EMPLOYMENT TRIBUNALS

Claimant: Mr J McBrearty

Respondent: Lancashire Teaching Hospitals NHS Foundation Trust

HELD AT: Manchester **ON:** 6 October 2017

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
Respondent: Mr Spencer, Solicitor

JUDGMENT ON APPLICATION TO AMEND

It is the judgment of the Tribunal that the application by the claimant to amend his claims to include a complaint that his dismissal was automatically unfair by reason of his having made a protected disclosure is dismissed.

REASONS

1. The Tribunal this morning has been considering an application by the claimant, Mr McBrearty, to amend his claims before the Tribunal which presently are of unfair dismissal only to include a complaint that his dismissal was unfair by reason of his having made a protected disclosure, and that the Tribunal should therefore allow him to proceed on that additional basis. The claim of unfair dismissal is presently listed before the Tribunal for two days on 7 and 8 November 2017, and the respondent appearing this morning through Mr Spencer has objected to the application. The Tribunal therefore has to decide at this stage whether to allow the claimant's application and then to consider the consequences that may arise if so.

2. The way in which this matter comes before the Tribunal is as follows. The claimant originally presented his complaint of unfair dismissal to the Tribunal by a claim form received by the Tribunal on 9 June 2017. In that claim form the claimant had ticked, in terms of the claims that he was making, the one box on section 8, at section 8.1, which is the box in relation to unfair dismissal. That is the only box ticked on that page. In terms of the details of his claims, what he did was to attach to that document a five page document appended to it in which he set out the narrative, if I can use that term, of the claims that he wished to make. Those claims arise out of

his dismissal on 10 March 2017 for an incident that occurred on the evening of 17 August 2016 when the claimant was working as a theatre support worker (a "TSW") and had some interaction that evening with his superiors, which led to the respondent taking action against him for which he was ultimately dismissed.

3. In the narrative document that he attached to the claim form, the claimant sets out his account of the events of that evening. He then goes on to make some reference to CCTV footage that he had viewed, which is in bold type; that is for the next 2½ pages or so of that document, and then he returns to ordinary font, and then goes through the process that he was taken through in relation to the investigation and his dismissal. He effectively makes criticisms of the respondent's processes and the decision that was made to dismiss him, which he alleges was unfair in all the circumstances.

4. In that document the claimant does, it is true to observe, say in the third paragraph on the first page:

> *"For several months/years prior to this alleged incident on several occasions I raised concerns with management of undermanning levels in my area."*

5. That is the only reference that the claimant makes to anything that could potentially be regarded as any form of protected disclosure, and he certainly does not, and does not contend today that he did, make any connection between raising of concerns and his subsequent dismissal. Certainly, in the claim form at section 8 the only box that he ticked was that for unfair dismissal.

6. It is, however, also correct to observe and note, although the Tribunal appears not to have done, (in the sense that there was no follow up to it but that is not uncommon in the experience of the Employment Judge), where the claimant had in fact ticked the box at section 10 in relation to whether or not he wished any relevant regulator to be contacted in relation to any protected disclosure, which occasionally does indicate that a protected disclosure, or whistle-blowing claim, is being made when , in fact, on the face of this claim form there was not one. But he did tick that box, and it is only relevant to make that observation at this stage as well.

7. The claim having been presented in that form, and accepted in that form, it was responded to and both the Tribunal and the respondent proceeded on the basis that it was only an unfair dismissal claim. Case Management Orders were made at the issue stage, and the hearing of the complaint was originally listed for yesterday, 5 October 2017. Subsequently, however, following communications from the respondent in terms of the number of witnesses, the Tribunal acceded to an application to vacate 5 October 2017, on the basis that two days would be needed, and it was re-listed for 7 and 8 November 2017.

8. Consequently, the proceedings continued ordinarily and in the normal way until 19 September 2017, when the claimant sent an email to the Tribunal in which he raised the question for the first time of whistle-blowing and whether or not his claim included such a complaint, and he said in that email that he had been informed by Hempsons, solicitors for the respondent, that his claim did not include mention of whistle-blowing , yet he believed his copy of the ET1 form had got that claim shown on it. He attached to that email a copy of an email he had received from his brother who had been assisting him preparing the Tribunal paperwork (and indeed has

attended with him today), which was in a different form to that which was received by the Tribunal in a number of respects in relation to details that were filled out in that claim form, but which were not in the claim form as received by the Tribunal. In particular, on page 6 of that document under section 8 whereas the original claim form had only the one tick this one has in fact some four ticks, because in the box for "I am owed" the claimant has ticked that box and also "arrears of pay", although no application has been made in relation to that as an amendment, but more significantly, in relation to the box that is entitled "I am making another type of claim" the word "whistle-blowing" has been inserted.

9. In that document the narrative that was originally attached to the previous claim form then appears or appears in part in box 8.2 , and is then continued in box 15. I say "appears in part" because, whereas the original narrative contained with it in bold, as I have referred to earlier in this judgment, a complete section setting out the claimant's observations in relation to the CCTV footage that he had seen, those observations are not included in what I have termed the "new" claim form, and although reference is made to that CCTV footage, and indeed the reference as to the web address where it could be obtained is also contained in this document, that section, which was originally in bold, is omitted from this document, which then resumes with "you will hopefully see from the footage" which was part of the original submission to the Tribunal. So this is a document which is something of a hybrid between the original claim form and the new claim, but has been treated, and the claimant accepts, is indeed a proposed new claim form, and he accepts that in terms of the form that the Tribunal received, his claim in it was the original claim form, and he does not seek to argue today that his original claim form was in the format that is in the email attachment to his email of 19 September 2017. That gives rise to the issue of amendment, and indeed once the Tribunal received that email it was treated as an application to amend the claim to include a complaint of whistle-blowing as it was termed.

10. The respondent was invited to make observations upon that application, which it did in an email of 25 September 2017, in which it raised objections, and consequently the matter has been listed today for the Tribunal to determine whether the application to amend should be granted or not. That basically is how we have come here today.

11. The claimant, appearing in person but assisted by his brother, has elaborated upon the application, and in the course of it has explained and indeed accepted how his original submission did not include a complaint of whistle-blowing, and the grounds upon which he wishes now to be permitted to add that claim.

12. In terms of the reason for the application, it arises, the claimant accepts, because of his omission and his mistake in not including that claim in the original claim form, and he thoroughly accepts responsibility for that.

13. In terms of the claims that he wishes to make by way of amendment, however, the Tribunal has this morning sought to elicit from the claimant more details of the claims he wishes to make by way of amendment. That is something the respondent did point out would be necessary, because one of the grounds of their objections was that there were insufficient particulars, to use lawyers', but "details", to use lay language, of the proposed amendment in any event, and they point out that the claimant in this new claim form did not specify what exactly his alleged

whistle-blowing was, or what indeed he was complaining of arising out of it. Consequently this morning the Tribunal has discussed the matter in more detail with the claimant, and has sought to elicit from him more details of the claims that he wishes to make by way of amendment.

14. In the course of that discussion it has been pointed out to the claimant, and of course as a lay person one would not expect him to be aware of this and it is no criticism of him, that protected disclosure, or whistle-blowing as it is commonly known, is a particular form of claim that has particular legal definitions, and indeed can give rise to two different types of claims. One is a detriment claim under section 47B of the Employment Rights Act 1996, the other is a complaint of automatically unfair dismissal under section 103A of the same Act. It might be thought, and reasonably thought, by any lay person, that a dismissal was a detriment, and indeed it is hard to imagine circumstances in which it would not be a detriment, and most people would indeed regard it as such. However, the scheme of the legislation under section 47B of the 1996 Act is that where the detriment in question amounts to a dismissal, one cannot complain of protected disclosure detriment under section 47B of that Act; one has to complain of automatically unfair dismissal under section 103A of the Act, and that is why there is a distinction between detriment claims and dismissal claims. So the Tribunal sought to find out from the claimant this morning which of those two types of claim he wished to make and he clarified, as indeed the Employment Judge suspected was the case, that his potential complaint was that his dismissal was something that had arisen as a result of having made protected disclosures. So to that extent, if the amendment is to be allowed it will be in relation to dismissal for having made protected disclosure as opposed to any detriment claim.

15. Having established that, the next thing that the Tribunal sought to find out from Mr McBrearty is what protected disclosures he was alleging he had made. In terms of the law on protected disclosures, the definition of “protected disclosure” is in fact to be found in section 43B of the 1996 Act, and in terms of what a disclosure must be, there is no requirement that a protected disclosure has to be in writing. A protected disclosure can be made purely orally and , if satisfying the relevant tests, which I will come to in a moment, there is no problem with a person relying upon having made a purely oral protected disclosure.

16. In terms of what a protected disclosure is, section 43B defines what one is, and what is a qualifying disclosure. Basically that section sets out the type of disclosure which will attract this protection, and the type of matter that has to be shown, or tended to be shown , in terms of the subject matter of such a disclosure. Section 43B lists there at subsections (a) to (f) the various types of disclosure which will potentially qualify for protection, and they are that:

(a) A criminal offence has been committed or is being committed or is likely to be committed;

(b) That a person has failed or is failing or is likely to fail to comply with any legal obligation to which he is subject;

(c) That a miscarriage of justice has occurred or is occurring or is likely to occur;

(d) That the health and safety of an individual has been or is being or is likely to be endangered;

(e) That the environment has been or is being or is likely to be damaged; or

(f) That information tending to show any matter falling within of the preceding paragraphs has been or is likely to be deliberately concealed;

(f) being in effect disclosure about "cover ups" of the other types of matter referred to in the preceding paragraphs.

17. Those are the necessary classes of disclosure, and of course in terms of whether or not a disclosure does amount to a protected disclosure there are other provisions as to who the disclosure is made to, and the circumstances and manner in which it is made. Also the reasonable belief in the disclosure on the part of the person making it is a potential issue. So there are a number of quite elaborate provisions in relation to protected disclosure before such a claim can be considered, and it was important that that is understood before the Tribunal goes any further.

18. So, in terms of what the Tribunal is trying to find out from the claimant, it was to whom he disclosed what, and how that might amount to a protected disclosure.

19. In terms of the most likely and most potentially relevant disclosures, from what the claimant told the Tribunal in relation to the events of 17 August 2016 and their immediate aftermath, it seems that if there was any potentially protected disclosure it would be purely oral , and it would be to potentially Wendy Hodge, Amy Hall, Andrew Shirtcliffe or Julie Cooper. Those are the four persons to whom any such protected disclosure may have been made, and in terms of the events of the evening in question the claimant's account, he accepts, is a little hazy in the sense that it was quite some time ago, and he has struggled to recollect precisely what was said on that occasion.

20. In terms of what he was able to tell the Tribunal, all this arose in circumstances where he being a TSW on duty that evening was involved in the post operative care of a patient in circumstances where, put bluntly, he could have done with some help, and he believed that there would be another TSW available, David Bibby, to assist him in carrying out his duties at that time. He discovered in the course of that evening that that person had been allowed to go home in circumstances where the claimant clearly believed that that should not have happened, not least of all because it increased the workload expected of him in those circumstances. In terms of raising that with anybody, he says that he asked, as he put it, Wendy Hodge who was one of the first people he spoke to about this, where this other employee, David Bibby, was, and was told by Amy Hall that he had gone home.

21. In terms of that and whether that potentially could be a protected disclosure, of course asking a question and getting an answer is not in itself potentially a protected disclosure. Whatever the answer is and whether one accepts it or not the question is whether or not there has been a disclosure, and asking a question is not

ordinarily considered to be the conveying of information, an essential part of a protected disclosure.

22. Thereafter, however, towards the end of the evening as the claimant was in fact getting ready to go home, he then spoke again to Wendy Hodge and at this point there may then have been a protected disclosure in terms of what he said to her then, he saying that he wanted to see her the following day and being told that he could not in fact do so, and at this point Andrew Shirtcliffe also becoming involved in relation to where David Bibby had been, and it may be, and I put it no higher than that, that it is at this point the claimant made what might amount to a protected disclosure in that he claims that he said that he would "take this higher" or something along those lines. Again, unfortunately the claimant is unable to be much more precise in terms of exactly what he said to Wendy Hodge or Andrew Shirtcliffe at this time, but I am prepared to accept for the purposes of this application that there may at that time a protected disclosure, albeit far more detail would be necessary for the claimant to establish precisely what it was.

23. The following morning, and indeed this is what the claimant was saying when he said that he would "take it higher", he asked to see Julie Cooper who would have been a more senior person to see, but she could not see him that morning but she did see him later that day after he had attended some union duties. In that conversation the claimant again says that he raised what may amount to a protected disclosure in relation to the events of the night before. By that time Julie Cooper, however, had made it clear that she had become aware of two complaints about the claimant's conduct the night before, and indeed had viewed the CCTV footage, and so it appears matters were underway, as it were, by that time, but in the course of this conversation again there may have been, and I put it no higher than that, a protected disclosure to the extent that the claimant may have raised issues in relation to David Bibby being allowed to go home. Again the terms are somewhat imprecise the best one can do at the moment is to find that there is potentially a protected disclosure at that point. Again its details are somewhat hazy.

24. Thereafter the respondent on the claimant's account sought to suspend him on the following Friday, but in fact, as he would not attend without appropriate representation, that did not take place, but he was subsequently suspended by a letter dated 22 August 2016 which apparently he got on or about 24 August 2016. The disciplinary procedure was then undertaken, albeit not until January 2017. The claimant apparently raised a grievance in the meantime but nothing is said to have arisen in that.

25. The other factor the claimant relies upon is that on or about 31 October 2016 he contacted the respondent's grievance/whistle-blowing champion, I should say, Phoebe Hemmings, and sought to raise through her concerns in relation to staffing levels and the incident in question. That, of course, would postdate the claimant's suspension, and the instigation of the disciplinary procedures against him.

26. In terms of those disciplinary procedures, ultimately they were carried out by Mr Price who I am told was the Chief of Pharmacy, and thereafter the appeal against the claimant's dismissal which he instigated was dealt with by Mrs Naylor who was Director of Midwifery and Nursing, or something of that nature.

27. In terms of the application, therefore, to the extent that the claimant has been able to elaborate upon the amendment he wishes to make, potentially he is relying upon one or more potential oral disclosures in relation, effectively to staffing levels and an implied perhaps, if not expressly stated concern, in relation to the health and safety of a patient in particular, but the respondent does make the point through Mr Spencer that equally it could be said that the claimant's real "beef", for want of a better word, and what he was disclosing was the impact upon his own working conditions arising out of the absence of any assistance because of the early departure of a potential colleague. The respondent points out that it would not necessarily be the case that the disclosures would tend to show what the claimant says they were tending to show, and indeed may not have been made in the public interest, but rather related to his own conditions of work.

28. In terms of the principles to be applied in such an application, as Mr Spencer has rightly submitted, they derive from the long established case of ***Selkent Bus Company v Moore [1996] ICR 836***, an Employment Appeal Tribunal decision, which has indeed largely been replicated in the Presidential Guidance on Case Management which was issued in 2014 and which, in respect of amendments at section 1 of that document, goes through many of the principles that are in fact derived from the ***Selkent Bus Company*** case.

29. Ultimately, as the ***Selkent*** case itself says, and which has not changed despite the rules changing over the years, but the principles remaining the same, the Tribunal has a discretion whether to allow an amendment of this nature or not, and in terms of that discretion it must take into account the relevant factors which are not said to be exhaustive but amongst the main ones that are regularly to be considered are the nature of the amendment to be made, what exactly is it that is sought to be added, any relevant time limits, and the timing and manner of the application.

30. As ***Selkent*** makes it clear as well, in weighing up these factors the Tribunal should have regard to the prejudice to the parties of either granting the amendment or of refusing it and of taking into account the interests of justice, which, of course, also includes the relevance of any time limits.

31. A further factor that may be relevant, but the degree to which it is is a little controversial, is the question of the merits of any proposed amendment and the degree to which the Tribunal can consider at this stage the prospect of success of a claim if so amended.

32. Basically all these factors have to be considered, and in considering them the first one it seems to me is the nature of the amendment. It is right to say that in seeking to amend in this way the claimant is, as the respondent submits, seeking to do more than make a minor amendment. This is not the correction of a clerical error, this is to add a new claim, a different jurisdiction, albeit one which I accept does arise out of the same facts if limited, as I find in fact the amendment would have to be, to the dismissal aspect. There is already a complaint of unfair dismissal; what the claimant is seeking to do is to add an additional basis in respect of that dismissal, and indeed a basis which would make it, if established, an automatically unfair dismissal which would prevent the Tribunal considering any other issues of fairness. That is clearly a substantial amendment but it is one, I accept, he has linked to the facts as already pleaded, because of course it all arises out of the dismissal and so that is a relevant factor.

33. In terms of the time limits, of course, it is right that if presented as a new claim on, say, 18 September 2017, which is when the claimant first sought to add this claim, then given that the dismissal was in March 2017 any new claim on that basis would have been out of time by some three months or so, and that is a factor that I am entitled, indeed required, to have regard to in deciding whether or not to grant the application.

34. In terms of the timing and the manner of the application, the timing is when the claim is fairly well advanced. It was not made until 19 September 2017 when the claim itself had been issued in June 2017, and indeed had already been listed for a hearing, so it is a relatively late application, but I do take into account the fact that this is still a relatively young claim in the sense that the dismissal was only in March 2017, and the Tribunal frequently deals with cases where a claim is considerably further advanced than this. That said, there is still a hearing date of two days listed in almost a month's time, and that is obviously a very relevant factor.

35. In terms of the manner of the application, it has been made in writing in terms of the email, but in terms of any further details the claimant did not until today really specify any more in terms of what he was seeking to amend and why, and in particular what it is he will allegedly relying upon in terms of the protected disclosures. The claimant has only really done that today and perhaps still needs further to refine that if the application is successful.

36. In terms of those factors, clearly the facts that it is a late application and is a substantial one are relevant. The respondent's position is that because the claim thus far had only been an unfair dismissal their only witnesses, as indeed one would expect in an unfair dismissal case, are to be the dismissing officer and the appeals officer, and of course in an unfair dismissal that is the norm. If the application to amend is permitted the respondent says that that would have to be revised, and the Tribunal accepts that is likely to be the case because the necessary witnesses will be those persons to whom the alleged protected disclosures were made. At the moment that is potentially some four people, it may be reduced to perhaps two, but it seems highly likely that if the application is permitted that at least two further witnesses will be required because they were the people to whom the alleged protected disclosures were made in the form of Wendy Hodge and Julie Cooper at the very least, and there may be others. So it certainly is the case that if the application is successful the respondent is likely to have to obtain witness evidence from those witnesses who are not presently likely to be called before the Tribunal.

37. Also the respondent, of course, would be entitled to put in an amended response once the claimant had actually formally, and this would be required, set out in writing the precise details of the protected disclosures upon which he relies. That is inevitably going to lead to delay because there would not be sufficient time for the Tribunal to allow the respondent to respond to any such formal written amendment which would be directed and to prepare the witness evidence and still retain the hearing date of 7 November 2017.

38. So whilst the claimant has suggested, I think, in correspondence that this as it were could be dealt with without disturbing the hearing date and without any further consequences, I cannot agree, and if the application does succeed it seems to me inevitable that there would have to be a postponement of the hearing and the respondents would have to consider getting evidence from additional witnesses.

That is clearly a matter of prejudice to them and although one has to weigh up prejudice in matters it may not be irredeemable but it is clearly significant.

39. On the other hand I have to weigh up what would be the effect of not allowing the amendment upon the claimant's case. This is a case where the claimant complains of unfair dismissal and has qualifying service. His unfair dismissal claim will be heard and is due to be heard in a month's time. Not granting this amendment will not affect that at all. Sometimes these amendments are sought because, for example, there is an issue in relation to qualifying service because automatically unfair dismissal, as the claimant might know, does not require qualifying service and very often a claimant will seek to rely upon an automatically unfair reason for dismissal because they have to do so because they cannot claim ordinary unfair dismissal. That is not the case here. If this application does not succeed the claimant's complaint of ordinary unfair dismissal can proceed and will be heard. He will, it is right of course, not be able to argue that it was automatically unfair, and there are of course some consequences in terms of the compensation recoverable in terms of an automatically unfair dismissal as opposed to an ordinary unfair dismissal, but those are consequences for remedy not for liability and ultimately if the claim is not amended the claimant still has a perfectly sustainable claim for unfair dismissal. So the prejudice to him of not allowing this amendment is not as great as if the whole of the claim potentially depended upon it.

40. The Tribunal is entitled, it considers, to have some regard to the value of the potential amendment in terms of the prospects of success for the claimant, and whilst that should not be determinative and is not going to be, it is nonetheless a relevant factor, I consider. The difficulty the claimant has is that even at this stage, and following today's ,I hope , fairly extensive discussion, the details of his claims are still a little unclear and he would need to be far more precise, and indeed his witness evidence would have to be far more precise, as to what it is exactly is that he is alleging constitutes the protected disclosures, in terms of what exactly he said to whom, and why he contends that that would be within the ambit of protected disclosure. That would be the first hurdle that he would have to get over but ultimately, and accepting that the burden of proof would then shift, in terms of determining whether his dismissal was by reason of the protected disclosure, (and of course it must be principally: if not the only reason it must still be the principal reason and not just part of it which was in fact the way in which the claimant put it in his application today), that there must be this causal link between the protected disclosures if established, and the dismissal. One immediate feature of this case is that the dismissal was carried out by someone who on the face of it, was at arm's length to the claimant. He is not the person, Mr Price of course, to whom the alleged protected disclosure was made. He was not involved in the direct day-to-day management of the claimant. There is nothing that has been put before the Tribunal so far that he may have been aware of the protected disclosures, save to the extent that it would have arisen out of the facts of the incident on 17 August 2017 that gave rise to the claim in the first place. In terms of the effect of the protected disclosure upon the mind of the person carrying out the dismissal, one immediate hurdle for the claimant is that there is no immediate apparent link between those two matters, and the same would also be true of any appeal, although I appreciate of course that the appeal effectively did not take place, certainly as far as the claimant was concerned, because he, for reasons of his own which are certainly understandable, did not attend.

41. In addition to that, of course, the Tribunal would be looking in a claim for protected disclosure dismissal for that link, but it may well be the case, and not to anticipate the respondent's response to any amended claim, that what emerges is that the respondent says that the claimant's dismissal as not by reason of having made any protected disclosure, but was by reason of the way in which he made it. Assuming for a moment then that the claimant's contention that he was making protected disclosures on the night of 17 August 2017 is correct, the reason for his dismissal, of course, was his conduct on that occasion. It is not the function of this Tribunal to decide if that is right or wrong, but in terms of the reason the respondent gives the reason they clearly gave was his conduct and the way in which he behaved towards colleagues on that night.

42. As is clear from a case called ***Bolton School v Evans [2007] ICR 641***, (wrongly referred to as ***Bolton School v Khan*** in the oral judgment) making a protected disclosure does not give an employee carte blanche as to the way in which he does it. He does not have the protection of a protected disclosure if the manner in which he goes about that disclosure is itself an act of misconduct. So the mere fact that in the course of making a protected disclosure there is misconduct does not protect a claimant in those circumstances if in fact that would amount to misconduct, so there are, it seems to me, potentially a number of quite serious hurdles to the claimant's amended claim succeeding, if it were to be allowed.

43. Weighing up, therefore, the potential benefit to him of allowing the amendment against the prejudice to the respondent, and the almost inevitable consequence of an adjournment of the hearing of 7 November 2017, with the increase in costs in having to have further witnesses once the claimant had further particularised his disclosures, which at the moment still remain a little vague, then weighing all those factors up, and with sympathy for the claimant, accepting it was entirely an error on his part that led to this position in the first place, the Tribunal does not accept his application to amend , and the claim will proceed unamended.

44. The Tribunal proceeded to discuss further case managements issues, which are dealt with in a separate Order.

Employment Judge Holmes

Dated 10 October 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

30 October 2017

FOR THE TRIBUNAL OFFICE