Neutral Citation Number: [2024] EAT 194

Case No: EA-2023-SCO-000015-DT

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street, Edinburgh EH3 7HF

Date: 10 December 2024

Before:

THE HONOURABLE LORD FAIRLEY

Between:

MR PAUL DOUGLAS

Appellant

- and -

NORTH LANARKSHIRE COUNCIL

Respondent

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- -

Mr Mark Allison, Advocate (instructed by Livingstone Brown) for the **Appellant**
Mr Graham Mitchell, Solicitor (Clyde & Co (Scotland) LLP) for the **Respondent**

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Hearing date: 20 August 2024

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JUDGMENT

SUMMARY

Practice and procedure – amendment - time limits.

Unfair dismissal – scope of "reasonable inquiry"

The appellant presented a claim to the Employment Tribunal on 18 May 2020 complaining *inter alia* of unfair dismissal. He later sought to amend his pleadings to introduce new complaints of detriment and automatically unfair dismissal on the ground of having made protected disclosures (sections 47B and 103A **Employment Rights Act, 1996**). The proposed amendment to introduce the section 47B claim lacked specification *inter alia* as to the what detriments were alleged, and when they were said to have occurred. An undertaking to re-draft the proposed amendment within 14 days was never complied with. The case was then sisted until November 2021. After the sist was recalled, the amendment was allowed in January 2022, and the case then proceeded to a full hearing in November and December 2022.

Having heard evidence, the tribunal found that the appellant had made protected disclosures on 10 March 2019 as a result of which he had been subjected to four detriments, the latest of which occurred on 23 March 2019. All other claimed detriments relied upon by the appellant were either found not have been established, or not to have been causally connected to the making of the protected disclosures. The tribunal held that it did not have jurisdiction over the section 47B claim as it had been brought outwith the primary time limit, and no basis had been shown to extend that time limit. The tribunal also held that appellant had been fairly dismissed.

The appellant argued that in allowing the amendment, the tribunal had implicitly and conclusively determined the issue of time bar in his favour. Separately, he argued that tribunal had failed properly to apply **Sainsbury's Supermarkets Limited v. Hitt** to his unfair dismissal claim.

Held, refusing the appeal:

(1) A tribunal considering an application to amend should usually examine the issue of time bar as one of the **Selkent** factors. Where the issue of time bar is unclear, however, it is competent for it to be reserved. Where, as here, an issue of time bar has obviously been overlooked at the stage of consideration of the amendment application, it remains a live jurisdictional point which any subsequent tribunal considering the evidence has an ongoing duty to address.

(2) There was no error of law in the tribunal's approach to the unfair dismissal claim.

The Honourable Lord Fairley:

Introduction

1. This is an appeal against a Judgment dated 18 January 2023 from a full Employment Tribunal sitting at Glasgow. The appellant challenges the tribunal's decision not to uphold his claim of unfair dismissal and its conclusion that it did not have jurisdiction to consider his claim under section 47B of the **Employment Rights Act, 1996** that he was subjected to detriment on the ground of making protected disclosures.

Summary of facts

2. The appellant was employed by the respondent as a driver. His employment commenced on 6 April 1993 and ended with his dismissal on 25 February 2020. Prior to 2012, the appellant had driven refuse collection vehicles. He developed a chronic health condition. In 2012, following occupational health advice, his regular duties were permanently changed to driving skip lorries.

3. In March 2019, the appellant had a disagreement with one of his supervisors over proposed changes to his driving duties and shift patterns, including a proposal to move him back to driving refuse collection lorries. At that time, the appellant was also concerned about the fairness of the allocation of overtime and about health and safety issues to do with other drivers. Those concerns were raised by him in a complaint to the respondent's Business Manager for Regulatory Services in an e mail sent on 10 March 2019. They were also discussed by the appellant with another of his supervisors on 12 March 2019.

4. On 13 March 2019, as the appellant was leaving work, he was approached in an aggressive manner by a colleague who had heard about his complaints. The same colleague subsequently telephoned the appellant at home that evening. The appellant felt intimidated. He was concerned that his colleagues had become aware of the nature and content of the concerns that he had expressed privately to the respondent's managers. On 23 March 2019, the same colleague who had previously

approached the appellant posted something on Facebook which appeared to mock the appellant about his complaints.

5. From 14 March 2019, the appellant was certified by his GP as being unfit for work due to work-related stress.

6. The respondent appointed its Service Delivery Manager to investigate the concerns expressed by the appellant in his e mail of 10 March 2019. The Service Delivery Manager thereafter made various attempts to meet the appellant to discuss those concerns. Following a meeting with the appellant on 23 May 2019, it was agreed that his driving duties and shift pattern would remain unchanged.

7. The appellant nevertheless remained absent from work. His other complaints (including those in relation to overtime) were further investigated by the Service Delivery Manager. She could find no evidence to substantiate his allegations but did not wish to finalise her investigation until she had been able to discuss matters with him. She invited him to attend a meeting with her on 8 July 2019. He did not do so as he was still absent from work with stress. Her investigation was therefore put on hold until the appellant confirmed that he was fit to participate in it.

8. The appellant was unable to attend absence management meetings on 26 July, 29 August and 3 September 2019. He did, however, attend a meeting with the respondent's occupational health advisors on 1 October 2019. They provided a report to the respondent dated 4 October 2019 which stated that the principal cause of the appellant being unfit for work was work-related stress. That was said to be "a result of events in his workplace which have occurred over the course of at least the past couple of years". A return to work was not assessed to be likely "until [the appellant] believes that the problems he is experiencing have been resolved to his satisfaction".

9. The appellant was unable to attend further scheduled absence management meetings on 7 November and 5 December 2019 and 3 January 2020. He attended an absence management meeting with the respondent's Operations Manager on 23 January 2020, accompanied by his union representative. The occupational health report of 4 October 2019 was discussed, including the

suggestion that a return to work was not likely until the appellant's workplace issues had been resolved to his satisfaction. The appellant indicated that he did not want to take part in the investigation process whilst he remained off sick. He advised that he expected his GP to certify him as unfit for work until 24 February 2020.

10. On 28 January 2020, the appellant sent a text to the Operations Manager indicating that he would be returning to work on 25 February 2020.

11. On 4 February 2020, the appellant attended a further occupational health assessment. A report of that assessment dated 7 February 2020 was provided to the respondent. The respondent had asked the occupational health assessor for advice on the likelihood of the appellant being able to maintain reliable attendance in the future. The report stated:

> "The most relevant predictor of what the future holds is what has happened in the past unless a significant intervention takes place in the future. I would expect that, if Mr. Douglas is able to come to terms with his problems, then he is likely to maintain a satisfactory attendance."

12. By letter dated 13 February 2020, the appellant was invited to a formal meeting with the respondent's Operations Manager to discuss his attendance record. The meeting was scheduled for 25 February 2020, which was also due to be the appellant's first day back at work. The appellant attended the meeting on that date, accompanied by his union representative.

13. Having discussed the appellant's absence record and the most recent occupational health report, the Operations Manager came to the view that the appellant's employment should be terminated. In reaching that view, he noted that the appellant had a substantial and intermittent absence record which had caused significant operational difficulties to the respondent. He also noted that whilst the appellant had returned to work, there was no guarantee that he would maintain satisfactory attendance in the future. Rather, the most recent occupational health report tended to suggest that the previous attendance pattern was likely to continue. Previous efforts to provide support and assistance to improve the appellant's attendance had not made any material difference. He accordingly had no confidence that the appellant's attendance would be satisfactory going forward.

14. At the date of his dismissal in February 2020, the appellant had been absent from work for a continuous period of 198 days. In the 4 years prior to his dismissal, he had been absent for a total of 474 days.

The appellant's claim to the Employment Tribunal

15. Following his dismissal, the appellant brought proceedings in the Employment Tribunal. His complaints at that time were of unpaid wages and holiday pay and unfair dismissal. His claim form (ET1) was presented on 18 May 2020.

16. On 15 July 2020, the appellant sought to amend his application to introduce complaints of detriment and automatically unfair dismissal on the ground of having made protected disclosures (sections 47B and 103A **ERA**) and a claim of disability discrimination. The respondent opposed the proposed amendment.

17. At a case management hearing on 18 August 2020 the proposed amendment was discussed. It was noted that it lacked specification. In relation to the claim under section 47B it was unclear what protected disclosures were relied upon, what detriments were alleged, and why any such detriments were said to be on the ground of the protected disclosures. The appellant's solicitor undertook to re-draft the proposed amendment within 14 days. Unfortunately, that undertaking was not complied with, and no steps appear to have been taken to follow it up.

18. The case was then sisted between 1 December 2020 and 17 November 2021 to allow the appellant's internal appeal to be progressed. Following the recall of the sist, an open preliminary hearing was held on 24 January 2022 to deal with the appellant's application to amend. The proposed amendment was exactly as it had been at the case management hearing in August 2020. It was still materially lacking in specification. The failure by the appellant's representative to comply with the undertaking given in August 2020 appears to have been overlooked.

19. On the face of the proposed amendment, the detriments relied upon for the section 47B complaint included all aspects of the absence management process, non-payment of wages, and

various other matters about which the appellant had complained to the respondent in October 2019. The dates of these other matters were not clearly identified within the proposed amendment.

20. In a Judgment dated 26 January 2022, an Employment Judge allowed the amendment in relation to the protected disclosures claims under sections 47B and 103A **ERA**, but refused it in relation to the disability discrimination claim.

21. In briefly expressed reasons, the Employment Judge explained that the amendment to add the claims under sections 47B and 103A was allowed because those claims were merely a re-labelling of claims already advanced, and the addition of them by amendment was not ultimately opposed by the respondent.

22. On 24 May 2022, a different Employment Judge ordered the appellant to provide further information about his section 47B claim. Specifically, the appellant was ordered to identify what protected disclosures were relied upon, what detriments he claimed to have suffered and how those detriments were said to be on the ground of the protected disclosures.

23. Unhelpfully, in what bore to be a response to that order dated 31 May 2022, the appellant stated simply that the detriments on which he relied were "as previously set out" in the amendment application of 15 July 2020. No further specification was provided.

The Tribunal's Judgment and Reasons

24. A full hearing of the appellant's claims, as amended, took place before a different tribunal consisting of an Employment Judge and two lay members. The hearing took place between 23 and 29 November with a further day by CVP on 14 December 2022.

25. At the start of the first day of the full hearing, the issues which the tribunal was being asked to determine were fully discussed. In the course of that discussion, dates were attributed – apparently for the first time – to the detriments relied upon in the section 47B complaint. Following that discussion, the Employment Judge prepared a draft list of issues. The list was provided to parties on the afternoon of the first day of the hearing. It did not refer to time bar. At that stage, however, the

respondent indicated that it intended to raise the issue of time bar / jurisdiction in relation to the detriments relied upon in the section 47B claim as it now understood them.

26. At the start of the second day of the hearing, parties confirmed that the list of issues prepared by the Employment Judge accurately reflected the issues to be determined by the Tribunal, subject to addition of the time bar point.

The section 47B claim

27. Having heard evidence in relation to the section 47B claim, the tribunal found that the appellant had indeed made two protected disclosures within his e mail of 10 March 2019 as a result of which he had been subjected to 4 specific detriments. Those detriments were:

- the leaking by the respondent of the contents of the appellant's e mail of 10 March 2019;
- the aggressive approach to the appellant by a colleague on 13 March 2019;
- the telephone call to the appellant later on 13 March 2019 from the same colleague;
- the Facebook post of 23 March 2019 by the same colleague

28. All other claimed detriments relied upon by the appellant were either found not have been established, or not to have been causally connected to the making of the protected disclosures.

29. The tribunal noted that the last of the relevant established detriments occurred with the Facebook post of 23 March 2019. Accordingly, the primary time limit for bringing a claim under section 47B in relation to those detriments was 22 June 2019. Early conciliation had not been commenced until 28 February 2020, and the ET1 had not been presented until 18 May 2020, almost 11 months after the expiry of the primary time limit. The tribunal further concluded that the appellant had failed to discharge the burden of showing that it would not have been reasonably practicable for the section 47B claim to have been brought within the primary time limit. It accordingly concluded that it had no jurisdiction to entertain it.

The unfair dismissal claim – section 98

30. The tribunal concluded that the reason for the dismissal was that the Operations Manager genuinely believed that that the appellant would not, in future, maintain satisfactory levels of attendance. It also concluded that there were reasonable grounds for such belief, having regard to the appellant's previous attendance record and the terms of the occupational health reports.

31. In the Tribunal's view, the Operations Manager's belief that the appellant would not be able to maintain a satisfactory level of attendance was not an issue of capability in terms of section 98(2)(a) **ERA**, but was "some other substantial reason" in terms of section 98(1)(b).

32. The tribunal directed itself as to its role, under reference to **Iceland Frozen Foods Limited v. Jones** [1982] IRLR 439. It concluded that whilst "somewhat harsh", dismissal nevertheless fell within the range of reasonable responses. Whilst another employer might have waited to see whether or not the appellant's attendance improved following his return to work, it could not be said that no reasonable employer would have acted in the way the respondent did having regard to the absence record and the occupational health advice.

Grounds of appeal

33. The appellant submits that the tribunal erred in law in two respects:

i. in considering and determining the issue of time bar in relation to his section 47B **ERA** claims; and
ii. in its application of section 98(4) **ERA** to the established reason for the dismissal of "some other substantial reason".

34. On the first ground, Counsel submitted that the Employment Judge's decision of 26 January 2022 on the amendment application implicitly and conclusively determined the issue of time bar in relation to the section 47B claim. It was, therefore, an error of law for the full tribunal to re-visit and re-determine that issue at the merits hearing in November and December 2022. Counsel invited me

to resolve the apparent conflict between **Amey Services v Alridge** UKEAT/0007/16/JW and **Galilee v Commissioner of Police of the Metropolis** [2018] ICR 634. Amey suggested that it was not open to a tribunal to reserve an issue of time bar when allowing an amendment. In **Galilee**, however, express reservation of time bar was found to be competent. The approach in **Amey** was to be preferred. Even if **Galilee** was the correct approach, however, it was impermissible for time bar to be revisited at the full hearing where that issue was not expressly reserved at the time of determination of the amendment. Finally. even if time bar could be revisited at a final hearing, the tribunal was in error in doing so in this case as the amendment was merely a relabelling exercise: **Reuters Ltd v. Cole** UKEAT/0258/17/BA; **Foxton Ltd v. Ruwiel** UKEAT/0056/08; **Abercrombie & Others v Aga Rangemaster Ltd** [2014] ICR 209.

35. On the second ground, the tribunal had failed adequately to scrutinise the basis for the respondent's reason for dismissing. Having concluded that the reason for the dismissal was the respondent's belief that the appellant would not maintain an acceptable level of attendance, it was incumbent upon the tribunal to consider whether or not reasonable grounds for such a belief existed after reasonable inquiry (per **Sainsbury's Supermarkets Limited v. Hitt** [2003] ICR 111). It had not done so.

Respondent Submissions

36. Counsel for the respondent submitted that neither **Amey** nor **Galilee** applied to a situation where there had been no consideration of time bar at all. In any event, the reasoning in **Galilee** should be preferred to that in **Amey**.

37. In relation to the unfair dismissal claim, the tribunal had correctly recognised that it should not substitute its view for that of the employer, and not done so. Its reasons did not disclose any error of law.

Decision and reasons

Time bar

38. The appellant's application to amend dated 15 July 2020 was unclear as to what detriments were relied upon in the section 47B complaint and the dates on which those detriments were said to have arisen. The undertaking given by the appellant's solicitor to provide greater clarity was never complied with. By January 2022, the appellant's pleaded position on the section 47B complaint remained as unclear as it had been in July 2020.

39. As a result of that absence of clarity, the Employment Judge who considered the amendment application in January 2022 concluded that the new claim was simply a re-labelling exercise. In some respects – for example in relation to those aspects of the absence management procedure that were founded upon both as alleged detriments and in the unfair dismissal claim – that was correct. As already noted, however, those alleged detriments were either found not have been established, or not to have been causally connected to the making of the protected disclosures.

40. In relation to the remaining alleged detriments which were ultimately identified as all having occurred in in March 2019, there was no connection at all to the unfair dismissal claim. That would not, however, necessarily have been apparent to the Employment Judge who considered the amendment application. As I have already noted, clarity as to the nature and dates of those section 47B detriments (and thus their absence of connection to the unfair dismissal complaint), was only achieved on the first day of the full hearing on 23 November 2022.

41. In these circumstances, it cannot reasonably be inferred that the Employment Judge who considered the amendment application in January 2022 applied his mind to time bar in relation to what were ultimately identified at the start of the full hearing as the March 2019 detriments. Rather, his conclusion that the amendment was simply a re-labelling exercise suggests that he did not realise that there might be a time bar issue that required to be addressed. It follows that, in allowing the amendment, he did not determine any time bar issue in relation to the March 2019 detriments either expressly or by necessary implication. The full tribunal which later heard the merits hearing was

entitled to regard that as still being a live issue before it.

42. Neither **Amey** nor **Galilee** applies in a situation where the issue of time bar has clearly been overlooked at the stage when the amendment was considered and allowed. That situation can arise where – as here – there was a material lack of clarity in the claimant's pleaded case. Were it necessary to resolve the apparent tension between **Amey** and **Galilee**, however, the approach taken in **Galilee** respectfully seems to me better to reflect the reality of written pleading in the Employment Tribunals. As was noted in in **Galilee**, and as this case illustrates, it will often be difficult or impossible to resolve a potential issue of time bar until evidence has been led at the full hearing, even where extensive efforts have been made during case management to bring clarity to the claimant's pleaded case. That problem can be particularly acute where what is relied upon alleged is a series of acts or omissions by the employer which are said to amount to a course of conduct.

43. Where possible, a tribunal considering an application to amend should usually examine the issue of time bar as one of the **Selkent** factors. Where the issue of time bar is unclear, however, it is competent for it to be reserved (**Galilee**). Where, as here, an issue of time bar has obviously been overlooked at the stage of consideration of the amendment application due to a lack of clarity in the claimant's pleaded case, it remains a live jurisdictional point which any subsequent tribunal considering the evidence has an ongoing duty to address, whether or not it has been raised by the respondent.

Unfair dismissal

44. In relation to the unfair dismissal claim, the tribunal did not substitute its view for that of the Operations Manager. That was the correct approach. The tribunal considered, in particular, whether or not the Manager had reasonable grounds for his conclusion that the appellant's attendance was unlikely to improve, having carried out such inquiry as was reasonable in the circumstances.

45. Applying that test, the tribunal did not err in law in concluding that the respondent had reasonable grounds for the belief that the appellant would not, in future, maintain satisfactory levels

of attendance. In part, that belief was instructed by past attendance records, but an important factor was also the terms of the Occupational Health reports of October 2019 and February 2020. The former stated that a return to work by the appellant was not assessed to be likely until the appellant believed that the issues he had raised had been resolved to his satisfaction. The latter stated that in the absence of "significant intervention", the most relevant predictor of future attendance was what had happened in the past. Significant intervention required that the appellant "come to terms with" his issues. Applying **Sainsbury's Supermarkets Limited v. Hitt**, the tribunal noted that whilst another employer might have waited to see whether or not the appellant's attendance improved following his return to work, it could not be said that no reasonable employer would have acted in that way. There was no error of law in that approach.

46. The appeal is therefore refused.