EMPLOYMENT TRIBUNALS

Claimant: Mr C Madden

Respondent: Wirral Borough Council

HELD AT: Liverpool **ON:** 5 December 2017

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: In person
Respondent: Mr P Jewell, solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The respondent's application to strike out the claimant's claim for unfair dismissal is successful, the claimant was still in employment and with the agreement of the claimant the unfair dismissal complaint is dismissed as the Tribunal has no jurisdiction to consider that complaint.

2. The proposal to order the claimant to pay a deposit under Rule 39(1) of the Tribunal Rules 2013 as a condition to continue to advance the claim of detriment brought under Section 47B of the Employment Rights Act 1996, on the basis that there is little reasonable prospect of success, is adjourned to 26 February 2018 with an estimated length of hearing of one hour pending written representations by the parties.

REASONS

1. This is a Preliminary Hearing to consider an application made on behalf of the respondent to strike out the claimant's claims and having heard oral representations from both parties. Taking into account the fact the claimant was taken by surprise by

the possibility of his being ordered to pay a deposit under Rules 39(1) as a condition to continuing to advance his claim of detriment under Section 47B of the Employment Rights Act 1996 as amended ("the ERA"), it was just and equitable to adjourn the Preliminary Hearing in order that the claimant could seek legal advice and provide submissions on whether or not there is little reasonable prospect of that claim succeeding.

2. The claimant clarified his claims as follows - he confirmed that the unfair dismissal complaint was incorrectly brought. He had "ticked the wrong box" and was still in employment in receipt of full pay under his entitlement of contractual sick pay.

3. The claimant complained that he was making a "whistle-blowing complaint" clarifying that it was a complaint for a number of detriments in respect of a protected disclosure allegedly made in 2011 to Phil Black, his Manager at the time. The disclosure was verbal, and there were no witnesses.

4. The alleged disclosure was two fold as follows:

4.1 The claimant allegedly complained that he had been left on his own in the Street Works Department (the claimant was employed as a Team Leader within the Street Works Department) to deal with all street work activities whilst other employees, including his managers, were spending their time getting evidence to deal with a BT arbitration hearing. The second part of the alleged disclosure was that the inspections were not being carried out as per the New Roads and Street Works Act, and the respondent was under a legal obligation to carry out street works under that Act.

4.2 Some time was taken with the claimant to understand the detriments he relies upon flowing from the protected disclosure made in 2011. In short, the claimant maintains that he was made redundant and during the redundancy notice period, unsuitable alternative employment was offered to him. The claimant maintains these events arose as a result of the protected disclosure he had made in 2011 and a grievance raised against managers Mark Smith and Robert Clifford were involved in the events which led to the protected disclosure, Kevin Adderley, Mark Smith and Robert Clifford's manager were all involved in deleting the claimant's post, which the claimant states, was retribution for raising the protected disclosures.

4.3 The claimant maintains the grievance he raised against the two managers has never been resolved, continues to remain outstanding and this is a continuing act for the purpose of time limits. Limitation period and jurisdiction is an issue in the case.

5. The claimant alleges the first detriments took place either in November 2012 or February 2013 when the respondent lost the BT arbitration case, and Mark Smith, Senior Management of the Street Works Department, "scapegoated" the claimant who was informed his post had been deleted because of the BT arbitration case and inspections being carried out differently. The claimant, who was a Team Leader at the time and not an Inspector (he managed four Inspectors), did not accept the post

had been deleted; he opposed the deletion and raised the grievance referred to above against his two managers.

6. The claimant received confirmation on 20 March 2013 that his post was not being deleted. He continued working in post until deletion proposals took place in 2014, and by 20 July 2015 the claimant's role had been made redundant, the claimant found alternative employment in his notice period, which he deemed unsuitable. The claimant transferred to the alternative employment on 20 July 2015 despite seeking legal advice from the union in relation to the first proposed redundancy/deletion of his post, the claimant did not seek legal advice when he transferred in the twelve week notice period to the role as Parking Services Team Leader. It was explained to the claimant that there were fundamental time issues in relation to his complaint going back to 20 July 2015. The claimant will assert there was a continuing act as his grievance had not been dealt with, the first proposed deletion of post was linked to the 2015 deletion of post, and the respondent's behaviour towards the claimant thereafter. It is clear from the claimant's responses to questions put to him by the Tribunal, the reason why he did not take legal advice, either prior to 20 July or after this date related to his resignation from the union (the claimant had been a UNISON representative), and he did not want to take steps against the respondent his intention being to continue with his employment.

7. The claimant maintains that it has become clearer over time the redundancy was a "sham" as his position still exists to date, two years down the line the respondent employs three people to carry out the job originally carried out by the claimant, a role which the claimant's manager is also still carrying out. The claimant is of the view that as he was not an Inspector at the time, had disagreed with the way the inspections had been carried out, and yet it was his role that was made redundant (and not that of the Inspectors) the redundancy was a sham, and all of these matters were referable back to the protected disclosure made in 2011.

8. There was also a suggestion that the claimant had been discriminated against in his capacity as a UNISON representative, although this was not a matter pleaded by the claimant and nor does it form part of his complaint before this Tribunal.

9. The claimant alleges Robert Grifford (one of the two managers against whom he raised the grievance) wanted to delete the claimant's role and as a consequence he was "forced to do something else" to avoid unemployment. On this basis he accepted the Parking Services Team Leader role into which he transferred on 20 July 2015.

10. The next detriment alleged by the claimant relates to that role. The claimant maintains the position of Parking Services Team Leader was not suitable. He requested training in appraisals with Steve Atkins, his new manager, in the Park and Services Team and that training has not been given. The claimant alleges he has not been trained because he raised the protected disclosure in 2011, despite "pleading" with senior management because he was unable to cope. The claimant reports how three employees had gone off with stress with no one to replace them and no one in his team to deal with appeals and on this basis the respondent, with knowledge, placed him in a team he could not manage and this has caused the claimant stress and absence on the grounds of medical ill health.

11. The claimant indicated Steve Atkins' failure to provide training had some sort of causal connection with the protected disclosure made in 2011. The claimant's allegations were confusing. He stated that Steve Atkins was not conspiring, despite the fact Phil Black was Steve Atkins' Manager, and it was Phil Black to whom the disclosure had been made in 2011. The claimant "presumes" the department's failure to train him relates to the protected disclosure made in 2011, and the Tribunal is not in a position, without hearing oral evidence on cross examination, to determine whether or not there is no reasonable prospect of that claim succeeding, and it is thus not just and equitable to dismiss the claim despite the problems with time limits.

12. The claimant's lack of clarity is further exacerbated by the claimant's allegation that it was also his "audacity" in raising a grievance against the two managers which he described as "more the line I am looking at" resulted in the detriments. As indicated earlier the claimant maintains the grievance against the two managers is still outstanding despite an offer to mediate, which one of the managers refused and yet the grievance was not reinstated. The issue appears to be a live one between the parties and there is an issue as to whether this is a continuing act or not. Joe Blott, the Strategic Director, considered the grievance closed. He had chaired the second stage grievance, which had been adjourned, the grievance was dated 11 February 2013, and the claimant maintained his grievance was not has not been dealt with as a result of the protected disclosure made, and the fact that he raised a grievance against two managers.

13. On behalf of the respondent Mr Jewell submitted the claimant's Section 46B ERA complaint was out of time, the disclosure he made relate to resources applied to arbitration and the respondent allegedly not complying with Regulation some time ago. The claimant commenced his current role on 13 July 2015 and this detriment is out of time. It was reasonably practicable for the claimant to have made the claim in time; the difficulties experienced by the claimant were not connected to a protected disclosure, i.e. the lack of training and support. There was a different manager in place not involved in the decision regarding the grievance or the restructuring of the department in 2015. The respondent disputes the alleged detriment flows from the protected disclosure, and even if the last detriment was as a result of the protected disclosure it is out of time. The respondent maintains there was no continuing act, and the claimant's reference to his medical condition was one to the consequences of the detriment i.e. the effect, rather than the continuing act in itself and so the Tribunal agreed.

14. It was the Tribunal's view that the difficulty with the respondent's position was the claimant's allegations that the grievance he raised was still outstanding and his request for training in to his new role were all continuing acts, and linked to the earlier allegations flowing from the protected disclosure made in 2011.

15. Under Rule 37 of the 2013 rules a Tribunal can exercise its power to strike out a claim or response on the ground that a claim has no reasonable prospect of success, and this case was very close to that. There exist special considerations however, when a Tribunal is asked to strike out a claim involving detriments, given the fact that such claims are often fact sensitive and require full examination of the

evidence to make a proper determination of the facts so as to decide whether inferences can be raised.

16. Despite grave reservations concerning the prospects of success and whether or not there is a continuing act as alleged by the claimant, the Tribunal took a view that the Section 47B claim should not be struck out and as an alternative, consideration should be given to order a deposit.

17. Under Rule 39(1) of the ERA where a Tribunal considers that a specific allegation in a claim has little reasonable prospect of success, "it may require 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". In short, to order a deposit in weak cases the Tribunal must be satisfied that there is "little reasonable prospect" of that particular allegation succeeding. This is a different test to striking out under Rules 37(1)(a), as a less draconian alternative to a weak case.

18. As the respondent requested a hearing to strike out the claim of unfair dismissal which was successful it was just and equitable to adjourn the application pending written submissions by the parties, given the fact the claimant was not put on notice that a Deposit Order would be applied for in respect of his Section 47B complaint as an alternative to a strike out. Case Management Orders were agreed in relation to the exchange of written closing submissions as set out below.

19. The Tribunal was required to consider, when making a Deposit Order, under Rule 39(2) the claimant's ability to pay a deposit, which it has done. The claimant having conceded he was in receipt of salary £2,607 gross, £1,562 net per month and was in a position to afford to pay a deposit, if the Tribunal's judgment is to order one. In the written submissions, both parties will deal with the amount of deposit to be ordered in the event of the Tribunal deciding it was just and equitable to make such an order. The parties will also deal with the date by which the relevant sum must be paid under Rule 39(4) i.e. 21 days.

20. The claimant is aware that if a Deposit Order is made, and he fails to pay by the date specified, the Section 46 ERA claim will be struck out under Rule 39(4) of the ERA. The strike out will be automatic with the Tribunal having no discretion about the matter.

21. Finally prior to making a final decision on whether or not a Deposit should be ordered against the claimant, the Tribunal has been referred to a number of documents within the bundle by the claimant, which it will read at the reconvened hearing set down for 10.00 am on 26 February 2018. The parties need not attend the hearing, the Tribunal will consider the written submissions and documents to which it was referred. The parties may recall that those documents have been amended by the claimant with relevant dates and there is no requirement for submissions on this.

22. It was agreed the respondent will send to the claimant its written submissions no later than 8 January 2018.

23. The claimant, who is being given time to seek legal advice, will serve his written submissions on the respondent no later than 12 February 2018.

24. Both sets of written submissions and any responses to those submissions will be lodged with the Tribunal no later than 19 February 2018 in anticipation of the 26 February 2018 hearing.

11.12.17

Employment Judge Shotter

JUDGMENT AND REASONS SENT TO THE PARTIES ON

15 December 2017

FOR THE TRIBUNAL OFFICE