EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Akhibigbe	v	**Berkeley Homes (Urban Renaissance) Limited**

PRELIMINARY HEARING

Heard at: **On:** **6 January 2016**

Before: Employment Judge Bedeau

Appearances:

For the Claimant: **In person**
For the Respondents: **Ms K Donnelly, Counsel**

JUDGMENT

1. The correct respondent is Berkeley Homes (Urban Renaissance) Limited.

2. St Edward Homes Ltd and The Berkeley Group Plc are dismissed from these proceedings.

3. The claimant's application to amend is refused.

4. The claimant's claims are struck out.

REASONS

1. The claimant presented his claim form to the tribunal on 5 January 2016 in which he complained that he made a number of public interest disclosures and had suffered detriments as a result both during and after the termination of his employment. He named St Edward Homes Ltd and The Berkeley Group Plc as respondents.

2. In the response presented to the tribunal on 2 February 2016, the respondents averred that the claimant was not employed by them but by Berkeley Homes

(Urban Renaissance) Ltd. His employment was terminated within the probationary period because he had failed to meet the standards expected of him. They asserted that all of the claims except for the last one of "persistent refusal to release my personal data despite Subject Access Request (09-10-215)" were presented out of time. They, however, contended that even this last act had no reasonable prospect of success and should be struck out. They applied for the case to be listed for a preliminary hearing to determine these issues.

3. On 29 February 2016, the claimant applied to amend his claim by sending a document entitled "Amended Rider to ET1" comprising of 115 paragraphs. In his covering letter he stated that he was prevented from adding to his claim form as he was limited as to the number of characters. He also stated that his uncle had recently passed away on Nigeria.

4. The case was listed for a preliminary hearing on 3 June 2016 but could not be heard as the claimant had a conflicting job interview. It was, therefore, taken out of the list by Employment Judge Hyams to be relisted at the convenience of the parties. He ordered that the claimant should serve a witness statement setting out the reasons why he did not make his detriment claims within three months from the date of each act and "why he did not make a claim of that sort before 5 January 2016."

The issues

5. By order of Employment Judge Heal dated 20 September 2016, the case was listed for a preliminary hearing today for me to hear and determine a number of issues. These are as follows:-

   5.1 the claimant's application to amend;

   5.2 the respondents' application to add Berkeley Homes (Urban Renaissance) Ltd as the correct respondent in place of St Edwards Homes Limited and the Berkeley Group Plc;

   5.3 the respondents' application to strike out all or part of the claim on the ground that it has no reasonable prospect of success pursuant to rule 37;

   5.4 alternatively, the respondents' application to strike out the claim on the ground that it was presented out of time and, if so, to consider whether time should be extended;

   5.5 to consider whether to order a deposit pursuant to rule 39; and

   5.6 if the claim is allowed to proceed, to identify the issues and to make case management orders.

6. In relation to the first issue, the respondents' position is that they did not object to the claimant's application to amend if the protected disclosures and detriments

relied upon were confined to those in his original claim form and that any new information in the Amended Rider to ET1 is considered as background only.

The evidence

7. I heard evidence from the claimant. No witnesses were called by the respondent but I read the two witness statements by Mr Daniel Kelly, the claimant's line manager. In addition to the oral evidence the parties produced a joint bundle of documents comprising of 178 pages. References will be made to the documents as numbered in the bundle.

Findings of fact

8. The claimant commenced employment on 22 September 2014 as an Apprentice Site Manager on a 6 months' probationary period terminable upon giving 1 week's notice by either side. (pages 83-90 in the bundle)

9. The claimant claimed that during his employment he made qualifying disclosures on 3 and 12 November 2014, about alleged breaches of the law as well as health and safety concerns. As a consequence, he suffered a number of detriments, such as being excluded from emails; being issued with a verbal warning; being falsely accused of being asleep while at work; being humiliated at a meeting; being physically assaulted; given menial jobs; his employment being terminated without due process on 13 February 2015; failure to provide a reference on 11 February 2015; on 18 August 215, placing malicious and false statements on his personnel review file, and on 9 October 2015, persistent refusal to release his personal data despite his subject access request.

<u>The correct respondent</u>

10. The respondents' position is that the claimant was at all material times employed by Berkeley Homes (Urban Renaissance) Limited and that was clearly stated in the response to the claim form. They had not resiled from that position and supported their stance by reference to the offer of employment letter sent to the claimant dated 15 September 2015, clearly stating that Berkeley Homes (Urban Renaissance) Limited was his employer. (83-90)

11. The respondents asserted that the claimant had failed to perform to the standards expected of him and was dismissed within his probationary period on 13 February 2015. He was given one week's pay in lieu of notice. He did not challenge his dismissal nor did he appeal. His public interest disclosure claims were denied.

12. All further references to the respondent shall be to Berkeley Homes (Urban Renaissance) Limited.

13. The position having been pointed out to the claimant by me that the respondent had acknowledged that he was employed by Berkeley Homes (Urban Renaissance) Limited, he decided that his claims should proceed against that company. Consequently, I substituted Berkeley Homes (Urban Renaissance)

Limited as the correct respondent and dismissed St Edward Homes Ltd and The Berkeley Group Plc from these proceedings.

The claimant's application to amend

14. The second matter to hear and determine was the claimant's application to amend. His claim form was presented on 5 January 2016. In his evidence and I do find as fact, he stated that the claim form was presented by him and had done some legal research and made numerous references to section 43C, Employment Rights Act in support of his public interest disclosure claims against the respondent. He said he was limited as to the number of characters on the form.

15. It is useful to have regard to the lay out of the claim form. Section 8 of it sets out the possible claims in boxes for a claimant to tick. He ticked the box "I am making another type of claim" and outlined his public interest disclosure detriment claims which continued into box 8.2.

16. In relation to section 15 of the form, it states "You can provide additional information about your claim in the section" and there the claimant included further matters in relation to him suffering detriments and quoted the case of Woodward v Abbey National. He also cited section 48(4) Employment Rights Act in relation to time limits. About a third of that section had been completed by him. He said that there was more information to be included but he was prevented from including the matters which were in his Amended Rider as he was restricted in terms of the number of words he could use. (1-20)

17. The additional information he wanted to include he clarified during the course of his address to me by reference to paragraph numbers 47, 50, 51, 52, 53, 55, 58, 61,62, 90 and 91 of the Amended Rider. In his letter he stated that all the facts relied on in respect of the detriment claims for making a protected disclosure were included in the original ET1. The effect of the amendment sought, he stated, was merely to add a new label to the facts already pleaded. In other words, he was not making any new claims. (75-82)

18. After presenting his claim form he said that he sought the assistance of a paralegal on 14 January 2016 and apparently had paid some money up front for work to be done by way of adding to the claim form. According to the claimant, as the paralegal did not do his job he realised that he had been the victim of a fraud but, curiously, was able to get back the money he had advanced. From the email trail between him and the paralegal, it would appear that they exchanged email correspondence up to May 2016 but the paralegal did not do any work on his behalf.

19. The claimant said that he had done his own research but wanted someone with legal knowledge and experience to draft the document in a legally acceptable way. He, however, agreed in cross-examination that he stated in his covering letter to the tribunal dated 29 February 2016, that "All the facts relied on in respect of the detriment claim for making a protected disclosure were included in the original ET1." (73)

20. The claimant, prior to 29 February 2016, in fact presented his first Rider on 17 February 2016 with 118 paragraphs and amended that document in his second Rider dated 29 February 2016, comprising of 115 paragraphs. It is the second Amended Rider that has been the subject of his application to amend.

21. The claimant's uncle in Nigeria was ill and had passed away some time in February 2016. As the uncle had cared for him when he was a child and treated him as a member of the family, he was obligated to care for his uncle in his time of need. I accepted what he told me that what he was engaged in doing was providing money, first to his uncle and then to his uncle's family.

22. The claimant is a married man with one dependant son. His wife works part-time. He is also a well-educated man having obtained a Masters' degree though I am not aware of the subject area.

23. I find it difficult to accept that the claimant was in effect primarily responsible for the affairs of his uncle knowing that his uncle had four adult children in Nigeria and a wife. Further, the claim form allows for additional information to be included not limited by characters.

24. The claimant's reasons for the delay in making the application were two-fold. Firstly, he was looking after the affairs of his uncle and, secondly, the work to be done in terms of expanding the claim form, he had instructed the paralegal to do.

Submissions in relation to the application to amend

25. The claimant said that he had added new detriments to demonstrate the extent of his suffering but they could not be included on the claim for due to the limitation on the number of characters plus the fact that he had family issues to attend to.

26. Ms Donnelly, counsel on behalf of the respondent, submitted that the claimant was seeking to add new claims and this it was not a relabelling exercise. As regards the timing and manner of the application, it was made on 29 February 2016 covering 11 new claims which the respondent, until the claimant's address to me, believed to be background. He had all the information by 5 January 2016 and there clearly was space on the claim form for additional information. He reference to family issues was vague and the respondent remained sceptical about the alleged role of the paralegal. In relation to prejudice, the additional new claims would add to the respondent's burden as more witnesses would be required to deal with the additional matters and they would be difficult to trace as employees come and go.

The law

27. I considered the case of Selkent Bus Company v Moore 1996 ICR 836 on the test to be applied approved by the Court of Appeal in Ali v Office of National Statistics 2005 IRLR 210, in relation to an application to amend.

Conclusions on the application to amend

28. I have to look at the timing and manner of the application; the reason for the application; the nature of the application; whether it was an application to amend by adding a new claim or claims or simply a relabelling exercise, or the adding if mere further information.

29. The claimant answered the first question by saying that the 29 February 2016 Amended Rider was an application to amend in respect of the paragraphs identified and those paragraphs added new claims of detriment. He told me that were the tribunal to find in his favour in respect of those additional matters, he would want to be compensated. They were, therefore, new claims.

30. As regards the timing and manner, the claim form was presented on 5 January 2016. I could see no reason why the claimant could not have continued on the claim form in the section entitled "Additional Information". He had only completed about a third of that page. There was no reason why he could not have included the additional matters he had highlighted in his Amended Rider.

31. The timing was eight weeks after the claim form was presented. I do not accept that he was so consumed in his care for and the affairs of his uncle that they had effectively prevented him from putting in a timeous application to amend. I say that because the uncle had been ill since December of 2015 and yet he was in a position to present a fairly detailed claim form on 5 January 2016. Furthermore, I was satisfied that the extent of the assistance he gave to his uncle and to the uncle's affairs, was financial which would not have prevented him from spending that additional amount of time expanding his claim on 5 January 2016.

32. The other reason that the claimant advanced was in relation to the paralegal but the paralegal had not been involved either prior to or after the presentation of the claim form. I saw no evidence before me that instructions were given to him to present the additional matters and that he would be paid accordingly. Even if that was the case, the position as at 5 January 2016, was that the claimant could have put in the additional matters on to the claim form. If the claimant was the subject of a scam by the paralegal, it is surprising that he was able to recover the money, he said, he advanced to him.

33. In relation to the manner, I do accept the position adopted by the respondent. The claimant had stated in his covering letter dated 29 February 2016, that the additional matters were not new claims but his position had changed this morning when he said that they were new claims which, if proved, he would be seeking compensation.

34. In relation to prejudice, the claimant has other detriments in which he is intent on pursuing and I do accept the respondent is likely to suffer some prejudice in that if these matters were allowed to proceed, it would have to gather relevant evidence and to search for witnesses who may have left their employment. Taking in to account all those matters as I am required to do, I have come to the conclusion that the claimant's application to amend should not be granted.

The respondent's strike out and/or deposit application

35. The other issue I have to hear and determine is the respondent's application for either a strike out or deposit order in respect of the claims made by the claimant against it. The respondent has set out, in table form and in numerical order, the claimant's claims. Ms Donnelly asked that she should address the last act relied upon by the claimant first, namely the allegation that the respondent had persistently refused to release the claimant's personal data despite a Subject Access Request. The date relied on by the claimant being 9 October 2015, number 12 in the respondent's list.

36. The claimant submitted a Subject Access Request on 24 July 2015. He cited section 7 Data Protection Act 1998 and listed his personnel files, emails between himself and Mr Daniel Kelly, the claimant's line manager, between 22 September 2014 and 13 February 2015; emails between himself and Miss Denise Reeves, site secretary, between 22 September 2014 and 13 February 2015 and, finally, all documents emails, memoranda, notes and the like relating to and containing information about him. (99)

37. I am satisfied the respondent had prepared the necessary information by 3 September 2015 but the claimant did not receive the personal data until 22 September 2015. There was a covering letter sent to him dated 3 September 2015 referring to one lever arch file containing personal information.

38. In relation to information not provided, it stated that:

> "Following an analysis conducted in line with guidance given by the Information Commissioner's Office, witness statements (relating to an altercation on 4 December 2014) that consist of third party personal data have been withheld. This is because they were given with an expectation of confidentiality by the individuals not in the course of their professional duties."

39. The letter also stated that not all of the emails were provided as they only referred to his name and did not amount to personal data. (106-108)

40. Earlier, on 22 September 2015, he wrote an email to a Miss Joanna McClellan, requesting the disclosure of a number of documents and stated that:

> "1. When my appointment was terminated Allen Michaels made some notes and those notes are missing.
>
> 2. I requested emails between Denise Reeves and myself and yet some are missing.
>
> a) email dated 7 November 2014 titled "Shirt sizes" and
>
> b) email dated 13 November 2014 titled "Labourers".

41. He went on to write that some emails and documents were missing. (128)

42. The claimant forwarded an email dated 6 October 2015, requesting information in relation to attendance for week-ending 14 November 2014. He said that it would

usually be in an Excel document sent by Miss Denise Reeves, titled "Site Resources." (123)

43. Both the claimant's emails of 22 September and 6 October 2015 were addressed by Mr Edwards Wall, solicitor acting on behalf of the respondent, in writing, on 9 October 2015. I am told that he dealt with all of the subject access disclosures on behalf of the respondent. He was, therefore, central to the claimant's case that the respondent had persistently failed to disclose his personal data.

44. In relation to the Mr Allen Michaels email or notes, Mr Wall stated that Mr Michaels did not recall making notes but as he was out of the country and that he, Mr Wall, would invite him to check and if the notes were available they would be passed on to the claimant.

45. In relation to the claimant's requests in respect of Miss Reeves, Mr Wall wrote that a search revealed one email but it did not constitute personal data about the claimant. The email was, however, disclosed. Mr Wall then wrote,

> "If you had responded to that email and stated your shirt size then that information would constitute personal data and so would have been disclosed but there is no record of you responding to the email. A search revealed no email on or around 13 November with the title "Labourers" or a title similar to that.

46. In respect of the claimant's email request of 6 October 2015, Mr Wall stated that the claimant should provide further information with regard to the allegation that he was found sleeping while on duty. Mr Wall was able to discover an email dated 14 November 2014, and it stated that the claimant was found "today in the Induction Room apparently sleeping" but he could not find a reference to 6 November. He attached a copy of the claimant's attendance record for November. (125-126)

47. The claimant has referred to a number of documents in his letter dated 11 February 2016, sent to the employment tribunal. In relation to Miss Reeves "Labourers" email, he did in fact receive a copy of it although the respondent's view was that that was not personal data because the claimant was simply copied-in. The claimant said to me in his address that he was not going to pursue this aspect of his case as he would be focusing on the matters he listed, namely (b) to (i) in his letter as they remain part of his case of persistent refusal to disclose personal data. (50-51)

48. The respondent's position was that from (b) to (i) the claimant had not specifically requested these documents earlier. It only become aware of his requests when it received a copy of his 11 February 2016 letter.

49. The claimant did not know whether it was Mr Wall who had persistently refused to release his personal data despite his Subject Access Request.

Submissions in relation to persistent refusal to disclose personal data

50. The claimant submitted that his claim stopped at 9 October 2015 as the respondent decided not to release all of his documents and left out the documents he requested in his 11 February 2016 letter (b) to (i).

51. Ms Donnelly submitted that the claimant's requests were responded to where it involved his personal data. The claimant alleged that Mr Wall, solicitor acting on behalf of the respondent, was in some way influenced by his qualifying disclosure/s in failing to supply his personal data but there was no evidence in support of this claim.

Conclusion on the application for a strike out/deposit order

52. In respect of the allegation that there had been persistent refusal to release the claimant's personal data despite a Subject Access Request, clearly that claim identifies Mr Wall's conduct. As at 9 October 2015, Mr Wall was in correspondence with the claimant in relation to his Subject Access Request. The claimant said to me in his address that he could not be sure whether it was Mr Wall's conscious decision in relation to the protected disclosure or whether he was influenced by a third party in conducting matters in the way he had done. I was not convinced that there was evidence which tended to show that Mr Wall had engaged in persistently refusing to release the claimant's personal data. The position was this, the claimant put in his Subject Access Request. It was responded to by 3 September and by 22 September 2015, the claimant had the information in his possession. In relation to subsequent correspondence, by 9 October 2015, Mr Wall had stated the respondent's position in relation to the claimant's request, namely that some of the documents could not be disclosed as they were not personal data and one document in relation to Mr Michaels' notes could not be found as Mr Michaels could not recall making notes but if he did in fact make notes and they were found then they would be sent them to the claimant but no such notes were sent to him. The conclusion to be drawn from that being that they were not found.

53. In relation to the application for strike out of that claim, the claimant has clarified that it was based on public interest disclosure. He had made a protected disclosure on or around 3 November 2014 and alleged that Mr Wall, in persistently refusing to release personal data, he suffered a detriment. The claimant has to establish that there was a causal connection between the protected disclosure and the alleged detriment, that being the persistent refusal.

54. I have been told that the documentary evidence before me amounts to all of the evidence a tribunal would need consider in determining the matter whether the claim should be struck out? I am satisfied that the claimant cannot establish a causal link between the protected disclosure in November 2014 and Mr Wall's conduct in relation to the disclosure of information of a personal nature to the claimant as at 9 October 2015. The claimant stated that he could not be sure whether it was Mr Wall's conduct in relation to disclosure of personal data or whether he was influenced by a third party but it is clear from the documentary evidence that it was Mr Wall who dealt with the subject access disclosures. Of

importance, is the chronology of events in September to October 2015 and I am satisfied that Mr Wall did disclose information to the claimant. His conduct could not be described as "persistent refusal" and I am also satisfied that the respondent did disclose information to the claimant prior to Mr Wall's involvement. Where information could not be disclosed the respondent's position was communicated to the claimant. I was not satisfied that by 9 October 2015, the respondent had engaged in persistently refusing to disclose personal data to the claimant under s.7 of the Data Protection Act 1998. There was no evidence that Mr Wall was aware of the 4 November 2014 protected disclosure. The causal link has not been established and the claimant would have difficulty in establishing it as he is unsure as to whether or not it was Mr Wall's action or the third party but it was Mr Wall who later had conduct of the subject access disclosures.

55. I accept that tribunals must tread very carefully before striking out a claim as it is seen as a draconian step, particularly where there are disputed matters but with all of the relevant evidence before me I am in a position to determine this issue. I have come to the conclusion that were this case to continue to a final hearing the claimant's position is unlikely to improve. In respect of this last act relied upon as part of his public interest disclosure detriment claim, it has no reasonable prospect of succeeding. Accordingly, that claim is struck out.

Out of time

56. After giving judgment Ms Donnelly submitted that the last act in the claimant's list of acts was on 23 June 2015, the allegation that Mr Kelly, his line manager, refused to provide a reference to anther employer. She submitted that it was presented out of time and invited me to consider the time issue.

57. The claimant said that he believed that he had the information in relation to the last act was on 12 August 2015 but that was an error. He, however, took that date into account and worked out that the three months expired on 11 November 2015. He contacted ACAS on 7 November 2015 and an Early Conciliation Certificate was issued on 7 December 2015. He said that he was advised by an ACAS conciliation officer that he had one month from the 7 December 2015 to present his claim. He, therefore, submitted it on 5 January 2016, believing that he was in time.

The law

58. I have considered section 48(3) Employment Rights Act 1996, "ERA" where the ordinary time limit for presenting a public interest disclosure detriment claim is three months unless not reasonably practicable to do so.

59. Under section 207B ERA1996, time would be extended where ACAS had tried, unsuccessfully, to conciliate.

Conclusion

60. The claimant gave no evidence as to why he delayed in presenting his claim after the 23 June 2015. The three months expired on 22 September 2015. With the

ACAS one month's extension it would have taken the claimant up to 22 October 2015 to present his form to the tribunal. The claim form was presented on 5 January 2016. It was, in my conclusion, reasonably practicable for the claimant to have presented the claim in time as he did all of his legal research himself and is an educated man. It was reasonable feasible for him to have put in his form by 22 October 2015. There was no impediment whether mental or physical that prevented him from doing so.

61. No documentary evidence was provided by ACAS to confirm the claimant's account. Accordingly, this last act was not presented in time and I do not extend time as it was reasonably practicable for the claimant to have put in his claim within the ACAS extended period.

62. It follows from my judgment that the claimant's claims are struck out.

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Employment Judge Bedeau

Sent to the parties on:

28 February 2017

For the Tribunal:

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