



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr B Awerije

**Respondents:** 1) Ms E Martin  
2) Everdale Grange Limited

**Heard at:** Leicester **On:** 30 August 2019

**Before:** Employment Judge Batten (sitting alone)

## Representation

**Claimant:** In person  
**Respondent:** Mr M Curtis, Counsel

**JUDGMENT** having been sent to the parties on 7 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## JUDGMENT

Upon hearing from the claimant and from Counsel for the respondents, the judgment of the Tribunal is that the claimant's claims are struck out because they have no reasonable prospects of success.

## REASONS

### Background and Issues

1. On 4 February 2019 the claimant issued a claim under case number 2600439/2019 in which the Claimant indicated that he claimed unfair dismissal, race discrimination and a claim of "prejudice" which was clarified at the start of the preliminary hearing and is effectively a claim of race discrimination.

2. On 14 May 2019, the claimant issued a further claim which under case number 2405558/2019 in which the Claimant indicated that he claimed wrongful dismissal.
3. This preliminary hearing was initially listed for case management in private. Following an application made within the grounds of resistance attached to the Respondent's ET3 and consideration of the files by Employment Judge Britton, the cases were listed for an open preliminary hearing to consider the following issues:
  - 3.1 whether the claims or any of them should be struck out for want of jurisdiction or as having no reasonable prospect of success; and
  - 3.2 in the alternative as to whether deposits of up to £1,000 per claim should be ordered payable by the claimant, the claims or any one of them having only little reasonable prospect of success.
4. The parties were directed by the Tribunal to agree a bundle for use of the Tribunal at the preliminary hearing and the parties were also informed, within the notice of preliminary hearing, that the adjudications will be made on the papers and submissions and that sworn evidence will not be received.

### **The claims**

5. At the beginning of this preliminary hearing, and before the Tribunal heard submissions on the issues identified at 3.1 and 3.2 above, the Tribunal discussed the claims with the claimant. It was explained to the claimant that it appeared to the Tribunal that a claim of ordinary unfair dismissal could not proceed for lack of jurisdiction because the claimant does not have the necessary 2 years' continuous service required to bring that claim and this was accepted by the claimant.
6. As a result of the discussion, the claimant confirmed that he pursued claims of: (1) automatic unfair dismissal for making a protected disclosure in relation to his dismissals on 22 November 2018 and 21 February 2019; (2) detriment for making a protected disclosure; and (3) race discrimination.

### **Evidence**

7. The Tribunal was provided with a bundle of relevant documents prepared by the Respondent. The claimant had sent the respondent certain documents for inclusion in the bundle but It was not clear whether they had been included or not. Therefore, at the beginning of the hearing we took some time to check that each document relied upon by the claimant was in fact in the bundle. There were 2 documents identified by the claimant which were not in the bundle: the first is a character reference on the claimant from Dr Rehman of the University of Plymouth; and the second is a copy of a complaint about the claimant which was sent to by

the respondent the claimant asking for the claimant's response to what was alleged in the complaint.

8. The Tribunal heard lengthy and detailed submissions from both parties who each referred to the documents in the bundle.
9. In the course of submissions, the claimant announced that he had a number of recordings of conversations made between him and the respondent on his phone. The claimant said that he had made these recordings because he did not trust the respondent and he had decided that he wanted the Tribunal to listen to the recordings. It had been directed by Employment Judge Britton, and was set out in the notice of preliminary hearing that the matters would be dealt with on the papers and submissions. It was noted that no application or enquiry had been made by the claimant to the Tribunal as to what he might do about those recordings and no transcripts had been produced. The respondent had not been provided with copies and had not had an opportunity to listen to the recordings or take instructions upon them.
10. The Tribunal considered that it was not appropriate to raise the recordings in the middle of submissions particularly as, at the beginning of the hearing, the Tribunal had been at pains to point out to the parties that it wanted to have all the relevant evidence in front of me from the start. The Tribunal specifically said that it did not want anything held back or produced during the course of the hearing depending on how a party felt things were going. In those circumstances, the Tribunal declined to listen to the recordings and they were not used.

### **Relevant findings of fact**

11. The findings which the Tribunal has made as relevant to the applications before it are as follows, taking into account the contemporaneous documents in the bundle.
12. The claimant started working for the respondent on 8 July 2018 as a carer at its care home in Leicestershire. He was subject to a 6 months' probationary period.
13. On 21 November 2018, the Claimant reported an incident that he said he had witnessed involving a fight between a resident with dementia ("AP") and a carer called Mickey. The Claimant alleged that, in the course of the altercation between them, Mickey hit, kicked and shouted at the resident who was a vulnerable person with dementia. The Respondent checked the resident and a body map of the resident showed no injuries or bruises.
14. The Claimant was interviewed at 4:30 pm on 21 November 2018 and he repeated his allegations. Subsequently, Mickey was interviewed and she denied the allegations. A Registered Nurse who was working on shift at the time, Ms Makawa, was also interviewed and she corroborated Mickey's account of events.

15. As a result of the investigation, on 22 November 2018 the Claimant was invited to a disciplinary meeting. He was interviewed and then suspended pending a decision. The disciplinary meeting was chaired by Helen Bedder, the Manager, who decided to dismiss the claimant. The Tribunal was satisfied that Ms Bedder made the decision to dismiss because she took the view that the claimant had made what she considered to be false allegations
16. The letter of dismissal was sent out to the claimant by somebody from the Respondent's administration on 27 November 2018. Ms Elena Martin, who has been named as a respondent to these proceedings, was not involved in the initial interview nor the disciplinary meeting and the Tribunal finds that she had no involvement in the decision to dismiss the claimant.
17. The Claimant appealed his dismissal. On 22 January 2019, an appeal meeting took place, chaired by Mr Nanji, a Director of the respondent company. In the course of the meeting it is recorded (in the bundle at page 144) that the Claimant effectively accepted that he had made up the allegations which he reported on 21 November 2018 and he said "*I am sorry for this. I never wanted to go so far. I was angry on Mickey. She did not hit AP. This is the reason why I did not document it in the log book at the time. It is AP who punched Mickey, not Mickey who punched or hit AP*". The claimant went on to explain this by saying "*Mickey is a hard-working carer but she is always telling me what to do and I was fed up. She gives me headaches. I think I exaggerated. I do not like to be told what to do*". Later on in the meeting, the claimant said "*I know I made mistakes and I hold no grudges against Mickey or the other Romanians. I understand they like to work together because I like to work with my people too. They understand my way*".
18. Having heard the claimant's apology and taking into account a number of things that the claimant had said about his conduct, the respondent decided to give the claimant a 'second chance' and the respondent reinstated him into the position of Care Assistant. The respondent did so because the claimant had expressed what they understood to be genuine remorse. The respondent also took into account what the claimant said about his personal circumstances and, as a result, the respondent believed that the claimant would change his ways. However, because the claimant had admitted his actions, the respondent issued him with a final written warning.
19. Following the appeal meeting on 22 January 2019, Mr Nandji wrote to the claimant to point out that on the balance of probabilities the allegation he had made was false and maliciously constructed. However, Mr Nandji also wrote "*You have shown genuine remorse for your actions together with your personal circumstances. We agree for you to restart your employment and as you assume liability for your behaviour we are issuing you a final warning and you are subject to a 6-month probationary period*".

20. Because the claimant was reinstated, the respondent paid the claimant almost 2 months' backpay, from the end of November 2018 to the middle of January 2019 so the claimant was compensated for loss of earnings for the period between his dismissal and reinstatement.
21. On 4 February 2019, the claimant returned to work and worked the night shift. He then worked a night shift on 5 February 2019.
22. On 6 February 2019, a Nurse Thompson reported 2 concerns that she had, having worked with the claimant on the previous night's shift. She reported that she had witnessed the claimant filling in the shift log in advance and she also was concerned that he was not completing checks on residents either regularly or in a sufficient manner. The nurse's handwritten complaint appears in the bundle and the report gives several examples of residents to whom the claimant had not attended properly.
23. The respondent proceeded to investigate the concerns raised. It transpired that Nurse Thompson's accounts were corroborated by a number of other employees who worked in the care home and who had worked on shift with the claimant.
24. As a result, the respondent decided at that point to move the claimant to day shifts although he was not able to work on days immediately because of his childcare arrangements.
25. On 7 February 2019, the claimant wrote to the respondent admitting to having filled in the log book in advance but he sought to deny that residents had been left for hours without being checked. However, one of the concerns raised by the respondent's employees about the claimant was that a resident had been found with dried vomit and dried faeces about her person indicating that she had been left in that condition and without attention from the claimant for some considerable time during the night. The carers said that they believed that checks could not have been done either regularly or in a proper manner.
26. Also on 7 February 2019, a night nurse raised concerns about the claimant's conduct. She raised matters such as the claimant arguing with senior carers about the jobs that were allocated to him, filling in the logs in advance (this was despite that it had been raised with him that day and that the claimant had admitted doing so and had said that he would not do so in future) not checking on residents regularly and not responding to residents' call bells.
27. As a result of all the concerns raised, the respondent invited the claimant to a probationary review meeting. The letter if invite told the claimant that, if his performance was found to be unsatisfactory, one outcome could be that his employment was terminated.
28. The Claimant then signed himself off sick, self-certifying his sickness, to 21 February 2019. In the meantime, the Respondent investigated the

concerns by talking to employees, whereupon a number of further concerns came to light.

29. On 21 February 2019, Mr Baljit Panesar, a Director of the respondent, chaired the claimant's probationary review meeting. Later that day, he sent the Claimant a letter terminating his employment.
30. On 27 February 2019, the Claimant appealed against his dismissal.
31. On 15 March 2019, an appeal meeting took place but the claimant's appeal was turned down on the basis that his performance was found to be well below the standard of care that the respondent expected and that a registered care home required. The respondent considered that the Claimant had not shown insight into the possible consequences of a number of his failures and that he had simply failed to carry out his duties either correctly or, in some cases, at all.

### **Applicable law**

32. Rule 37 of schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules") provide that a Tribunal may at any stage of the proceedings, either on its own initiative or upon application by a party strike out a claim or response on grounds which include where the Tribunal considers the claim or response has no reasonable prospects of success.
33. Rule 39 of the ET Rules provide that where a Tribunal considers any specific allegation or argument in a claim or response has little reasonable prospects of success, the Tribunal may order the party concerned to pay a deposit no exceeding £1,000.00 as a condition of continuing to advance that allegation or argument.
34. Section 47(B) of the Employment Rights Act 1996 ("ERA") provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure.
35. Section 103A ERA provides that an employee who is dismissed shall be regarded 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.
36. A "protected disclosure" means a disclosure of information, but not mere allegations, to the employer or to a prescribed person which, in the reasonable belief of the worker is in the public interest and tends to show one or more matters including a failure to comply with a legal obligation, that the health or safety of any individual has been endangered, or that a criminal act has been committed.
37. A claimant must establish a causal link between the protected disclosure and the detriment or dismissal and must establish, on a balance of

probabilities, that he was subjected to the detriment or dismissed complained of because of the protected disclosure.

38. The Equality Act 2010 protects employees from discrimination based on protected characteristics which include race. Unlawful discrimination includes less favourable treatment and harassment because of race. The burden of proof rests first on a claimant to show facts capable, absent any other explanation, of supporting an inference of unlawful discrimination.

## **Conclusions**

39. Having made relevant findings of fact, the Tribunal considered the merits of the claimant's claims under the applicable law, to determine whether those claims or any of them have prospects of success and, if so, the extent of the prospects of success.
40. The Tribunal first considered the claim of unfair dismissal for whistleblowing relating to the dismissal on 22 November 2018. The Tribunal concluded that this claim has no reasonable prospects of success. A claim of unfair dismissal requires there to have been a dismissal. In this case, the claimant appealed the dismissal of 22 November 2018, was reinstated on 22 January 2019 and returned to work on 4 February 2019, accepting backpay to cover losses of earnings in the intervening period. The cases of Howgate -v- Fane Acoustics Limited [1981] IRLR 161 and J Sainsbury Limited -v- Savage [1981] ICR 1 are authority to the effect that, if an employee is subsequently reinstated following a successful appeal, he will be treated as not having broken his continuity of employment whether or not there is a term to that effect in his contract. The dismissal is effectively extinguished. The Tribunal noted that the Claimant has acknowledged that he was not in effect dismissed because, in his second ET1 he states his dates of employment as being from July 2018 until his dismissal in February 2019. He does not mention any break in service or prior dismissal and the tribunal took that as an acknowledgement by the claimant that his reinstatement has extinguished the first dismissal.
41. The claimant also pursues a claim of unfair dismissal for whistleblowing in relation to the second dismissal, on 21 February 2019. The protected disclosure contended for by the claimant is that, on 21 November 2018, the claimant reported an incident that he said he had witnessed involving a fight between the resident, AP, and the carer called Mickey, wherein the claimant alleged that Mickey hit, kicked and shouted at AP. The claimant said that the disclosure was in the public interest and that it disclosed that a crime had been committed because a carer had hit a resident. The claimant's case was that the treatment about which he complains is all linked to his protected disclosure, including his dismissal on 21 February 2019. However, the claimant had later admitted, at the appeal meeting on 22 January 2019, that this disclosure was not true and that he had twisted his report of the events so as to get Mickey into trouble because he was cross with Mickey. In those circumstances, the Tribunal considered that the disclosure relied upon did not amount to 'facts', nor was it something

about which the claimant could be said to have a reasonable belief simply because it was not true. The disclosure was not therefore a protected disclosure and on that basis, the claims of whistleblowing must fail.

42. Even if the disclosure had been true, the Tribunal considered the evidence and the factual matrix in this case but found nothing to link the purported disclosure made in November 2018 to the claimant's treatment or dismissal on 21 February 2019 for which the respondent has advanced entirely different and justifiable reasons which are supported by the evidence. In addition, it was noted that the claimant had not raised his disclosure at the probationary review meeting nor did he suggest at any time that the fact that staff were then raising concerns about him was linked to the disclosure he had made in November 2018. He did not mention it. He also did not refer to the disclosure in his appeal letter, as might be expected if as he now contends he was dismissed in consequence of it, and he did not mention his disclosure at the appeal meeting - he had at least 3 opportunities to say that his treatment and dismissal was a set up because he had reported Mickey.
43. The Tribunal considered that the reasons for the claimant's dismissal on 21 February 2019 are clear and are amply supported by the evidence and contemporaneous documents. The reason for the claimant's dismissal on was the claimant's misconduct, his lack of performance to acceptable standards and his lack of insight into his conduct. The complaints and concerns about the claimant are numerous and the Tribunal considered that the respondent was entitled to call the claimant to a probationary review meeting and ultimately to dismiss the claimant in the circumstances. Consequently, the whistleblowing claims now advanced by the claimant about his dismissal or detrimental treatment because of a protected disclosure do not have reasonable prospects of success and shall be struck out.
44. Lastly, the Tribunal considered the merits of the claimant's claim of race discrimination claim. The Tribunal understood that the claimant considers the treatment about which he complains is race discrimination or alternatively detrimental treatment for whistleblowing. The treatment in issue was confirmed by the claimant to be that there was a harassment environment at the care home, that Romanians were treated differently in terms of rotas, shifts worked and where they worked, and that Ms Martin had preferred Mickey's account, over his report, when considering the accounts of what had happened in the incident that he reported and for that reason he was dismissed in November 2018.
45. First, the claimant has produced no evidence of what he considers to be the "harassment environment" that he claims existed at the care home nor has he brought evidence to demonstrate any difference in treatment between himself and Romanian employees. The Tribunal noted that Ms Martin did not dismiss the Claimant. Helen Bedder was the manager who decided to dismiss him, because she considered that he had made a false allegation. The Claimant's case ignores the fact that a number of employees corroborated Mickey's account and Helen Bedder was entitled



to accept such. Further, at his appeal in January 2019, the notes record that the claimant admitted that he made the initial allegation up. He changed his position then and, at this hearing, the claimant has again changed his position because he now seeks to argue that the notes of the hearing in January 2019 are in fact incorrect. The claimant has submitted, at this hearing today and for the first time, that he had never made any admission that the disclosure of 21 November 2018 was false. He now contends that it was true all along and instead that the respondent is the party who is making things up. This is despite what is in the bundle at page 144 which is the record of the meeting of 21 January 2019.

46. The claimant had not challenged that record nor produced an alternative version of events until now. The explanation given today does not appear in either of his 2 ET1s nor in his additional statement of case which he sent to the Tribunal on 4 April 2019 which is in the bundle at pages 13 and 14.
47. Counsel for the respondent has described the claimant's position as that of asking the Tribunal to find that the respondent, by not believing the Claimant's false account, was guilty of unlawful discriminatory and/or detrimental treatment of him. The Tribunal accepted Counsel's submission on this aspect and in the circumstances concluded that there are no reasonable prospects of the claimant persuading a Tribunal to take that view.
48. Further, in the bundle at page 144 the claimant makes comments about the Romanians working together and the claimant says that he likes to work together with his people. Those comments are potentially discriminatory and today, in this preliminary hearing, the Tribunal regretted to note that the claimant made further and similar remarks about "foreigners" in contrast to "white people", to the extent that the Tribunal was compelled to ask the claimant to desist. For a litigant pursuing a claim of race discrimination, such conduct is reprehensible.
49. In light of the above, the Tribunal did not consider that the treatment complained of was either detrimental or discriminatory because of race and the claimant has not shown that it was related to his disclosure in November 2018.
50. The claimant's case begs the question why, if the respondent was so against the claimant, from November 2018 onwards, did the respondent reinstate the claimant in January 2019? Having considered the evidence, the Tribunal accepted the respondent's submissions that its director genuinely thought the claimant had showed remorse for his actions and that he would change as he said and so the respondent decided that the claimant should be given a 'second chance'. Very soon after that decision, numerous further concerns were raised by a variety of people. The respondent could at that point have dismissed the claimant for failing his probationary period. Instead it embarked on a lengthy procedure, which they were arguably not required to do but they did, through to mid-March 2019 in an effort to resolve matters and involving a number of

employees and Directors. The Tribunal considered that such were not the actions of an employer who wanted rid of the claimant or which did not like him for whatever reason; rather those are the actions of an employer that is diligently following the ACAS code of practice in an effort to be fair to everybody concerned.

51. The Tribunal considered that the allegation made by the claimant in November 2018 was very serious. The Tribunal has found that the allegation was retracted in February 2019 and the Tribunal was concerned as to the claimant's motive for doing so at his appeal – the claimant may have thought there was some prospect of getting his job back. However, if the allegation, serious as it was, was in fact true as the claimant today asks the tribunal to accept, it is of concern that the claimant would retract it in such a manner. If the allegation is not in fact true it is equally of concern that the claimant had made such an allegation in the first place. Either way, the Tribunal considered that the credibility of the claimant was in doubt which is a factor to be taken into account in assessing the prospects of success of his claims.
52. In the course of his submissions, the claimant asked the Tribunal to adopt the view that the respondent and all its personnel were lying, falsifying, changing and fabricating accounts and that the respondent's records and witness statements were unreliable. The Tribunal considered that view to be fanciful and without any evidence to support it.
53. In addition, at the preliminary hearing today, the claimant brought up a further appeal that he said had been turned down by the respondent. There is no mention of a further appeal in any of the contemporaneous documents, in either of the ET1s or in the claimant's additional statement of case. The claimant also sought to persuade the Tribunal that the body map of the resident, AP, which showed no injuries might be so because no bruises were shown and that this did not mean that AP had not been hit. Again, this was a new submission and something which the claimant had not raised at any time before this hearing.
54. In light of all the above, the Tribunal concluded that the weight of evidence in this case is against the claimant and that a number of the arguments he has pursued today smack of desperation. For example, the claimant told the tribunal that if it struck out his claims or if it made a deposit order, it would be in breach of his human rights to have his case heard and that he would not be able to afford to pay any deposit. In response, the Tribunal pointed out that there is no right to a free trial. The right, under Article 6 of schedule 1 of the Human Rights Act 1998, is to a fair trial. In that regard., whilst considering the prospects of success of the claims and the claimant's rights, I must also take account of the respondent's right to ask the Tribunal to strike out claims which have no reasonable prospects of success and which, otherwise, would put the respondent to considerable expense in a Tribunal where costs are not recoverable except in exceptional circumstances.

55. Finally, the Tribunal was mindful of the fact that the higher courts have provided guidance to the Employment Tribunals to the effect that it is only in exceptional cases that a Tribunal should strike out a claim of unlawful discrimination. The Tribunal has concluded that this case is such an exception. The facts asserted by the Claimant are wholly inconsistent with the contemporaneous documents and the claimant's case is nowhere corroborated. In those circumstances, the Tribunal's judgment is that the claims shall be struck out.

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Employment Judge Batten  
Date: 4 October 2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE