Case Number: 2206029/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Mr K Kareem		**Secretary of State for Justice**

REASONS FOR THE JUDGMENT SENT TO THE PARTIES ON 23 APRIL 2019

Introduction

1 The Claimant was employed by the Respondent in an administrative capacity at the Royal Courts of Justice from 28 January 2018 until 24 July 2018 when he was dismissed, purportedly for a reason relating to conduct.

2 By a claim form presented on 12 September 2018 the Claimant complained of 'automatically' unfair dismissal and referred to 'whistle-blowing'. In box 5 of the form he asserted that his employment had begun on 5 April 2016, a contention he later abandoned.

3 At a preliminary hearing in public on 14 March 2019 Employment Judge Grewal struck out the 'ordinary' unfair dismissal claim for want of jurisdiction (the Claimant not having accrued the necessary qualifying period of two years' continuous service). She then went on to identify what was left in the case, namely claims under the 'whistle-blowing' provisions of detrimental treatment and automatically unfair dismissal, in these terms:

> **Protected disclosures**
>
> **2.1 [The Claimant] claimed that the following communications by him amount to qualifying disclosures under section 43B(1)(b) of the Employment Rights Act 1996. The legal obligation in question was the Respondent's obligation to permit workers to have rest breaks during the working day.**
>
> **(a) Some time in March 2018 he sent an email to Debbie Tomlin in which he said that he was overworked and under pressure, he was doing the work of five people while he was still being trained, the person who was supposed to be training him was off sick, it was very stressful and affecting his work-life balance and his family life.**
> **(b) Prior to sending that email he had given Debbie Tomlin the same information verbally a few times. He had said "I have not had a break" and she had said that she would send someone to take over from him. However, they were short-staffed and she did not send anyone. Her reaction when he raised that showed that she was unhappy with him for raising it.**

(c) In his grievance of 24 April 2018 the Claimant referred to working during his break times.

Detriments

2.2 The Claimant was subjected to the following detriments because he had made those protected disclosures:

(a) Rahima Rahman gave false evidence that the Claimant had given his log in to an Agency worker to gain access to his PC;
(b) Rebecca Acquah, who heard the Claimant's grievance, did not record accurately in her grievance report what he had told her in the grievance investigation.

Automatic Unfair Dismissal

2.3 The reason, or principal reason, that Geraint Edwards dismissed the Claimant on 24 July 2018 was that he had made the protected disclosures set out at paragraph 2.1 (above).

4 The judge then proceeded to list a preliminary hearing to deal with further case management and to address any applications on behalf of the Respondent for striking-out and/or deposit orders.

5 The Respondent duly made such applications in a letter dated 27 March.

6 The matter came before me on 18 April 2019 in the form of a public preliminary hearing to consider the Respondent's applications and, subject to my adjudication on them, case management as applicable. The Claimant was represented by Ms N Joffe, counsel, appearing as a volunteer under the auspices of the ELIPS scheme. Mr B Gray, counsel, represented the Respondent. The hearing began with an application on behalf of the Claimant for a postponement to a fresh date. I made it clear that I was disinclined to postpone and suggested to Ms Joffe that a short adjournment might be all that was required. She accepted my offer and after taking time in private with the Claimant was content to proceed. Having heard the helpful submissions on both sides, I gave an oral judgment dismissing all remaining claims. The written judgment followed, on 23 April.

7 By an email of 30 April the Claimant made a request for written reasons. These are my reasons. I regret the delay in supplying them, which is attributable to a number of factors including pressure of work, my absence on two periods of leave and the fact that the Tribunal's copy of the bundle has been lost or destroyed, necessitating a request to the Respondent's representative for a copy.

The law

8 Under the Working Time Regulations 1998, reg 12(1) a worker whose daily working time exceeds six hours is entitled to a rest break.

9 By the Employment Rights Act 1996 ('the 1996 Act'), s43B, it is stipulated that:

> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more of the following –**
>
> **(a) …**
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject …**

10 Qualifying disclosures are protected if made in accordance with ss43C to 43H (see s43A). By s43C, it is provided that:

> **(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –**
>
> **(a) to his employer …**

11 The requirement for a reasonable belief that the disclosure is in the public interest was enacted by means of an amendment introduced by the Enterprise and Regulatory Reform Act 2013. Its effect was examined by the Court of Appeal in *Chesterton Global Ltd v Nurmohamed & Anor* [2017] EWCA Civ 979. Giving the leading judgment, Underhill LJ rejected the argument that a disclosure about a breach of an individual worker's contract of employment (or some other matter personal to him or her) could not fall within the statutory protection. In such a case the Tribunal must have regard to all the circumstances including the number of people whose interests the disclosure served, the nature of the interests affected and the extent to which they are affected by the disclosure, the nature of the alleged wrongdoing and the identity of the alleged wrongdoer.

12 By s47B(1) a worker has the right not to suffer a detriment (which may take the form of an act or a deliberate failure to act) done on the ground that he has made a PID. A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL.

13 The necessary link between a protected disclosure and any detriment relied upon is established if the former was a material influence upon the latter: see *Fecitt v NHS Manchester* [2012] ICR 372 CA. By virtue of s48(2) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

14 A dismissal is 'automatically' unfair if the reason or principal reason is that the person dismissed has made a protected disclosure (s103A). Where, for want of two years' qualifying service, the employee is not protected against 'ordinary' unfair dismissal, he or she bears the burden of proving the 'automatic' ground relied upon: see S*mith v Hayle Town Council* [1978] ICR 996 CA.

15 By the Employment Tribunals Rules of Procedure 2013, r37(1)(a), the Employment Tribunal has power to strike out claims or parts of claims on the ground that they have no reasonable prospect of success.

16 It is well-established that striking-out orders are exceptional, particularly in discrimination and 'whistle-blowing' cases. The Tribunal must exercise great care when faced with an application for such an order (see *Anyanwu v South Bank Students Union* [2001] 1 WLR 683 HL, a discrimination case). That said, in an appropriate case a striking-out order should be made and failure by the Tribunal to do so may be held to amount to an error of law (see *e.g. ABN Amro Management Services Ltd v Hogben* UKEAT/0266/09).

Analysis and conclusions

17 For several reasons, I was satisfied to a high standard that all of the Claimant's 'whistle-blowing' claims were hopeless and that the only proper course was to strike them out. The first was that it was exceedingly improbable that a Tribunal would find that the Claimant believed when making the disclosures relied on that they were in the public interest. The email of March 2018 was not shown to me but EJ Grewal's summary of its content (her para 2.1(a))[1] has not been challenged or questioned by the Claimant. Nor has her summary of the second and third disclosures (para 2.1(b) and (c)). No disclosure contains any suggestion of a public interest element, let alone a belief on the part of the Claimant that he was raising a matter of public interest. Each is entirely personal to him and expressed in terms that show that he regarded it as personal to him. There is no suggestion that the things about which he complained pointed to an issue affecting his colleagues, much less the Respondent's workforce generally. Plainly, there is no public interest in a private dispute about work pressure and rest breaks and I have been shown no evidence of any arguable reason for the Claimant to believe that there was or is any such a public interest.

18 The second reason is that it is all the more unlikely – not to say vanishingly unlikely – that a Tribunal would find, if somehow persuaded that the Claimant believed that the disclosures were in the public interest, that such a belief was reasonable. There appears to be no sensible basis on which the Tribunal could so hold.

19 These reasons combine to make the 'whistle-blowing' claims entirely untenable. There is no arguable basis for contending that the disclosures relied upon attracted the protection of the Act, Part IVA. The case is a paradigm example of the mischief which the 2013 amendment was designed to address.

20 Even if I had not found the case on protected disclosures hopeless, I would have struck it out in any event, either, in the case of the detriment at para 2.2(a), because there was no reasonable prospect of showing that any such detriment was suffered or, in the case of detriment 2.2(b) and the unfair dismissal claim (para 2.3), because there was no reasonable prospect of the Tribunal finding, respectively, that a material reason for, or the reason or principal reason for, the matter complained of was the (alleged) protected disclosure. I will develop these briefly in turn.

[1] Para numbers below refer to EJ Grewal's document.

21 As to para 2.2(a), it is evident that the alleged detriment put before, and recorded by, EJ Grewal did not happen. The disciplinary allegation against the Claimant was not that he had "given his log in" to an agency worker, but that he had logged in to two computers and allowed an agency worker to use one to gain unauthorised and unsupervised access to the Respondent's confidential database. The contemporary documents in the bundle demonstrate plainly and incontrovertibly that this was the charge and that Ms Rahman gave evidence consistent with it. The complaint of detrimental treatment at para 2.2(a) is bound to fail.

22 As to paras 2.2(b) and 2.3, I am satisfied that the Claimant's contention that there was a significant link between his alleged protected disclosures and the (alleged) detriment of failing accurately to document the grievance and/or the (admitted) dismissal is hopeless. As to the former, the idea that the dubious alleged detriment of having a grievance imperfectly noted in the course of an investigation can be attributed (to any material extent) to the fact that he had complained about work pressure and rest breaks is obviously fanciful. As to the latter, it is common ground that the disciplinary charge was serious. The evidence to support it was strong (in the end it was proved on the Claimant's own admission). He had not accrued the right not to be unfairly dismissed. The possibility of the Tribunal finding that *the* reason, or *principal* reason for dismissal was one offending against the 1996 Act, s103A is beyond fanciful.

23 The conclusion just stated on the para 2.2(b) detriment amends my oral decision, in which I stated that, had the claim survived the analysis to date, a deposit order would have been made. On further reflection, I am clear that striking out would have been the only proper course.

_____

EMPLOYMENT JUDGE SNELSON
29 July 2019

……

Reasons entered in the Register and copies sent to the parties on 29 Jul. 19

..... for Office of the Tribunals