EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr Rouhman Choudhury	v	**The London Borough of Southwark**

HEARING

Heard at: London South **On: 8 January 2019**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: Mr W Brown solicitor
For the Respondent: Mr A Line of Counsel

JUDGMENT on PRELIMINARY HEARING

1. The claim of unfair dismissal under section 103A of the Employment Rights Act based on alleged protected disclosures one, two, the email of 29 March 2017 in three and four is struck out as having no reasonable prospect of success.

2. The claim under section 103A based on an email dated 4 April 2017 is not struck out nor is it made subject to a deposit order.

3. The claim of detriment because of having made protected disclosures is dismissed on withdrawal.

REASONS

Preliminary

4. This preliminary hearing was fixed in order to consider the Respondent's application to strike out the claims based on four alleged protected disclosures. The alleged protected disclosures relied upon by the Claimant are specified at paragraphs 21 – 25 of his Particulars of Claim.

5. The Respondent has made its position known since its ET3 that the Claimant's case under section 43B, 47B and 103A lacked clarity and had no reasonable

prospects of success. At a previous preliminary hearing on 4th April 2018, EJ Baron listed this preliminary hearing because he considered that Claimant's claim relating to protected disclosures was unclear. Since then, notwithstanding the passage of time, the Claimant has not sought to clarify his claim at any point.

6. The Claimant withdrew his claim of detriment because of having made protected disclosures on 18 May 2018, accordingly this claim is dismissed.

Alleged disclosures

7. The first alleged disclosure is at paragraph 21 of the Claimant's Particulars of Claim. The Claimant relies on an FOI request he made on 22nd October 2016, and an email dated 22nd November 2016 in which he complained about delay in processing the request. The Respondent accepts that the FOI request was made, and it was acknowledged in an email dated 18th November 2016 which states that his request was received on 14 November and replied to on 25 November 2016.

8. The second alleged disclosure is at paragraph 23 of his Particulars of Claim. The Claimant refers to a complaint he raised about a right to buy valuation on 13th January 2016. At paragraph 9 the Claimant describes an email as follows:

> "… the Claimant emailed a complaint to the Chief Executive, Councillor Karl Eastham, and the leader of the council cabinet regarding his right to buy application and stating that equality has not been complied [sic]."

Neither party has the email referred to.

9. The third alleged disclosure is at paragraph 23 of his Particulars of Claim, the Claimant refers to a complaint he raised about his right to buy valuation on 29th March 2017 and 4th April 2017. At paragraph 11 the Claimant describes these emails as follows:

> "the claimant sent an email on 29th March 2017 to the District Valuer and was informed that the Adjudicator's Office had been contacted to carry out an investigation into the respondent. This email was then forwarded and the right to buy complaint was reiterated on 4th April 2017 to the respondent's Chief Executive, Neil Coyle MP, and Councillor Mark Eastham. The claimant highlighted his concerns that council properties were being sold below market value."

During the course of the hearing, the Claimant's solicitor accepted that the email of 29 March could not be a disclosure. Neither party has the email of 4 April 2017.

10. The fourth alleged disclosure is that the Claimant relied on a complaint he made to the ICO on 27 October 2017. The respondent pointed out that as the claimant had been dismissed on 13 July 2017 and his appeal had been determined by 25 September, he was no longer a worker and hence this cannot amount to a qualifying disclosure. The Claimant's solicitor withdrew the case so far as based on the fourth alleged disclosure.

Submissions

11. The Tribunal heard oral submissions from both parties and considered written submissions from the respondent.

Law

12. For the Claimant's claim under section 103A to succeed, he must establish:

a. That he has made a protected disclosure(s) within the statutory meaning.

b. That, as a matter of causation, the reason or principal reason for the dismissal was that he made a protected disclosure(s).

13. The Claimant requires to prove that he made a qualifying disclosure within the meaning of section 43B (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—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

14. It has been held that a qualifying disclosure must be a disclosure of information, which means the conveying of facts, as opposed to mere allegation: **Cavendish Munro Professional Risks Assessment Ltd v. Geduld** [2010] IRLR 38. In **Kilraine v. London Borough of Wandsworth** [2018] ICR 1860 CA, the Court of Appeal supported the EAT's view that a rigid dichotomy between information and allegation should not be read into section 43B, but that a disclosure must contain sufficient detail and content to be capable of tending to show one of the prescribed categories of information in section 43B (1). Ultimately, this will be an evaluative judgement for the Tribunal to make, see paragraphs 30 – 36. Further, it was held that the context in which the disclosure is made is a relevant consideration, see paragraph 41.

15. The editors of Harvey at CIII(4)(C) [21] summarise the position as follows:

> "… in effect there is a spectrum to be applied and that, although *pure* allegation is insufficient (the actual result in *Cavendish*), a disclosure may contain sufficient information even if it also includes allegations… The question therefore is whether there is *sufficient* by way of information to satisfy s 43B and this will be very much a matter of fact for the tribunal. Clearly, the more the statement consists of unsupported allegation, the less likely it will be to

> qualify, but this is as a question of fact, not because of a rigid information/allegation divide."

16. Once a disclosure has taken place it becomes necessary to consider whether or not that disclosure can be categorised as a qualifying disclosure. This largely depends upon the nature of the information revealed. As an initial starting point, it is necessary that the worker making the disclosure has a reasonable belief that the disclosure tends to show one of the statutory categories of 'failure' (ERA 1996 s 43B (1)). It needs to be stressed that what is required is only that the worker has a reasonable belief and it is not necessary for the information itself to be actually true. It follows that a disclosure may nevertheless be a qualifying disclosure even if it subsequently transpires that the information disclosed was incorrect. This was made clear by the Employment Appeal Tribunal in **Darnton v. University of Surrey** [2003] IRLR 133 EAT. In that case the employment tribunal had held that the claimant had not made a qualifying disclosure because the allegations relied upon were not factually correct. In allowing the employee's appeal, the Employment Appeal Tribunal confirmed that the proper test to be applied is whether or not the employee had a reasonable belief at the time of making the relevant allegations. Although it was recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

17. The determination of whether a belief is reasonable is dependent on his subjective believe, but that belief must be objectively reasonable: **Babula v Waltham Forest** College [2007] IRLR 346.

18. In **Chesterton Global Ltd. v. Nurmohamed** [2018] ICR 731 CA at paragraphs 35 - 37, on the issue of public interest, it was held:

> "[35] …It is in my view clear that the question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest. That is in my view the ordinary sense of the phrase "in the public interest"…
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> [36] The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be… The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.
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> [37] Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34

above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

19. The 'Laddie factors' referred to are: (a) the number of workers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; (c) the nature of the wrongdoing disclosed; and (d) the identity of the wrongdoer.

Requirement of fair notice of a claim

20. It is trite to say that parties should know, in advance, reasonable details of the nature of the complaints that each side is going to make at the hearing, see **White v. University of Manchester** [1976] ICR 419 EAT.

STRIKING OUT

21. Rule 37(1)(a) provides:

"(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—

that it is scandalous or vexatious or has no reasonable prospect of success;"

22. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001] IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious'.

23. As whistleblowing cases have much in common with discrimination cases, in that they too are fact-sensitive and involve similar public interest considerations, (see **Ezsias v. North Glamorgan NHS Trust** [2007] ICR 1126 CA, applications to strike out should be approached with great care.

24. In **Abertawe Bro Morgannwg University Health Board v. Ferguson** [2013] ICR 1108 EAT, at paragraph 33, it was said "Applications for strike out may in a proper case succeed. In a proper case they may save time, expense and anxiety. But in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general, it is better to proceed to determine a case on the evidence in light of all the facts."

25. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hak v, St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

> Rule 37 of the Employment Tribunal Rules 2013 provides materially:-
>
> > "(i) At any stage in 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) Where it is scandalous or vexatious or has no reasonable prospect of success…"
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> 55. The words are "no reasonable prospect". Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):
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> > "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"
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> 56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

26. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

> "There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach."

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27. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

DEPOSIT ORDERS

28. A deposit order can be made if the specific allegation or argument has little reasonable prospect of success. It was noted in **Van Rensburg v. Royal Borough of Kingston-Upon-Thames** UKEAT/0095/07/MAA at paragraph 27 that:

> *"*Moreover, the test of little prospect of success in r 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success found in r 18(7). It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."

29. In **Hemdan v. Ishmail** [2017] IRLR 228, Simler J, pointed out that the purpose of a deposit order 'is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails' (para 10), she stated that the purpose 'is emphatically not to make it difficult to access justice or to effect a strike out through the back door' (para 11).

30. As a deposit order is linked to the merits of specific allegations or arguments, rather than to the merits of the claim or response as a whole, it is possible for a number of such orders to be made against a claimant or respondent in the same case.

DISCUSSION and DECISION

31. The first alleged disclosure is an FOI request. The Tribunal considered that an FOI request cannot amount to a protected disclosure. It is a statutory procedure for requesting information, as opposed to a disclosure of information.

32. The second alleged disclosure as described does not fall within section 43B(1)(b) in terms of subject matter. In addition, the Claimant will fail to establish any reasonable belief in the public interest, because this was an email about his personal housing application. Although there is a reference to equality, this cannot be taken as a reference to discrimination without specification.

33. In the third alleged disclosure, the Claimant says that the same email which he sent on 29th March 2017 to the District Valuer was then forwarded onto Neil Coyle MP and Councillor Eastham on 4th April 2017. The Claimant does not say what was contained in the email of 29th March 2017.

34. In respect of the 4th April 2107 email, the Claimant says that he raised more general concerns that properties were being sold below market value. Whether such a disclosure as ever made, whether it is protected or not and whether it has any causative relationship with the dismissal is a matter for evidence.

35. The Tribunal considered how to exercise its discretion in the light of its findings. It determined to strike out the allegations with the exception of that based on the alleged email of 4 April 2017.

36. The Tribunal considered whether or not to make a deposit order in relation to the remaining allegation but decided not to do so as, without evidence, it could not determine that the claim had little prospect of success, at this stage.

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Employment Judge Truscott QC

Date: 17 January 2019