



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant: DR F CARPOS-YOUNG

Respondent: ROYAL ACADEMY OF MUSIC

PRELIMINARY HEARING

HELD AT: London Central

ON: 28 September, 2018

HEARD BY EMPLOYMENT JUDGE: Oliver Segal Q.C.

Representation:

For Claimant: Mr M Lee, Counsel

For Respondent: Mr D Leach, Counsel

JUDGMENT

- (1) The Claimant is allowed to amend her claims in so far as necessary to include claims of having suffered detriments/been dismissed by reason of having made qualifying disclosures, as set out at paras 3.1.1, 3.2-3.4, 4 and 5 of her draft List of Issues prepared for the first PH in this matter (“**the Draft Issues**”).

- (2) The Claimant is permitted to add by way of amendment to both her victimisation claim under the Equality Act 2010 and her claims of whistle-blowing detriments/dismissal comments she said she made during her disciplinary hearing as set out at para 1.1.2 and 3.1.2 of the Draft Issues, by way of additional protected acts and qualifying disclosures, respectively.

REASONS

The claims of whistle-blowing detriments/dismissal

1. The Claimant complained in her ET1 of March 2018 that she suffered detriments and/or was dismissed inter alia by reason of various “disclosures” she made. However, the ET1 as received by the tribunal made no express reference to a whistle-blowing claim or to “qualifying disclosures”, though it is her case that the relevant box was ticked on the online version of the form.
2. In June the Claimant sought to amend or clarify her claims to include in the alternative claims of whistle-blowing detriments/dismissal based on the same “disclosures” she was relying on as protected acts for the purposes of her victimisation claims.
3. Leaving aside the issue of which boxes were ticked on the online ET1 form, and applying the well-known **Selkent** principles, it seems to me clear that those amendments sought amount, at their highest, to a re-labelling of claims already contained in the ET1 – indeed arguably are simply the express legal characterisation of those claims already made, in particular at paras 19 and 23 of the narrative to the ET1.
4. The Respondent argued that:
 - 4.1. The only “disclosure” relied on in the ET1 as originally pleaded was to students and not to the Respondent and therefore could not fall within s. 43C ERA;
 - 4.2. Pursuant to **Housing Corporation v Bryant** [1999] ICR 123, CA and **Foxtons Ltd v Ruwiel** UKEAT/0056/08/DA, it was not sufficient for the Claimant to refer to “disclosures” without more in the ET1 to warrant the amendment sought: a causative link had to be pleaded between potentially qualifying disclosures and the detriments or dismissal complained of.
5. As to that first argument, it has merit as far as it goes. However, the amendment sought is not put solely within s. 43C; it is also put within s. 43G. I accept that on the face of it, the principal disclosures already pleaded in the ET1 do not appear to have been to the Claimant’s employer and thus would not fall within s. 43C. However, those disclosures were – at least very arguably – made within 43G(1)(d) read with 43G(2)(c)(i); namely, they were disclosures where the Claimant had previously made a disclosure of substantially the same information to her employer: either
 - 5.1. during the application process (although I recognise there might be argument about whether 43G(2)(c)(i) should be construed narrowly so as to exclude previous disclosures made to someone who became the Claimant’s employer but was only her potential employer at the time); and/or

5.2. in anticipation of sending the material to students, when the Claimant was already employed by the Respondent.

6. Therefore, subject to the Claimant having pleaded that she suffered the relevant detriments/dismissal as a result of disclosures that she now seeks to label in the alternative as qualifying disclosures, there is no reason not to allow her to amend her ET1 to make it clear (and it is arguable that even without amendment that is the natural interpretation of the narrative to the ET1) that she wishes to claim, in the alternative, that those disclosures were qualifying disclosures as well as protected acts.
7. The argument based on **Bryant** etc. I do not find persuasive. Those two cases deal with a different issue, namely whether a claimant can amend to plead that a particular detriment was caused by a protected act or was on grounds of her sex where no such causative link was originally pleaded. That is not this case, where the causative links are clearly asserted in the ET1.
8. I therefore allow the Claimant to re-label in the alternative those claims as whistle-blowing claims. There is no jurisdictional (time) point which arises in the circumstances; and the balance of prejudice clearly favours allowing the amendment which was sought at an early stage in the proceedings.
 - 8.1. The Respondent's only prejudice will be (apparently) that it has prepared its witness statements (for service over 3 months later and with these potential amendments clearly a live issue following the first PH in this case) without including evidence in relation to such parts of a whistle-blowing claim as do not apply to a victimisation claim (reasonable belief of the claimant, disclosures not made for personal gain, reasonable for claimant to make disclosure); that is partly a matter for which the Respondent has caused its own difficulties and in any event there is time for it to be remedied.
 - 8.2. The Claimant, however, will suffer potentially the very substantial prejudice if the amendments are not allowed that her victimisation claims might be dismissed whilst her whistle-blowing claims would have succeeded.

The application to add a protected act/qualifying disclosure by way of amendment

9. The Claimant seeks to add a further protected act/qualifying disclosure to those on which she first relied, namely comments she made at the disciplinary meeting which led to her dismissal.
10. I record and agree with a preliminary submission made by the Claimant that the Respondent, in its ET3, has rather emphasised the importance of what was said by the Claimant at that meeting by asserting that the Respondent had not decided to dismiss the Claimant until after the meeting.

11. Both counsel addressed me at length on a point which I did not find it easy to resolve: did this application to amend involve the Claimant in introducing a new “cause of action”? It was agreed that even if it did, that would not be determinative, applying **Selkent** principles; but the Respondent rightly submitted that the bar is higher for the Claimant (particularly as regards the applicability of time limits for bringing claims, and in relation to any lack of sufficient explanation for not having pleaded the claims originally) if the application did involve seeking to introduce new causes of action.
12. In the end, I decide that this application does not seek to introduce new causes of action. Neither party put before any authority directly on point. The Respondent relied again on **Bryant** and **Ruwiel**, though conceded rightly that in those cases no claim of victimisation/sex discrimination had been pleaded, to which could be added any further particulars/further claim.
13. The Claimant relied on **Pruzhanskaya v International Trade & Exhibitors (JV) Ltd** UKEAT/0046/18/LA, in which the EAT held ([42]) that adding a complaint of automatically unfair dismissal by reason of making a protected disclosure to an in-time claim of ordinary unfair dismissal did not involve bringing a new complaint/cause of action. However, as the Respondent pointed out, the burden of proving the reason for a dismissal was the employer’s in any event in that case (cf in a victimisation or whistle-blowing claim where there is no ordinary unfair dismissal claim); moreover, the reasoning of the EAT is not entirely clear in light of the earlier authorities it considers, in particular **New Star Asset Management Holdings v Evershed**.
14. In the end, mindful of the **Pruzhanskaya** decision but not considering myself bound by it in the different circumstances of this case, I do find that the Claimant does not seek to add new causes of action where she has already brought claims of victimisation and whistle-blowing detriments/dismissal by reference to other protected acts/disclosures.
15. If the Claimant had simply pleaded that she had suffered the particular detriments and was dismissed because of earlier protected acts/disclosures, it is obvious she would have been allowed (indeed required) to particularise those without having formally to amend or being considered to be adding new causes of action. It is difficult to justify putting the present Claimant in a worse position.
16. If that is right, then again there is absolutely no reason not to allow the amendments sought. The potential prejudice is all one way. What was said at the disciplinary meeting is already very much in issue and detailed evidence will have to be given by both parties about that; further the reason for the alleged detriments/dismissal will also have to be the subject of detailed evidence from the Respondent. If these amendments are refused, however, and the tribunal were to find that the real reason for the detriments/dismissal was by reason of the disclosures made by the Claimant during the disciplinary hearing, then the Claimant will suffer considerable injustice in having all of her claims dismissed.

17. If I am wrong on the “cause of action” point, I must consider the “*paramount considerations ... the relative injustice and hardship involved in refusing or granting an amendment*” (**Selkent** [24]) from a partly different perspective. Now the potential new claims would be substantially out of time and in respect of the whistle-blowing claim time could not be extended had the claim been brought by way of an ET1 presented in June. Also it would be more relevant to consider why these claims had not been pleaded originally (**Selkent** [24, 26]), although the lack of any explanation other than the oversight of a claimant or her legal representatives is not determinative: **Evershed** [33].
18. Even so, I would allow the amendments sought. The balance of relative injustice would still favour the Claimant. As I say, the Respondent has put very much in issue the causative effect of what happened at the disciplinary hearing; there should be no prejudice to the Respondent in providing evidence about what was said at that meeting given that that matter is much disputed in any event; and I repeat, if these amendments are refused, and the tribunal were to find that the real reason for the detriments/dismissal was by reason of the disclosures made by the Claimant during the disciplinary hearing, then the Claimant will suffer considerable injustice in having all of her claims dismissed.

Other matters

19. The Respondent argued that paras 1.3 and 1.4 of the Draft Issues raised claims that were not in the ET1. The Claimant noted that those parts of the Draft Issues were agreed at the previous PH. In all events, the relevant facts are pleaded at para 12 of the narrative of the ET1 and Box 8.1 of the ET1 filed and served asserts a claim of “associative victimisation”. I was told that in an EAT case which I was not provided with the EAT had left open whether such a concept existed in law.
20. In the circumstances, it seems to me that the claims ought to be permitted to proceed and be included in the finalised List of Issues, albeit I personally had difficulty in seeing how the statutory language of the victimisation provisions in the **EqAct** could be construed to support those claims.

FURTHER DIRECTIONS

21. The Claimant must by **4 pm 1 October 2018** clarify for the Respondent, whether by an amended ET1 or otherwise, precisely how she puts her whistle-blowing claims.
32. The Respondent may, if so advised, amend its ET3 to respond to the Claimant’s reliance on additional protected acts/qualifying disclosures and/or to the particularised whistle-blowing claims to be provided pursuant to the direction set out in the previous paragraph, by sending such amended document to the Claimant on or before **4 pm 5 October 2018**.

33. The parties should cooperate sensibly in relation an appropriate date for exchange of witness statements and may agree, without further reference to the tribunal, an extension to the directed date up to and including the date 14 days prior to the commencement of the full merits hearing.

EMPLOYMENT JUDGE SEGAL

2 October 2018

London Central

**Date Sent to the Parties
3 October 2018**

For the Tribunal Office

IMPORTANT NOTES

(1) Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

(2) Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rules 74-84.

(3) You may apply under rule 29 for this Order to be varied, suspended or set aside.