ButlerBdk

# EMPLOYMENT TRIBUNALS

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| **Claimant:** | **Mr K Wyness** |
| **Respondent:** | **Aston Villa Football Club Limited** |
| **Heard at: Birmingham** | **On: 27 February 2019** |
| **Before:** | **Employment Judge Butler (sitting alone)** |
| **Representation** | |
| **Claimant:** | **Mr M Pilgerstorfer, Counsel** |
| **Respondent:** | **Mr C Rajgopaul, Counsel** |

# JUDGMENT

**The judgment of the tribunal is that:**

1. The Claimant's application to amend his claim to include a claim of detriment pursuant to section 47B Employment Rights Act 1996 is dismissed;
2. The Claimant's application to add Jian Tong Xia as a second respondent is dismissed:
3.The Respondent's application to strike out parts of the particulars of claim on the ground of legal advice privilege is dismissed.

# REASONS

1. This matter came before me on 27 February 2019 to consider the Claimant's application to amend his claim by adding a claim for detriment pursuant to section 47B Employment Rights Act 1996 ("ERA"), his application to add Jian Tong Xia ("Dr Xia") as a respondent and the Respondent's application to strike out references in the particulars of claim which were bound by legal advice privilege.

2. The hearing had been listed by Order of EJ Woffenden dated 18 December 2018 as a Public Preliminary Hearing but, after hearing representations from the parties on the nature of the applications, particularly that in relation to legal advice privilege, I converted the Hearing to a Private

Preliminary Hearing. I took careful note of the submissions of the parties, the evidence of the Claimant and considered the authorities relied upon by each of them. I also considered the relevant Presidential Guidance. Both Counsel produced comprehensive skeleton arguments.

## The Claimant's Applications

3. In his claim form, the Claimant sets out a detailed account of events leading up to his dismissal. At the time of that dismissal he did not have two years' continuous employment for the purposes of a claim for unfair dismissal but, based on his alleged public interest disclosures, he clearly confined his claim to one of automatically unfair dismissal "contrary to s.103A of the Employment Rights Act". At the previous Preliminary Hearing in December 2018, the Claimant indicated his intention to apply to amend his claim as set out above. EJ Woffenden noted that the Claim Form made no reference to detriment and that any application must be properly made in writing and considered at a further Hearing.

4. The thrust of the Claimant's application is that all of the events upon which he would rely in a detriment claim are specifically referred to in his claim form and there would, therefore, be no prejudice to the Respondent. Accordingly, amending the claim as requested would amount to a re-labelling only. Further, there would likewise be no prejudice to Dr Xia in adding him as a Respondent since, as the effective owner of the Respondent and one who took the decision to dismiss the Claimant, he would be heavily involved in resisting the claim in any event.

5. In his skeleton argument, Mr Pilgerstorfer said, "Here, the Claimant considered that his claim did involve a claim for detriments under s., 47B ERA". In this regard, it was important to hear the Claimant's evidence on that point. In response to Mr Rajgopaul's questions the Claimant said, "I try to keep up to date on employment law. I intended my ET1 to include a claim for detriment" and "My grounds of complaint do not include a reference to detriment. I had to fully understand and get my head around it. I would have believed at the time it was broad enough to include section 47B detriment. I didn't just rely on my solicitors". Further, he said, "I didn't know the time limit or how a detriment claim can be issued so I relied on my solicitors. It not being mentioned in the claim form was a technicality I was going to take advice on".

6. I found this evidence to be vague and inconsistent and noted that the Claimant was confused in answering the questions put to him, at one point saying he relied on the advice given to him under legal privilege. He did not clarify what that advice was nor is he required to. However, on the balance of probabilities, I find that the question of detriment was not anticipated by the Claimant in preparing to submit his claim. His inability to give evidence on the point with any clarity at all illustrates the point.

7. The leading case on amending claims is Selkent Bus Co Limited v Moore [1996] IRLR 661 which requires the tribunal to "take into account all the circumstances and (it) should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it". The EAT laid down factors which are relevant when considering to allow an amendment and I consider these in relation to this application below.

8. Firstly, I consider the nature of the amendment in terms of whether it is minor such as the correction of clerical and typing errors, the addition of factual details to existing allegations or re-labelling for facts already pleaded; or whether it is a substantial alteration making new factual allegations which change the basis of the claim. It is correct that the detriments relied upon by the Claimant are referred to in his particulars of claim. However, these are clearly stated in support of his claim for automatically unfair dismissal and not a claim under s. 47B. They illustrate an alleged course of conduct by the Respondent which will be material in deciding at the substantive hearing whether the Claimant was automatically unfairly dismissed. The Respondent has contested the claim on this basis only. The remedy for a detriment claim may, if that claim is successful, be substantially more than one for automatically unfair dismissal as under s.49(2) ERA, "the amount of compensation awarded shall be such as the tribunal considers just and equitable in all the circumstances having regard to", inter alia, "any loss which is attributable to the act, or failure to act, which infringed the complainant's right". This includes a potential award for injury to feelings which is not available to a claimant in an automatically unfair dismissal claim.

9. In my view, therefore, the proposed amendment is not one within the scope of a re-labelling exercise but is one which introduces a new cause of action, not previously pleaded or responded to.

10. Secondly, I consider the question of time limits. Both parties agree that the detriment claim is outside the three month time limit imposed by s. 48(3) ERA. Under s. 48(3)(b), that period may be extended by "such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months". In this case, the Claimant was dismissed on 8 June 2018 and, allowing for a one month period of early conciliation, the claim should have been presented by 7 October 2018. It was first raised before EJ Woffenden in December 2018.

11. Given my findings above, I note that the Claimant was advised by solicitors in drafting his claim which, it can be assumed, he discussed with them for the purpose of giving instructions and receiving advice. This is not a case where the Claimant submits he was too ill to address the question of a detriment claim, nor can he argue he was acting in person without legal counsel and was ignorant of the law. Although I found his evidence on the point to be totally unconvincing, the fact remains that he was professionally advised and, for whatever reason, no detriment claim was alluded to in his claim form. Whilst Mr Pilgerstorfer submits that little weight should be attached to the time limit in this case, I cannot agree with him when the Claimant was professionally advised throughout. This is not a situation where I would consider extending the time limit on the ground that it was not reasonably practicable for the detriment claim to have been brought within that time limit. In my view, it clearly was.

12. Thirdly, I consider the timing and manner of the application. In Selkent, the EAT said that an application should not be refused solely because there has been a delay in making it but it is relevant to consider why the application was not made earlier. As submitted on behalf of the Claimant, there are no new facts or information discovered post the submission of the claim. The paramount considerations are the relative injustice and hardship involved in refusing or

granting an amendment. I do not subscribe to the view that there will be no prejudice to the Respondent. If the application is granted, it will be faced with amending its claim to contest the detriment claim and will, therefore, incur additional costs and it is a moot point as to whether such costs are likely to be recovered if the Respondent is successful.

13. Of course, it is not known why the Claimant did not plead a detriment cause of action. Some of his rather confused evidence suggests it was within his contemplation whereas some evidence suggests it was not. Either way, he instructed his solicitors to bring a claim and they omitted it or he did not instruct them to do so and they did not advise that he should. That is a matter for discussion outside the tribunal's jurisdiction and potentially requires consideration of the decision in Dedman v British Building and Engineering Appliances Limited [1974] ICR 53 CA.

14. Considering all the circumstances surrounding this application which are discussed above, I refuse the application to amend to include a detriment claim.

15. Moving on to the request to add Dr Xia as a respondent, the considerations are very similar. If I understand the Claimant's application correctly, the Respondent is vicariously liable for Dr Xia's actions but there may be insurance covering those actions. The Claimant would, therefore, have the security of that policy if the Respondent was unable to pay any award made to him. In his evidence, the Claimant said he thought there may be an insurance policy covering his claim. The Respondent was unable to confirm this. I find the inability of the former CEO of the Respondent or the Respondent itself to confirm the existence or not of such a policy to be quite remarkable.

16. Mr Pilgerstorfer relies on the Court of Appeal decision in Timis and another v Osipov [2018] EWCA Civ 2321 as authority for the proposition that claims for whistleblowing detriment can now be made against individual decision makers personally, in this case, Dr Xia and the decision was published after the claim was issued. Mr Rajgopaul counters that Osipov merely upholds the decision of the EAT to the same effect. There is merit in Mr Rajgopaul's argument. In any event, I have already dismissed the application for amendment so the point becomes academic.

17. Considering the issue more widely, Dr Xia lives in China. It is true that, given the events leading up to the Claimant's dismissal, Dr Xia would need to give evidence and he has now instructed the same firm of solicitors as is acting for the Respondent. But this does not mean, as the Claimant suggests, that he will not be put to any prejudice. He is currently a witness and, on the basis of the claim as originally submitted, could have had no thoughts of personal liability. If the amendment had been allowed and he was added as a respondent, he would be prejudiced by the additional costs of defending his actions along with the additional demands on his time.

18. Further, as above, any claim against him is out of time. The Court of Appeal in Osipov affirmed the decision in the EAT. Accordingly, it was open to the Claimant to include Dr Xia as a respondent from the outset. He was represented and, for whatever reason, did not do so. As concluded above, I find it was reasonably practicable for the Claimant to have included Dr Xia as a

respondent within the statutory time limit. Any failure to do so is a matter to be considered elsewhere.

19. For these reasons, I dismiss the application to add Dr Xia as a respondent.

**The Respondent's Application**

20. By letter of 23 November 2018, the Respondent indicated its intention to apply to strike out references to privileged information in respect of advice given to it by its legal advisers and which was repeated in the Claimant's claim form. At this Hearing, the Respondent had narrowed down what it considered to be the privileged passages.

21. It is clear that legal advice privilege applies between a lawyer and his or her client, made in confidence for the purpose of giving or receiving legal advice. The Claimant was the CEO of the Respondent charged with statutory obligations to act in the best interests of his employer. This, he claims, he did by taking legal advice when he thought the Respondent was in danger of insolvency due to an unpaid tax demand. He also asked Ms V Wilkes, the Respondent's Head of Legal, for a written opinion on UK insolvency law which he sent to Dr Xia on receipt of it.

22. The Claimant was the only statutory director resident in the UK, Dr Xia and a non-executive director, Ms Gu, both being resident in China. Other written advice was given by Ms Wilkes and circulated to all three directors. Accordingly, it is the Claimant's case that he has already seen the legal advice given to the Respondent both through him from retained solicitors, Squire Patton Boggs LLP, and emanating from Ms Wilkes.

23. Legal advice privilege attaches to communications given in confidence for the purpose of giving or receiving legal advice. It is, therefore, necessary to establish whether the legal advice given to the Respondent was confidential as between it and the Claimant.

24. Mr Pilgerstorfer placed significant reliance on passages from Passmore on Privilege (3rd Edition) and the judgment in Derby v Weldon (No. 10) [1991] 1 WLR 660 where Vinelott J held "… it does not follow that the company can rely on privilege attaching to, for instance, instructions and advice passing between the company and its solicitors, copies of which have been supplied to the director, if there is subsequently litigation between the company and the director and the advice or instructions are material to an issue raised in the litigation".

25. Passmore, at paragraph 7-110 says, " Just because a privileged document has been disseminated internally does not prevent the company claiming privilege against external adversaries. However, privilege may not be available in proceedings between the company and a former employee who has had legitimate access to the privileged material. In that situation, there can be no confidentiality in that information as against the employee, even though it would be open to the company to assert privilege against adversaries who had not had access to it". The judgment in Derby is then relied upon to confirm that view.

26. Mr Rajgopaul disagrees by referring to the judgment of the EAT in Bradford Hospitals NHS Trust v Burcher [2001] UKEAT 958 01 2809 which did not consider the judgment in Derby. It is clear to me, however, that the facts of these two cases can be distinguished in that the issue in Bradford Hospitals surrounded the employee's own notes of a meeting at which legal advice was given and Mr Burcher did not seek disclosure of any legally privileged documents.

27. In Three Rivers District District Council and others v Governor and Company of the Bank of England (No 5) [2003] EWCA Civ 474, it was confirmed that legal advice privilege applied only to communications between a client and his legal advisers and that the Bingham Inquiry Unit set up by the Bank and comprising three bank officials appointed by the Governor of the Bank were the client for privilege purposes. As Mr Pilgerstorfer rightly submits, the Respondent's application seeks to extend the scope of legal advice privilege to communications between the Claimant and other internal personnel of the Respondent, in particular, Ms Wilkes and the judgment in Three Rivers holds that such preparatory communications are not privileged.

28. The Claimant in this case was the CEO of the Respondent charged with acting in its best interests at all times. A relevant question is whether he could be seen as an embodiment of the Respondent. The Respondent is a separate legal entity operating through its appointed directors. In seeking advice, the Claimant was, in my view, fulfilling his statutory obligations as a director, not only for the Respondent, but for the individual directors too. Advice seems to have been given to him directly by the Respondent's solicitors and through Ms Wilkes. This advice was given at a time when no proceedings between the parties was contemplated. The Claimant had legitimate access to what would have been privileged legal advice if proceedings had been brought by a third party adversary. This is not the case here.

29. Accordingly, I cannot find that the advice given to the Respondent, both directly to the Claimant and through Ms Wilkes, was confidential. It follows that I do not find the Respondent can rely on legal advice privilege in relation to the giving of advice which was properly disseminated to the Claimant in the course of his employment.

30. For the above reasons, I dismiss the Respondent's application.

Employment Judge Butler
25.3.2019