EMPLOYMENT TRIBUNALS

Claimant: **Mr A**

Respondent: **Ms B (1)**
Ms C (2)
Ms D (3)
The Organisation (4)

Heard at: **Nottingham** **On:** **5 August 2020**

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

Representation
Claimant: **In person**
Respondent: **Mr C Mordue, Solicitor**

RESERVED JUDGMENT

The judgment of the Employment Judge is that the claim against the first respondent is dismissed.

ORDERS

Made pursuant to the Employment Tribunals Rules of Procedure

RESTRICTED REPORTING AND ANONYMISATION ORDER

Pursuant to rules 50(1) and 29 of the Employment Tribunals Rules of Procedure 2013, it being in the interest of justice to do so, **THIS ORDER PROHIBITS** the publication in Great Britain, in respect of the above proceedings, of identifying matter in a written publication available to the public or its inclusion in a relevant programme for reception in Great

Britain. 'Identifying matter' in relation to a person means 'any matter likely to lead members of the public to identify the complainant or such other persons (if any) as may be named in the Order '

The following persons may not be so identified and must be anonymised as follows:

The Claimant:	Mr A
The First Respondent:	Ms B
The Second Respondent:	Ms C
The Third Respondent:	Ms D
The Fourth Respondent:	The Organisation
The witness to these proceedings:	Mr W

The Order remains in force indefinitely unless revoked earlier.

The publication of any identifying matter or its inclusion in a relevant programme is a criminal offence. Any person guilty of such an offence shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale

DEPOSIT ORDER

The Employment Judge considers that the claimant's allegations or arguments that he suffered detriments as a result of making protected disclosures have little reasonable prospect of success. The claimant is ORDERED to pay a deposit of £**500** (£250 for each alleged disclosure) not later than **14** days from the date this Order is sent as a condition of being permitted to continue to advance those allegations or arguments. The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit.

REASONS

The Hearing

1. This preliminary hearing follows the telephone preliminary hearing before Employment Judge Ahmed (EJ Ahmed) on 1 July 2020. He ordered that the following issues be determined at this hearing:

1.1 whether the complaints against any or all of the respondents should be struck out as having no reasonable prospects of success under rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013 (as amended) (the rules);

1.2 alternatively, whether the claimant should be ordered to pay a deposit under rule 39 as a condition of continuing any allegation or argument or claim against any of the respondents and, if so, to determine the amount of the deposit;

1.3 whether in relation to any detriment the claim has been presented in time; and

1.4 whether the tribunal should make an order under rule 50.

The Claims

2. The claimant submitted his claim form to the tribunal on 4 March 2020. As noted by EJ Ahmed in his case summary of 1 July, the claimant brought claims of detriment as a result of making protected disclosures but there was a lack of detail in his claim form as to the relevant statutory provision under section 43B of the Employment Rights Act 1996 (ERA) upon which the claim is brought. Further, he had not identified the public interest in relation to the disclosures and why he had a reasonable belief in making them.

3. Before me, the claimant clarified certain matters which I summarise as follows:

3.1 His disclosure was made under s.43B(1)(b) ERA as it involved persons who failed to comply with a legal obligation. They had breached the protocols in force under the licence granted to them by the Home Office in relation to the use of animals in research. The claimant made two disclosures to the third respondent. The first was in July 2019 when he alleged the second respondent was over-starving rats and the second was the first respondent's refusal to administer an analgesic called Metacam preoperatively to a rat. The claimant considers both matters indicate a breach of a legal obligation.

3.2 The disclosures were in the public interest because non-compliance with licence conditions leads to a breakdown in the system, animal research is carried out for the benefit of humankind and the welfare of the animals and the science is in the public interest.

3.3 The detriments the claimant suffered were as follows:

(i) the first respondent making a complaint against him that contained libellous comments;

(ii) the second respondent making a complaint against him that was libellous;

(iii) the third respondent "committing to a disciplinary procedure" against him on 27 October 2019;

(iv) the removal of his access to the animal unit in late October 2019;

(v) the handling of a subject access report;

(vi) the handling of the disciplinary investigation and his grievance, the contents of the investigatory report and being invited to a disciplinary hearing in relation to issues of competence.

Documents Produced

4. There was produced to me the written submissions of the parties, bundles of documents running to 898 pages and a bundle of authorities of 474 pages. I was hardly referred to any documents by the parties which is not surprising since most of them had no relevance to the issues to be decided. Similarly, the authorities were in the main not relevant. There was a statement from Mr W which was relevant to the rule 50 application.

The Rule 50 Application

5. Rule 50 provides:

(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to prevent the Convention rights of any person ……

(2) in considering whether to make an order under this rule, the tribunal shall give full weight to the principle of open justice and to the convention right to freedom of expression.

(3) such orders may include-

(a) an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing

or in any documents entered on the Register or otherwise forming part of the public record;

(c) an order for measures preventing witnesses of a public hearing being identifiable by members of the public;

(d) a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunal's Act.

6. The respondent's grounds for the rule 50 application are that if this case is heard in public there is a real and credible risk that the parties may be targeted by animal rights activists because they will be publicly identified and associated with alleged wrongdoing or breaches of animal welfare standards. The fact that the fourth respondent is engaged in research on animals is already in the public domain. The evidence at pages 870-898 of the bundle confirms that the fourth respondent is regularly subjected to protests and campaigns by animal rights activist groups. Other organisations have been targeted by activists on a long-term basis which included acts of physical violence, harassment and intimidation.

7. The claimant opposes this application but I must profess that I do not fully understand his objections. His objections are found at paragraphs 178-204 of his long skeleton argument. Specifically, at paragraph 200, the claimant seems to be arguing that a restricted reporting order would mean he did not get a fair hearing in open court. I am at a loss to understand how this objection can be supported. The claimant would still have his day in court, the proceedings would allow him the same right to state his case and to cross-examine the respondents' witnesses. He suggests at paragraph 183 that "if (the respondents) are asking you to perceive 350 protesters as potential terrorists, I would ask you to perceive these 350 protesters as members of the public who care about animal rights". At paragraph 184 he seems to suggest that not granting a restricted reporting order is in the public interest.

8. I do not accept the claimant's objections. The interests of justice are not harmed by granting a restricted reporting order but the interests of the individuals concerned, including the claimant, are protected by the granting of such order. In my view, the history of the animal rights movement and the actions of its members show there is a real risk of all of the parties being targeted in their workplace, their homes and the tribunal building. For these reasons, I have made a restricted reporting order and also order that the names of all parties be anonymised.

The First Respondent

9. The respondents argue that the first respondent should be dismissed from these proceedings. They maintain that, as a PhD student in receipt of a

stipend from the fourth respondent, she is not an employee and there are no grounds to join her in to these proceedings. The claimant argues she is either an employee, a worker or an agent of the fourth respondent. He points to the fact that she is entitled to certain benefits such as sick pay, maternity leave and maternity pay.

10. I do not accept the claimant's argument. The first respondent is pursuing an academic qualification. As part of this study, she is required to make satisfactory progress in her work on a particular project. She receives a stipend which is effectively for her maintenance whilst studying. She still has to pay fees to the fourth respondent like any other student. There is no legislative basis for the payment of sick pay, maternity pay and other benefits which is undertaken on a voluntary basis by the fourth respondent. The argument that she is an agent of the fourth respondent is not credible. Accordingly, she should be dismissed from these proceedings.

The Second and Third Respondents

11. In the first telephone preliminary hearing, EJ Ahmed considered that the claimant's claims seemed to be have their foundation more in retaliation than in law. To some extent I agree with those comments. The naming of individuals and the objection to the rule 50 order suggest to me that the claimant is retaliating as a result of his perception that the alleged detriments he suffered arose because of the actions of the three individuals.

12. The respondents do not argue that the second and third respondents cannot be named as respondents in these proceedings. They are both employees. However, as the fourth respondent will be vicariously liable for their actions, and has confirmed as much, there is little point in naming them in the proceedings. Having said that, the claimant is free to do so and I have no discretion in this regard. The second and third respondents remain as respondents.

13. I do, however, find that the fourth respondent should be more properly described as the first respondent and I so order.

The Strike Out Application

14. Rule 37 provides that a claim may be struck out on the ground, inter alia, that it has no prospect of success.

15. In Balls v Downham Market High School & College UKEAT/0343/10/DM, Lady Smith said that in applications for a strike out on the ground that the claim has no reasonable prospects of success, "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 word "no" because it shows that 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 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".

16. In considering this application, I have had regard to the decision of the EAT in Mechkarov v Citibank NA [2016] ICR 1121. In particular, I have considered whether there are any core issues of fact that turn to any extent on oral evidence because that case essentially says that if there are the claim should not be struck out.

17. I heard no oral evidence at this hearing. The parties did not disagree that the relationship between the claimant and the first and second respondents was at various times strained. Certainly the relationship between the claimant and the second respondent had been the subject of discussions between the third respondent and the fourth respondent's HR team. The first two respondents made a complaint about the claimant. His case is that the complaint, which ultimately resulted in a disciplinary investigation, was not the cause of the detriments he says he suffered; rather, the detriments were caused by his protected disclosures which were focused on the treatment of rats by the first and second respondents. In this regard, there is likely to be some difficulty for the claimant in establishing to the tribunal's satisfaction that his protected disclosures as opposed to the complaints actually caused all of these detriments. There certainly appear to be issues around the time of the claimant's allegations that rats were over-starved and when he complained about this to the third respondent.

18. Ultimately, however, what caused the claimant to suffer these alleged detriments is a core issue of fact which must be decided by the tribunal in due course. On this basis, I refuse the application for a strike out.

The Application for a Deposit Order

19. Rule 39(1) provides that a tribunal may order a party to pay a deposit on the ground that the claim has little reasonable prospect of success. Thus it is distinguished from a strike out and the bar is lower.

20. Whilst there is a core fact to be decided by the tribunal, it remains the case that the detriment the claimant says he suffered must be on the ground that he made a protected disclosure. In NHS Manchester v Fecitt and others [2012] IRLR 64, the Court of Appeal discussed the question of causation holding that the test is whether the protected disclosure materially influences the employer's treatment of the whistleblower. The Court clarified that a

material influence must be more than a trivial influence.

21. In his oral submissions, the claimant said about causation that he could prove the detriments arose because of his disclosures. Unfortunately, he did not point to any documentation which supported that view. Indeed, documentation I was referred to by the respondents suggested, by way of example, that his claimed disclosure in July 2019 about rats being over-starved was actually made in May 2019 and was quickly dismissed as inaccurate by the third respondent. It is, therefore open to question whether this disclosure led to detriments some five months later.

22. What is clear from the documents before me is that the second respondent had raised clear concerns about sharing an office with the claimant and the first respondent raised concerns about the claimant's manner and competence as early as May 2019 (page 540 onwards).

23. It seems from the documents that a toxic atmosphere was brewing between the claimant and the first and second respondents. This seems to have ignited in October over the Metacam issue. The first respondent felt bullied by the claimant and decided to raise a complaint against him. The second respondent effectively joined in with that complaint. These issues arose after a history of ill-feeling between them. The documents do not show that the disclosures made by the claimant caused the alleged detriments. Further, his insistence that the first, second and third respondents be publicly named in these proceedings lend weight to the argument that the proceedings are indeed retaliatory and bring into question the claimant's reasonable belief that the disclosures were in the public interest.

24. Having reviewed the submissions of the parties, and allowing for the fact that the claimant is a litigant in person, I consider the claim to be weak and one which has little reasonable prospect of success. Accordingly, I have made a deposit order. I did so after ascertaining from the claimant that he earns £30,500 per annum, receives £1700-1800 net per month, pays rent of £600 per month and has savings of £3,000. I consider, therefore, that the amount of the deposit is reasonable in accordance with his means.

Time Limits

25. I consider the claim to have been presented in time.

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Employment Judge Butler
13 August 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS