EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr T Carolan	AND	Lightspeed Broadband Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (by telephone) **ON** 20 August 2024

EMPLOYMENT JUDGE J Bax

Representation

For the Claimant: Mr T Carolan, in person
For the Respondent: Mrs M Morton, solicitor

JUDGMENT ON APPLICATION TO AMEND

The claimant's application to amend the originating application to add claims of detriment and automatically unfair dismissal for making a protected disclosure and to add Mr Coward and Mr Shepherd as additional Respondents is refused.

REASONS

1. In this case the Claimant sought leave to amend his claim which is currently before the Tribunal, which the Respondent opposed.

Procedural background

2. The general background and procedural history of the claim before the determination of this application was as follows.

3. On 12 January 2024, the Claimant presented a claim of unfair dismissal and sex discrimination. He notified ACAS of the dispute on 29 November 2023 and the certificate was issued on 10 January 2023.

4. The claim form detailed that the Claimant was made redundant in October 2023. He said that only his role, Acquisition Director, was made redundant. In May 2023 he was promoted by Mr Coward to Acquisition Director. Mr Coward left the Respondent in June 2023 and returned in August 2023 and then made the Claimant's role redundant by replacing it with a Marketing Director role and a Digital Sales Manager. The Digital Sales manager role was the same as the Claimant's role before his promotion.

5. The Claimant had also attached a timeline document to his claim form, in which he referred to starting with the company. The next event was February 2023 when the Acquisitions Director role was created and Mr Leyland was appointed and to whom the Claimant reported. Restructuring occurred in April 2023 and the Acquisition Director and the Claimant's Digital Sales Manager roles were considered safe. Mr Leyland left and the Claimant applied for his role and was promoted. Ms Skeierczynska applied for the Claimant's role and was appointed. Mr Coward left and returned. The Claimant told Mr Coward about becoming a father on 29 September 2023. On 4 October 2023 he was told his role was at risk of redundancy. He raised a grievance on 8 November 2023, which was dismissed. His appeal against the outcome was heard on 29 November and was dismissed.

6. The Claimant did not tick the box saying he had a whistleblowing claim.

7. In the response the Respondent asserted that there was a companywide restructure in April 2023 and a decision was taken to move forward with the Acquisition Director, digital Sales Manager and 2 marketing executives roles. The Claimant was appointed as Acquisition Director when Mr Leyland resigned. A number of redundancies were made in the summer of 2023. When Mr Coward returned in August 2023 he assessed the continuing performance of the business and the commercial reality of its new existence. A new marketing strategy was created. It was considered there was a need for a Marketing Director, but it was unnecessary to have both a Marketing director and Acquisition Director. At the consultation meeting the Claimant was told about the 2 new roles of Marketing Director and Digital Sales Manager for him to consider if he wanted to apply. A further consultation took place on 9 October 2023, however the Claimant did not attend and he had not put forward any proposal and the Claimant was informed he was being made redundant and given 2 months' notice on garden leave. He raised a grievance about the proposed roles, that Ms Skeierczynska had not been placed at risk of redundancy and he had said he was going to be a father. It was not accepted Ms Skeierczynska moved into the Claimant's Digital Sales Manager role when he was promoted.

8. On 20 May 2024, the Claimant wrote to the Tribunal applying to amend his claim to add a claim of whistleblowing. In the application he said that he had been involved in a whistleblowing incident on 24 September 2022. After he

went on gardening leave the person he reported returned to the company and was promoted by Mr Coward. Further he added that the new role of Marketing Director was given to the wife or close relation of Brett Shepherd, CEO. He sought to add an alleged protected disclosure raising concerns on 24 September 2022 about Jake Allen and his actions toward Mark Lutitt and about him communicating with a competitor about working for them. He sought to add an allegation of detriment in relation to his dismissal.

9. In the Claimant's agenda for the hearing he sought to add Mr Coward and Mr Shepherd as Respondents and this also formed part of his application.

10. The draft amended particulars of claim set out what the Claimant relied upon as a protected disclosure and as a detriment .

11. The protected disclosure was said to consist of the following:

    a. On 24 September 2022 orally to Mr Shepherd, CEO, that Jake Allen (sales manager) and members of his sales team had collectively lodged complaints against Mr Lutitt (Marketing Director) with Mr Coward with the aim of having Mr Lutitt dismissed. Further that Mr Allen had been in discussions with a competitor about the possibility of transitioning his team if the situation with Mr Lutitt was not resolved.
    b. It was in the public interest because, 'You want to believe that companies are fair and transparent and are not committing misdemeanours.' The public wants to know that companies you are purchasing broadband from are acting in good faith towards their employees.
    c. The information tended to show that there had been a breach of a legal obligation, namely: The Respondent has a duty to investigate whistleblowing complaints, a duty of care to the employee who is making it and that he had followed the whistleblowing policy. Potentially serious misconduct by trying to get an employee in trouble and was speaking to a competitor.

12. The Claimant sought to add a detriment of making the Acquisition Director role redundant. He also sought to add that the dismissal was automatically unfair.

The Claimant's submissions

13. The Claimant submitted that the reason why the application was made on 20 May 2024 was that he became aware in about March 2024 that Mr Allen had been rehired by the Respondent and that someone with the same surname as Mr Shepherd had been appointed as marketing director. He had seen these things on Linked and received confirmation from a friend on

17 April 2020 that Mrs Shepherd was Mr Shepherd's wife. Earlier in April it had been confirmed that Mr Allen had been re-hired and promoted. He then thought that his dismissal was linked to the disclosure he made in September 2022.

14. He had not made enquiries when he brought his claim because he did not think the Respondent would appoint those individuals.

15. He did not make the application to amend until 20 May 2024 because he wanted to make sure that he got everything he could. He knew that the Tribunal could give consideration if it was out of time and he wanted to be thorough.

16. In terms of the merits of the alleged protected disclosure the Claimant relied on what he had described when discussing the list of issues, in terms of the public interest and what it tended to show.

17. In relation to the reason why he says that the decision to make him redundant was materially influenced by the alleged disclosure, he said: it was long term retaliation, he had whistle blown on the wrong person, the Respondent did not do an investigation and they rehired him

18. The reason why he sought to add Mr Coward and Mr Shepherd were because they were involved in the dismissal and Mrs Shepherd was the wife of Mr Shepherd.

19. The claimant said the hardship to him, if the application was not granted, would be that he could not bring those allegations and the chances of success in a claim would be reduced.

20. In reply he said that the appointment of Mrs Shepherd was bias, favouritism or nepotism. He had been promoted but Mr Coward had no choice as it was an internal appointment and no one else applied. If he had not gone for the director role he would still be employed.

The Respondent's submissions

21. The Respondent submitted that the application to amend was a wholly new cause of action and involved wholly new facts not set out in the claim form.

22. The allegations were speculative in nature. If he had any belief that whistleblowing was the reason for his dismissal he would have raised it in his claim form.

23. The Respondent accepted that Mr Allen returned to the business in November 2023 as interim sales director and Mrs Shepherd was engaged

as a self-employed interim marketing director in October 2023. The Claimant was offered the opportunity to apply for the Marketing director role but did not do so.

24. The allegations within the application were out of time. He had not entered into early conciliation about whistleblowing.

25. In terms of the merits of the claims they were bound to fail. He would not be able to establish he made a protected disclosure it did not show a breach of legal obligation or the public interest. He was made redundant 11 months later and in the meantime he was promoted. A colleague going to a competitor is not a misdemeanour, it is a matter of contract.

26. It would be prejudiced by a longer final hearing and more evidence

The law

27. Rule 34 provides, "The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings; and may remove any party apparently wrongly included."

28. In Mist v Derby Community Health Services NHS Trust [2016] ICR 543, it was held that there was no requirement for a Claimant who sought to add an additional Respondent to an existing claim to go through the EC procedure again in respect of that application.

29. In relation to applications to amend generally, an Employment Tribunal has jurisdiction to determine the case put before it, not some other case (per Gibson LJ at paragraph 42 of Chapman v Simon [1994] IRLR 124). If a case is not before the Tribunal, it needs to be amended to be added.

30. In Cocking v Sandhurst (Stationers) Ltd and anor [1974] ICR 650 NIRC Sir John Donaldson laid down a general procedure for Tribunals to follow when deciding whether to allow amendments to claim forms involving changing the basis of the claim, or adding or substituting respondents. The key principle was that in exercising their discretion, Tribunals must have regard to all the circumstances, in particular any injustice or hardship which would result from the amendment or a refusal to make it. This test was approved in subsequent cases and restated by the EAT in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT, which approach was also endorsed by the Court of Appeal in Ali v Office of National Statistics [2005] IRLR 201 CA.

31. The EAT held in Selkent Bus Company Ltd v Moore [1996] ICR 836 EAT: In determining whether to grant an application to amend, the Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. Mummery J as he then was explained that relevant factors would include:

32. 1 - The nature of the proposed amendment - applications to amend range, on the one hand, from the correction of clerical and typing errors, the addition 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 a substantial alteration pleading a new cause of action; and

33. 2 - The applicability of time limits - if a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim or cause of action is out of time and, if so, whether the time limit should be extended; and

34. 3 - The timing and manner of the application - an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings. 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.

35. These factors are not exhaustive and there may be additional factors to consider, for example, the merits of the claim.

36. In Vaughan v Modality Partnership UKEAT 0147/20, the EAT confirmed that the core test in considering applications to amend is the balance of injustice and hardship in allowing or refusing the application. The factors identified in Selkent are not a tick box exercise, they are the kind of factors likely to be relevant in striking the balance. A balancing exercise always requires express consideration of both sides of the ledger, both quantitatively and qualitatively. It is not merely a question of the number of factors, but of their relative and cumulative significance in the overall balance of justice Where the prejudice of allowing the amendment is additional cost, consideration should be given as to whether it can be ameliorated by an award of costs, provided the paying party can meet it.

37. 1 - The nature of the proposed amendment: A distinction may be drawn between (i) amendments which are merely designed to alter the basis of an existing claim, but without attempting to raise a new distinct head of complaint; (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim (often called "relabelling"); and (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.

38. Mummery J in Selkent suggests that this aspect should be considered first (before any time limitation issues are brought into the equation) because it is only necessary to consider the question of time limits where the proposed amendment in effect seeks to adduce a new complaint, as distinct from "relabelling" the existing claim. If it is a purely relabelling exercise than it does not matter whether the amendment is brought within the timeframe for that particular claim or not – see Foxtons Ltd v Ruwiel UKEAT/0056/08. Nevertheless whatever type of amendment is proposed the core test is the same: namely reviewing all the circumstances including the relative balance of injustice in deciding whether or not to allow the amendment (that is the Cocking test as restated in Selkent).

39. The fact that there is a new cause of action does not of itself weigh heavily against amendment. The Court of Appeal stressed in Abercrombie and ors v Aga Rangemaster Ltd 2013 IRLR 953 CA that Tribunals should, when considering applications to amend that arguably raise new causes of action, focus "not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted".

40. Any mislabelling of the relief sought is not usually fatal to a claim. Where the effect of the proposed amendment is simply to put a different legal label on facts that are already pleaded, permission will normally be granted.

41. 2 - The applicability of time limits: This factor only applies where the proposed amendment raises what effectively is a brand new cause of action (whether or not it arises out of the same facts as the original claim). Where the amendment is simply changing the basis of, or "relabelling", the existing claim, it raises no question of time limitation – (see for example Foxtons Ltd v Ruwiel UKEAT/0056/08 per Elias P at para 13).

42. There are now conflicting authorities on the applicability of time limits and the "doctrine of relation back", that is to say that an amendment relates back to the date of presentation of the claim form. The opposing view is that an

amendment takes effect from the date of the amendment, and that time limits are to be assessed as a substantive matter as against that date.

43. In Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN, HHJ Hand QC held that the doctrine of relation back does not apply to Employment Tribunal proceedings. The guidance given by Mummery J in Selkent and his use of the word "essential" should not be taken in an absolutely literal sense and applied in a rigid and inflexible way so as to create an invariable and mandatory rule that all out of time issues must be decided before permission to amend can be considered. The judgments in both Transport and General Workers' Union v Safeway Stores Limited UKEAT 009207 and Abercrombie v AGA Rangemaster Limited [2014] ICR 209 CA emphasised that the discretion to permit amendment was not constrained necessarily by limitation.

44. See also Reuters Ltd v Cole UKEAT/0258/17/BA at para 31 per HHJ Soole: "In this respect a potential issue arises from the conflict in EAT authorities as to whether the Tribunal must definitively determine the time point when deciding on the application to amend (Amey Services Ltd & Enterprise Managed Services Ltd v Aldridge and Others UKEATS/0007/16 (12 August 2016)) or whether the applicant need only demonstrate a prima facie case that the primary time limit (alternatively the just and equitable ground) is satisfied (Galilee v Commissioner of Police for the Metropolis UKEAT 0207/16/RN (22 November 2017)). In the light of the exhaustive analysis of the authorities undertaken by His Honour Judge Hand QC in Galilee, I would follow the latter approach."

45. However, this is not the view more recently taken by HHJ Tayler in Vaughan v Modality Partnership UKEAT/0147/20/BA(V) (9 November 2020). There has been some confusion as to whether a tribunal may grant an amendment in the form of a new claim without applying the law of time limits to the new claim at the time of application. HHJ Tayler reminds us that a tribunal may do so and suggests that the Selkent categories are regularly misunderstood. Whether the claim may be out of time is just one matter that the Employment Judge has regard to in exercising discretion on whether to allow the amendment. It is not necessarily conclusive.

46. 3 - The timing and manner of the application: This effectively concerns the extent to which the applicant has delayed making the application to amend. Delay may count against the applicant because the Overriding Objective requires, among other matters, that cases are dealt with expeditiously and in a way which saves expense. Undue delay may well be inconsistent with these objectives. The later the application is made, the greater the risk of the balance of hardship being in favour of rejecting the amendment - see Martin v Microgen Wealth Management Systems Ltd EAT 0505/06. However, an application to amend should not be refused solely because

there has been a delay in making it, as amendments may properly be made at any stage of the proceedings. This is confirmed in the Presidential Guidance on General Case Management for England and Wales (13 March 2014).

47. The EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise in Ladbrokes Racing Ltd v Traynor EATS 0067/06: the Tribunal will need to consider: (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) 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 (iii) 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.

48. 4 - The Merits of the Claim: It may be appropriate to consider whether the claim, as amended, has reasonable prospects of success. In Cooper v Chief Constable of West Yorkshire Police and anor EAT 0035/06, one of the reasons the EAT gave for upholding the Tribunal's decision to refuse the application to amend was that it would have required further factual matters to be investigated "if this new and implausible case was to get off the ground". However, Tribunals should proceed with caution because it may not be clear from the pleadings what the merits of the new claim are: the EAT observed in Woodhouse v Hampshire Hospitals NHS Trust EAT 0132/12 that there is no point in allowing an amendment to add an utterly hopeless case, but otherwise it should be assumed that the case is arguable.

49. Langstaff P made the following observations in Chandhok v Tirkey [2015] IRLR 195 EAT from paragraph 16: "The claim, as set out in the ET1, is not something to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract 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 … the claim as set out in the ET1. [17] … If a claim or a case is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had all along been made, because it was "their case", and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of

permitting or denying amendment; it allows issues to be based on shifting sands; it ultimately denies that which clear-headed justice most needs, which is focus. It is an enemy of identifying, and in light of the identification resolving, the central issues in dispute. [18] In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it; so that they can tell if a tribunal may have lost jurisdiction on time ground; so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand-in-hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverting into thinking that the essential case is to be found elsewhere than in the pleadings."

50. The '*public interest*', for the purpose of a protected disclosure, was not defined as a concept within the Employment Rights Act 1996, but the case of Chesterton-v-Normohamed [2017] IRLR 837 provides assistance. The Court of Appeal determined that it was the character of the information disclosed which was key, not the number of people apparently affected by the information disclosed. There was no absolute rule. Further, there was no need for the 'public interest' to have been the sole or predominant motive for the disclosure. The following factors could be relevant:

    a. the numbers in the group whose interests the disclosure served

    b. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed

    c. the nature of the wrongdoing disclosed, and

    d. the identity of the alleged wrongdoer.

Conclusions

Application to add a whistleblowing claim

51. The proposed amendment was a wholly new cause of action, there being no suggestion that whistleblowing was a feature in the original claim form and timeline of events. Further the factual basis of the proposed amendments was not set out in the original claim form.

52. The application was made at an early stage in the proceedings and before the first case management hearing.

53. Time to bring a claim of detriment runs from the time of the detrimental act, in this case the Claimant relied upon the making of his role redundant and the termination of his employment. His employment ended on 10 December 2023. Allowing for pausing for early conciliation the time limit for bringing his claim from the last act of detriment expired on 20 April 2024.

54. The Claimant would have been aware of the facts about the alleged protected disclosure from the time that he claims to have made it. The Claimant was aware that Mr Allen and someone with the same surname as Mr Shepherd had been appointed in March 2024. It was formally confirmed to the Claimant that Mr Allen had returned in April 2024 and Mrs Shepherd's identity was confirmed on 17 April 2024. The Claimant had all the facts he needed to make his application to amend within the time limit.

55. Time can only be extended if it was not reasonably practicable to present the claim in time. The Claimant had an idea of the true situation in March 2024. It was reasonably feasible for him to make his application and obtain the formal confirmation. He was aware there were time limits in the Tribunal. It would have been reasonably feasible to have made the application in time. The Claimant had poor prospects of success in his assertion it was not reasonably practicable to make the application in time. Even if I were wrong it would need to be made within a reasonable period thereafter. The Claimant accepted that he could have made it a little bit quicker. It was highly unlikely that a reasonable time would have been later than 2 weeks after 20 April 2020. It was therefore unlikely that time would have been extended.

56. The application was therefore made out of time, however that is only a factor to take into account.

57. In terms of the merits, the information the claimant said he gave was about a team collectively raising complaints to the Chief Commercial Officer against a director and that the sales manager was in discussions with a competitor to move with his team to that organisation. Employees are entitled to raise complaints against superiors. They also cannot be forced to stay to work for an employer. The Claimant suggested that the disclosure was in the public interest because you want to believe companies are fair and transparent and not committing misdemeanours. It was difficult to see from the information the Claimant gave, how the company was committing a misdemeanour. He was raising an issue about the actions of an employee. The information did not suggest the Respondent was not being transparent. He also suggested that members of the public buying broadband would want to know the company was acting in good faith towards its employees. The matter was one which appeared to be internal and is a dispute between employees and their superior and were personal.

The treatment of a director by employees complaining about what they are doing is an internal matter and not something which is likely to be in the public interest. Similarly disillusionment with the director and looking to leave is also something which is unlikely to be in the public interest, in that it is difficult to see how it affects anyone other than those involved and the company itself.

58. In the amended grounds of claim the Claimant said it tended to show a breach of legal obligation by the Respondent. The information did not refer to failing to follow whistleblowing policies or failing in a duty of care to a whistle-blower. He said that it was potentially serious misconduct by trying to get an employee into trouble and speaking to a competitor. At best that would be a breach of an obligation by Mr Allen, however it is very difficult to see how the Claimant could reasonably believe that was in the public interest.

59. The case that a protected disclosure had been made was very weak.

60. Further it was difficult to see how Mr Coward would have been influenced by the disclosure. He was aware of the complaints by the Sales team, because they were made to him. He promoted the Claimant when the Acquisition Director left, all things which pointed strongly away from hostility towards the Claimant. The Claimant's case on linking the disclosure to the detriment was weak. Similarly his claim that Mr Shepherd was influenced by it was weak, the Claimant was promoted. No one was appointed as an employee into the Marketing director role. The appointment of Mrs Shepherd on an interim or self-employed basis does not suggest that a protected disclosure was the reason, the post needed to be filled. The Claimant did not apply for the Marketing Director role.

61. The prospects of success in the whistleblowing claim were poor.

62. In terms of prejudice the Respondent, to some extent is being asked to hit a moving target. The claim form is not something to set the ball rolling. The Respondent considered the case on the basis that the Claimant had set out in his claim form. There was no hint of the claim now sought to be brought. The proposed claim is based on inference and the Claimant did not refer to any direct evidence which could show that a protected disclosure was a material influence. It is a claim which appeared to be speculative and one which has poor prospects of success.

63. The Claimant has a claim of ordinary unfair dismissal and can argue that he was removed so that Mrs Shepherd could fill the Marketing director role. If the application is refused he would not be able to assert that he was dismissed because of whistleblowing.

64. Balancing all of the factors together, balance of prejudice and hardship fell more heavily in favour of the Respondent. The application was refused.

65. The application to add Mr Coward and Mr Shepherd as Respondents was dismissed. The only claim remaining is one of unfair dismissal and such a claim can only be brought at against the Claimant's employer, Lightspeed Broadband Limited.

66. The Claimant may refer to the re-appointment of Mr Allen and the appointment of Mrs Shepherd as part of his contention in the claim of ordinary unfair dismissal that his dismissal was a foregone conclusion.

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Employment Judge J Bax
Dated 22 August 2024

Judgment sent to Parties on

16th September 2024

For the Tribunal Office