further preliminary hearings were likely to be required in advance of the final hearing. However, should their position change in that regard they should contact the Tribunal.

Employment Judge: **A Jones**
Date of Judgment: **28 March 2022**
Entered in register: **29 March 2022**
and copied to parties