EMPLOYMENT TRIBUNALS

Claimant: Mr Kamal Salem

Respondents: The Italian Food Company Limited t/a Rosso Restaurant

HELD AT: Manchester **ON:** 25 October 2019

BEFORE: Employment Judge Holmes

REPRESENTATION:

Second Claimant: Mr B Norman, Counsel
Respondents: Mr L Bronze, Counsel

JUDGMENT ON PRELIMINARY HEARING

It is the judgment of the Tribunal that:

1. The respondent's application to strike out the claimant's claims of unfair dismissal, breach of contract and protected disclosure detriment , on the basis that they were presented out of time is granted, save in respect of one claim of protected disclosure detriment, which is alleged to have occurred on 31 August 2018. The Tribunal has no jurisdiction to hear them and they are dismissed.

2. The respondent's application to strike out the claimant's remaining claim of protected disclosure detriment , or for a deposit order, is dismissed .

REASONS

1. The Tribunal has been considering in this Preliminary Hearing issues which arise from the claims made by the (second, as there is another combined claim)

claimant in a claim form presented to the Tribunal on 30 November 2018. The claims are of protected disclosure detriment, and automatically unfair dismissal, and of wrongful dismissal. Whilst the claimant originally brought claims against further two individual respondents, these were dismissed upon withdrawal by him on 30 April 2019. The claims accordingly proceed solely against the remaining respondent, the Italian Food Company Limited, after the original first respondent, Rosso Restaurants and Bar, was removed as a respondent, on the basis that that it was a trading name, and not a legal entity.

2. The respondent contends that the claims were presented out of time, and should be struck out on that basis. Further, in relation to the second claimant's claims of protected disclosure detriment , and automatically unfair dismissal, should be struck out as having no reasonable prospect of success, or, in the alternative, he should be required to pay a deposit as a condition of pursuing those claims.

3. The respondent was represented by Mr Bronze of counsel, and the second claimant, hereafter simply referred to as "the claimant", by Mr Norman of counsel. There was a preliminary hearing bundle (references to page numbers are to pages in this bundle) , and both counsel had prepared skeleton arguments, to which they spoke. The submissions were received on 25 October 2019, and the Tribunal reserved its judgment which is now given. The Tribunal's judgment will consider each application in turn, and make rulings accordingly.

The out of time application.

4. The factual background to this application is not in dispute, and is as follows. The claimant was employed at Rosso Restaurant, 43, Spring Gardens, Manchester M2 2BG , from 20 August 2010 to 20 July 2018, when he was dismissed.

5. On 14 September 2018 the claimant contacted ACAS to instigate the early conciliation process. He clearly gave his permission to ACAS to contact the proposed respondent, and , no conciliation having been achieved, on 26 October 2018 ACAS issued an early conciliation certificate to the claimant, number R316495/18/50 (page 1 of the bundle).

6. The name of the proposed respondent on this certificate is "Rosso restaurants and bar", and its address is given as "Spring garden Manchester M2 2bg" (sic) .

7. The claimant at some point sought legal advice, and by 29 November 2018 he (or his solicitors) contacted ACAS again under the early conciliation provisions. This time there were three separate proposed respondents, two of whom were the individuals who are the second and third respondents. The other proposed respondent was The Italian Food Company Limited, whose address was given as The Robert Street Hub, 12 – 14 Robert Street, Manchester M3 1EY.

8. On this occasion it seems that the claimant did not give permission for ACAS to contact the proposed respondents, as the following day, 30 November 2018, ACAS issued three certificates, the relevant one for these purposes, being in relation to The Italian Food Company Limited. The number of this certificate is R349730/18/83.

9. The same day, 30 November 2018, the claimant presented his ET1 to the Tribunal (pages 5 to 25 of the bundle). It was drafted by his solicitors, Laveer Legal, whose details were provided at box 11 of the claim form.

10. In that ET1, the claimant brought claims against four respondents. The first (page 5) is expressed to be "Rosso Restaurants and Bar", and its address is given as Spring Gardens, Manchester. The second is expressed to be "The Italian Food Company Limited", and its address is given as the Robert Street Hub, Manchester. Mr Svatek and Mr Bayandi are the third and fourth respondents.

11. In relation to the first and second respondents, the claimant provided in respect of each of them the relevant early conciliation certificate numbers. These were correct, and matched the two certificates that had been issued on 26 October and 30 November 2018 respectively.

12. The error that the claimant (in fact, his solicitors) made was to include Rosso Restaurants and Bar as a respondent at all. That was, as was later realised , only a trading name, and the claimant's employer was the limited company which was named as the second respondent, when it should have been the first.

13. Thus, whilst there was an early conciliation certificate in relation to the claims against the limited company, that was not obtained until 30 November 2018, the day that the claims were presented to the Tribunal.

14. A response was filed (pages 26 to 44 of the bundle). It was expressly stated to be filed on behalf of The Italian Food Company Limited t/as Rosso Restaurant and Sasha Svateck.

15. No point is actually taken in the Grounds of Resistance about the claims being presented out of time. Reference was still made to "the first respondent", although in reality there is no such legal entity.

16. The response to the claims by the other claimant did raise time limit and early conciliation issues, and subsequently these issues were raised in relation to this claimant's claims.

17. At the preliminary hearing held by Employment Judge Holmes on 7 March 2019 the issue as to the correct identity of the claimants' employer was raised, this claimant's solicitors in their Agenda , at box 1.1, making it clear that the claimant had initially obtained an early conciliation certificate against Rosso Restaurants and Bar, which was only a trading name, and the correct legal entity was the Italian Food Company Limited. Application was made to "amend the name" of the first respondent to the Italian Food Company Limited. It was pointed out that this company was already the second respondent to the claimant's claim.

18. For the respondents, in their Agenda, the point was made that the first respondent was not a legal entity, and should be dismissed from the proceedings.

19. The Tribunal did not amend the name of the first (or second) respondent, but in its Orders, removed the original first respondent from the proceedings, as it was not a legal entity.

The submissions.

20. The respondent's application is simple. The claimant obtained , within the primary time limit, an early conciliation certificate in relation to a non – existent legal entity. He then obtained, outside the time limit, another certificate , against the correct legal entity , that was indeed his employer.

21. His claims are therefore out of time against the limited company. He cannot, as he appears to be trying to, save these claims by reference to the earlier early conciliation certificate that he had obtained against the wrong party.

22. Mr Bronze referred the Tribunal to the cases of ***Mist v Derby Community Health Services Trust UKEAT/0170/15*** and ***Giny v SNA Transport Limited UKEAT/0317/16*** .In the former, Mr Bronze concedes that the EAT does indeed adopt a liberal approach to the early conciliation provisions, suggesting (at para. 54 of the judgment) that the early conciliation requirements do not require the precise or legal title to be specified, and how a trading name may suffice. That is not, however, he contends the *ratio decidendi* (the Latin being permissible given all representatives are qualified lawyers) of the decision, and should not be taken as affording the claimant a way out of the predicament that he finds himself in. Para. 59 of that judgment is the real nub of the matter, the claimant in that case was seeking to amend, where different considerations apply, as the claimant is then not a prospective claimant, nor the respondent a prospective respondent.

23. The claimant is relying upon the "minor error" provisions in the early conciliation regime which permit a Tribunal to accept a claim form, even when there is a discrepancy between the respondent's details on the claim form and on the early conciliation certificate , if the Tribunal considers that the claimant had made a minor error, and it would not be in the interests of justice to reject the claim. Mr Bronze submitted that the claimant cannot rely upon these provisions. The claimant has not said that he was unaware of the true identity of his employer, and there is no claim for failure to provide a s.1 ERA written statement of particulars of employment. There was no application for an extension of time. The claims were accordingly out of time, and must be dismissed.

The claimant's submissions.

24. Mr Norman , in reply, contended that the claimant had made a minor error as to the identity of his employer, and that the Tribunal could have accepted the claim based on the first early conciliation certificate, and it would not necessarily have been rejected. He submitted that rule 12(1)(e) to (f) did not require rejection, it conferred to discretion to reject a claim.

25. The Tribunal had in fact accepted the claim against the first respondent (i.e the limited company) , and the proper course was for the respondent to seek reconsideration of the Tribunal's acceptance of the claim. This was particularly so

given that at the previous preliminary hearing the Tribunal had proceeded to deal with the claims, and made case management orders.

26. He relied upon the judgments in ***Mist*** and ***Giny*** as supporting the approach which he invited the Tribunal to take. This was precisely the very type of technical procedural issue which HHJ Eady QC (as she then was) , deprecated in her judgment in ***Mist*** . The removal of Rosso Bar and Restaurants as a respondent at the preliminary hearing had effectively made the amendment that was necessary. The early conciliation procedure had been operated, the respondent had been contacted, and there was no difficulty in identifying the claimant's employer. Alternatively the Tribunal should now hear an application to reconsider the Tribunal's acceptance of the claims against the trading name, and then accept that claim as if made against the limited company.

27. He referred the Tribunal to para. 35 of the judgment in ***Giny*** in which Soole J. examined the language of rule 12(2A) . Once a minor error had been identified, it would usually be in the interests of justice not to reject the claim.

Discussion and Findings.

28. The central issue it seems to the Tribunal is that the claims against the limited company , in respect of whom the claimant did not obtain an early conciliation certificate until 30 November 2018, when the claims were already out of time, are out of time. That being the starting point, the next question is whether, absent an application to extend time for presentation, there is any basis for finding that the claim was in fact presented within time, or otherwise saving it by amendment or any other case management power.

29. The relevant time limits for claims for unfair dismissal , protected disclosure detriment, and breach of contract three months are three months from the date of the dismissal, the detriment complained of, or the termination of the contract breach of which is complained of.

30. In terms of primary time limits, absent the effect of any early conciliation period, time to present any of these claims which arose , at the latest on the date of termination on 20 July 2018, expired on 19 October 2018.

31. The effect of the first conciliation certificate, whereunder the claimant authorised ACAS to contact the proposed respondent, so that the period between 14 September and 26 October 2018 operated to "stop the clock" , was to extend the date by which the claimant had to be presented to 30 November 2018, when it actually was, but against four respondents, the limited company being one of them. The early conciliation certificate obtained in relation to the limited company, however, did not operate to stop the clock, and hence, the claims against it were presented out of time .

32. The question then is whether the claims can be saved by virtue of the claimant having previously obtained an early conciliation certificate against a non – legal entity, which was nonetheless a trading name and address at which the

claimant worked. ACAS was able to contact “the employer”. In these circumstances can the claimant save his out of time claims?

33. It is an unfortunate feature of this case that notwithstanding that it was known, by the time the claims were issued, that Rosso Restaurant and Bar was only a trading name, it was still named as the first respondent, and the early conciliation certificate number which relates to it was also referred to. There was thus a claim against a non – existent party which should not have been made.

34. The claimant, it seems to the Tribunal is seeking the best of both worlds. Having obtained , in time , an early conciliation certificate against the wrong respondent, which extended time for presentation of the claims, having then obtained , out of time , one against the right respondent, he seeks the benefit of the former to preserve his claims against the latter.

35. With all due respect to Mr Norman, his submissions are based upon a hypothesis that never occurred. He in effect is submitting that, had the claimant submitted his claim against the limited company , relying upon the certificate obtained in respect of the trading name, the Tribunal could and would have accepted the claim against the limited company , despite the discrepancy, on the basis that such an error was a minor one, and it would not be in the interests of justice to have rejected the claim. He is in effect inviting the Tribunal to do that now, in effect ignoring the fact that the claimant did claim against the trading name , in respect of which he provided the details of the relevant certificate.

36. The simple analysis is this. The claimant brought claims against four respondents, and provided early conciliation certificate numbers for each of them. The Tribunal did not reject the claims against the (original) first respondent because there was no reason to do so – its details matched those on the early conciliation certificate. If the claimant had only claimed against the limited company, but had relied upon the first certificate, the Tribunal might have accepted the claims on the basis that there had been a minor error. Alternatively, if the claims were rejected, the error could perhaps have been rectified in time. That, however, did not happen. All the claims were accepted, and, from an early conciliation perspective, correctly accepted as the details on the certificates matched the respondents named in the claim form.

37. The Tribunal sees no basis for performing the type of convoluted hypothetical procedural exercise which is the basis of the claimant’s argument. It relies upon the fiction of submission of the claim against the limited company, as if it had been presented in conjunction with the inaccurate previous early conciliation certificate, whereupon the Tribunal would have notionally decided to accept it , on the basis that the claimant had made a minor error. That would afford the claimant the benefit of the early conciliation certificate he had obtained against the wrong respondent, in respect of his claims against the right one. That however, did not occur, and the claimant now seeks to take advantage of something which , had it occurred, would have put him in a better position.

38. The position therefore remains that the claims presented on 30 November 2018 against the limited company were presented out of time. The claimant cannot

seek the benefit of the stop the clock provisions on one early conciliation certificate against a wrong, or non existent, party, when he then obtains such a certificate in respect of the right party. Whether , had the claim against the limited company been accompanied by reference to the certificate in relation to the trading name, the Tribunal would have accepted it under the "minor error" provisions is irrelevant, and a matter of speculation. Whilst treated almost as a "given" in the claimant's submissions, the Tribunal does not , in any event, consider it axiomatic that this would be treated as a "minor error" by the Tribunal upon initial consideration , there being a clear difference between the names and addresses of the two proposed respondents. As the caselaw demonstrates, the Tribunal as a wide margin of appreciation as to what constitutes a minor error, and what one Tribunal may regard as a minor error in these circumstances, another may not. That is, however, slightly beside the point, as the Tribunal's primary finding is that this is an irrelevant line of enquiry.

39. The test for extension of time limits applicable to all the claims is that of reasonable practicability. As observed, no application for an extension of time has been made, so there is no basis for the claims continuing , as they were presented out of time, and the Tribunal has no jurisdiction to hear them. It is appreciated that this may appear harsh, and had the Tribunal a discretion to extend time, as it would in discrimination claims, these matters may well be highly relevant to the exercise of that discretion. It does not, however, have that discretion, and no application for an extension of time has been made . These claims are accordingly dismissed as the Tribunal has no jurisdiction to hear them

Remaining detriment claim.

37. Whilst this disposes of most of the claims which arose on or before 20 July 2018, the date of the dismissal, there is, perhaps overlooked by both counsel, one claim which remains, and which was presented in time. At paras. 19 and 20 of the grounds of Claim the claimant contends that one of the detriments that he was subjected to by "R1/R2", i.e his employer, was that he was told on 31 August 2018 that he could not appeal his dismissal. That, of course is potentially a further detriment, if established, and, as the claim form was presented on 30 November 2018, this claim is in time

38. That claim accordingly cannot be struck out on the basis that it is out of time, and the Tribunal has jurisdiction to consider it.

39. In the circumstances, therefore, there is a need for the Tribunal to proceed to determine the further applications for striking out (or a deposit order) in respect of the issue of whether the claimant has reasonable prospects of establishing that he made a protected disclosure.

The protected disclosure.

40. The protected disclosure relied upon (for there is only one) is alleged to have been made on 25 May 2018 , and is pleaded at para. 15 of the claimant's Grounds of Claim (page 22 of the bundle). It is in these terms:

".. C complained to Mr Shaw and Ms Lawless about [the respondent] advertising and selling their food to customers as halal, when it was not halal and about their unfair treatment of Mr Elfghi, C explained that he and Mr Elfghi were in the process of compiling evidence to prove to [the respondent] that the meat they were selling was not halal."

41. Para. 16 goes on to plead that the disclosures were qualifying disclosures because they were made by the claimant in the reasonable belief that they tended to show one or more of the circumstances set out in s.43B(1)(a) to (f) of the ERA. Para. 17 goes on to plead what the claimant believed, namely that the respondent had failed to comply with the Trade Descriptions Act, by selling as halal food to customers food which was not halal. It is also leaded that the claimant reasonably believed that the decision to suspend Mr Elfghi as a result of him making complaints about this was unlawful.

a)No disclosure of information.

42. Mr Bronze submits that the claimant has no reasonable prospects of establishing that he reasonably believed either of these things. Firstly, he submits that the claimant did not convey "information". He cites ***Cavendish Munro Professional Risks Management Ltd v Gedud [2010] IRLR 38*** in support of this contention. In particular he referred to para. 24 of the judgment, in which the meaning of "information" was considered, and it was held to amount to conveying facts. This was contrasted with making an allegation.

43. For the claimant, Mr Norman referred also to ***Cavendish Munro***, arguing that it was a relatively simple test to apply, and relying upon ***Kilrane v London Borough of Wandsworth [2018] EWCA Civ 1436*** where the Court of Appeal warned against making too rigid a dichotomy between "information" and "allegation" .

44. The Tribunal disagrees with the respondent that there is no reasonable prospect of the Tribunal finding that there was a disclosure of information. As observed in para. 36 of the judgment in ***Kilrane*** :

"36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by the tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in s.43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters."

45. The Tribunal considers this important guidance, from which it cannot be said that the disclosures in this case have no, or little, reasonable prospect of being found to be disclosure of information. All will depend upon all the facts, and the evaluate judgment of the Tribunal. There are no grounds for striking out, or for a deposit order on this basis.

b)The claimant's reasonable belief at the time of making the disclosure.

46. The next basis for the respondent's application is that the claimant has no prospects of showing that he reasonably believed that the disclosure tended show that the respondent had failed, or was likely to fail, to comply with a legal obligation to which it was subject. Mr Bronze notes that the legal obligation in question is expressly said to be the Trade Descriptions Act , but says that there is "no evidence that the claimant had this in mind." He cited ***Darnton v University of Surrey [2003] IRLR 133*** where the EAT approved a contention that there must be more than unsubstantiated rumours, a whistleblower must exercise some judgment on his own part, the belief must be reasonable. The respondent has asked the claimant for evidence that the meat in question was not halal, but the claimant has refused to provide it. The Trade Descriptions Act was only first mentioned in the claim form, and had not been mentioned by the claimant.

47. Mr Norman's reply was that the claimant is not required to specify the precise legal obligation which was being breached , and that the claimant's disclosure that the respondent was passing off (for want of a better term) meat as halal when it was not. That was an obvious breach of a legal obligation, and that was all the claimant had to do. There was no obligation for the claimant to be right in his belief, only reasonably to believe that was the case.

48. There is no requirement for the whistleblower to identify the precise legal provisions he considered were being breached. This indeed is the effect of authorities such as ***Bolton School v Evans [2006] IRLR 500*** and ***Fincham v HM Prison Service UKEAT/0925/10*** . The Tribunal was also referred to ***Blackbay Ventures Limited t/a Chemistree v Gahir UK EAT/0449/12*** . That has been cited as support for the contention that unless there is a obvious case of a breach of a legal obligation , the source of the legal obligation should be identified and capable of verification by reference to statute or regulation (from para. 98 of the judgment in that case). That , however, may be misinterpreted as imposing that obligation upon the whistleblower. As has subsequently been considered in ***Arjomand – Sissan v East Sussex Healthcare NHS Trust UKEAT/0122/17***, it is at the later stage of the tribunal considering whether the whistleblower had the necessary belief that it (and not the claimant) has to carry out that exercise (see paras. 27 and 28 of the judgment, where counsel made this submission, and paras. 58 to 61, in which these submissions are implicitly accepted).

49. The Tribunal was also referred to the need for the belief to be in breach of a legal obligation, and not merely a moral one, reference being made to the EAT judgment in ***Eiger Securities LLP v Korshunova [2017] IRLR 115*** , and in particular para. 46 where this requirement is discussed.

50. Here, it seems to the Tribunal that it is at least arguable that the claimant's disclosure that the respondent was providing to customers meat which was described as halal , which was not, was a obvious breach of both the criminal and civil law. Not only would it probably be breach a breach of the Trade Descriptions Act, but it may well amount to obtaining money by deception, and breach of contract, in that anyone ordering halal meat was contracting for that type of food, and to supply anything else would be a breach of contract.

51. The Tribunal was taken to the evidence in the bundle (pages 76a , 76b, 77 and 78) which sets out what the respondent will contend the claimant disclosed. It is of note that on page 76a , the brief note of what the said to David Shaw on 25 May 2018 , reference is made to not supplying halal meat, and "misinforming customers". Further, This is described by the claimant as "racist and anti-muslim". Whilst not put this way, the Tribunal can see an argument that these allegations too "tended to show" breach of a legal obligation, namely those under the Equality Act 2010 not to discriminate, in the provision of goods and services, against any person on the grounds of race, and/or religious belief. At this stage, however, this Tribunal does not have to determine these issues, but there are clearly arguable. This argument too does not afford the respondent any grounds for striking out or for the making of a deposit.

c)Did the claimant have the requisite reasonable belief in the public interest in making the disclosure?

52. The next argument advanced by Mr Bronze relates to the requirement that the claimant must have a reasonable belief that it was in the public interest to make the disclosure. He submits, citing ***Chesterton Global Limited t/a Chestertons v Nurmohamed [2017] EWCA Civ 979*** , and ***Babula v Waltham Forest College [2007] IRLR 346*** that the test that the Tribunal should apply is , firstly, whether the claimant subjectively believed at the time that making the disclosure was in the public interest, and, if so, secondly, whether that belief was objectively reasonable.

53. Mr Bronze , however, concedes in his Skeleton argument that there may be a potential link (although he uses the word "logic" at para. 15 of his Skeleton) between the public interest and halal meat , he contrasts that with the disclosure relating to the suspension of the first claimant, which he contends is not a matter which could reasonably have been believed to have been a matter in the public interest. The claimant was merely expressing his unhappiness that his friend and colleague had been, as he saw it, unfairly suspended. That was not a public interest, it was a private one.

54. For the claimant, Mr Norman submitted that it was sufficiently in the public interest to raise a disclosure that the first claimant had been suspended for raising a concern about the non – halal meat. It was not merely the fact of the suspension, but the reasons for it that made it of public interest. That took it beyond mere private interest arising from sympathy for a friend or work colleague who had been treated unfairly.

55. In the Tribunal's view, given the concession that disclosure in relation to the halal meat issue was potentially arguable as being a matter which satisfied the public interest test, it is somewhat splitting hairs to seek to separate out the complaint about the first claimant's suspension, and consider striking out , or making a deposit order , in relation to that particular aspect of the disclosure. That does not mean it should not be done, if appropriate, but the Tribunal is far from satisfied that the respondent has demonstrated that there are no , or little, reasonable prospects of success on this aspect of the claim either.

56. In conclusion, ultimately, these are highly fact sensitive issues, which usually require, as the caselaw makes clear, in relation to every element of the component parts of protected disclosure claims, the Tribunal to make its judgments in all the circumstances, and hence in the light of all the evidence. If the respondent had been able to demonstrate that these claims were so weak, and bound to fail, striking out would be appropriate. It has, however, failed, despite Mr Bronze's assiduous and capable submissions, to get that far, and whilst the respondent clearly has many valid issues to explore , and may ultimately succeed on these specific issues, it is not in a position to demonstrate today that this is bound to be the case. These applications are accordingly dismissed.

Employment Judge Holmes

Date : 22 November 2019

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

25 November 2019

FOR THE TRIBUNAL OFFICE