EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112398/2021

Consideration of written submissions in chambers on 24 May 2022

Employment Judge M Sangster

Mr C Yates	**Claimant** **In person**
Fife Council	**Respondent** **Represented by** **Ms Sutherland** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's application, dated 10 April 2022, to amend his claim is granted. The issue of whether the Tribunal has jurisdiction to hear these complaints, or whether they were lodged outside the timescales set out in section 48 of the Employment Rights Act 1996, is however expressly reserved to be determined at the final hearing.

REASONS

Background

1. The claimant's claim was lodged with the Tribunal on 12 November 2021. Early conciliation had taken place from 10 September to 22 October 2021. The claimant's claim is that, contrary to section 47B of the Employment Rights Act 1996 (**ERA**), he was subjected to detriments on the grounds of making protected disclosures on certain Covid related matters.

2. The respondent submitted their ET3 form on 13 December 2021, resisting the claim.

3. In the agenda document submitted by the claimant on 21 December 2021, the claimant stated that he was asserting that he was subjected to detriments by the respondent, as a result of making protected disclosures, when:

    (i) The claimant's confidentiality was breached by Michael Enston when details of the whistleblowing actions he had taken were disclosed to members of Fife Council's HR team and that information was subsequently released to the claimant's line management.

    (ii) The respondent failed to follow their own absence management procedures, including failing to provide an action plan to address the claimant's work related stress absence.

4. The respondent submitted their agenda document on 11 January 2022. Attached to this was a draft list of issues, which included reference to two asserted detriments, as follows:

    (i) Was the claimant's confidentiality breached by Michael Enston?

    (ii) Has the respondent failed to follow its attendance management procedures in respect of claimant?

5. A case management preliminary hearing took place on 18 January 2022, before Employment Judge Young. At that hearing the claimant was ordered to provide further particulars of his claim.

6. The claimant confirmed, in further particulars which he lodged with the Tribunal on 28 January 2022, that he asserted that he had been subject to detriments by the respondent when they *'deliberately failed to facilitate my early return to work by systematically failing to follow Fife Council's own attendance management procedures, as well as failing to effectively address many of the concerns I had raised'*. Further details of the ways in which the claimant asserted the respondent had failed to follow their attendance management procedures were provided by the claimant at the case management preliminary hearing, held before Employment Judge Jones on 8 March 2022. Five specific examples were provided, namely:

(i) he did not receive an action plan by end February 2021 regarding his return to work and the management of stress;

(ii) he was placed on stage A of the respondent's procedure around February 2021 although he had not reached the relevant trigger points in that regard;

(iii) his absence from 20 October 2021 was not correctly recorded;

(iv) there was a failure to record meetings and phone calls regarding his absence in writing; and

(v) There was a failure to take steps to find alternative work for him in around October 2021.

7. He stated however that there were also further detriments upon which he sought to rely. The claimant was ordered by Employment Judge Jones to set out any additional detriments which he sought to rely on by 22 March 2022. He was also ordered to confirm, in the further particulars he was to provide by 22 March 2022, whether he believed an amendment application was required in relation to his assertion that he was subjected to detriments by the respondent failing to follow their attendance management procedures, and any other additional detriments on which he sought to rely. On 18 March 2022, the claimant provided a list of 20 detriments upon which he sought to rely. The claimant indicated that he did not believe an application to amend the claim was required in respect of any of the additional detriments listed. The respondent provided comments in response to the claimant's correspondence in a letter dated 1 April 2022, extending to 11 pages.

8. On 5 April 2022, seven of the asserted detriments listed by the claimant in his correspondence of 18 March 2022 were accepted by me as further particulars of the claimant's claim, namely:

(i) *'Fife Council (specifically Michael Enston, Diarmuid Cotter and Angela Milne), following my absences of 13 January to 7 September 2021 and 20 October onwards, failed to make any reasonable adjustments that would have facilitated my early return to work;*

(ii) *Fife Council (specifically Mr Enston), sometime between 14 and 28 January 2021, failed to maintain the confidentiality I had a right to expect under their own Whistle-blowing Procedures.*

(iii) *Fife Council (specifically Mr Enston), sometime between 14 and 28 January 2021, failed to inform me of any need to breach my confidentiality.*

(iv) *Fife Council (specifically Mr Enston), on 17 June 2021, implied that disciplinary action would follow as a result of my criticism of his earlier investigations into my protected disclosures.*

(v) *From 7 September to 20 October, Fife Council (specifically Mr Cotter and Ms Milne) failed to make any of the reasonable adjustments that it had committed to prior to my return to work on 7 September 2021.*

(vi) *Fife Council (specifically Ms Milne), from 7 September to 20 October 2021, failed to ensure there was adequate support in place to ensure I was likely to remain at work.*

(vii) *Fife Council (specifically Mr Cotter and Ms Milne), from 7 September 2021 onwards, provided contradictory figures regarding the abatement of my holidays and the holiday balance I could carry forward from 2021into 2022, and no confirmation from Transactions Payroll of the correct amount of leave abatement has yet been received.'*

9. In relation to points (i) to (v) inclusive and (vii), the respondent had accepted in their correspondence of 1 April 2022 that there were sufficient pleadings in the claimant's ET1 claim form for these to be treated as further and better particulars of his claim and that no application to amend was required in respect of these asserted detriments. The respondent's view was that an application to amend was required in respect of the other asserted detriments.

10. It was confirmed to the claimant that, as the 13 remaining asserted detriments (the **Additional Detriments**) were not foreshadowed in the ET1, and did not therefore constitute particulars of the existing claim, the claimant would

require to apply to amend his claim to include the Additional Detriments, setting out the basis upon which he asserted that his application to amend his claim should be accepted. The claimant was directed to do so within 14 days, with the respondent having 14 days thereafter to respond to any such application.

11. On 10 April 2022 the claimant submitted a 19 page document containing his application to amend his claim to include the Additional Detriments, numbering these 1-13 inclusive, which are summarised as follows:

    (i) Failure to retain records of key discussions held under the respondent's Attendance Management Procedure in the period 12 February to 27 October 2021 (which the claimant asserts he became aware of on 17 December 2021);

    (ii) Failure to provide an Action Plan in February and November 2021, as required under the respondent's Attendance Management Procedure;

    (iii) Failure to provide any feedback to the stress risk assessment discussed on 29 April 2021;

    (iv) Giving misleading information, in May 2021, regarding the claimant's absence to an external agency when making an Occupational Health referral;

    (v) Failing to act on the recommendations of the Occupational Health Consultation Report of 14 July 2021 that would have facilitated the claimant's early return to work;

    (vi) Failing to initiate steps, following discussions on 27 October 2021 and 20 December 2021, that would have led to a capability hearing (and the possibility of redeployment) when it became clear that the claimant's return to work within a reasonable timescale was unlikely;

    (vii) Failing to inform the claimant until 16 December 2021 that it had initiated formal action under the Attendance Management Procedure

and placed the claimant on stage A of the respondent's procedure in February 2021, although he had not reached the relevant trigger points in that regard;

(viii) Failing to correctly record the claimant's absence from 20 October 2021 onwards, which prevented the claimant from ending his absence promptly when he returned to work on 12 February 2022;

(ix) Failing to take steps that could have led to the claimant's redeployment, following his email of 24 November 2021;

(x) Failing to hold a 4 week absence review, which should have been held on 17 November 2021, until 20 December 2021;

(xi) Excluding the claimant, during his long term absence, from completing the staff questionnaire of 17 March 2021;

(xii) Not informing the claimant of changes to his terms and conditions, regarding his sick pay entitlement, which the claimant became aware of this on 26 November 2021; and

(xiii) Not informing the claimant that he needed to claim Employment Support Allowance to supplement his reduced pay, which the claimant became aware of on 26 November 2021.

12. In response to the claimant's application to amend, the respondent provided supplementary comments, by letter dated 25 April 2022.

13. The amendment application, and the respondent's comments in relation to this in their correspondence of 1 & 25 April 2022, were then considered in chambers.

14. The final hearing is scheduled to take place from 8-11 August 2022 inclusive.

Relevant law

15. Employment Tribunals have a broad discretion to allow amendments at any stage of proceedings, either on the Tribunal's own initiative or on the application by a party. Such a discretion must be exercised in accordance

with the overriding objective (which is set out in the Employment Tribunals Rules of Procedure) of dealing with cases fairly and justly. Although various principles apply specifically to the assessment of an application to amend, the need to comply with the overriding objective underlies the application of those principles.

16. In ***Selkent Bus Company Limited v Moore*** 1996 ICR 836 guidance was given as to how Tribunals should approach applications to amend. The EAT confirmed that any application to amend a claim must be considered in light of the actual proposed amendment, so that the Tribunal may understand and give consideration to the purpose and effect of the amendment. It is important therefore that the application sets out the terms of the proposed amendment in the same degree of detail as would be expected had it formed part of the original claim, to give fair notice to the other party of the case which it is to meet.

17. In approaching the question of whether to allow an application to amend, Tribunals must have regard to all the relevant circumstances and in particular to any injustice or hardship which would result from the amendment or a refusal to allow it (***Cocking v Sandhurst (Stationers) Limited and another*** 1974 ICR 650, NIRC).

18. Accordingly, when determining whether to grant an application to amend Tribunals should carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the levels of hardship that would be caused to the parties by granting or refusing the amendment. In ***Selkent*** the then President of the EAT, Mummery P, explained that relevant factors would include:-

    (i) **Nature of the amendment** - i.e. is the amendment, for example, one involving the correction of clerical or typographical errors, the addition of factual details to existing allegations and or the addition or substitution of other labels for facts already pled? Alternatively, is the amendment one which involves the making of entirely new factual allegations that change the basis of the existing claim? In other

words, whether the amendment sought is a minor matter, or a substantial alteration pleading a new cause of action.

(ii) **Applicability of time limits –** if a new claim or cause of action is proposed to be added by way of amendment, the Tribunal should consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended.

(iii) **Timing and manner of the application –** an application should not be refused simply because there has been 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 identification of new facts or new information from documents disclosed on discovery.

19. The above is not an exhaustive list. There may be additional factors to consider in any particular case, but the above basic factors should form part of the Tribunal's consideration.

20. The Court of Appeal in ***Abercrombie & Others v Aga Rangemaster Ltd*** [2013] IRLR 953 provided:

"the approach of both the EAT and this Court in considering applications to amend which arguably raise new causes of action has been to 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"

21. The hardship and injustice test is a balancing exercise. As noted by Lady Smith in ***Trimble and another v North Lanarkshire Council and another*** EATS0048/12 it is inevitable that each party will point to there being a downside for them if the proposed amendment is allowed or not allowed. It will therefore rarely be enough to look at the downsides or 'prejudices' themselves. These need to be put in context, and that is why it is important

Discussion & Decision

22. The Tribunal considered each of the factors set out in ***Selkent*** and reached the conclusions set out below.

Nature of the amendment

23. The only claim before the Tribunal is under section 47B ERA. The proposed amendment does not introduce a new cause of action.

24. The Tribunal noted that there were 13 Additional Detriments, which were not included in the claimant's ET1, and which he sought to have included in his ET1 by way of his amendment application.

25. Whilst these were not expressly mentioned or asserted as detriments in the ET1, the management of the claimant's absence was addressed in the factual matrix asserted in the ET1. The amendments accordingly seek to add new factual allegations, expanding the scope of the existing claim, albeit that these are related to the existing factual matrix, so are unlikely to involve substantially different areas of enquiry.

Applicability of time limits

26. The claimant's application to amend his claim was lodged on 10 April 2022.

27. Section 48 ERA states that an Employment Tribunal shall not consider a claim under s47B ERA unless it is presented:

(i) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where failure is part of a series of similar acts or failures, the last of them, or

(ii) in a case where it is satisfied that it was not reasonably practical with a complaint to be presented before the end of that period three months.

28. The claimant asserts that the 13 Additional Detriments constitute a series of similar acts or failures, all related to the application of the respondent's attendance management procedures. He has provided specification of each

of the individual acts/omissions relied upon and said to form the basis upon which a continuing act may be established. The 13 Additional Detriments, which the claimant states constitute a series of similar acts or failures, are said to have occurred in the period from February 2021 to 20 December 2021

29. In the case of ***Galilee v Commissioner of Police of the Metropolis*** [2018] ICR 634, the EAT gave guidance on the consideration of amendment applications in where a continuing act is asserted. Judge Hand QC stated, at paragraph 109 of the Judgment, as follows:

'(d) The guidance given by Mummery J in Selkent Bus Co Ltd v Moore [1996] ICR 836 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...

(g) Whilst in some cases it may be possible without hearing evidence to conclude that no prima facie case of a continuing act or for an extension on just and equitable grounds can arise from the pleadings, in many cases, often, but not necessarily confined to, discrimination cases, it will not be possible to reach such a conclusion without an evidential investigation.

(h) As indicated in the opinion in Kaur, sometimes it may be necessary to hear a significant amount of evidence and sometimes it may not be possible or sensible to deal with the matter at a preliminary hearing and decisions may need to be postponed until all the evidence has been heard.

(i) In such cases permission to amend can precede decisions as to whether any new claim raised by the amendment is out of time; in other cases a decision on whether to grant permission to amend can be postponed.'

In that case it was found that the Employment Judge had erred in proceeding to consider whether the claim was lodged timeously without resolving the issue of whether or not there was a continuing act.

30. This case involves claims under s47B of the ERA, rather than claims under the Equality Act 2010, and the test is of reasonable practicability, rather than

what is just and equitable. The possibility of a series of similar acts or failures is however a feature of both. The Tribunal in this case cannot determine whether the claims were timeously lodged without determining which acts are established and, of those, whether they did indeed constitute a series of similar acts or failures. That matter cannot be determined as a preliminary matter: it can only be determined following evidential investigation at the final hearing.

Timing and manner of the application

31. The Tribunal considered why the application was being made at this stage. The Tribunal noted that the claimant is representing himself in these proceedings. Whilst the claimant's application to amend his claim was lodged on 10 April 2022, the claimant referenced that he felt that he had been subjected to detriments in relation to the application of the attendance management process, and that he wished to advance this as part of his claim, as follows:

    (i) On 21 December 2021, in his case management preliminary hearing agenda document;
    (ii) On 18 January 2022, at the initial case management preliminary hearing;
    (iii) On 28 January 2022, in the further particulars he submitted following the case management preliminary hearing;
    (iv) On 8 March 2022, at the second case management preliminary hearing;
    (v) On 18 March 2022, in the list of detriments submitted in accordance with the orders issued by the Tribunal at the second case management preliminary hearing; and
    (vi) On 10 April 2022 in his application to amend.

32. The claimant appears to have acted promptly in response to orders and sought to comply with the orders and directions issued, albeit perhaps not initially appreciating the level of detail required. The application to amend

contains a sufficient level of detail for the respondent to understand the detriments being asserted.

Balance of Prejudice

33. The respondent asserts that they would be prejudiced if the application to amend is permitted to proceed. The Tribunal notes however that they stated in the draft list of issues attached to the agenda document that they submitted on 11 January 2022 that one of the issues to be determined at the final hearing was whether the respondent failed to follow its attendance management procedures in respect of claimant. They also noted in their agenda that Angela Milne and Diarmuid Cotter would be witnesses for the respondent to speak to *'the process of managing the claimant's absence and return to work'*, with their evidence in chief estimated to last 4-5 hours and 5-6 hours respectively. With the exception of one of the Additional Detriments, namely Additional Detriment 9, each of the Additional Detriments relate to the actions of Angela Milne and Diarmuid Cotter. The length of their evidence was estimated to be significant, and the purpose was to address the claimant's absence and return to work, which all of the Additional Detriments relate to. Accordingly, if the amendment is allowed, it is unlikely to involve substantially different areas of enquiry.

34. Whilst Additional Detriment 9 references Steve Grimmond as being the sole individual responsible, the asserted detriment relates to the possibility of redeployment, which is also a factor in Additional Detriment 6. Accordingly, while an additional witnesses may be required for the respondent, if the application to amend is accepted, it appears that would only be in relation to one point, which may already be covered by other witnesses. His evidence would accordingly be limited, if required.

35. The respondent also highlights that Additional Detriment 12 references 'HR' being responsible, as well as Angela Milne and Diarmuid Cotter. The respondent has indicated that an additional individual may accordingly be required from the HR team to address this, if the application to amend is accepted. Again however, it appears that would only be in relation to one

point, which may already be covered by other witnesses. The evidence of that individual would accordingly also be limited, if required.

36. There is ample time prior to the commencement of the final hearing for the appropriate arrangements to be made to accommodate any additional witness(es). If an additional day is required, as the respondent asserts may be the case, steps can be taken to identify that date now, to avoid any potential delay.

37. In relation to the respondent's arguments regarding the merits of the Additional Detriments, these are matters which can only be determined following evidence, at a final hearing.

38. In light of the above, the Tribunal conclude that the prejudice to the respondent, if the proposed amendment is allowed, is minimal.

39. The prejudice to the claimant on the other hand is significant, as he would not be able to proceed with a claim in relation to the Additional Detriments.

40. Taking into account the above factors, and considering the balance of hardship and injustice between the parties, the Tribunal concludes that the application to amend the claim to include the Additional Detriments should be allowed, with the issue of whether the Additional Detriments were lodged within the requisite timescales set down in s48 ERA being expressly reserved to be determined at the final hearing.

41. If the respondent wishes to respond to the amended claim, by amending their response, they should do so within 14 days of the date this Judgment is sent to the parties.

Employment Judge: Mel Sangster
Date of Judgment: 25 May 2022
Entered in register: 26 May 2022
and copied to parties