EMPLOYMENT TRIBUNALS

Claimant: **Mr L Johnson**

Respondent: **D B Cargo (UK) Limited**

Heard at: **Nottingham** **On:** **Monday 2 November 2020**

Before: **Employment Judge Victoria Butler (sitting alone) by CVP**

Representatives:

Claimant: **In person**
Respondent: **Mr Macmillan, Representative**

JUDGMENT having been sent to the parties on 3 November 2020 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

The Employment Tribunal Judge gave judgment as follows:-

The Claimant's claim is struck out on the basis that it has no reasonable prospect of success.

REASONS

Background

1. The Claimant was engaged on a contract with the Respondent in the role of data sanitisation for the period 18 November 2019 until 13 December 2019. He is the sole director and shareholder of a company called Bometrics Limited and claims whistleblowing. The Respondent accepts that he was a worker for the purposes of s.43K Employment Rights Act 1996.

2. At a closed preliminary hearing on 11 June 2020 ("the PH") it was recorded

that the Respondent terminated the Claimant's assignment because of his failure to comply with health and safety requirements and for other reasons relating to his conduct. The Claimant strongly believes that this is a lie and the real reason his contract was terminated was because of his concerns about health and safety. By way of background, the Claimant was very experienced in matters of health and safety compliance.

3. At the PH, the Claimant was unable to identify relevant protected disclosures made before the end of his assignment. Accordingly, the case was set down for an open preliminary hearing to consider the issues and decide if the claim (or part of it) should be struck out because it has no reasonable prospect of success, or if the Claimant should be required to pay a deposit as a condition of pursuing an allegation because it has little reasonable prospect of success.

The issues

4. At the outset of this hearing, we established the issues in the Claimant's case. He says that he made a protected disclosure on Tuesday 26 November 2019 to Charlie Coulby, Procurement Administrator, after an altercation with a train driver earlier that day. The Claimant had been walking along a pathway without wearing PPE causing the train driver to shout at him. The Claimant asked Ms Coulby if he could use the pathway and if he was required to wear PPE whilst walking on it. Her answers were vague so he said: "***you should have suitable signage for pedestrian routes and PPE***". The Claimant clarified that this was the disclosure relied upon and the words used.

5. The detriments relied on by the Claimant, in summary, are:-

   i.) The week after making the disclosure, a senior manager approached him at his desk to talk about (1) a trespasser on site, and; (2) a report regarding the altercation with the train driver and the Claimant walking around the site without PPE. The parties were unable to identify the senior manager in question, but the Claimant asserts that he made him feel intimidated and bullied. It was not *what* the manager said that caused him to feel this way, it was *how* it was said it. Unfortunately, the Claimant cannot remember what the manager said to him.

   ii.) Paul Miller, the Claimant's manager, invited him to his office for a meeting to discuss his performance. Mr Miller confirmed that he was happy with it, but the Claimant says this amounts to a detriment because another contractor, 'Yvonne', who was previously an employee of the Respondent was not called into such a meeting.

   iii.) The Claimant has had a hip replacement and took daily walks at lunchtime to aid his recovery. He tends to sweat a lot so would change into a T-shirt beforehand. On 28 November 2019, Parveen Johal (manager) shouted across the office so that everyone heard, "*why have you changed into your T-shirt?".*

   iv.) Another senior manager (who the Claimant cannot identify) would look

at the Claimant with a 'piercing stare' which he found intimidating. This manager did not say anything that gives rise to an allegation of detriment.

v.) The Claimant also says that he was dismissed because of making the disclosure and claims unfair dismissal.

The law

Striking out a claim or part of it – Rule 37 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013

6. Rule 37 provides:

"At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds:

(a) That it is scandalous or vexatious or has no reasonable prospect of success.
(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;
(b) For non-compliance with any of these Rules or with an order of the Tribunal;
(c) That it has not been actively pursued;
(d) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)"

7. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is "no reasonable prospect" of success in respect of that claim or complaint. It is not sufficient to determine that the chances of success are remote or that the claim or part of it is likely, or even highly likely to fail - it must be bound to fail. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):

"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 words "no" because it shows 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 the 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…"

8. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal will rarely, if ever, be appropriate to be struck out as having no reasonable prospect of success before the evidence has been deliberated.

9. When consideration is being given to striking out discrimination claims particular care must be exercised and it will rarely, if ever, be appropriate to do so in cases where the evidence is in dispute. The Claimant's case should be taken at its highest, unless it can legitimately be said as enjoying no reasonable prospect of succeeding at a substantive hearing.

Deposit Orders – Rule 39 Employment Tribunals (Constitution & Rules of Procedure Regulations 2013

10. Rule 39 provides:

"(1) Where at a Preliminary Hearing (under Rule 53) the 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.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

(3) The Tribunal reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented as set out in Rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides a specific allegation or argument against the paying party for substantially the same reasons given in the deposit order: - (a) The paying party shall be treated as having acted unreasonably pursuing that specific allegation or argument for the purpose of Rule 76 unless the contrary is shown and; (b) The deposit shall be paid to the other party or if there is more than one to each other party (or the parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

11. Accordingly, a Judge or Tribunal may make a Deposit Order where allegations or arguments have little reasonable prospect of succeeding. It remains at the discretion of the Tribunal to determine if such an Order should be made, even where there is little reasonable prospect of success.

12. The Judge or Tribunal should identify the allegations or arguments that have little prospect of success and to discourage their pursuit by ordering a sum to be paid, consequently placing the party at risk of costs if the claim is pursued and subsequently fails.

13. I am not restricted to considering purely legal issues and am entitled to have regard to the likelihood of the Claimant being able to establish the facts necessary to the case and can reach a provisional view as to the credibility of the assertions being advanced.

Discussion and conclusions

14. I considered the papers and both parties submissions before reaching my conclusions. Mr Macmillan for the Respondent submitted that the claim cannot succeed because the Claimant did not make a protected disclosure in the first place.

15. To qualify for whistleblower protection there are a number of requirements that need to be met. i.) was there a disclosure of information? ii.) did that information show that the health and safety of any individual has been, is being or is likely to be endangered? iii.) did the Claimant hold a reasonable belief that the information tended to show that an individual's health and safety has been, is being or is likely to be endangered? and, iv.) did the Claimant had a reasonable belief that the disclosure was made in the public interest.

16. The Claimant submitted that he made the disclosure because the lack of signage was endangering him and other workers.

17. Mr Macmillan took me to page 11 of the trial bundle which is the Claimant's ET1. It sets out the chronology of events which, in summary, starts with the altercation with the train driver. The Claimant describes that during the exchange he asked the driver whether he should be wearing PPE. Thereafter, he asked Ms Coulby about PPE thereby seeking further clarification. The Claimant continued to walk on that particular pathway without PPE and subsequently asked Andrea Jones, Paul Miller and then another member of staff about the requirement to wear PPE.

18. Mr Macmillan referred me to ***Cavendish Monroe Professional Risk Management Limited v Geduld [2010] ICR 325*** and ***Kilraine v Wandsworth London Borough Council [2018] ICR 1850***. The Claimant is required to convey facts capable of conveying one of the types of wrongdoing. Simply expressing an opinion, voicing a concern or making an allegation is insufficient to meet the first limb. The context within which a disclosure is made is also a key consideration.

19. On the Claimant's own chronology, he explains that he asked numerous individuals about the requirement to wear PPE on the pathway. The disclosure itself - "*you should have suitable signage for pedestrian routes and PPE*" - is made in the overall context of seeking clarification about PPE. It is not a disclosure of information tending to show danger to the health and safety of any individual. It is merely an opinion. On the Claimant's case as he advances it, he does not establish the first requirement of making a protected disclosure.

20. I considered whether the Claimant held a reasonable belief that health and safety would be endangered. Mr Macmillan submitted that if the Claimant genuinely held this belief he would not have continued to walk on the pathway, more particularly given his background in health and safety. I agreed with this submission.

21. I considered whether the Claimant held a reasonable belief that the disclosure was made in the public interest. As above, it is clear that the disclosure was made in the context of clarification about PPE, rather than any matter of public interest.

22. Accordingly, I consider that the Claimant has no reasonable prospect of success of establishing that he made a protected disclosure.

23. For completeness I deliberated the detriments relied upon. Overall, they are weak and lack substance. As a general observation, the Claimant could not point to any link between the disclosure and the alleged detriments, save that they occurred after the disclosure.

    Detriment 1

24. The Claimant cannot identify the manager who spoke to him in way that made him feel intimidated or bullied (although I have no doubt that this can be overcome). His case is not *what* this manager said, it was *how* it was said but the fundamental problem with this allegation is that the Claimant could not tell me what was said in any event. The Claimant has had opportunity to provide this information in his ET1, at the PH on 11 June, in his further particulars of claim and before me today. In the absence of that crucial information it would be impossible for a Tribunal to determine whether the exchange, and how whatever was said was said, amounted to a detriment. Accordingly, this allegation has no reasonable prospect of success.

    Detriment 2

25. I cannot conclude that the Claimant would be able to establish that being called to a private meeting, in which his manager confirmed he was happy with his performance, amounted to a detriment just because another contractor was not (or not to the Claimant's knowledge). This appears to amount to an unjustified sense of grievance which is borne out by the Claimant's view expressed during the hearing that he was being treated differently because Yvonne had worked for the company previously and was

'in favour' so to speak. Accordingly, this allegation has no reasonable prospect of success.

Detriment 3

26. It is unforeseeable how the Claimant would be able to establish that being asked about changing into his t-shirt amounted to a detriment in any event but, further, a detriment because he made a protected disclosure. The Claimant fails to point to any matter in support of that view. Accordingly, I consider that it has no reasonable prospect of success.

Detriment 4

27. The Claimant is unable to identify the manager in question and does not take issue with anything he actually said. I am unable to conclude he would persuade a Tribunal that the way someone looked at him amounted to a detriment and as such, consider that it has no reasonable prospect of success.

Dismissal

28. The Claimant has not advanced how his dismissal was in any way linked to the disclosure. It may have happened after the disclosure but that in itself is insufficient to establish a link. The Respondent offers a seemingly credible reason for the Claimant's dismissal, supported by documents where available. As such, I consider the complaint of unfair dismissal has no reasonable prospect of success.

29. To conclude, having considered the information before me, the claim is bound to fail and has no reasonable prospects of success. The Claimant will fail to clear the first hurdle of establishing that he made a protected disclosure. Even if he did clear this hurdle, I do not consider that he has any prospect of success of establishing firstly, that he suffered detriments and secondly, that any such detriment suffered/his dismissal was because he made a protected disclosure.

30. In accordance with Rule 37 of the Employment Tribunal Rules of Procedure, the claim is struck out.

_____

Employment Judge Victoria Butler

Date: 24 November 2020

Notes

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877568/t426-eng.pdf