



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms K Townsend

**Respondent:** Paper London Limited (In administration) (R1)

**Heard at:** Watford (By CVP)

**On:** 23 July 2024

**Before:** Employment Judge Bansal

## Representation

**Claimant:** Mr Oliver Mills (Counsel)

**R1** No Attendance or Representation

**Ms P Thackeray** Mr Alexandra MacMillen (Counsel)

## RESERVED JUDGMENT

1. The claimant's application to amend her claim to include a complaint of detriment for making a protected disclosure pursuant to Section 47B(1A) of the Employment Rights Act 1996 is granted.
2. The claimant's application to join Ms Philippa Thackeray as a respondent to this claim is granted.

## REASONS

### Introduction

1. This Public Preliminary Hearing was listed following an Order made by Employment Judge Hunt at a preliminary hearing held on 6 June 2024. At this hearing the Tribunal was required to determine two applications made by the claimant to amend her claim. The first amendment application to include a complaint of "automatic unfair dismissal" pursuant to s103A of the Employment Rights Act 1996 ("ERA 1996) was granted. The second application referred to as the "Detriment Application" to include a complaint pursuant to s47B(1A) of the ERA 1996 of having suffered 6 detriments by acts of Ms Philippa Thackeray ("Ms Thackeray") for making a protected disclosure, and to join her as a party to these proceedings. This second application was listed to be determined at this hearing.
2. Accordingly, this judgment is to be read in conjunction with record of the 6 June 2024 preliminary hearing.

### **Chronology**

3. The claimant was employed by the respondent in the role of Creative Director from 1 February 2011 to 24 March 2023, on which date she was summarily dismissed for gross misconduct. Following ACAS early conciliation commenced on 23 April 2023 and which ended on 4 June 2023, the claimant on 20 June 2023 presented a Claim Form making a complaint of ordinary unfair dismissal. At that date the claimant had the benefit of legal advice and was represented by solicitors Woodfines LLP.
4. On 30 November 2023 the Tribunal and the respondent were informed by email that the claimant changed legal representation to Leigh Day solicitors. The email also stated that the claimant is considering making an application to amend the claim and requested the Tribunal not to issue any judgment against the respondent. At this date Leigh Day have yet to receive the claimant's file from Woodfines LLP.
5. On or about December 2023 the respondent entered into administration.
6. On 4 December 2023, Leigh Day received the case papers from Woodfines LLP, the file being in excess of 1500 pages.
7. By email dated 12 January 2024 the solicitors acting for administrators of the respondent gave their consent for the claimant's claim against the respondent to proceed.
8. On 5 February 2024, Leigh Day solicitors made an application to amend the claim. The application was served with a draft amended Particulars of Claim. For the purposes of this hearing, the relevant amendments sought are set out at Paragraphs 41 to 43 of the draft amended Particulars of Claim.

### **Preliminary Hearing**

9. For this hearing the Tribunal was presented with a bundle of documents of 182 pages prepared by the claimant's solicitors. This bundle included the claimant's application to amend and written representations made on behalf of Ms Thackeray. The claimant provided a witness statement in support of the application. Also Mr Mills provided a comprehensive skeleton argument on behalf of the claimant.
10. The claimant was in attendance and was represented by Mr Mills who attended at the last preliminary hearing on 6 June 2024. There was no representation for the respondent. Ms Thackeray was not in attendance but was represented by Mr Alexander MacMillian.
11. The claimant gave oral evidence and was cross examined. Both Mr Mills and Mr MacMillian made their submissions.

### The parties submissions

12. The parties submissions are summarised below.

#### For the claimant

13. In summary Mr Mills argued that the balance of injustice and hardship points in favour of the claimant to grant the proposed amendments and join Ms Thackeray as a party otherwise the claimant will be denied the right to justice and a remedy, if successful. The proposed amendment although is a new cause of action, is a minor amendment and arises from the same background facts to the two dismissal complaints. As to the timing of the application although the Tribunal may find there has been a delay, the time limits do not apply as this new cause of action arises from the same facts. If there is a time issue it should be extended due to the personal and mental health issues of the claimant. Further there is no prejudice caused to Ms Thackeray, and she has not demonstrated that any delay has specific implications that cause her hardship, if she is joined as a party.

#### For Ms Thackeray

14. Mr Macmillan elaborated on the written representations dated 4 July 2024 made in response to the application. Mr MacMillan reinforced the following points. The application is a new cause of action which will involve different areas of enquiry and considerable and personal expense to Ms Thackeray, as well as the risk of being made financially liable. The application is considerably out of time as the application should have been made by early August 2023 but did not do so until 5 February 2024. At the date of presenting the claim the claimant was legally represented by Woodfines LLP, and if they failed to fully plead her claim any remedy lies against her previous solicitors. There is considerable prejudice to Ms Thackeray given the passage of time, and that cogency of her evidence is bound to be affected. Further, in refusing the application this will not leave the claimant without any remedy.

### The legal framework

15. Rule 29 ET Rules of Procedure 2013 provides for the Tribunal's general power of case management:  
*"The Tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order..."*
16. Rule 34 ET Rules of Procedure 2013 provides:  
*"The Tribunal may on its own initiative, or on the application of a party or any other person wishing to become a party, add any person as a party, by way of substitution or otherwise, if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings..."*
17. Regarding the joinder of parties, the absence of time limits was clarified in ***Gillick v BP Chemicals Ltd [1993] IRLR 437***. Lord Coulsfield said questions of delay are merely matters to be taken into account by the tribunal

in the exercise of its discretion. Lord Coulsfield said at [8],  
*“It seems to us to be clear that the approach set out in Cocking does, as counsel for the appellant submitted in the present case, require the Industrial Tribunal to treat an application to amend an originating application by the addition of a new respondent as a question of discretion and not as one to be settled by the application of the rules of time-bar. The ‘time-bar approach’, which formed the basis of the decision of the Industrial Tribunal in Cocking, and which was essentially the same as the reasoning of the Industrial Tribunal in the present case, was expressly disapproved by the National Industrial Relations Court. It seems to us that it follows, on these authorities, that there is no time limit which applies as such when it is proposed to add a new or substitute respondent to an application which has been lodged timeously with the Office of the Industrial Tribunals. The question whether an amendment should or should not be allowed becomes, as the appellant submitted, one of the exercise of discretion in the whole circumstances of the case.”*

18. This point was further endorsed by the **EAT in Drinkwater Sabey Ltd v Burnett [1995] IRLR 238, [1995] ICR 328**, when rejecting an argument that the joinder of a respondent after the time limit for making a claim against him has expired should only be permitted on grounds of misnomer—where the claimant has misnamed or misdescribed the party whom he intended to sue, and not where he has mistakenly decided to sue the wrong party, in the same way as the High Court exercises its analogous jurisdiction. The EAT concluded that the High Court rules have no application to the exercise of the tribunals' power to add or substitute parties, a power that is exercisable, in accordance with the principles in Cocking, at any time, even if the relevant time limits have expired.”
19. In **Selkent Bus Company Ltd v Moore [1996] IRLR 836** Mummery J said *“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.”*
20. The guidance in **Selkent** provides for consideration of the nature of the amendment, the timing and manner of it and the applicability of time limits. The key question a Tribunal is asked to determine is where does the balance of injustice/prejudice lie if an application to amend is granted or refused.
21. This is reflected in the Presidential Guidance on Case Management and was recently confirmed by **the EAT in Vaughan v Modality Partnership 2021 IRLR 97.**
22. In **Ladbroke's racing Ltd v Traynor EAT/0067/06** the EAT gave guidance on how to take into account the timing and manner of the application in the balancing exercise. The Tribunal will it need to consider; (i) why the application is made at the stage at which it is made, and why it was not made earlier; (ii) whether if the amendment is allowed, delay will ensue and whether there are likely to be additional costs because of the delay or because of the extent to which the hearing will be lengthened if the new issue is allowed to be raised, particularly if these are unlikely to be recovered

by the party that incurs them; and (iii) whether delay may have put the other party in a position where evidence relevant to the new issue is no longer available or is rendered of lesser quality than it would have been earlier.

### **Conclusions**

23. The Tribunal has general and wide discretion to add a party under Rule 34 of the ET Rules of Procedure 2013, if it is in the interests of justice to do so, taking into account the well-established principles in ***Selkent***. Paragraph 16.2 of the Presidential Guidance on Case Management deals expressly, within the context of amendment, with the possibility of joinder of individuals,
24. The overriding objective should apply equally at this stage where the reason to join a named individual in a claim is consistent with a Tribunal's requirement to deal with cases fairly and justly with regard to the prospect of remedy, if the claimant was to succeed in her claim.
25. In terms of the timing of the application, in the case of ***Gillick***, it was made clear, *"there is no time limit which applies as such when it is proposed to add a new or substitute respondent to an application which has already been lodged timeously"*. The question of whether to allow an amendment is one which requires the exercise of discretion in the whole circumstances of the case.
26. In coming to my decision I have taken into account the parties submissions, the cases and legal principles referred to. I have also considered as I am required to do, the guidance in ***Selkent***, namely that in deciding whether to exercise the discretion to grant leave to amend the claim, a Tribunal should take into account all of the circumstances and should balance the injustice and hardship of allowing the amendment as against the injustice and hardship of refusing it. The relevant circumstances in determining that issue include: (a) the nature of the amendment; (b) the applicability of time limits; and (c) the timing and manner of the application. I deal with these below.
  - a. The nature of the amendment. This is not a strictly re-labelling exercise as the claimant is seeking to add a new cause of action of detriment for making protected disclosures. This cause of action arise out of the same background facts and appear to be directly linked to the pleaded complaints of ordinary unfair and automatic unfair dismissal. In my view, the only additional issue for the Tribunal to enquire and determine, if it finds the claimant did make protected disclosures is to determine if the claimant suffered the alleged detriments, because Ms Thackeray was in any way influenced by the disclosures. I am therefore not persuaded this amendment will require a new line of enquiry and investigation or that the cogency of the evidence for the respondent or Ms Thackeray would be affected. Ms Thackeray was heavily involved in the dismissal of the claimant and therefore should have good knowledge of the background facts and circumstances, thus to be able to respond fully.
  - b. The applicability of time limits. I agree with Mr Macmillan this application to amend is made out of time. Taking into account the statutory time limits and ACAS conciliation the complaint should have been made by early August 2023. The amendment application was made just over 6 months late. The

claimant's explanation is that firstly, she did engage with Woodfines LLP to make a whistleblowing complaint but was advised against it. She has been adamant that this complaint would have been pursued timeously had Woodfines LLP acted on her instructions. I am not convinced that because Woodfines LLP did not include the detriment complaint, that she should be precluded from making this application or that it should be refused. I have to take into account all of the circumstances. Having heard the claimant, I accept that following her dismissal her ability to engage and deal with this matter was severely impaired by her personal circumstances and poor mental health. This prevented her from dealing with this matter until around November 2023 when she felt more able to do so with the assistance of others. I note that Leigh Day upon being instructed did give notice of a potential amendment application to include a whistleblowing complaint. It is not unusual for newly appointed legal representatives to wait to review the previous file before considering their advice and how to progress the case. Leigh Day received the file on 4 December 2023, and made the application some 8 weeks later, which in my view was within a reasonable time taking into account the Christmas and new year period and then engaging with the administrators of the respondent, which was necessary. I have considered the guidance given by Underhill LJ in the case of **Abercrombie v Aqa Rangemaster Ltd (2014) ICR 20** and am persuaded by Mr Mills submissions that the circumstances of this claim are that this proposed detriment complaint arises substantially from the same facts of the two dismissal complaints being pursued, and there is no prejudice to the respondent or Miss Thackeray if this amendment is granted.

- c. The timing and manner of the application. On hearing the claimant's evidence I accept that following her dismissal and up to changing solicitors in November 2023, she had personal issues and her mental health and well-being was severely affected which impaired her ability to engage with her solicitors and make this application sooner. I am of the view that Leigh Day solicitors acted reasonably following receipt of the file of papers from Woodfines LLP. Leigh Day notified the Tribunal and the respondent on notice of the claimant's intention to make this application, which was made before any knowledge or information that the respondent was about to enter into administration. This application was not made in consequence of the respondent entering into administration. Even if there has been delay as argued by Mr MacMillan, there has been no prejudice as the application was made before any case management orders were issued. It appears there has been some delay in processing this application caused by the Tribunal administration and not by the claimant. I am also satisfied that the proposed draft amended Particulars of Claim have been drafted clearly with sufficient information for Ms Thackeray to prepare a response.
- d. I have taken into consideration all of the relevant circumstances. I am mindful that any amendment should not jeopardise the final hearing listed for 3 to 6 February 2025. In the time available to the final hearing there is no reason why this case cannot be fully prepared for hearing.
27. I am satisfied that the balance of hardship favours the Claimant. I agree with the claimant that by not adding Ms Thackeray to these proceedings would

significantly prejudice the claimant as she would lose the opportunity of pursuing a cause of action and is unlikely to have an effective remedy against the respondent given that it is in administration. The claimant should not be denied the right to justice and a fair hearing. She has the legal right to ensure her complaints against the respondent and Ms Thackeray are fully explored and determined which without Miss Thackeray's involvement and participation will not be possible. Whilst I accept the hardship to Ms Thackeray she will be exposed to potential financial liability, however, it is in the interests of justice that this amendment is granted and Miss Thackeray is joined as a respondent.

28. For those reasons the claimant's application to add the complaint of detriment as drafted in Paragraphs 41 to 43 in the draft amended Particulars of Claim and to join Ms Thackeray as a respondent to this claim is granted.
29. A Case Management Order will be sent separately to the parties.

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**Employment Judge Bansal**  
**Date 18 October 2024**

JUDGMENT & REASONS SENT TO THE PARTIES ON  
21 October 2024  
FOR THE TRIBUNAL OFFICE