EMPLOYMENT TRIBUNALS

Claimant **Mr Christopher Sladovich**

Respondents **1. Edda Crewing Services Limited**
2. Svitzer Terminal Limited

Heard at: **Bristol (by video)** **On:** 19 June 2024
Before: **Employment Judge Hogarth**

Appearances
For the claimant: The claimant Mr Sladovich in person
For the respondents
First respondent: Mr R Dennis, counsel
Second respondent: Mr J English, solicitor

RESERVED JUDGMENT

1. The claimant's application to amend his claim against the first respondent under section 49B of the Employment Rights Act 1996, by adding an alleged detriment relating to the first respondent's actions in dealing with his appeal against the refusal of a decision not to uphold his whistleblowing grievance, is refused.
2. The claimant's claims against the first respondent all relate to acts done prior to a transfer of the claimant's contract of employment to the second respondent under the TUPE regulations. Accordingly, the first respondent cannot be liable for the claims because any liability in relation to those acts transferred to the second respondent with his contract of employment. The claims are bound to fail and so the first respondent is removed as a party to the proceedings.

REASONS

The hearing

1. The purposes of the preliminary hearing were (a) to determine whether the first respondent should be dismissed from the proceedings (and if not whether it should be ordered to provide an amended response), (b) to consider any application by the claimant to amend his claims and (c) to carry out any necessary case management.

2. The hearing was conducted by video (CVP). There were no significant problems with the video platform. I was provided in advance of the hearing with an agreed bundle of documents, a bundle of authorities and a list of issues for the claimant's substantive

claims agreed by the claimant and the second respondent, with suggested amendments from the first respondent.

3. At the start of the hearing, I explored with the parties exactly what was in dispute and needed to be determined. This was not clear in advance. It boiled down to two main questions, described in paragraphs 4 and 5 below. These reasons deal with those issues. I also needed to consider some detailed amendments to the claims against the second respondent that the claimant seeks permission to make. I propose to deal with those in separate case management orders.

4. The first respondent has applied for its removal from the proceedings and/or for the claims against it to be struck out, on the basis that it cannot (as a result of a transfer of the claimant's employment to the second respondent under the TUPE regulations) have any liability in respect of employment matters relating to events prior to the transfer. It was common ground that, if appropriate, I could consider striking out some or all of the claims against the first respondent if I did not decide to remove it from the proceedings. The claimant resists the first respondent's application for a number of reasons, and relies on, among other things, views expressed by Employment Judge Midgley in his case summary following a telephone case management preliminary hearing on 21 February 2024.

5. The claimant has applied to add a further claim to his whistleblowing detriment claim under section 49B of the Employment Rights Act 1996 against the first respondent, alleging that the acts of the first respondent in taking on and then rejecting his appeal against the decision on a grievance raised by him with the first respondent constitutes a detriment resulting from a protected public interest disclosure to the first respondent. The first respondent resists the claimant's application.

6. It was clear from the outset that the two main issues are linked, in that if the first respondent is right to assert that the current claims against it are misconceived in law, a decision on whether to remove the first respondent from the proceedings or to strike out the existing claims cannot be made before the decision on the second issue is made. Conversely, if the new claim would be the only claim against the first respondent, that may be a relevant consideration in the decision whether to grant the application for permission to amend the claim against the first respondent.

7. I agreed with the parties that I would hear submissions from them on the first issue, then on the second issue and finally in relation to the claimant's application to amend the claims against the second respondent in various respects.

8. It was clear to me from the start of the hearing that the claimant has always wanted the first respondent to remain a party because he holds it responsible for the matters that have led to these proceedings. He told me that he wanted to hold the first respondent accountable, regardless of legal liability. While I understand he has strong feelings on the point this is not a factor that is relevant to the decision I must make on either of the main issues. He also said he would be at a procedural disadvantage in terms of discovery and the ability to cross-examine witnesses if the first respondent is no longer a party. I explained during the hearing how the TUPE regulations operate, and that

even of the second respondent carries regal responsibility for his claims (in place of the first respondent), if his claims succeed it would be clear that previous employer (the first respondent) had been responsible at the time for what occurred, This explanation appeared to re-assure the claimant to an extent, but he maintained his objection to the first respondent's application to be removed from the proceedings.

9. I reserved judgment at the end of the hearing because time was short and I needed to consider carefully the claimant's subtle legal submissions as to the effect of the TUPE regulations in relation to a whistleblowing detriment claim and the position of the first respondent. The parties had taken up most of the hearing with their submissions on the two main issues.

Background and the facts

10. The claimant was employed by the first respondent from 15 May 2013 until 30 June 2023 when his employment as a ship's Master transferred to the second respondent under a TUPE transfer on that date. This followed a service provision change: the identity of the company carrying out particular services at Fawley Terminal under a services contract changed. The claimant had been engaged in the provision of those services. Accordingly, since 30 June 2023 he has been employed by the second respondent.

11. The claimant says he made various protected public interest disclosures, first by raising a "collective grievance" with the first respondent on 5 January 2020 relating to a number of matters. Those included health and safety risks at work in relation to the exposure of himself and his crew to noxious gases, concerns relating to the cover up of violent offences by a general manager and more generally bullying and harassment. It appears that there are other documents by which, or occasions at which, the claimant maintains that protected disclosures were made, between 5 January 2020 and 6 January 2023. On 6 January 2023 he says he made a further protected disclosure largely repeating concerns mentioned on 5 January 2020.

12. On 30 July 2020 the claimant began a period of sick leave due to significant health conditions. On 10 August 2021 he received income protection payments at 50% of his salary in accordance with an income protection policy he benefited from through his employment with the first respondent. The first respondent agreed to pay a further 25% of salary for a period.

13. On 28 April 2023 the claimant says he received his April pay slip which indicated that the first respondent stopped the additional 25% salary supplement with effect from 1 April. He raised a grievance on 6 June 2023 (with the first respondent), alleging that (a) the first respondent had wrongly consulted him to determine whether he could return to work before reviewing the 25% uplift, (b) the uplift was contractual and could not be removed unilaterally and (c) further or additionally the uplift was removed in bad faith or to facilitate the proposed TUPE transfer on 30 June 2023.

14. The claimant attended a grievance meeting on 23 June and he was notified his complaints were rejected on 30 June 2023.

15. The first respondent's grounds of resistance state that a TUPE transfer of the claimant's employment took place in the evening of 30 June 2023. That appears to refer to midnight between 30 June and 1 July. In any event it must refer to a time after the end of a normal working day. This statement of fact is not disputed. It follows that the decision to reject the claimant's grievance, which was notified to him on 30 June, must have been taken before the transfer. The parties' submissions assumed this was the case and nobody involved has suggested it was not. It is also consistent with the fact that the grievance meeting had taken place a week before the TUPE transfer.

16. The claimant now says (in relation to his application to amend the claim against the first respondent) that the first respondent considered his appeal against the rejection of his grievance after the TUPE transfer. He told me (and for present purposes only I must accept) that he instigated an appeal process with the first respondent after he was told on 30 June 2023 his grievance had been rejected. This started after 1 July, and the first respondent accepted the appeal on 11 August 2023, an appeal meeting took place on 25 August and a final decision rejecting the appeal was made on 10 November 2023. At all material times the first respondent was not the claimant's employer. It is not clear to me why the first respondent undertook the appeal, given that it no longer had any liability for the previous grievance and all acts relating to the claimant's employment were deemed by regulation 4(2) of the TUPE regulations to be acts of the second respondent. There was, in these circumstances, nothing the first respondent could do to remedy any of the claimant's underlying complaints, even if it had thought the appeal to be well-founded. I return below in my conclusions on the second main issue to the legal status of the decision on the appeal.

17. The claimant notified ACAS of a potential dispute against the first respondent on 9 June 2023. An early conciliation certificate was issued on 21 July 2023. Three weeks after the TUPE transfer, on 21 July 2023 the claimant notified ACAS of a potential dispute against the second respondent. An early conciliation certificate was issued on 14 August 2023. Whether it was necessary to carry out early conciliation again must be doubtful, given the nature of the transfer of the claimant's employment to the second respondent. But it is perfectly understandable that the claimant thought it sensible to repeat the exercise with the second respondent.

18. By a claim form presented on 18 August 2023 the claimant brought the following complaints against <u>both</u> respondents:
    a) Detriment on the ground of having made a protected public interest disclosure;
    b) Breach of contract;
    c) Unlawful deductions from wages;
    d) Accrued but unpaid holiday pay.

19. The detriments the claimant says he was subjected to are set out in EJ Midgley's Case Summary of 21 February 2024. They relate to a number of actions occurring prior to the TUPE transfer, including requiring the claimant to work on the same shift as those he had criticised in his disclosures, threats of physical violence and various other acts connected with his income protection payments and holiday pay. He also asserted that the rejection of his grievance of 6 June 2023 was a detriment done by the first

respondent shortly before the TUPE transfer on 30 June. He now seeks to add a claim against the first respondent alleging that the acts of the first respondent intaking on and deciding his appeal against its rejection of his grievance was a further detriment. The claimant says that because the appeal and decision took place after the TUPE transfer, responsibility for it remains with the first respondent and his claim should be amended by adding the further alleged detriment. This would mean that the first respondent would need to remain as a party, whatever my decision on the first main issue. This raises some awkward questions which I discuss below in my conclusions.

20. The first respondent's response to the claims (12 October 2023) disputed that it was the correct respondent and/or whether it could be liable on the claims in the circumstance of the TUPE transfer. It maintained this position at the hearing, saying that all the current claims are misconceived because any relevant liability in relation to acts of the first respondent transferred to the second respondent at the time of the transfer. That, it says, means the claims must fail and so meet the test for striking out.

21. Following an extension of time for its response, the second respondent's substantive response to the claims (9 November 2023) resisted the claimant's claims. It denies that protected disclosures were made by the claimant and that he reasonably believed that his disclosures were in the public interest. It also disputes the detriments and asserts that the grievance was rejected on its merits.

22. It appears from the actions the second respondent has taken since these proceedings began that it has no practical difficulties in dealing with the facts as to events prior to becoming the claimant's employer. I would expect the parties to a TUPE transfer to have made arrangements for co-operation on such things.

23. The second respondent supports the removal of the first respondent from the proceedings, but the claimant has objected for reasons set out in a letter dated 19 December. Employment Judge Midgley explained in his Case Summary of 29 February 2024 (paragraphs 77 and 78) what the main objections were and why he regarded them as "not strong". He stated (paragraph 82) that his provisional view was that the claimant would not be prejudiced by the dismissal of the first respondent from the proceedings. EJ Midgley explained that he was ordering disclosure of documents to take place before the hearing on 19 June (to remove one possible disadvantage complained about by the claimant were the first respondent to be removed) but that on reflection there might be a case for retaining the first respondent in order for the claimant to be able to seek a declaration under section 49 ERA 1996, because it was the employer at the relevant time. I will come back to this point later in this judgment.

24. At the time of the hearing on 21 February 2024 there was a list of issues for the final hearing agreed by the claimant and second respondent. EJ Midgley ordered the parties to produce an agreed list in advance of 19 June. At the hearing I had a document based on the previous list but with amendments proposed by the first respondent. I was told it was not in fact agreed between all three parties.

25. On 19 April 2024 Employment Judge Roper refused an application by the claimant for the response to be struck out. On Tuesday 4 June Employment Judge Midgley

dismissed an application for the order for disclosure to be varied and ordered the parties to co-operate in the production of a hearing bundle for the hearing before me.

26. I propose to deal in this judgment with the two main issues separately. I have already set out the material facts, based largely on the helpful summary in EJ Midgley's case summary. Given the nature of the hearing, and the absence of any oral evidence or witness statements, I am not making findings on any questions of disputed fact. Those are matters for the final hearing.

The first main issue and the relevant law

27. The first main issue is whether the first respondent should be removed as a party from the proceedings or, whether some or all of the claims against it should be struck out. That requires me to consider, among other things, whether the first respondent cannot be liable for any of the current claims by virtue of the effect of the TUPE regulations.

28. Under rule 34 of the Employment Tribunal Rules the Tribunal may on its own initiative or on the application of a party "remove any party apparently wrongly included". It would be right to view a party as "wrongly included" if there is no basis in law on which the party could be liable for the claims against it.

29. Under rule 37 the Tribunal may, either on its own initiative or on the application of a party, strike out all or part of a claim on a number of different grounds, including (in rule 37(1)(a) "that it has no reasonable prospect of success". Self-evidently a claim that is bound to fail has no reasonable prospect of success.

30. The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the TUPE regulations) deal with "relevant transfers". It is common ground that a change in the identity of the company providing services at Fawley Terminal constituted a service provision change to which the TUPE regulations applied and so was a "relevant transfer". As mentioned above it is also common ground that this took place in the evening of 30 June 2023.
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31. Regulation 4 deals with the effect of a relevant transfer on contracts of employment:

> 4.-(1) ...., a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, **but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.**
> (2) Without prejudice to paragraph (1) but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer--
>
> (a) **all the transferor's** rights, powers, duties and **liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee**; and
> (b) **any act or omission before the transfer is completed, of or in relation to the transferor** in respect of that contract or a person assigned to that organised grouping of resources or employees, **shall be deemed to have been an act or omission of or in relation to the transferee.**

The emphasis is mine as the words in bold are the key words in this case.

32. There are limited exceptions to regulation 4(2). Criminal liability is not transferred or affected (regulation 4(6)), and special rules apply where insolvency is involved (regulation 8) and where there is a failure to carry out the consultation required by the regulations (regulation 15(9)). None of the exceptions are material in this case.

33. It is common ground that the claimant's contract of employment transferred from the first to the second respondent by reason of a relevant transfer in the evening of 30 June 2023. The provisions in bold above make clear that the regulations deem various things to ensure that the transferee (the second respondent) is to be treated as the claimant's employer back to the time the contract of employment was made (regulation 4(1) and that the acts of the transferor (the first respondent) or acts of others done in relation to the transferor are to be treated as done by or in relation to the transferee (regulation 4(2)(b)). Further, all liabilities of the first respondent "under or in connection with" the claimant's contract of employment were transferred to the second respondent (regulation 4(2)(a)). The relates to liabilities arising before the transfer. New liabilities incurred by the former employer after the transfer are not included in the transfer under regulation 4(2)(a).

34. The parties relied on various authorities as to the effect of the TUPE regulations and the position of the first respondent as, potentially, the wrong respondent. The summary above, based on the wording of regulation 4, is supported by those authorities, and I do not consider it necessary to discuss them all.

35. An early example is *P & O Property Holdings LTD v Allen and others* EAT [1997] ICR 436 where the employer prior to a TUPE transfer (under an earlier version of the regulations) was held to not to be the correct respondent in relation to claims relating to matters for which the new employer was responsible.

36. The claimant relies on a comment made by the judge in *Alamo Group (Europe) Ltd v Tucker* [2003] ICR 839 (EAT). I deal with this below. The case again related to an earlier version of the TUPE regulations. The EAT decided, among other things, that the transfer provisions meant what they said and should not be given a "contrary construction" based on an argument that they produced an unjust result. The question for the Tribunal will usually be whether the matters in dispute arise "in connection with" a person's contract of employment.

Conclusions on the first main issue

37. All the current claims against the first respondent relate to acts prior to the transfer of the claimant's contract of employment to the second respondent. In those circumstances any liabilities relating to them transferred to the second respondent by virtue of regulation 4(2)(a), in place of the first respondent. That transfer took place by operation of law as part of the transfer of the contract of employment to the second respondent. In addition, anything done by or in relation to the first respondent before the transfer is deemed by regulation 4(2)(b) to have been done by or in relation to the second respondent (and not the first respondent). That is a significant legal proposition as it results in the first respondent effectively been treated as the same person as the second respondent for all purposes relating to the events that have led to these proceedings. Those events are all "connected with" the claimant's contract of employment.

38. By the end of the hearing, I was unclear whether the claimant was still disputing that the effect of regulation 4 was for the second respondent to take over (from the first respondent) any liabilities of the first respondent in relation to the allegations forming part of the claims against it. In relation to the second main issue, he appeared to be relying on regulation 4 having that effect. But, in any event, that is the clear legal position. In particular, the deeming provisions in regulation 4(2)(b) mean that anything done by the first respondent as alleged by the claimant is in law to be treated as having been done by the second respondent (i.e. as if they were the same person). The consequence of that legal change was that the first respondent ceased to be potentially liable for any of the pleaded claims, and the second respondent became liable in its place if the claims are otherwise well-founded.

39. The claimant relied on comments of Judge Altmann in *Alamo Group (Europe) Ltd v Tucker* to the effect that the purpose of the TUPE regulations is to protect employees, so that the "innocent transferee may on occasions" have to bear the responsibility. He reads this as the judge suggesting there may be cases where the transferor may have to retain liability to protect the employee, especially in relation to whistleblowing. That is not in my view a conclusion that follows from what Judge Altman said in that case. In any event, the terms of regulation 4(1) and (2) are clear and now well-established in case law and the result is that the transferee employer has to bear liability for any breaches of employment law by the transferor. The limited exceptions to regulation 4(2) are not engaged in this case. It is important to note that regulation 4 does not distinguish between different situations or kinds of claim: <u>all</u> relevant liabilities transfer to the transferee, who is then taken to be the person who did anything the transferor did in connection with a transferred employee's employment. Anything done to the transferor (such as making a protected disclosure) is deemed to have been done to the transferee. I imagine the policy purpose here was to ensure that there was one person legally responsible as employer for everything.

40. The claimant argued that the first respondent should remain a party for a number of other reasons. Underlying those reasons was his belief that the first respondent was responsible for the matters he relies on when they took place and should be held responsible (morally at least) for what he says went wrong. He wants, as he put to me, to hold the first respondent to account irrespective of whether they are liable. However, the legal position is as summarised above and there is no basis on which his wish can affect the inevitable outcome of applying the provisions of regulation 4 to his situation. He has all the rights against the second respondent as his employer as he had before the TUPE transfer against the first respondent, and anything done or omitted by the first respondent before the transfer is deemed by law to have been done or omitted by the second respondent (and no longer to have been done by the first respondent).

41. The claimant asserted that he would be at a procedural disadvantage if the first respondent is removed. However, if (as I have concluded) the first respondent can have no liability for the claims based on the pleaded facts asserted by the claimant, then in my view the respondent should be removed, whether or not that may complicate the proceedings as far as the claimant is concerned. While I am aware that in some situations it can be convenient for procedural reasons to postpone a final decision to remove a party (for example to allow time for the right respondent to be added), that does not in my view mean that a wrong respondent should remain a respondent until the final hearing.

42. Even if I am wrong on that point, the claimant did not establish that he would be significantly disadvantaged if the first respondent is removed as a respondent. The deadline for disclosure had passed and was, on the face of it, complied with by the parties. In any event, he has rights under the procedure rules against the second respondent for disclosure of documents (as it is responsible for pre-transfer events as if it were the same person as the first respondent) and, potentially, against the first respondent as a third party who might be in possession of relevant documents. I also consider that any possible prejudice in relation to who might be called as a witness by the second respondent is limited. A claimant has no control over who is called as a witness by a respondent; and a claimant can always apply to have a relevant witness required to attend under rule 32.

43. The claimant also relied on comments of EJ Midgley in the Case Summary from the previous case management hearing suggesting that the first respondent might need to be retained as a party in order for a declaration under section 49 ERA 1996 to be made against it, referring to it as the claimant's employer at the material time. In my view, having had the chance to consider regulation 4 of the TUPE regulations and the authorities carefully, that suggestion is not correct. I note that the point will not have been fully argued at a short telephone hearing. It is not the case that the Tribunal at the final hearing will seek to decide the liability of the first respondent for the claims and the compensation due, which then becomes the responsibility of the second respondent to meet. Rather, the approach taken in regulation 4 is, once the TUPE transfer happened, for the second respondent to be deemed to be the employer at all times, with the acts of the first respondent in connection with the claimant's employment being deemed to be the acts of the second respondent. This inevitably means that only the second respondent should be the respondent in relation to the pleaded claims, because the first respondent has no liability after the TUPE transfer. Any declaration under section 49 would therefore be made in relation to the second respondent as the employer whose (deemed) acts are in issue, although doubtless the Tribunal would also make clear in the reasons for its decision that it was acts of the first respondent and its staff at the time that made the second respondent liable.

44. For all the above reasons I do not consider that the claimant's objections to the removal of the first respondent from the proceedings are well-founded. The current claims, all relating to events before the TUPE transfer, are bound to fail against the first respondent. Those claims have no prospect of success (reasonable or otherwise) and if they remain the only claims against the first respondent it is, in my view, right for me to order that the first respondent is removed from these proceedings. If any other potentially valid claims are added to the claim then it would be right, given the current claims plainly have no reasonable prospect of success, to strike them out.

The second issue and the relevant law

45. The second issue is whether to give permission for the claimant to amend his claim by adding an allegation that he was subjected to a detriment by the first respondent consisting of its taking on and rejecting his appeal against the rejection of his grievance of 6 June 2023. This requires me to consider a number of matters under the well-established case law on amending tribunal claims (summarised below). They include the "balance of hardship" and the point advanced by the first respondent that the new claim was not made within the relevant 3-month period following the decision on that appeal and could have been made much earlier in the proceedings had the claimant wished to pursue it. I also have to consider the prospects of the new claim being

successful and in that regard I must consider the status of a decision made by someone who was not the claimant's employer and so could not do anything about his grievance even if it had decided to grant the appeal.

46. The power to allow an amendment of a claim is part of the Tribunal's case management powers under rule 29 of the procedure rules. It is in general for a claimant to identify the exact amendment he wishes to make and to apply to the Tribunal for permission to amend. It is then for the respondent to object and explain why.

47. The discretion given by rule 29 is broad, but guidance has been given to employment tribunals by the EAT and the senior courts in numerous cases over the years. The key authority is *Selkent Bus Co Ltd v Moore [1996] ICR 836,* in which the EAT (Mummery P) set out the main principles in exercising the power to permit amendment of a claim. Those principles require the Tribunal to consider (as appropriate in the circumstances of the particular case) the balance of injustice and hardship to the parties in allowing or refusing the application to amend. This is a balancing exercise for the Tribunal.

48. There is no exhaustive list of possibly relevant factors and all relevant factors should be taken into account. But in *Selkent* the EAT noted a number of factors that will generally be relevant to the assessment, namely--
    a. the nature of the amendment (for example whether the amendment is relatively minor or effectively a new claim),
    b. the applicability of time limits (for example would a new claim made at the time of the application be out of time and if so would time be extended, and
    c. the timing and manner of the application (for example has there been any delay or other difficulty in the way the application has been made and if so why).

    I will now give my conclusions on those three matters and in addition on any other matter that may be relevant to the balancing exercise mentioned above. I will then carry out that balancing exercise.

49. It was common ground between the parties that in this case that any claim for whistleblowing detriment is required to be made within the period of 3 months beginning with the date on which the alleged detriment took place (plus any early conciliation extension when relevant, which it is not in this case). In the case of the new claim that means on or before 9 February 2024, because the decision on the appeal was made and communicated to the claimant on 10 November 2024. I note that the tribunal is able to extend time for a whistleblowing detriment claim made late, but only if a claimant can show that it was not reasonably practicable (i.e reasonably feasible) for the claim to be made in time and the claim was then brought within a reasonable time.

50. As it is relevant to the nature of the amendment sought I note that the new claim being put forward relates to a new allegation that an act of the first respondent (after the TUPE transfer) constituted a detriment by it on the ground of his having made one or more protected public interest disclosures (see section 49B ERA 1996). For this purpose a detriment is something that puts the claimant at a disadvantage. That is a very broad concept, but if an act does not in fact disadvantage the claimant it cannot be a detriment.

Conclusions on the second main issue

51. The applicant has applied to amend his whistleblowing detriment claim under section 49B ERA 1996 to add an allegation against the first respondent that its actions in taking on and deciding to reject his appeal against the rejection of his grievance was a detriment done on the ground of previous protected disclosure(s) to the first respondent. During the hearing he explained that he considers the actions taken by the first respondent in carrying out the appeal and taking so long to conclude it to be part of the detriment he now wishes to allege as part of his claim.

52. As for the first factor mentioned in *Selkent*, the amendment the claimant seeks to make is to add a new alleged detriment to his whistleblowing claim. That is in effect a new claim and would (if the amendment is permitted) be the only claim against the first respondent surviving in these proceedings. That is because I have concluded above that the existing claims against the first respondent cannot succeed and should be struck out if the new claim against it is added. This means that adding the claim would require the first respondent to participate in the final hearing despite only having a small interest in the issues for determination at the hearing. It would also involve the Tribunal, the claimant and the first respondent in an enquiry into events taking place after the TUPE transfer, unlike all the other current claims which relate to events before that time. That will inevitably add to the documentation that needs to be disclosed, will require witnesses to cover the facts in their witness statements and will take up time during the final hearing in both oral evidence and submissions.

53. On any view, allowing the new claim to go forward would put the first respondent to considerable inconvenience and expense, in participating in the remaining proceedings in this case and the final hearing. It will put pressure on the timetable for the final hearing. It will of course require the claimant to seek to make out his case on the new claim, but adding one further claim to the other matters already in issue would appear to be a limited additional burden on him.

54. The claimant has a number of claims in these proceedings against the second respondent including in particular whistleblowing detriment claims involving a number of alleged detriments, including the decision on the claimant's grievance. It appears to me that the new claim against the first respondent would not add that much to the claimant's case. It is unlikely that he would be able to establish that the appeal process was a detriment on the ground of the protected disclosures he relies on unless the grievance decision was also a detriment on that ground. But if he succeeds on his claim in relation to that detriment it appears unlikely that success on the extra new allegation about the appeal would significantly affect the overall outcome in terms of remedy, although the claimant would have the satisfaction of a decision against the first respondent, who he believes was seriously at fault in relation to the matters underlying his current claims.

55. I conclude that the nature of the amendment sought is to advance a new claim that will have the effect of forcing the first respondent to remain a full participant in the proceedings. I agree, for the reasons mentioned in paragraph 54, with the submission of counsel for the first respondent that the new claim is a relatively modest addition to the claimant's other claims, and that refusing the application to amend would not greatly affect the nature of his overall case.

56. As for the question of time limits affecting the new claim, the documents in the bundle show that the specific application to amend was first made by an email dated 30 May

2024. On that basis the application was made over 3.5 months late, because the period of 3 months beginning with 10 November 2023 ended on 9 February 2024.
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57. I have not found anything in the bundle to suggest that any application to amend the claim as described above was made before 30 May 2024. The claimant submitted to me that he mentioned the new claim to EJ Midgley at the hearing on 21 February. The Case Summary at paragraph 104 refers to the claimant intimating an intention to apply to amend his claim, by pleading further disclosures to the second respondent and, possibly, further detriments. There is no mention of the specific new claim he now wishes to add to his claims against the first respondent. Certainly, he did not make the specific claim at the hearing on 21 February or shortly after, which he could have done if he wished, given that possible applications to amend were discussed at the hearing.

58. At the end of paragraph 104 of EJ Midgley's Case Summary the judge noted that there was no written application or amended pleading (in the context of the matters referred to in paragraph 52 above). The paragraph goes on to say that the judge instructed the claimant that he would need to make a written application supported by amended pleadings if he wished to pursue the application to amend.

59. I note that even if the evidence did show the application was made at or shortly after that hearing, the application would still have been out of time, by at least 12 days. Instead, there was a delay of more than 3 months after the hearing on 21 February before a written application was made. There does not appear to be a draft of the proposed amendment or an amended pleading provided by the claimant, although in the case of an unrepresented layman that may be understandable, so long as the application is clear.

60. The claimant did not say a great deal about the reasons why he believed it was not reasonably practicable to advance the new claim by seeking to amend his claims within the 3-month period after the decision to reject the appeal and why it then took until 30 May 2023 to seek to make the new claim. He said that he was not aware of the time limit. He knew about the need to make his claim but thought what he had done was OK. I accept of course that the claimant is a litigant in person and that Tribunal procedures are complicated. However, he was able to make his existing claims in 2023 and engage fully in various procedural matters, including by initiating procedural applications. It is not clear to me whether he has had any legal advice, but he has certainly been able to put forward detailed legal arguments which suggest he is well able to find out about employment law and procedures and participate in all interlocutory matters. He was told by the judge on 21 February that a written application was needed, which in my view undermines his assertion that he was unaware of any time limit. I consider that he either knew or ought to have known that there are relevant time limits of 3 months to bring employment claims and that he needed to act promptly. He ought to have known because he is clearly able to find out about the need to act promptly in raising a new claim and about the need to comply with the relevant time limits. Parties are expected to do what they can to find out this sort of information, and there is information publicly available as well as other sources of information and advice (such as the citizen's advice bureau).

61. I note also that the decision said to have been part of the new alleged detriment was made some months after the claimant initiated the current proceedings against the first respondent, after a process that appears to have taken about 4.5 months from the

decision to reject the claimant's grievance. If he had wanted to amend his complaint to include the new claim, I cannot see any good reason why this could not have been done by 9 February 2024 as he already had employment proceedings in existence, and it would have been relatively straightforward to apply to add the claim, had he wanted to. He had after all already identified the decision to reject the grievance as a detriment, on his case. The topic of amendments came up at the hearing on 21 February 2024, and that was another opportunity for the claimant to put the new claim forward had he wanted to. He was instructed by the judge to make a written application if he wanted to pursue additional claims, but failed to do so until 30 May. It may well be that the new claim was something of an afterthought as there is no record in the Case Summary of it having been mentioned. That is not, in my view, a good reason for delay.

62. In these circumstances, I conclude that the reason for delay put forward by the claimant was not sufficient to show that it was not reasonably practicable for him to advance the new claim within the initial 3-month period or (even if he had shown that) that the claim was in the end put forward within a reasonable period. He should have taken action as soon as reasonably practicable after the previous hearing.

63. It follows that the fact the claims were out of time and there is no basis for extending time is a strong factor against the claimant in the *Selkent* balancing exercise. Allowing the amendment sought would deprive the respondent of the protection of the time limits for bringing whistleblowing detriment claims.

64. As for the third *Selkent* factor (the timing and manner of the application) the claimant clearly did not follow the instruction EJ Midgley gave him at the hearing on 21 February 2024 about making a written application. He waited until 30 May before doing that, which in my view was not a justifiable delay. It was however made in time for the point to be raised and argued at the hearing before me. So while the delay in making the application is a factor against the claimant in the *Selkent* balancing exercise, it is not in my view a strong factor. The factor relating to time limits for the new claim is considerably more significant.

65. I have also considered whether there are other factors to be taken into account in the balancing exercise. In the unusual circumstances of these proceedings and the new detriment being alleged, the merits of that claim appear to me to be relevant.

66. I agree with the claimant's submission (not resisted by the respondents) that it is possible in theory for a detriment by a former employer to be relied on in a whistleblowing complaint under section 49B ERA 1996. I also accept that if there had been no TUPE transfer, a negative decision by an employer on an appeal against the rejection of a grievance is in theory capable of being a detriment. Both of those things will depend on the particular facts of the case. However, the claimant's situation is greatly complicated by the TUPE transfer, because at the point of the TUPE transfer of his contract of employment to the second respondent, all liabilities of the first respondent for previous events transferred as well, all acts done by the first respondent (such as rejecting the claimant's grievance) were deemed to have been done by the second respondent instead and all acts done in relation to the first respondent (including any protected disclosure to it by the claimant) were deemed to have been done in relation to the second respondent instead.

67. There is no explanation before me from the respondents as to why the first respondent took on the appeal and made a decision on it. It was not the claimant's employer at the time, and the pre-transfer grievance and rejection decision was no longer any business of the first respondent, as regulation 4(2) of the TUPE regulations deems its decision to have been made by the second respondent, as from the date of the TUPE transfer. That means any appeal should have been made to, and dealt with by, the second respondent. It seems the first respondent made a mistake: not only was it no longer the employer and the grievance decision was now deemed to have been made by the new employer under regulation 4(2), but there was nothing it could do about the situation even if it had thought the appeal was well-founded. It was not in its gift to do anything in relation to the claimant who was now not its employee. Nothing it said or decided could bind the second respondent in any way. It might be different if there were arrangements made between the two respondents for the first respondent to act on its behalf, but that was not the basis on which the new claim is put forward.

68. In these circumstances, I consider the new claim has no reasonable prospect of success in relation to the purported decision on the appeal itself. That act cannot have put the claimant at any disadvantage. The appeal process and decision could not affect the outcome of the grievance process. This means, in my view, that this part of the new claim is misconceived and has no reasonable prospect of success.

69. The claimant also puts forward as part of the new alleged detriment the actions of the first respondent in taking on the appeal and taking too long on it. I can see that the mistake in taking it on put the claimant to some inconvenience and delay, but I did not fully understand his submissions as to why he thought the detriment was something more than that or how he proposed to show that the actions were taken (and, perhaps, strung out) "on the ground of" the protected disclosures, as required by section 49 of ERA 1996. . There is also a further difficulty in that under the TUPE regulations the disclosures are now deemed to have been made to the second respondent (not the first respondent). The claimant appears to think the two respondents were colluding in some way to his disadvantage, an accusation to which counsel for the first respondent took exception as speculative and unfounded. It may be that the second respondent made the same mistake as the first respondent.

70. I cannot conclude at this stage that the whole of the new claim in relation to the alleged detriment has no reasonable prospect of success. The part relating to the actual decision on the appeal has no reasonable prospect of success for the reasons given above. That is certainly a strong factor against the claimant in the *Selkent* balancing exercise so far as that part of the new alleged detriment is concerned. The rest of the new claim is in my view speculative (largely because of the complications involved in the effects of regulation 4) and I consider that it would be difficult for the claimant to make out his factual and legal case on it. The speculative nature of the alleged detriment and its link to any of the protected disclosures would certainly take up some time at a final hearing, both in hearing oral evidence based on witness statements dealing with all the facts and in legal submissions addressing the various matters mentioned in paragraph 69 above.

71. The claimant did not identify any specific hardship that would result to him if his application is refused, over and above the inevitable loss of one potential claim against the first respondent in addition to his various existing claims against the second respondent. Although he would lose the chance to hold the first respondent to account, as he put it, I do not regard that as a significant additional hardship, given that all his

other claims against it are misconceived in law. His wish to keep the first respondent in the proceedings for his own reasons is not in my view a significant factor in the *Selkent* balancing exercise.

72. Taking account of the various factors discussed above, I consider the balance of hardship to be in favour of the first respondent: the factors against granting the application outweigh those in favour of granting it. While the question of time limits is not decisive, it appears to me to be a strong factor in the balance that the first respondent would be deprived of the protection of the rules on time limits for making claims. But taken with the hardship to the first respondent if required to remain a party solely because of the new claim, the speculative nature of the new claim (and the complexity of the issues relating to regulation 4 of TUPE) and the fact that the appeal decision itself cannot be a detriment, as well as the fact the new claim would involve additional facts and significant time at the final hearing, the balance is in my view clearly in favour of the first respondent and against the claimant.

73. For the above reasons, I conclude that the application to amend should be refused.

74. I should refer also to my conclusion in paragraph 70 above that so much of the new claim as relates to the decision on the appeal against the rejection of claimant's grievance as a detriment has no reasonable prospect of success. So, even if I had allowed the application, the new claim would have to have been framed in more limited terms than the claimant put forward.

Employment Judge Hogarth
20 September 2024

Sent to the parties on:

24 September 2024

Jade Lobb
For the Tribunal: