Case number: 3312962/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B. Czarnecki	AND	John Lewis PLC

HEARD AT: **Watford Tribunal Centre** **ON:** 1 December 2022

BEFORE: **Employment Judge Douse (Sitting alone)**

Representation:

For Claimant: **In person**

For Respondent: **Ms Anderson, Counsel**

RESERVED JUDGMENT
AT A PRELIMINARY HEARING

The Claimant's application to amend his claim to include complaints of protected disclosure/whistleblowing detriment is refused.

REASONS

Background

1. The preliminary hearing was listed to determine:

1.1 Whether the claimant was disabled within the meaning of the Equality Act 2010 at the relevant times for the purposes of the Tribunal claim;

1.2 Whether the claimant should be permitted to amend his claim (including to allege protected disclosure/whistleblowing detriment);

1.3 Obtain further clarification of the claim and the defence;

1.4 Make case management orders and list the case for a full merits hearing.

2. In relation to 1.1 above, before the hearing started the Respondent conceded that the Claimant was disabled within the meaning of the Equality Act 2010, by virtue of the problems with his hip and right knee. I heard evidence in relation to his other condition – musculoskeletal problems affecting his back – and gave an oral judgment on the day that this did not meet the criteria of a disability for the purposes of the Equality Act 2010.
3. 1.4 above, but there was insufficient time to deal with this in great detail and to make further case management orders. Therefore, the case has been listed for a further preliminary hearing in private, for general case management.
4. In relation to 1.3 above, the Claimant had been ordered to provide further specific information by EJ Eeley. He did this to some degree in writing [124 – 147], and also provided various supporting documents {148 – 257].
5. The Respondent had provided an amended response/grounds of resistance, with further details of their defence.
6. The rest of this judgment will deal with the substantive issue at 1.2 above, the claimant's application to amend his claim to include complaints of protected disclosure/whistleblowing detriment.

7. The Claimant had been ordered to provide the following information (Further and better particulars (FBP)) by EJ Eeley:

"4. The claimant wishes to amend his claim to pursue a claim of public interest disclosure detriment (see paragraph 6 below). The claimant should write to the Tribunal and the respondent by no later than 30 September 2022 explaining why he did not set out his public interest disclosure (whistleblowing) claim in the claim form from the outset and explaining why the Tribunal should give him permission to amend his claim in this way...

6.2 In relation to the claimant's proposed claim of whistleblowing/Public Interest Disclosure:

6.2.1 The date of each whistleblowing disclosure;

6.2.2 The contents of each of the whistleblowing disclosures (what did the claimant say/disclose?);

6.2.3 Did he believe it tended to show that?

6.2.3.1 a criminal offence had been, was being or was likely to be committed;

6.2.3.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

6.2.3.3 a miscarriage of justice had occurred, was occurring or was likely to occur;

6.2.3.4 the health or safety of any individual had been, was being or was likely to be endangered;

6.2.3.5 the environment had been, was being or was likely to be damaged;

6.2.3.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed;

6.2.4 On what basis the claimant says he reasonably believed that he was making the disclosure in the public interest;

6.2.5 Details of who the claimant made the whistleblowing disclosures to;

6.2.6 Confirmation of how the disclosure was made (verbally, email, in writing?);

6.3 In relation to the whistleblowing/public interest disclosure claim:

6.3.1 Details of each detriment the claimant alleges he was subjected to as a result of 'blowing the whistle'/making a public interest disclosure, to include:

6.3.1.1 What happened (what detriment was he subjected to?);

6.3.1.2 Who subjected him to the detriment;

6.3.1.3 The date(s) on which he was subjected to the detriment(s)"

8. The Claimant provided the following responses:

"I ask the Tribunal to give permission to amend the claim to include this point as it was my intention to bring it for consideration from the outset of the case. I have raised this issue with the ACAS conciliator, and I was clear that it constitutes an essential part of my claim and bears public interest as it is to my best knowledge repeated process across all branches of my ex-employers and has dealt damage not only to myself but to other former and present employees. Unfortunately, the box it has been misclicked during the completion of the form, but at the same time, it was stated in the text part of it " [124].

"● COVID-19 concerns

In an email, and communicator swap (Whats-app) with Mary Richards dated 21 May 2020 I have made disclosure about lack of COVID countermeasures in the Waitrose Aylesbury branch. Raised points were

● Turning off hot water in the toilets made employes unable to properly wash their hands

● Not providing soap to (savings/lack of care) for the night made employees unable to wash their hands

● The fact that I was not allowed to keep my KN-95 mask and was asked to remove it during my meeting with Kamran Shahid on/or about 9th of May 2020

● Forcing employees to interchangeably using one "freezer coat" while performing duties.

● During the meeting Kamran Shahid was purposely sitting shoulder to shoulder with me, disobeying 2m distancing rule.

Those actions had negative impact on my mental health as I was terrified of contracting COVID-19, forced me to self-isolate and avoid coming back to my duties at least until vaccinated. It was putting other employees at the risk of

contractin COVID-19, and brought undue stress from worries of the contraction. My repost to local council was conveyed to the branch - namely this was brought up with Andrew Prescott-Jones and my name was mentioned as a person complaining. At the same time as my employer refused me serving the work under the Sick-note stating I was available for work with adjustments I believe that forced lack of distancing and order to remove a mask was aimed at discouraging me from coming to work. That was fully successful.

- *Systemic error with the payroll system for night workers. A day of work in the HR and Payroll system at John Lewis Partnership runs from 0:00:01 till 0:00:00 so it encompasses 24 hours of a day.*

  Night workers - at least at the branch I worked at - start the shift at 21:00 day1 and finish at 7.30 Day2.

  Therefore every shift falls on to 2 accounting days on the system. While in my case I was starting every thursday at 21:00 working trough night Fridays, Saturdays and Sundays, my contractual hours were logged in as factual, but absences were logged as full accounting days. So every week of absence was creating excess of deductible hours at the start and at the end - Thursdays and Mondays.

  The way pyroll was calculated it was Contractual Pay - Absences = payout.

  It is easy to see that in a case of a full week absence deductions were greater than the contractual pay.

  This resulted in negative pay, deductions made to pensions, NIN and Taxes.

  The negative payslips would add-up for consecutive months of the absence and at the end of my contract amounted to nearly 3000 GBP, which my employer falsely excused as overused holidays.

  This issue was reported by me to the immediate manager - Andrew Prescott-Jones, Head Office, was part of 2 grievances. As it is reasonable (but questionable) to believe that the employer was not aware of the issue prior to my disclosure, even after it they found it convenient to not fix the issue and leave it as it was - mostly because it was a way of pushing out long term sick employees and keeping inside the business their contractually due pay, holiday payments, pensions and even STATUTORY SICK pay.

  The excerpt from SAR shows and evidences that the employer was and still is aware that the issue is persisting, but decided to NOT take steps to fix the issue letting it be."

“That was the case for myself which resulted in me having no pay- even statutory sick pay during the most difficult time during COVID lock down. It had a huge impact not only on my physical health - inability to pay for pain relief medicine, pain relief supplements (bath salts) but it had a huge negative impact on the mental health as well, driving me into depression, anxaiety and PTSD.”

“● Andrew Prescott-Jones

Was making harassing and abusive calls trying to persuade me to drop attempts to expose his fraudulent meddling with timesheets, and attempts (successful for a long time) to stop contractual payments due to me. I had to respond in written form to it:

He proceeded with same unsolicited calls to my GP, trying to extract illegally - without permission - the content of my medical records. I was informed about that in a call from my GP who was both shocked and unhappy to receive abusive calls from Andrew.

It was followed up with another email from me to Andrew and Occupational Health revoking previously given permission to access my med history.

Mail dated 13/05/20

“Please respond to my request, communicate with my representative, and please stop harassing behaviour, like today when you called me and tried to press me for answering without legal advice. These are causing on top of depression from financial struggle, anxiety attacks and trouble with concentration. I believe you will enter consultation with my legal representative and will reach an agreement without any further escalation.”

And email dated 14/5/20

“Dear Andrew, I would like to inform you and ask to pass this information onto the Occupational Health that I withdraw my consent (for Health Occupation I was referred by yourself to) to access my medical record, which was given in February this year. It is a result of your breach of my privacy and attempts to unlawfully extract information related to my health without any notice of intending nor my consent. This infringement happened during today's telephone contact with my GP. I would like to remind you that never you, nor any other partners working in the branch have been given permission to initiate such a contact nor to obtain any

parts of my medical record. This permission has been given in goodwill only to the Occupational Health medical professional body.

This is with immediate effect"" [141-143].

Procedure and evidence

9. I was provided with an electronic bundle of 257 pages – references to page numbers within this judgment are to that bundle and contained within [ ].
10. The Claimant also provided a number of separate documents, but these were already included within the bundle.
11. The Claimant did not provide a witness statement, but following an affirmation he accepted the contents of his ET1 and FBP as true, and was cross-examined by Ms Anderson.
12. I spent some time getting the claimant to clarify the nature of the specific disclosures he was relying on, and what detriment he says flowed from these.
13. The Claimant confirmed to me that the final bullet point, relating to Andrew Prescott, related to his harassment claim rather than whistleblowing.
14. The Claimant also said that part of the further information he provided in answer to questions about other claims actually related to a whistleblowing claim, namely:

"Group Insurance Protection mishandling - Richard Benninson and Andrew Prescott-Jones.

From around February 2021 Head Office of John Lewis Partnership was opening a claim in my name in regards to the Group Insurance Protection claim, which further handling was relayed to the "peoples Manager" Richard Benninson, who deliberately neglected any action on this matter and avoid any contact in this regard with myself, even when being chased up by myself, the management of his own Head Office and claim handler from Ariva - Insurance provider.

Finally, they have refused to proceed with the claim claiming "no full days being worked in the qualifying period" - please refer to the above refusal to accept me serving the contractual work as a setup for this refusal. Dates approx Feb 2021 till May 2021.

This has been raised in number of email swaps in the mentioned period of time, and was a part of the written Grieviance" [128].

"Mismanagement of a First aider availability during night shifts Our night team had two acting night managers - Grant Hurrel and Kamran Shahid

Grant was first aid trained, and to my best knowledge, Kamran WAS NOT.

In this regard half of the time - when Kamran was a Night Manager we had no first aider on the site. Additionally, Grant was cutting every of his night shifts short leaving the site (with unofficial approval from the manager Andrew Prescott-Jones as his job perk - being paid for a full night every time).

That was leaving me (and others) with no supervision - especially during the morning delivery (usually between 5-7 am) where I was made to take and manage the delivery on my own and never assisted with. This is evidenced by the disciplinary notes and my reporting of the manager's absences, and Grant being asked about it and confirming that was the case. That was on the same night Grant habitually left early, claiming he was owned time (that is not true as he did that every night) and did not follow the procedure to request owned time, rather taking his own liberty to do so.

Hence he left prior to promised meeting with me during which we were meant to process my hours owed as an early leave. I have taken the same liberty to go home without following the procedure. The end result was Grant not being even reminded what he should do in regard to the time owed, and I was given a written warning.

Please refer to the file "disc-notes-Grant skipping shift.pdf" " [137].

"Andrew Prescott-Jones

Making fraudulent changes to the time sheets.

It was brought to my attention with March 2020 payslip that my PSP (Partneship Sick Pay) was not renewed for the 2020 year. I was informed by PPA (help line for Partners) that in order to qualify for the renewal I had to be working for a full week after my anniversary of the contract (4th of January each year). This prompted me to check timesheets via Partnerlink (online portal for HR interactions with the place of work eg holiday requests) where to my surprise I have noticed retrospectively added Holiday - part day on the 18th of January 2020

This would and had stopped my renewal of PSP, but was not an entry representing actual state of my times worked. The only one reason that was added there was to stop me from receiving contractually due PSP. I have raised this issue with Andrew on or about 26th of February 2020 during face to face meeting in the store 625 Aylesbury. I remember Andrew asking for the reason why would that possibly had happened and I expressed my doubts about legality of the change that was the first time I disclosed it as fraud.

It has been then raised in email swaps with Andrew - emails 29 April 2020, 11 May 2020 and his Manager (Will Westbrook) in the email dated 19th May 2020.

It was explicitly stated in a letter (file letter1.pdf) 19th May 2020" [137].

15. I was eventually able to ascertain that:

15.1 The claimant relies on the following disclosures:

15.1.1 Health and safety:

15.1.1.1 Regarding Covid measures; on 21 May 2020; to Mary Richards (Environmental Health) who then relayed this to the respondent

15.1.1.2 Regarding there being no first aider on site; to Andrew Prescott Jones in meetings in June and July 2019

15.1.2 Fraud

15.1.2.1 with payroll systems; by email to xx in February/March 2020, in his grievance on 12 July 2020, in the grievance meeting on 26 August 2020, and by email to Will Burton on 7 October 2020

15.1.2.2 regarding timesheets; as above

15.1.3 Negligence in relation to handling of:

15.1.3.1 pensions

15.1.3.2 group protection insurance

15.1.3.3 data security

15.2 It was difficult to get the claimant to assign specific detriments to specific disclosures, but I was able to establish that says he suffered the following detriments as a result of the above disclosures:

15.2.1 Prevented from performing his duties until July 2020

15.2.2 Financial issues – furlough refused, and underpaid so couldn't afford his painkillers and basic supplies

15.2.3 Partnership sick pay not renewed

15.2.4 Contribution to PTSD

15.3 During the course of his evidence, the Claimant also alleged that failure to fulfil his SAR requests was also a detriment.

16. The above disclosures and detriments were the basis of the amendment application and evidence taken from the Claimant.

Facts

General

17. On 1 July 2021 the Claimant sent an email to Richard Bennion [152], with the subject

"Dear Sirs,

Please be informed that from 01/07/2021 the contract of employment signed by myself, Bartlomiej Czarnecki, Partner nr 83281665, and former Waitrose – now Waitrose and Partners, (John Lewis plc who has its registered office at 171 Victoria Street, London, SW1E 5NN ("the Partnership")) on the 4th January 2018

Is terminated due to employers breach of employment contract. Main breaches of contract listed below:

1 Breach of the payroll policies – from January 2019 till now - point 7 of employment contract

2 Negligence in timesheets keeping – from January 2019 till now - point 7 of employment contract

3 Breach of the contract by not following Group Insurance Policies - point 12 of employment contract

4 Illegal deductions of wages in April 2021, May 2021 and, March 2021

5 Breach of contract in accounting for PSP Partnership Payment, last occurrence 27th June 2021 - point 11 of employment contract

6 Breach of contract by not offering safe and injury-free working environment

7 Deliberation to cause mental harm – evidenced by ignoring Acute mental health advice

8 Discrimination, harassment, bullying from the management team

9 Failure to follow Grievance policies and its appeal via claiming that issues with pay occurred in 2021 were already addressed in September 2020. - point 13 of the employment contract

I expect, to be paid statutory, contractual, and special notice period payments, all unused holidays, back payments for illegally deducted wages and compensations already raised with you since February 2021.

Bartlomiej Czarnecki"

18. By way of a claim form dated 9 July 2021, the Claimant brought claims of: Unfair dismissal; Disability discrimination; Notice pay; Holiday pay; Arrears of pay/deductions from wages; and 'other payments'.
19. There was also a claim for gender reassignment discrimination, which the Claimant confirmed to EJ Eeley that he was not making.
20. In the ET1, at Section 8.1 [6], the Claimant had made reference to:

"...Possible fraud and identity theft...Negligence to policies in regards to pensions, group protection insurance, health and safety, and data security...Non-compliance with ICO regulations"

21. In section 8.2 [7], the Claimant provides further details of his complaints of discrimination (disability and race), unfair (constructive) dismissal and deductions from wages. There is also reference to *"defrauding time cards and retrospectively placing never happened holidays"*, and an allegation that the resignation letter was *"constructed by themself and via identity theft uploaded on my behalf into the HR systems."*
22. There are other references to 'illegal' actions, but these relate to the wages deductions.
23. I will deal with each alleged disclosure separately.

<u>Identity theft</u>

24. Whilst the Claimant contends that the respondent had used his identity to upload the termination letter, he does not deny writing or sending the email with the subject 'Termination of the employment contract' on 1 July 2021.
25. What follows that is an email conversation over a number of days between the Claimant and Richard Bennion. This included an email from Mr. Bennion on 5 July

2021 [154] advising the Claimant that the proper process is for a resignation to be uploaded to the system 'Workday' and a statement that:

"If I do not hear anything from you to the contrary in the next 24 hours I will process your resignation on Workday."

26. The Claimant's reply to this [155] included:

"As far as I am concerned contract of employment (between myself and the Partnership) has dissolved on 1st July 2021 due to the Partnership permanently breaching it in multiple ways."

Covid

27. The Claimant gave evidence that he told Mary Richards (an individual responsible for environmental health) about his covid concerns on 21 May 2020, who then passed this on to the respondent a few days later by calling the branch. He describes this as "*My repost to local council was conveyed to the branch - namely this was brought up with Andrew Prescott-Jones and my name was mentioned as a person complaining."*
28. The Claimant says Mary Richards then emailed him with the outcome.
29. The Claimant says these communications included exchanging emails/WhatsApp messages. None of these were in the bundle – the Claimant said this is because he didn't think he needed to give full evidence.
30. The Claimant agreed Covid was not specifically referred to in the ET1 – he said it wasn't at the top of his head when filling in the form.
31. The Claimant told me he was prevented from performing his duties until July 2020. However, in his further and better particulars, after listing the alleged Covid breaches he says "*Those actions had negative impact on my mental health as I was terrified of contracting COVID-19, forced me to self-isolate and avoid coming back to my duties at least until vaccinated."*
32. The Claimant provided a handwritten note from Kamran Shahid, dated 3 May 2020, that the Claimant shouldn't attend work until he'd had a meeting with Andrew Prescott Jones. This pre-dates the alleged disclosure.
33. The Claimant contends that when he said "*not offering safe and injury-free working environment"* in his resignation email, he was referring to Covid measures (and

lack of first aider, which is addressed below). He says that Covid wasn't specifically mentioned because there were so many infringements.

First aider

34. The Claimant says he raised this by reporting the absence of the manager/first aider during disciplinary meetings regarding his own absence. He provided a witness statements and meeting notes dated 14 June 2019, 11 and 15 July 2019.
35. Those notes confirm that the Claimant reported the absence of Grant Hurrell – manager – but no specific reference to the fist aider status and the effect of this.

Payroll systems and Timesheets

36. The Claimant says this was originally raised verbally in January/February 2020 to Adrew Prescott Jones, and then in emails to him in February/March 2020. These are not mentioned in the ET1.
37. There was also reference to the respondent only becoming aware in May 2020 – the Claimant says this is when they found out themselves, but that he raised it earlier. He relies on the respondent not fixing the underlying issue once aware in May 2020 as causing an ongoing detriment.
38. The Claimant says he additionally raised these issues in his grievance of 12 July 2020, and the meeting that followed on 26 August 2020.
39. He Claimant contends his reference to fraudulent timecards in the ET1 relates to this disclosure. However, he accepts that stating "systemic issues with IT" does not explicitly refer to a disclosure about the payroll system, but says that is what he meant.
40. He says he raised this again in October 2020 when he emailed other managers, including Will Burton.
41. The Claimant says after the disclosure in February 2020, there were incorrect absences applied to his account.
42. The Claimant gave evidence that the issues with payroll systems then affected pensions and insurance.

Negligence – pensions, group protection insurance, data security

43. The Claimant says the issues with pensions and insurance stem from the payroll system/timecard errors as these affect eligibility for various benefits. He gave evidence that he would need to work 1 day in the respondent's financial year in order to be eligible, and because he was prevented from attending work this was impacted for him.
44. The complaint regarding data security appeared to be related to identity theft issue I have already dealt with above. He also said this was linked to his harassment complaint.

Submissions

45. The Respondent's submissions, in summary, were:

45.1 There was no hint of any disclosures within the original claim – the complaints are entirely new rather than simple relabeling of existing complaints

45.2 In any event, all complaints are out of time, and would have been even if brought in the original claim

45.3 There is no evidence it was not reasonably practicable to bring the claims within time, or alternatively that they were brought within a reasonable time after the limit expired

45.4 The balance of prejudice weighs most on the Respondent as they would have to enter into substantially new areas of enquiry, witnesses and documents

45.5 Much of what the Claimant relies on for the alleged disclosures already forms part of his other complaints

46. The Claimant's submissions were:

46.1 He agrees they complaints weren't expressed as clearly as they could be – this is because he is not a legal professional, and the issues are complex

46.2 He disagrees that the complaints are a long time again, because the last pay issue was in April 2021

46.3 The Covid issue was very important matter for himself and others - it's important for the Tribunal to look at this

46.4 He accepts the Respondent will have extra cost, but they shouldn't have acted in the way they did. The prejudice to him is that his mental health has suffered and he wants closure.

46.5 If the Respondent says his unfair dismissal claim includes all the elements of the other complaints, he would be happy just to get that out

The law

Amendment

47. The starting point in an application to amend is always the original pleading set out in the ET1. **In Chandok 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 the time limits but which is otherwise free to be augmented by whatever the parties choose to add or subject 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."

48. In dealing with an application to amend, the Tribunal will take into consideration its duty under the overriding objective: to ensure that the parties are on an equal footing; to deal with the case in a way that is proportionate to the complexity and importance of the issues; to avoid unnecessary formality and seek flexibility in the proceedings; to avoid delay so far as compatible with proper consideration of the issues; and to save expense.

49. In **Cocking v Sandhurst Stationers Ltd [1974] ICR 650** it was held that regard should be had to all the circumstances of the case and in particular the Tribunal should "consider any injustice or hardship which may be caused to any of the parties if the proposed amendment was allowed or, as the case may, be refused".

50. In **Selkent Bus Company Limited v Moore [1996] IRLR 661** the EAT held that:

> "…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.
>
> (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 are of 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 the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has 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 a 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 should be extended under the applicable statutory provisions
>
> (c) The timing and manner of the application
>
> An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Rules 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 or new 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 an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.

51. In **Vaughan v Modality Partnership 2021 ICR 535, EAT,** the EAT gave detailed guidance on the correct procedure to adopt when considering applications to

amend tribunal pleadings. It confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. Where the tribunal invites representations, the parties must therefore make submissions on the specific practical consequences of allowing or refusing the amendment.

52. The Presidential Guidance on General Case Management ("the Guidance") incorporates the factors set out in Cocking and Selkent.

53. In respect of re-labelling, the Guidance provides:

> "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".

54. Under 'Time Limits' the Guidance provides:

> "The Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Where for instance a claimant fails to provide a clear statement of a proposed amendment when given the opportunity through case management orders to do so, an application at the hearing may be refused because of the hardship that would accrue to the respondent".

55. A Tribunal can allow an application to amend, but reserve any limitation points until the final hearing, which might be necessary in cases where it is not possible to make a determination without hearing the evidence – **Galilee v Commissioner of the Metropolis UKEAT/0207/16**.

56. In the recent EAT case of **Chaudry v Cerebus Security and Monitoring Services Ltd EA-2020-000381**, guidance was given on how to approach amendment applications. Namely:

    a. in express terms, identify the amendment sought; and

    b. balance the injustice and/or hardship of allowing or refusing the amendment taking account of all the relevant factors, including, to the extent appropriate, those referred to in Selkent.

Time limits

57. Section 48 of the Employment Rights Act 1996 provides that an employment tribunal cannot consider a complaint of detriment because of a protected disclosure 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.

58. Ignorance or mistaken belief as to rights or time limits will not render it "not reasonably practicable" to bring a claim in time unless that ignorance or mistaken belief is itself reasonable. It will not be reasonable if it arises from the fault of the employee in not making inquiries that he or she should have made, or from the fault of the employee's solicitors or other professional advisers in not giving all the information which they reasonably should have done (**Wall's Meat Co Ltd v Khan 1979 ICR 52)**.

59. The Tribunal is not legally required to, but may, consider the check list set out in section 33 of the Limitation Act 1980 in considering whether to exercise its discretion:

a) the length and reason for the delay;

b) the extent to which the cogency of the evidence is likely to be affected by the delay;

c) the extent to which the party sued had cooperated with any requests for information;

d) the promptness which the claimant acted once he knew the facts giving rise to the cause of action; and

e) the steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

60. The most relevant factors are the length of, and reasons for, the delay, and whether the delay has prejudiced the respondent. The Tribunal will consider whether a fair trial is still possible. The Tribunal may consider the merits of the claimant's discrimination claims when deciding whether to extend time on the basis it is just and equitable to do so.
61. In **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**, the Court of Appeal advised against following the Limitation Act factors as a checklist, but rather advised that a tribunal should take into account all relevant factors including the length of and reasons for the delay.

Conclusions

Nature of amendment

General

62. What the Claimant now says are claims for whistleblowing, are expressed in his resignation letter breaches of contract/policies.
63. I do not accept the Claimant "misclicked" - this would only apply to selecting "another claim" in box xx. Even without this selected, he would have been able to provide the relevant details in box.

Covid

64. Only general health and safety is included in the ET1.
65. Covid was such a specific and memorable situation that the Claimant described as very important to him – I would have expected that he would have included it I the form if that was the case. It could have easily been included with just one word.

66. I do not accept the Claimant's assertion that the communications with Mary Richards weren't provided to the Tribunal because he didn't think he had to provide full details. He gave a lot of information with a significant amount of supporting documents, from other aspects of the complaints.
67. The detriment for this was not clearly made out – the evidence of being prevented from attending work predated the claimed disclosure, and the Claimant was inconsistent in his reasons for not attending work. I conclude that the Claimants concerns over Covid meant he felt unable to attend work, rather than Respondent preventing him from attending because of his disclosure.
68. I consider that the prospects of this complaint succeeding are extremely low.

First aider

69. Only general health and safety is included in the ET1.
70. There was no evidence before me that a specific disclosure was made in relation to the lack of first aider.
71. A specific detriment for this alleged disclosure was not identified by the Claimant.
72. I consider that the prospects of this complaint succeeding are extremely low.

Payroll systems and timesheets

73. There was reference to fraudulent timecards in the ET1. However, this appears to me to bear more relevance to the claims for deductions from wages - which forms the bulk of the information in the claim form – rather than a disclosure.
74. The reference to systemic issues with IT in the ET1 is insufficient to identify this as potential disclosure.
75. I do not accept that the Claimant's assertion that he couldn't have been expected to include all details in the short claim form, because there is the ability to upload additional documentation during the process of making a claim.
76. The financial detriment identified by the Claimant is as a result of the effect of the system errors rather than because the Claimant made an alleged protected disclosure.
77. I consider that the prospects of this complaint succeeding are extremely low.

Negligence

78. The issues identified by the Claimant are consequences of the problems with the payroll systems, not disclosures in their own right.
79. At best they are detriments of the alleged payroll/timesheet disclosure, however as detailed above this is a result of the effect of the system errors rather than because the Claimant made an alleged protected disclosure.
80. I consider that the prospects of this complaint succeeding are extremely low.

Time limits

81. Considering that all of the alleged disclosures were made in 2020 – some in 2019 - they are significantly out of time now, and for the claim that was presented in July of 2021.
82. It is the date of the disclosure that is relevant, rather than the detriment, so I reject the Claimant's assertion that the issues were ongoing up until April 2021.
83. It was reasonably practicable for the Claimant to have brought his complaints within the original claim. The Tribunal would then have considered time limits and jurisdiction at that point.

Timing of application

84. I make no additional conclusions on this – the application was triggered by EJ Eeeley identifying potential complaints at the previous hearing.

Injustice and hardship

85. In applying the balance of prejudice test, I note that the claimant already has other complaints – particularly unfair dismissal and deductions from wages –which are proceeding. Many of the issues raised in relation to disclosures and detriment form the basis of those claims, so all that he would lose is the ability to bring a whistleblowing complaint which appears to have little prospect of success.
86. By contrast, if I were to allow this amendment, the respondent would be put to considerable prejudice because it would have to defend a complaint which has

multiple alleged protected disclosures involving different individuals, so a lot of witness evidence would be required to defend it.

87. Furthermore, given the nature of the claimant's approach, the time involved in defending such a complaint would be likely to be extensive and costly. There would, therefore, be enormous prejudice to the respondent if I were to allow this

88. Whilst I have taken into account the fact that the Claimant is a litigant in person, and cannot be expected to express his claims to the same level as a professional, overall I find that he could and should have made the complaints more explicitly. Additionally, in any event, the proposed complaints have low prospects of success and are significantly out of time.
89. The Claimant's application to amend his claim to include complaints of public interest disclosure/whistleblowing detriment are refused in relation to all individual complaints.
90. The existing complaints will be discussed further at the Closed Preliminary Hearing on 16 February 2023, where case management orders will be made to progress the case to a final hearing.

Employment Judge Douse
Date: 14 February 2023
Sent to the parties on:
14 February 2023
For the Tribunal:

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