EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105611/2016

Held in Dundee 10 April 2017

Employment Judge: Ms M Robison

Mr R Miller — **Claimant**
In person

Scottish Hydro Electric Power Distribution PLC — **Respondent**
Represented by
Ms Skeoch
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is that:

(1) the complaint of disability discrimination under the Equality Act 2010 is dismissed;

(2) the complaint of unfair dismissal under section 94 of the Employment Rights Act 1996 is dismissed;

(3) the amendment application is granted only to the limited extent set out in the reasons below;

(4) the claimant's request to amend the claim to include claims under section 47B and s103A of the Employment Rights Act 1996 is refused;

(5) the claimant's request to amend the claim to include claims under regulation 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 is refused; and

(6) the claimant's request to amend the claim to include automatically unfair dismissal on the grounds of employment blacklisting section 104F Employment Rights Act is refused.

REASONS

Introduction

1. In this case the claimant submitted a claim to the Tribunal which was recorded as containing a claim for unfair dismissal and discrimination because of sexual orientation, as well as disability discrimination. The respondent denied the claims, asserting that the claimant did not have sufficient service to claim unfair dismissal and that there was insufficient specification of the discrimination claims and therefore they should be struck out.

2. This preliminary hearing was set down following a telephone case conference call which took place on 20 January 2017 and which was conducted by Employment Judge McFatridge. In the note following the case conference call prepared by Judge McFatridge, he stated that the purpose of this preliminary hearing was to:

    a. Determine whether all or part of the claimant's application to amend should be accepted;
    b. In the event that the respondents advise in their note of objections that they are seeking strike out of all or any part of the claimant's claims (even if they are allowed in by amendment) then to deal with such application for strikeout; and
    c. In the event that the respondents are seeking a deposit order in respect of all or any aspect of the claimant's claims (assuming they are allowed in following amendment) then to deal with that application.

3. This course of action was set down because it had become clear to Judge McFatridge during the course of the conference call that the claimant had included in his agenda for that case management preliminary hearing a substantial number of additional issues, some of which he understood to be additional factual specification of claims and others, such as the issue of blacklisting, which appeared to relate to new and additional claims. It was apparent too to Judge McFatridge that some of the claims which the claimant sought to raise were claims in respect of which the Tribunal did not have jurisdiction to determine. It became clear that in order to pursue any or all of these further claims he would require to amend his claim. The respondents had indicated that they would oppose any application to amend. It was agreed that

the claimant should produce a single document setting out all of the claims and the facts and incidents upon which he seeks to rely.

4. At the outset of this hearing, Ms Skeoch said that she thought that it would be a more efficient use of the Tribunal's time and in line with the overriding objective if consideration was given first to the question only of the amendments, rather than having arguments on strike out and a deposit order on issues that may not ultimately form part of the claimant's claim. I agreed that this was a sensible course of action, and indeed that it was in the claimant's best interests too, since it meant that he required only to focus on his proposed amendment at this preliminary hearing.

5. Consequently, at this preliminary hearing, consideration was given only to the claimant's application to amend his claim, with the other issues, namely strike out and deposit order, if appropriate, to be considered once a determination had been made regarding the acceptance or otherwise of the claimant's application.

Amendment application

6. The focus of the discussion therefore was on the amendments to the claimant's written case, as set out in the ET1 and in particular in paragraph 8.2 which formed the extent of the original pleadings (that is his written case). This was the starting point for consideration. Consideration was given to whether and to what extent the claim could be amended on the basis of an amendment document which Mr Miller had prepared, setting out his claims as succinctly as he felt able as requested by Employment Judge McFatridge. That document consists of 27 pages, including a summary of the legal basis of his claims on pages 1/27 to 6/27, and a table setting out in more detail the dates and summary of events upon which he seeks to rely. In this note, that document is referred to as the "amendment application". I explained to Mr Miller that the agenda for the case management preliminary hearing which he had completed for the case conference call (a document which ran to 45 pages) did not form part of his written case. This was because the amendment application replaced that document (as requested by Employment Judge McFatridge).

7. The respondent set out the reasons for opposing the claimant's amendment application in a letter dated 3 March 2017. In that letter, the respondent identified 10 claims which it was understood that the claimant now sought to make. Following discussion with Mr Miller, it was agreed that this accurately set out the claims which he was seeking to make, and during the discussion we focussed on the claims set out on page 2 of that document, numbered claims 1 to 10. It was agreed however that we would cross refer to his amendment application to check that all the points he was raising had been covered.

8. Although the claimant had ticked the box on the ET1 in respect of disability discrimination, Ms Skeoch noted, and Mr Miller agreed, that he was no longer pursuing a claim of disability discrimination. Consequently, he agreed to withdraw that claim, and therefore that claim is dismissed (there being no reason identified why it should not be).

9. With regard to the jurisdiction issue raised initially by the respondent, the claim has been recorded as an ordinary unfair dismissal claim and Ms Skeoch submitted that should be dismissed. Following discussion Mr Miller accepted that since he did not have two years' service, he did not have an ordinary dismissal claim, on the basis that he was able to pursue the automatically unfair claims. In the circumstances, he agreed to withdraw that claim, and therefore that claim is also dismissed (there being no reason identified why it should not be).

The relevant legal tests

10. The focus of the deliberations in this case then is whether or not the claimant's application to amend his claim should be granted. The question whether or not to grant an application to amend is a matter of judicial discretion. When determining that question, account requires to be taken of the guidance set out by the EAT in **Selkent Bus Co Ltd v Moore** 1996 IRLR 661. In that case, the EAT stated that "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" (the so-called "balance of hardship" approach).

11. In making that assessment, the EAT stated that the relevant circumstances include (although are not limited to):

    a. *the nature of the amendment*. It is necessary to draw a distinction between (1) amendments which are simply intended to alter the basis of an existing claim, (2) those which add a new type of claim arising out of the facts already plead (re-labelling) and (3) amendments which add a wholly new type of claim which does not relate to the facts set out in the original claim at all.
    b. *The applicability of time limits*. If the amendments add a wholly new type of claim, it is necessary to determine whether or not any new claim is out of time, and if so whether the time limit should be extended under the relevant statutory provisions. This however is only a factor to take into account and is not determinative.
    c. *The timing and manner of the application*. Otherwise, there are no time limits laid down in the rules for the making of amendments. The mere fact that there has been a delay in making any amendments does not mean that an application should be refused. Rather it is a factor to be taken into account, considering why the application was not made earlier and why it is now being made. Questions of delay, as a result of adjournments, and additional costs are relevant in reaching a decision.

Claims 1 and 2 (protected disclosures)

12. Turning to deal with Claim 1, that is that the claimant has been subject to a detriment due to an alleged protected disclosure (under section 47B of the Employment Rights Act 1996 (ERA)). This claim is linked with Claim 2, that the claimant was automatically unfairly dismissed on the grounds that he made an alleged protected disclosure (in terms of section 103A ERA).

13. In the first instance I considered the type of amendment being sought, that it is whether it fell within category 1, 2 or 3 set out above.

14. After some discussion, the claimant confirmed that in essence his protected disclosure claim related to the fact that he had told the respondent that he was blacklisted. The claimant said that this is the essence of his entire claim and

that the issue of sexual orientation is secondary. Mr Miller said that one of the reasons he was dismissed was because he kept on raising the issue of being blacklisted by other employers. He said that the detriment amounted to "dirty tricks" along the way. As a result of this he has not got or lost out on jobs and that is why he is not in employment.

15. Thus the claimant believes that he was dismissed (and suffered detriment) because he repeatedly raised concerns about being blacklisted by other employers. In the hearing, he stated that this is an allegation either that a criminal offence has been committed or that there has been a failure to comply with any legal obligations (which would fall into category s43B(1)(a) or (b)). He says that he believes that this is included in his ET1, at 8.2, where he states (in line 1) that a former employer contacted the respondent and informed them that he was a troublemaker. His point here is that in stating that he was a "troublemaker", he is saying that he was blacklisted (although he did not use that term).

16. Further and in any event, he has fleshed out this claim in his amendment application. For example he states, on page 25/27, that on or around 3 to 7 August 2015, he made his first protected disclosure to HR officer, Heather Fleming; specifically "I told her that there had been an issue with a former employer regarding me raising a concern about insinuations about my sexuality". He says that he repeated this to Heather Fleming on 27 January 2016, set out at page 8/27, and that he repeatedly raised concerns that the respondent's employees were pursuing this issue.

17. In response, Ms Skeoch does not accept that a whistleblowing claim has been set out at all in s8.2. She submits that this is a new cause of action.

18. Further, the details provided by the claimant in the amendment application lack the necessary specification to establish such claims. During the case management preliminary hearing on 20 January 2017, Employment Judge McFatridge stated that the claimant should "set out in clear terms exactly where, when and to whom each qualifying disclosure was made", and instructed the claimant to establish which of the sub-categories of sections 43B-43H of the ERA he believed his disclosures related to. It is the respondent's

position that the claimant has failed to do so and that the application (as it relates to claims 1 and 2) does not provide sufficient specification to provide the respondent with fair notice of the complaints now advanced and the issues which will need to be determined as a result. She submitted that the pleadings are simply a narration or statements of events, rather than setting out what happened and when, and the reason why he believes he was treated that way.

19. Further, Ms Skeoch submitted that it is not clear from the amendment what complaint the claimant is asserting. There is a manifest lack of precision in relation to the fundamentals of the claim, and she cannot be at all certain of the basis of the claims or the facts upon which the claimant relies. Although he states that he believes that he was dismissed because of making a protected disclosure, that is not mentioned in the ET1 or clear from the amendment application, where there are a large number of events and individuals and dates which are not mentioned at all in the ET1. While he now states that he is also claiming he has suffered a detriment, it is not clear from the amendment application what those detriments are alleged to be. Given that the question of the time limit is different depending on the date of the specific detriment, the lack of clarity regarding what the detriments are will make it difficult for her to know the date from which time starts to run.

20. In support of her submission that the protected disclosure claim is a new cause of action which has no basis, foundation or causative link with the ET1, she relied on the judgment of the Court of Appeal in **Abercrombie and others v AGA Rangemaster Ltd** 2013 IRLR 953, in which the Court of Appeal indicated that in considering applications to amend that arguably raise new causes of action, Tribunals should 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 the legal issues raised by the new claim and the old, the less likely it is that it will be permitted".

21. She also relies on **Ali v Office of National Statistics** [2005] IRLR 201 and **Redhead v London Borough of Hounslow** UKEAT/0086/13/LA, which make it clear that the pleadings must contain more than general observations. Although there does not have to be a reference to "whistleblowing", there is

nothing in the ET1 which leads to the conclusion that he is relying on a protected disclosure or that he believed that he suffered a detriment on account of that; or that dismissal was due to a protected disclosure.

22. Ms Skeoch also relied on the decision in **Housing Corporation v Bryant** 1999 ICR 123, CA and **Foxton Ltd v Ruwiel** UKEAT/0056/08. Even if it is a relabelling, there needs to be a causal link between the unlawful act and the alleged reason; it is not enough to say that this is the claim and to bolt it on. Here there is no reference in the ET1 even of general unfair dismissal. The respondent included reference to that in their response because he had ticked the box for unfair dismissal; but in any event highlighted the preliminary issue of jurisdiction.

23. In response, Mr Miller said that he did not know that he had to use "buzz words"; he had kept it brief; he was clear that he had raised these issues and they were not investigated. He said that the detriments were set out there, for example he mentions the mental health issues, he mentioned behaviours designed to discredit and isolate him, and he mentions the fact that he was signed off. He states that these are clearly detriments. Although he did not use the right words, he reported these issues, made it known that he was not treated well and said that it was because of his complaints about blacklisting.

24. Taking into account what was stated in the ET1 overall, I conclude that the claimant is seeking to introduce an entirely new claim through amendment. I did not expect the claimant, who has not had the benefit of legal advice, to have used the correct labels or "buzzwords" as he put it, or indeed necessarily to label the facts as "detriments", or to have specified which legal provisions he was relying on. However, I would have expected the claimant to have set out in the narrative the relevant facts upon which he could rely to establish his claim that he had been dismissed or suffered a detriment as a result of having made a protected disclosure. However, nothing in the narrative set out at 8.2 indicated that the claimant intended at that point to pursue such a claim. Although he alleged that "a former employer contacted SSE and informed them that I was a trouble maker", not only did he not say that this related to the fact that he had made a protected disclosure, or resulted in him making a protected disclosure, but he went on to say that this was "due to a perception that I am a

homosexual". In his ET1 he focuses on the fact that he can prove that this happened, but that the respondent denied that any complaints had been made about him. He states that he was "routinely subjected to behaviours which were designed to discredit and isolate me from personnel", but he does not specify what those behaviours were, or that they related to him having made a protected disclosure, or specify what detriment he had suffered, except by implication. Otherwise, he explains that the treatment resulted in him being signed off with depression, and concerns he had about being required to attend a medical.

25. Although Ms Skeoch argued that the amendment application did not provide the necessary specification to establish such claims, I did not accept her submission in that regard. Although his claims could have been better and more clearly expressed, bearing in mind that the claimant did not have the benefit of legal advice, I considered that the amendment application did contain sufficient specification to make it sufficiently clear that he was pursuing a claim that he was dismissed and/or suffered a detriment as a result of making a protected disclosure. The question whether the claimant could establish that by leading evidence at any future tribunal is another matter, but I could not say that the pleadings, as set out in the amendment document, were not sufficient to set out a prima facie claim in this respect. The question of whether this claim had no prospects, or little prospects, of success is another matter, which it has been decided would not be considered at this preliminary hearing.

26. I next turned to the issue of time limits in respect of this claim. Ms Skeoch argued that these claims were out of time. With regard to the date from which time was to run in respect of the amendments, it was agreed that the date of dismissal (effective date of termination, EDT) was 29 August 2016. The claimant notified ACAS of his claim on 25 October 2016, and therefore the three month time limit was suspended from that point (ie day A, 26 October 2016) up to and including the day the early conciliation certificate was issued (ie day B, 17 November). That meant that 23 days had to be added to the original time limit, which was 28 November 2017, so that the time limit as a result of the early conciliation was extended to 21 December 2016.

27. The claimant lodged his ET1 on 21 November 2017 (ie well within the time limit in respect of the EDT). However, in respect of the amendment application, although it was dated 5 February 2017, Mr Miller accepted that it had been lodged on 12 February 2017.

28. While the claimant argues that he was dismissed because he made a protected disclosure (and so that he would have required to have lodged his claim by 21 December to be in time), a difficulty in this case, caused, Ms Skeoch argues, by the claimant's lack of specification in respect of the detriments which he states that he has suffered, is that the time limit will run from the date of each detriment. However, there is no clear statement as to the alleged detriment caused. Although the claimant's amendment is relatively specific in respect of dates, I accept that it is less clear in respect of which actions he would label as "detriments".

29. However, using the date of dismissal (29 August 2016) as the last possible date of any alleged detriment, it is clear in any event that claim 1 and claim 2 have been brought outwith the applicable statutory time limits, even allowing for the EC extension.

30. I accepted Ms Skeoch's submission that in respect of the question whether this claim was time barred, this falls to be determined by reference to the date when the application to amend is made, not by reference to the date at which the original claim form was presented. Accordingly, in respect of any new claims which he was seeking to add, the amendment application had been lodged some 9 weeks after the date of dismissal, and therefore out of time.

31. The next question to ask is whether or not the time limit should be extended, the test being whether or not it was reasonably practicable to have completed the claims in time.

32. Ms Skeoch argued that it was feasible and practicable to submit the ET1 in time and so that undermines any argument he may have that it was not reasonably practicable to include the other substantive claims. There is no reference to new facts which have emerged or he has become aware of since. This is not a case where he is arguing ignorance of his rights. There was nothing in the

amendment application which would serve as an explanation for the delay, and no physical impediment to lodging the claim, and therefore it had to be concluded that it was reasonably practicable to have lodged the claim in time.

33. Mr Miller said that as far as he was concerned there was no delay in him submitting his claim. The forms had been provided by the tribunal and he had completed them. There was no option for him to complete a box relating to blacklisting. He filled out the agenda for the case conference call, and he submitted it on the date that he was asked to submit it. He had handed it in at the end of December. It was clear from the form that it could be filled out differently for those who did not have legal representation.

34. I accepted Ms Skeoch's argument that it could not be said that it had not been reasonably practicable for the claimant to have lodged the protected disclosure claim in time. He had been able to lodge an ET1, he had set out the facts there, and subsequently in his amendment application, but the facts upon which he seeks to rely are the same facts which were known to him at the time of lodging his original claim. No new information or facts have come to light since which might explain why he now sought to categorise his complaint as one of having made a protected disclosure, if he believes that is the reason.

35. I conclude that this is a new cause of action, that the claim is time barred, that it could not be said that it was not reasonably practicable to have lodged the claim on time. I was aware however that this was only one factor to be taken into account in relation to whether the amendment should be allowed, albeit an important factor, given the particular circumstances of this case (that is that the claimant had lodged a claim in time, but made no mention of a protected disclosure).

36. With regard to the timing and manner of the application, Ms Skeoch highlighted the additional costs and delay that would result if the amendment was permitted. Stepping back to consider the extent to which the parameters of this claim would extend, she submitted that to permit the amendments which Mr Miller seeks would be to extend the factual and legal scope of the claim significantly. The facts, witnesses and legal issues are relevant to that question.

From a relatively contained ET1, this would extend to a scenario involving a number of individuals.

37. With regard to other circumstances, I agreed that the legal and factual claim which the claimant now seeks to make varies significantly from the original claim. In particular, I take account of the fact that the claimant's original claim is a claim which relates to discrimination because of sexual orientation, and the claimant will be entitled to pursue his claim in that regard (as discussed below).

38. Taking all of the circumstances into account, and balancing injustice and hardship of allowing the amendment against refusing it, I concluded that the amendment should not be allowed in this respect.

Claim 3 (failure to provide suitable companion)

39. Claim 3 relates to a complaint by the claimant that the respondent allegedly breached the duty to allow the claimant to be accompanied at a disciplinary hearing by a companion of his choice in terms of regulation 10 of the Employment Relations Act 1999.

40. This claim is not included or identified in the ET1 as a standalone claim. However, the claimant can rely on the facts set out there, which refers to "a meeting between myself and HR (at very short notice, and with no opportunity to obtain adequate representation)". In such a case, time bar arguments relate to the date of the original application. It is clear therefore that this claim has been lodged in time. Indeed I understood this to have been conceded by the respondent.

41. I accept that this claim is set out in the ET1 and is not out of time, and I accept that the amendment application contains further specification of that claim. It seemed to me however that the other arguments made by Ms Skeoch related to the question of the prospects of success, and in particular, the question whether the meeting on 29 August 2016 was not in any event a "disciplinary meeting" within the meaning of the Employment Relations Act, and because the claimant was accompanied by Lesley Edwards. Mr Miller stated that he believed any meeting at which his employment was to be terminated was a

disciplinary meeting. Although he accepted that he was accompanied by Lesley Edwards, his complaint appears to be that she was there for moral support only and that he should have been given the opportunity to get a union representative of his choice. I gave no further consideration to these issues because the question of the prospects of success is a matter which would be determined at any future hearing on strike out and/or deposit orders.

42. Mr Miller has however also included in his amendment application, as he confirmed at the hearing, a complaint about the fact that while he went to the appeal with his TU representative, there was an attempt to remove the TU representative because the respondent said that he was not allowed to have the one of his choice. He referred in particular to page 10/27 of his amendment application and the entry dated 26 September 2016 that "respondents made attempts to remove my trade union representative as they were not used to dealing with him".

43. Ms Skeoch categorised this as an additional claim, for which there were no pleadings in the original ET1. She states that this is therefore a new claim, and that it is time barred.

44. However, I did not understand Mr Miller to be arguing that the respondent's attempts to remove the trade union representative or his choice were successful, and therefore I do not categorise these as pleadings which support any additional claim under the Employment Relations Act.

Claims 4 and 5 (blacklisting complaints)

45. Claim 4 relates to the claimant's complaint of employment blacklisting under regulation 3 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 (the Blacklisting Regulations). The claimant also claims that his dismissal was automatically unfair because it related to employment blacklisting, in terms of section 104F of ERA (claim 5).

46. There is clearly a link between the blacklisting complaints and the protected disclosure complaint, because Mr Miller has stated that the protected disclosure was that he raised the issue of blacklisting (which he states is a criminal

offence or otherwise breach of a legal obligation in terms of section 43B(1)(a) and/or (b)), whereas the blacklisting complaint relates directly to the Blacklisting Regulations.

47. Mr Miller says that he had raised these in the ET1, specifically by reference to the fact that he was a trouble maker. As I understood Mr Miller's argument, the reference to him being a troublemaker, is a reference to him being blacklisted.

48. Regulation 3 is headed up "general prohibition" and states that at regulation 3(1) that "no person shall compile, use, sell or supply a prohibited list". A prohibited list is defined in regulation 3(2) is a list which:

> "(a) contains details of persons who are or have been members of trade unions or persons who are taking part or have taken part in the activities of trade unions; ***and***
>
> (b) is complied with a view to being used by employers or employment agencies for the purposes of discrimination in relation to recruitment or in relation to the treatment of workers".

49. Mr Miller said that he was relying on regulation 3(2)(b). Initially, he said that he was relying on (b) only, and not (a). I pointed out to him that the provisions require that he can fulfil the conditions of (a) as well. Once this was pointed out to him, he went on to say that he was a member of a trade union (Unite) and they represented him at the appeal hearing (and that the respondent knew that). He then said that he was (after all) relying on this provision because he was a member of a trade union; and that he had previously (with former employers) made complaints about health and safety concerns and about those insinuating about his sexual orientation.

50. Mr Miller conceded that he had not specified that his complaint relates to trade union activity because he did not realise that he had to specify that. He said however that it was clear from the application process that he was a member of a trade union.

51. With regard to the reference to 3(2)(b), and its reference to discrimination, he said that he had been dismissed because he was on a blacklist and that he had suffered a detriment because he was on a blacklist, and he considers this to be

discrimination. The detriments which he states that he has suffered are the same as the detriments which he had previously alluded to earlier in the hearing, and which he states are set out in his ET1 and in the amendment application, namely that he was targeted by colleagues, and that he was forced to go on sick leave, and ultimately that he was dismissed.

52. In response, Ms Skeoch stated that with regard to regulation 3, this is a general prohibition and that the ET has no jurisdiction to hear claims in relation to its breach. I accepted Ms Skeoch's submission in that respect, and therefore I accepted that the Tribunal does not have jurisdiction to hear claim 4 as it has been articulated here.

53. However, Mr Miller said that he was relying on regulation 9, and therefore claim 4 ought properly to be articulated as a claim relating to regulation 9, not regulation 3.

54. Regulation 9 states that:

> "(1) A person (P) has a right of complaint to an employment tribunal against P's employer (D) if D, by any act or any deliberate failure to act, subjects P to a detriment for a reason which relates to a prohibited list, and either –
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> (a) D contravenes regulation 3 in relation to that list, or
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> (b) D –
>
> (i) relies on information supplied by a person who contravenes that regulation in relation to that list, and
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> (ii) knows or ought reasonably to know that information relied on is supplied in contravention of that regulation.
>
> (2) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that D contravened regulation 3 or relied on information supplied in contravention of that regulation, the tribunal must find that such a contravention or reliance on information occurred unless D shows that it did not.
>
> (3) This regulation does not apply where the detriment in question amounts to the dismissal of an employee within the meaning of Part 10 of the Employment Rights Act 1996."

55. With regard to his dismissal however, Mr Miller stated that he was also claiming automatically unfair dismissal under section 104F, for which he, rightly, stated that he did not require qualifying service. That provision states that:

> "(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal relates to a prohibited list, and either –
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> (a) the employer contravenes regulation 3 of the 2010 Regulations in relation to that prohibited list, or
>
> (b) the employer –
>
> (i) relies on information supplied by a person who contravenes that regulation in relation to that list, and
>
> (ii) knows or ought reasonably to know that the information relied on is supplied in contravention of that regulation.
>
> (2) If there are facts from which the tribunal could conclude, in the absence of any other explanation, that the employer –
>
> (a) contravened regulation 3 of the 2010 Regulations or
>
> (b) relied on information supplied in contravention of that regulation,
>
> the tribunal must find that such a contravention or reliance on information occurred, unless the employer shows that it did not".

56. While I accepted Ms Skeoch's submission that Mr Miller could not pursue a stand-alone claim under regulation 3, clearly, in principle, he can pursue a claim under regulation 9, that he has suffered a detriment, or he can claim under section 104F, that he has been automatically unfairly dismissed.

57. In regard to either however, Mr Miller will require to establish the existence of a prohibited list as defined by Regulation 3. While in this regard the burden of proof will shift once a prima facie case is established by the claimant, still the claimant will require to establish facts to raise the inference that he has been treated in this way because of a matter which related to a prohibited list. It is for that reason that he has referred the matter to the Information Commissioner. He said that the information commissioner was investigating his complaint, and therefore there must be some substance to it. He said that it was a complex investigation because it had been going on for 7 years. Mr Miller said that he

would not be able to prove this until the information commissioner had completed the investigation, and it was for that reason that he had requested, on several occasions, a sist of these proceedings.

58. While in principle the claimant could pursue a claim that he had suffered detriment or been unfairly dismissed for a reason which relates to a prohibited list, the question which first requires to be considered is whether or not there are any pleadings in the original claim to support such a claim.

59. Ms Skeoch argued that there was no claim or causative link in the ET for the claim of blacklisting in relation to the claim for detriment or dismissal. There is no reference to blacklisting as such. The relevant case law requires a "factual substratum" in the ET1 in order to suggest a "relabelling". In **Housing Corporation v Bryant** and **Foxton**, the absence of a causative link is "fatal".

60. Ms Skeoch argued in any event that any claim was lodged out of time, and that it was not just and equitable in terms of s111(5) to extend time. She argued that the claimant seeks to extend the factual and legal scope of his claim significantly, and that any such amendment would involve significant costs and delay.

61. Ms Skeoch also urged the Tribunal to take account of the claimant's "remarkable change of position" in relation to the blacklisting claim. She submitted that the Tribunal should take account of the fact that the claimant made a clear submission in this hearing that he was not relying on that part (a). It was only when he was advised that it is a requirement that the claim is contingent on a trade union list that he sought to assert that this forms the basis of his complaint.

62. Mr Miller said that he accepted that he had not made reference to this in any of his written case, but he confirmed that he is a trade union member, and that the respondent was aware of that.

63. As stated above, in relation to the protected disclosure claim, which is in itself linked to the blacklisting complaint, there are no pleadings in the original claim, (beyond a general reference to being a trouble maker), which indicate or even

imply that the claimant seeks to argue that he has suffered a detriment or been dismissed for a reason which relates to a prohibited list or to blacklisting.

64. I therefore concluded that no such claim had been made, and any request to amend the claim to include such a complaint must be categorised as an entirely new cause of action.

65. However, I thought that it was particularly significant that Mr Miller had conceded that he had made no reference to trade union activities in his ET1 or indeed in his amendment application because he did not realise that he required to. I thought that it was significant then that there are clearly no pleadings at all to support this legal argument, either in the ET1 or in the amendment application, since there is no reference at all to trade union activities, and no suggestion that the reason he was "blacklisted" related in any way to trade union activities.

66. Nowhere in the ET1 or indeed in the amendment application is there any reference to the claimant being concerned that his treatment related to the fact that he was a trade union member or because he has taken part in trade union activities. As I understood the claimant's complaint, he believed that he had been less favourably treated because he was believed to be a "troublemaker" by his previous employer, and that he had been branded a "troublemaker" because he had made complaints about a colleague whom he accused of saying that he was gay. No mention whatsoever is made of the fact that this related to trade union activities. This suggests that this was not a reason which was in any way in Mr Miller's contemplation when he was drafting either the ET1 or the amendment application.

67. He mentions only that he had a trade union representative in the appeal. I considered that it was not sufficient for him to assert, in the tribunal, that he was a trade union member and that the respondent knew that he was a trade union member. That is not in any way sufficient to link the treatment which he complains about to the reason for that treatment being that he was a trade union member or had undertaken trade union activities, far less that he was treated that way because he was on a prohibited list. I considered therefore that the written case which the claimant has made, both in relation to the ET1

and the amendment application, that he is not seeking to prove facts which could establish that the reason for his treatment was related to a prohibited list. Even if could prove all that he seeks to prove in his written case, than would not amount to a contravention of the Blacklisting Regulations or related provisions.

68. Taking account of all of these factors, I considered that it was not appropriate in all the circumstances of this case to allow the claimant to pursue a claim under these legal provisions, specifically when his written case, even in the proposed amendment, does not include pleadings to support such a claim.

Claims 6, 7, 8 and 9 (under the Equality Act)

69. The claimant also makes a claim under section 13 of the Equality Act of direct sexual orientation discrimination (claim 6); of indirect sexual orientation discrimination in terms of section 19 of the Equality Act (claim 7); of harassment related to sexual orientation under section 26 of the Equality Act (claim 8) and of victimisation because of a protected act under section 27 of the Equality Act (claim 9). Mr Miller explained that these claims were related to rumours about his sexual orientation which resulted in him working in an intimidating environment.

70. Ms Skeoch submitted that there was no valid claim of discrimination in the ET1. Considering the totality of the ET1, short of the reference to homosexuality and the ticking of the box, there was nothing apart from that upon which to base his claims. Although he did not have to specify whether discrimination was direct or indirect, there had to be a factual substratum to support these legal claims. With regard to the dismissal, there is nothing in the ET1 which states or even suggests that “I was dismissed because of sexual orientation”. A simple reference to sexual orientation is not sufficient, and here there is no reference to unfair or unlawful treatment in the ET1 or in the amendment.

71. When asked for clarification, Mr Miller stated that he does not assert he was dismissed because of his perceived sexual orientation; his position is that he was dismissed because of being blacklisted. He had however raised the issue of sexual orientation with HR, and made what he thought were formal complaints. His complaint was that he was being subjected to rumours and

innuendo relating to sexual orientation. He was discriminated against for reasons related to sexual orientation because his colleagues had been told that he had made complaints about this to previous employers. This resulted in him having to work in a hostile and intimidating environment and ultimately going off sick. He said that he was making a complaint of harassment on the basis of the same information (that is the detriments or less favourable treatment).

72. Mr Miller agreed then that he believed that he had been less favourably treated because of sexual orientation, that is that he believed he had been directly discriminated against. He said that he was making a complaint of harassment on the basis of the same information (that is the detriments or less favourable treatment).

73. However, on the question of which facts he was relying on to base his claim of indirect discrimination, he said that this was related to the indirect rumours and gossip. Following discussion, he agreed that he was not aware of the legal provisions which are required to establish indirect discrimination, and accepted that he had not referred to facts which could support an indirect discrimination claim. With regard to the victimisation claim, he said that it was because of the way that he was treated when he went on site, and that these were actions which were designed to force him to leave. He said that he was not aware of what a “protected act” was and agreed that he had no facts to support a claim of victimisation either.

74. Mr Miller therefore confirmed that he is not pursuing a claim of indirect discrimination or of victimisation. The focus of his claims therefore was on the direct and harassment claims.

75. I did not accept Ms Skeoch’s submission that there were no facts in the ET1 which could support a claim of discrimination related to sexual orientation. Bearing in mind the fact that the claimant is not legally represented, I noted in part 8.2 that the claimant had made reference to complaints about a perception that he was homosexual. He went on to state that he was then “routinely subjected to behaviours which were designed to discredit and isolate me from personnel” and “I have kept a diary of all events demonstrating the discriminatory treatment”. The claim was registered as one relating to sexual

orientation. I concluded that these facts were sufficient to set out a prima facie case of discrimination relating to sexual orientation. Indeed, as I read the ET1, the claimant's argument is that he was identified as a troublemaker and that related to having made complaints about colleagues innuendo regarding his sexual orientation. The claimant also makes numerous references in his amendment application to treatment by various colleagues relating to assertions or innuendo that he was gay, and to the treatment he considered he suffered as a result. For example, at 10/27 he states that (during the appeal) "explanation was provided that the blacklisting was occurring due to me raising an issue with respect to another employee insinuating I was homosexual during my time with Petrofac". While he now uses the term "blacklisting", given that he did not realise that blacklisting related specifically to trade union activities, I understood him to suggest that he had been "marked out", "targeted" or "victimised" (in the ordinary use of the term) for reasons related to sexual orientation (generally).

76. I did not therefore accept that this was a new cause of action being raised by amendment. Rather, I categorise the amendments sought as type 1 amendments, that is amendments which seek to alter a claim already plead, or specifically to provide further specification of the claim.

77. Notwithstanding references in the appeal to the claimant's perceived sexual orientation, given confirmation that Mr Miller is not arguing that he was dismissed because of his sexual orientation, but rather that he had suffered detriments, as Ms Skeoch pointed out, this raises the issue of time bar. Mr Miller stated that the last act of discrimination was 12-14 April 2016, and that was referred to at page 14/27. Although this was not a new cause of action, given that Mr Miller accepted that his dismissal was not related to his sexual orientation, time would run from the date of the last act of discrimination. Given that he has stated this to be 12-14 April, and the ET1 was not lodged until 21 November, Ms Skeoch argued that this claim was time barred.

78. I was conscious that I was not considering the question whether or not the claim was time-barred, or whether there were little or no reasonable prospects of success to justify strike out or a deposit order. In this case, I am only considering whether an amendment should be allowed. As discussed above, I

categorise the amendment as simply giving further specification of a claim already raised in the original claim. In such circumstances, the issue of time limits as such is not relevant to whether or not I accept the amendment.

79. Consequently, at this stage at least, the question of time limits is not relevant to the question whether the amendment should be accepted. It may be that the respondent will seek to argue that these claims are time barred, it may be that Mr Miller will seek to argue that any discrimination is a continuing act, or that there should be a just and equitable extension of time. Given the parameters of this hearing however, these are not relevant questions to determine at this stage.

80. In this case, the amendment application is made at the very early stages of proceedings, and indeed in response to a request from Employment Judge McFatridge to set out the specific dates and events upon which he relies. Having regard to the balance of prejudice and injustice, and the timing and manner of the amendment application, the amendments in so far as they support, and are relevant to, the claimant's claim under the Equality Act are allowed.

Claim 10 (human rights)

81. Mr Miller makes various complaints in his amendment application which relate to breaches of the Human Rights Act. Following discussion, Mr Miller accepted that he could not make a free-standing human rights claim in the Employment Tribunal. It was agreed that human rights issues may be relevant, but only to the extent that the legislation which he relies on, namely claims under the Employment Rights Act, Employment Relations Act and the Equality Act, must be read in line with the requirements of the HRA.

The claimant's application: outstanding claims

82. Having discussed each of the claims which were identified by the respondent (and numbered 1 – 10), consideration was given to the claimant's amendment application and in particular the claims which he had said that he was relying on and which he had summarised at pages 2/27 to 5/27.

83. During the course of discussion, Mr Miller accepted that he was not alleging any post employment discrimination because of sexual orientation. He therefore accepted that he had no valid claim under the provisions of s108 of the Equality Act.

84. Mr Miller advised however that he was alleging post employment discrimination in relation to the blacklisting. He stated that he was making a claim in relation to a continuing act in relation to the blacklisting. He said that he had made over 800 job applications and that the respondent had continued to actively participate in contacting new employers. In particular, he alleged that Donald Mackenzie had been contacting his new employers within hours of him arriving (although he did not know how Mr Mackenzie was managing to track them). Mr Miller said that he had referred to this in his amendment application, and there is a reference to that eg at page 7/27.

85. Ms Skeoch said that with regard to the allegations of ongoing blacklisting, as far as she understood there was no provision for post-termination detriment upon which Mr Miller could rely against the respondent. Mr Miller thought that there was but could not refer to any provisions of the legislation to support that. I have concluded that, unlike the provisions of the Equality Act, and in particular section 108, which do refer to post-employment discrimination where the discrimination arises out of and is closely connected with a previous employment relationship, there are no provisions in the Blacklisting Regulations or other provisions which would allow the claimant to pursue such a claim.

86. Finally, Mr Miller also said he was alleging a breach of section 23 of the Employment Relations Act 1999 regarding the collective agreement which had been entered into by the respondent and the union. He alleged that terms and conditions agreed thereby had become incorporated into his contract of employment, and specifically that it had been agreed that the respondent would follow the agreed disciplinary procedure before dismissing him, and so given the respondent's failure, they were in breach of contract. Following discussion and reference to the case management note drafted by Employment Judge McFatridge, he accepted that he was not making a separate or additional claim in respect of this (which would have been breach of contract claim).

87. Mr Miller confirmed that the discussion had captured all of the claims which he intended to make. Ms Skeoch had understood that Mr Miller had stated at some point that he was pursuing a claim in relation to asserting a statutory right. However, Mr Miller confirmed that he was not pursuing such a claim.

Next steps

88. Ms Skeoch raised a number of concerns which related to next steps in the event that any or all of the claimant's amendments were accepted. She asked me to take these factors into account when considering the amendment application overall and the balance of hardship test. In particular, she argued that any amendment would involve a widening of the parameters of this claim, both in factual and legal scope, and this would involve the respondent in considerable additional enquiries and the requirement to call additional witnesses. It is likely to result in delay in procedures: the respondent may require to amend in light of any amendments permitted, and the respondent may still require further particularisation of the claims. Given the lack of clarity in respect of what the less favourable treatment actually is, there may well be a subsequent application for strike out and/or a deposit order in relation to all or any of the additional claims. She also highlighted the additional costs and delay that would result if the amendment was permitted. The facts, witnesses and legal issues are relevant to that question. From a relatively contained ET1, this would extend to a scenario involving a large number of additional legal and factual claims as well as additional individuals. Having regard to the totality of the amendment and its scope, there is much more prejudice to the respondent which will have to embark on setting out its defence to all the new claims, which will involve considerable time and costs.

89. In coming to my conclusion regarding the amendments, and in undertaking the balance of hardship assessment, I have taken all of these factors into account in respect of each issue which was raised. I have refused to allow the claimant to pursue claims in respect of the protected disclosure and blacklisting, and therefore the scope of the claim has not significantly expanded as a result of allowing the amendments.

90. I considered however that Ms Skeoch made a very important point when she expressed concern about the lack of precision in respect of the amendments sought. I agreed with her that it is important to ensure that the proposed amendments are properly particularised, and that it is clear which amendments have been allowed and which have not.

91. I was however also conscious that the claimant is not legally represented, and I did not consider it appropriate to ask him to prepare further pleadings on the basis of this decision regarding his amendment application.

92. Bearing that in mind, I accept that the claimant's claim is amended to include the narrative contained in the left hand side boxes set out from first the box headed up 26 September 2016 on page 10/27 to the end (page 27/27). Although I do appreciate that those pleadings do make reference to "protected disclosures" and "blacklisting", for the avoidance of doubt, I have not accepted, for the reasons set out above, that those pleadings support legal claims relating to protected disclosures and blacklisting.

93. With regard then to next steps, it is for the respondent now to consider whether they wish to re-new the previous application made for strike out and/or deposit orders on the basis that some or all of the remaining claims have little or no prospects of success. The respondent should now indicate to the tribunal, within 14 days, whether they intend to renew these applications, or make proposals for alternative procedure.

94. In summary therefore the following claims are either withdrawn, refused or dismissed:

    a. The claim of disability discrimination under the Equality Act 2010;
    b. Claims relating to "ordinary" unfair dismissal under s94 ERA;
    c. Claims under or in relation to protected disclosures, specifically
        i. Claim that the claimant has been subjected to a detriment due to a protected disclosure
        ii. Claim that the claimant has been automatically unfairly dismissed for making a protected disclosure
    d. Claims relating to "blacklisting", specifically

iii. Claim that the claimant has been subjected to a detriment for a reason related to a prohibited list;
iv. Claim that the claimant has been automatically unfairly dismissed for a reason related to a prohibited list;

e. Indirect discrimination because of sexual orientation under section 19 of the Equality Act 2010;
f. Victimisation claim under section 27 of the Equality Act 2010;

95. The claim will proceed in respect of the following claims:

a. Breach of duty to allow the claimant to be accompanied at a disciplinary hearing by a companion of his choice under section 10 of the Employment Relations Act 1999;
b. Discrimination because of sexual orientation under section 13 of the Equality Act 2010;
c. Harassment related to sexual orientation under section 26 of the Equality Act 2010.

Post-hearing correspondence

96. I was made aware that the claimant had e-mailed the tribunal after the hearing. I must make it clear that in so far as these subsequent e-mails contained additional information to add to what had been discussed at the preliminary hearing, I was not able to take that into account. In particular, I was not able to take into account anything included in the so-called “high level document” referred to in the claimant’s e-mail of 11 April 2017.

97. Further, although the claimant requested in that e-mail of 11 April that proceedings be halted until such time as the ICO has concluded their investigation, I am not able to consider that request at this stage. Once the claimant has considered the terms of this judgment, should he consider it appropriate to do so, he should renew his request to halt (or “sist”) proceedings, at which time consideration will be given to that request and to any objections from the respondent.

Employment Judge: Muriel Robison
Date of Judgment: 09 May 2017
Entered in register: 09 May 2017
and copied to parties