EMPLOYMENT TRIBUNALS

Claimant: Mr M A Riaz

Respondent: CMR Surgical Limited

RECORD of an Open PRELIMINARY HEARING

Heard at: Cambridge (by CVP) **On:** 18 October 2024

Before: Employment L Brown (sitting alone)

Appearances

For the Claimant: In person

For the Respondent: Bethan Davies, In-House Counsel

JUDGMENT ON PRELIMINARY ISSUES

(1) The Claimant's claim for automatic unfair dismissal is not struck out on the basis that it has no reasonable prospect of success.

(2) Disclosure 1 which stood as part of the Claimant's two disclosures is however struck out as a qualifying disclosure as that has no reasonable prospects of success as a qualifying disclosure.

(3) The application for a deposit order fails.

REASONS

(4) The Claimant was employed by the Respondent as a Senior Risk and Regulatory Specialist. He commenced employment with the Respondent on 1 November 2021. He was dismissed on 27 July 2023.

(5) The Claimant represented himself at the hearing before me on 18 October 2024, as he has done throughout these proceedings. The Respondent was represented by in-house Counsel, .

(6) I had a bundle of 140 pages that was referred to by both parties.

(7) Ms Davies had filed outline written submissions on behalf of the Respondent, to which she spoke. I heard submissions from the Claimant.

(8) I reserved my Judgment due to lack of time at the end of the hearing to give an oral Judgment.

The Law

Strike Out Application

(9) Rule 37 of the Employment Tribunals Rules of Procedure 2013 provides,

> "(1) At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds –
>
> (a) that it is scandalous or vexatious or has no reasonable prospect of success…"

(10) I remind myself that the power to strike out should only be exercised in rare circumstances (Tayside Public Transport Company Limited (t/a Travel Dundee) v Reilly [2012] IRLR 755; that cases should not, as a general principle, be struck out where the central facts are in dispute (Tayside and North Glamorgan NHS Trust v Ezsias [2007] EWCA Civ 330).

(11) The Tribunal is required to form a view on the merits of the case. The question is not whether the Claimant is likely to succeed on the balance of probabilities, as set out in Short v Birmingham City Council and ors EAT 0038/13. If the Tribunal is of the view that there is a *'more than fanciful'* prospect of the claim succeeding, the claim should not be struck out, see A v B and anor 2011 ICR D9, CA.

(12) In assessing the merits of the case, the Claimant's case should be taken at its highest, unless it is contradicted by plainly inconsistent documents, as per the EAT in *Mbuisa v Cygnet Healthcare Ltd* EAT 0119/18.

(13) In the context of Litigants in Person and whistleblowing or discrimination claims, useful guidance was given by HHJ Taylor in *Cox v Adecco Group UK & Ireland and ors* 2021 ICR 1307, EAT where it was said as follows:

13.1 the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike-out will be appropriate;

13.2 there has to be a reasonable attempt at identifying the claim and the issues before considering strike-out or making a deposit order. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are;

13.3 a fair assessment of the claim(s) and issues should be carried out on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim. In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing;

13.4 strike-out is not a way of avoiding rolling up one's sleeves and identifying, in reasonable detail, the claims and issues; doing so is a prerequisite of considering whether the claim has reasonable prospects of success.;

13.5 Respondents particularly if legally represented, should, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, they should assist the tribunal;

13.6 if the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment;

13.7 litigants in person also have responsibilities in this context. So far as they can, they should seek to explain their claims clearly, even though they may not know the correct legal terms, focusing on core claims rather than trying to argue every conceivable point. The more prolix and convoluted the claim is, the less a litigant in person can criticise an employment tribunal for failing to get to grips with all the possible claims and issues. Litigants in person should appreciate that, usually, when a tribunal requires additional information it is with the aim of clarifying, and where possible simplifying, the claim, so that the focus is on the core contentions. The overriding objective also applies to litigants in person, who should do all they can to help the employment tribunal clarify the claim;

13.8 the employment tribunal can only be expected to take reasonable steps to identify the claims and issues. But respondents, and tribunals, should remember that repeatedly asking for additional information and particularisation rarely assists a litigant in person to clarify the claim. Requests for additional information should be as limited and clearly focused as possible.

Deposit Order Application

(14) Rule 39 of the Employment Tribunals Rules of Procedure 2013 provides,

> "(1) Where, at a Preliminary Hearing (under Rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an Order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument."

(15) As regards the making of Deposit Orders, I further remind myself that a Tribunal may have regard to the likelihood of a party being able to establish the facts essential to his case and to reach a provisional view as to the credibility of the assertions being put forward, albeit the Tribunal must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.

(16) Ahir v British Airways Plc [2017] EWCA Civ 1392, is a case in which the Court of Appeal upheld an Employment Tribunal's decision to strike out claims of less favourable treatment as a fixed term employee. At paragraph 16 of the Judgment in Ahir, Lord Justice Underhill specifically noted that the hurdle of a strike out is higher than the hurdle of the making of a Deposit Order, which depends on the claim having little reasonable prospect of success as opposed to no reasonable prospect of success. Nevertheless, a Deposit Order may still serve a significant deterrent to a party in continuing with their claim. I approach the matter having careful and proper regard to the public interest considerations that apply in discrimination claims.

The Facts

(17) I spent most of the hearing clarifying the issues in this claim with the Claimant and the Respondent and by the end of the day we agreed a final List of Issues. For the automatic unfair dismissal claim the Claimant agreed that his claim for whistleblowing was limited to the act of dismissal of him on the 27 July 2023, and that it followed two disclosures that he made on the 26 and 27 July 2023 prior to his dismissal. It was this claim that was the subject of an application for strike out or a deposit order by the end of the day as the Respondent withdrew its application for a strike out or a deposit order on all the discrimination and harassment claims due to lack of time.

(18) The List of Issues defines this claim as follows:-

Automatic Unfair Dismissal

Protected Disclosure

1. *Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:*

    a. *What did the Claimant say or write? When? To whom? The Claimant says he made two disclosures:*
        i. *On 26 July 2023 at 14:53, the Claimant sent an email to Linda Yates stating he would raise race allegations against Karen Kelson and Chris Weatherall; and*
        ii. *On 27 July 2023 at 00:10, the Claimant sent an email to Natalie Forster, Emma Armstrong and Supratim Bose, alleging racial discrimination.*

    b. *Did he disclose information?*

    c. *Did he believe the disclosure of information was made in the public interest?*

    d. *Was that belief reasonable?*

    e. *Did he believe it tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, that being a failure to prevent breaches of the Equality Act 2010 in the workplace?*

    f. *Was that belief reasonable?*

2. *If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to the Claimant's employer.*

Dismissal

3. *Was the reason or the principal reason for the Claimant's dismissal that he had made a protected disclosure? The Respondent says that the reason was conduct.*

(19) The written submissions of the Respondent were taken fully into account as were the oral submissions of the Claimant and I do not repeat them here. However the Respondent said that at the time of the emails the decision to dismiss had clearly been taken prior to his disclosures.

(20) In relation to 'Disclosure 1' the Respondent said as follows:-

Disclosure 1

12. *The meaning of disclosure should be given it ordinary meaning, that being conveying facts[2]. A disclosure must have sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f)[3].*

13. *The email to Linda Yates did not disclose any facts, save for that the Claimant would, at some point in the future, raise allegations of racial discrimination. The fact that such an allegation may be made in the future, cannot be said to tend to show one of the matters listed in S.43B(1)(a)–(f) .*

(21). Reading the content of the email sent whilst it was a statement by the Claimant that he intended to report allegations of racial discrimination it did not set out any facts whatsoever. I therefore find that with a statement of a bare intention to make a future disclosure there are no reasonable prospects of the Clamant establishing that Disclosure 1 was a qualifying disclosure, and I therefore strike out this Disclosure 1 as invited to do so by the Respondent as there was nothing in that email that could possibly amount to a disclosure *'that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.'*

(22). As to Disclosure 2 I found that in fact the Claimant was really relying on the ground that the disclosure fell into the following category:-

Did he believe it tended to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, that being a failure to prevent breaches of the Equality Act 2010 in the workplace?

(23) Whilst in his Further Information sent to the Tribunal he did not set this out on discussion he accepted that this was the only category it could fall under and not the other grounds he set out. I don't hold the Claimant to the standards of a professional advocate in this regard and so it was agreed that the List of Issues reflected paragraph 22 above.

(24) As to the claim as a whole, and the application to strike out the whole claim for automatic unfair dismissal I noted that the Respondent stated that if you looked at all the communications of the Respondent preceding his dismissal that they had already decided to dismiss him and that his claim that the reason for the dismissal was Disclosure 1 (which is now struck out) and Disclosure 2 was in effect *'no more than fanciful.'*

(25) I noted that Disclosure 2 was sent on the 27 July 2023 at 00:10, when the Claimant sent an email to Natalie Forster, Emma Armstrong and Supratim Bose, alleging racial discrimination. He was then dismissed at about 3 pm that day.

(26). I noted the communications in the bundle as referred to by Counsel for the Respondent and her submissions as follows:-

` 26.1 That it was not in dispute that the Claimant on the 11 July 2023 the Claimant received negative feedback Ms from Kelso [P.101 of the bundle] and;

26.2 On the 19 July 2023 Ms Kelso made it clear to others that she was struggling in her relationship with the Claimant, and that her last words were to the effect of that *"… am finding all of this quite unsettling tbh …".*

26.3 She also referred to a statement made about the Claimant by Chris Weatherall at 13.39 on the 19 July 2023 that [P.101]:-

"..Hi Linda,

I agree I have spoken with Karen yesterday regarding Malik. We need to get any toxic people moved on sooner rather than later for everyone's benefit.

> Let me know what you need from me to support.
>
> Thanks,
>
> Chris'

(27). Counsel submitted that by the 19 July 2023 there was a clear intention by the Respondent to dismiss the Claimant.

(28). However I noted that the email that the email at paragraph 26.3 above was replying to had said as follows:-

> **Sent:** Wednesday, July 19, 2023 1:36:43 PM
> **To:** Chris Weatherall
> **Subject:** FW: Risk Management Process Handover to Design Control - for information only
>
> Hi Chris
>
> Just sending this to you to make you aware of the situation. I think Karen is finding Malik extremely challenging and may need some support in the short term. We've given him until Friday to bring forward any specific concerns regarding his allegation of racism at CMR. We may then need to investigate to really understand the situation, if we don't hear anything however we'll need to arrange a meeting with him sooner rather than later.
>
> Best wishes
> Linda
>
> Linda Yates
> People Team

(29). The Claimant referred in the hearing to saying he had told the Respondent that he had questions about the 'ethnic footprint' of those criticising him and that the reaction had been negative and that the Respondent in the meeting accused him of somehow making false implications of racism. On the face of it I could see that the email at paragraph 26.3 above shows that they were expecting complaints of racism. Whilst I don't find that he had made any actual disclosures on the face of the documents prior to Disclosure 2 there was evidence before me that they were anticipating a formal complaint and notification about alleged racism in the organisation from him which then arrived in Disclosure 2. I could not rule out the possibility that had he not sent Disclosure 2 he may not have been dismissed and it is arguable if I take the Claimant's case at its highest, as I must, that there is an argument that is in my judgement arguable, and is more than fanciful, that the Disclosure 2 in a sense 'sealed his fate' and if he had not

sent the Disclosure 2 the Respondents may have pulled back from deciding to dismiss him.

(30). It was said by the Respondent that [P.106] that on the 25 July 2023 before his purported Disclosure 2 sent on the 27 July 2023 that he was invited to a meeting to discuss feedback about *'your behaviours.'* However I noted that when he asked for the feedback prior to the meeting that it was not provided and he was told that it would be provided at the meeting [P.108].

(31). It was also said by Counsel that the second email on the 26 July 2023 [p.108 to the Claimant] – at 10.52, reiterating that the meeting was now the next day to discuss feedback, showed that there was an intention to dismiss him sooner or later. I did not find that discussing negative feedback meant the outcome was inevitable in the form of dismissal, it was simply a discussion about concerns they had, and I found that the Claimants case in essence, which was that it was a 'set up' so that when he made a disclosure they could then dismiss him, was at least arguable and in any event was evidence sensitive.

(32). I was then referred to the next email [P.109] sent at 12.15 before either of the Disclosure 1 or Disclosure 2 where Linda Yates sent to Chris Weatherall a draft script for review and it was said that it is clear from the script that the Claimant was going to be told at the meeting he was being dismissed due generally to the way he spoke to other people that he worked with, and due to the fact they had criticism of his performance.

(33). Whilst this draft script no doubt demonstrated an intention to dismiss him due to his performance and behaviour it is the Claimants case this was a set up because they knew he was about to report racism. His case appears to be that it was only upon him sending Disclosures where he reported racism in the organisation [Disclosure 2] that the decision was taken to dismiss him upon them receiving it that day on the 27 July 2023. Whilst this is at least arguable I have to ask myself does it amount however to *'no reasonable prospect of success.'* As this is evidence sensitive and all the evidence was not before me I cannot conclude there is no reasonable prospect of success in this claim, as the Claimant could perhaps establish that this was a set up that they would only

execute if the Disclosure, i.e., Disclosure 2 was in fact made by him. It is arguable that had he not made the Disclosure 2 they may have rowed back from the plan to dismiss him. When making this finding the following email showed that the decision had not been definitively made in any event and it was sent on the 26 July 2023 at 13:01 pm as follows:

> **Sent:**
> Wednesday, July
> 26, 2023
> 12:57:01 PM
> **To:** Chris
> Weatherall
> **Cc:** Barrington D'Arcy
> **Subject:** FW: Meeting via Teams
>
> Hi Chris
>
> Just sending this on to you for your opinion. Malik is pushing back on the meeting tomorrow because of workload. Is the meeting he's talking about critical? If so, I can reschedule. I prefer him to be able to have someone with him as he's requested it, but I'm not sure if we should delay the meeting for this.
>
> I am nervous of Karen returning and the situation not being resolved. I am on leave on Friday and Monday which is annoying, so after Thursday we're realistically looking at Tuesday.
>
> Happy to be firm and confirm we're going ahead tomorrow, but I think Malik will need that from you rather than me!
> Best wishes
> Linda
>
> **Linda Yates**
> People Team Business Partner, CMR Surgical

(34). In any event I noted that all this evidence would be heard in relation to the claim for the act of dismissal being an act of race discrimination, and so by removing this head of claim no costs or Tribunal time would be saved in any event.

(35). As to whether or not these facts as presented to me meant that the Claimant had *'little prospect of success'* I did not find that the Respondents had established there was

'little' prospect of success as again this was fact sensitive and would depend on evidence. If the Claimant was able to establish that it was a plan set up to only be executed if he actually made a Disclosure then it is conceivable he could win such a claim as at least one of the communications by the Respondent refers to his stated intention to report racism as referred to at paragraph 23 above where it is said as follows:-

> *'We've given him until Friday to bring forward any specific concerns regarding his allegation of racism at CMR. We may then need to investigate to really understand the situation, if we don't hear anything however we'll need to arrange a meeting with him sooner rather than later.'*

(36). In my Judgment this shows an element of what the Respondent did was dependent arguably on whether the Claimant made a statement about alleged racism in the organisation and so this does not in my judgment mean the claim for automatic unfair dismissal when he made Disclosure 2 has 'little prospect of success' on the evidence before me. I therefore make no order for a Deposit Order.

Useful information

49. All judgments (apart from judgments under Rule 52) and any written reasons for the judgments are published, in full, online at https://www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimants and respondents.

50. There is more information about the Employment Tribunals on the judiciary website. In particular, you may wish to read the information behind the tiles "Before the hearing", "At the hearing", "Rules, Orders, Practice Directions and Guidance", Sources of advice and support" and "Further information". The website is here:

Employment Tribunals (England and Wales) - Courts and Tribunals Judiciary

51. The Employment Tribunals Rules of Procedure are here:

https://www.gov.uk/government/publications/employment-tribunal-procedure-rules

52. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here:

https://www.gov.uk/appeal-employment-appeal-tribunal

53. Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings. You can access the Direction and the accompanying Guidance here:

Practice Directions and Guidance for Employment Tribunals (England and Wales) - Courts and Tribunals Judiciary

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Employment Judge L Brown

21 October 2024

Sent to the parties on:
22 October 2024
For the Tribunal: