EMPLOYMENT TRIBUNALS

Claimant: Ms SJ Tinsley

Respondents: 1. Cutting Edge Services Limited
2. David Mook

Heard at: Manchester **On:** 28 May 2021 & 9 June (in chambers)

Before: Employment Judge Sharkett

REPRESENTATION:

Claimant: Mr Budworth of Counsel **Respondent:** Mr Green of Counsel

RESERVED JUDGMENT ON PRELIMINARY HEARING

(a) An application to amend the claim to include the additional information in respect of items (i)-(vii) and (ix) and (x) listed in this Judgment is required and the claimant is allowed to rely on this additional information in pursuing her claim.

(b) Items (viii) (ix) and (x) amount to new allegations. The application to amend the claim to include these new allegations does not succeed and permission to amend is refused.

REASONS

1. The Preliminary Hearing was listed to consider whether the further particulars provided by the claimant are further particulars of the existing claim or whether leave to amend is required. If leave to amend is required, the hearing will also consider whether leave should be given.

2. The parties were both legally represented at the Hearing and neither the claimant or the respondents were in attendance. I had been provided with a bundle of documents for the purpose of this hearing and written submission from Mr Budworth. Mr Green had provided copies of authorities relied on by the respondent and oral submissions were made by both representatives. I have had regard to all the above in reaching a decision in this matter.

3. At a Preliminary Hearing, (PH), of 14 October 2020 Employment Judge (EJ) Buchanan ordered the claimant to provide further information relating to the claims pursued before the Tribunal. At the PH (EJ), Buchanan identified the broad legal issues in the claims advanced by the claimant (in a far as are relevant for the purpose of this PH) as "Claims of detriment on the grounds of protected disclosure: s47B ERA 1996" (the 1996 Act) and "Claim of unauthorised deduction of wages: Part II of the 1996 Act" It was noted that this claim referenced outstanding salary for November 2019, bonus payments for 2018 year to be paid in November and December and holidays accrued but not taken.

4. At paragraph 4.4. of the Case Management Order (CMO) it is recorded that "The grounds of complaint do not clearly plead the claims advanced in respect of disclosure detriment or details of such claims……..." and at 4.6 "It is not possible at this stage to prepare a detailed list of the legal and factual issues arising for determination by the Tribunal". The Orders then go on to record precisely what the claimant is required to provide in respect of the protected disclosure claims. For the avoidance of doubt the relevant parts are set out below:

> *4.1 The information said to have been disclosed which forms the basis of any claimed qualifying disclosure as defined in Past IVA of the 1996 Act*
>
> *4.2 To whom and when any such information was disclosed 4.3 In what way or ways any such information falls within the provisions of paragraphs (a)-(f) of section 43B(1) of the 1996 Act ……*
>
> *4.6 The detriments said to have been suffered by the claimant on the ground that she had made such protected disclosures and in particular what detriment(s) did the claimant suffer, when did she suffer them and who was responsible for such alleged detrimental conduct and were there any witnesses and if so who, to such detrimental conduct.*

5. In providing the further information the claimant produced a schedule of allegations to which the respondent has filed a response. The respondents object to the inclusion of the alleged/expanded additional dosclosures/detriments listed on the basis that they are new claims. In

submissions Mr Green has addressed me on each of the alleged disclosures/detriments by reference to the paragraphs in the respondents' response. The additional allegations are:

Management Charges/VAT

(i) Mid-2018 meeting with the claimant, CBJ and the second respondent. (10.1)
(ii) Telephone call to the second respondent in March/April 2019 (10.2)
(iii) Telephone call to the second respondent on or around 16 July 2019 (10.3_
(iv) Email to second respondent 16 July 2019 (10.4)

MBO Structure

(v) Email to Vanessa Hamer 21 October 2019 (10.5)
(vi) Meeting Vanessa Hamer 23 October 2019 (10.6)
(vii) Meeting second respondent 24 October 2019 (10.7)

Accounts/Kitchen Business Insolvency

(viii) Meeting with Vanessa Hamer 23 October 20109 (10.8)
(ix) Letter 8 November 2019 (10.9)
(x) Letter 22 November 2019 (10.10)
(xi) Letter 29 November 2019 (10.11)
(xii) Letter 9 December 2019 (10.12)

Submissions

Respondent's submission

6. For the respondent Mr Green submits that the starting point is the fact that the claimant is not a litigant in person and has been professionally represented throughout. He explained that it was the respondent who asked for the further particularisation of the claims pleaded in the grounds of complaint. It is, he submits, clear that there are claims for automatic unfair dismissal and detriment, but that at the PH EJ Buchanan made it clear that the order to provide further information was not an opportunity for the claimant to extend her claim. Mr Green submits that the ET1 is not an opportunity to set the ball rolling but should set out the essentials of the claimant's case. Mr Green submits that at the previous PH, EJ Buchanan agreed that it would be useful if the further information provided made reference to the ET1 but that this was not done.

7. Mr Green submits that the relevant paragraph of the grounds of complaint is paragraph 32 and, it is the information contained therein which is lacking and which required further explanation. In particular the information that was

required related to meetings which took place between the claimant and the respondents in 2019, and the written correspondence of 8 November and 22 November 2019. Mr Green submits that the claimant has gone far beyond providing further details of the detriments already pleaded i.e. the disciplinary process, unlawful deduction from wages and a failure of the part of the Respondent to deal with her grievance. He submits that the information the claimant has added is not a matter of a relabelling exercise. Mr Green draws the Tribunal's attention to the additional detriments now relied on and the additional sections of s43B ERA which the claimant has also included. He accepts that these allegations do not introduce new heads of claim but do, non the less, introduce new allegations.

8. Mr Green refers to each of the disputed paragraphs of the additional information the claimant now seeks to rely on with reference to the respondent's response, and whilst he accepts that paragraphs 10.6,10.9 and 10.10 are pleaded, i.e. (vi) (ix) and (x), the remainder are not.

9. Mr Green asks the Tribunal whether it is reasonable to consider emails and telephone calls, not referred to in the original claim form but now included by the claimant, as 'meetings' relied on by the claimant in her original grounds of complaint. He submits that to allow the claimant to take the opportunistic approach to bolster her claim and introduce additional allegations will require the respondent to carry out further investigation and call upon additional witness evidence at the final hearing. He submits that the claimant already has a claim without the need to rely on additional detriments and therefore any prejudice to her is only small as opposed to the respondent who will be put to additional time and expense. The other factor to consider he submits is that inclusion of additional allegations may also result in extending the time needed to dispose of the matter at final hearing.

Claimant's Submission

10. Mr Budworth, for the claimant submits that the further particulars provided on the Order of EJ Buchanan are just that, further particulars of claims that are already pleaded. If the Tribunal finds that any of them are not, then he submits that the claimant should be allowed to amend her claim particularly as at the previous PH, the respondent accepted that further details of the protected disclosure claims were needed and the Order for further information was unqualified. He further submits that there can be no question that any alleged new claim would be out of time as a claim for whistleblowing was identified on the claim form.

11. In respect of the respondent's submission that the loss of the MBO is a new detriment, Mr Budworth submits that this is 'an unreal contention' as it is the claimant's case that the whole purpose of the allegations raised against her were a sham to prevent the MBO taking place. In response to the authorities relied on by the Respondent, Mr Budworth submits that authority is squarely against the respondent's position. Mr Budworth submits that there are no

compelling circumstances that would require the claimant to be denied the right to have an adjudication of her complaints as she wishes to articulate them and reminded the Tribunal that the paramount consideration in any application to amend a claim is the relative injustice and hardship involved in refusing or granting the amendment.

The Law

12. In the case of **Selkent Bus Company Limited -v- Moore 1996 ICR 836**, the Employment Appeal Tribunal endorsed the key principle that when exercising its discretion in an amendment application, Tribunals must have regard to all the circumstances and in particular, any injustice or hardship which would result from the amendment or refusal to make it.

13. In that case, Mr Justice Mummery outlined that a Tribunal will need to consider: -

    (i) The nature of the amendment: is it minor or substantial;

    (ii) The applicability of time limits – if a new claim is proposed by way of amendment, whether the new course of action is in time or whether time limits should be extended;

    (iii) The timing and manner of the application.

14. Guidance Note one of the Presidential Guidance on general case management, at paragraph 12 states "if the claimant seeks to bring a new claim, the Tribunal must consider whether the new claim is in time".

15. However, at paragraph 11.2 Tribunals are reminded that even if no new facts are pleaded, the Tribunal must balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

16. Before any time limit issues are considered, it is incumbent on the Tribunal to consider the nature of the proposed amendment.

17. In the case of **Abercrombie and Others -v- Aga Range Master Limited 2013 IRLR 953** the Court of Appeal determined that when considering a new allegation amendment, Tribunals should focus on:

    "not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted".

Conclusion

18. In determining this application I have first had regard to the nature of the further information that was Ordered by Employment Judge Buchanan at the PH of 14 October 2020. Mr Budworth is correct in his submission that the Order was unqualified and that it is not for this Tribunal to go behind what is directed in that Order. The claimant has brought claims that she has made protected disclosures and as a result suffered alleged detriments. The purpose of ordering the claimant to provide further information about her claims was to do just that. It required further information of the claims already pleaded and not to use the exercise as an opportunity to introduce further claims without making an appropriate application to amend her claim.

19. The claimant in her further particulars seeks to rely on a detriment which is not specifically pleaded as such in the original grounds of complaint and I will deal with this later.

20. A protected disclosure requires the disclosure of information. For the purpose of this application it is therefore necessary to identify the information that is said to have been disclosed in the original grounds of complaint. Having done this, and as a primary exercise, I have then determined whether the further particulars produced by the claimant relate to that information or are additional types of information not already relied on. If the latter it will be necessary to consider whether the application to amend should be allowed having regard to the relevant legal principles. For the avoidance of doubt, I do not accept Mr Green's submission that any application to amend should be refused on the basis that the claimant has other allegations on which she can rely. Claims that would otherwise be allowed should not be refused simply because a claimant may be pursuing other allegations in their claim. The respondent has already conceded that the information in the following are already pleaded:

    a. "(vi)" The meeting with Vanessa Hamer of 23 October 2019 in which the claimant expressed her concerns regarding
        (i) the proposed MBO and the fact that she would be purchasing the parent company instead of the first respondent.
        (ii) The potential implications for intercompany transactions before and/or after the MBO
        (iii) The fact that the MBO deal was substantially reduced subject to no external due diligence or warranties/indemnities

    b. "(ix)"Letter of 8 November 2019 to the respondent from the claimant's solicitors in which concerns were raised about the claimant's suspension and the motivation for the same given the MBO and the claimant having raised concerns about management charges.

c. "(x)"Letter of 22 November 2019 to the respondent from the claimant's solicitors raising a formal grievance about the MBO, management charges and 'other issues' not particularised in the further particulars (10.10)

21. The respondent submits that the remaining disclosures listed in the further particulars are new claims not pleaded in the original grounds of complaint. The first four relate to concerns raised about management charges/vat

(i) Mid-2018 meeting with the claimant, CBJ and the second respondent. (10.1) This meeting is not specifically referred to in the original grounds of complaint and I accept Mr Green's submission that paragraph 32 of the original grounds of complaint refer to meetings in 2019. However, it is clear that the Order for further information has not restricted the claimant to information about her claim that took place within a specific time period, as submitted by Mr Green. Mr Budworth submits that this detail has arisen as a result of the claimant being invited to further consider her complaint and provide the detail of the disclosure of information she relies on, and when this took place. I find that this information does not seek to introduce a new course of action, although it does introduce an additional act of disclosure of information. However, the information said to have been disclosed at this meeting is already relied on in the original grounds of complaint. I find that this is further detail about information already relied on and does not require an application to amend the same. If I am wrong and the allegation amounts to a new claim I would have allowed the application on the basis that the amendment is not significant; it is information that the respondent is already aware the claimant relies on as forming part of her protected disclosure and it will be for the Tribunal to determine the date upon which the information was disclosed, if at all. In the circumstances, the balance of hardship would fall more heavily on the claimant if the application was refused because she would be denied the opportunity to have her claim considered in full. The claimant is able to rely on this paragraph of the further particulars.

(ii) Telephone call from the claimant to the second respondent in March/April 2019 (10.2) It is the respondents' case that there is no reference to reliance on telephone calls in the original grounds of complaint, and management charges or VAT were not referred to until the the letter from the claimant's solicitors of 8 November 2019. The question is

whether this is merely further information of a claim already pleaded or whether an application to amend will need to be considered. Whilst the grounds of complaint do refer to meetings the claimant had in 2019, I am prepared to accept that technology now means that meetings can operate in many formats and it would be reasonable to take the reference to 'meetings' in the original grounds of complaint to encompass communications, other than in person conversations between the parties during that time. It is quite clear that meetings can take place by phone and often do. Similarly, what might be otherwise be said in person will, today, often be set out in email. I have had
regard to Mr Green's submission that the claimant has specifically relied on two written communications at paragraph 32 of the original grounds of complaint, but I find that these fall into a separate category to the emails relied on as they are formal letters, which are not routinely used for everyday communications between colleagues. For the avoidance of doubt, unless otherwise specified, telephone calls and emails will be accepted as 'meetings' for the purpose of the remainder of this application. I accept Mr Budworth's submission that the claimant was asked to provide further detail of the disclosures at the 'meetings' referred to in her original grounds of complaint and I accept that this is what she has done and the subject matter is referred to in the original grounds of complaint. For these reasons and those set out at (i) above the claimant is allowed to rely on this paragraph of her further particulars.

(iii) Telephone call from the claimant to the second respondent on or around 16 July 2019 (10.3). It is clear from the wording of the first paragraph of the email of 16 July 2019, that at the time of writing the email the claimant had not already spoken on the telephone with the second respondent that day, and that the content of the email had not already been discussed with the second respondent. However, it will be for the Tribunal at the final hearing to determine when, if at all, the disclosure of this information was made and whether it was a protected disclosure. For the same reasons as given at (i) and (ii) above the claimant is allowed to rely on this paragraph of the further information.

(iv) Email to second respondent 16 July 2019.The information contained in this email quite clearly makes reference to management charges and advance cash dividends being paid to the second respondent thus decreasing the first respondent's net worth and putting the financial facility with the bank at risk. For the reasons given at (i) (ii) above the

claimant is allowed to rely on this paragraph of the further information.

(v) Email to Vanessa Hamer 21 October 2019 Whilst the copy of this email produced for the purposes of this PH is very poor however it is possible to identify the nature of the content of the email, which clearly relates to information which has already been referred to in the grounds of complaint, at least to some extent. For the reasons at (i) and (ii) above I find that this is not an amendment and the claimant can rely on this paragraph of the additional information in pursuing her claim.

(vi) Accepted by the respondent as further information as already pleaded

(vii) Meeting with second respondent 24 October 2019 The Order of EJ Buchanan was for the respondent to provide further details of the disclosure of information she made to the respondent at the various meetings referred to, at paragraph 32, of the original grounds of complaint and, which she alleges amount to protected disclosures. There is no reference to this meeting in the original grounds of complaint although there is reference to a meeting on 4 November 2019 at paragraph 9, and in the letter of 8 November 2019 from the claimant's solicitor. I accept that this is further information as anticipated by the Order made as it falls within the category of 'various meetings' referred to in the original grounds of complaint. That being said even if it did require an amendment to the claim in order to rely on it, the information said to have been disclosed is information that the respondent knows the claimant relies on. and would not therefore require a significant amendment involving different witnesses or investigation. In the circumstances the balance of hardship test would weigh in favour of the respondent and an application would be allowed. This is not a new head of claim as the claimant quite clearly states her intention to bring claims of detriment as a result of making protected disclosures about, amongst other matters the financial situation and dealings of the first and second respondent.

(viii) Meeting with Vanessa Hamer 24 October 2019.The claimant alleges that she had previously been told during a meeting with the second respondent on 19 September 2019, that the financial year end of the first respondent was to be changed, in order to delay the date to protect the first respondent from adverse comment from a competitor. At the same meeting it

is alleged the second respondent told the claimant that he had liquidated the kitchen company because the previous owner had been fraudulent. It is the claimant's case that at this meeting she informed Vanessa Hamer of the meeting she had had with the second respondent and raised concerns about the impact this would have on the proposed MBO. Unlike the other information said to have been disclosed by the claimant there is no reference to these matters in the grounds of complaint. There is however reference to the meeting of 19 September 2019 in the letter of 22 November 2019, and the intended reason for the change in the financial year end of the first respondent. There is also reference in the letter to the alleged fraud conducted by the previous owner of the kitchen company but there is no suggestion that the claimant raised concerns about this, only that she would ask CBJ to take it up with VH which she did and the date was changed. This is quite clearly a new allegation which would require an application to amend the claim. Having had regard to the timing of the application, Mr Budworth has not offered any explanation as to why this allegation was not included in the original grounds of complaint. This is completely different information and in the amended grounds of resistance the respondents express concern at the year delay in the claimant raising it. This is a different category of allegation. Whereas I have accepted that the claimant may have had better recollection of events when asked to provide the further information of her claims in respect of the matters dealt with above, this allegation was a matter that had been discussed between the claimant and her advisors prior to the grounds of complaint being submitted. The information is not raised even as an issue in the letter from the claimant's solicitors of 22 November 2019 and is not referred to at all in the grounds of complaint. In considering the circumstances in the round and the balance of hardship in either allowing or refusing this application I find that the respondent would be required to adduce evidence about events that occurred over a year prior to any application to include it in her claim form and the claimant has not given explanation of why, if the claimant considered she had made such a disclosure and suffered a detriment as a result of doing the same, it was not included in the original claim given that it was a matter that had clearly been previously discussed with her legal advisor. I consider in these circumstances the balance of hardship falls on the respondent and the application is refused. The claimant is not allowed to rely on this paragraph of the additional information.

(ix) Letter 8 November 2019 Accepted by respondent as already pleaded

(x) Letter 22 November 2019 Accepted by Respondent as already pleased

(xi) (and)

(xii) Letter 29 November 2019 and letter of 9 December 2019 It is the respondents' case that these are new allegations which were not raised in the original grounds of complaint and were made after the claimant had been dismissed. Both letters refer to the same disclosure of alleged information i.e. *"that the claimant was dismissed without due process due to her protected disclosures regarding the financial irregularities of the first and second respondent as requesting the claimant's formal grievance of 22 November 2019 be investigated by a jointly instructed expert as no acknowledgement/response had been received".* Both of these paragraphs appear to say exactly the same and it is unclear what the information is that the claimant is alleging save for the fact that she is making clear that she considers that her dismissal and respondent's failure to follow a proper procedure are as a result of her making previous disclosures. The claimant has already listed these detriments as arising from allegations above. Whilst an application to amend can be made at any stage of the proceedings and in accordance with **Selkent** an application should not be refused solely because there has been a delay, I have not been given any explanation of why the information in these particular letters was not contained in the original grounds of complaint and they seem to add little to the claim. Both letters were known to those who drafted the original grounds of complaint so this is not a matter of the claimant's memory being jogged to recollect further meetings as has been the case above. Given all the circumstances of this particular part of the claimant's application and the fact that the subject matter of these additional letters are already before the Tribunal, I find the balance of hardship in either allowing or refusing this application will fall on the respondents who will be put to additional time and expense in responding in full to these additional paragraphs. I refuse the application to amend the claimant's application to include these new allegations and claimant will not be allowed to rely on the same in pursuing her claim.

Detriments

23 In paragraph 35 of the claimant's original grounds of complaint she lists the alleged detriments she has suffered as a result of making the protected disclosures as:

(i) The claimant's purported misconduct was not dealt with in accordance with the First Respondent's disciplinary procedure

(ii) The claimant's formal grievance of 22 November 2019 was not investigated in accordance with the First Respondent's grievance procedure

(iii) The respondent made unlawful deductions from the Claimant's final pay

24 At paragraph 4 of the case management orders of EJ Buchanan, the claimant is ordered to provide *"further information in respect of the claims advanced to include the following detail (at 4.6) "the detriments said to have been suffered by the claimant on the ground that she had made such protected disclosures and in particular what detriment(s) did the claimant suffer……..".* In the further information the claimant has expanded on the original detriments listed (i) to (iii) above. I find that this additional information is simply that as the matters included are already clear from the original grounds of complaint and no amendment to the claim is necessary.

25 The claimant also includes an additional detriment of "loss of the MBO deal". It is quite clear from the original grounds of complaint that the claimant considers, that as a result of events that took place she was denied the opportunity to be part of the proposed MBO. However, it would appear that there was a deliberate decision at the time of lodging the claim to carve out matters relating to the MBO, presumably for obvious reasons, as it was intended that this would be dealt with through the civil courts. At the time of the previous PH no civil proceedings had been commenced and I do not find it is relevant today to identify whether or not proceedings have been commenced since, as this is a matter for the claimant and her advisors. I consider however that this is a matter that requires an application to amend even though it is referred to in the original grounds of complaint. I make this finding because it would appear that there was a conscious decision not to include the loss of the MBO as a detriment previously. An application to amend can be made at any stage of the proceedings, and whilst I have not been addressed on why this detriment was not originally included it is non the less clear from the grounds of complaint that it was always a detriment in the opinion of the claimant. When considering the balance of hardship in allowing or refusing the application I accept that the claimant could seek remedy for the loss of the MBO elsewhere and that the respondent will be put to additional enquiry if the application is allowed. However, the respondent would be put to that enquiry in any event if the claim was pursued through the civil courts. Consequently, I find that the balance of hardship would fall on the claimant who would be put to the additional time and expense of pursuing her claim through the civil courts if the application was refused. The application succeeds and the claimant is allowed to amend her claim to include the detriment of loss of the MBO deal.

26 At the previous PH the claimant, at 4.3 of the case management order, was required to state in "what way or ways any such information [disclosed] falls within the provisions of paragraphs (a)-(f) of section 43B(1) of the 1996 Act". The respondent has objected to the claimant relying on additional paragraphs to those pleaded in the original grounds of complaint. I do not find that these additions require an application to amend, whether or not the information disclosed by the claimant tends to show (in her reasonable belief) that one of the failings had occurred or were likely to, is a matter for determination at the final hearing. If anything this is simply a re-labelling exercise relating to facts already pleaded.

Conclusion

27 An application to amend the claim to include the additional information in respect of items (i)-(vii) and (ix) and (x) is required and the claimant is allowed to rely on this additional information in pursuing her claim.

28. Items (viii) (ix) and (x) amount to new allegations. The application to amend the claim to include these new allegations does not succeed and is refused.

Employment Judge Sharkett
Date 9th July 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON
15 July 2021

FOR THE TRIBUNAL OFFICE