THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MORTON**
(Sitting alone)

BETWEEN:

Mr R Bowman **Claimant**

AND

Virgin Atlantic Airways Ltd **Respondent**

ON: **6 October 2017**

Appearances:

For the Claimant: **In person**

For the Respondent: **Mr B Williams (In house solicitor)**

WRITTEN REASONS PRODUCED FOLLOWING A WRITTEN REQUEST BY THE CLAIMANT

1. My judgment in this case was that the Claimant's claim of unfair dismissal had no reasonable prospect of success and should therefore be struck out. Furthermore, the Claimant having conceded that his outstanding notice pay and expenses had been paid by the Respondent his claim of breach of contract was dismissed.

2. The Claimant made an application for written reasons on 7 November 2017, the judgment having been sent to him on 24 October. His request was referred to me on 20 November.

3. The Claimant began work as a member of cabin crew for the Respondent on 18 April 2016. He was dismissed on 11 May 2017. He claimed unfair

dismissal and breach of contract for unpaid notice pay. His claim form suggested that he was also making a whistleblowing claim, although this was not particularised. He had simply ticked the box at 10.1 on the ET1.

4. The Respondent resisted the claims and sought a preliminary hearing to determine whether the claims should be struck out or a deposit ordered. It submitted that the Tribunal did not have jurisdiction to hear the Claimant's claim of unfair dismissal because he lacked the two years' qualifying service needed to bring such a claim under s108 Employment Rights Act 1996 ("ERA").

5. It also submitted that on the grounds set out in paragraph 11 of the ET3 that the Claimant would not be able to establish that he had made a public interest disclosure, nor that any disclosure on his part had been the cause of his dismissal. It submitted therefore that he would not be able to establish his right to bring a claim of unfair dismissal without the two year qualifying period under s103A ERA.

6. At the hearing Mr Williams repeated these submissions. In response the Claimant argued that in fact the background to his claim included matters related to health and safety. He appeared to be arguing that because the decision to dismiss him had been taken in part because he had not attended work when he was unfit to do so because of an ear infection, his dismissal was related to his endeavour to comply with the Respondent's health and safety policy.

7. I heard submissions from both parties on the substance of what Mr Bowman was saying and whether it amounted to a substantive amendment to his claim. I also heard submissions on how this allegation might fit into the available legal frameworks – s 43B ERA and s100 ERA. Mr Bowman considered that he fell within the scope of s100(1)(a). Mr Williams disagreed and concurred with my initial observation that Mr Bowman did not seem to be saying that he had been dismissed for carrying out health and safety activities during the course of carrying out his duties.

8. Mr Williams also made the point that if no employee could be dismissed in connection with a sickness absence that affected his or her ability to fly for reasons related to health and safety, the Respondent's business would become inoperable. He reminded me of the way in which the Claimant had put his case at the outset, namely "I believe the actual reasoning behind it to be because I had complained about Frances Wilburn as nothing was ever done about this. I believe this is due to nothing ever happening regarding the complaint and also because the company has failed to accept the evidence given regarding the sickness despite me appealing with further evidence and even though their policy is not to operate anyway".

Decision

9. The provisions on striking out claims are set out in Rule 37 of the Employment Tribunal Rules the relevant part of which is a follows:

37.— Striking out

(1) 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 any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

…..

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

10. An application for a deposit is dealt with under Rule 39 the relevant part of which provides as follows:

39.— Deposit orders

(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.

11. Whilst I was not making findings of fact for the purposes of this application, it was clear that the Claimant intended to argue that whilst he was ostensibly dismissed for sickness absence, and 'no shows' (such as the time he did not attend work because his car broke down), the real reason for his dismissal was that he complained about Frances Wilburn and the manner in which she had spoken to him on a particular occasion. He would also say that the Respondent failed to take into account the fact that when he did not attend work because of an ear infection he was merely complying with the Respondent's own health and safety policy.

12. The Respondent would say that the principal reason for the Claimant's dismissal was his failure to turn up to work on a number of occasions and his high level of sickness absence. It would say that a further factor was its disinclination to believe that the Claimant's sickness absence in March 2017 was genuine.

13. In order to succeed in this case the Claimant would have had to show that the sole or principal reason for his dismissal was:
    a. That he had made a protected disclosure within the meaning of section 43B(1) ERA; or
    b. That he was carrying out or proposing to carry out activities in connection with reducing or preventing risks to health and safety at work.

    If he were to convinced me that he had a reasonable prospect of showing that either or both of these was the case, then that part of his claim would proceed without a deposit.

14. If he were to convince me that he had little chance of showing that either or both of these matters were the sole or principal reason for his dismissal, then that part of his claim would proceed but I might determine that he was liable to pay a deposit.

15. If he could not convince me that a particular claim or argument had any reasonable prospect of success then I might decide to strike it out.

16. I also needed to consider whether his argument in relation to s100 ERA amounted to a substantive amendment to his claims and whether it would be just to allow him to make that amendment. The Respondent objected to the amendment and argued that the original claim form had not made it clear that this was the basis of the Claimant's claim and hence the amendment was substantive and not merely a relabelling of matters that had already been referred to in the claim. The question in relation to an amendment application is where the balance of injustice and hardship lies in allowing or refusing the amendment. The relevant time limits must also be taken into account.

Whistleblowing

17. Dealing first with the whistleblowing complaint, in my view Mr Bowman has no reasonable prospect of showing that his complaints about Frances Wilburn and the manner in which she spoke to him amounted to protected disclosures within the meaning of s43B ERA, if I apply the public interest test as articulated in *Chesterton Global v Nurmohamed [2017] EWCA Civ 979*. There are no grounds on which Mr Bowman could reasonably have believed that it was in the public interest for him to make a complaint about the manner in which a line manager had spoken to him on one occasion.

18. I accept that a disclosure related to health and safety on an airline is much more likely to meet the public interest test. The question here is whether Mr Bowman has a reasonable prospect of showing firstly that he made such a disclosure; and secondly that he was dismissed because he did.

19. The relevant provisions are in my view subsections 43B(1)(b) and (d) ERA which provide:

> **43B.— Disclosures qualifying for protection.**
>
> **(1) In this Part 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— …..**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,…**
>
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered…**

20. In my view Mr Bowman will not be able to show that he disclosed information to the dismissing officer, or indeed the appeal officer subsequently, that tends

to show either of these matters. For his complaint to fall within subsection (b) he would have to argue that dismissing him for an unacceptable level of sickness absence was a failure to comply with a legal obligation. I do not think that proposition can be accepted, as despite the rule in the handbook that states that you must not fly with an ear infection, taken to its logical conclusion, Mr Bowman's submission would mean that someone suffering from chronic ear infections could never be dismissed as there would always be a health and safety related reason justifying their absence from work. I in any event do not accept that there is any breach of a legal obligation involved in dismissing someone whose level of sickness absence is unacceptable to the employer unless the employer has failed to comply with the unfair dismissal regime. In this case that regime does not apply and I do not think praying in aid the background of health and safety considerations assists Mr Bowman in what is essentially an ordinary unfair dismissal claim to which the two years qualifying period applies.

21. For the complaint to fall within subsection (d), Mr Bowman would have to show that he had disclosed information that tended to show that the health and safety of an individual had been, was being or was likely to be endangered. I do not see how he could show that on these facts. His absence from work was the very thing that obviated a danger of this kind. It was his remaining away from work that prevented any health and safety issue arising. It is not his case that he was expected to attend work whilst having an ear infection. It is the Respondent's case that he simply had too many absences. There is no reasonable prospect in my view of his establishing a claim within section 43B(1)(d).

22. For completeness I would observe that if the Respondent succeeded in its submission that Mr Bowman was actually dismissed because the Respondent thought he was lying, that would take Mr Bowman even further from establishing that the principal reason for his dismissal lay within s 43B.

23. Turning now to the potential complaint under s100, before deciding whether or not the claim needs to be, or should be, amended to include such a complaint I will first consider the potential merits of a claim under s100. The argument Mr Bowman wishes to run is that by dismissing him for taking sick leave when he had an ear infection, the Respondent dismissed him because he was carrying out activities in connection with preventing or reducing risks to health and safety at work. I have considered this submission carefully, but in my view this is stretching the meaning of the legislation beyond that which Parliament intended. It also has the consequence I have already noted – that no person whose illness made it unsafe for them to fly would ever be able to be lawfully dismissed, regardless of the length of their absence. I also think that "activities" does not mean remaining at home on sick leave. That is stretching a definition too far. Activities connotes taking active steps to manage health and safety risks, in the manner Mr Bowman described himself as potentially being required to do whilst carrying out his duties on board an aircraft.

24. I do not therefore think Mr Bowman has any reasonable prospect of establishing a claim of automatic unfair dismissal under s100 (1)(a) ERA and

it is not therefore necessary for me to consider whether to allow him to amend his claim.

25. It follows from all that I have said that I do not think that Mr Bowman's claim of automatic unfair dismissal to which no qualifying period of service is applicable, has any reasonable prospect of success whether brought under s 100 or section 103A ERA and I therefore propose to strike out the claim of unfair dismissal.

26. As Mr Bowman has confirmed that the Respondent has paid him all sums due under his contract of employment I also dismiss the claim of breach of contract. I accept Mr Williams's submission that the Respondent's procedures are non-contractual and that no breach of contract claim can arise from them.

27. I refuse the Respondent's application for costs. The Claimant's claims ostensibly had no reasonable prospect of success, but in my view he did not fully understand the legal framework and was entitled to have his claims adjudicated by the Tribunal. He did not act vexatiously or unreasonably in pursuing his claims or in the manner in which he did so.

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Employment Judge Morton
Date: 30 November 2017