EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr R Sutton **V** **Apex Group Limited**

Heard at: London Central
(By Cloud Video Platform) **On**: 22 February 2021

Before: Employment Judge Joffe

Representation

For the Claimant: In person

For the Respondent: Mr T Brown, counsel

JUDGMENT AND WRITTEN REASONS

JUDGMENT

1) The claimant's claims have no reasonable prospects of success and are struck out.

2) The claimant's application to amend his claim form is refused.
3) The hearing listed for 2, 3 and 4 August 2021 is vacated.

REASONS

The hearing

1. This was an open preliminary hearing listed by Employment Judge Spencer to determine the following issues:

   - Whether the Tribunal had jurisdiction to consider the claimant's claims
   - Whether the claims should be struck out or alternatively a deposit order made on the basis that the claims had no, alternatively little reasonable prospect of success;
   - Whether the claims should be consolidated for hearing with claims brought by the claimant against other respondents under claim number 2202532/2020;
   - Case management if appropriate.

2. I was provided with an agreed bundle of some 177 pages, comprising pleadings, orders, some correspondence and a skeleton argument submitted by the claimant.

3. The hearing commenced with the respondent's application to strike out the claimant's claims. In reply the claimant made an application to amend his claim form if necessary, although there was no draft amendment available. Mr Brown then responded to that application.

The pleadings and timeline

4. The claimant commenced Early Conciliation against the respondent on 6 August 2020 and presented a claim to the Tribunal on 8 September 2020.

5. At section 8 of the claim form, the claimant ticked the boxes for age discrimination and discrimination because of sexual orientation. He then referred to having been blacklisted for previously asserting statutory rights.

6. In the narrative box at section 8, the claimant wrote:

   After filing a number of grievances against DB Group Services (UK) Limited over the course of 2016 and 2017, the company made me redundant in retaliation for my grievances.

   After then finding alternative employment with Wilmington Trust SP Services (London) Limited, employees of DB Group Services (UK) Limited then started

to make derogatory comments about me at industry events and during the course of work. As a result of this slander, Wilmington Trust SP Services (London) Limited terminated my contract.

Since the above. and since initiating in County Court and Employment Tribunal, I have been blacklisted by the 'bank' trustees and fund administrators. and have not been able to continue my corporate trust career.

One employee of DB Group Services (UK) Limited went so far as to remark to me: "...I'm telling you now, you better get the f--- out of this country and you better get out fast if you know what is good for you...everyone has been told about you. Those jobs you've been trying for at BNY, Citi, HSBC...you're not getting them, they've all been told about you...And Wilmington Trust knows about you...you're not getting another job again..."

It has since come to light that after applying to and interviewing with another prospective employer, the company reached out with out my consent to Apex Group Ltd for feedback and/or a reference with employees from Apex Group Ltd then responding, "...Was speaking to [blank] on Rob Sutton and he thinks steer clear of Rob Sutton?" and "...I e-mailed [blank] and advised him to give Rob a wide berth..." Apex Group Ltd has not shared with me the blanked out names. David Rhydderch, Karl Salemangi and Vakita Patel, all with Apex Group Ltd, were former work colleagues at DB Group Services (UK) Limited involved in my grievances against the company.

.As a result of the above. I've lost a significant amount of wages and my employment prospects have been significantly reduced.

In addition to having earlier filed an ET1 on 26th April 2020 against Global Loan Agency Services Limited and other potential employers in the industry, I hereby file this ET and apply to the Employment Tribunal for the claims to be merged.

7. There was no reference in the claim form to any applications the claimant had made for employment with the respondent.

8. The other claim referred to by the claimant was a claim against a number of other respondents presented to this Tribunal on 26 April 2020. He has presented a subsequent claim against a further respondent at London East Employment Tribunal.

9. The emails referred to in the claim form involving employees of the respondent were obtained by the claimant in March 2020 as a result of a data subject access request, although he told me he did not read them at that time because he had a great deal of material from other data subject access requests (as many as twenty such requests) to look at and he had a heavy

workload, in part because he was having to arrange to work from home due to the pandemic.

10. On 8 December 2020, Employment Judge Glennie ordered the claimant to provide further information as follows:

1) When the matters you are complaining about, occurred

2) Whether you were an applicant for employment with the Respondent and if not, complain [sic] on what basis the Tribunal has jurisdiction to hear your case.

11. In response, on 15 December 2020, the claimant submitted a lengthy document. That document referred to the acts of the various other organisations the claimant was complaining about in other proceedings and inter alia made allegations in respect of causes of action the employment tribunal has no jurisdiction over, such as defamation.

12. In relation to his protected characteristics, the claimant said:

The Claimant's protected characteristics under the Equality Act 2010 include:

i.Age, with a large proportion of retaliatory acts directed toward the Claimant being acts that significantly disadvantage the Claimant because of age;

ii. Race, with the Claimant being treated differently because of national origin from the United States of America; and,

iii. Sexual orientation, with the Claimant being treated differently because of work colleagues (i) engaging in speculation regarding the Claimant's sexuality and/or (ii) perceiving and treating the Claimant's manager-subordinate relationship differently because of perceptions of the Claimant's sexual orientation.

13. He went on in that document to explain that the acts complained about had their origin in what he said were public interest disclosures / assertions of statutory rights made at his previous employer, Deutsche Bank Group Service (UK) Limited ('DB'). The claimant said that his management team at DB commenced a campaign against him which led to his dismissal by DB in 2018 and also to the emails complained of in the claim form, sent by former DB employees when the latter were employed by the respondent.

14. The claimant was concerned that the former DB employees were causing him ongoing damage in relation to his career in the banking industry and I understood his various proceedings to have arisen from that concern.

15. Although the claimant also said in that document: 'Yes, the claimant was an applicant for employment with the Respondent,' he did not set out what applications he had made and when and whether he was seeking to pursue any claims in respect of those applications.

16. Those applications were not particularised until the claimant submitted a skeleton argument for this hearing, dated 15 February 2021. In that skeleton argument, the claimant said that he was 'a well-suited candidate to whom the Respondent should have considered offering employment for one or more employment vacancies advertised in one form or another by the respondent between 2018 and the present'. He went on to set out the applications he had made:

    - 3 May 2018 – senior fund account – private equity and real estate team;
    - 20 February 2019 – treasury controller;
    - 15 July 2019 – events and associations marketing manager
    - 4 August 2019 – head of compliance and DPO UK
    - 30 August 2019 – private equity depository analyst
    - 1 October 2019 – general enquiry about employment opportunities
    - 4 February 2020 – general enquiry about employment opportunities.

17. The skeleton argument again averred that former DB employees now employed by the respondent had made communications to a third party with a view to damaging the claimant's interests because he had previously made public interest disclosures and asserted statutory rights. He said that the arrangements made for whom to offer employment to discriminated against him because of his age because they did not engage 'with the detail of the length, breadth and depth' of the claimant's career experience.

Law

<u>Striking out</u>

18. Under rule 37 of the Employment Tribunals Rules of Procedure 2013, a claim or response may be struck out on various grounds including that it is

scandalous and vexatious or has no reasonable prospects of success: rule 37(1)(a).

19. In heavily fact-sensitive cases, such as those involving whistleblowing or discrimination, the circumstances in which strike out is appropriate are likely to be rare: Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT.

20. The test is not whether the claim is likely to fail. It is not a test that 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 a high test: Balls v Downham Market High School and College 2011 IRLR 217, EAT.

21. It is crucial when considering strike out to take the claimant's case at its highest; where there are core issues of fact which turn to any extent on oral evidence, these should not be decided without an oral hearing: Mechkarov v Citibank NA [2016] ICR 1121.

22. Caution should be exercised where a case is badly pleaded and a claimant is unrepresented; the proper course of action may be to allow an amendment: Mbuisa v Cygnet Healthcare Ltd EAT 0119/18.

Amendment

23. In considering an application to amend a claim, a Tribunal will have particular regard to the balance of hardship and injustice in refusing or allowing the amendment, together with any relevant factors. Those include the factors set out in Selkent Bus Co Ltd v Moore ICR 836, EAT:

    The nature of the amendment: The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new cause of action.

    Applicability of time limits: If a new claim or cause of action is proposed to be added by way of amendment, it is essential for the tribunal to consider whether that claim/cause of action is out of time and, if so, whether the time limit should be extended.

    Timing and manner of the application: Delay in making the application is a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the identification of new facts or new information from documents disclosed on discovery.

24. The merits may be relevant to an amendment application; if a proposed claim is obviously hopeless, that consideration affects the assessment of the injustice caused to a claimant by not being able to pursue it. Nothing is lost in

not being able to pursue a claim which cannot succeed: Herry v Dudley MBC and anor EAT 0170/17.

Liability under the Equality Act 2010

25. Liability in the employment relationship is dealt with in Part 5 Chapter 1 Equality Act 2010. Various types of discrimination related to protected characteristics are unlawful if done by an employer in relation to an employee of that employer or a potential employer in relation to an applicant for employment. Section 108 covers liability for discrimination in relationships which have ended.

Public interest disclosures - detriment

26. Under section 47B (1) of the ERA 1996:
"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".

27. Although an employee may complain of detriment in employment which is the result of whistleblowing prior to the start of the employment relationship (BP plc v Elstone and anor 2010 ICR 879, EAT*)*, as Mr Justice Langstaff observed in that case: 'the statute does not prohibit action against a whistle-blower… when an applicant for employment, as it might have done'.

28. Under s 48 (3) ERA 1996 a complaint of a breach of s 47B shall not be considered by a tribunal:

… unless it is presented—
(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of *a* series of similar acts or failures, the last of them, or
(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

Submissions

29. In essence, Mr Brown pointed to the fact that there was nothing in the claim form which amounted to a complaint the Tribunal had jurisdiction to hear. The only acts committed by employees of the respondent were the emails referred to, which were expressions of opinion made by those individuals in a personal

capacity. They were not made about the claimant as a current employee of the respondent or as a prospective applicant to the respondent; the Tribunal's jurisdiction under the Equality Act 2010 was not engaged. The claimant had in any event failed to plead how his protected characteristics were involved in the factual matters he complained of.

30. In response, the claimant told me that what he was complaining about was not being offered employment by the respondent. He said that that complaint was implicit in his brief claim form. If it was not implicit, the claimant said he was making an application to amend. I concluded that it would be appropriate to consider the claimant's application to amend, if such an application was required, in tandem with the strike out application, having regard to the guidance in Mbuisa v Cygnet Healthcare Ltd.

31. After discussion it appeared that the claim the claimant was seeking to pursue was a claim for public interest disclosure detriment in relation to being refused employment by the respondent on a number of occasions. The internal complaints and previous ET proceedings, he told me, were not complaints of discrimination so it followed that the claim he was seeking to make against this respondent was not a claim of victimisation under the Equality Act 2010 but would have to be pursued under s 47B Employment Rights Act 1996.

32. In order to try to understand whether the claimant had claims under the Equality Act 2010, I explained the nature of direct and indirect discrimination to him. He said, to summarise, that the way in which his protected characteristics were involved in the matters he complained about was that he applied for vacancies which would have been suitable for someone with his level of experience, which experience comes with age, but he was not interviewed or employed. There were fewer opportunities for someone of his level of experience, hence age, but his treatment by the respondent and others meant he was not being appointed to positions. It appeared from what the claimant was saying that he felt that his race in the form of his nationality and perceptions about his sexual orientation had influenced some of his treatment when he worked for DB, but he did not identify any treatment by this respondent in which those characteristics played a role.

33. In response to the application to amend, Mr Brown said that the Tribunal had no jurisdiction to hear a claim of whistleblowing detriment from an applicant for employment. That was his primary submission. He submitted that in any event the complaints were out of time in circumstances where the claimant had brought previous employment tribunal claims as long ago as August 2018 and so would have been aware of the tribunal process and time limits, and where the claimant had clearly long had suspicions of the respondent, as evidenced by applications prior to his data subject access request for unsuitable roles at the respondent and his speculative enquiries about employment.

34. In terms of the timing of the application to amend, the claimant had not only not included the basis of the complaint now sought to be advanced in his claim form, he had failed to include it in his further information or at any stage prior to submission of his skeleton argument for this hearing.

Conclusions

Strike out

35. The claim form does not reveal any claim over which the Tribunal has jurisdiction and in particular does not reveal the claims the claimant told me he intended to pursue, which are claims for public interest disclosure detriment in relation to his non appointment to roles at the respondent and some form of age discrimination in relation to the same factual matters. What it contains is factual allegations about the sending of emails by some of the respondent's employees to a third party potential employer. Since the respondent was not and never has been the claimant's employer and the claimant was not, in relation to the emails complained, an applicant for employment by the respondent, I concluded that the Tribunal had no jurisdiction to hear the claims in the claim form. There were no issues of fact which required to be resolved in determining that the Tribunal lacked jurisdiction, so this was the rare discrimination case in which strike out might be appropriate.

36. It followed that the claims as pleaded had no reasonable prospects of success and must be struck out unless I allowed amendments to add the claims the claimant said he had intended to pursue.

Amendment: public interest disclosure detriment

37. I did not allow an amendment to plead a claim of public interest disclosure detriment. The respondent was not the claimant's employer at the time of the applications for employment or at any time and therefore the claimant cannot bring himself within s 47B. The Tribunal has no jurisdiction to hear this claim. Looking at the balance of hardship, there is no hardship to the claimant in not being allowed to amend to purse a hopeless claim and considerable hardship to the respondent in the form of costs and inconvenience in being required to defend a hopeless claim.

38. Even if there had been jurisdiction to hear a claim of this sort, there was no reasonable prospect of the claimant establishing that it was not reasonably

practicable to bring the complaint in time when he had the materials which he says showed the attitude of the respondent's employees to him in March 2020 and when he was or should have been well aware of tribunal time limits as a result of bringing previous employment tribunal proceedings in 2018. Had I not concluded that the lack of merit in the claim conclusively tipped the balance in favour of refusing the amendment, the limitation issue and the lack of alacrity with which the claimant sought to amend would in any event have weighed heavily in the balance against allowing the amendment.

Amendment: age discrimination claim

39. It appeared from our discussion, that the claimant was not asserting that the respondent's treatment in not employing him was because of his age nor was he suggesting that the respondent had a provision criterion or practice which adversely affected job applicants of his age. He was complaining instead that because he was being treated badly as a result of his whistleblowing, prospective employers were failing to give him credit for experience he would not have been able to accrue if he were younger. He was also saying that his age meant there were fewer appropriate roles for him to apply for because of his seniority. He was not asserting that the respondent had turned him down for any of the roles he applied for because of his age or experience. His complaint boiled down to a complaint that he did not receive the more favourable treatment he should have done consequent on his age and experience for reasons unconnected with his age and experience.

40. Taking the claimant's case at its highest, it seemed to me to be hopeless. He has not asserted less favourable treatment because of age or that he was adversely affected by a provision criterion or practice of the respondent. He has not brought a complaint which has the elements of any type of unlawful discrimination.

41. I therefore did not grant this amendment either.

42. If I had not concluded the claimant's case in this respect was hopeless, I would have concluded that it was not just and equitable to extend time for this complaint to be heard. It did not seem to me that being busy with work and other litigation was a good excuse for a delay of some months in circumstances where the last application for an actual role was 30 August 2019 and the earliest application was May 2018. Again there did not seem to be any coherent explanation for the delay in pursuing the amendment.

43. For those reasons the application to amend was refused. Since the claim form as unamended has no reasonable prospects of success, it followed that the claims were stuck out.

44. The claims having been struck out, there were no further matters to consider in relation to consolidation with other claims or case management.

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Employment Judge Joffe
London Central Region
16th March 2021

Sent to the parties on:
17th March 2021

For the Tribunals Office