EMPLOYMENT TRIBUNALS

Claimant: Mr A O'Grady

Respondent: Alpha Response (2004) Ltd t/a Red Support Services

RECORD OF A PRELIMINARY HEARING

Heard at: by CVP at Croydon **On:** 5 September 2023

Before: Employment Judge Sekhon

Appearances
For the claimant: In person
For the respondent: Ms Rumble, Counsel

RESERVED JUDGMENT

1. **The Tribunal does not have jurisdiction to consider the amendments to the claimant's claim set out in his application dated 2 March 2023 because they were presented outside of the statutory time limit when it was reasonably practicable to do so.**

REASONS

Introduction

1. The matter was listed before me as a preliminary hearing to consider further to the respondents' application dated 2 March 2023 whether to agree to amend the claimant's claim. The respondent clarified at the outset of the hearing that they dispute the amendments sought to the claimant's claims.

Background

2. The Claimant commenced employment for the Respondent on 31 January 2020 as a Security Officer, initially on a 6-month contract. He was dismissed with immediate effect on 18 October 2021.

3. Early conciliation commenced on 22 December 2021 and ACAS issued the claimant with an ACAS certificate on 24 January 2022.

4. The claimant brings a claim against the respondent by way of a claim form dated 24 February 2022 for being dismissed after making protected disclosures under section 47B of the Employment Rights Act 1996.

5. An ET3 and Grounds of Resistance was filed with the Tribunal on 31 March 2022, denying the allegations and stating that the claimant had failed to particularise his claims for automatic unfair dismissal and "other payments". The respondent's case is that the claimant was dismissed for reasons of conduct (gross misconduct). The claimant does not have qualifying service as set out in section 108 of the Employment Rights Act 1996 and cannot bring a claim for ordinary unfair dismissal.

6. A case management hearing took place on 10 February 2023 before Employment Judge Wright and a List of Issues was agreed by the parties and set out in the Case Management Order of the same date. Directions were provided and a final merits hearing has been listed to take place on 26 February 2024 for 3 days. The respondent served an amended ET3 on 3 March 2023.

7. The claimant wrote to Tribunal on 2 March 2023 seeking to amend his claim by adding further acts when he alleges he made qualifying disclosure in the public interest. These had not been raised with EJ Wright at the Case Management conference and are not included in the List of Issues agreed between the parties as the claimant explained that he did not recall these at the hearing.

8. The relevant allegations sought to now be included by the claimant are: -

    1. *I informed the Respondent that Adobe Flash was no longer going to be supported, and that as the Car Parking system (WPS) was built on the Flash software, it would be vulnerable once support ended on 2020-12-31. This system had the personal details for hundreds of staff and members of the public stored on it so that they could use the site carpark at a reduced cost.*

       I originally told the Site Supervisor (then acting Manager, and soon to be Site Manager) Ines Aleman sometime around the start of January 2021 after discovering that It was no longer being supported on a security podcast I sometimes watch (TWIT: Security Now). I then again told Sophie Day on 2021-08-10. I mentioned it several times between these 2 dates to Ines but would not have the details of those conversations.

       I will refer to this allegation as New Protected Disclosure 1 through this decision.

    2. *On 2021-03-22 at 00:40 I told Sophie Day by phone about the check-call system to monitor lone workers safety at night. I believe it is not fit for purpose, with events at the start of October later that year showing the validity of my concerns when a staff member "blacked out" and was not found for around 3-4 hours. I had also told Ines Aleman about these concerns on 2021-03-09 @ 18:13, 2021-03-15 @ 18:15 & 2021-03-29 @ 18:25 among other occasions.*

       I will refer to this allegation as New Protected Disclosure 2 through this decision.

The Hearing

9. The respondent provided a bundle totalling 85 pages which had not been agreed by the claimant. I did not receive this prior to the hearing and did not have a copy of the Court file as this could not be located. The claimant informed me that he received this the bundle the

previous day at 4.30 p.m. I requested a copy of the bundle and received this during the hearing. I adjourned for 10 minutes to review this briefly during the hearing.

10. The claimant attended without representation and Ms Rumble, Counsel, attended upon behalf of the respondent. Neither party provided any witness evidence in support and the respondent having instructed Counsel did not provide a skeleton argument or legal authorities on which they rely. This did little to assist the claimant, who was not legally represented.

11. I heard representations from both parties on this issue and I reserved my decision because I had not received the bundle prior to the hearing or the court file (which could not be located) and did not have sufficient time to read through the documents during the hearing and give an oral decision. At the hearing, I also had to consider further issues relating to disclosure of documents and provide further directions in this case which are set out in a separate Case Management order.

The Law

12. The general case management power in rule 29 of First Schedule to the Employment Tribunals (Constitution and Rules of Procedure) Regulations2013 (amended and reissued on 22 January 2018) ("the ET Rules") together with due consideration of the overriding objective in rule 2 to deal with the case fairly and justly, gives the Tribunal power to amend claims and also to refuse such amendments.

13. In the case of Selkent Bus Co Limited v Moore [1996] ICR 836, the Employment Appeal Tribunal gave useful guidance, namely:

"(4) Whenever a 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 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 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, e.g. in the case of unfair dismissal section 67 of the Employment Protection (Consolidation) Act 1978.

(c) The Timing and The 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 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 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 factors into account the Parliament considerations are relative injustice and hardship involved in refusing or granting an amendment. The question 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."

14. This position is also summarised in the Presidential Guidance issued under the provisions of Rule 7 of the ET Rules which I have also considered.

15. The EAT followed the Court Appeal decision in Housing Corporation v Bryant 1999 ICR123 in Foxtons Ltd v Ruwiel EAT 0056/08, "it is not enough even to make certain observations in the claim form which might indicate that certain forms of discrimination have taken place; in order for the exercise to be truly a relabelling one, the claim form must demonstrate the causal link between the unlawful act and the alleged reason for it".

16. In the case of Remploy Ltd v Abbott and others UKEAT/0405/14, the EAT confirmed that, in deciding whether or not to allow an amendment to a claim, employment judges must consider issues such as the reason for delay, and the impact that the amendment is likely to have on case management and preparation for hearings, in light of the prejudice to the parties.

17. Galilee v Commissioner of Police of the Metropolis 2018 ICR 634, EAT, the Appeal Tribunal held that it is not always necessary to determine time points as part of the amendment application. This might be deferred where the new claims are said to form part of a continuing act with the original, in-time, claim, given the fact sensitive nature of determining whether there is a continuing act.

18. Transport and General Workers' Union v Safeway Stores Ltd EAT 0092/07, whether a claim has been presented in time is "a factor — albeit an important and potentially decisive one — in the exercise of the discretion".

19. Ladbrokes Racing Ltd v Traynor EATS0067/06 when considering the timing and manner of the application in the balancing exercise. It will need to consider:

    • why the application is made at the stage at which it is made and not earlier

    • whether, if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered by the party that incurs them; and

    • whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

20. It may be appropriate to consider whether the claim, as amended, has a reasonable prospect of success - Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06 and Olayemi v Athena Medical Centre and ors EAT 0613/10.

Discussion

21. The principles to be considered when dealing with an application to amend were set out in the case of Selkent Bus Co Ltd v Moore [1996] ICR 836 (as set out above). Whilst this is not a prescriptive list, and there are other factors that might be relevant, there are certain circumstances which should be considered to ensure a balance between the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. I will deal with each of the factors that the Tribunal consider when considering whether to allow an amendment to the ET1.

(a) Nature of the amendment

22. The nature of the amendment is an important issue to consider. Here, the respondent states that the proposed amendment raises a new cause of action, namely wholly new allegations of qualifying disclosures that he says he made rather than simply amounting to a correction of a clerical error or adding more detail to allegations already made. Upon reviewing the ET1 I find that there was no specific reference to the disclosures referred to in paragraph 8 above.

23. Mr O'Grady stated that in his view the additional allegations he has raised in his letter are not new allegations as the respondent is aware of these. He referred me to box 8.2 of his ET1 (page 8 of the bundle) and explained that the additional allegations he has raised are referred to under the phrase, *"I've brought numerous complaints to Alpha Response's attention from minor issues to major issues like potential loss of life and legislation breaches".* He also referred me to box 15 of the ET1 (page 14 of the bundle) which stated, *"During ACAS conciliation, Alpha Response denied systemic issues on my site of work and asked for proof of my claims. I provided them with a 16 page document on my whole appeal stance including 3 pages listing situations that had been ignored on site including times and dates. I can provide this document to the tribunal if needed. ACAS already have it on record."*

24. Upon clarification, Mr O'Grady confirmed that he had not submitted the 16 page document to the Tribunal and this was not before me today. Mr O'Grady stated that this document did refer to the two additional disclosures he is seeking to add to his claim referenced at paragraph 8 above and the respondent was therefore aware of these incidents. He provided this to ACAS. I explained that ACAS and the Tribunal are not linked and that the Tribunal do not have access to the documents that he has supplied ACAS.

25. The respondent in their Grounds of Resistance dated 31 March 2022 (page 28 of the bundle), sought further and better particulars of the claimant's claims. The Grounds of Resistance state, "It is admitted that the Claimant has raised a number of concerns with the Respondent regarding system and process issues surrounding CCTV and fire panels" but no dates are provided and it is unclear whether the respondent was referencing the disclosure the claimant alleges he made in January 2021 and repeated on 10 August 2021 in relation to the Adobe Flash not being supported (New Protected Disclosure 1 referred to in paragraph 8 above). The Grounds of Resistance does not refer to the New Protected Disclosure 2 allegation that took place in March 2021 relating to the check-call system to monitor lone workers safety at night. The respondent also did not reference or respond in their Grounds of Resistance to the 16-page document to which the claimant refers.

26. I do not accept Mr O'Grady's view that the two qualifying disclosures (at paragraph 8 above) he now wishes to add to his claim are sufficiently referred to or pleaded in the ET1. The allegations are vague and refer to a document that was not sent to the Tribunal at the time of issuing the ET1 or since. The respondent was unclear as to the claims being made against them and set out in their Grounds of Resistance on 31 March 2022 that further information was required. I have not been provided with any documentation to show that the claimant provided the respondent with this information after this request. It is therefore

not sufficient for Mr O'Grady to say that he believed the respondent knew the allegations that he was making against them.

27. I find that it was not until the Case Management conference with EJ Wright on 10 February 2023 (11 months later) that after discussion with the claimant, the respondent was made aware of the exact qualifying disclosures that the claimant alleged that he made, and these were set out in the List of Issues in the Order. I find that the allegations in paragraph 8 above are therefore new allegations and new causes of action, and both involve a separate factual background/ set of circumstances from the allegations that are currently in the agreed List of Issues.

(b) Time limits

28. The applicability of time limits must also to be considered. The Tribunal must consider whether a new complaint or cause of action is out of time, and if so, whether the time limit should be extended under the applicable statutory provisions. Ms Rumble referred to the dates of early conciliation and accepted that the claim form had been bought in time, namely within 3 months from the date of the claimant's dismissal. Ms Rumble submitted that the allegations in paragraph 8 were not referred to the ET1 and were first made on 2 March 2023, some 13 months later. Based on my findings above, that the amendments sought at paragraph 8 are new allegations and not referred to in the ET1, I accept that these allegations have been bought out of time.

29. The issue to be decided is whether the time limit should be extended, and the onus is on the claimant to show this. The law states that a Tribunal may only extend time for presenting a claim where it is satisfied that it was not reasonably practicable for the complaint to be presented in time (before the end of the period of 3 months) and the claim was nevertheless presented within such further as the tribunal considers reasonable.

30. Case law tells us that the meaning of reasonable practicability is not reasonableness and nor is it whether it was physically possible; the question for the tribunal is whether presenting the claim in time was reasonably feasible, see *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA.* According to the Employment Appeal Tribunal in *Asda Stores Ltd v Kauser EAT 0165/07* : 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.

31. The delay in this case has been at a minimum some 13 months (at the time of the claimant's application to amend) and at the time of the hearing some 19 months. I refer to my comments at paragraphs 26 and 27 above.

32. I accept that the claimant's application to amend his claim was 3 weeks after the Case Management Hearing. Save for the reason that he forgot to raise the issues set out in paragraph 8 above at the Case Management conference with EJ Wright and he realised this when he was preparing anther part of his case, Mr O'Grady could not explain to me why he failed to mention the allegations in paragraph 8 above to EJ Wright.

33. When questioned why Mr O'Grady did not refer to the 16-page documents during his discussion with EJ Wright, Mr O'Grady stated that he did not realise what would take place at the Case Management Hearing and was ill prepared.

34. I find that Mr O'Grady had multiple opportunities to set out all this claims since he presented his claim form even if he was under the mistaken view that the respondent was aware of the claims he was making. He was asked to clarify his claims by the respondent on 31 March 2022 and did not do so. He had an opportunity to raise these issues with EJ Wright

on 10 February 2023 when discussing the list of issues and failed to do so. He also had a 16-page document that he could have referred to as an aide memoire at the Case Management hearing and did not do so. I find that it was reasonably practicable for Mr O'Grady to present all his claims within the time limits set out by the law.

35. I have to consider the balance of hardship and injustice. The time limit provisions are in place for good reason. They protect respondents from being faced with stale claims. I bear in mind that Mr O'Grady is a litigant in person for the life of his claim, but I find that the amendments being sought to Mr O'Grady's claims are not of a legal technical nature but of factual issues relating to why he is bringing his claim, ones that he should be aware of. I accept there is some force to Ms Rumble submission that the allegations at paragraph 8 cannot be core parts of the claimant's claim and the reason for his dismissal if he could not recall these readily at the Case Management conference. I therefore do not accept that the fact Mr O'Grady is not legally represented precluded him from bringing all his claims in time.

(c) Time and manner of the application

36. The timing and manner of the application is important. The Tribunal should consider why the application was not made earlier and why it is now being made. I have considered this above.

37. I do not find that Mr O'Grady has given me any adequate reasons why he has not sought to seek to amend his claim earlier to include these claims or even to include these in the List of Issues.

38. I find that the respondent would be prejudiced by the granting of the application to amend the claimant's claim to include additional qualifying disclosures that Mr O'Grady allegedly made.

39. The respondent was not aware of these allegations until 2 March 2023, and by that the that they prepared the Amended Grounds of Response which was served on 3 March 2023. The ET1 was served on 24 February 2022. I accept Ms Rumble's submission that the respondent has been deprived the opportunity of preserving evidence and seeking potential witnesses that could be asked to recall events approximately 2 and half years ago to defend the amended claims at paragraph 8 and in any event one individual has since left the respondent's employment and as such the respondent may have no evidence from that individual to defend one the claims.

40. The final hearing has been listed for 26 February 2023 and allowing for an amended response to be served and additional disclosure and witness statements may put the final hearing date in jeopardy and would be a timely and costly process for the respondent. Ms Rumble also submitted that the respondent would require further particularisation on the amended claims to establish what the alleged new disclosures intended to show which would add a further delay.

41. **Having regard to all the circumstances above, I do not allow the claimant to amend his claim. The claim should and could have been made in time as it was reasonably practicable to do so, and I do not find it the claim was presented within such further time as the I consider reasonable. Accordingly the Tribunal has no jurisdiction to consider the amended claims at paragraph 8 above.**

_____

Employment Judge Sekhon

Date: 7 September 2023