Case Number: 3201807/2017

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EMPLOYMENT TRIBUNALS

Claimant: **Mr M Valleriani**

Respondent: **Niccolo Cusano Italian University Ltd**

Heard at: **East London Hearing Centre** **On: 9 April 2018**

Before: **Employment Judge Jones**

Representation

Claimant: In person

Respondent: Written submissions

JUDGMENT ON OPEN PRELIMINARY HEARING

The unanimous judgment of the Employment Tribunal is that:-

(1) The Claimant does not have sufficient service to bring a complaint of unfair dismissal. That complaint is dismissed.

(2) The complaints of detriment and dismissal following the making of protected disclosures has no reasonable prospect of success. The complaint is dismissed.

(3) The complaints of victimisation and of general breach of the Equality Act 2010 have no reasonable prospects of success. The Tribunal has no jurisdiction to hear it. The complaints are dismissed.

REASONS

1 The Claimant complains that he made disclosures of malpractice within the University and in particular, in relation to the appointment of Luisa Morettin as a Reader. The Claimant's case is that her appointment was contrary to the Open University regulations; the standard practice within British universities, as well as being in breach of the Equality Act 2010.

2 The Claimant was employed at the University as a Senior Lecturer of Political Science on 4 January 2017. The University had not yet opened to students. It was undergoing the validation process so that it could award degrees under the auspices of the Open University and the Claimant asserts that he was assisting the Respondent in navigating that process. In April 2017 he was appointed Chair of the Equality and Diversity Committee. It is the Claimant's case that until he objected to Ms Morettin's appointment as Reader, the Respondent had no issues with his employment but after his objection he was subjected to various detriments which ended with his termination of employment. He alleged that those were also acts of victimisation.

3 His complaints to the Tribunal are that he made protected disclosures to various senior officers within the Respondent, that he was subjected to a detriment because of it, and he was dismissed. He also brings a complaint of unfair dismissal.

4 The Respondent defends these proceedings. The Respondent denies that any 'disclosure of malpractice' was made by the Claimant to either Professor Orsucci, Mr Ciccolini or Ms Di Gioacchino. It also denies that there was any malpractice at the Respondent. The Respondent asserted that Ms Morettin's appointment was proper and was not any form of malpractice. The Claimant also complains about the appointments of Ms Fazzin and Ms Molle as Readers.

5 This open preliminary hearing was listed by Regional Employment Judge Taylor who conducted a preliminary hearing on the 12 March 2018 at which the parties engaged in an initial discussion on the issues in this case.

6 At that hearing the Claimant confirmed that he made the following disclosures:-

6.1 The appointment of named individuals to the post of Reader and Professor in the Faculty of International Relations and Political Science should be vetted and confirmed by a specialist committee. This was allegedly said to the three most senior employees of the University who were Franco Orsucci, Provost, Mauro Ciccolini, Vice Provost, and Oriana Di Gioacchino, Business Manager.

6.2 The appointment of these individuals was in breach of the Equality Act 2010, given that the Equality Act protects the employee in place of work

from having lesser treatment than employees (of the same qualification) doing the same job.

7 The Claimant submitted that this was information which tended to show that the Respondent had failed to comply with a legal obligation to which it was subject.

8 At that hearing, Regional Employment Judge Taylor noted that the Claimant was unable to identify what the legal obligation was that the Respondent was subject to and how it is said by him to have breached this legal obligation. REJ Taylor considered that the claim appeared to be misconceived and after further discussion, it was agreed that an open preliminary hearing should be listed so that the matter could be considered further.

9 Today's hearing was listed to enable the Tribunal to consider the following:-

9.1 Whether the Claimant's allegation that he made a disclosure of information that qualifies for protection under section 43 of the Employment Rights Act 1996 should be struck out and/or in the alternative whether the Claimant should be required to pay a deposit as a precondition of each allegation proceeding to hearing.

9.2 The Tribunal shall also consider whether the Claimant's claim of unlawful victimisation should be struck out.

9.3 The Tribunal will also need to consider whether the Claimant can pursue a complaint of unfair dismissal as it does not appear that the Claimant either withdrew that complaint at the last preliminary hearing and Regional Employment Judge Taylor did not strike it out.

10 In preparation for this hearing, both parties were given leave to send in further written submissions for the Tribunal to consider. It was also noted at that hearing, that the Respondent indicated that having considered the overriding objective, and in particular in order to save time and costs, it may decide not to attend the open preliminary hearing. In those circumstances, it was ordered that if either party did not attend, the Tribunal would decide the matter on the papers, in their absence. The Claimant was also to send in a short statement setting out his income and savings so that the Tribunal would be able to consider his means if it was going to consider making a deposit order.

11 Both parties made written submissions to the Tribunal.

12 In addition, the Claimant attended today's hearing and made additional oral submissions to the Tribunal.

13 From the evidence, the Tribunal makes the following findings.

Relevant facts

14 The Claimant was employed by the Respondent between 4 January 2017 and following his dismissal, his effective date of termination was 25 August 2017.

15 The Claimant told the Tribunal today that in a meeting with the Open University and the Respondent in which he was present, the representative from the Open University stated that someone who is a PhD student cannot be totally in charge of one subject but if they are teaching on a course, they must be partnered with someone who does have a PhD in order to lead that subject. Being appointed to the post of Reader means that you are effectively leading the whole faculty. The Claimant considered that the appointment of a PhD student as Reader went against this oral advice from the Open University.

16 The Claimant also alleges that there were other people within the staff complement of this fledgling institution who wished to be considered for the Reader posts but were not and who were unhappy with Ms Morettin's appointment. His case is that he was trying to protect the institution by raising these issues with the Provost, vice Provost and Business Manager.

17 However, the Claimant struggled to identify the particular legal obligation that he says the Respondent breached in making the appointments that it did. He stated that despite the comment made by the representative from the Open University referred to above, the Open University has gone on to validate the Respondent. In addition, in response to his requests for assistance, the Open University has refused to comment further as it wishes to continue to have an ongoing commercial and collaborative business relationship with the Respondent.

18 He also confirmed that as far as he was aware, the relevant legislation gives the particular institution the power to make appointments and does not set out any particular requirements as to how those appointments should be made. There is a general expectation that each institution would appoint fairly and appoint people who are suitably qualified for the post. The Respondent's internal procedures were being written at the time and therefore, the appointments were not in breach of any internal procedures that the Claimant was aware of.

19 The Claimant pointed to a general legal obligation on the Respondent to protect the standards of the teaching and consequently the awards, the students and other teaching colleagues. He believes that if it is known publicly that the Respondent has appointed people to posts for which they are not suitably qualified and standards fall below what is expected as a result; this would reflect badly on the institution.

20 The Claimant referred to the recently set up Office for Students (OfS) which is the independent regulator for Higher Education in England. Although the OfS was set up in 2017, the Claimant's case is that its predecessors had a similar brief. However, the Claimant did not refer to any specific requirements from the OfS in relation to the appointment of Readers or Professors at universities. It is his case that the OfS' brief is to protect students and the market from poor quality or transient providers from entering the market.

21 The Claimant stated that he believed that there were also consumer protection regulations which existed to protect the students, as consumers of the University, from being misled by the University as to the abilities and competencies of staff but this was not something that he referred to in his conversations with the Provost, Vice Provost or

Business Manager. As the University did not have any students at the time he raised the issue, he focused on other requirements as he understood them.

22 We discussed the Claimant's understanding of the features of the Equality Act. The Claimant believes that the appointments of the individuals to the post of Reader was outside of the fair recruitment procedures envisaged by the Equality Act 2010 although he agreed that it did not breach any particular section of it. He believed that there were other people employed by the University who were more suitable for the posts and that they expressed dissatisfaction to him about the process. However, those individuals have not issued any proceedings in the Employment Tribunal on this matter.

23 The Claimant did not allege that he had done any protected act that would enable him to seek protection from victimisation under the Equality Act 2010 and did not refer to any protected characteristic that would bring him within the ambit of the Act.

Law

24 The Tribunal's power to strike out a claim is in Rule 37 of the Employment Tribunal's Rules of Procedure 2013. The rule states that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on a number of grounds, the most appropriate one in this case being that it is scandalous or vexatious or has no reasonable prospect of success.

25 As a Respondent submitted, striking out a whistle-blowing claim is rare, especially where the decision at the final Hearing will be dependent on findings of fact which can only be made after hearing sworn evidence, tested by cross-examination. The Respondent submitted that if the Tribunal is satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, provided that the Tribunal is keenly aware of the danger of reaching a conclusion in circumstances where the full evidence has not been heard and explored, then it is appropriate for the Tribunal to consider strike out*. (Ahir v British Airways plc* [2017] EWCA 1392). The Respondent submitted that this case is one of those rare instances where it is entirely appropriate to strike out the Claimant's claim as having no reasonable prospects of success, thus obviating the need for the costs and resources that would be spent in pursuing and defending this claim.

26 The Tribunal was aware that the power to strike out a claim under the Tribunal Rules on the grounds that it had no reasonable prospect of success should only be exercised in rare circumstances.

27 The Tribunal considered the case of *North Glamorgan NHS Trust v Ezsias* [2007] EWCA Civ. 330 in which it was held that it would only be in an exceptional case that an application to an Employment Tribunal will be struck out as having no reasonable prospects of success when the central facts were in dispute. If the facts sought to be established by the Claimant were 'totally and inexplicably inconsistent with the undisputed contemporaneous documentation' then a strike out may be appropriate. In a case where there is an extensive number of disputed facts between the parties which go to the core of the issues to be determined by the Tribunal, a strike

out would not be appropriate. In these circumstances it has been held that the correct approach for a Tribunal to adopt is to take the Claimant's case at its highest, as set out in the claim, unless contradicted by plainly inconsistent documents, taking care to exercise caution if the case has been badly pleaded; and assess whether or not there are any reasonable prospects of success. *(Ukegheson v London Borough of Haringey* [2015] ICR 1285 EAT).

28 The Respondent's secondary application was that should the Tribunal decide that there is little reasonable prospect of the claim succeeding it should order the Claimant to pay a deposit as a condition of continuing with his claim. In that regard, the Tribunal considered the case of *van Rensburg v Royal Borough of Kensington Upon Thames and others* UKEAT/0096/07. In that case the President of the EAT confirmed that the test of little prospect of success is plainly not as rigorous as the test that the claim has no reasonable prospect of success. This means that the Tribunal has greater leeway when considering whether or not to order a deposit. The Tribunal must have a proper basis for doubting the likelihood of the party been able to establish the facts essential to the claim or response.

29 Under section 108 of the Employment Rights Act 1996, the complaint of unfair dismissal cannot be considered by the Employment Tribunal unless the employee has been continuously employed for a period of not less than two years ending with the effective date of termination.

30 Section 103A of the same Act states that an employee who is dismissed shall be regarded for the purposes of this part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure. This means that if the Claimant can prove that he made protected disclosures, the Tribunal will be able to consider his complaint of detriment for making protected disclosure and also his complaint of unfair dismissal.

31 The first issue the Tribunal conducting the final Hearing would have to consider is whether the Claimant has made protected disclosures. What is a protected disclosure? This is defined in section 43A and 43B of the same Act. The protected disclosure is a qualifying disclosure which is made by a worker in accordance with any of sections 43C to 43H.

32 A qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following, (a) that a criminal offence has been committed, is being committed or is likely to be committed, or (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which s/he is subject. The other categories do not apply in this case as it is the Claimant's allegation that the information he gave to the senior people at the Respondent was that they were failing to comply with a legal obligation to which the University was subject.

33 The Respondent referred the Tribunal to the case of *Eiger Securities LLP v Korshunova* [2017] IRLR 115 in which it was held that in a case where it was not obvious that the action complained of was plainly a breach of legal obligation, the Employment Tribunal will have to identify the source of the legal obligation to which the Claimant believed the Respondent was subject and how they failed to comply with it.

Actions can be considered wrong because they are immoral, undesirable or in breach of guidance without being in breach of legal obligation.

34 A necessary ingredient of a 'qualifying disclosure' is a reasonable belief that a person had failed to comply with a particular legal obligation (by reference to the source of the same), as contrasted with another type of obligation; and included how the Respondent has failed to comply with it; if that is missing then it is unlikely that the disclosure would qualify for protection. (*Blackbay Ventures Ltd v Gahir* [2014] IRLR 416). In *Korshunova* it was held that where the Tribunal is unable to find that the Claimant reasonably believed at the time of the disclosure that a particular legal obligation was breached, by express reference to the source of the same, there can be no finding that the Claimant made a qualifying disclosure. The Respondent submitted that as the Claimant was unable to identify the source of any legal obligation in his ET1 or subsequently, at the preliminary hearing on 12 March 2018 and in its written submissions, this demonstrates that his claim has no reasonable prospect of success.

35 The Respondent also submitted that the Claimant did not disclose information such that would make what he said a qualifying disclosure. In the case of *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, it was held that the ordinary meaning of information is 'conveying facts'. That case then went on to make a distinction between making an allegation of a breach of a legal obligation or stating the position and disclosing information about it. It was the Respondent's submission that the Claimant's alleged first disclosure disclosed no facts whatsoever and the Claimant simply conveyed his personal view as to the appropriate way in which appointments should be made. In relation to the second disclosure, again it was submitted that the Claimant did not suggest at any time that persons of any particular protected characteristic had been discriminated against. The Respondent submitted that his alleged second disclosure amounted to his assertion that the Equality Act 2010 prohibits all differential treatment between persons holding the same qualifications and doing the same job. The Respondent submitted that the Claimant had misunderstood the Equality Act and his wrongly held belief was not reasonable, particularly as the Claimant was appointed as the Chair of the Respondent's Equality and Diversity Committee. In addition, the Respondent submitted that the alleged second disclosure, disclosed no information, conveyed no facts but was rather an allegation.

36 The Tribunal conducting the final hearing would then need to consider, whether, taking the Claimant's case at its highest, he is likely to be able to prove facts from which a Tribunal can conclude that he made a protected disclosure and that he suffered detriment as a result, including his dismissal. In his submissions, the Claimant stated that as the conversations between himself and the Provost, Vice-Provost and Business Manager were all conducted in Italian there would need to be a consideration at the final Hearing of what words were used and what they meant. He asserted that his disclosure was of malpractice and referred again to the appointment of Ms Morettin to the position of Reader in the faculty of international relations and political science. He submitted that this went against acceptable and standard practice in British universities, disregarded procedures and regulations and Open University regulations. He submitted that it breached law and other employee's rights under the Equality Act 2010. The Claimant did not make any reference to any particular sections of the Act. He submitted that the appointment of the PhD student to the post of Reader was unusual and submitted that it is likely that this was a first in the history of British

universities. The Claimant was unable to produce any documents or other evidence that he will rely on in a full hearing to prove this statement. I concluded that this is what he would say to a Tribunal at a final Hearing.

37 In his submissions, he reiterated that Ms Morettin, Ms Fazzin and Dr Molle's appointments had not been reviewed and properly vetted by specialised committee within the University and that is the reason for his complaint. He was unable to show where this requirement came from.

38 In relation to his second alleged disclosure, the Claimant submitted that his understanding of the Equality Act was that it tends to protect the individual in the place of work from less favourable treatment compared to colleagues with the same or similar qualifications to the point that employees with the same level of qualifications, doing the same job, cannot be given different job titles. This is not the effect of the Equality Act and the Claimant has misunderstood it.

39 Section 4 of the Equality Act 2010 (EA) sets out a list of protected characteristics that are protected under the Act. Section 13 EA states that a person (A) discriminates against another (B) because of a protected characteristic i.e. age, race, gender, disability, if he treats B less favourably than he would treat others. The Claimant does not submit that he had been treated less favourably by the Respondent on the ground of a protected characteristic in comparison to others.

40 The Claimant complained of victimisation. It is likely that this relates to the allegedly abusive emails he says he received from Ms Morettin and the work he was given to do which he says set him up to fail so that he could be dismissed. Those are also his alleged detriments from making protected disclosures. Section 27 EA states that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act. A protected act is the act of bringing proceedings under the EA, giving evidence or information in connection with proceedings under the EA or making an allegation that A or another person has contravened the Act, or lastly, doing any other thing for the purposes of or in connection with proceedings under the Act.

Decision

41 It is this Tribunal's judgment that the Claimant does not have sufficient qualifying service to be able to pursue a complaint of unfair dismissal. The Claimant was not employed for two years.

42 The Claimant's complaint of unfair dismissal is struck out as the Tribunal has no jurisdiction to consider.

43 The Claimant told the Tribunal the meaning of the words that he used when he spoke to the Provost, Vice-Provost and Business Manager about his concerns relating to the appointment of Ms Morettin. The other conversations between them may need to be interpreted but he provided REJ Taylor with the words the Claimant used in his alleged disclosures. He confirmed today that those were the words or the meaning of the words that he used.

44 In relation to the first disclosure, the Claimant makes specific referral to a need for the appointment of named individuals to the post of Reader and Professor in the faculty of international relations and political science to be vetted and confirmed by specialist community committee. The Claimant was unable to point to any document, any regulation or any statute or even any guidance that sets out such a requirement or procedure. The Claimant may have believed that the way in which the Respondent went about the appointments was misguided or immoral or unfair but that is not the same thing as a breach of a legal obligation. In my judgment, the Claimant was unable to point to any legal obligation on the Respondent that it has failed to comply with.

45 In addition, in the words used in the first disclosure, the Claimant did not refer to any legal obligation that he considered the Respondent had breached or failed to comply with. He simply stated his opinion, which was that the appointments should have been vetted and confirmed by specialist committee.

46 In relation to the second disclosure, the Claimant's understanding of the Equality Act is incorrect and misconceived. It is not the case that the Equality Act prohibits employees in the same place of work from being appointed to different posts if they have the same qualifications. It is not clear what the Claimant meant by the phrase 'doing the same job' in the alleged disclosure because if the named individuals are appointed to the post of Reader and Professor, they will not be doing the same jobs as the individuals he is comparing them to. If anyone felt that they had been treated less favourably by the Respondent by these appointments and they had a protected characteristic, they would have been able to issue proceedings under the Equality Act in the Employment Tribunal. I was not told that any such proceedings have been brought.

47 The Claimant was not able to point to an equal opportunities policy, any particular regulation or refer to any specific breach of the Equality Act 2010. The Claimant did not refer to any particular legal obligation that he says the Respondent was subject to and which these appointments breached.

48 The Claimant was clearly unhappy about the way in which these appointments came about. He may have genuine concerns about the way in which the Respondent proposed to run the University and about its commitment to equality. I do not know whether those concerns were real or were justified. However, in relation to the two potential disclosures he relies on, it is this Tribunal's judgment that he would not be able to persuade a tribunal conducting a final Hearing that they were qualifying disclosures under section 43B of the Employment Rights Act 1996. They did not disclose information which in his reasonable belief, tends 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; or that a criminal offence had been committed, is being committed or is likely to be committed.

49 The Tribunal is aware that it is a drastic measure to strike out the claim at this point in the proceedings and before any evidence is heard. The Tribunal listened carefully to the Claimant's submissions and considered the law and facts as set out above. I considered his prospects of success by assessing his case at its highest. Having done so, it is this Tribunal's judgment that there is no reasonable prospect of

the Claimant being able to prove at a final Hearing that his alleged disclosures qualify for protection.

50 In those circumstances, it is this Tribunal's decision, that there are no reasonable prospects of the Claimant being able to prove at a final hearing that he made protected disclosures. If he is unable to prove that he has made protected disclosures then he does not get the protection from detriment that the Employment Rights Act gives for those who have made public interest disclosures. The Tribunal will have no jurisdiction to consider his complaints.

51 As there are no reasonable prospects of the Claimant being able to prove that he made protected interest disclosures his claims for detriment and dismissal cannot be considered by the Tribunal. The complaint is dismissed.

52 In relation to his potential complaint under the EA, he did submit that there were other members of staff who had been interested in the post of Reader but who were not given the opportunity to be considered. However, his complaint is that the appointments are contrary to the EA because it has not been sanctioned by a specialist vetting committee. There are no reasonable prospects of him being able to demonstrate to a tribunal that the EA requires the Respondent to vet and confirm appointments by a specialist committee. There are no reasonable prospects of him succeeding in convincing a tribunal that the mere fact of the appointment is contrary to the provisions in the EA. What is required is that there is a process of open recruitment and that the most suitable candidate is appointed to the post. If someone considered that they had been treated less favourably by the process of appointment or recruitment and they consider that this was on the grounds of a protected characteristic, then they would be able to bring proceedings here. That is not the complaint that the Claimant has brought in this case. He has not brought proceedings under the EA. He has not given evidence or information in connection with proceedings brought under the EA. He has made a broad allegation in his second disclosure that the appointment breached the EA but as the Claimant did not identify a section in the EA that he says the appointment breached, it is this Tribunal's judgment that his complaint of victimisation, if made under the Equality Act has no reasonable prospect of success. The complaint is dismissed.

53 The Claimant's complaints had no reasonable prospect of success and they are hereby struck out.

Employment Judge Jones

14 March 2018