

THE INDUSTRIAL TRIBUNALS

CASE REF: 1608/16

CLAIMANT: Edward Cooke

RESPONDENT: Woodvale and Shankill Community Housing Association

PRE-HEARING REVIEW AMENDMENT DECISION

The decision of the tribunal is that the claimant's application to amend his claim is granted to the extent set out in the body of this decision.

Constitution of Tribunal:

Employment Judge (sitting alone): Employment Judge Murray

Appearances:

The claimant represented himself.

The respondent was represented by Mr T Warnock, Barrister-at-Law, instructed by Ms K Gray of BLM Solicitors.

ISSUES

1. The issue to be determined at the amendment PHR was whether or not the claimant's claim as presently drafted includes a claim for detriment and constructive dismissal on grounds of having made protected disclosures (otherwise known as a whistleblowing case). The claimant clarified the extent of the amendment sought in a document which is attached to this record of proceedings.

THE LAW

2. In the case of *Selkent Bus Company v Moore 1996 ICR 836* it was stated as follows:-

"Whenever the discretion to grant 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."

...

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 has 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 statutory 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.*
- (c) The timing and manner of an application. An application should not be refused solely because there has been a delay in making it. There are no time-limits laid down in the Rules for the making of amendments. The amendments can be made at any time before, at, or even after the hearing of the case. 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 discovery of new facts or new information appearing from documents disclosed in discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result from adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.”*

3. *Harvey states at Paragraph 311.3 of Part T:-*

“A distinction may be drawn between –

- (1) Amendments which are merely designed to alter the basis of an existing claim but without purporting to raise a new distinct head of complaint.*
- (2) Amendments which add or substitute a new cause of action but one which is linked to or arises out of the same facts as the original claim.*
- (3) Amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all.”*

4. The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (as amended), state where relevant as follows:-

“Overriding objective

- 3.(1) *The overriding objective of these Regulations and the rules in Schedules 1, 2, 3, 4, 5 and 6 is to enable tribunals and chairmen to deal with cases justly.*
- (2) *Dealing with a case justly includes, so far as practicable –*
- (a) *ensuring that the parties are on an equal footing;*
 - (b) *dealing with the case in ways which are proportionate to the complexity or importance of the issues;*
 - (c) *ensuring that it is dealt with expeditiously and fairly; and*
 - (d) *saving expense.*
- (3) *A tribunal or chairman shall seek to give effect to the overriding objective when it or he –*
- (a) *exercises any power given to it or him by these Regulations or the rules in Schedules 1, 2, 3, 4, 5 and 6; or*
 - (b) *interprets these Regulations or any rule in Schedules 1, 2, 3, 4, 5 and 6.*
- (4) *The parties shall assist the tribunal or the chairman to further the overriding objective.*

...

Hearings - General

- 14(2) *So far as it appears appropriate to do so, the chairman or tribunal shall seek to avoid formality in his or its proceedings and shall not be bound by any statutory provision or rule of law relating to the admissibility of evidence in proceedings before the courts.*
- (3) *The chairman or tribunal (as the case may be) shall make enquiries of persons appearing before him or it and of witnesses as he or it considers appropriate and shall otherwise conduct the hearing in such manner as he or it considers most appropriate for the clarification of the issues and generally for the just handling of the proceedings.”*

5. It is settled law (see the cases of ***Johnston v Manpower Direct (UK) Ltd [2015] UKEAT/0351*** and ***Higgins v Home Office [2015] UKEAT/0296/14***) that it is open to me to identify claims on the claimant’s behalf from the documents presented by him. In essence, the issue is one of degree. On the one hand, is inappropriate for

an Employment Judge or tribunal to become to become an advocate for an unrepresented party. On the other hand, it could be an error of law for a tribunal to ignore a clear case being made even if the claimant puts the wrong legal label on it.

EVIDENCE AND SUBMISSIONS

6. The claimant gave evidence in relation to the scope and timing of his applications.
7. Mr Warnock at the outset of the hearing helpfully clarified the areas of contention between the parties as follows:
 - (1) Under heading (a) in the attached document Mr Warnock confirmed that paragraphs 1 to 8 relate to allegations which are set out in the claim form and amount to additional facts being pleaded in relation to the constructive dismissal claim. Mr Warnock confirmed that the matters set out at paragraphs 10 to 12 under heading (a) also amount to additional facts in relation to the alleged breach of contract which led to the alleged constructive dismissal. Dr Cooke confirmed that paragraphs 10 to 12 do comprise additional facts related to the alleged breach of contract which led to his resignation which he alleges amounted to a constructive dismissal. It was agreed that these points clarify the constructive dismissal claim and do not therefore require amendment as they meet the **Selkent** test.
 - (2) The points made under heading (b) in the attached document were agreed by the parties to amount to additional facts in relation to the alleged breach of contract which led to the resignation. Insofar as the claim form required amendment to include that level of detail, it was agreed, and I so order, that the claim form should be amended to include the detail listed under heading (b) in the attached document at sub paragraphs 1 to 6.
 - (3) The points set out under heading (c) in the attached document are in contention between the parties in this amendment application as it is the respondent's case that these comprise new allegations which are not in the claim form; they entail changes to the claim; they change the legal basis of the claim; they comprise extra facts in addition; and they entail a time-point.
8. At the PHR Dr Cooke clarified the scope of the protected disclosure claim as follows:
 - (1) That he was subjected to detriment when he received a letter on 5 September 2015 from the respondent saying that his duties had been removed and he was effectively silenced following a period of his having raised concerns about health and safety and other breaches from the outset of his employment.
 - (2) That from early on in his contract (that is from July 2015) the claimant raised issues about health and safety and, as a consequence, was ignored; was not consulted in areas that he had responsibility for; and, in particular, there was a diminution of his work between January and June 2016 resulting in him being under-utilised and effectively "twiddling his thumbs" instead of working.
 - (3) That he resigned in response to a last straw event which occurred in June 2016. The claimant confirmed at the PHR what he had said at the CMD on 5

October 2016 in this regard namely:

- (i) That he had raised his issues on a continuing basis and this culminated in his raising concerns and objections in June 2016 in relation to the work being given to the subsidiary company and its intention to bring in the ex-chairman as a foreman.
- (ii) The claimant became aware two to three days before he resigned that the ex-chairman was proceeding to do that work and he therefore realised that his concerns and objections had effectively been ignored.
- (iii) The claimant feared damage to his reputation and the last straw was the fact that they progressed with this contractor against his advice and that he was being ignored.
- (iv) The claimant connects his resignation to the issues raised because it is his case that what the respondent was doing was potentially unlawful as regards procurement processes and he had health and safety concerns particularly in relation to fire safety.

9. It was the claimant's contention at the PHR that the points raised were contained in the resignation report which was sent after his resignation and this report was referred to in the claim form as a document which the claimant intended to rely on in making his claim. The claimant also indicated in the claim form that he would be relying on his resignation notice letter of 14 June 2016 which stated as follows:-

"To the Members of the Management Board and Senior Management Team

Dear Board Members/Members of the SMT

Further to my letter dated 1 June 2016, I am writing to confirm that I am resigning from the post of building surveyor. I am therefore giving the Board of WSCHA (my employer) the required one month's notice of my resignation.

On 2 June 2016 and again within a formal agenda dated 6 June 2016, I wrote to the Senior Management Team suggesting that the subsidiary company (A&O/WGS), a company designed by WSCHA, was badly structured, lacked managerial expertise and was not fit-for-purpose. It is my belief that sometime during April/May, the Board and SMT decided to appoint WGS to undertake improvement work to 47 properties within Cambrai/Disraeli Street. I have pointed out in my correspondence of early June that this is a mistake. WGS is not fit-for-purpose and WSCHA have failed to undertake at the proper time, full risk assessments for following this procurement route.

I am of the opinion, that the DfC Audit Team would reach the same conclusion if they assessed the lack of management structures and competencies of WGS as of the start of June 2016. I have suggested that there were serious errors with A&O's completion of the 4 house 'Pilot Scheme'. I am at a loss why the SMT/Board would contemplate using WGS after completing a much smaller scheme that was delivered late, that should have incurred L&A damages, that omitted fundamental works and that encompassed sub-standard specifications. Furthermore, I am of the opinion that my expertise in these matters has been continually overlooked and

therefore I wish to be completely disassociated from the SMT/Board's procurement strategy. My resignation reflects the depth of my feelings in this matter. In 35 years I have never before worked for a housing association where the employer declined to provide the competitive tenderers with tender feedback information 14-15 weeks after the tender return date.

My resignation will come as no surprise to either the SMT or the Board. I first confirmed my intention to resign at a meeting with the Operations Manager on the 9 February 2016 when it was initially suggested that WSCHA were considering embracing procurement strategies that I (rightly or wrongly) considered posed serious conflict of interest problems and could be potentially damaging to the long term future of the association. I then confirmed my intention to resign at the meeting of the 2 June 2016 in protest at WSCHA's handling of the Framework properties and WSCHA's ill-advised intention to use a subsidiary company that was not-fit-for purpose for the Framework Scheme proper. I would be obliged if Jocelyn could prepare all the necessary P45/P60 forms as I commence my four week notice period from today.

Yours sincerely

Edward Cooke

Building Surveyor"

10. Mr Warnock made the following points:
- (i) That it was in the claimant's mind from 2015 that he would raise protected disclosures.
 - (ii) That the claimant was aware that he had the right to make a claim and could have sought legal advice given his earnings.
 - (iii) That in the documents to the tribunal and in the claim form the claimant's tactic was to resign and then threaten constructive dismissal which would then be withdrawn if the respondent met the requirements to meet his concerns.
 - (iv) It was not the claimant's intention to bring a protected disclosure claim forward.
 - (v) There is a time point because the allegations of detriment amount to discrete points which are out of time and there was no evidence given by the claimant that it was not reasonably feasible for him to present a claim within the time limit.

DECISION

11. The claimant's claim in a nutshell is that he raised concerns about regulatory and other breaches and about health and safety concerns on an ongoing basis and, as a result, had duties removed from him, was sidelined and ultimately forced to resign as a result.
12. The claimant resigned by letter of 14 June 2016 and it appears that by agreement his last day was to be 15 June 2016. His claim form was lodged on 4 July 2016 and

was therefore within the three-month time-limit from the date of resignation.

13. The claimant's case is that he raised issues on an ongoing basis and that the removal of duties and sidelining occurred from September 2015 until the date of his resignation. He therefore appears to allege an ongoing act and, if his argument is accepted on that point, time would likely only run from the date of the resignation.
14. I am satisfied that the thrust of the claim made in the claim form and in the resignation report and resignation letter attached to it, is that the claimant raised ongoing issues of health and safety, regulatory, and other breaches which he said were ignored and as a result he alleges he was sidelined, his duties were reduced and this culminated in his resignation. Whilst the claimant characterises his claim in the claim form as a constructive dismissal claim referring to breaches of his contract, it is clear to me that the facts pleaded amount to the articulation of a protected disclosure claim in all but name. I therefore find that the facts pleaded support the label of a protected disclosure claim being placed upon this claim.
15. I therefore grant the amendment to label this claim a protected disclosure claim in the following respects:
 - (i) Constructive dismissal on grounds of having made a protected disclosure; and,
 - (ii) Detriment on grounds of having made a disclosure in the respects set out at paragraph 8 above.
16. There is an issue as to whether or not the detrimental acts alleged amounted to a continuing act or whether they were separate acts with time-limits running from the date of each act. I decline to deal with any time-limit issue in this regard as this is a matter which should more appropriately be assessed by the tribunal hearing the full claim. It is open to that tribunal to find that the acts are connected in which case time runs from the date of the last act. It is also open to that tribunal to find that they are separate acts, in which case time would run from the date of each act and it would then be for the claimant to persuade that tribunal that it was not reasonably practicable for him to lodge his claim at an earlier stage.
17. Determining the time-point and whether the acts should be linked together to form a continuing act would involve a consideration of the whole case and, in line with the House of Lords guidance in the **SCA Packaging v Boyle** case, is not apt for consideration at a PHR, I therefore decline to do so.
18. In addition, at the very least, the allegations might constitute background evidence which the claimant could bring forward in order to show that his resignation amounted to a dismissal and was unfair because he had previously raised concerns. This is another reason why this is not apt for determination at a PHR as it is not at all clear to me that there would be a saving in time in relation to the evidence to be called.
19. It is clear from my assessment of the documents presented in this case that the claimant appears to misunderstand the nature of protected disclosure claims in the tribunal. It is open to the claimant to seek advice, if he requires it, in relation to that aspect of his claims. That however is not a reason for me to refuse to amend the claim by relabelling it. It is not a bar to amendment that a claimant either

misunderstands or does not know that he has a protected disclosure claim contained within the factual scenario and allegations set out in his claim form.

20. The claimant has also not helped himself by creating obfuscation because of the lengthy, repetitive and discursive documents produced by him. I remind the claimant in particular of the obligation on all parties to comply with the overriding objective to enable the claim to be clearly understood and thus to allow the proceedings to progress expeditiously from now on.
21. As this is a relabelling amendment application the time point does not apply at all to the constructive dismissal claim but, as set out above, it may apply to the claims of detriment if the claimant fails to persuade the tribunal that the alleged acts were connected together in the requisite way.
22. This case will now proceed to be case managed in the normal way and a Case Management Discussion in that regard will be arranged as soon as possible.

Employment Judge:

Date and place of hearing: 3 November 2016, Belfast.

Date decision recorded in register and issued to parties:

Edward Cooke v WSCHA, Case reference: 1608/16

Attention of Judge Murray at mail@employmenttribunalsni.org

Case Management Clarifications:

(a) Constructive Dismissal Breaches directly referred to in the original claim form dated 4 July 2016:

I alleged specifically in the original OIT&FET claim form (4 July 2016) that:

- 1 – WSCHA in the appointment of the Ex-Chairman to several projects (without submitting a competitive tender) breached DSD procurement regulations
- 2 – WSCHA breached Charity Commission regulations
- 3 – WSCHA breached the CDM (2007) Regulations
- 4 – WSCHA breached general H&S policies and procedures
- 5 – WSCHA entered into a sham (aborted) tender at a cost to all the tenderers
- 6 – WSCHA continued to let 4 specific properties that were potentially dangerous
- 7 – WSCHA re-let properties that were potentially dangerous
- 8 – WSCHA aborted using the recommended NEC 3 Management Contract. I spend some 20+ nights from Sept 2015 until May 2016 attending Quigg Golden seminars to understand the rudiments of the NEC 3 Contract. The NEC contract was named in the competitive framework tender process, a process that was belatedly abandoned. The change was required because of the inability of the subsidiary contractor/s (A&O /WGS) to comply with the complexities of the NEC management contract.

Other breaches referenced (indirectly) in the original claim form:

- 9 – I confirmed in my original claim form that I would also be relying on: e-mailed letters / reports; the WSCHA Employers handbook; the Building Surveyors Job Specification; the Building Surveyors Job Description Agreement; my resignation notice letters and my resignation notice report sent to the Board. (The OIT&FET on-line submission form does not enable applicants to forward on attachments).
- 10 – The Resignation Report (26 June 2016) to WSCHA (referenced within the original constructive dismissal claim form) includes the following general headings: DSD Audit Report breaches (pp.12-19); Building Surveyor Job Specification breaches (pp.19-23); Property Management Failings (pp.23-26); H&S / Fire Protection breaches (pp.19-23) and Summary Reasons for resigning (pp.30-33). On page 17 of this resignation report I suggest that the H&S of the WSCHA Board Members had been compromised by design failings of the new Cambrai Street offices.
- 11 - On page 20 (item b) of the resignation report, I point out that my contractual duty to implement 'safe systems of work and the application of H&S practices was breached'.

12 - On page 20 (item d) of the resignation report, I point out that the WSCHA Employer's handbook, p.27 sets out the reasons employees can make public interest disclosure clauses, e.g. criminal offences; failure to comply with legal obligations and endangering H&S of an individual.

(b) Constructive Dismissal Breaches set out in the claim form to be relabelled.

(1) **Breach of Contract** (Including my pension entitlement;, my salary review entitlement; removing me (by instruction) from the 3 Streets Project; reducing my workload by aborting / suspending the Framework tender procurement exercise; holding meetings without my attendance; denigrating my skills by my omission from the procurement of three large green energy boiler projects and my omission from the procurement of solar panel project to 300 + houses). Specific failure to honour a pre-contract verbal assurance about addressing fire safety problems at 12, 22, 24 and 28 Rosebank Street. Out of hours attendance on an NEC course that was later aborted.

(2) **The Employer's Unreasonable Behaviour** (e.g. the failure to respond to numerous e-mail reports that raised procurement and H&S concerns and the failure to provide minutes of meetings)

(3) **Breaches of Statutory Regulations** (e.g. the CDM (2007) Regulations, the H&S at Work Act 1974, Building Control Regulations and Planning Regulation breaches)

(4) **Breaches of H&S Regulations** (e.g. the Housing Association Guide, the CDM (2007) Regulations and the H&S at Work Act 1974)

(5) **Other Regulatory Breaches** (e.g. Charity Commission breaches)

(6) **Conflict of Interest Breaches** (e.g. Regulatory breaches in relation to the non-competitive appointment of green energy contractors and the appointment of the ex-Chairperson to several projects at Ohio Street, Ballygomartin Road and Cambrai Street and in the procurement of contractors / consultants outside the AECOM Framework agreement entered into in August / September 2015)

(c) New allegations not contained in the original claim form (PID claim)

The application form does not specifically mention that this claim is a **Public Interest Disclosure claim**, however in my resignation report of the 26 June 2016 sent to the WSCHA Board on page 26, I point out that I had previously sought advice about making a PID claim and I asked the Board to make a PID (on my behalf) to the Department of Communities (the new regulator). On the 19 September 2016, in my reply to **BLM's request for Further and Better particulars**, at point (16) I confirm to BLM in 25 lines where I think I am entitled to make a PID in relation to: four houses in Rosebank Street; 4 houses in Bray Street; failure to apply to the Building Control Office for boiler and heating installations; failure to protect WSCHA's staff in the Cambrai Street offices; failure to protect residents from fledgling contractors who are not properly H&S assessed; CDM (2007) Regulation breaches; failure to apply or to obtain planning approval and possible acts of fraud in appointing contractors. BLM failed to inform the Tribunal judge of the above points at the last case management meeting

Edward Cooke – 13 October 2016 (E-mailed to BLM solicitors).