Case Numbers: 2303033/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr D Cox

Respondents: (1) Adecco UK Limited
(2) Giant Group Limited
(3) London Borough of Croydon

Heard at: By CVP **On:** 27 June & 1 July 2022

Before: Employment Judge Harrington

Appearances
For the Claimant: Mr C Devlin, Counsel

For the First Respondent: Mr R Hayes, Solicitor
For the Second Respondent: Mr M Green, Counsel (27 June 2022)
Mr Wilson, Counsel (1 July 2022)
For the Third Respondent: Mr B Phelps, Counsel

WRITTEN REASONS FOR THE JUDGMENT OF THE TRIBUNAL DATED 2 JULY 2022

These reasons are provided following receipt of the Claimant's email dated 21 July 2022 at 09.26. A summary of the content is also contained in the Case Summary section of the Case Management Order dated 2 July 2022.

[Please note that the EP references appearing in square brackets refer to electronic pages within the hearing bundle.]

Introduction

1 This case comes before me following a reasonably lengthy procedural history including consideration by the Employment Appeal Tribunal. The parties provided me with the following materials:

1.1 a hearing bundle with 349 electronic pages;
1.2 a supplemental bundle with 80 electronic pages;
1.3 a bundle of authorities;
1.4 a case report provided by the Claimant – Coleman v Sytner Group Limited (which I am told is also contained within the bundle of authorities);
1.5 a skeleton argument from Mr Hayes, on behalf of the First Respondent.

2 At this preliminary hearing, the Claimant has been represented by Mr Devlin of Counsel and the First, Second and Third Respondents by Mr Hayes, Mr Green (with Mr Wilson in attendance on 1 July 2022) and Mr Phelps respectively. I am grateful to them for their assistance.

Factual Background

3 By way of background, the Claimant's claim form was received by the Tribunal on 14 August 2018. On 18 February 2019 a Preliminary Hearing was held with Employment Judge Downs. At that hearing a further Preliminary Hearing was listed to determine applications for strike out and a deposit order. In the Tribunal Order following that first Preliminary Hearing, the Claimant's complaints were set out in general and broad terms [EP 121].

4 Directions given by EJ Downs included that the Claimant provide further particulars of his claims. It was also understood that the Claimant wished to make an application to amend his claim [see further paragraph A4 [EP122]]. The direction given was as follows,

'The Claimant shall serve on all the respondents and file with the Tribunal his application to amend his claim on or before 4.30pm on 11 March 2019.' [EP 123]

5 The Claimant produced a Further and Better particulars of claim [EP125] and a Scott Schedule [EP160]. The Claimant also produced a Particulars of Claim (Amended) [EP170].

6 Consequently the Second and Third Respondents produced an Amended Grounds of Resistance [EP182, 187].

7 It was recognised by the Tribunal that the Claimant's application to amend required determination. A letter confirmed that it would be considered by the Tribunal at the second Preliminary Hearing [EP195].

8 In the event, the second Preliminary Hearing took place on 12 July 2019 before Employment Judge Martin. The Judgment at that Preliminary Hearing was that the Claimant did not make a protected disclosure and the claims against the First and Third Respondents were dismissed. Accordingly only the claims for wrongful dismissal and holiday pay proceeded against the Second Respondent.

9 The Claimant appealed this outcome to the Employment Appeal Tribunal. On 9 April 2021 a Judgment was produced by the Employment Appeal Tribunal and His Honour Judge Tayler. The Claimant's appeal was allowed and the matter was remitted for case management and determination by a differently constituted Employment Tribunal. In his Judgment, HHJ Tayler emphasised the need to take reasonable steps to identify the claims and the issues in the claims beyond requiring the Claimant, a litigant in person, to say what the claims and issues are.

10 At paragraph 79 of the EAT Judgment, HHJ Tayler stated as follows:

'It is important that care is taken to analyse the pleadings to gain a fair understanding of the claim that the claimant is seeking to advance. This may require consideration of amendment (subject to the usual rules).'

The Judge went on to observe that there might be prior disclosures when the case is properly analysed.

11 Following this, Counsel drafted the Claimant's application to amend his claim. This application is dated 12 August 2021 [EP221]. The Application included proposed amended grounds [EP 227].

12 In October 2021 the First Respondent applied for a deposit order [EP 241].

13 On 27 October 2021 a further Preliminary Hearing was held. The Claimant's claim of automatic unfair dismissal under section 103A of the ERA 1996 was dismissed upon withdrawal. Employment Judge Pritchard also gave case management directions both for a further preliminary hearing and for preparation of the case for a full merits hearing which, subsequently, has been listed for 3 – 10 October 2022 [EP 347]. In particular, it was noted that the Claimant's application to add further allegations of detriment was to be considered at the next preliminary hearing.

14 It is against this procedural context that I now have the case before me. At the start of the hearing it was agreed by the parties that the matters which continue to require consideration are as follows:

14.1 The Claimant's application to amend his claim;

14.2 The First Respondent's application for a deposit order;

14.3 General case management – this is to include a consideration of the List of Issues which is still in draft form. The First Respondent has raised queries with issues 10 and 20.

15 During discussion with the parties the following factual matter was clarified – namely, that the Claimant says that he was locked out of the portal on 4 July 2018 but that he was informed by email about this at 8.50am on 5 July 2018. It was agreed by all parties that it was important for this matter to be recorded at this hearing and that the relevance and importance of this is an issue to be properly considered further at the full merits hearing in October 2022.

Legal Summary

16 Employment Tribunals have a general discretion to grant leave to amend a claim (see Rule 29 of the ETs (Constitution & Rules of Procedure) Regulations 2013, Sch 1. Presidential Guidance is also provided on making amendments to a claim in the Presidential Guide – General Case Management document.

17 In summary, allowing an application is an exercise of a judicial discretion. When an application to amend is made, the Tribunal should have regard to the extent of the amendment sought. Minor amendments, such as a correction of a typographical error or a date, may cause no difficulties. More substantial amendments can cause problems. Regard must be had to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it.

18 The Tribunal must carry out a careful balancing exercise of all of the relevant factors, having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment. Relevant matters include the nature of the amendment sought, the applicability of time limits and the timing and manner of the application. These were the relevant circumstances identified by Mummery J in Selkent Bus Co Ltd v Moore [1996] IRLR 661 on a non-exhaustive basis. Later judicial comment has identified that Mummery J's guidance in Selkent was not intended to be a box ticking exercise but was simply a discussion of the kinds of factors likely to be relevant when carrying out the balancing process required (for example, see Abercrombie v Aga Rangemaster Limited [2013] EWCA Civ 1148 and the judgment of HHJ Tayler in Vaughan v Modality Partnership [2021] IRLR 97).

19 If a new complaint or cause of action is intended by way of amendment, the Tribunal must consider whether that complaint is out of time and, if so, whether the time limit should be extended under the appropriate statutory provision (i.e. reasonable practicability or on the just and equitable ground). A party will need to show why the application was not made earlier and why it is being made at that time. An example which may justify a late application is the discovery of new facts or information from the disclosure of documents.

20 The Tribunal notes that the just and equitable test enables a far wider range of factors to be taken into account than the reasonably practicable formulation, which is focused on whether it was feasible for the claimant to have presented his claim in time. In practice, there is unlikely to be any material difference in the application of the 'just and equitable' test and the 'balance of justice and hardship' test - if an amendment were refused under the former test, it is difficult to envisage what additional matters might cause it to be granted under the latter (see Ali v Office of National Statistics [2004] EWCA Civ 1363). Where the not reasonably practicable test applies, it was noted by Underhill J in Transport and General Workers Union v Safeway Stores Ltd UKEAT/0092/07 (6 June 2007, unreported) that,

'an employment tribunal has a discretion in any case to allow an amendment which introduces a new claim out of time'.

As the judge was wrong not to have considered the balance of hardship and injustice test, Underhill J proceeded to apply it himself. The main factors that he took into account in permitting the amendment were that the new claim was very closely related to the original one and all or most of the facts necessary to prove it were already before the tribunal; that the new claim, which was omitted from the original pleadings by the mistake of the claimant's lawyers, would not have come as a surprise to the respondents; and that the application to amend was made reasonably promptly. In the circumstances, his Lordship held that there would be a greater injustice to the claimant if the amendment were refused than to the respondents if it were allowed.

21 The Tribunal identifies amendments as follows: (i) amendments which are merely alter the basis of an existing claim without raising a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim; and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

22 In deciding whether the proposed amendment is within the scope of an existing claim or whether it constitutes an entirely new claim, the entirety of the claim form must be considered. If the claim form includes facts from which such a claim can be identified, the Tribunal as a rule adopts a flexible approach and grants amendments that only change the nature of the remedy claimed. While there may be a flexibility of approach to applications to re-label facts already set out, there are limits. Claimants must set out the specific acts complained of, as Tribunals are only able to adjudicate on specific complaints. A general complaint in the claim form will not suffice. Further, an employer is entitled to know the claim it has to meet.

23 In Abercrombie v Aga Rangemaster Ltd [2013] EWCA Civ 1148 Underhill LJ summarised the approach adopted by the EAT and Court of Appeal when considering applications to amend 'which arguably raise new causes of action' This is:

" … to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

24 It is only in respect of amendments falling into category (iii) - entirely new claims unconnected with the original claim as pleaded - that the time limits will require to be considered. The fact that the relevant time limit for presenting the new claim has expired will not exclude the discretion to allow the amendment.

25 The Tribunal is able to make a deposit order pursuant to Rule 39 of the ETs (Constitution & Rules of Procedure) Regs 2013, Sch 1. Where a tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may order the party putting forward the allegation or argument ('the paying party') to pay a deposit of an amount not exceeding £1000 as a condition of continuing to advance the allegation or argument. If the paying party fails to pay the deposit by the date specified, the specific allegation or argument to which the order relates will be struck out.

26 If the tribunal ultimately decides the specific allegation or argument against the paying party for substantially the same reasons given in the order, the paying party will forfeit the deposit, which will be paid to the other party.

27 In Hemdan v Ishmail [2017] IRLR 228, Simler J pointed out that the purpose of a deposit order

'is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails',

and he stated that the purpose
'is emphatically not … to make it difficult to access justice or to effect a strike out through the back door'.

28 When determining whether to make a deposit order, a tribunal may have regard to the likelihood of the party being able to establish the facts essential to his case. There must be a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response and it is important that the tribunal engages with, and understands, the basis of the claimant's claim before concluding that it has little reasonable prospect of success (Wright v Nipponkoa

Insurance (Europe) Ltd UKEAT/0113/14 (17 September 2014, unreported), at [75]; Tree v South East Coastal Ambulance Service NHS Foundation Trust UKEAT/0043/17 (4 July 2017, unreported)). Whether there is little reasonable prospect of success under Rule 39 is a summary assessment by the Tribunal intended to avoid cost and delay. It should not involve a mini-trial of the facts, as this would defeat the object of the exercise.

The Claimant's Application to Amend

29 The Claimant's application to amend sought to significantly broaden the claim from that understood or acknowledged to date. In particular the Claimant identified nine further disclosures he sought to rely upon and a number of further detriments. Each of the amendments sought required careful consideration as there were differing factors relevant to each. In considering the application I heard oral submissions from Counsel on behalf of each of the parties and applied the relevant legal principles as set out in the summary.

30 I shall first consider the application to amend to add nine further alleged disclosures, taking each proposed amendment in turn:

(1) An oral disclosure to Ms Sheryl Brand-Grant of R3 on or around 18 or 19 June 2018

31 In the Claimant's ET1, there is reference to this conversation at paragraphs 47 – 52. The narrative within the ET1 is reasonably detailed and the description of a conversation with Ms Brand-Grand is also referred to in the context of a complaint being received from Ms Goldklang. This is material because it is this type of context that enables parties to understand the case and, in particular, for a respondent to understand the case they have to meet. I acknowledge that not only is there a reasonably detailed description of the relevant factual narrative but that this was set out when the Claimant first brought his claim. Further the Third Respondent acknowledges that the material included in the ET1 does set out the factual basis for the disclosure.

32 This is an example of a relabelling of existing facts pleaded in the case. Taking into account the entirety of the relevant circumstances including the nature of the amendment sought and the timing and manner of the application and carrying out the exercise of balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it, I allow this amendment.

(2) An oral disclosure to Ms Sabrina Joseph of R2 on or around 25 June 2018

33 It is said by the Claimant that the relevant facts for this amendment are also already to be found in the relevant documents. I am referred to

paragraph 53 of the ET1. That paragraph begins with the sentence, *'I had called both Adecco and Giant …..*'. The paragraph continues with a description of the conversation with Ms Hyde.

34 There is no reference to a conversation with Ms Joseph either in the ET1, the Further and Better information or the Scott Schedule. Nor is Ms Joseph's name mentioned in the August 2021 application. The relevant paragraph in that document refers only to the *'Second Respondent'.*

35 It appears that Ms Joseph's name first appears within the draft List of Issues. In this way, the amendment sought is not simply a relabelling exercise. Rather, the Claimant is seeking to amend by introducing a new allegation for the first time today that he had a conversation with Ms Joseph.

36 In carrying out the relevant balancing exercise, I have been particularly concerned by the fact that not only is there no reference to Ms Joseph's name in any earlier document but there is also no description of what was said by the Claimant to Ms Joseph. This lack of necessary particulars weighs heavily in my decision that this amendment should not be allowed. That there is no account with any particulars of what was said together with the other factors of the passing of time and that this is alleged to have been an undocumented, oral exchange between individuals leads me to conclude that the amendment should not be allowed. There is real evidential prejudice caused to those who would need to respond to this allegation. This amendment is refused.

<u>(3) An oral disclosure to Ms Emma Hyde of R1 on or around 25 June 2018</u>

<u>(4) A written disclosure in a email to Ms Hyde of R1 on or around 25 June 2018</u>

37 The next two amendments sought can be considered together. They refer to an oral conversation said to have taken place between the Claimant and Ms Hyde and an email that is said to have been sent following this and to which a response was received by the Claimant on 28 June 2018.

38 There is reference both to the telephone call and the email dialogue in the ET1 at paragraphs 53 and 54.

39 I am satisfied that both these amendments should be allowed. It is in the interests of justice to allow them and the balancing exercise of all relevant factors favours the amendments being permitted. There is clear reference to the relevant factual matters within the original ET1 and this is a case of relabelling those pleaded facts as amounting to a disclosure.

(5) An oral disclosure to Ms Alison Farmer of R3 during a meeting on 2 July 2018

40 It is accepted by Counsel for the Claimant that there is no reference to this alleged conversation within the pleadings themselves. The reference comes from the letter of 5 July 2018 which, in turn, refers to a conversation with Ms Farmer.

41 Accordingly I am satisfied that this amendment cannot be categorised as a relabelling exercise. Rather, the Claimant is seeking to introduce new facts in order to allege that he made a further disclosure to Ms Farmer.

42 I have considered the entirety of the circumstances relevant to this part of the Claimant's application. In particular, I am referred to the timing of the application. Ms Farmer is no longer employed by the Third Respondent. Mr Phelps submits that there is real prejudice to the Third Respondent in respect of this proposed amendment as no enquiry would have been made about this matter at the time of service and receipt of the ET1 because it wasn't included there. Although it is the Claimant's case that there is a clear reference in the letter of 5 July 2018, the Respondents were not put on notice of this conversation including an alleged disclosure until the August 2021. I do accept the submissions made about evidential prejudice and the likely loss or diminution in quality of cogent evidence for the Respondents. In the circumstances, I am satisfied that this factor supports the relative hardship to the Respondents is greater in allowing this part of the application when compared with the hardship to the Claimant in refusing it.

43 I am satisfied that this amendment should not be allowed.

(6) An oral disclosure to Ms Brand-Grant of R3 on 2 July 2018

44 The relevant narrative to this amendment is found in the Further and Better information document. At paragraph 37 it is said,

"On Monday 2nd July 2018, after meeting Ms. Farmer, C then had a brief meeting again with Ms. Brand-Grant, it was here that Ms. Brand-Grant had told C to get rid of emails and that he was 'ignorant'. C clearly stated that he would not get rid of emails as he was suspicious that something was not right. Ms. Brand-Grant stormed off and said she would speak to Ms. Pasby to reassure C that Ms. Goldklang did not leak his data to the SEN department."

45 The Claimant's disclosure is identified as being the Claimant saying he would not get rid of emails, as he was suspicious that something was not right.

46 Of course, this sentence is capable of two interpretations. Firstly, that all the Claimant said was that he would not get rid of emails or that he said he would not get rid of emails because he was suspicious that something was not right. In other words, the second part of the sentence could be something the Claimant actually said or it could be a narrative phrase to explain why the Claimant said the first part of the sentence.

47 In considering this proposed amendment, I was not satisfied that the information particularised could be said to amount to a disclosure for the purposes of section 43B of the Employment Rights Act 1996. I accept the submissions made, that the necessary elements of a qualifying and protected disclosure are not present in the paragraph quoted above. I have also taken into account that this is said to have been an oral conversation without written record.

48 Carrying out the balancing exercise, I am satisfied that this proposed amendment should not be allowed.

(7) An oral disclosure to Ms Brand Grant of R3, Mr Thompson of R3 and / or Ms Pasby of R1 during a meeting on 2 July 2018

49 There is reference to this meeting in paragraphs 56 – 63 of the ET1. However within those paragraphs, there is no reference to any disclosures made by the Claimant. At its highest, the Claimant says that he asked what the First Respondent's policy was (see paragraph 61 of ET1). However having considered the paragraphs in detail, I do not consider that there is anything contained in them that can be said to amount to a disclosure made by the Claimant at that meeting, that falls within Section 43B.

50 Within the draft List of Issues, it is said that the Claimant communicated that this personal data was leaked to colleagues by Ms GoldKlang.

51 This is not referenced within the description of the meeting already pleaded nor is it particularised appropriately in any proposed pleading.

52 Having carried out the balancing exercise and noting the passage of time and the failure to appropriately particularise this proposed amendment, I do not allow this amendment.

(8) An oral disclosure to Ms Wright of R3, Mr Thompson of R3 and / or Mr Casartelli of R1 in a meeting on 3 July 2018

53 This meeting is described in paragraphs 64 - 74 of the ET1 [63-64]. The matters that are said to have been disclosed by the Claimant are set out in paragraphs 8.1.1 and 8.1.2 of the draft List of Issues.

However there is no reference to this information being disclosed by the Claimant within the description of the meeting in the paragraphs of the ET1 to which I have just referred.

54 Accordingly like the previous amendment, this is an example of the Claimant seeking to introduce entirely new facts to his claim in order to assert that he made a further disclosure.

55 Having heard submissions from Counsel on this part of the application, there does not appear to be any explanation for the delay in introducing these entirely new facts and, in particular, why they do not appear within an otherwise reasonably detailed description of the relevant meeting within the original pleading. The relevant Respondents object to what they view as a delay in introducing this alleged disclosure and the affect this, in turn, will have on obtaining evidence on this point.

56 I do accept the likelihood of prejudice on the part of the Respondents caused by an original description of this meeting being expanded to include alleged oral disclosures. In the circumstances I am satisfied that the hardship caused to the Respondents in allowing this amendment outweighs the hardship to the Claimant in my refusing it. Accordingly this amendment is not allowed.

(9) An oral disclosure to Ms Ruiz of R1 during telephone conversation on 4 July 2018

57 This is referenced in the Further and Better Particulars [125]. I note that the following is stated,

'C first raised his concerns to R1 on 4th July 2018 via telephone to Ms Paula Ruiz (HR Adviser). Ms Ruiz had told C before she can investigation, C was to put his concerns in writing.'

58 It is clear that the Claimant then proceeded to write his letter dated 5 July 2018, the contents of which are already noted by the parties.

59 The references to this matter within the Further and Better Particulars are clear. Whilst it was an oral conversation, the fact that it happened is apparently supported by the Claimant following the instruction to send a letter which he did the following day.

60 I am satisfied that this amendment should be allowed. The context to the alleged oral disclosure is clear and the balancing exercise favours this allegation forming part of the Claimant's case to be considered at the full merits hearing.

61 I now progress to considering the proposed amendments concerning alleged detriments. I note that the Third Respondent takes no issue

with the alleged detriments set out in paragraph 33(i) – (v) of the August 2021 application.

62 The First Respondent takes particular issue with paragraph 33 (v) and it is accepted by the Claimant that this is entirely new. In other words, it has not been referenced in the early documents produced in this case.

63 I have considered carefully whether this amendment should be allowed. I have decided that it should be allowed. I have taken into account the entirety of the relevant circumstances and the fact that the amendments concerning disclosures and Emma Hyde have been allowed in this application. I also therefore consider it to be appropriately consistent to allow this alleged detriment which is said to be a reference within an email. I hasten to note that I understand that there will of course be full argument in October 2022 at the full merits hearing as to whether this can amount to a detriment and my allowing the amendment is in no way a signal to the Claimant that he has a good case in so far as this issue is concerned.

64 The Second Respondent raises issues with the parts of these paragraphs that relate to them. There are three alleged detriments raised against the Second Respondent. These are locking the Claimant out of the online system and terminating two assignments.

65 Other than a reference to being locked out within the Scott Schedule, these detriments have not been particularised until the August 2021 application.

66 Mr Devlin referred to the argument that if information had been included within the ET1 and / or the Further and Betters, that would tend to indicate that the amendment should be allowed. As noted, these proposed amendments were not so included. I have heard Mr Green's arguments about the prejudice to the Second Respondent if these amendments are permitted and the difficulty faced with uncovering the relevant evidence at this stage. I also note the argument that some of this delay is to be put at the Claimant's door particularly following the EAT Judgment in 2021 and the time that then passed prior to the August 2021 application being produced.

67 The relevance of these proposed amendments will obviously require further consideration following my judgment on the first part of this application but insofar as they continue to be relevant, I am satisfied that the references to actions of the Second Respondent cancelling the assignment on its online system should not be allowed as amendments to the list of alleged detriments.

68 Again, insofar as it remains relevant, I am satisfied that the reference to the Second Respondent locking the Claimant's access to the online system on 4 July 2018 should be permitted as an amendment.

69 This was referenced in the Scott Schedule and, although I am mindful of the fact that this was a minimal reference, I also note that the factual context of the Claimant being locked out of the system appears to be documented with an email being sent to him the following day. In my judgment, the balance of prejudice and hardship test on this point therefore favours the Claimant and this amendment being allowed.

70 In summary, the references to actions of the Second Respondent cancelling the assignment on its online system should not be allowed as amendments to the alleged detriments as set out in paragraphs 33(i) – (v) of the August 2021 application. Save for that matter, the alleged detriments set out in those paragraphs are allowed by way of amendment.

71 Turning to paragraph 34, paragraphs (vi) – (xi), these matters are contained in the detailed paragraphs within the Further and Better Information from March 2019. They are presented under a heading 'Post Dismissal Detriment'.

72 I have carefully considered Mr Phelp's submissions about the status of the Further and Better Information. As Mr Phelp's submits, that document has not been ruled on and there was no guarantee in March 2019 that the Claimant would have those matters added to his case by way of amendment. I have also taken into account his points about Ms Degnman no longer being employed by the Third Respondent and general difficulties with witnesses remembering relevant things at this stage.

73 However, on balance, I am satisfied that those alleged detriments should be allowed in by way of amendment. Again, this should not be taken as any indication of the strength of argument that any of the identified matters actually amount to a detriment. Rather, and for the purposes of this application, I am satisfied that taking account of the balance of prejudice and the hardship test, that those matters should be permitted as amendments. In particular I note that the alleged detriments come from an examination of documentary material provided to the Claimant following a data subject access request. In this way, the comments referred to are a matter of documentary record and not alleged oral exchanges. They were also identified by the Claimant at an early stage in this litigation. I allow those amendments.

The Draft List of Issues

74 An issue arises concerning paragraph 10 of the draft List of Issues. This refers to the 5 July 2018 letter as a disclosure to R1. It is said, principally by R1, that the information set out in the draft List of Issues at this section requires a successful application to amend if it is to remain within the list for the Tribunal's consideration at the full merits hearing in October.

75 In essence, the Claimant relies upon four paragraphs contained in the letter of 5 July as amounting to disclosures of information and then, at paragraphs 10.2.1, 2 and 3, refers to relevant sections of Section 43B of the ERA 1996.

76 Having heard submissions from Counsel for each of the parties, I have reached the view that there was relevant narrative included by the Claimant in the ET1 but that it was not presented at that time as a Public Interest Disclosure claim with the legal labels that the Tribunal has to apply. Accordingly the Respondents were aware of the points being raised by the Claimant as to alleged leaking of his personal data and references to unqualified staff but, as Mr Hayes put it, it wasn't expressly 'packaged' as disclosures and a PIDA claim. I consider it could have been capable of that interpretation but also it was entirely capable of other interpretations – for example, the data breaches were thought to be a freestanding complaint over which the Tribunal did not have jurisdiction. It was also understandable that the parties may not have embraced the narrative as amounting to a public interest disclosure claim when, in the early stages of this litigation, there was a greater emphasis by the Claimant as to criminal allegations and fraud.

77 It is in this context, that I do find that an application has to be brought by the Claimant to amend the claim. The amendment sought is essentially a relabelling of the pertinent narrative of data leaks and unqualified staff into a PIDA claim. Mr Devlin has referred to a fleshing out of these claims in the further and better information and the August 2021 application. He also refers to their being a minimal prejudice to the Respondents due to the fact that these issues always formed part of the case presented by the Claimant to the Tribunal.

78 Mr Hayes tells me that the application is for an alternative cause of action for facts already pleaded. He refers me to points on time limits and the balance of prejudice. The prejudice he alights upon is that the Claimant's allegation is inherently contradictory. In one way, the Claimant says that there was an intrusion into his privacy by the leak of data as to payment of a particular daily wage – however, he says that it was clear that the Claimant was never paid that daily wage. In other words, there is a suggestion that because the information which apparently became known by others was incorrect, this may inform the position as to whether there can truly be said to be a leak of personal data.

79 Mr Hayes also refers to prejudice caused by the vagueness of the alleged disclosure concerning unqualified staff. He takes me to the relevant section of the letter of 5 July 2018 and identifies that there is no specific qualifications referred to and he submits that the statement made is a bare allegation rather than the detail required for a disclosure of information.

80 This is a matter picked up upon by Mr Wilson, although the Second Respondent does not strictly have an interest in this application, it no longer being a party to the PIDA claim. Mr Wilson refers to the need for a specific qualification to be identified by the Claimant as it can't be said that the need for any particular qualification is a given or a matter upon which judicial notice can be taken.

81 Mr Phelps on behalf of the Third Respondent refers to the fact that it is said for the first time today that somehow R3 is involved in the alleged disclosure at paragraph 10 because R3 came to know of the letter from the Claimant via R1.

82 He has taken me to relevant documents within the bundle where it is clear that R3 has repeatedly stated its case that after the letter of 5 July 2018 was sent to R1, R3 was told about it but R3 was not shown the letter nor aware of the detail of its contents.

83 Following my consideration of this matter, I am sympathetic to the submissions from Mr Phelps. I am entirely satisfied that it has not been made clear before today that it was part of the Claimant's case that R3 had knowledge of the disclosure set out in paragraph 10 of the draft List of Issues. It was headed a disclosure to R1 and there was no further narrative to suggest that any other Respondent was being referred to as having knowledge of that disclosure.

84 For the record, I note that that observation is no criticism of Mr Devlin's presentation of the case today. He is representing the Claimant in a full, robust and entirely professional way, as I would expect of Counsel.

85 However, taking account of the stages through which this case has passed, I am satisfied that the very late mention of R3 being said to be involved with the alleged disclosures in the letter of 5 July 2018 is prejudicial to R3. As I have commented, there was no proper and clear suggestion that this was the case before today. I entirely accept the points made by Mr Phelps as to prejudice and I am satisfied that that prejudice results in the balancing exercise favouring the amendment not being permitted. I do not allow the claim to be amended to include an assertion that R3 had knowledge of the disclosures within the letter of 5 July 2018, such that any alleged detriments from R3 have flowed or been caused by those alleged disclosures.

86 Turning to the first part of the application, I do allow the amendment of the claim and therefore for the issues at paragraph 10 of the draft List of Issues to proceed to a full merits hearing.

87 I do not find that the prejudice identified by Mr Hayes, of a weak or inconsistent case on the part of the Claimant, to be such that it outweighs the prejudice caused to the Claimant if the amendments are not allowed.

88 I observe that there are apparent weaknesses to the Claimant's case – the issue of what qualification and the question of what amounts to a disclosure - but I am not satisfied that the weaknesses are such that the matter should not proceed to a full merits hearing or that those weaknesses tip the balancing exercise in favour of refusing the amendment.

89 Accordingly I will allow the amendments in so far as paragraph 10 of the draft List of Issues is concerned.

Application for a Deposit Order

90 The First Respondent makes an application for a deposit order pursuant to Rule 39. Rule 39 states that where the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success it may make an order requiring a party to pay a deposit.

91 The first argument that Mr Hayes puts forward is in relation to issue 15 within the draft List of Issues – was the Claimant co-employed by the First Respondent in addition to being employed by the Second Respondent?

92 Mr Hayes details multiple arguments that he identifies show the inherent weakness in the Claimant's case that he was co-employed. These include that co-employment is a reasonably rare scenario and his assertion that the Claimant specifically elected to be employed by the Second Respondent and to not be employed by the First Respondent. He also refers me to relevant case law, which I have considered. It is agreed that the pertinent legal issue is whether there is necessity to imply a contract of employment. Mr Hayes refers me to payslips and identifies other clear arrangements he says were in place, in submitting that there is no need to imply a second contract of employment when there is no obligation on the First Respondent to pay the Claimant and the Claimant asked for his contract with the First Respondent to end. Mr Hayes has also made a submission that there was no breach if the assignment was brought to an end without notice.

93 In addition Mr Hayes refers me back to the alleged disclosure about unqualified staff – he reiterates his points that this alleged disclosure is wholly speculative absent the identification of any specific individual or any specific qualification when imparting the information.

94 I agree with Mr Hayes that the First Respondent has strong arguments on both of these matters – the need or not to imply a second contract of employment and whether the information imparted amounts to a disclosure.

95 I am required to apply Rule 39 and, in particular, decide whether I am satisfied that in this regard the claim has little reasonable prospect of

success. On the information before me I am satisfied that the Claimant has some arguments on both of the relevant limbs of his case. There is some evidence that, at the relevant time, the First Respondent regarded themselves as the Claimant's employer. They apparently told him this in a meeting. There is also some evidence in support of the First Respondent carrying out some tasks expected of an employer. In those circumstances, on the brief information and evidence I have before me at this time, and guarding against conducting a mini-trial, I am not satisfied that the Claimant has little reasonable prospect of success on this point such that a deposit order is appropriate. There is a weight of authority the Claimant will need to navigate in order to succeed with this part of the claim and I acknowledge that but I accept Mr Devlin's point that the detail of the arrangements and the practical exercising of the responsibilities of employer need to be understood in detail.

96 Insofar as the alleged disclosure is concerned, I am not satisfied that it is appropriate for me to make a deposit order in this regard. Again I note that there are weighty arguments against the contention that this amounts to a disclosure but in the circumstances of this case I am not satisfied that a deposit order should be made. The alleged disclosure made in the letter of 5 July 2018 was made in the context of several discussions and meetings which had happened beforehand. I do consider it is important for the Tribunal to have an understanding of this context in full and in my judgment it is not possible to reach a conclusion that the allegation has little reasonable prospect of success without a proper and thorough grasp of this context.

97 Accordingly the First respondent's application for a deposit order is refused.

Employment Judge Harrington
17 August 2022