EMPLOYMENT TRIBUNALS

Claimant: Benjamin Holt

Respondents: White Star Education Ltd (in liquidation) (1)
Zakaria Mahmood (2)

Heard at: London South (by cvp) **On:** 07June 2021

Before: Employment Judge Housego

Representation

Claimant: Monica Beccles, of Advantage Human Resources

Respondent: Alice Meredith, of Counsel, instructed by Springhouse Solicitors

JUDGMENT

1. The claim against the 2nd Respondent is dismissed under Rule 37(a) as one that has no reasonable prospect of success.
2. The Claimant is ordered to pay the 2nd Respondent £3,500 costs.
3. The name of the 1st (remaining) Respondent is amended as above.
4. The claim against the 1st Respondent remains stayed.

REASONS

1. The following facts and statements of position are not in dispute.

2. The Claimant was employed by the 1st Respondent from 04 April 2018 until summarily dismissed on 02 January 2019. He was Director of Global Planning & Analysis, and his salary was £105,000 a year.

3. The 2nd Respondent was the Director and Chief Executive of the 1st Respondent, and sat on the Board.

4. The Claimant was the sole shareholder and director of TeamCamp Ltd. On 09 January 2018 he emailed the 2nd Respondent to say that he had closed down all operations save a summer camp, and that he had a project manager who would be "leading things forward".

5. The Claimant's contract of employment required that he work full time and exclusively for the 1st Respondent. In an email of 15 February 2018 Mr Mahmood pointed out that this was important to the 1st Respondent, and in reply (on 18 February 2018) Mr Holt referred to clause 5.2.1 of the contract, and said that he had no problem with being fully professionally engaged with the 1st Respondent, and his only observation was that he would not be expected to work literally every hour and have no leisure time.

6. The 1st Respondent was deep in discussion with an outside investor for the introduction of £5m. That investor did due diligence work, and discovered the Claimant's ownership of TeamCamp Ltd. The investor regarded it as a conflicting interest, and withdrew. The Claimant would have put the 2nd Respondent to proof of this, but in assessing the strength of the claim I note that all the correspondence and meeting notes (involving the Claimant, who agreed them, with amendments) are that this was what occurred.

7. Mr Mahmood called a Board meeting to explain this to the Board. The Board meeting was on 27 December 2018. Those present were Mr Mahmood, the Chair, and 2 non-executive directors. The Board was most unhappy about this, and Mr Mahmood was instructed to hold a disciplinary hearing.

8. At that hearing this matter was discussed, as were other matters. These were that there was extensive email traffic from Mr Holt on the 1st Respondent's system about TeamCamp matters, he had interviewed someone for a role at TeamCamp at the 1st Respondent's premises, and had been sick with a migraine one day, but had gone to a TeamCamp social event in the evening. He was alleged habitually to have interrupted meetings to take what he had described as personal calls, but which it was now felt were TeamCamp related. The Board considered TeamCamp a competitor. It felt that Mr Holt had not been open and honest, had not declared his business interest and had been obliged to do so, and that he was in breach of his contract which required him to make the 1st Respondent his sole work.

9. At the disciplinary hearing on 02 January 2019, the minutes show that Mr Holt said that Mr Mahmood knew all about his involvement with TeamCamp Ltd. Mr Mahmood disputed this. Mr Holt was not prepared to give much information about TeamCamp Ltd. It was not the business of the 1st Respondent what he did out of working hours (he later stated that on 06 December 2019 he had a migraine, had slept 6 hours, and recovered enough to attend TeamCamp Ltd.'s annual social meeting, while still "fragile").

10. On 27 December 2019 the Board had agreed a matrix of actions dependent on Mr Holt's approach to matters: non acceptance of any issue and lack of regret meant that Mr Mahmood was to dismiss Mr Holt, which he did, at that meeting, Mr Holt not accepting that there was an issue and expressing no regret.

11. On 07 January 2019 Mr Holt appealed. He stated that TeamCamp Ltd was a complementary business and that Mr Mahmood and he had discussed the matter frequently, and how this would be managed so as not to be a conflict. He had not invented a reason to leave work early. Mr Mahmood knew he suffered from migraines.

12. The appeal was taken by the 1st Respondent's Chair, who dismissed it, seeing no reason why it was not appropriate to dismiss Mr Holt.

13. Mr Holt then started Employment Tribunal proceedings. His Acas Early Conciliation Certificate was applied for on 31 January 2019, and issued on 01 March 2019. The prospective respondent was INTCAS (UK) Ltd, which was then the name of the 1st Respondent.

14. This claim was lodged on 03 March 2019.

15. On 31 October 2019 Mr Mahmood resigned from the 1st Respondent.

16. On 17 January 2020 there was a case management hearing. Ms Beckles was instructed the day before the hearing, or possibly the day before that. She read the particulars of claim, and advised Mr Holt that he should be seeking to add Mr Mahmood as a 2nd Respondent. She made that application, without notice, at the case management hearing. Mr Mahmood knew of the hearing, and contacted the 1st Respondent. He went to the hearing, not intending to represent the 1st Respondent but so that he could report back to them. He was not expecting to be facing an application to be joined as a respondent himself.

17. After that hearing he was not sent the case management order, nor the claim form. Eventually he was served, presumably in early May 2020, as the date for filing the ET3 was 08 June 2020.

18. He did file an ET3, broadly similar to that of the 1st Respondent, but also asking for further and better particulars of the claim against him.

19. The claim was listed for a 3 day hearing in April 2021. The further and better particulars were not filed. Then Mr Mahmood applied for removal as a respondent or that the claim be dismissed as having no reasonable prospect of success, or a deposit ordered if that application was not successful but the claim was felt to have little reasonable prospect of success.

20. On 17 May 2021 the Claimant applied to have Mr Mahmood's defence struck out under Rule 37, asserting that Mr Mahmood had made a threatening telephone call in March 2020 from a mobile phone in which he was said to have told Mr Holt that it would be better for hm and his children if he did not attend the 3 day hearing in April 2020. Mr Holt recorded part of it, and the police investigated. They did not think it was Mr Mahmood's voice. Mr Mahmood handed over his phone to the police and there was no call made at the time to Mr Holt's number on it. Mr Holt says the caller knew the names of his children and details of the claim and so it must have been Mr Mahmood. Part of the call was recorded: Mr Mahmood says this must be an attempt to discredit him. I have no papers or information about this, and declined to deal

with this at this hearing. It is not referred to in the notice of hearing. The other matters would, in any event, need to be dealt with first.

21. Ms Meredith applied for Mr Mahmood to be removed as a respondent under Rule 34, submitting that he had been apparently wrongly included. Alternatively, she invited me to reconsider the case management order under Rule 70, of my own volition or on her application.

22. I observed that Judge Freer's order had not been appealed, and one could not appeal by the back door by seeking an order from another judge to replace that of another. Ms Meredith pointed out that Mr Mahmood had not been able to appeal as he had not had the order of 17 January 2020 until May 2020, and that it was strongly arguable that he was wrongly included as a party. Judge Freer had given no reasons why he had allowed the application, and the very brief paragraph did not consider the *Selkent*[1] principles. There was no Acas EC certificate in relation to him, and the application was about 9 months out of time with no explanation.

23. I observed that reconsideration was usually undertaken by the judge who made the order. Ms Meredith pointed out that Rule 70 refers to "A Tribunal…" not "The Tribunal…", and submitted that it was very much in the interests of justice to do so.

24. Her third application was to strike out the claim as having no reasonable prospect of success.

25. The hearing started with Ms Meredith's submissions on removal of Mr Mahmood as 2nd Respondent, and part of that submission was the balance of prejudice (that the claim was now stale, that Mr Mahmood had not been in the 1st Respondent since October 2019, that the 1st Respondent was in administration and so there was limited or no opportunity for him to obtain evidence).

26. Ms Beckles' response to this submission developed the way the Claimant presented his case, and I decided to deal with this application first.

27. I make it clear that Mr Mahmood does not accept any part of the Claimant's case, and what follows is as the Claimant asserts matters. The Claimant's case is that Mr Mahmood was tasked with reducing headcount and cost. He used the fact of Mr Holt's ownership of TeamCare Ltd, of which he had always known, as a pretext. He and Mr Mahmood had discussed leveraging advantage from TeamCare Ltd for the benefit of the 1st Respondent. Mr Mahmood had intentionally misled the board about Mr Holt not telling anyone about TeamCare Ltd as a way of getting him dismissed.

28. I enquired what any of this had to do with Mr Holt's migraines. Ms Beckles said that Mr Mahmood had wrongly accused Mr Holt of faking a migraine to go home, but went to a TeamCare Ltd social that evening, 06 December 2018. He had also said on occasion that Mr Holt looked tired, and on one occasion in Dubai had criticised his wearing of a hat to shield himself from the sun, so as to try to avoid a migraine.

[1] Selkent Bus Co Ltd v Moore [1996] ICR 836

29. Ms Meredith pointed out that the claim was raised only as a S15 claim, not as one of direct discrimination, and that the matter of the hat in Dubai was not referred to at all. She pointed out that there is no mention in the ET1 of *"leveraging"* TeamCare Ltd's business to the advantage of the 1st Respondent. She pointed out that the whole thrust of this argument was totally unconnected with migraine, and that the reference to the 06 December 2018 was tangential at best, as the focus was on the loss of an investor, and Mr Mahmood allegedly seeking to deflect blame for the loss of the investor over a matter he knew all about, and about cost saving being the reason why Mr Holt was, in his submission unfairly, targeted for dismissal.

30. That submission sums up the case accurately and shortly. Mr Holt cannot bring a claim for unfair dismissal, and so relies on a protected characteristic, but that protected characteristic has no connection with the detriment of dismissal. The other matters were either not pleaded at all, or no detriment flowed from them. It was not that the 06 December 2018 function was of any weight when compared to the loss of £5m investment and, in any event, Mr Holt says that he was targeted to save money, not by reason of any disability, or was a scapegoat to conceal what he says was Mr Mahmood's fault in losing that investor. That is not causally connected to disability.

31. The claims made have evolved as circumstances have changed. The original claim centres on the TeamCamp matter and the asserted conflict of interest. Mr Mahmood was not made a respondent, and it did not occur to him, but to his representative, a year after he was dismissed.

32. The claim form was not amended when Mr Mahmood was added and is so opaque so far as Mr Mahmood is concerned that he sought further and better particulars of what was alleged against him, which has not been forthcoming.

33. While the application predated the start of the administration of the 1st Respondent by few days and so could not have been the reason for the application, there has been no application to the administrators to continue the claim, some 14 months after the action was stayed against the 1st Respondent. Plainly the Claimant, having not thought of pursuing Mr Mahmood for a year, now relies on doing so.

34. The claim was outlined in this hearing as set out above: when opposing the costs application which followed my ex tempore oral judgment the claim had further evolved so that it was then based on contempt by Mr Mahmood for Mr Holt, such that the 06 December 2018 was a trigger event leading to the dismissal on 02 January 2019, the TeamCamp matter being but a pretext. This was not pleaded in the ET1. Nor does it deal with there being no dispute that there was an issue with an investor: which was an essential part of the prior iteration of the claim.

35. That finding means that I do not have to deal with the other matters. For the avoidance of doubt, I would not have reconsidered the case management order of 17 January 2020. It is too late to do so, but more fundamentally such an application would be considered by the judge who made it.

36. I would have allowed the application to remove the 2nd Respondent as a respondent to this claim for other reasons. With great respect to the judge who made the order, the reasoning behind it is not apparent. Rule 34 expressly states that the Tribunal may remove any party apparently wrongly included. This is intended to apply to administrative decisions made on consideration of claim forms, but the rule also refers to the interests of justice (albeit in connection with adding respondents).

37. Rule 2 is the overriding objective, which is to deal with cases fairly and justly, and that informs my decision.

38. I note (and rely on) Rule 29. This provides that a case management order may set aside a case management order where it is in the interests of justice to do so. It is in the interests of justice to set aside the case management order of 17 January 2020 in so far as it joined the 2nd Respondent.

39. This is because:

    39.1. Mr Mahmood has no access to the 1st Respondent's papers, systems or records, and has not had such access since (at latest) 5 days after the hearing of 17 January 2020.

    39.2. Mr Mahmood was not joined for a year after Mr Holt was dismissed, which was about 9 months out of time.

    39.3. There was no new information leading to the application to join him – it was simply that his new representative thought that he had made a mistake in failing to do so.

    39.4. The application was made on the day of the order – 17 January 2020. Mr Mahmood had no notice of it and was not represented. He had attended only as a favour to his previous employer. He was taken by surprise by this application and decision.

    39.5. He did not receive the case management order or the claim form until May 2020, about 16 months after Mr Holt was dismissed.

    39.6. The claim form does not make clear what claims are made against him, other than unfair dismissal.

    39.7. The case management order expressly states that if the 1st Respondent stated that it did not rely on the statutory defence consideration would be given to removing Mr Mahmood as a respondent. The 1st Respondent provided such confirmation in a letter faxed to the Tribunal that very day, 17 January 2020, but there was no reconsideration of the order joining Mr Mahmood as a respondent.

40. I do not consider this meets the *Selkent* principles. The nature of the amendment made on 17 January 2020 is to add new claims against a different respondent. There is a real issue with time limits, and no explanation for delay other than not knowing for a year that he could claim against Mr Mahmood. The timing and manner of the application was an ambush at the hearing on 17 January 2020. The order does not consider the length of time

the claim was out of time by 17 January 2020, as is required by *Galilee*[2]. It was not a relabelling, but a different claim (of direct discrimination, not S15) against a different respondent.

41. I also attach weight to Vaughan v Modality Partnership UKEAT/0147/20/BA, paragraphs 21-27. The consequences of this amendment are very significant for Mr Mahmood, and he has great difficulty in defending. Paragraphs 24.2 and 24.3 are apposite – there is prejudice as he has to face a cause of action that would have been dismissed as out of time had it been brought as a new claim, and it is a late amendment and Mr Mahmood is prejudiced because it is more difficult to respond to than if made in time.

42. Accordingly, had I not found that the claim had no reasonable prospect of success I would have still dismissed the claim against the 2nd Respondent.

43. In parenthesis I reject Ms Meredith's argument based on absence of an Acas early conciliation certificate. I do not find the absence of an Acas Early Conciliation Certificate of relevance. Respondents can be substituted without one[3]. An overly technical approach should not be taken[4]. The certificate relates to a *"matter"* which is intended to be vague and all encompassing[5]. The issue is simply one of amendment[6].

44. There was no application in respect of the claim against the 1st Respondent, and so I do not strike out that claim also, although it is not easy to see how it may succeed given this judgment.

45. I note also that Companies House states that the administration started on 22 January 2020 and ended on 23 November 2020, on which date the 1st Respondent entered a creditors voluntary liquidation, and so I have amended the name of the 1st Respondent in this claim.

46. Ms Meredith applied for costs under Rule 76(1)(b) (no reasonable prospect of success) and 76(1)(a) (litigation conducted *"otherwise unreasonably"*). Ms Beckles opposed the application. Her reasons for doing so came close to not accepting the finding that the claim had no reasonable prospect of success, in part by restructuring the emphasis of the claim in a way not put at earlier stages.

47. I decided to make a costs order under both sub paragraphs. The Claimant was on notice that such an application would be made. The sum claimed was £8,575. Vat was not sought on that figure. Ms Meredith accepted that £850 costs incurred when a hearing listed for 22 September 2020 was adjourned for want of judicial resource were not recoverable. While opposing in principle, Ms Beckles did not object to any aspect of the amount of costs.

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[2] Galilee v Commissioner of Police of the Metropolis UKEAT/207/16
[3] Drake International Systems Ltd & Ors v Blue Arrow Ltd (Practice and Procedure) [2016] UKEAT 0282_15_2701
[4] De Mota v ADR Network & Anor (Jurisdictional Points) [2017] UKEAT 0305_16_1309
[5] Compass Group UK & Ireland Ltd v Morgan (Practice and Procedure: Preliminary issues) [2016] UKEAT 0060_16_2607
[6] Science Warehouse Ltd v Mills (Practice and Procedure: Amendment) [2015] UKEAT 0224_15_0910

48. I decided that aspects of the way this case had been handled by the Tribunal system had added to the costs, so that the order should not be for the whole amount of costs incurred. I decided that it was just and equitable to order the Claimant to pay to the 2nd Respondent the sum of £3,500, this being a little less than half of the total (after removing the £850 in respect of 22 September 2020).

Employment Judge Housego

Date 07June 2021