EMPLOYMENT TRIBUNALS

Claimant: Mr Kirsz

Respondents: Britmet Tileform Limited and others

Heard: Birmingham Employment Tribunal

On: 8 September 2020

Before: Employment Judge Cookson (sitting alone)

Appearances
For the claimant: Mr Hirst (solicitor)
For the respondent: Mr Isaacs (counsel)

RESERVED JUDGMENT

1. The respondent's application for the claimant's claims of unfair dismissal and disability discrimination to be struck out on the grounds that they have no reasonable prospect of success is refused.

2. The respondent's application for the claimant's claims of unfair dismissal and disability discrimination to be subject to a deposit order on the ground that they have little reasonable prospect of success is refused.

REASONS

Background

3. The claimant was employed from 17th November 2014, latterly as Plant Operations Manager, by the first respondent, a manufacturer of light weight tile effect roofing panels for domestic and commercial properties until dismissal with effect on 11 January 2019. By a claim form presented on 2 April 2019, following a period of early conciliation from 24 February to 11 March 2019 in respect of the first respondent, and 19 March to 22 March 2019 in respect of the second, third and fourth respondents, the

claimant brought complaints of unfair dismissal and monetary claims against the first respondent, and disability discrimination against all four respondents.

4. The claimant relies on his conditions of Distal Hereditary Motor Neuropathy and Stenosis of the spinal column.

5. The claimant was dismissed for gross misconduct. A number of aspects of conduct were relied upon including gross negligence or incompetence in relation to his duties in the manufacturing process, allegations in relation to honesty and in relation to the claimant's conduct towards colleagues.

6. A preliminary hearing was held on 19 March 2020 before Employment Judge Richardson which ordered a hearing to determine the strike out issue and deposit issue I have dealt here along with a number of other matters. This judgment relates only to the strike out and deposit issue.

Submissions and documents considered at this hearing

7. I received helpful written submissions from both Mr Hirst and Mr Isaacs. They both supplemented those submissions orally but the written documents accurately reflect the arguments presented to me.

8. I had before me a bundle of documents and witness statements from Gian-Carlo Grossi and the claimant. I did not hear cross examination and emphasised to the parties that I would not hear oral evidence nor make findings of fact as this could create difficulties for a tribunal at future full hearing. The bundle contains some 50 evidential documents running to several hundred pages. I read the pleadings and related documents, the witness statement and a very limited number of documents referred to me in those statements such as the dismissal letter to better understand the arguments and submissions of the parties. I did not read all of the documents in the bundle.

9. There was discussion within the submissions about a video clip of the claimant in a meeting which the respondent seeks to rely upon evidence of his gross misconduct. I concluded that viewing this video was not appropriate. It appears inevitable to me that in doing so the respondent was, in effect, inviting me to make findings of fact in isolation of the wider evidence. The claimant disputes what weight can be attached to this video evidence and significantly points out what happened at that meeting was not the only matter relied upon by the respondent to justify the claimant's dismissal.

The Law

Strike out

10. A claim or response (or part) can be struck out on the following grounds:
    a. that it is scandalous or vexatious or has no reasonable prospect of success — rule 37(1)(a)
    b. that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious — rule 37(1)(b)

c. for non-compliance with any of the tribunal rules or with an order of the tribunal — rule 37(1)(c)
d. that it has not been actively pursued — rule 37(1)(d)
e. that the tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out) — rule 37(1)(e).

11. In this instance the respondent seeks strikeout of all of the claimant's claims on the ground that they have no reasonable prospect of success.

12. Special considerations arise if a tribunal is asked to strike out a claim of discrimination or whistleblowing on the ground that it has no reasonable prospect of success. This is because these claims are generally fact-sensitive and require full examination of the evidence by an employment tribunal panel applying their industrial experience to make a proper determination and it is a matter of "high public interest" that discrimination claims are decided on their merits.

13. In assessing whether a claimant's case has a reasonable prospect of success for these purposes it is necessary to take the claimant's case at its highest. If the case is conclusively disproved by, or is totally and inexplicably inconsistent with, undisputed contemporaneous documents, then it might be appropriate to strike it out, but whenever there are core issues of fact that turn to any extent on oral evidence, these should not be decided without an oral hearing (*Mechkarov v Citibank NA* UKEAT/0041/16/DM). This means examining the pleaded facts and for the purposes of the strike-out consideration assuming (unless there is a compelling reason not to) that the claimant's version of any key disputed facts is correct. This is cautious approach to strike out will also apply where the facts of the case are largely undisputed but the reasons for the acts complained of, are in dispute.

14. Strike out is also inappropriate in unfair dismissal cases where there is a significant dispute of fact. In *Tayside Public Transport Co Ltd v Reilly* 2012 IRLR 755, Ct Sess (Inner House) the Court of Session noted that where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. There may be cases where it is instantly demonstrable that the central facts in the claim are untrue but where there is a 'crucial core of disputed facts', it is an error of law for the tribunal to preempt the determination of a full hearing by striking out the claim. This may be case even where there are partial admissions by a claimant but the claimant says those admissions must be seen in particular factual context (*Sajid v Bond Adams LLP Solicitors* EAT 0196/15).

15. It is to be acknowledged that in *Ahir v British Airways plc* 2017 EWCA Civ 1392, CA, the Court of Appeal asserted that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored. However, the facts of that case are somewhat unusual. In that case the Court upheld an employment judge's decision to strike out the victimisation and discrimination complaints of an employee who had been dismissed for falsifying his CV. His claims were based on allegations that six managers who had each separately considered the admitted misconduct of the employee during the disciplinary process had allowed their

decisions to be tainted by the protected acts of the employee even though there was no evidence to suggest that they were aware of those protected acts. The Court concluded that the employment judge had rightly described the allegations as 'fanciful' and struck out the claims as having no reasonable prospect of success. *Ahir* did not overrule decisions setting out the cautious approach I have described above but it makes clear that the power to strike out in can be applied to discrimination claims where it is appropriate to do so.

Deposit Orders

16. Rule 39(1) of the Tribunal Rules 2013 provides that where at a preliminary hearing a tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, *'it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument'*. This power allows for more targeted case management and is likely to discourage parties, particularly claimants, from pursuing weak elements of their case.

17. Deposit orders are directed at weak 'allegations and arguments' contained within the pleadings, not to the entire claim or response itself. Thus, consideration of whether to make a deposit order should be focused on particular allegations/arguments, each of which should be considered separately.

18. The threshold for making a deposit order is that the tribunal must be satisfied that there is 'little reasonable prospect' of the allegation or argument succeeding. This preserves the distinction between the criterion for making a deposit order and that for striking out a case under rule 37(1)(a) on the ground that the proceedings have 'no reasonable prospect of success'

19. The altered criterion allows deposit orders as a less draconian alternative to strike-out where a claim or response (or part) is perceived to be weak but could not necessarily be described as having no reasonable prospect of success. It therefore follows that a tribunal has a greater leeway when considering whether to order a deposit but it must still have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response — *Jansen Van Rensburg v Royal Borough of Kingston-upon-Thames and ors* EAT 0096/07. However a cautious approach must still be taken where there are disputed issues of fact which can only be determined by the testing of evidence through cross examination and this will be particularly so where claimant alleges that a respondent had an ulterior motive for its actions recognising that there is rarely direct evidence of discrimination in documents.

20. The purpose of a deposit order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs if the claim failed. That is a legitimate policy, because claims or defences with little prospect cause unnecessary costs to be incurred and time to be spent by the opposing party and also occupy the limited time and resources of tribunals that would otherwise be available to other litigants. However, the purpose of a deposit order is not to make it difficult to access justice or to effect a strike-out through the back door.

21. It is also the case that just because a tribunal concludes that a claim or allegation has little reasonable prospect of success does not mean that a deposit order must be made. The tribunal retains a discretion in the matter and the power to make such an order under rule 39 has to be exercised in accordance with the overriding objective — to deal with cases fairly and justly — having regard to all of the circumstances of the particular case and regard must be had, for example, to the need for case management and for parties to focus on the real issues in the case. Another relevant factor is the extent to which costs are likely to be saved and the case likely to be allocated a fair share of limited tribunal resources.

My conclusions and reasons

22. For the purposes of this judgment I take the claimant's case at its highest. The claimant's case is that his dismissal was predetermined and was motivated by ulterior reasons connected to the claimant's disability, that, in effect, faced with an employee with serious health problems, the respondent sought to find a reason to end his employment. He says that his health conditions have contributed to some of the allegations against him and that other allegations have been exaggerated. In the course of the disciplinary process the respondent then failed to make adjustments for the claimant's medical condition and the impact the surgery had on him. Although there are number of separate grounds of claims set out in the claimant's list of issues they are all linked to the disciplinary process.

23. In essence the respondent asserts that the documents and chronology (set out in Mr Isaacs submissions) show that the disciplinary case against the claimant was so clear cut his discrimination claims are implausible and his unfair dismissal claim cannot succeed. At page 84 a in the bundle this is set out as follows:

"In particular the allegations that the Respondent's real reason for dismissal was that the Claimant had a disability (or was for a reason connected to disability) and was not misconduct has no reasonable chances of success on the basis of the following undisputed facts:

a. The Respondent's investigation was triggered by a complaint by a grievance from a colleague who had reported to the Claimant, Mr Manjit Sanger;
b. The ensuring investigation showed video evidence which taken by the Claimant himself and saved for his own purposes showing the Claimant deliberately humiliating Manjit Sanger in front of management colleagues;
c. This conduct would be sufficient to justify dismissal for Gross Misconduct;
d. The Respondent raised these allegations and other equally serious allegations with the Claimant in a process which accorded with ACAS code of practice (whatever its alleged failings in relation to disability discrimination)
e. The Respondent properly concluded that humiliating Manjit Sanger in this way was gross misconduct (and that gross misconduct was proven in relation to other allegations as well).

24. The claimant says the dissatisfaction of the respondents with him seems to be linked to be increasing health problems and highlights the proximity of his suspension to the timing of major surgery. He suggests that the fact that the grievance was raised some time after the employee in question left raises questions about how and why it was

raised. His case is that the disciplinary issues have been exaggerated or are misconceived and Mr Hirst suggests that the video evidence can only be considered in the context of oral evidence from the claimant, explained that that the claimant's case is that all the disciplinary case must be seen in the wider context.

25. The claimant also alleges that there was substantive procedural unfairness in his dismissal, in particular that the respondent refused to delay the disciplinary hearing until he was well enough to attend. The respondent says proceeding with hearing was justified because the claimant had sought an "indefinite" postponement of the disciplinary hearing. At paragraph 18 Mr Isaacs says *"C appears to suggest that his dismissal was unfair and discriminatory because the disciplinary process was concluded without him attending a hearing. However, it is clear from the chronology that R could not postpone its disciplinary process indefinitely, that C was not identifying when he may be fit in the future, that faced with an employee who was not fit to attend a disciplinary that R made adjustments to its processes by delaying hearings and ultimately by inviting written submissions"*.

26. I cannot see that issues of significant evidential and legal dispute which go to the heart of whether the respondent acted within the range of reasonable responses and whether there was disability discrimination do not arise here. I understand from Mr Hirst that Mr Isaacs' chronology is not accepted as being undisputed but even insofar as the facts referred to there are not in dispute, that chronology does not demonstrate that there is no substantial dispute relating to the dismissal. Without getting into evidential detail the claimant was dismissed within weeks of his surgery. In terms of the failure to the delay the hearing I cannot accept the respondent's submissions. This was not a case of an employee who had already been absent from work for many months with an uncertain diagnosis or prognosis and a respondent forced to proceed with a disciplinary process to avoid further delay. The claimant had had major surgery and was unable to say in the immediate aftermath of that how quickly he may be fit to attend a hearing. That may well be true of most employees in similar circumstances. It cannot be inevitable that an argument that a reasonable employer would have waited for at least some time to see if the medical position became clearer given the obvious uncertainty of unfitness after surgery and the seriousness of the allegations against the claimant, is doomed to fail. That is not to say of course that the respondents' arguments will not succeed, but I cannot say that it is "fanciful" to say that the respondent may have acted outside the range of reasonable responses.

27. The documents in the bundle which sets out the respondents' grounds for its application states that *"the Respondent raised these allegations and other equally serious allegations with the Claimant in a process which accorded with ACAS code of practice (whatever its alleged failings in relation to disability discrimination)"*. However it is not accepted that the dismissal was procedurally fair and this too is the matter of a significant dispute.

28. The claimant says that the procedure untaken by the respondent was significantly procedurally flawed because the manager who carried out the disciplinary investigation, Mr Attley, would also determine any appeal. That seems to me to be an issue which must create at least a risk there were significant procedural flaws in this case whose existence and significance can only be determined through evidence. It is not an answer to that for the respondent to say "*but we reasonably believed that the*

claimant was guilty of gross misconduct" as that is to ignore the potential substantial breach of natural justice which arises if a manager acts as a judge in his own cause..

29. Reliance is placed by the respondent that the video shows conduct which it says must be accepted as amounting to gross misconduct. That is not accepted by the claimant but even if the claimant had admitted conduct that at the very least might be expected to be regarded as contributing to his dismissal (and for the avoidance of doubt I make no finding of that), that is not the only issue for a tribunal considering the fairness of a dismissal. Employees who have admitted, or are found to have committed, gross misconduct may still be unfairly dismissed. Even in cases where significant contributory conduct by a claimant is found, an employee in such circumstances is entitled to a finding of unfair dismissal. A declaration of unfair dismissal in itself may be of significant value to a claimant. This is why, however conclusive the video clip the respondent wished me to view is, I do not believe it can have the determinative weight in this application that the respondents suggest.

30. In terms of the discrimination claims in particular if I determine that the claimant's claims have no or little reasonable prospect of success by accepting the respondents' explanations for its actions as set out in its documents, I will be failing to acknowledge the obvious fact that it is extremely unlikely that such a discriminatory motivation would be explicit in the documents prepared by the respondent.

31.. In this case the claimant's case can only be determined by testing the respondents' explanations and that will require oral evidence and cross examination.

32. The claimant's case is based on allegations of an ulterior motive by the respondents and determination of whether that is true is a matter which should be determined at a full tribunal. I note what Mr Isaacs says about *Ahir* but that decision does not limit the caution with which tribunals should approach the striking out of discrimination claims where there are significant disputes of fact. In Mr Ahir''s case it was implausible that the six managers against whom his allegations were made were aware that Mr Ahir had previously raised protected disclosures. In this case the relevant managers were clearly all aware of the claimant's medical condition (whether or not they believed that was a disability) so it is wrong to suggest that his claims require the sort of conspiracy that was found to be so implausible in Mr Ahir's case. I do not accept that this claimant's case fall into the category of claims that the Court of Appeal identified in *Ahir* where strike out is appropriate.

33. I am satisfied that the claimant presents claims which requires an explanation from the respondents which should be properly tested through examination of the evidence. I cannot say that the claims have either no or little prospect of success. It is not appropriate to strike out the claims nor is it appropriate to make a deposit order.

34. In his submissions Mr Isaacs says that the claimant has failed to adequately particularise the claims against the individually named respondents and relies on this in his submissions. These are not matters referred to in the documents at pages 84 a and b and they are not matters Mr Hirst had addressed in his skeleton. I am concerned that I am being asked to apply the draconian outcome of a strike out if the claimant was not prepared for that application but in any event it is not appropriate for me to strike out claims if what is lacking is proper case management. Mr Hirst says they are

named as the decision makers and controlling officers of the respondent. I have not been taken to correspondence showing that the respondent has sought to have those claims properly explained and faced a refusal by the claimant to do so. There is a document where the claimant has sought to link the allegations to evidence (page 63 to 84) and explain the link to the individual respondents. That document may not satisfy the respondent's questions, but the claimant has sought to provide some clarification.

35. The claims against the individual respondents must be properly explained by the claimant. If those details are not provided the tribunal will be sympathetic to the appropriate orders being made, including unless orders if necessary. However, I will not use strike out or deposit orders in the place of appropriate case management when there is still time for the case to be properly prepared. For that reason I am not prepared to make a deposit order in relation to those claims at this stage. If appropriate that can be revisited by the tribunal in the future.

36. I have made separate orders for case management.

Employment Judge Cookson
Date 25 September 2020