EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112056/2021

Open Preliminary Hearing Held by CVP on 20 June 2022 at 10.00am

Employment Judge: Russell Bradley

Mr Roy Urquhart Pettigrew — **Claimant In Person**

Universal Student Living Ltd — **Respondent Represented by: Ms K Graydon - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that: -

1. The claim of discrimination on grounds of age is dismissed under Rule 52 of the Employment Tribunals Rules of Procedure 2013 its withdrawal having been confirmed at this hearing;

2. The claim of discrimination on grounds of race is dismissed under Rule 52 its withdrawal having been confirmed at this hearing;

3. Insofar as the claimant has sought to add Homes for Students Ltd as a respondent, that application is refused;

4. The claim of discrimination under section 20 of the Equality Act 2010 should proceed against the respondent to a case management preliminary hearing to be held by CVP on a date to be fixed;

5. There is no relevant claim of unfair dismissal under either section 98 of the Employment Rights Act 1996 or under section 103A of that Act;

6. The claim or a failure to consult the claimant about an alleged transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) made against the respondent should proceed to the case management preliminary hearing anticipated at 4 above:

7. Insofar as the claimant makes a claim of detriment under section 47B of the Employment Rights Act 1996 against the respondent on the ground that he made disclosures to it that (i) the coronavirus regulations were not being complied and (ii) the student premises were non-compliant with building regulations, that claim should proceed to the anticipated case management in preliminary hearing.

REASONS

introduction

1. On 26 April 2022 an emailed Notice to the parties fixed this CVP preliminary hearing. It followed an Order by EJ Kearns at a telephone conference preliminary hearing on 25 April. The Notice confirmed her order that this hearing was fixed to determine two issues. First, the claimant's application to amend the ET1. Second, to review case management. The parties were represented as noted above. Ms Stephanie Wessel was in attendance with Ms Graydon. it was unfortunate that the claimant was not represented as had been anticipated by EJ Kearns in paragraph 2 of her Note. It appears that special arrangements were made to accommodate that representation.

2 For this hearing an indexed paginated bundle of 86 pages was lodged. Both parties lodged written submissions Following my request, Ms Graydon emailed to the tribunal a copy of an agenda previously lodged by the claimant which had not been included in the bundle. It appears that it was emailed to the tribunal on 13 December and to Ms Graydon on 24 December 2021.

3. On 28 October 2021 the claimant presented his ET1. He named two respondents. They were (first) Universal Student Living Ltd and (second) Homes for Students Ltd (H4S). On 5 November 2021 the tribunal wrote to the claimant. The letter said *"a Legal Officer … has decided that part of your*

- t» - *tgards to the second respondent should be rejected under rule 12 because you have not complied with the requirement to contact Acas before instituting relevant proceedings "* It said that his claim was defective because he had *"not provided an early conciliation number for each respondent … and your claim is rejected insofar as it is made against the following respondents: Homes for Students LTD,"* The letter returned the claim form. The letter also advised that the claimant could apply to the Tribunal for the decision to be considered afresh by an Employment Judge within 14 days. It further advised of his right to apply for a reconsideration of the decision under Rule 13 of the Employment Tribunals Rules of Procedure 2013 and of a right of appeal. The claimant did none of these three things. On 7 December an ET3 was submitted by the respondent.

4. It was agreed that the claimant had been employed as a Building Manager.

The ET1 form

5. The claimant indicated at 8.1 of his form that he made claims of unfair dismissal and of discrimination on grounds of (i) age (ii) race and (iii) disability. At 8.2 of the form and relative to the claim of unfair dismissal the claimant said that; it was clear that H4S *"wanted rid of'* him from day 1 (that day being 29 July 2021): he was accused of threatening behaviour/insubordination; his suspension and accusations were made while he was suffering from mental health issues; the disciplinary process was not conducted fairly and an investigation report was flawed and inaccurate; and notes at a meeting were not a true record. While there was reference to racist and discriminatory *"tactics"* affecting others, there was nothing relevant supporting a claim by the claimant of discrimination on grounds age, race or disability. The background at 8.2 contained references to failures to adhere to COVID-19 guidance, and faults and non-compliance at the claimant's place of work 194-200 Cowgate, Edinburgh. It also referred to a grievance raised by the claimant. It narrated that the respondent was acquired by H4S on 29 July [2021]: he was made aware of it that day: and there had been no prior consultation. At that time of presenting his ET1 the claimant was not represented.

Preliminary Hearing on 13 January 2022

6. On 13 January 2022 EJ Porter conducted a telephone conference preliminary hearing (pages 35 to 41). The parties were represented as they were before me. I understand that agendas were lodged by both parties prior to it. The respondent's agenda was indexed in this bundle as dated 7 January 2022 (pages 29 to 34). While neither agenda is referred to in the Note, it is clear from the email forwarded by Ms Graydon at my request that she received an email with the claimant's agenda on 24 December. The tribunal ordered further and better particulars. They were to contain details of; the basis of the claim of unfair dismissal against the respondent; the claims of direct and indirect discrimination (age); the basis of the claim of race discrimination: the basis of claims of direct and indirect discrimination (disability); and whether claims under sections 15 and/or 20/21 were made and if so particulars of them. The tribunal noted that the claimant's narrative could be construed as bringing a claim of public interest disclosure, it later recorded the claim as being one of detriment and ordered further and better particulars about it. Disability was not conceded by the respondent. The claimant was ordered to intimate an impact statement and al! relevant medical records A further preliminary hearing was fixed for 1 March. The tribunal noted the claimant's undertaking to seek legal advice from the Citizens' Advice Bureau or a law clinic affiliated to a university it appears that the claimant first approached the University of Strathclyde law clinic for assistance on 21 January.

28 February Orders and the 1 March Preliminary hearing

7. On 28 February 2022 and on reading a letter of that date from the claimant's general medical practitioner EJ d'lnverno made the following orders (see page 50);-

    1. Postponed the PH fixed for 1 March 2022
    2. Directed that it be relisted on the first available day after 6 weeks
    3. (On his own initiative) extended the time for compliance by the claimant with the Orders of 14 January 2022 to 21 March 2022

4. Allowed the Respondent until 11 April 2022. within which to (a) write to confirm which points if any of the Further Particula . objected to on the grounds that they require to be the subject of an application for (eave to amend, and (b) adjust the paper apart to Form ET3 in response, if so advised.

8. The GP letter was not in the bundle. Neither side could recall its content. It was agreed that I would source a copy from the tribunal file and share it, which I did later in the afternoon of this hearing.

9. It is obvious from EJ d'lnvemo's orders that by 28 February the claimant had not complied with the orders from the hearing on 13 January.

Further pleadings

10. On 21 March an 11 page document was submitted for the claimant **(pages 52 to** 62). It is headed, *"ET1 section 8 paper apart."* It contains 74 paragraphs. It is set out under a number of headings. They are; *"Preliminary Matters", "Parties"; 'Background';* '*The Claims"* and *"Remedies"* 1shall refer to it from hereon as *"the F&BPs"* I understand that the F&BPs were prepared by Strathclyde University law clinic. The claims were particularised at paragraph 54 as being:-

    1. Failure to make reasonable adjustments (Section 20 of the Equality Act 2010).

    2. Victimisation as a result of raising protected disclosures (Section 27 of the Equality Act 2010).

    3. Breach of TUPE Regulations 2006 for a failure to inform and consult regarding a transfer of employment

    4. Unfair dismissal under s 94-98 of the Employment Rights Act 1996 (should Homes for Students be added to the claim).

11. Paragraph 55 said *"The law and facts are set out below as applicable to each of the above claims:"*

12. On 11 April the respondent submitted its response (pages 63 to 67). It set out that the claimant's paper apart was *entirely new"* and was *interpreted by the respondent as an application to amend "* Under various headings it set out its basis of opposition to the claimant's application for leave to amend.

Preliminary Hearing: 25 April 2022

13. The case was next considered by EJ Kearns at the telephone conference preliminary hearing on 25 April noted at paragraph 1 above. She ordered this hearing and specified the issues for it. At paragraph 1 of her note, EJ Kearns recorded that *"although the claims have become better focused by the further and better particulars he lodged recently, the precise nature of the claims requires additional information in order to understand them properly."* Accordingly, she ordered the exchange of a table or Scott Schedule requesting and providing the information currently missing from the claimant s further and better particulars which (information) was required in order to understand the claims being advanced. The Schedule containing the questions and the claimant's answers to them are pages 75 to 86, lodged on 30 May.

14. The completed Scott Schedule provided information on; disability; the claim of a failure to make reasonable adjustments; the alleged protected disclosures; the alleged detriments; the failure to consult under TUPE; and the claim of unfair dismissal. At this hearing the claimant confirmed that his unfair dismissal claim was made against H4S only.

The issues

15. The issues were fixed by the Notice of Hearing. First, the claimant's application to amend the ET1. Second, to review case management. After discussion, it was agreed that the second could only properly be determined after a decision on the first.

Discussions prior to evidence

16. In discussions prior to hearing evidence, I noted that: -

1. Ms Graydon would email a copy of the claimants agenda as reference to it was made at paragraph 65 of the F&BPs;

2. Tne claims of discrimination on grounds of age and race were withdrawn and could be dismissed. I have done so;

3. Case management should follow at a separate preliminary hearing after and in light of a decision on amendment;

4. Disability remained disputed;

5. While the victimisation claim was labelled as such under section 27 of the 2010 Act, it was properly a claim of detriment under section 47B of the Employment Rights Act 1996 for allegedly making protected disclosures;

6. The claimant makes a claim of (automatic) unfair dismissal under section 103A of the 1996 Act

Evidence

17. The claimant gave evidence and was cross examined.

Findings in Fact

18 From the tribunal paperwork and the claimant's evidence, I found the following facts admitted or proved as relevant to the first issue.

19. The claimant is Roy Urquhart Pettigrew. His employment with the respondent began on or about 10 or 11 December 2018. He was employed as a building manager. On 29 July 2021 his employment transferred to H4S. He was suspended on or about 24 August. He was dismissed from their employment on 24 September 2021 He was signed off from work with medical certificates from his GP in the latter part of 2021 . That situation continued until a last certificate at that time on 10 January 2022. Early conciliation with the respondent began on 11 October. A certificate was issued on 13 October. The ET1 form was presented on 28 October.

20 The claimant worked at 194-200 Cowgate Edinburgh. It is principally used as student accommodation. In the claimant's opinion it was a *"non-complianf* building since about 2018- In his opinion a previous conversion or the building in or about 2012 was *"very bad'.* He complained to a number of individuals about various faults there. Those complaints included the unsuitability of fire extinguishers, a faulty ventilation system and a large hole in a roof/floor. There were, in his view, *"lots of other issues'* at the building. He also complained about a failure to follow COVID-19 related legislation. His complaints were made before and after 29 July 2021 to a number of individuals. On or about 21 August 2021, he raised a grievance to do with his concerns about safety of the building and COVID-19 compliance.

21. His written case is now contained within; his ET1 form; his agenda; the F&BPs; his Scott Schedule; and his written submission. He completed the form and the agenda himself. The other material was prepared by the law clinic. They were prepared based on information which he had provided to them The claimant met with the law clinic on or about 21 January 2022. On or about 3 February a Statement of Facts was prepared by the clinic for the claimant which he approved shortly thereafter. The claimant could not recall if or if so when he gave the law clinic his ET1, the Note from the PH in January 2022 or the letter of 5 November 2021 from the tribunal.

22. The Scott Schedule alleged that; various adjustments should have been implemented in the period January to June 2019 relative to his disability; protected disclosures were made in June 2019 and August 2021 and on other unknown dates; the alleged detriments occurred in June 2019 and August 2021 and on other unknown dates. The Schedule alleged that there was a TUPE transfer on 29 or 30 July 2021 between the respondent and H4S and that there was a failure to inform or consult about it. The Schedule set out the basis of the claim of unfair dismissal against H4S only.

23. In relation to the various adjustments where there were alleged failures, the claimant just *"took them on the chin."* He expected things to get better, but they were never fulfilled.

24. The claimant suffers from anxiety. He did so when he submitted his ET1. He has been assessed by the Benefits Agency as being unfit for work in the longer •.erm. The claimant had a telephone appointment with his GP on 24 February 2022. The GP then wrote a *"to whom it may concern letter* on 28 February. As at 28 February 2022 he was assessed as unfit for work due to depressive and anxiety symptoms. The GP's letter recorded; the claimant's commentary of a recent deterioration in his health, particularly mental health, his mood and levels of generalised anxiety; the claimant's opinion that he would not manage to represent himself at the upcoming hearing; and his understanding that the claimant was seeking to postpone the hearing until he felt mentally stronger and more able to prepare for it. It recorded the GP's opinion that in light of the claimant's current mental state the request to postpone was reasonable. It also recorded that after review, it was necessary to commence antidepressant medication.

I ' **Submissions**

25. Both parties lodged written submissions in advance. Ms Graydon agreed that the respondent's submission should be heard first. In very large measure she repeated her written submission. I mean no disservice by not repeating it. She agreed that broadly it replicated her written response, at pages 65 to 67 of the bundle. Under the headings of Delay, New Factual Allegations, New Head **of Claim, Time Bar** and **Prejudice** she detailed her argument as per those pages. Her written submission added a heading and detail of **Jurisdiction - Respondent not alleged perpetrator.** Her argument was that to the extent that the claimant seeks to introduce Homes for Students Ltd as a respondent in various claims, that should not be allowed.

26. The law clinic had prepared the claimant's written submission to which he made a short oral addition. Again I mean no disservice by not repeating it. He underlined that; he did not have legal representation at the time of his ET1; his illness (anxiety) was exacerbated by the tribunal process: his amendment did not introduce anything new; and in relation to TUPE enough was said in his ET 1 at Box 8.2 (about the acquisition and absence of consultation) for this not to be regarded as a new claim.

The law

27. The decision of the EAT in *Selkent Bus Co Ltd v Moore [1996] ICR 836* (cited by both parties) contains genera! guidance to employment tribunals in relation to amendments (recognised as such in the Court of Appeal in *AH v. Office of National Statistics* [2005] IRLR 2011 I refer to that guidance below.

28. Rule 34 of the Employment Tribunals Rules of Procedure 2013 provides that *'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: and may remove any party apparently wrongly included."*

29. In *Argyll & Clyde Health Board* v *Mr A Foulds & Others* UKEATS/0009/06/RN the Scottish EAT (Lady Smith) considered the question of amendment by bringing in (in that case) a third respondent about four months after presentation of the ET1. At paragraph 40, Lady Smith said, *''If it was being presented outwith that time limit the tribunal need to look at the explanation given for that having occurred: Why were the respondents not included in the original claim? What was known by the claimant and/or his solicitor about their potential as relevant respondents at that time? What should have been known? When did the claimant and/or his solicitor realise that the respondents ought to be included? What steps were taken after that? What was the reason for any delay thereafter? Did the claimant and/or his solicitor take prompt action once the need to seek to include the respondents was realised or not? If not, why not? Would there be injustice or hardship to the claimant if the application were refused? If so, of what nature? What would be its cause? Would there be injustice or hardship to the respondents in being brought in as respondents at this stage?"*

30. The claimant's written submission referred to a number of decisions of upper courts.

Discussion and decision

31 In his written submission, the claimant says, *The purpose of this preliminary hearing is to determine if the ET1 paper apart submitted on 21 March 2022 is an amendment to the original claims and if so whether the amendment should be allowed.'* With respect, that is not quite accurate. EJ Kearns and the Notice of Hearing had determined that the F&BPs *were* an application to amend. There was no prior question.

32. On the application to amend, it is convenient to set out the guidance from the EAT in *Selkent.*

> *1. 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. What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant, (a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action, (b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978. (c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments.*

> *The amendments may be made at any time — before- at, even after the hearing of the case. Delay in making the application is, however a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision.*

33. It is perhaps helpful to start by acknowledging what claims were and were not within the ET1 form.

Claims of discrimination

34. The form is marked to show claims of discrimination on grounds of age, race and disability. By agreement now, the age and race discrimination claims have been withdrawn and are dismissed. While its details are unfocussed and contain some material which is strictly not relevant, the ET1 says, *"I was accused of threatening behaviour/insubordination. This was done as they were aware I was suffering from mental health issues."* On any reading that is an assertion of a claim of discrimination connected to a condition which could be a disability. In his agenda which appears to have been sent to the tribunal and to the respondent on 24 December, he asserted claims under sections 15 and 20 of the 2010 Act. Schedule 2 with the agenda (D6 to D8) contains the claimant s answers to questions relevant to a claim under section 20. The F&BPs are clear that such a claim is asserted (see page 59, paragraph 54.1 and paragraphs 56 to 63). The Scott Schedule information further specifies four conditions relied on as a disability in respect of each alleged failure to make reasonable adjustments. The Schedule then identifies the months (January, March and June 2019) when it is said that the adjustments should have been made, in my view the further detail provided in the F&BPs and the Schedule is not (as per ***Selkent)*** pleading a new cause of action. It is the

part ia n of the claim which was anticipated by EJ Porter on 13 January. Her Note (at paragraph 9) expected the F&BPs to address the question of whether there is a claim under sections 20 and 21 and if so poses three questions to be answered. The claimant has now done so. The respondent's agenda anticipated that without specification of the claims there may be a time bar argument. Given the dates now relied on by the claimant there may well be. That may be a preliminary issue which will require to be addressed. But to summarise, the F&BPs do not seek to amend in a new claim under section 20. That claim (only) should proceed against the respondent.

Ciaims of unfair dismissal

35. The ET1 form is also marked to include a claim of unfair dismissal. The claimant has now clarified that this claim is made against only H4S. His F&BPs anticipate that it can go on only if they are *"added to the claim".* In my view, two points occur. First, the claimant has done nothing to retain them as a party after the letter of 5 November. It set out three steps available to him. He took none. No explanation has been offered as to why the claimant did nothing in answer to it. Further, EJ Porter s Note records (paragraph 2) that the claims against H4S were rejected at the stage of eariy conciliation. The claimant did nothing to address this issue even after 13 January, Second, and while not referred to by either party Rule 34 appears to me to be relevant. But so are the views expressed in ***Foulds.*** Notwithstanding the involvement of the law clinic since about mid-February 2022, there is no answer to any of the questions posed by Lady Smith in that case. The attempt to add H4S in the F&BPs is clearly outwith the time limit. While they were included in the original ET1, by about 5 November the claimant knew that any ciaim against them was not proceeding without further action by him and within certain time limits. He knew what he needed to do and the timescale within which it needed to be done. No steps were taken to add them until 21 March, in the circumstances that was not prompt action. The obvious hardship to the claimant is the loss of a claim of unfair dismissal. There appears to be no prejudice to the respondent in that this claim is exclusively against an

unconnected third party. But in my e he hardship to the claimant has come about as a result of his own inaction. The claim if deemed presented on 21 March is dearly out of time. And while the claimant's written submission to the question of reasonable practicability and 12 cases which are said to be relevant to that question in my view the question is; was it reasonably practicable for the claimant to have taken one or more of the three steps available to him on receipt of the letter of 5 November? In my view it was reasonably practicable for him to have done so. He was aware that the claim against H4S had been rejected on receipt of the letter of 5 November. There was no explanation from him as to why none of the suggested steps were taken. The application to amend the claim by adding H4S is therefore refused.

Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

36. In the ET1 the claimant says, "*Homes for students acquired Universal Student Living in* [sic] *the 29th July. No prior consultation. I was made aware of take over by Robyn Burns HAS on 29th of July."* In his agenda (at 4.1) in answer to the question *"What are the issues that you consider the tribunal will have to determine?"* the claimant includes, *"Failure to consult notify prior to acquisition of USL by HFS."* In her written submission. Ms Graydon says (under the heading of **New Head of Claim)** "*The Claimant's application introduces an entirely new head of claim which is raised out of time: an alleged breach of the TUPE Regulations 2006 fora failure to inform and consult."* I do not agree that the F&BPs seeks to introduce a claim which is entirely new. The ET1 refers to an acquisition and a takeover. He refers to being made aware of it on 29 July, in its Grounds of Resistance the respondent says (at **BI) (page 25)** "*On 29 July 2021, the Second Respondent acquired the First Respondent by way of on an acquisition. As a result, the Claimant's employment automatically transferred to the Second Respondent."* In his ET1 the claimant complains about "*no prior consultation*" . It is clear from the context of that narrative that he is referring to the acquisition of the respondent by H4S. I note that while the F&BPs say (paragraph 55 on **page 59)** that "*The law and facts are set out below as applicable to each of the above claims*

there are no pleadings to support a claim for a failure to consult. I have taken account of what was said by Langstaff J (the then President of the EAT- as he then was) in the case of *Chandhok and another v Tirkey* (20151ICR. 527 at paragraphs 16 to 18

1. *" ……The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely on their say so. instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respond. A respondent is not required to answer a witness statement, nor a document, but the claims made— meaning, under the Employment Tribunals Rules of Procedure 2013 (SI 2013/1237), the claim as set out in the ET1. [17] I readily accept that tribunals should provide straightforward, accessible and readily understandable fora in which disputes can be resolved speedily, effectively and with a minimum of complication. They were not at the outset designed to be populated by lawyers, and the fact that law now features so prominently before employment tribunals does not mean that those origins should be dismissed as of little value. Care must be taken to avoid such undue formalism as prevents a tribunal getting to grips with those issues which really divide the parties. However, all that said, the starting point is that the parties must set out the essence of their respective cases on paper in respectively the ET1 and the answer to it. If it were not so, then there would be no obvious principle by which reference to any further document (witness statement, or the like) could be restricted. Such restriction is needed to keep litigation within sensible bounds, and to ensure that a degree of informality does not become unbridled licence. The ET1 and ET3 have an important function in ensuring that a claim is brought, and responded to, within stringent time limits, if a "claim" or a "case" is to be understood as being far wider than that which is set out in the ET1 or ET3, it would be open to a litigant after the expiry of any relevant time limit to assert that the case now put had al! along been made,*

> because *it was "their case ' and in order to argue that the time limit had no application to that case could point to other documents or statements, not contained within the claim form. Such an approach defeats the purpose of permitting or denying amendments; it allows issues to be based on shifting sands: it ultimately denies that which clear-headed justice most needs, which is focus It is an enemy of identifying, and in the light of the identification resolving, the central issues in dispute. [18] In summary, a system of justice involves more than allowing parties at any time to raise the case which best seems to suit the moment from their perspective. It requires each party to know in essence what the other is saying, so they can properly meet it: so that they can tell if a tribunal may have lost jurisdiction on time grounds: so that the costs incurred can be kept to those which are proportionate; so that the time needed for a case, and the expenditure which goes hand in hand with it, can be provided for both by the parties and by the tribunal itself, and enable care to be taken that any one case does not deprive others of their fair share of the resources of the system. It should provide for focus on the central issues. That is why there is a system of claim and response, and why an employment tribunal should take very great care not to be diverted into thinking that the essential case is to be found elsewhere than in the pleadings "*

37. In my view, in his ET1 the claimant was saying that there had been a failure to consult about what he understood to be the acquisition (or takeover) of his employer by H4S. It appears to me that his F&BPs do little more than identify that the claim about that alleged failure arises by virtue of TUPE. Given what was apparently known to the respondent when it drafted its ET3, it knew (or should have known) *"in essence"* what was being complained about in the ET1, In my view the claimant does not seek to introduce a new claim in his F&BPs. The essence of the claim (in fact) was pled in the ET1 itself. The claim of a failure to consult should proceed against the respondent As an aside, I noted that in answer to my question Ms Graydon initially appeared to accept that TUPE applied to the acquisition. After an intervention from Ms Wessel contradicting her, it appears that the respondent now disputes that TUPE

applied to the admitted acquisition. If TUPE did not apply it is obvious that this claim cannot succeed

Detriment for making alleged protected disclosures

38. In her note, EJ Porter said that in her view *"a claim of Public Interest Disclosure* could be construed as being brought from the ET1 narrative. She later recorded the claim being one of detriment and ordered further and better particulars about it (see paragraph 10 of the Note, page 39). At paragraph 10 EJ Porter said, *… the claimant claims detriment on the grounds that he made Public Interest Disclosures. To this end, the claimant states that he intimated to the respondents that the coronavirus regulations were not being complied with. He also intimated to the respondents that the student premises were non-compliant with building regulations, it is unclear what detriment he suffered as a consequence of the alleged disclosures. Further and Better Particulars of these claims are required. The Further and Better Particulars should, as a minimum"* include a number of essential matters.

39. The F&BPs (page 61, para 65) say "*The Claimant believes he was treated negatively for raising protected disclosures regarding compliance with Coronavirus legislation and health and safety issues. These issues are outlined in the Claimant's PH agenda."* The relevant reference in the agenda appears to me to be (at 2.2), *"Victimised due to constant raising of concerns regarding client and directors failure to adhere to Landlord registration building regulations/health and safety/fire safety. A failure to adhere to the Coronavirus(Scotland)(no2)Act 2020 and the dismissal of my emails\advice regarding this.'* The Scott Schedule avers five disclosures (pages 80 and 81). Claims arising from the latter two (on 21 and 23 August 2021) cannot proceed because, logically, they were not disclosures made to the respondent. Indeed the Scott Schedule says they were made to an employee of H4S. Any claim of detriment allegedly based on those disclosures cannot proceed. The first alleged disclosure (June 2019) relates to an alleged undertaking to provide a laptop. There is no disclosure as such allegedly made by the claimant. This is beyond what is noted by EJ Porter as being his case when she considered it in January. It is, in my view, an attempt to

introduce a new claim based on a disclosure concerning a different matter. The ciaimant has not provided any explanation as to why it was not included cr even referred to at ail in his ET1 . Looked at in the context of ***Selkent*** my view is that this is an attempt via the F&BPs to introduce a new factual basis of a claim. It is on the face of it out of time No explanation has been offered as to why it was not included earlier, it is a proposed amendment which I refuse.

40. The second alleged disclosure made to a director of the respondent (also June 201 9) related to gas safety, suitability of fire extinguishers and ventilation system. It appears to me that it could be a complaint that the premises were non-compliant with building regulations. The claim against the respondent of alleged detriment based on that disclosure should proceed. I note that the date of the disclosure (and apparently of the alleged detriment) is June 2019. It is, on the face of it, out of time.

41. In relation to the one other alleged disclosure (and detriment) (failure to follow Coronavirus legislation in particular the Coronavirus (Scotland) (No.2) Act 2020) the claimant says (pages 81 and 82) that the exact dates are unknown as the claimant raised these concerns on numerous occasions to many different people. He lists seven individuals. One at least was the director of the respondent. In my view what is said in the F&BPs and the Scott Schedule is not the introduction of a new claim. It is further specification of a claim within the ET1 against the respondent which was recognised at the January PH. At paragraph 66 (page 61) of the F&BPs the claimant avers, *"The Claimant on numerous occasions brought to the Respondents attention issues with the property which amounted to breach of health and safety regulations. Further, the client made the Respondent aware of the duty of student accommodation providers under the Coronavirus (No.2) (Scotland) Act 2020, when he was told that this did not apply to the company as they were an English company:'* This averment does not add anything material to what was recognised in January. I note in passing that in answer to the Scott Schedule question for detail of each detriment alleged the claimant says (page 82) *"The Claimant felt he was victimised and treated negatively as a*

result of him flagging up concerns relating to Coronavirus legislation. He felt the respondent wasn t listening and wouldn t tak actio n ot ; s ues despite the apparent safety concerns. The Claimant further felt his reputation and character and he felt he was pressured into keeping quiet and not voicing his concerns.' While not strictly not a matter for this hearing, it appears to me that the relevance of that passage as a claim for detriment is questionable.

Summary

42. The following claims will proceed against the respondent:

1. discrimination under section 20 of the Equality Act 2010
2. a failure to consult the claimant about an alleged transfer TUPE
3. detriment under section 47B of the Employment Rights Act 1996 limited as per the judgment above

43. I direct that a case management preliminary hearing is fixed to take place by CVP in order to determine further procedure for those claims. One hour should suffice. It would be helpful if the claimant's representative could attend that hearing.

Employment Judge: R Bradley
Date of Judgment: 11 July 2022
Entered in register: 14 July 2022
and copied to parties