EMPLOYMENT TRIBUNALS

Claimant: **Ms A Matthews**

Respondent: **Spire Healthcare Limited**

Heard at: **Birmingham Employment Tribunal in private and by telephone**

On: **7 April 2020**

Before: **Employment Judge Cookson**

Representation

Claimant: Mr Johnston (counsel)
Respondent: Mr Caiden (counsel)

RESERVED JUDGMENT ON APPLICATION TO AMEND

The judgment of the Tribunal is that:

1. The claimant's application to amend the ET1 to add new claims of detriment on grounds of a public interest disclosure is refused.
2. This case should be listed for a further telephone case management to consider appropriate case management and to list this case for final hearing.

REASONS

The issues

1. The background to this matter is set briefly that this is a claim brought by Ms Matthews on 11 January 2019 which raises claims for unfair dismissal and disability discrimination (which was subsequently withdrawn) in section 8 of the claim form. In the attached rider she refers to these grounds of claim and additionally in that rider she refers having "suffered several detriments

as a result of raising a protected disclosure" (paragraph 62 of the rider) and the claim form refers to various concerns. The claims are contested.

2. I understand that on 29 May 2019, the respondent sought further and better particulars in relation to the whistleblowing detriment claim, namely the protected disclosure and detriments. The response to this one page request was a 33 page table which in relation to detriments contained extensive narrative. The respondent sought to clarify this information and produced its own table of the disclosures it had understood from the response with space for succinct factual detriment. On 13 November 2019, at a hearing before Employment Judge Woffenden it was confirmed that the claims were of constructive unfair dismissal, automatically unfair whistleblowing dismissal and whistleblowing detriments. However the Claimant's counsel was unable during this hearing to indicate where the Claimant's case could be found. The result was the respondent was ordered to indicate which contents of the initial ET1 'particulars' were found in the scheduled disclosure/detriments and if the Claimant wished to make an application to amend to include those not falling within. I note that at that hearing Employment Judge Woffenden expressed her concern (at paragraph 10 of her order) at the failure of the claimant's solicitors to particularise claims by reference to the essential elements required in a protected disclosure claim. It is unfortunate that it seems no attention was paid to those concerns.

3. The respondent then produced a schedule setting out the 12 protected disclosures and some 36 alleged detriments, with referencing to the relevant ET1 paragraph number. The claimant responded by amending that document produced by the respondent, showing amendments sought in bold but unhelpfully not showing the amendments it had made to the table produced by the respondent in the usual way. It is disappointing that such a lack of consideration to the respondent's solicitors was shown and not only did it increase the work required of the respondent in preparing for this hearing it made the task required of me in comparing the pleadings and various tables simply to work out what amendments are being sought and their extent more difficult than was necessary. There was disagreement between counsel on the exact number of amendments sought, perhaps contributed to by the absence of the usual numbering used by lawyers but there are a large number of matters highlighted in bold.

4. In determining the application before me I have heard submissions on the amendment application from both parties and I also received a skeleton argument from Mr Caiden. I considered the schedules submitted by the parties along with the original application to amend which is a letter dated 11 December 2019, an application submitted exactly 11 months after the claim was submitted. The matters to which I have given consideration relate to the nature of the amendment sought, the applicability of time limits and manner of the application. I have taken into account the overriding objective and the interest of justice, balancing the possible prejudices to both parties.

5. The claimant's original claim pleaded that she had made public interest disclosures and suffered detriments as a result based on matters set out in rider. However, this application seeks to widen that claim to bring in new alleged disclosures and detriments not referred to originally set out in the details of the claim. Mr Johnston describes this an "amplification" of the

original claim. Nevertheless an application to amend has been made. If the amendments sought were not raising new matters no application to amend would be required and this is certainly not an application to amend based on a simple mislabeling or to correct minor typing or similar errors.

6. Mr Johnston has explained that the reason why the application has been made a significant time after the original claim was brought, is that his instructing solicitors had only a short period of time in which to take instructions then draft and file the claim before the limitation period for the unfair dismissal claim would have passed. There was the process of clarification of the claims being sought which I have described and it was in the course of that that the respondent raised the fact that an amendment application appeared to be required. Mr Johnston says that the need for an amendment was raised relatively late in the day by the respondent and appears to suggest that I should consider this in the claimant's favour. I would say at this stage I find that argument has little merit. The claimant is professionally represented. I understand why an claim form may have been submitted that was less thorough than usual due to the pressure of an imminently expiring limitation period, but that does not explain at all why the claimant's lawyers did not then check that the application was complete at the first available opportunity after that and make an application to amend at that early stage. There was a further opportunity for them to do that same exercise when the further particulars were provided. Ensuring the claims the claimant wishes to bring are encompassed in the pleaded claim was a matter for her representatives not for the respondent to police. Further as I believe Employment Judge Woffenden also pointed out, this is a matter of jurisdiction, it is a not matter of compliance that the respondent had let pass and could have raised earlier.

7. Mr Caiden placed considerable reliance on the fact that the matters referred to in the application to amend are raised considerably outside the primary time limit. That the new claims are brought out of time is accepted by Mr Johnston. This is an important matter for me to consider. These are new matters which are being relied upon, albeit matters which are linked to the claims which were brought in the claim form. However, while the issue of timing is important but it is not determinative.

8. The weight which I should to time limits was helpfully clarified by Lord Justice Underhill in the case of *Transport and General Workers Union v Safeway Stores Ltd* UKEAT/0092/07/LA, when he expanded upon the guidance set out in *Selkent Bus Co Ltd v Moore* [1996] ICR :

"In Selkent Mummery P. gave some general guidance as to how applications for leave to amend, including applications for amendments raising a new cause of action, should be approached.

'Whenever the discretion to grant an amendment is invoked, the tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.'

That is, of course, the Cocking test. He continued:

'(5) What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant.

(a) The nature of the amendment. Applications to amend are of many different kinds, ranging, 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 have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action.

(b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory provisions, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978 [now s. 111 (2) of the Employment Rights Act 1996].

(c) The timing and manner of the application …'.

Point (b) might, if taken out of context, be read as implying that if the fresh claim is out of time, and time does not fall to be extended, the application must necessarily be refused. But that was clearly not what Mummery P. meant. As Waller LJ observed in Ali v. Office of National Statistics [2005] IRLR 201, at para. 3, point (b) is presented only as a circumstance relevant to the exercise of the discretion; and the reasoning of the Appeal Tribunal on the actual facts of the case clearly turns on the exercise of a "Cocking discretion" rather than the application of an absolute rule….Thus the reason why it is "essential" that a tribunal consider whether the fresh claim in question is in time is simply that that is a factor – albeit an important and potentially decisive one - in the exercise of the discretion."

9. This is the approach that I have adopted. The fact that the new claims which it is sought to include are brought out of time weighs against the amendment being allowed, but I have not ended my considerations there.

10. One of the further matters which I have to balance in determining the application is the prejudice to the parties. On the question of prejudice, Mr Johnston argues that these are matters on which evidence will have to be given in any event, so the prejudice to the respondent is limited because it will have to deal with these matters evidentially in any event and of course the claimant faces significant prejudice if her claims are not examined by the tribunal. Mr Caiden disagrees, pointing out that there is considerable difference for a respondent between dealing with a matter on which findings must be made and background evidence. He has explained that in relation to new matters some of the key witnesses are no longer employed by the respondent and are likely to be unavailable to give evidence.

11. In his supplemental submissions Mr Caiden also suggests that in looking at prejudice I should take into account the problems the respondent faces in

deciphering the amendments which are sought. Some of the amendments are vague and if allowed would require further clarification before they could be said to be properly pleaded.

12. Mr Johnstone conceded that there are deficiencies in the application. The claimant's representatives have done little to assist either the respondent or the tribunal. The original application to amend did not attach an amended rider. Rather the application is framed as follows:

"We refer to the Respondent's letter of 27 November 2019. The Claimant seeks to rely on the original ET1 and the attached Scott Schedule as comprising her claim. The Scott Schedule sets out the disclosures and detriments relied on for the whistleblowing claim. The Claimant relies these detriments and the ongoing failure of the Respondent to address her concerns, as constituting breaches of the implied term of trust and confidence for the purpose of her constructive unfair dismissal claim.

For convenience, the aspects of the claim that the Respondent maintains require an application to amend are highlighted in bold on the attached Scott Schedule…."[the application then explains some changes made to the original Scott Schedule].

13. I have considerable sympathy with the respondent's objections as put forward by Mr Caiden that what is put forward is not sufficiently clear to enable the respondent to understand the case it is now being required to answer. The amendments sought raise numerous questions about what is meant by the claimant. I accept Mr Caiden's submission that if this application was allowed the inevitable consequence is that the respondent would be forced to make any application to clarify the details of the pleadings.

14. For example:

    a. under a table column which says "detriment" in the section numbered 3, the sought amendment in bold is "*the claimant's suggestions regarding the accident/incident and daily checks on the minor procedure room oxygen and suction were ignored leaving patients, members of the public and staff at risk. The respondent failed to act on the claimant's concerns [ET1 17,20], the respondent minimalised patient safety concerns*". None of these things appear to be allegations of detriments applied to the claimant by the respondent;

    b. in section 6, the new protected disclosure is "*Concern re Mr Lahiri booked for abdominoplasty following a period of corrective surgery only*" but it is not clear at all why it is said that it is a protected disclosure at all.

    c. in section 7 the new protected disclosure in bold is "*Mr Lahiri did not attend clinic, arranged for post-operative patient with complications to be seen within another private hospital group instead. This was not standard practice. Sue Hook told claimant submit a Datix but to copy Pat Munday into a completed Telephone Liaison Enquiry Form 5 (TLEF)*" but the fact someone reports

something that is not standard practice is not, of course, enough to suggest it is a protected disclosure or what it is protected disclosure of.

d. In section 14 the new protected disclosure in bold is *"Incidents related to Triple Workload Collisions [ET1 — 33. Inappropriate staffing structure. Inadequate workload assessment. Lack of structure/database to manage workloads"*. It is not clear to me what "inappropriate staffing structure" means (for example) and why it is said to be a protected disclosure.

e. I have similar concerns about many of the alleged detriments which are vaguely set out without it being apparent why they are alleged to detriments applied to the claimant at all

15. If I cannot understand the amendments which are sought on their face it is not appropriate for me to expect a respondent to answer those claims where the claimant's solicitors have failed to meet the most basic essential obligation to set out what the claim is.

16. I acknowledge that the claimant will be prejudiced if the amendments are not allowed. However, it seems to me that Mr Caiden is correct when he says that if these amendments are not allowed the effect on the claimant is in fact limited. Her claim is primarily about her dismissal and it is from that her loss flows. It is that claim which will determine the compensation she receives if her claim succeeds. Refusing this application will not affect that she has a significant number of detriment claims which will be considered. Balanced against that this respondent faces significant prejudice is the amendments are allowed. The active scope of this litigation will be significantly expanded and that respondent faces the prejudice of having lost witnesses due to the passage of time. That is not proportionate.

17. I have considered the nature of the amendments sought and summarised briefly some of my concerns above. My criticism does not apply to each and very amendment sought. I have considered whether I should go through the schedule and allow the clearer amendments to be allowed. However I do not consider that this is an appropriate thing for me to. It should not be the role of an employment judge to try and carve out well pleaded amendments from the difficult to follow and vague documents such as those which I have presented with. The claimant could have chosen to present a new amended particulars of claim showing the amendments which are sought and precising identifying the new protected disclosures and alleged detriments which sufficient particularity that the respondent could answer those new claims if I allowed the amendment. For whatever reason the claimant's solicitors chose not to do that and it is not for me to try and work out what they would have pleaded it that process had been undertaken. In light of that I have been forced to conclude that balance of prejudice against the respondent is such that none of the amendments should be allowed.

18. This case should now be listed for a further case management hearing to consider appropriate case management for the final hearing.

Employment Judge Cookson
11 May 2020