



# THE EMPLOYMENT TRIBUNAL

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**SITTING AT:** LONDON SOUTH  
**BEFORE:** EMPLOYMENT JUDGE BALOGUN  
**BETWEEN:**

Mr Y Al Housseyni

**Claimant**

And

See Ability Ltd

**Respondent**

**ON:** 2 March 2020

**Appearances:**

**For the Claimant: No attendance**  
**For the Respondent: Mr T Perry, Counsel**

## **JUDGMENT ON PRELIMINARY ISSUE**

1. The claims of automatic unfair dismissal, whistleblowing detriment and breach of contract are struck out pursuant to rule 37 of the Employment Tribunal procedural Rules on grounds that they have no reasonable prospect of success.
2. The wrongful dismissal claim can proceed.
3. The wrongful dismissal claim will be heard on **24 August 2020**. The remaining 2 dates (25 & 26 August 2020) have been vacated.

## REASONS

1. The claimant brought claims of automatic unfair dismissal (whistleblowing); detriment claim; breach of contract and wrongful dismissal. All claims were resisted by the respondent.
2. The respondent applied for the claims to be struck out on grounds that they had no reasonable prospect of success. In the alternative, it sought a deposit order on grounds that the allegations or arguments had little reasonable prospect of success.
3. The claimant did not attend the hearing. I waited until 10.25am in case he was running late and then asked the clerk to ring him, but the call went straight to voicemail. Part way through the hearing, the clerk informed me that the claimant had rung back, said that he was in Oxford and that he was unaware of the hearing.
4. The hearing was listed on 24 October 2019 at a preliminary hearing at which the claimant had been present and acted in person. Details of the hearing are set out on the first page of the record of the hearing at paragraph (3). This was sent to the parties on 20 November 2019. There was therefore no excuse for the claimant's non attendance and I therefore considered it appropriate to continue with this hearing in his absence.

### The Law

5. Rule 37 of the Employment Tribunal procedural Rules 2013 (the "Rules") provides that a Tribunal may strike out all or part of a claim or response if.....it has no reasonable prospect of success.
6. Rule 39 of the Rules provides that a Tribunal may require a party to pay a deposit not exceeding £1000, as a condition of being allowed to pursue a specific argument or allegation in a claim or response if it considers that it has little reasonable prospect of success.

### Conclusions

7. Having reviewed the claim form and having considered Mr Perry's oral submissions and been taken to various documents in the bundle provided, I have reached the following conclusions on the claims:

#### *Automatic Unfair Dismissal*

8. The claimant contends that he was dismissed for making a protected disclosure. He says that on 25.2.19, during a conversation with a Karen Sirett, Manager, he disclosed to her that she had made an inappropriate and discriminatory comment regarding a patient to the effect that, as a Muslim, the patient believed that men were superior to women and that women should stay at home. The respondent denies that there was such a disclosure.
9. It was submitted that regardless of whether or not there was such a disclosure, the claim that dismissal was because of it has no reasonable prospect of success. This is because those involved in the claimant's dismissal were unaware of the disclosure.

10. On 6 March 2019, the claimant was invited to a meeting and told that he was to be dismissed for sleeping on duty. He had very little advance notice of the meeting and was not told what it was about beforehand. His dismissal would therefore have come as a bit of a surprise and he would not have had time to reflect or put forward a response. However, later that evening, he sent the respondent a grievance about the dismissal. The grievance focused on procedural failings and the respondent's improper use, as the claimant saw it, of CCTV evidence. The claimant refers to the ACAS code, the Working Time Regulations 1998 and the Data Protection Act 2018 but make no reference at all to having made protected disclosures under the Employment Rights Act 1996, let alone alleging that they were the cause of his dismissal.
11. A grievance meeting was held on 18/3/19. I have seen the hearing notes, which are signed by the grievance manager and the claimant, thereby indicating that they are an accurate record of the discussion. There is no reference at all in the notes to the claimant having made protected disclosures or them having been the reason for dismissal.
12. As the claimant had less than 2 years' service, he has the burden of proving that he was dismissed for an impermissible reason. I have seen no contemporaneous evidence of such a disclosure having been made. Further, there is no evidence before me to suggest that those involved in the decision to dismiss knew of the disclosure, if it was made. The claimant is unlikely to discharge the burden of proving that he was dismissed for making a protected disclosure. I therefore consider that there are no reasonable prospects of his automatic unfair dismissal claim succeeding and it is accordingly struck out.

#### Detriment Claim

13. Although one of the claims identified is a detriment claim pursuant to section 43 ERA, this appears to be solely based on a reference in the ET1 to "*Detrimental attitude after a protected qualifying disclosure*". This appears to be a reference to the manner of the claimant's dismissal and is therefore not a distinct and separate detriment from the dismissal itself. That aside, the claimant has to prove that he made a protected disclosure and for the reasons already stated, he is unlikely to do so. This claim is also struck out as having no reasonable prospect of success.

#### Breach of Contract

14. This claim is based on the respondent's alleged failure to follow its disciplinary procedure, which the claimant contends is contractual. I was taken to the claimant's contract of employment in the bundle and under the heading Disciplinary Procedure, it states: ***A copy of the current disciplinary Policy can be found in the Staff Manual located in your Service. This procedure does not form part of the Contract.***
15. It is therefore clear that the disciplinary procedure is not contractual. In those circumstances, it cannot form the basis of a breach of contract claim. The claim is therefore struck out on grounds that it has no reasonable prospect of success.

Wrongful Dismissal

16. The claimant contends that he was dismissed without receiving contractual notice. His contractual notice would have been 2 weeks except in the case of gross misconduct where the Respondent is entitled to dismiss without notice.
17. The respondent will therefore have to satisfy the Tribunal that the claimant was guilty of conduct entitling it to dismiss without notice.
18. There is no specific offence of sleeping on duty under the Gross Misconduct category of the disciplinary policy, though it is not an exhaustive list. There was also no dismissal letter setting out the reason for dismissal. The notes of the dismissal meeting record that dismissal was on grounds of safeguarding for sleeping on duty. This is expanded upon in the grievance outcome/appeal outcome letter of 25 March 2019 where it is said that the claimant was asleep for a period of 4 hours on a waking night shift on the 3 March 2019 when his duties were to constantly monitor an individual who was at risk from dying of seizure. There is also a reference to the claimant fraudulently signing the night hourly observation form for that night. The claimant challenged this and contended that he was not asleep but lying down and had got up intermittently to check the patient.
19. The Respondent's case is based on CCTV evidence. That original footage covered a period of 4 hours. It is no longer available but a condensed version lasting 4 minutes is available for the Tribunal to view. It will be a matter for the final Tribunal whether or not the condensed footage adequately demonstrates that the claimant was asleep for 4 hours. I am not in a position to say what the likelihood of that is and in those circumstances, I am not prepared to strike out this claim or order a deposit. The matter can therefore proceed to a full hearing.

Final Hearing

20. The matter is currently listed to be heard over 3 days from 24 August 2020. However, as most of the claims have now been struck out, the matter will be heard over 1 day, on 24 August 2020, and the remaining dates will be vacated.

Employment Judge Balogun

Date: 17 March 2020