Case No: 2203467/20, 2206537/20, 2206538/20, 2206539/20, 2206540/20, 2206541/20

EMPLOYMENT TRIBUNALS

Claimant: Mr H. Moran-Citkovic **Respondents** (1) Yeo Messaging Ltd
(2) Mr A. Jones
(3) Mr A. Wilson
(4) Mr. J. Ward
(5) Ms S. Norford-Jones
(6) Mr P. Calver

London Central Remote Hearing (CVP) **On: 2 March 2021**

Before: **Employment Judge Goodman**

Representation
Claimant: in person
Respondents: Ms D. Grennan, counsel

PRELIMINARY HEARING

JUDGMENT

The claims against the fourth, fifth and sixth respondents are dismissed under rule 37 because they have no reasonable prospect of success.

REASONS

1. Under rule 37, the Tribunal has power to strike out a claim on the basis that it has no reasonable prospect of success. In claims under the Equality Act, and of whistleblowing brought under the Employment Rights Act, it has been made clear to employment tribunals that they must take great care before deciding to strike out a case at a preliminary stage, before evidence has been heard, because they are so often fact sensitive, and they are important for society as well as the individual parties- **Anyonwu v South Bank University**, **Ezsias v North Glamorgan NHS Trust**. If making the decision before evidence has been heard, they must take the claimant's case at its highest, and

assume that what is said in the claim form is true and proved, and then decide whether in law it amounts to a claim with any prospect of success. The tribunal is also entitled to look at incontrovertible contemporary documentary evidence in assessing this. If there are likely to be disputes of fact which affect the outcome, the claim should go to a full hearing.

2. The respondents seek to strike out the claims against the fourth, fifth, and sixth respondents. They are, respectively, James Ward who is the company secretary, Sarah Norford-Jones, a co-owner who had recently returned from maternity leave and assumed some HR functions, and Paul Calver, who joined the company on 11 May 2020 and was recruited as the claimant's replacement. It is said that none of these respondents was involved in decisions about the detriments pleaded, or the dismissal.

3. It is important to record that the first respondent accepts that it is vicariously liable for any actions of their officers and employees who are the second to sixth respondents. The claimant is not therefore deprived of a claim relating to matters in which they may have had some involvement if they are no longer respondents to the action.

4. James Ward was the company secretary, but had no executive or management role, and had no company email. He was unaware of any issues raised by the claimant about alleged furlough fraud, or delayed development of the software, until copied in to the claimant's email of 29 May 2020. He did not participate in the discussions in which the claimant made the alleged oral disclosures, and the written disclosure of 17 May 2020 was not copied to him . The disclosure that was copied to him came the day *after* the claimant understood from discussions with the respondent that they contemplated dismissing him.

5. On the claim form the claim against James Ward was that he: "unfairly criticised or lied about the quality and status of my work, believe me, failed to act upon and prevented me from advancing my whistleblower grievance, and failed to act upon the suspension of suspended access to my accounts for over 10 days, reasons why I was forced to submit a constructive dismissal". In another document headed "statement H.Moran v Sarah Norford-Jones", at paragraph 9 he says: "after refusing to join the furlough fraud initiative and making the PID's I suffered detriments by James Ward". He gives no detail of what James Ward said or did. If there is anything about it in his witness statement for the interim relief hearing (which I do not have for this hearing), it is not recorded in that decision. The respondent's case is that Mr Ward knew nothing about allegations of furlough fraud until 29 May, by which time the decision to dismiss had been made by the first respondent, and the claimant had already been suspended. The respondents agree

there was a discussion on 31 March 2020 about the first respondent's cash flow situation, when Mr Ward expressed no view on the claimant's performance. As of 31 March, the only protected disclosure that have been made so far was on 27 March, orally, to Mr Jones, second respondent It is said that he only met the claimant once or twice and the contact was innocuous.

6. This does not explain what exactly Mr Ward is said to have contributed to the process. As company secretary in a small start-up it is possible that he will have been aware of the funding difficulties posed by the software development falling short of the expected date for the further funding round, and may have been aware of discussions about the claimant before 29 May 2020. However, being aware of the discussion does not demonstrate that he was the actor or agent of the company in any of the detriments, which have been listed by Employment Judge Palca in her order.

7. I conclude that on the claimant's case, which is pleaded in generic terms identical to those against the other individual respondents, without specific facts, it is not shown that Mr Ward took any of the actions alleged as detriment, save as an agent of the company and on instructions from others, and it is no more than speculation that he might have been told about the oral disclosures. The claim against him has no reasonable prospect of success and for that reason should be struck out.

8. As for Sarah Norford-Jones, the claimant says of his 29 May grievance, following which his work accounts were closed, "Sarah Norford-Jones was copied in this grievance, but he (sic) failed to act upon it. Equally, she failed to restore my accounts and so allow me to continue with my work". For the respondent it was said that Ms Norford-Jones was on maternity leave until the end of February, that she then returned to work half-time working from home until the end of April, then increased her hours but continued to work from home. She works in product design, and had little contact with the claimant. Her only involvement in HR was to try to build some team culture while staff were working from home. She did not become involved in the claimant's grievance as her father, the second respondent, was dealing with it. I discussed this with the claimant in the hearing. His case was that even if she was not aware of disclosures, she was manipulated by others, and should therefore be a respondent.

9. I conclude that even taking the claimant's case at its highest he has not shown any facts which establish that Ms Norford-Jones took actions, or failed to take action which she should have done (processing the grievance), because of the claimant making protected disclosures

about furlough fraud. It is clear that her involvement was peripheral, and that the grievance was in the hands of her father, the second respondent. Insofar as she failed to take independent action on the grievance, or to restore his accounts, it is clear that the decisions on this were taken by other named respondents. To succeed against her as a named respondent, the claimant would have to establish that the reason why she acted as she did was because he had made a protected disclosure. The claimant did not suggest that she was aware of disclosures before being copied into the grievance of 29 May, so not processing the grievance is the only matter for which she could be responsible Given her late involvement in the series of actions pleaded as detriment, and given the fact that others had made a decision to dismiss the claimant before (as pleaded by the claimant) she was aware of any disclosure, I conclude that any case against her is speculative, and has no reasonable prospect of success. The claim against her is struck out.

10. Paul Calver was recruited on 11 May 2020 and had no previous association with the respondent company. He was a software developer intended to replace the claimant because of concern that the claimant's work was not going to meet the funding deadline or would be adequate. He was asked to prepare a report on the claimant's work so far. On the claim form, it is said that he "engaged in detriments contrary to section 47B (1A), particularly detriments resulting in dismissal", and so is vicariously liable. It says "the respondent lied about my performance and status of my work, and this in turn led to other detriments by the management, ultimately forcing me to submit a constructive dismissal". As I do not have the bundle available to Judge Hodgson, I do not know when he was asked to prepare this report. The ET3 response suggests that he was asked to prepare a statement for the purpose of the interim relief application, which suggests that it was not prepared until after proceedings began in midJune 2020.

11. In the case of Paul Calver, I see no reasonable prospect of success against this respondent. It seems highly improbable that he was aware of allegations of furlough fraud. More importantly, on the claimant's own case, as recorded in paragraph 62 of employment Judge Hodgson's decision, the claimant realised that the (first) respondent was engaged in strategy of bullying and intimidation to make him resign, and for that reason contacted a whistleblower charity for help on 11 May 2020. Then on 28 May there was a discussion in which was made clear that his employment was to be terminated, which the claimant does not dispute, save to say that there was no "formal termination" until he resigned on 8 June or the respondent dismissed him on 9 June. Even if Paul Calver wrote his assessment of the claimant's work before 28 May, there is no prospect of establishing that anything he did materially influenced the respondent's decision to dismiss the claimant. It is clear that the respondent had already decided that the claimant's work was

inadequate, that is why they decided to recruit a replacement, interviewing Paul Calva on 7 May, to start on 11 May. Anything he said after that, even if written before 28 May, is unlikely to have contributed much or at all. I concluded that the claim against Paul Calver should also be struck out as disclosing no reasonable prospect of success. Even if, which is unlikely, he knew about the protected disclosures, the decisions and acts pleaded as detriment, and the dismissal decision, were made before he became involved with the respondent company.

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Employment Judge Goodman

Date: 17/03/2021

JUDGMENT and REASONS SENT to the PARTIES ON

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18th March 2021

FOR THE TRIBUNAL OFFICE