RM

EMPLOYMENT TRIBUNALS

Claimant: Mr P Bahad

Respondents: (1) HSBC Bank Plc
(2) Resource Solutions Ltd

Heard at: East London Hearing Centre (by telephone)

On: Friday 18 September 2020

Before: Employment Judge Housego

Representation

Claimant: In person
1st Respondent: Rebecca Stephens, solicitor, of Pinsent Masons LLP
2nd Respondent: Catherine Meenan, of Counsel, direct access

JUDGMENT

The claims are dismissed.

REASONS

1. The Claimant brought his claim against 2 Respondents, the 2nd being an agency, the 1st the company where they placed him. The Claimant had his own personal service company. By reason of changes to IR35, HSBC decided that all its contractors would have to become employees of the agency which placed them with HSBC. The Claimant was offered and accepted such a contract. The effect is a reduction in net pay, as PAYE and NI is deducted at source. The Claimant indicated that he would not sign (and so would leave the 2nd Respondent and cease to work at the 2nd Respondent. Soon afterwards the Claimant's line manager, Joseph

Kavanagh, brought the relationship to an end. The reason given in the ET3 is:

> 12. "Around the same time as the uncertainty as to whether the Claimant was going to remain providing his services to HSBC post 1 February 2020, negative feedback had been received within HSBC regarding the Claimant in his role, principally around his communication style and lack of stakeholder engagement / management. This was raised with the Claimant but he failed to take it on board or act accordingly. In addition, the programme the Claimant was working on was moving from the analytical to the delivery stage when such communication and stakeholder engagement skills would become more important.
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> 13. As a result of this feedback and lack of acknowledgment or improvement from the Claimant, HSBC decided therefore that they no longer required the Claimant's services.

2. His claim was listed in paragraph 8.1 of the ET1 claim form as race discrimination, religious discrimination, a redundancy payment, holiday pay, and under the heading "another type of claim" a "Covid-19 furlough payment". There is reference in the statement of claim to "whistleblowing" but a public interest disclosure claim is not readily apparent from the narrative. (There is reference to a referral to the FCA, but it is not linked to any detriment, and, as Ms Stephens pointed out, there was no disclosure until after the Claimant had been given notice.)

3. A case management hearing was listed, and the Respondents both sought strike out orders in respect of the claims. The hearing took about 1¼ hours, primarily in the Claimant explaining his case to me.

4. The hearing was to consider the Claimant's application to strike out the ET3 under Rule 37, which, so far as relevant states:

> "Striking out
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> 37. (1) 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 any of the following grounds—
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> (a) that it … has no reasonable prospect of success;

5. The case law indicates that this is not an easy test to meet. In most of the cases relating to discrimination cases it is the Claimant who appeals the striking out of his or her claim. The case law is set out fully in Malik v Birmingham City Council & Anor (Striking-out: dismissal) [2019] UKEAT 0027. Discrimination claims is particularly sensitive. Striking out a claim ends it totally, and without evidence being heard. For public policy reasons this should be done in race (and other) discrimination cases in only the clearest cases. I have borne this in mind.

6. Para 29 onward sets out the law, and para 31 states:

> "In Mechkarov, it was said that the proper approach to be taken in a strike out application in a discrimination case is that:

(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 by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and
(5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

7. I asked the Claimant about his claim against the 2nd Respondent. The Claimant said that he had spoken to Acas and they had said that he had to claim against the 2nd Respondent as they had been his employer. I asked if the 2nd Respondent had done or not done anything because of his race or religion. They had not. The Claimant did not claim to have made a public interest disclosure concerning the 2nd Respondent. He felt they could have been more helpful by mediating between him and the 1st Respondent and helped him get a payment holiday on his mortgage, but that is not a basis for a claim. He had expected them to get him a Covid-19 CJRS payment. He did not know why they should pay him a redundancy payment. He accepted that he had not been employed by them for 2 years. I asked who discriminated against him, and the Claimant said that it was HSBC staff. He had blown the whistle and he had lost his income. I asked why that might be the fault of the 2nd Respondent. The Claimant said that it was not their fault. I asked why he thought they might be liable for anything the 1st Respondent had done. The Claimant said that he was not saying that they were. He had to include them as a respondent because Acas had told him that he had to do so. While he thought they could have done more, he had not included anything in his schedule of loss about the 2nd Respondent. I asked if he meant that he had no reason to take action against the 2nd Respondent. The Claimant said that he had not – he was suffering, he said because HSBC had done what they should not. He sought remedy only against them.

8. Accordingly, as the Claimant agreed that he had no claim against the 2nd Respondent I dismissed all claims against them, and Ms Meenan left the telephone hearing.

9. I asked the Claimant about his public interest disclosure claim. After some time it emerged that the 4th paragraph of page 2 of the statement of claim refers to the detriment of a job application within HSBC not being taken further in late March 2020. The Claimant thought this might be victimisation because of his disclosure. The Claimant said that by reason of race or disclosure he had been dismissed and lost his income.

10. I asked why the Claimant thought any of his issues with HSBC were connected with religion. The Claimant said that it was a difference between him and others, and so he had ticked all the boxes where there was a difference. That was race and religion. I asked how religion was relevant to

what happened to him with HSBC. The Claimant said that he did not eat meat and so there was a difference at lunchtimes. I asked the Claimant if he could identify anything about his claim to which religion was relevant, and he said that he could not. I said that I would strike out the religious discrimination claim, because it had no reasonable prospect of success. The Claimant said that he had no objection to that – it was a point of difference was all, and he had simply ticked all the boxes where there was a difference.

11. The Claimant accepted that he was not entitled to a redundancy payment (from anyone, and not from HSBC who had never employed him). Accordingly I struck out that claim.

12. The Claimant said that had he not been dismissed by HSBC he would have been eligible for a furlough payment. That is a proposition that cannot succeed. First the 1st Respondent did not employ the Claimant and a CJRS payment is made only to employees. Secondly, by the time the CJRS started the Claimant was not employed by, or working at, either Respondent. It is no different to wages not earned because dismissed: which is part of remedy where there is a successful claim, and not a claim itself. In so far as that attaches to any of the claims, I dismiss it.

13. The Claimant accepted that he had no money claim against the 1st Respondent, as it had always been the 2nd Respondent which had paid him. In so far as there are money claims against the 1st Respondent I dismiss them.

14. I asked about the race discrimination claim. This was based on the Claimant's Indian ethnicity. In one of his emails expanding on his claim, the Claimant said that this was "clever implicit racism" based on a colonialist view of India. It was not a nationality claim.

15. I asked what bad things had happened to him that he said were at least partly because of his Indian ethnicity. The Claimant said that Joseph Kavanagh had discriminated against him. He had reported to Joseph Kavanagh, who had fabricated a reason to get rid of him. The terms of the contract he had been offered were not right. He should have had a higher daily rate than before, and that had not happened. He was working in a small team and that meant more work, and the change from limited company status to employee meant less money. He had no reason to think that he had been treated any differently to anyone else.

16. His claims for race discrimination and for public interest disclosure seemed to centre on Joseph Kavanagh, and I asked him to expand on what he said happened. First the Claimant said that his disclosure was on 03 February 2020, and was to the Financial Conduct Authority. I pointed out that his emails said this was on 03 April 2020: he said that at the end of March 2020 he should have been interviewed for another role in HSBC but was not. He

made reference in his claim form to a disclosure to the HSBC Confidential whistleblowing process, at 27 February 2020.

17. The Claimant accepted that 03 April 2020 was after he left HSBC, and the 2nd Respondent, so that his dismissal could not be connected with it, as something that happens after something cannot be the cause of it.

18. The Claimant said that he had made an internal public interest disclosure about Joseph Kavanagh on 28 February 2020. He did not know if or how Joseph Kavanagh could have known of a report that was in a process expressly stated to be confidential.

19. Ms Stephens pointed out that it was on 28 February 2020 that the Claimant made his disclosure to the HSBC's confidential reporting department, and that was during the Claimant's 4 week notice period, which had been given on 12 February 2020, so that again it was impossible for the ending of the employment to be because of the disclosure.

20. After some considerable discussion the Claimant said that he had applied for another role within HSBC on 31 March 2020 and that might have been because of his internal disclosure. He accepted that Joseph Kavanagh had no connection with that other role or recruitment for it. The Claimant thought that by not appointing him to another role HSBC was preventing him accessing their systems which might enable them to avoid him being further involved in the disclosures he had made to the FCA. The outcome of that disclosure had been notified to him, and it was that there was said to be no evidence of wrongdoing. There is also the point Ms Stephens made – the end of March 2020 was a time when recruitment was largely on hold throughout the country, lockdown having started about a week before.

21. This is speculative, at best. There is no real prospect of success in a claim that the Claimant was victimised by not being taken on in another role because of a public interest disclosure, for the reasons above. Accordingly I struck out the claim for public interest, however framed. It would have needed an application to amend, which would not have passed the tests in Selkent[1].

22. I note also (and in addition) there is only a hint of a public interest disclosure claim in the claim form, and I do not accept that this was because the Claimant put his Covid-19 claim in the box marked "other claims".

23. I asked the Claimant to return to his race discrimination claim. The Claimant said that he had been dismissed, but named 3 people who were white and had not been dismissed. He said that may have been because he was of

[1] Selkent Bus Co Ltd v Moore: EAT 02 May 1996
[1996] IRLR 661

Indian ethnicity, and that it was possible that Joseph Kavanagh may have benefitted financially in some unspecified way by so doing.

24. The Claimant had not previously raised this as an allegation, in his claim form, emails of 26 August 2020 and 07 September 2020, or in his PowerPoint "walkthrough" of the case. The Claimant repeatedly said that he had ticked the boxes at 8.1 of the claim form whenever he could see a difference (in the sense of a protected characteristic), not because he had any sense of grievance related to that characteristic. The requirement for some evidence of a causal link between that characteristic and the detriment[1] is absent in this claim.

25. I bear fully in mind the case law guidance. There are no core issues of fact to be decided. Taking the case at its highest this is at best a speculative claim based on the Claimant's unhappiness at his role at HSBC ending. Even the claim form says only that it is "possible" that race was a factor. There is no reasonable prospect of the Claimant establishing facts from which a Tribunal might find that there was a taint of race discrimination in the non-selection of the Claimant for a new role with HSBC, or in his original dismissal. There is no reasonable prospect of success of any other race discrimination claim of the Claimant.

Employment Judge Housego
Date 21 September 2020

JUDGMENT & REASONS SENT TO THE PARTIES ON
Date: 21 September 2020

[1] Bahl v The Law Society & Anor [2004] EWCA Civ 1070