IN THE HIGH COURT OF JUSTICE [2022] EWHC 820 (QB)
QUEEN'S BENCH DIVISION QB-2020-001520

MASTER MCCLOUD

BETWEEN

KAPOOR

And

MIZUHO INTERNATIONAL PLC

JUDGMENT

The Claimant in person
Andrew Smith (instructed by Simmons & Simmons LLP) for the Defendant

Authorities cited to the court

Johnson v Unisys Ltd [2001] ICR 480

Edwards v Chesterfield Royal Hospital NHS Trust; Botham v Ministry of Defence [2012] ICR 201

Kim v Park & others [2011] EWHC 1781 (QB)

Towler v Wills [2010] EWHC 1209 (Comm)

Cleeves v The Chancellor, Masters and Scholars of the University of Oxford [2017] EWHC 702

Duchess of Sussex v Associated Newspapers Ltd [2020] EMLR 21

Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch)

Swain v Hillman [2001] 2 All ER 91

ED&F Man Liquid Products v Patel [2003] EWCA Civ 472

Royal Brompton Hospital NHS Trust v Hammond (No5) [2001] EWCA Civ 550

Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co100 Ltd [2007] FSR 63
ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725
Calland v Financial Conduct Authority [2015] EWCA Civ 192

Introduction

1. This is the Defendant's application for summary judgment/strike out on the bulk of this claim. The Defendant is an entity regulated by the Financial Conduct Authority, the FCA. The Claimant applied to work for the Defendant in a FCA regulated role starting 16 September 2013 but was dismissed with the stated reason being gross misconduct, on 18 October 2013. Prior to commencing the job he was required to provide the Defendant with certain details of previous job titles, previous directorships, and reasons for leaving previous roles. He was offered employment subject to the FCA approving him as a 'fit and proper person'.

2. In the financial services industry, where an individual is recruited to perform a controlled function, the employer must legally seek regulatory approval from the FCA, such that the individual is formally authorised to carry out the duties associated with that controlled function. That starts with the employer submitting "Form A" to the FCA. The FCA reviews that, grants approval and the employee then can perform the controlled function. Where the employee has been authorised but subsequently ceases to perform the controlled function for the employer it has to tell the FCA by submitting "Form C".

3. In this case things were somewhat atypical because the Defendant dismissed the Claimant soon after employing him, and the FCA Form A process had not been completed. In such circumstances there is a 'Form B' procedure. This amounts to consensual withdrawal from the Form A approval process, unless the employee objects. In that event the FCA proceeds with the approval process even though the employee is not in fact going to be continuing in the role.

4. In this instance on 21 October 2013, the Defendant notified the FCA that it intended to withdraw the application in circumstances of Mr Kapoor's dismissal. Thereafter the

Form B was provided on 29 October 2013. When it initially notified the FCA on 21 October 2013 the Defendant mentioned a "misrepresentation during the interview and pre-employment screening process".

5. Mr Kapoor did not consent to the withdrawal of the Form A notification and the FCA was then required to make its independent assessment of the Claimant's fitness to perform the role. The FCA performed that process and confirmed that he was a fit and proper person from the FCA's perspective. He had a clean bill of health as far as the FCA was concerned.

6. It was therefore said before me to be common ground that as at 6 January 2014, there was no regulatory bar or restriction upon the Claimant performing a controlled function at another financial services institution regulated by the FCA assuming he obtained a job and was processed by the FCA again. So whilst the Defendant did not want to employ the Claimant, he was not barred in any regulatory sense from working elsewhere if taken on.

The Claim

7. The Claimant's Particulars of Claim ("PoC") were pleaded by Counsel: Mr Kapoor was representing himself at this hearing. He pleads that he was dismissed by the Defendant (per PoC para. 9) at a meeting where doubts were expressed as to his ability to obtain Approved Person status. By a letter of 29 October 2013 (per PoC para. 10) he was informed that the 'gross misconduct' relied upon was misrepresentation of his previous job title, of the reason for his departure from a previous employer, and a failure to disclose all Form A information. He pleads (per PoC para. 11) that this was expanded upon in 2017 by a letter of 2 October 2017 which gave various particulars such as, among other things, his claiming to have been 'Vice President' at the Royal Bank of Scotland and of claiming to have a 'pending' qualification when he had not yet sat exams.

8. He pleads at PoC para. 12 that the fact of his dismissal for 'gross misconduct' was 'registered on the FCA's Financial Services Register'. He claims at PoC para. 14 that he was 'successful at interview' for a job at Credit Agricole but that at around the end

of April 2014 he was informed they no longer wanted to offer him a job. This is referred to by him as rescinding a job offer. He claims that this was due to a 'negative' call from the Defendant. The Credit Agricole job is not part of this application.

9. He further claims in the PoC that offers of employment were also made to him but were then rescinded by the following prospective employers (and these alleged offers and rescissions do fall within this application):

"15. The following offers of employment were rescinded by the following organisations on the following dates:

a. 23 January 2014: CEO EMEA at Natixis;
b. March 2014: Head of Sales at UBS;
c. 18 March 2014: Head of Sales at Banca IMI;
d. 19 April 2014: Head of Fixed Income at ICE;
e. 12 June 2014: CEO EMEA at Churchill;
f. February 2017: CEO EMEA at Mirexia; and/or
g. 28 February 2017: Head of High Yield at BBVA."

10. He alleges at PoC para. 16 that those prospective employers backed out after making offers because of their reliance on regulated references from the Defendant and/or reliance on the FCA Register which he alleges states openly that the reason for his dismissal by the Defendant had been Gross Misconduct.

11. He therefore claims at PoC para. 17 damages based on a pleaded duty of care to 'act fairly, diligently and/or reasonably when dealing with matters concerning [his] employment' and, in particular, a duty not to 'dismiss [him] and/or state or find that he had conducted 'Gross Misconduct' unless there was [sic] fair and reasonable grounds for doing so and after having undertaken a fair and reasonable investigation and disciplinary process'. He pleads (at PoC para. 18) that it was foreseeable that a finding of Gross Misconduct would be recorded on the FCA Register. He also pleads a duty when giving a 'regulated reference, to exercise due care and skill…', and

which should be ‘true, accurate, fair and reasonable’ (per para 19. POC). He further pleads that it was foreseeable that the FCA would rely on any reference or statement provided to them by the Defendant, including in relation to any finding of Gross Misconduct (per PoC para. 20).

12. He further pleads (at PoC para. 21) that it was foreseeable that a statement on the FCA register of ‘Gross Misconduct’ as the reason for his dismissal would be accessible by prospective employers and would inhibit his ability to get a regulated job.

13. He pleads as misstatements the various details given to him by the Defendant (ie statements made to him by the Defendant, not to third parties) of the purported reasons for his dismissal, for example he says that he had disclosed details of a previous conviction (DR 30: Driving or attempting to drive then failing to supply a specimen for analysis), that he had in fact been Vice President at RBS, that he had explained he had not yet sat his exam and, that he had disclosed details of a Bankruptcy Petition (despite it being annulled).

14. He therefore relies on breaches of the pleaded duties and claims damages for loss of opportunity to gain employment in his specialist field, loss of opportunity of employment at Credit Agricole and the other employers said to have rescinded offers of employment, past loss of earnings, future lost earnings and also a general plea in relation to lost reputation. Aggravated and exemplary damages are prayed.

15. There is a proposed amended Particulars of Claim but there is no application to amend. The draft changes references to the FCA ‘Register’ to ‘Record’ (which is not a minor change in context because it seeks to abandon the allegation that the Register contained details of the finding of Gross Misconduct, and alleges in more general terms a ‘Record’ of some form different from the official FCA Register).

16. The Particulars of Causation (within the proposed amended Particulars of Claim referred to at paragraph 15 above) mostly plead various FSMA 2000 Regulations but also allege that the Defendant made ‘misleading impressions’ for the purposes of those Regulations, failed to take into account that what it sent to the FCA would not

be amended by the FCA and that the Defendant had to ensure accuracy, failed to disclose its procedure leading to dismissal, and that the Defendant by submitting Form A confirmed he had adequate references and had confirmed he was competent and capable, fit and proper. Further, that the Defendant failed to allocate proper time to the Claimant in the completion of FCA forms.

Defendant's position

17. The Defendant's submissions on the PoC and proposed amended Particulars of Claim as at the time of hearing were that, among other things, they did not provide proper particulars. In the circumstances, the Defendant previously sought an order that the Claimant provide proper answers to Part 18 requests made by the Defendant. That application was granted by myself on 24 February 2021, when I observed that it was an "exceedingly straightforward application on some simple factual questions" and "obviously a meritorious application". The Claimant was ordered to pay the Defendant's costs of that application.

18. The Claimant filed the Part 18 Response, late, on 21 March 2021 but his responses to multiple questions were marked "N/A". Other responses were vague or amounted to the Claimant saying he had no recollection of the matters in issue, and did not add materially to the information provided in the PoC. The Defendant helpfully wrote to the Claimant on 8 April 2021 and provided a table of outstanding questions for him to complete. The Claimant responded by asserting that he had complied with the Part 18 Order and confirming that he did not have anything to add. Shortly thereafter, the Defendant filed this Application.

19. In its Defence the Defendant denies that the FCA Register records the Claimant's dismissal on grounds of Gross Misconduct and points out that the Register simply does not state that.

20. The Defendant, as regards 'references' alluded to in the Claim, pleads that it has only ever given one reference for the Claimant and that was for a student loan, and which was in terms set out in the Defence which states in simple terms that the Claimant had worked for the Defendant from 16 September 2013 to 18 October 2013, in the

position of Vice President in the Fixed Income Trading Department and which states that it does not imply any comment of either a positive or negative nature about him.

21. No admissions are made as to the other job offers from the list given above. The Defence was followed by Part 18 Requests but no offer letters have been produced and no documentary evidence of rescission of offers. Many responses to requests relating to perfectly proper requests for details of the offers referred to such as dates simply say "I do not remember" or "I do not recall specifics".

22. It is admitted by the Defendant at paragraph 25 of the Defence that the author of a reference (and the Defendant pleads that none have been requested or given save as above and the Claimant has provided no evidence of such) owes a duty to exercise reasonable skill and care in providing a reference which is true, accurate and fair. It is also admitted at paragraph 23(e) of the Defence that it was an implied term of the Claimant's contract of employment that the parties to that contract would not, without reasonable and proper cause, act in a manner which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between them. Insofar as the allegations amount to procedurally unfair dismissal, any such claim may only be brought in the Employment Tribunal (under the Employment Rights Act 1996), and it is averred that in any event the law relating to that applies only to those employed for 2 years or more (which the Claimant was not). The extensive length of the PoC and the necessarily detailed form of the Defence makes it impractical to summarise all the pleading points here, but the arguments on the Application before me were relatively simple.

23. Further to the above and in any event it was noted by the Defendant that the events underpinning the allegations made with respect to four of the Potential New Employers namely Natixis, UBS, Banca IMI and ICE, as listed at paragraphs 15(a)-(d) of the PoC, all allegedly occurred prior to 20 April 2014. The Claimant's claim was not issued until 29 April 2020. Accordingly, pursuant to section 9 of the Limitation Act 1980, the Defendant submits that those claims are out of time and the Court has no jurisdiction to determine them.

Alleged existence and breach of common law duty in relation to manner of dismissal

24. As to the common law duties pleaded in the PoC in relation to the manner of dismissal of the Claimant, namely at common law "or otherwise" to act fairly, diligently and/or reasonably when dealing with matters concerning the Claimant's employment and, in particular, to not dismiss him and/or find or state that he had committed 'Gross Misconduct' unless there were fair and reasonable grounds for doing so and after having undertaken a fair and reasonable investigation and disciplinary process. The Defendant argued that this is, in essence therefore, an allegation that the Defendant was under a civil law duty as regards the manner of the Claimant's dismissal. The Defendant however argued that the judgment of the House of Lords in Johnson v Unisys Ltd [2001] ICR 480 confirmed the concept of the "Johnson Exclusion Zone" which, in essence, precludes the pursuance of common law claims (save for wrongful dismissal) which concern an employee's dismissal or the manner of it (but not claims which are genuinely independent of the dismissal). The scope and application of the "Johnson Exclusion Zone" was considered by the Supreme Court in the linked cases of Edwards v Chesterfield Royal Hospital NHS Trust and Botham v Ministry of Defence [2012] ICR 201.

25. In *Edwards* the court reached conclusions which can be summarised (adopting the Defendants' summary) as follows:

- an employee cannot bring a common law claim for damages in respect of the circumstances or manner of their dismissal, either under contractual or tortious principles;

- the implication of a term (or duty) not to dismiss an employee without good cause and/or in an unfair manner would be inconsistent with the statutory unfair dismissal scheme (which provides the exclusive remedy prescribed by Parliament for this) and thus precludes the existence of a common law remedy for such eventualities; and

- damages for injury to reputation caused by the manner of the dismissal or arising from the dismissal are irrecoverable at common law.

Alleged mis-statements by the Defendant

26. Paragraphs 24(a) and (b) of the PoC refer to statements made by the Defendant to the Claimant regarding the termination of his employment. It was argued that these statements cannot found a claim for negligent misstatement in the context of a 'negative reference' case. The Claimant it was said had made no attempt to explain on what basis he asserts that statements made privately to him regarding his dismissal by the Defendant may found a claim for damages in respect of the alleged rescission (months or years later) of offers of employment allegedly made to him by third parties.

Apparent claim for damage to reputation due to the dismissal

27. The Defendant addressed this apparent limb of the claim by arguing that it falls foul of the 'Johnson Exclusion Zone' being a claim for damages which arises from the manner of dismissal. Furthermore the FCA made its own determination that the Claimant was a fit and proper person, and such does not amount to something capable of damaging the Claimant's reputation.

Response

28. The Claimant in argument anticipated that there should be a trial and that the relevant people would be witnesses and asked about the alleged offers (which were said to be oral but his position did seem to be inconsistent at times) and that an expert witness would deal with practice in the industry in that regard. Furthermore he believed that information about the offers would emerge during disclosure. In relation to the ICE alleged offer he asserted that he would find something to evidence the offer in an email chain, but no such email chain was shown to me to that effect. In relation to Churchill he argued that he had had a written offer. Yet this was not produced to me and was not in his disclosure documents. Put broadly, he asserted that there would be much evidence on his laptops and phones, including WhatsApp. However none of this was put before me in response to this application so as to back up the claims that there had been formal, albeit oral (in one case written) job offers. Whilst one would not expect a case to be fully organised evidentially at this stage, Mr Kapoor has had plenty of time to at least produce the material he says he has to substantiate these crucial aspects of his claim but did not do so.

29. Leading on from the alleged offers, the Claimant argued that 'A lot of those offers would have been rescinded on the phone', which in my view is a very vague position to adopt and is inherently implausible. If a would-be employer has made a formal offer – and assuming one gets over the implausibility that no evidence of such in writing exists was produced to me – the would-be employer having made such an offer would be very careful to evidence the withdrawal of it in writing so as to protect itself legally against later acceptance. He said that written confirmation of withdrawal might 'come back to bite' employers because "If they send me a letter telling me that this has been rescinded they have to give me a reason behind it." This does not seem to me to be a sensible reason why a would-be employer would throw caution to the wind by failing to confirm in some written form that it was withdrawing an offer. Indeed a sensible would-be employer would want to be careful in explaining why it had rejected an applicant, even in anodyne terms so as not to be misunderstood. Moreover Mr Kapoor produced no trace of evidence from any of the relevant would-be employers in this application as to the withdrawal of offers (let alone of the offers themselves).

Decision

30. Pursuant to CPR Part 3.4(2), the court may strike out a statement of case, or part thereof, which (a) discloses no reasonable grounds for bringing a claim and/or (b) is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings.

31. A statement of case which is unreasonably vague or incoherent may properly be struck out. The court may consider whether that defect might be cured by amendment (and, if there is reason to believe that it can be, the court should refrain from striking it out without first giving the party concerned an opportunity to amend): Kim v Park & others [2011] EWHC 1781 (QB), at [40]. However where a party has already been ordered to provide further information in respect of their claim, one considers whether the information provided has remedied the defects, cf Towler v Wills [2010] EWHC 1209 (Comm).

32. In Cleeves v The Chancellor, Masters and Scholars of the University of Oxford [2017] EWHC 702, Whipple J identified the following propositions:

i) A pleading which is unreasonably vague or incoherent is abusive and likely to obstruct the just disposal of the case.
ii) One factor for the Court to consider is whether there is a real risk that unnecessary expense will be incurred by the Defendant in preparing to defend allegations which are not pursued, or will be impeded in its defence of allegations which are pursued, or that the Court will not be sure of the case which it must decide.
iii) Another factor for the Court to consider is whether the Defendant will be able to recover its costs, if successful at the end of the day; and if not, whether it may well feel constrained to make some sort of payment into Court, not because the case merits it, but simply as the lesser of two evils and for the avoidance of costs.
iv) A claim can still be struck out even if it discloses a reasonable prospect of success

33. In Duchess of Sussex v Associated Newspapers Ltd [2020] EMLR 21, Warby J said at [34]: "In the context of r 3.4(2)(b), and more generally, it is necessary to bear in mind the Court's duty actively to manage cases to achieve the overriding objective of deciding them justly and at proportionate cost; as the Court of Appeal recognised over 30 years ago, "public policy and the interest of the parties require that the trial should be kept strictly to the issues necessary for the fair determination of the dispute between the parties"".

34. The principles applicable to applications for summary judgment were summarised in Easyair Ltd v Opal Telecom Ltd [2009] EWHC 339 (Ch), at [15] and numerous other cases and are well known:

i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman[2001] 2 All ER 91;
ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED&F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];
iii) In reaching its conclusion the court must not conduct a "mini-trial": *Swain*;
iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it

may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED&F Man Liquid Products* at [10];

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No5) [2001] EWCA Civ 550;

vi) The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co100 Ltd [2007] FSR 63;

vii) If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.

35. I remind myself also that Lewison LJ in Calland v Financial Conduct Authority [2015] EWCA Civ 192, at [29], noted that "In evaluating the prospects of success of a claim or defence the judge is not required to abandon her critical faculties..."

36. I had no statements or proofs of evidence or letters from any lay witnesses confirming that job offers had been made in response to this application or correspondence which evidenced the alleged oral offers. I had no letters from the Claimant to the Defendant seeking references or confirmation from the alleged would-be employers in relation to this application, by which they confirmed they had sought references. I had no letters of acceptance of offers or acknowledgements of them by the Claimant to the would be employers. He did not claim that there were such follow up letters or written

confirmations of the alleged offers. He indicated in relation to the UBS alleged offer for example that he would have regarded it as presumptuous even to ask for an offer letter. I find that not credible, and I am not obliged as noted, to suspend my critical faculties on such an application as this.

37. I do not conduct a mini-trial but it is nonetheless not acceptable for a response to an application to be placed on the footing in effect that something will turn up, if witnesses are called and cross examined or an expert is called or if the Claimant is able to look further into his phones and laptops and emails. The court on an application such as this is astute not to take things at face value and to ask itself whether an argument is inherently implausible. I find that to be the case here. I find that there is no material before me on this application from which I can have any confidence that a court would be able to find at trial that there were formal offers of employment for the relevant companies and that they were withdrawn. There would be material readily available which I could have been shown had that been the case.

38. Dealing with the allegation which is in the current pleaded case that the FCA Register in any way disclosed material damaging to Mr Kapoor relating to misconduct, that is simply and self evidently not the case. The Register does not do so. That is a matter of public record. I was shown the relevant material.

39. It rendered Mr Kapoor's case if anything less credible still that when faced with that simple truth he sought to argue that he could now change his case to allege some other form of record ('a central repository' was how he termed it) which was damaging to him other than the Register on which he had relied for his claim throughout, but about which he produced no shadow of any evidence. The same can be said about the allegation that such offers were withdrawn due to regulated references from the Defendant, which has nothing from the Claimant to substantiate it other than an assertion. When pressed he said that he was told there were references by a recruitment consultant, on the phone. I had no statement, letter or proof of evidence from that person. Indeed he confirmed he could not substantiate that, but that it related to Commerzbank. I have not dealt extensively with various contradictions and inconsistencies in the Claimant's case on the pleadings but those further serve to

undermine confidence in the credibility of this claim. I shall give examples from counsel's submissions verbatim:

"So paragraph 10 is where the claimant addresses this limb of our application. What does he say?

Submission 1, he refers to an email from UBS. He says this: "Probably a formal offer would have materialised."

Compare that, master, with paragraph 15(b) of the particulars -- it might be actually helpful, if you can do this, to have paragraph 15 of the particulars, page 9, tab 2, open in front of you. The pleaded allegation is in March 2014 an offer from UBS which had been made was rescinded. What does he say in his skeleton? I didn't get an offer at all."

"Submission 2 in paragraph 10 of the claimant's skeleton, Banca IMI. He says here: "My application for a fixed income sales role with Banca IMI was rejected."
So what he's saying there is I didn't get an offer either from Banca IMI. Compare and contrast with paragraph 15(c) of the particulars of claim, where it is pleaded: I got a job offer from them and they rescinded it."

40. In relation to the apparent claim for damages for mis-statements made by the Defendant to the Claimant I see no basis on which a claim for loss in such a context can stand, and accept the Defendant's argument that such private statements do not amount to statements third parties could rely upon.

41. In relation to the apparent claims in relation to damages for manner of dismissal and reputational damages those plainly fall within the 'Johnson Exclusion Zone' and would fail. He has not pursued a contractual claim for wrongful dismissal, or a claim for unfair dismissal in the Employment Tribunal.

42. I shall accede to the Defendant's application accordingly. To continue with an overly complex claim which in reality is based in significant part only on supposition about some form of 'central repository' (even if the claim were to be re-pleaded in that way, which it has not been) or on the basis of unevidenced offers and unevidenced

rescissions would be to waste vast amounts of money and court time and be doomed to fail.

43. The proper role of strike out and summary judgment is to prevent essentially hopeless or opportunistic cases occupying court resources and parties' time and money in the hope that 'something will turn up' to assist the Claimant, once large sums of money have been expended, and in this instance the success of this Application will serve to ensure that the one matter proceeding, namely that in relation to Credit Agricole where it is said the Defendant's staff in effect 'bad mouthed' him as counsel put it, will be tried proportionately.

44. I shall consider proposed draft orders in the light of this judgment from each side, on paper, including as to the question of costs. Parties should send me any proposed typographical or obvious factual corrections within 21 days of receipt, and draft consequential orders for consideration. In the event of any costs order I shall summarily assess costs and therefore will require a costs schedule from the party(ies) seeking costs, and will expect any costs submissions to be made with the list of any typographical corrections. The judgment will be handed down in absentia on a date to be fixed.

MASTER VICTORIA MCCLOUD
Handed down 8 April 2022