EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4123058/2018

Preliminary Hearing Held at Glasgow
9 September 2019

Employment Judge M Robison

Mr A Rasheed	**Claimant**
Distell International Ltd	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the public interest disclosure claim pursued under section 43A of the Employment Rights Act 1996 is struck out under rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, on the grounds that it has no reasonable prospect of success.

REASONS

1. This is a claim by Mr Rasheed for unfair dismissal, race discrimination and whistleblowing. This preliminary hearing was set down to determine whether or not his claim for whistleblowing should be struck out. There is no argument from the respondent that his claims for unfair dismissal and race discrimination should be struck out because it is accepted these are valid

claims and will that evidence will require to be heard about them at a forthcoming final hearing.

2. In essence, Mr Rasheed's whistleblowing case, as set out in the paperwork which he had provided, was that the failure by his manager, Mr Colquhoun, to obtain more than one quote and to award a contract to a particular company (GEP Environmental), was a breach of company policy and practice, which was to obtain quotes from at least three organisations before awarding contracts.

3. Mr Rasheed had brought with him additional documents which he proposed to rely on. Although Ms Miller had not seen copies of those documents before, it was agreed that we would hear Mr Rasheed's submissions after hers and that she would be given time, if required, to consider her response to them.

4. It had already been determined that no evidence would be heard at this hearing, because the claimant's case would be taken at its highest, that is it was accepted, for the purposes of the legal argument at this hearing, that he could prove everything that he was offering to prove.

Ms Miller's submissions

5. In submissions from Ms Miller, she made an application for strike out in terms of rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, on the grounds that the whistleblowing claim has no reasonable prospects of success, which failing for payment of a deposit order, in terms of rule 39, on the alternative grounds that the claim had little reasonable prospects of success. She supplied a written submission, and copies of relevant case law. She had prepared a volume of documents, which consisted of copies of correspondence between the parties and the tribunal.

6. She stated that this application follows orders made by Employment Judge Young for the claimant to provide further particulars of his claim following a preliminary hearing on 7 February 2019 (pages 28-31). Mr Rasheed supplied further particulars as directed on 28 February 2019 (pages 33-36), but Ms Miller's position was that they simply restated what the claimant had previously set out in his ET1, apart from an additional reference to an amicable relationship between Mr Colquhoun and a director at GEP.

7. In a note following a further preliminary hearing dated 17 May 2019 (pages 62-67), Employment Judge Gall set out in some detail the legal provisions which the claimant will require to meet in order to prove that he made a protected disclosure and that he was dismissed or suffered detriment because he made that disclosure.

8. Mr Rasheed complied with the order of Judge Gall providing information in tabular form with attachments, dated 28 May 2019 (pages 70-77). The respondent's position was that, again, these revealed no new information beyond that already provided.

9. Ms Miller's position remains that the information provided, even if Mr Rasheed could prove everything he was offering to prove, did not meet the relevant legal tests to prove that he made a qualifying disclosure.

10. While she accepted that some if not all of the information which Mr Rasheed had complained about was the disclosure of information (specifically as I understood it the information in the e-mail of 10 July 2018, pages 76-77) she did not accept that the information related to any one of the six types of relevant failure, specifically: it was not a criminal offence; a breach of a legal obligation; a miscarriage of justice; a danger to health and safety or the environment; or an attempt to conceal any of those failures.

11. Ms Miller also asserted that the claimant could not therefore show that he had a reasonable belief that the information tended to show one of the relevant failures. She submitted further that he had effectively conceded that any "disclosure" was not in the public interest, by reference to an email dated 2 May 2019 (pages 60-61) in which he stated that, "I understand that my position against contract award to GEP Environmental company or request for further training was not in the public interest but definite in the best company interest and for the development of employees as company policy states".

12. Ms Miller submitted that since the claimant could not establish a qualifying disclosure, therefore that the claim has no reasonable prospects of success and should be struck out.

13. She accepted that the threshold is high and referred to case law which indicate that in discrimination and whistleblowing cases that it would be exceptional to strike out a claim where the facts are in dispute.

14. She submitted that the essential facts are not in dispute in this case. She went on to add that even if Mr Rasheed could show that Mr Colquhoun had an amicable relationship with a director in the company to whom the contract was awarded (which is denied), that would make no difference.

15. She set out her alternative argument that he should be required to pay a deposit order because the claim has little reasonable prospects of success.

16. She argued that the overriding objective is served because otherwise the hearing will be lengthened by Mr Colquhoun having to give evidence, and she said that there would be no prejudice to the claimant because he has two other claims before the Tribunal.

Mr Rashid submission

17. In his submissions Mr Rasheed set out the background to his employment with the company. He went on to say that he had particular concerns about the way that Mr Colquhoun had awarded the contract to GEP and that alarm bells had rung for him when he noted that no other companies were asked to quote, and there was no discussion regarding the price.

18. He said this was not company policy and against the culture of the company where the standard practice was to obtain a minimum of three and up to five quotes for such contracts. Given his concerns he raised this issue within the company.

19. Mr Rasheed then went on to refer to the documents which he had lodged for the hearing today. These were a powerpoint delivered by the CEO to staff in 2017 which among other things shows the company structure and turnover around the world (C1). He then made reference to a letter from Scottish Enterprise (C2) awarding the respondent a grant in relation to the relevant project, and an extract (C3) from the application form showing the company had a turnover of £50 million (and therefore as I understood it would be a company which was entitled to be awarded such grant, because it would qualify as an SME). Mr Rasheed also lodged at C4 the company's Annual report and Financial statements, which he alleged showed that the company's turn over was very much higher.

20. I understood therefore that Mr Rasheed's position was that the respondent was awarded a grant in breach of Scottish Government, European Union and Scottish Enterprise criteria.

21. At this point Ms Miller, rightly, pointed out that she was not aware that this argument would be advanced, there had been no reference in any of the paperwork until now of this argument, and she was not aware of these documents. She has therefore had not notice at all of this argument or prior sight of the documents upon which it was based. Further Mr Rasheed had already had several opportunities to clarify his claim before now, and Judge Gall had indicated at the last case management preliminary hearing that this was his last opportunity to do so.

22. In discussion Mr Rasheed confirmed that he had only ascertained the position in the last 20 days, having undertaken research into the position. He explained that while alarm bells had rung for him when he found out about the awarding of the contract by Mr Colquhoun, he did not have time to undertake further research into the background circumstances while he was only two days per week for the company, undertaking a PHD and looking after his family.

23. Ms Miller's position was that this was a new argument, based on documents which neither she nor the company had seen. There could not therefore have been any disclosure to the company and therefore it cannot be said that the claimant was badly treated as a result of disclosing that information.

Relevant law

24. Rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on the grounds, inter alia, that the claim has no reasonable prospects of success.

25. Under rule 39 of the 2013 Rules, where at a preliminary hearing the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospects of success, it may make an order requiring the party to pay a deposit as a condition of continuing to advance that allegation or argument.

26. The law relating to public interest disclosures is contained in Part IVA of the Employment Rights Act 1996 (ERA). Section 43B(1) states that a "qualifying disclosure" means any disclosure of information which, "in the reasonable belief of the worker making the disclosure tends to show", "(a) that a criminal offence has been committed, is being committed or is likely to be committed; (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; (c) that a miscarriage of justice has occurred, is occurring or is likely to occur; (d) that the health or safety of any individual has been, is being or is likely to be, endangered, (e) that the environment has been, is being or is likely to be damaged; or (f) that information tending to show any matter failing within any one of the preceding paragraphs has been, or is likely to be deliberately concealed".

27. A qualifying disclosure will be a protected disclosure if it is made by a relevant worker to an appropriate person. Section 43C(1) ERA states that "a qualifying disclosure is made….if the worker makes the disclosure a) to his employer….".

28. Section 47B(1) ERA states that "a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer, done on the ground that the worker has made a protected disclosure".

29. Section 48(2) states that on a complaint under 47B, it is for the employer to show the ground upon which any act or failure to act was done

30. Where the worker is an employee and the detriment amounts to dismissal, section 47B does not apply. In that case, section 103A states that an employee who is dismissed shall be regarded….as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".

31. The threshold that must be reached to support a strike out on this basis is a high one. For example, in *Ezsias v North Glamoran NHS Trust* 2007 EWCA Civ 330 (a case where there were facts in dispute), it was stated that only very exceptionally will a case be struck out without hearing evidence.

32. In *Mechkarov v Citibank NA* 2016 ICR 1121 (a discrimination case) Mr Justice Mitting, after considering the relevant authorities, set out the correct approach to be taken in a strike out application in a discrimination case, namely: (1) only in the clearest case should a discrimination claim be struck

out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the claimant's case must ordinarily be taken at its highest; (4) if the claimant's case is "conclusively disproved of" or is "totally and inexplicably inconsistent" with undisputed contemporaneous document, it may be struck out; and (5) a tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts

33. That the same approach applies in public interest disclosure cases has been made clear by the EAT (Mrs Justice Simler, President) in *Morgan v Royal MENCAP Society* UKEAT/0272/15 which stated that, "Whistleblowing cases have much in common with discrimination cases, involving as they do an investigation into why an employer took a particular action or decision ... In the same way that courts have expressed a reluctance to strike out fact sensitive claims of discrimination in order to avoid injustice, the same or a similar approach has been held to be appropriate in whistleblowing cases."

34. However, in *DEFRA v James* UKEAT/0154/18, the Employment Tribunal's decision to refuse to strike out a claim was overturned by the Employment Tribunal because it was "illogical" not to.

Deliberations and decision

35. Mr Rasheed confirmed that he had only found out about the potential breach of the criteria in regard to the applying for and awarding of the relevant grant some 20 or so days ago when he had found the time to research the matter

36. I take no view on the veracity of his argument, which may or may not be accurate. Indeed it may be that the respondent has a perfectly legitimate response to the accusation, but this having been the first time that the argument was made, had no opportunity to research their position.

37. However, the respondent has had no notice whatsoever of these potentially serious accusations. Mr Rasheed has been given a number of opportunities to provide further particulars of his claim and to show that the circumstances mean that he can prove that he has made a qualifying disclosure and has been dismissed or suffered detriment as a result. His explanation is that he has only now found out about this. He stressed that he is not legally qualified and has only now had time to undertake the relevant research

38. I fully accepted that the fact that Mr Rasheed is not legally qualified may have explained the delay in bringing this argument to the attention of the respondent and of the Tribunal. In light of the overriding objective to ensure that parties are on an equal footing in particular, I may well have given the claimant an opportunity to make an application to amend his claim to bring these matters before the Tribunal. Ms Miller states understandably that she would object to that, and it would be a matter for the Tribunal to determine whether the claimant would or would not be allowed to include that in his argument although it is made very late in the day.

39. However, Mr Rasheed has confirmed that he has only recently become aware of these allegations. He accepts that he did not bring these specific allegations to the attention of the respondent.

40. As a matter of simple logic, even if Mr Rasheed could prove that everything he states is true, he cannot show that he was dismissed or disadvantaged ***because*** he made a disclosure of that information, when in fact he did not do so (until today).

41. It is for that reason that I do not consider it is appropriate to allow the claimant an opportunity to make an application to amend his claim, because it will make no difference to the outcome of this application.

42. Accordingly the claimant's case is that set out in his ET1, his further particulars and his matrix. I can only take his written case to date into account when considering this application for strike out.

43. While I accept that there was a disclosure of information (specifically in the e-mail of 10 July) I do not accept that it served to reveal any one of the relevant failures. While I accept that it may well have been in breach of company policy, and contrary to the culture of the organisation, I do not accept that this could be said to be a breach of a legal obligation (or any other relevant failures listed). It cannot therefore be said that the claimant had a reasonable belief that the information disclosed tending to show a breach of a legal obligation.

44. Nor do I accept, on the basis of the arguments made or the documents lodged, and by reference to the email of 2 May, that it could be said that it was in the claimant's reasonable belief that the disclosure, at that point in time, was in the public interest.

45. It may well be that whatever happened in respect of the grant from Scottish Enterprise that it could possibly be argued to be a breach of a legal obligation (and I repeat that I make no comment on the accuracy or otherwise of those allegations), the fact is that the claimant on his own evidence, and if all of his evidence is accepted, cannot meet the test to prove that there has been a protected disclosure because it cannot possibly be the case that the was dismissed/ suffered detriment for a "disclosure" that he had not yet made at the relevant time.

46. I therefore came to the view that the claimant's claim has no reasonable prospects of success and therefore the public interest aspect of the claim should be struck out

47. I came to this view taking account of the relevant case law that there is a high threshold, and the fact that such claims should only be struck out in exceptional circumstances, especially when facts are in dispute. However this hearing has proceeded on the basis that no facts are in dispute, taking the claimant's claims at his highest, yet still he cannot meet the legal tests to establish that he was dismissed or disadvantage because he blew the whistle, so that it is not possible for his to prove a breach of the relevant legal provisions.

48. I bore in mind too the overriding objective in respect of the fact that any final hearing would be significantly extended should this claim be included, but with no reasonable prospect of success. Further and in any event the claimant will still be able to proceed with his claim in respect of unfair dismissal and race discrimination. I noted that much of the arguments he made in submissions relate to one or other of these claims and he will still be able to have these arguments heard in the final hearing in this case.

Further case management

49. After delivering an oral judgment as above, and given that this case will proceed to a final hearing to determine outstanding claims, I proposed to follow this hearing with a case management discussion to make further preparations and progress towards a final hearing to determine outstanding matters in respect of preparations for that hearing.

50. Mr Rasheed did not agree with that proposal because he had come prepared only for the strike-out application. Ms Miller proposed in the circumstances that a date could be set down for a further case management preliminary hearing given that Mr Rasheed is a party litigant, and this was agreed.

51. We did however discuss the issues which will be considered at that case management preliminary hearing. These include: identify the outstanding issues for determination by the Tribunal; confirm names of witnesses to be called and documents to be relied upon; and to set dates for the final hearing.

52. When discussing which witnesses will be called, Mr Rasheed advised that he intends to call a Mr Ewan Morrison (his previous line manager) and a Mr Patberry (health and safety manager), both of whom have now left the company and whom I understand are reluctant to attend having signed non disclosure agreements. Mr Rasheed will therefore require to make a request, at that hearing, for witness orders in respect of those witnesses.

53. This case should now be listed for **a case management preliminary hearing (two hours) on Friday 7 October 2019 at 10 am.**

Employment Judge: M Robison

Dated: 09 September 2019

Entered in Register and
Copied to Parties **13 September 2019**