EMPLOYMENT TRIBUNALS

Claimant: Mr F A Brockway

Respondent: JD Williams & Company Limited

HELD AT: Manchester **ON:** 23 March 2017

BEFORE: Employment Judge Sherratt

REPRESENTATION:

Claimant: Not present or represented
Respondent: Mr I McGlashan, Consultant

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that the claimant's claims are struck out as they have no reasonable prospect of success.

REASONS

Introduction

1. At a preliminary hearing held by telephone on 19 January 2017 when the claimant was represented by his solicitor I noted that he brought claims of unfair dismissal and of automatically unfair dismissal following the making of a protected disclosure under section 103A.

2. I provided for the claimant to give full particulars of the alleged protected disclosure to the respondent and to the Tribunal by 3 February 2017 and for the respondent to amend its response by 17 February 2017.

3. I also provided for a hearing of the respondent's application to strike out the claimant's claims and/or for deposit orders.

The Alleged Protected Disclosure

4. The claimant did not provide full particulars of the alleged protected disclosure to the Tribunal or the respondent by 3 February 2017, but on 8 February 2017 the claimant's solicitor forwarded to the respondent's representative only an email from the claimant providing those particulars.

5. In the words of the claimant:

> "(1) I mentioned to Mark Lowe (team leader) about the intolerable conditions which does not help my chronic obstructive pulmonary disease. I also made my views known to Dot Jagger (process manager) who wasn't too happy to say the least when I sarcastically uttered 'sweatshop, sweatshop'. What made conditions even worse was the rotating conveyor steamer press was operational round the clock. This is used to remove creases from hanging garments ready for retail shops and this was the middle of summer."

6. In paragraphs (2) and (3) and his email the claimant said that he raised the points on or around 19 or 20 July 2016, orally and not in writing. In conclusion he referred to temperatures on the shop floor being in the region of 40°C.

7. The respondent did not consider it necessary to amend its response in the light of this information.

The Preliminary Hearing

8. At 20:31 on 22 March 2017 the claimant's solicitor sent an email to the Employment Tribunal and copied it to the respondent's representative and to the claimant stating that "the claimant will be representing himself at the strike out/deposit order application", and it set out what he would be arguing:

> "As to unfair dismissal the so-called threatening comments were made in a confidential meeting between a trade union official and his member. The union official breached the claimant's right to privacy and confidentiality. We would argue before the Tribunal hearing the full merits application that they should have regard to the right to privacy in the European Convention on Human Rights to interpret reasonableness under Employment Rights Act 1996 in relation to unfair dismissal. In particular it would be argued that a reasonable employer would respect a worker's convention rights and not take action against a worker regarding information which was secured in breach of the worker's right to privacy.
>
> As to automatically unfair dismissal the claimant complained about poor working conditions and so a protected act is established. It is a matter of fact whether this reporting influenced the decision to dismiss the claimant. On this view the respondent took the occasion of the report from the union official to get rid of the claimant in retaliation for his having made earlier protected disclosures. If the Tribunal is minded to make a deposit order the claimant is unemployed but will be able to give evidence as to his means."

9. Mr Brockway was not present at 10.00am when the hearing was scheduled to commence. I indicated to the clerk that I would start the hearing at 10:30 giving me time to look at the hearing bundle which had been prepared by the respondent's representative.

10. When the hearing started the claimant was still not present. The clerk was asked to make contact with the claimant using the mobile telephone number provided on the ET1. The clerk informed me that after ringing out for some time the call was not answered. She left a voicemail message for the claimant.

11. For the purposes of rule 47 I decided that it would be appropriate to proceed with the hearing in the absence of the claimant, taking into account the written representations made by his solicitor and being satisfied that the claimant was aware of the hearing and that he had provided no reasons for his absence.

12. As to the alleged protected disclosure Mr McGlashan, for the respondent, submitted that the disclosure as particularised does not amount to a disclosure of information. The reference to "intolerable conditions" is an allegation rather than a statement of fact.

13. As to the claimant using the word "sweatshop", not only does this not disclose information, the claimant says that he used the word sarcastically, thus removing the claimant's reasonable belief.

14. I conclude that the claimant has not disclosed information and therefore he has not made a protected disclosure for the purposes of Part IV A of the Employment Rights Act 1996. This being the case his claim under section 103A has no foundation and is therefore dismissed for having no reasonable prospect of success.

15. As to the unfair dismissal claim, I was taken to a written statement from the claimant's trade union representative who had informed management of a comment by the claimant – "if anything happens to my wife I'd come in and shoot Paul and the staff". I was taken to the notes of a disciplinary hearing on 16 August when Mr Kemp repeated this and thereafter the note of the claimant saying that he might have probably said it, and later in the meeting the claimant said that it was a good job his wife was alive and keeping him going "otherwise he would get a gun and shoot them all".

16. In the letter of dismissal sent on 30 August 2016 the comment about shooting Paul and the various other matters were found to be behaviour that was totally unacceptable resulting in a decision to terminate the claimant's employment with immediate effect in that his actions constituted gross misconduct. The claimant appealed and the appeal was dismissed.

17. The claimant's solicitor refers to the claimant's right to privacy and the Human Rights Act 1998. If the reference is to Article 8, the right to respect for private and family life, it provides that there shall be no interference with the exercise of it by a public authority. This respondent is not a public authority and therefore in my judgment the Article 8 right is not engaged.

18. On the basis of the admitted statement of the claimant it seems to me that his unfair dismissal claim has no reasonable prospect of success. The claimant was dismissed following a hearing at which he accepted one of the elements that was found to amount to gross misconduct.

19. The claimant's unfair dismissal claim is therefore struck out on the basis that it has no reasonable prospect of success.

Employment Judge Sherratt

30 March 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

31 March 2017

FOR THE TRIBUNAL OFFICE