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EMPLOYMENT TRIBUNALS (SCOTLAND)
Case number: 8001723/2024

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Preliminary Hearing in Chambers on 27 February 2025

Employment Judge A Jones

Ms M McKay

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Claimant
Represented by
Mr McKay (claimant's son)

Lothian Health Board

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Respondent
Represented by
Mr Reeve, solicitor

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JUDGMENT

The claimant's application to amend her claim is allowed in relation to a claim that the claimant was automatically unfairly dismissed in terms of section 103A Employment Rights Act 1996. The application to amend to include a claim that the claimant has been subjected to detriments in terms of section 47B Employment Rights Act is refused.

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REASONS

1. The claimant lodged a claim on 21 October 2024. The claimant's employment as an Office Manager had terminated by way of resignation on 22 August 2024. A preliminary hearing for the purpose of case management took place on 6 January. During that hearing the claimant's representative indicated that an

application to amend the claimant's claim may be made. Mr McKay, who is the claimant's son, indicated that he had only recently become involved in the matter. The claim had been lodged indicating that the claimant was unfairly dismissed, and although the claim form made reference to claims in relation to redundancy and other payments, these were not advanced. He indicated that a claim in relation to whistleblowing may be made.

2. An application to amend was made on 17 January. The application was to the effect that the claimant made a protected disclosure on 19 June 2022, the factual background to which had been included in the original claim. The application sought to introduce a claim of automatic unfair dismissal on the basis that she had made this protected disclosure. The application also suggested that the claimant had been subjected to detriments for having made the protected disclosure.
3. The respondent objected to the application in an email of 20 January.
4. Parties were asked to confirm whether they were content for the application to dealt with on the basis of the written submissions and if so, to provide any additional submissions within 14 days.
5. Parties agreed to the application being dealt with in writing and further submissions were made on behalf of the claimant on 4 February and the respondent on 5 February. Further written submissions were then provided on behalf of the claimant on 26 February.
6. A final hearing is listed for determination of this case between 22 and 25 April 2025.

Nature of the amendment

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7. The application for amendment was made in the following terms.

The Claimant's premise is that (a) the factual narrative to sustain the whistleblowing head of claim is already contained in the ET1 (b) the only earlier omission on the part of the Claimant was in her failing to tick the relevant box in the ET1 (c) the amendment consists only of formally labelling the head of claim and making express that which is already clear

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in the ET1 (that is to say, in truth, no fresh and stand-alone claim is made) (d) no issue of time-bar arises (e) no prejudice is caused the Respondent by admitting the Application to Amend, and (f) in any event, the interests of justice and both the spirit and letter of the Tribunal's Overriding Objective demand that the Application to Amend be accepted.

The Claimant made a Qualifying Disclosure which was a Protected Disclosure in terms of Section 43A et seq of ERA 1996.

In factual terms, the disclosure consisted of the Claimant's observing inappropriate sexual conduct between Patient A and his girlfriend (Girlfriend) at the instigation of the Girlfriend, in circumstances where (a) Patient A suffered from serious neurological damage and cognitive impairment caused by external trauma to the head, where it was reasonable to assume that (i) he was not capable of giving full or proper consent to sexual relations, and (ii) such sexual contact, given his neurological and psychological state, would more likely than not be materially harmful to his treatment, his general welfare and well-being and his clinical rehabilitation (b) Patient A was at the relevant time subject to a Guardianship Order or the like or the equivalent, and (c) the Girlfriend and Patient's A's family were in dispute, legal and/or otherwise, about the fact and extent of her contact with Patient A whilst hospitalised and whilst the subject of the Guardianship Order.

The Claimant was shocked and concerned about what she saw. She believed that she had a duty of care to Patient A, to his family, to the Guardian and to her employer, the Respondent. She did not believe that what she observed could reasonably be deemed to be in Patient A's best interests. The Claimant took the view that what she observed was or was likely (a) to constitute sexual abuse of an incapax amounting to a sexual assault (and/or simple assault) at the instance of the Girlfriend, and so a criminal offence (b) to evidence that the Girlfriend had failed to comply with the legal obligation on her not to conduct herself as she had conducted herself, and (c) to endanger the health and/or safety of Patient A. These are the Qualifying Disclosures and Protected Disclosures cited and relied upon by the Claimant.

5 *The Claimant immediately reported these matters and expressed her deep concern to the Nurse in Charge at the time of the incident. The Claimant reported these matters to the Charge Nurse on 19th June 2022. The Claimant reported these matters for the best of reasons and the highest of motives. She felt that what she had observed was simply wrong and posed a serious risk to Patient A. She subsequently reported the matter to Nicky Scott and also another senior employee of the Respondent. What happened thereafter, both formally and informally, to the Claimant and also between the Claimant and the Respondent arose, as matters of both causation and fact, entirely from the circumstantial matrix surrounding the making of the Qualifying Disclosures and Protected Disclosures. All of what followed was an egregious breach of trust on the part of the Respondent towards the Claimant. Put simply: without the said Disclosures having been made, the Claimant would still have been in the Respondent's employment and the employment relationship maintained.*

10 *As is narrated in the ET1 and also the Further and Better Particulars, the Respondent's several failures towards the Claimant proved manifestly detrimental to her. The Claimant says that she suffered serious detriment, direct and/or indirect and conscious and/or unconscious, as the result of her having made the said Disclosures. She was denied due process, all as narrated in the ET1 and in the Further and Better Particulars. She suffered material psychological, emotional and financial detriment. She says further that her (constructive) dismissal is directly attributable to her having made the said Disclosures.*

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Discussion and decision

8. In determining whether to exercise its discretion to allow any application to amend a claim, the Tribunal should take into account a number of factors. In the first instance, the Tribunal should always be mindful of the overriding objective to deal with cases fairly and justly. Consideration should also be given to any impact on case management. The then President of the EAT set out guidance as to some of the factors to be considered in the case of **Selkent**
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Bus Co Ltd v Moore 1996 ICR 836, although he also highlighted that all relevant factors should be considered and a balancing exercise carried out.

Factors will generally be relevant are: the nature of the amendment, the applicability of time limits, and the time and manner of the application. The balancing exercise should include consideration of the interests of justice and the relative hardship to parties of granting or refusing the application.

9. In the present case, the claimant seeks to amend her claim to include claims that she has been subjected to detriments because she made a protected disclosure and that her dismissal was automatically unfair because she made a protected disclosure. It is important to consider each aspect of the proposed amendment in turn.

Detriment claim

10. The claimant's position is that the detail of the protected disclosure now relied upon is already set out in her claim form. It is noted that the claimant does refer in her claim form to reporting an incident to the Nurse in charge and that the incident was of inappropriate behaviour.

11. The claim form also refers to breaches of contract which are said to have occurred thereafter, although the main reference is to a breach of confidentiality.

12. The application to amend does not specify the specific detriments to which the claimant says she was subjected for having made a protected disclosure. If it is being suggested that a detriment was a breach of confidentiality, then it appears that this breach took place around June 2022. It is not clear what are said to be other detriments to which the claimant alleges she was subjected, when these are said to have occurred or in what way these are said to be related to having made a protected disclosure.

13. Any detriment which occurred in June or July 2022 is significantly out of time, given the application to amend was lodged in January 2025. In addition, the application to amend does not specify with any clarity what other acts or omissions on the part of the respondent were said to amount to detriments, when they are said to have occurred or why they are related to the making of a protected disclosure.

14. Further enquiry would require to be made in order to clarify what detriments are said to have occurred and in what manner these are said to have related to the protected disclosure. It is understood that the claimant was absent on sick leave from February 2023. It may be that some of the alleged detriments relate to her treatment while on sick leave. However, the absence of clarity on these points, and the failure to provide any reference in the amendment application to any specific detriments, suggests that significant issues of time bar are likely to arise even were any detriments to be clarified. The respondent is entitled to know the detail of the allegations against it. Any process of clarification is likely to require the final hearing to be discharged. In any event, there were likely to be significant issues in relation to the question of time bar.
15. For these reasons, the application to amend the claim to include a claim that the claimant has been subjected to detriments in terms of section 47B Employment Rights Act is refused.

15 **Automatically unfair dismissal**

16. The claimant also seeks to introduce a claim that she was automatically unfairly dismissed in terms of section 103A Employment Rights Act.
17. As highlighted above the claimant did set out in her original claim form the details of the initial incident which she says ultimately led to her resignation. The claimant now seeks to categorise that incident as a protected disclosure. The claimant's employment terminated in August 2024 and therefore a new claim of automatically unfair dismissal is out of time. However, it is not significantly out of time. The claimant was not legally represented at the time she submitted the claim and raised the issue of a potential amendment at the first preliminary hearing in the case, her son having taken over her representation at that time.
18. Evidence will require to be led at the final hearing in relation to the background to the claimant's resignation. If the claim of automatically unfair dismissal is allowed, it is the Tribunal's view unlikely that much in the way of additional evidence will be required. Whether the claimant's reporting the incident in June 2022 was a protected disclosure is largely a legal issue. Whether the claimant resigned for reasons related to that disclosure such that a dismissal occurred

and it was automatically unfair in terms of section 103A will be determined by the evidence the claimant gives in relation to the reasons for her resignation. The claimant has already set out the basis of what is said to be a protected disclosure and to whom she made it. The claimant has explained why it is said

5 that this amounted to a protected disclosure. The claimant will be required to give evidence on the reasons for her resignation. That will be a matter for the claimant, and it does not appear to the Tribunal that the respondent will be required to carry out extensive further enquiry in that regard, or that the final

10 hearing will require to be discharged if this amendment is allowed. While there will be prejudice to the respondent in that it will be required to make submissions on the new claim, the Tribunal is satisfied that the prejudice to the claimant in not being permitted to argue that her dismissal was automatically unfair on the basis of section 103A outweighs that prejudice.

19. Taking into account all of these factors the application to amend the claim to

15 include a claim of automatically unfair dismissal in terms of section 103A Employment Rights Act is allowed.

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Employment Judge: A Jones
Entered in register: 28 February 2025
and copied to parties