



EMPLOYMENT TRIBUNALS

at an Open Attended Preliminary Hearing

Claimant: Mr E Marunda

Respondent: Nottinghamshire Healthcare NHS Foundation Trust & others

Heard at: Nottingham

On: 12 and 13 November 2018
20 November 2018 - Reserved

Before: Employment Judge Blackwell (sitting alone)

Representation

Claimant: Mr O'Odusanya, Solicitor

Respondent: Mr T Shepherd of Counsel

RESERVED JUDGMENT

1. For the avoidance of doubt, any complaint pursuant to section 104 of the Employment Rights Act 1996 (ERA) is dismissed on withdrawal by the Claimant.
2. The Employment Judge considers that the Claimant's allegations in respect of constructive unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 have little reasonable prospect of success. The Claimant is ordered to pay a deposit of £100 not later than 28 days from the date this order is sent as a condition of being permitted to continue to advance that allegation.
3. The Employment Judge considers that the allegations pursuant to section 47B of the ERA in respect of detriment suffered as a consequence of making protected disclosures have little reasonable prospect of success. The Claimant is ordered to pay a deposit of £100 not later than 28 days from the date this order is sent as a condition of being permitted to continue to advance those allegations.

4. The Employment Judge considers that the Claimant's allegations in respect of victimisation pursuant to section 27 Equality Act 2010 (EA) have little reasonable prospect of success. The Claimant is ordered to pay a deposit of £100 not later than 28 days from the date this order is sent as a condition of being permitted to continue to advance those allegations or arguments.
5. The Employment Judge has had regard to the limited information available as to the Claimant's ability to comply with the order in determining the amount of the deposits.

RESERVED REASONS

1. This is an application by the Respondents to:-
 - 1.1 strike out all of the Claimant's claims pursuant to rule 37(1)(a) of schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, thus:

“Striking out

37.—(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;”

- 1.2 or that the Claimant should be made to pay a deposit pursuant to rule 39(1) of the same schedule, thus:

“Deposit orders

39.—(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.”

2. The Respondent's application led to a case management discussion on 24 August at which Employment Judge Hutchinson set out at paragraph 2 of his summary the Claimant's claims identified that a Scott Schedule had now been provided and in paragraph 5 ordered that this hearing should take place so as to consider the Respondent's application.

3. I have been hampered throughout this two day hearing, which also had to consider the Claimant's belated application to amend his particulars of claim, by the complete lack of preparation and knowledge of either the facts of the case or the relevant law on the part of Mr Odunsanya. I appreciate that he was a late substitute but that is no excuse. I have had the benefit of both oral and written submissions by Mr Shepherd on the facts and the law and I have been taken to the majority of the documents in a bundle extending to 637 pages.
4. I will deal firstly with the complaint of constructive unfair dismissal which relies upon, in turn, section 103A of the 1996 Act, thus:

“103A Protected disclosure.

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.”

5. I cannot say that the claim has no reasonable prospect of success but it seems to me that it has a number of difficulties. The first of which is to establish that the disclosures upon which the Claimant relies fall within the statutory definition set out in sections 43A and 43B of the ERA. The Claimant has the further difficulty of establishing that those alleged disclosures convey facts, ie information rather than making allegations.
6. There is a further difficulty for the Claimant in establishing that his resignation was to some extent caused by the alleged making of protected disclosures. I note for example that his resignation letter makes no reference to the matter.
7. For these reasons, I consider that the claim of constructive unfair dismissal has little reasonable prospect of success.
8. The second head of claim is brought under section 47B of the ERA, thus:

“47B Protected disclosures.

- (1) *A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*
- (1A) *A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—*
 - (a) *by another worker of W's employer in the course of that other worker's employment, or*
 - (b) *by an agent of W's employer with the employer's authority,*

on the ground that W has made a protected disclosure.

- (1B) *Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.*
- (1C) *For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.*
- (1D) *In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—*
- (a) *from doing that thing, or*
 - (b) *from doing anything of that description.*
- (1E) *A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—*
- (a) *the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and*
 - (b) *it is reasonable for the worker or agent to rely on the statement.*
- But this does not prevent the employer from being liable by reason of subsection (1B).*
- (2) *This section does not apply where—*
- (a) *the worker is an employee, and*
 - (b) *the detriment in question amounts to dismissal (within the meaning of Part X).*
- (3) *For the purposes of this section, and of sections 48 and 49 so far as relating to this section, “ worker ”, “ worker's contract ”, “ employment ” and “ employer ” have the extended meaning given by section 43K.”*

9. Again, the same difficulties in relation to proving that there have been protected disclosures apply. There is also the same difficulty in proving causation given that the detriments disclosed in the Scott Schedule are allegedly inflicted by a number of different members of the Respondents'

management team who may or may not have had knowledge of the alleged disclosures.

10. For essentially the same reasons, I believe that this head of claim has little reasonable prospect of success.
11. The third of claim is brought pursuant to section 27 of the Equality Act 2010, thus:

“27 Victimization

(1) *A person (A) victimises another person (B) if A subjects B to a detriment because—*

(a) *B does a protected act, or*

(b) *A believes that B has done, or may do, a protected act.*

(2) *Each of the following is a protected act—*

(a) *bringing proceedings under this Act;*

(b) *giving evidence or information in connection with proceedings under this Act;*

(c) *doing any other thing for the purposes of or in connection with this Act;*

(d) *making an allegation (whether or not express) that A or another person has contravened this Act.”*

12. The first difficulty for the Claimant is establishing that anything that he identifies as being a protected act is a protected act within the meaning of subsection (2). Having seen the documents relied upon, I am of the view that there is little reasonable prospect of so proving.
13. The second difficulty is again the matter of causation. Again, on what I have seen, it seems that there is little reasonable prospect of so doing.
14. The final head of claim is direct discrimination on the ground of the protected characteristic of race. Mr Marunda makes a number of allegations of racist remarks being aimed at him by his managers. Of course, if he were to prove that those remarks were made, then his claim in that regard at least would succeed. As that will depend entirely upon evidence, I make no further comment and refuse the Respondents' applications in relation to that head of claim.
15. I would also note that matters of jurisdiction in relation to the provisions of section 123 of the EA are a matter best left to the full hearing.

16. As to Mr Marunda's means, I invited Mr Odusanya to deal with that by way of documentary evidence or during Mr Marunda's evidence. He did neither. I am also at fault for not reminding him to do so at the end of Mr Marunda's evidence. Thus, I have very limited information upon which to set the level of the deposits, which I know must not be a bar to justice and have therefore set the figure at £100 for each of the three heads of claim which in my judgment have little reasonable prospect of success.

Employment Judge Blackwell
Date 7 Dec 2018

JUDGMENT SENT TO THE PARTIES ON

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