Appeal No. UKEAT/0308/19/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON EC4A 1NL

At the Tribunal
On 12 November 2020

Before

THE HONOURABLE MR JUSTICE BOURNE

(SITTING ALONE)

MS D DORRINGTON — APPELLANT

TOWER HAMLETS GP CARE GROUP CIC — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

The Appellant	The Appellant in Person
For the Respondent	MR NEIL ASHLEY (of Counsel) Instructed by: Paladin Solicitors Wildwood House Hall Road Barton Turf Norwich NR12 8AR

SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURES
PRACTICE AND PROCEDURE

The Claimant's claim on a proper construction always included a claim for unfair dismissal based on protected disclosures, which appeared to be in time. In such a case the cause of action is unfair dismissal, not the making of protected disclosures. The ET therefore erred in law by treating the addition of further particulars of protected disclosures as an application to amend the claim by adding a new cause of action out of time.

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THE HONOURABLE MR JUSTICE BOURNE

B

1. This is an appeal from the decision of Employment Judge Martin sitting at East London Hearing Centre. The Appellant was the Claimant in those proceedings. The Reasons for the Employment Judge's decision were sent to the parties on 18h May 2019 following a preliminary hearing [PH] on 16th April 2019. The decision stated that: "The Claimant's Claim for protected disclosure is struck out" and refused permission for the Claimant to amend her claim by way of clarification which she had put forward in a document sent to the ET and to the Respondent on 13 March 2019.

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2. The issue arises because, for the generality of Unfair Dismissal claims, the claimant must have completed two years of continuous service with an employer before being entitled to present such a claim. However, there is no such pre-condition for a claimant who contends under Section 103A of the **Employment Rights Act** 1996 (ERA) that a dismissal was unfair because the reason or principal reason for the dismissal was that they had made one or more protected disclosures. In this context the making of a disclosure which is protected under ERA section 43A may be referred to as "whistleblowing".

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3. The Claimant was employed by the Respondent as a Service Delivery Manager between 2nd January 2010 and 9th May 2018. There was, however, a break in her continuity of employment in 2016 when she took voluntary early retirement but was then re-engaged by the Respondent some weeks later. She was dismissed with effect from 9th May 2018. I have not been taken to any detail about that, but the Respondent appears to have relied on conduct as the reason for the dismissal.

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4. The Claim Form (ET1) was received by the EAT on 7th August 2018. At section 8 the Claimant ticked a box to identify it as an Unfair Dismissal claim. She did not tick the alternative box headed:

> **"I am making another type of claim which the Employment Tribunal can deal with."**

At section 10, she ticked the box permitting information to be forwarded to a relevant regulator on the basis that she was claiming to have made a protected disclosure. At section 8.2 she inserted some "background and details of your claim" and at section 15 "additional information about your claim" ending:

> **"PLEASE NOT[E] THIS IS NOT ALL OF MY STATEMENT"**

The contents of those sections do not specify alleged reason for her dismissal or a specific legal basis for the claim.

5. On 10th November 2018 the Claimant sent an e-mail to the ET which stated:

> **"It has been brought to my attention by ACAS that the attached document which was sent to the ET team by myself on the 7th August 2018 has not been sent to ACAS and possibly not the employer?**
>
> **This was sent to and received by you on the 7th August 2018 as an addition to the ET form as the form did not have enough space. I would also like to point out that this is a claim for unfair dismissal based on whistleblowing and may need extra consideration on these grounds by the judiciary.**
>
> **Please can you confirm the receipt of this further information that was previously submitted to yourselves on the 7th of August 2018 and that this will be brought to the attention of the judiciary, the defendant and ACAS … as soon as possible?"**

6. The "attached document" has been added to the bundle for this Appeal. This would, in due course, be described as an "Addendum" to the Claimant's ET1. This is in the form of a chronology detailing events from July 2014 up to the Claimant's dismissal at the rejection of her Appeal in July 2018. There is an element in the Claimant's complaint about her treatment in general terms, including the assertion:

> **"Anyone who complains or raises issues against the Care Group are treated with disrespect."**

7. The Addendum identified a number of occasion when the Claimant made complaints or otherwise communicated information that was actually or potentially critical of others. Such communications may or may not have amounted in law to Protected Disclosures. It seems to me that these include the items numbered i, ii, and v which would, in due course, be mentioned to EJ Martin and which are listed at para. 22c below.

8. The Respondent filed its Response to the Claim in Form ET3 containing Grounds of Resistance dated 22nd November 2018. These simply asserted that the Claimant did not have two years' continuous service and therefore that the ET had no jurisdiction to consider the Claim. The Respondent added a general traverse in these terms:

> **"Unfair Dismissal**
>
> **9. Without prejudice to the Respondent's position as set out above, it is denied that the Claimant was unfairly dismissed as alleged or at all."**

9. The ET sought clarification about the Claim in a letter to the Claimant dated 12th December 2018 which stated:

> **"Employment Judge Brown has instructed me to write to the Claimant and say the following:**
> **You mention part time working in your claim and you also mention raising issues and concerns about the Respondent. What do you say was the reason the Respondent dismissed you?"**

10. The Claimant responded in an e-mail to the ET on 2nd January 2019. She thanked the Judge for the opportunity to explain her case and added:

> **"Please also find attached additional notes to my ET1 which were sent to the Employment Tribunal on the 7th August 2018 at the same time as the ET1 was submitted but which appear to have been misplaced."**

11. In this way, the Addendum was sent to the ET for a second time. The Claimant's e-mail continued by setting out a quite lengthy narrative of events during the couple of years leading up to her dismissal. These include details of communications. There is a substantial overlap between these and the communications mentioned in the Addendum. It seems to me that those mentioned in this e-mail of 2nd January 2019 include the items numbered i, ii, iv and v which would, in due course, be mentioned to EJ Martin and which are listed at paragraph 22 below.

12. The Claimant concluded, in bold type:

> **"I believe that because I continuously raised issues against the Care Group that they saw me as a troublemaker when really I was a whistle-blower trying to resolve serious issues which were affecting the service, its staff and in turn would have an adverse effect on the care of patients.**
>
> **Once again thank you for allowing me to confirm why I think I was dismissed … "**

13. It seems to me that this was an unambiguous assertion that whistle-blowing was the reason for dismissal, and that the whistle-blowing consisted of the continued raising of "issues" described in the Addendum and in that e-mail.

14. On 4th February 2019 the Claimant again e-mailed the ET. She was responding, in particular, to the Respondent's contention that she lacked the two years' continuous service needed to present an ordinary (i.e. not connected to whistle-blowing) Unfair Dismissal claim. She therefore set out her employment history, prefaced by these words (with emphasis in the original):

> **"I have been reading through the Respondents response to my claim and whilst my claim for unfair dismissal is not based on the 2 year rule but based on my being dismissed because <u>my employers considered me to be a whistle blower</u>, I would like to clarify further my employment history …"**

15. On 13 February 2019 the Claimant forwarded that e-mail to the Respondent's legal representative, stating:

> **"Please see the below which was submitted along with the attachments for the second time to the ET on the 02/1/19 …"**

Again, the Claimant had clearly stated that she had been dismissed for whistle-blowing.

16. There was a Preliminary Hearing on 14 February 2019 before Employment Judge Hyde, who ruled that the Claimant did not have sufficient continuity of service to bring an "ordinary" Unfair Dismissal claim and who directed a second Preliminary Hearing to take place on 16th April 2019 to consider whether there was an alternative claim of automatically Unfair Dismissal based on whistle-blowing.

17. Mr Ashley for the Respondent draws my attention to paras. 2 and 3 of Judge Hyde's Judgment which state:

> **"2. A further open preliminary hearing was fixed for two hours on 16 April 2019 commencing at 10am before any Tribunal (Judge Sitting alone), to determine:**
> **a. whether the Claimant could bring a Whistle Blowing claim, having regard to the contents of her claim form; and**
> **b. if so what was the detailed nature of this complaint?**
>
> **3. Further, the Claimant was directed to provide clarification about her statement in response to Employment Judge Brown's enquiry that she alleges that the reason for dismissal was whistle blowing, by reference to the facts set out in her claim form and the relevant law under Section 42A and the following Sections of the Employment Rights Act 1996, by 14 March 2019 to the Tribunal with a copy at the same time to the Respondent."**

18. Mr Ashley also points to EJ Hyde's Reasons, which explain that the Claimant was being given time to clarify the nature of her claim, even though the Respondent had pressed for any Protected Disclosures to be identified there and then. This, he states, is the context in which one must read EJ Martin's later decision, and I agree.

19. However, it also seems to me that the management of the case started to take a wrong turn at that point. On the one hand, it was reasonable for EJ Hyde to rule that the basis for the claim needed to be clarified. However, there are problems with the Order which was made. These can be expressed in the form of rhetorical questions. First, what did EJ Hyde mean by "a Whistle Blowing claim"? There are two quite different types of statutory claim which are based on Protected Disclosures: one is for unfair dismissal, the other is for the unlawful infliction of detriment other than dismissal. Second, what was the likelihood that this unrepresented Claimant would provide the *right* kind of information in response to the Order in the form in which it was made? The Claimant might not know, as a matter of law, what "the detailed nature of this complaint" would mean, and it did not help that the Order, as sent to the parties, identified the *wrong* section of the Employment Rights Act [ERA] 1996; the right section is section 43A.

20. Nevertheless, the Claimant attempted to comply. On 13 March 2019, she sent to the ET and to the Respondent a document which I have seen. It is an Excel document entitled "Tribunal pack Commentary". I should add that, at all material times, the Claimant has struggled to produce a properly legible print-out of it, perhaps because it is in Excel rather than Word. Like the Addendum and the e-mails of 2nd January and 4th February 2019, it contains a chronological narrative including reference to claims made by the Claimant about various work-related matters and it asserts that she was "unjustly victimised". It still does not contain the sort of particularised legal claim which a lawyer would draft. It does, however, state:

> **"I believe that because I continuously raised concerns and issues about and against the TH GP Care Group that they saw me as a troublemaker when really I was a whistle-blower trying to resolve serious issues which were affecting the service, its staff and in turn would have an adverse effect on the care of patients. Essentially, the majority of these complaints were public interest and my intentions were merely to try to instil some ethics and 'morality'".**

21. By now, it seems to me the Claimant had said that she relied on various identified disclosures and that she relied on their continuous nature i.e. on all of them. She had given some reasons why they amounted to Protected Disclosures. She blamed her dismissal on them. Whether she blamed other detriments on them was less clear.

22. So the matter came before EJ Martin ("the EJ") on 16 April 2019 at the second PH. In her written Reasons, the EJ stated:

a. It was at the end of the Hearing on 14th February that the Claimant had "suggested" that her claim was about Protected Interest Disclosure. She was given an opportunity to clarify her Claim for this Hearing".

b. The document provided by the Claimant on 13th March "sets out what she says on various disclosures. Again, the document is not clear about what disclosures the Claimant is relying on or what those alleged disclosures are."

c. At the Hearing, the Claimant relied orally on five disclosures, described in these approximate terms:

    i. one in August 2016 about TUPE transfer;

    ii. another in October 2016 about an issue relating to on-call work and about the attitude of the manager following her "retirement and pension leave";

    iii. another in March 2016 about an issue relating to on-call work;

    iv. another in June 2017 relating to a lack of response from the CEO during the London Bridge attack;

    v. the fifth and main disclosure was in August 2017 and related to drivers and their contracts;

d. In discussion, it was not clear whether her dismissal was said to be by reason of all five disclosures or only the last one.

e. Some, but not all, of the disclosures are referred to in the five page "Addendum to the ET1" and there was no reference to any of them being the reason for her dismissal, save the assertion that "anyone who complains or raises issues against the Care Group are treated with disrespect".

f. Although the section 10 box was ticked, "this box is regularly ticked by claimants who are not making a protected disclosure at all" .

g. Neither "in the Claimant's claim form or in any of the detail does she indicate that the reason for her dismissal is because any of these alleged disclosures … nor does she indicate that the reason for her dismissal was because of any issues that she raises in the Addendum to her ET1".

23. The EJ decided to deal with matter as an Application to Amend the Claim Form. She directed herself on the principles which apply to such applications as stated in **Selkent Bus Company Limited v Moore [1996] ICR 836** including the need to take into account the nature of the amendment, the application of any time limits, the timing of any application, and the hardship/injustice to either of the parties by allowing or refusing the amendment.

24. Her decision was to dismiss the Application, in particular, because:

a. The amendment was a new cause of action which had not been pleaded;

b. It was still not clear what disclosures were being relied upon;

c. As to time limits:

> **"the claim itself of a protected interest disclosure is substantially out of time. It clearly was reasonably practicable for the Claimant to have brought her initial claim in time. Her initial claim was brought in time. The Tribunal notes that the reason the Claimant days that she did not bring this claim in time was**

because she really did not understand what she needed to do, despite providing a lot of detail in her ET1."

d. The Application was being made "now, following effectively, her initial claim of unfair dismissal being struck out.";

e. The case was always "coded by the tribunal as an unfair dismissal claim and not as a protected interest disclosure claim."

f. The Tribunal had to balance the potential hardship to the Claimant in not being able to bring her Claim against the potential injustice to the Respondent in having to defend the Claim, which was initially not identified and is still not properly pleaded.

25. An Application for Reconsideration was refused by the EJ on 5th December 2019.

26. The Appellant's case, effectively, is that the EJ failed to appreciate that her Claim was *always* identified as a claim, at least in part, of whistle-blowing. This, she says, can be seen from the Addendum and from further clarification sent on 2nd January 2019 and the further e-mails to the ET on 4th February 2019 and the document sent on 3rd March 2019. The EJ was therefore wrong to characterise this as a stance taken by her when it became apparent that her ordinary Unfair Dismissal claim could not proceed.

27. Mr Ashley, for the Respondent, contends that EJ Martin's Reasons summarise accurately the facts of what happened. He submits that there is not, and never has been, a sufficiently clear or particularised case which identifies Protected Disclosures and asserts that one or more of them is the reason or principle reasons for the dismissal. This is in spite of the Claimant being given a number of opportunities to clarify her case by the Respondent in December 2019, by EJ Hyde following the first PH and by EJ Martin orally on the second PH.

A Mr Ashley therefore submits that EJ Martin's decision was well within the scope of her discretion as to case management matters and was not subject to any error of law.

B 28. It seems to me that the EJ's decision was subject to errors.

C 29. From the evidence I can see, the Addendum was always part of this claim. The Claim Form, including the Addendum, was the work of a Litigant in Person. It is not clearly drafted but it was necessary for the ET to construe it so as not to exclude anything which the Claimant sought to include.

D 30. The starting point was that the ET1 included a claim for Unfair Dismissal. The statutory right not to be unfairly dismissed is found in **ERA** Section 94. The right to make a claim is found in Section 111. If a person is dismissed, then a claim that the dismissal is unfair is their statutory cause of action.

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31. ERA Section 103A provides:

> **"An employee who is dismissed shall be regarded <u>for the purposes of this part</u> as unfairly dismissed for the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure." (Emphasis added.)**

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G 32. Reliance on a protected disclosure is, therefore, one of the ways which an employee can prove that a dismissal was unfair. But that reliance, by itself, is not a cause of action. The cause of action is the allegedly unfair dismissal.

H 33. The Claimant's ET1 undisputedly alleges Unfair Dismissal and it is not in dispute that she was dismissed. There was, however, lack of clarity as to why the dismissal was said to be unfair and, in particular, whether she relied on **ERA** Section 103A.

34. I therefore consider that EJ Martin erred in law when ruling, at the second PH, that the Claimant was seeking to amend her Claim to introduce a new cause of action. No such amendment was needed. She already had a Claim Form alleging Unfair Dismissal. The true subject matter of the second PH was, or should have been, a lack of particularisation of the Claim. That, at least in part, was because of the lack of sufficiently specific questions being posed in writing by EJ Hyde's Order of a kind which a Litigant in Person could be expected to answer.

35. That approach of treating the Claimant's case as an Amendment Application would, by itself, require this Appeal to be allowed. However, it seems to me that there were further errors.

36. The EJ held that any claim based on Protected Disclosures was out of time. I do not agree. The Unfair Dismissal Claim was definitely made in time. The defect was one of particularisation. However, the Particulars contained in the Addendum identified at least three of the five alleged disclosures to which the Claimant referred at the PH, including the one which she said was the most important. The basis for the claim plainly needed clarification. That was sensibly requested by EJ Brown on 12 December 2018. The reply on 2nd January 2019 unequivocally stated that the Claimant thought she had been dismissed because, thanks to her "whistle-blowing", the Respondent regarded her as a trouble-maker and it identified disclosures corresponding, in large part, with those covered orally at the second PH.

37. I therefore consider that there was an in-time claim based on **ERA** Section 103A. That is not to say that the claim had merit, and the claim needed clarification as I have said.

38. In addition, it was not accurate to characterise the Claimant's Claim as having been mounted by an Amendment Application in response to the striking out of any "ordinary" Unfair Dismissal claim. As I have said the Claim was present, but not very clear, from day one, and the basis for it had been expressly asserted on 2 January 2019.

39. The result has been a wrong turn in terms of case management. It seems to me that it remains necessary for the claim to be particularised. It will be for the ET to make the necessary orders, but the Respondent is entitled at least to know why, what disclosure(s) - when, how and who - are said to be the principal reasons for the dismissal, and (2) on what basis the Claimant asserts that the subsequent disclosure(s) satisfy the requirements in Section 43B sub-section 1 of the ERA. And today the Claimant has also told me that in addition to dismissal, she also complains about detriments in the various forms of investigations launched against her and also changes which were made to her responsibilities. That claim, if persisted with, needs to be particularised and then the ET may need to consider:

1) Whether it necessitates amendment, and if so
2) Whether there is a time limit defence, and
3) Whether, in all the circumstances, such amendment should be allowed.
4) Whether there are any other jurisdictional issues, or whether the claim should proceed to a substantive hearing.

40. The Appeal is therefore allowed and the Judgment promulgated on 10th May 2019 is set aside.

41. At the end of the hearing, I asked the parties to consider whether they wished me to exercise any of the powers of the ET under section 35(1)(a) with a view to moving the case

management forwards. I was invited to do so, and I in turn invited the parties to co-operate in the necessary particularisation of the Claimant's case. The parties have produced what is now schedule 1 to my order on this appeal. That schedule sets out the whistle-blowing claim which the Claimant seeks to advance. I would like to pay tribute to both the Claimant and to the Respondent and its counsel, Mr Ashley, for their exceptional co-operation and hard work in this process. I hope that this order will facilitate the ET's management of the remitted claim. I have also made an order for disclosure, with a view to keeping the case moving. It will now be for the ET to list a PH for further case management.