# EMPLOYMENT TRIBUNALS

**Claimants:** (1) Mr A. Marshall
(2) Mr B. Gee
(3) Mr A. Alston
(4) Mr A. F. Macedo
(5) Mr. F. Oliveira Silva
(6) Mr J. G. Ramstein
(7) Mr J.M. Bosher
(8) Mr J. Foster

**Respondents:** (1) The Doctors Laboratory
(2) Mr. D. Byrne
(3) Mr. L. Harvey

**London Central remote hearing (CVP)** **7 June 2021**

**Employment Judge Goodman**

**Representation:**
**Claimants:** Dr Melanie Sharp, pupil barrister
**Respondents:** Mr Thomas Kibling, counsel

# JUDGMENT

1. No order on the application under rule 37 to strike out claims as having no reasonable prosect of success.

2. The application for a deposit order under rule 39 is dismissed.

# REASONS

1. The 8 claimants bring claims of unfair dismissal and detriment for making protected disclosures, or for bringing working time claims (holiday pay) or for trade union activities, arising from the termination of employment with the first respondent in the early weeks of the pandemic. The respondents say this was by reason of redundancy.

2. It is common ground that the claimants were all workers, who can bring

claims for detriment, but in the unfair dismissal claims, all claimants but one have first to establish they were employees.

3. The employer is the first respondent. The second and third respondents ("the individual respondents") are the CEO and logistics director respectively of the first respondent. Claims have been brought against the individual respondents personally for subjecting the claimants to detriment on grounds of public interest disclosures made by the first and second claimant, who were the trade union representatives (paragraph 88, grounds of claim). The detriment is the selection for redundancy.

4. The individual respondents apply to have the claims against them struck out, alternatively, that the claimants be required to pay a deposit as a condition of continuing.

5. Order 37 of the Employment Tribunal Rules of Procedure 2013 provides power to strike out any claim of grounds that it has no reasonable prospect of success. Order 39 permits tribunal to make an order party be required to pay a deposit as a condition of continuing with any claim, if the tribunal considers that the trip claim has little reasonable prospect of success. If the claimant pays a deposit but fails at trial in essentially the same reasons as those for which the order was made, the claimant risks and order that he pay the respondent's costs on the basis that the claim was unreasonably pursued.

**6.** Striking out claims at a preliminary stage, before evidence has been heard, is a draconian measure, only to be taken in an obvious case. In any case where there is a "crucial core of disputed facts", those should be decided after hearing the evidence, and not at some kind of "impromptu trial" based on pleadings and written statements, save where there is, for example, incontrovertible contradictory evidence in a document. In whistleblowing (public interest disclosure) cases, which are important in a democratic society, over and above the interest of the individual claimant, and particularly fact sensitive, tribunals should be especially careful – **Tayside Public Transport Company Ltd v Reilly (2012) IRLR 755; Ezsias v North Glamorgan NHS Trust (2007) IRLR 603**. The tribunal must first decide whether there is no reasonable prospect of success and then whether to exercise discretion to strike out – **Balls v Downham Market High School and College (2011) IRLR 217.**

7. When considering a deposit order, the tribunal has to consider the cost time and anxiety of defending the claim with little reasonable prospect of success, while being mindful whether the order's practical effect may be to deter claimants, and in effect bar them access to justice – **Hemdan v Ishmail and another (2017) IRLR 228.**

8. The statutory background to the liability of individuals for public interest disclosure detriment, where other detriment claims are only brought

against employers, **Timis and Sage v Osipov (2018) EWCA Civ 2321.** The remedy for detriment in these claims could include the effect of a dismissal, if that was a foreseeable consequence of the detrimental decision. It may also be important that the test of causation differs in dismissal and detriment claims – sole or in this case was Daniel Frayn, whose witness statement for the earlier interim relief application in this case is before the tribunal. In his witness statement he denies any knowledge of the exchange of correspondence between the first claimant and the second respondent in March 2020 which is the pleaded protected disclosure. The first claimant was raising issues about the provision of personal protective equipment, Covid 19 testing, social distancing, the safety of sample packaging, and full pay, not just statutory sick pay, for those required to self-isolate. The claimants rely too on press and broadcast media statements about this. The claimants also rely explicitly on evidence from former manager, Tim Kerton,, that the second revolt respondent referred to the union activists as troublemakers, and to the third respondent having been brought into "deal" with the unions. Respondent says that Mr Kerton left the respondent's employment 15 months before redundancy decisions were made, and that even if this evidence could be substantiated, it demonstrates only the most tenuous link with the redundancy decision made in the early months of the pandemic, and is "inherently implausible".

9. The first respondent does not raise the statutory defence that it did not take reasonable steps to prevent the second and third respondents from acting unlawfully in respect of any protected disclosures. It is suggested that it is not therefore necessary for the claimants therefore to bring claims against the individual respondents, as well as the employer first respondent, and that it will cause a them anxiety and cost.

10. For the claimants, the tribunal is invited to consider in particular the difficulty of distinguishing the various factors operating on the minds of the respondent decision-makers, which in the run-up to the decisions range from the protected disclosure correspondence of March to the trade union activities including the strike ballot notice, and second respondent as CEO, aware of the decisions being made by Daniel Freyn, already knowing of the trade union backed claims in the employment tribunal, and likely to be aware of media coverage of the public interest disclosures. There was a "massive overlap" between the first and second claimants making protected disclosures in their capacity as trade union representatives, and the trade union activities more widely, which might make it difficult to distinguish whether it was the protected disclosures that operated on the mind of the respondent decision-makers, or the matters which cannot be brought against individuals, such as bringing a claim under working time regulations, or trade union activities. The tribunal should be able to consider the facts in their entirety.

11. It is not suggested that the claimants do not have ability to pay a deposit, or that the first respondent is or may become insolvent.

12. The central matter for the tribunal to decide in this case is the respondents' reasons for terminating the claimant's employment: whether redundancy, trade union activity, earlier claims for holiday pay, or public interest disclosures, and the part played by each. Principally, this will mean examining the reasons of the first respondent, the employer, as only the employer can dismiss, these are brought as unfair dismissal claims or claims for detriment, but as the principal decision maker, Mr Kerton, was seemingly unaware of the public interest disclosure correspondence, it will be necessary to examine the state of mind of the second respondent at least, given his position as CEO, and that he may have influenced the decision even if he did not make particular reasons clear. A reason is a set of facts, or as the case may be beliefs, held by the respondent. This is a disputed core factual issue, and on the face of it should not be struck out without full hearing of the facts, particularly as it involves protected disclosure. Assuming the first respondent's continued solvency, it may not be necessary to continue to involve the second and third respondent, but equally there is no reason why they should not be involved. Leaving aside the risk of insolvency, there was some suggestion that the claimants were concerned that the second and third respondents might not otherwise be called to give evidence as to their part in the decision making, as it was argued for the individual respondents that have to draft and serve statements and attend the hearing was unnecessary.

13. Given the potential complexity of making findings about reasons, I conclude that it is better for the tribunal to reach conclusions about the respondents reasons for dismissal, or deciding to dismiss, after hearing all the evidence and making findings of fact, rather than at this preliminary stage. There is no order on the application to strike out.

14. There is a stronger case for concluding that the claims of detriment for making protected disclosures on the health and safety issues have little reasonable prospect of success. They play but a small part in the overall background of trade union activities being alleged, and it is particularly relevant that Daniel Freyn says he was unaware of this correspondence. It is of course still *possible* that the protected disclosures, and the publicity given to them, played a part, causing the second or third respondent to direct or encourage the choice of this group of couriers for redundancy. However, even if there were little reasonable prospect of success, as an exercise of discretion I doubt there is much gain in making a deposit order. The real deterrent effect of a deposit order on weak claims is the threat of costs. If the claim against the individual respondents did not succeed, it would be particularly difficult to establish what additional costs had been incurred by these arguments, given the scope of the evidence that will have to be heard to examine the respondent's reasons for the decision to dismiss, and which of the competing or cumulative reasons were operative or had material influence. It is therefore hard to see what additional benefit there is in making such an order, when contrasted with the loss to the claimants if deterred from bringing claims against the individual

respondents for protected disclosures, and the difficulty they would face if the person to whom the disclosures were made did not give evidence. There is thus no order on the application for a deposit order.

Employment Judge Goodman

Date: 7th June 2021

JUDGMENT and REASONS SENT to the PARTIES ON

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FOR THE TRIBUNAL OFFICE