



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss A Wellspring

**Respondent:** IntelligentPA Ltd

**Heard at:** London South Croydon in public by CVP

**On:** 4 June 2021

**Before:** Employment Judge Tsamados

## Representation

**Claimant:** Did not attend and was not represented

**Respondent:** Mr Roddy, Trainee Solicitor

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

# JUDGMENT AT PRELIMINARY HEARING

The judgment of the Employment Tribunal is as follows:

The claimant's claim has no reasonable prospect of success and is struck out.

# REASONS

## Background

1. This is a public Preliminary Hearing listed for one hour commencing at 10 am at which to consider the respondent's application for the claimant's claim to be struck out.

2. The claimant presented her claim to the Employment Tribunal on 6 January 2020 following a period of early conciliation between 3 October and 3 November 2019. She was employed as an Accounts Assistant by the respondent from 9 to 29 September 2019. Within her claim form she raises a complaint of damages for breach of contract in respect of her dismissal without notice or payment in lieu of notice and a complaint of detrimental treatment and/or unfair dismissal as a result of making a protected disclosure, more commonly known as whistleblowing. However, the claim form does not set out sufficient particulars of the protected disclosure claim.
3. The particulars of claim essentially detail what amounts to unfair treatment, failure to provide an adequate contract of employment, failure to give notice of dismissal or payment in lieu and failure to adequately deal with Subject Access Requests under the data protection legislation.
4. The relevant part of her particulars of claim relating to the public interest disclosure complaint is as follows:

*"I believe all her reasons for dismissal to be fabricated after I questioned Joanna's practice regarding what i believe to be fraudulent practice that goes against the code of practice for AAT members and she didn't want me having access to sensitive information.*

...

*I didn't actually know this information until after I left so I believe her getting rid of me so quickly was an attempt to stop me finding out anymore sensitive information. There are several organisations complaints could be made to regarding the practices of her company."*

5. In its response received by the Tribunal on 5 February 2020, the respondent denies the claim in its entirety. In essence, the respondent states that the claimant was dismissed for poor performance and that she has subsequently been paid one week's notice pay of £178.50 on 3 February 2020. The respondent also makes the point that the claimant had no statutory entitlement to notice or written particulars of employment given her short length of service.
6. This is indeed the case, an employee not qualifying for statutory minimum notice of one week until having been employed for at least one month and similarly, at that time, with regard to written particulars of employment.
7. There was initially a difficulty created by the Tribunal administration in communicating with the claimant by writing to her at an incorrect address. However this was resolved as far as the respondent communicated with the claimant by email and thereafter so did the Tribunal administration.
8. A private preliminary hearing dealing with case management took place by CVP on 15 July 2020 conducted by Employment Judge Wright. Whilst the claimant initially took part in the hearing, she experienced IT problems and left the hearing and did not subsequently re-join. At that hearing, EJ Wright noted the respondent's concerns about each of the complaints. As a result, the claimant was ordered to confirm whether or not she withdraws her claim for notice pay and if not to set out particulars of that claim and secondly the claimant was ordered to provide particulars strictly by reference to her pleaded claim form in the level of detail required to disclose the factual basis on which she alleged that she had been dismissed because she had made a protected

disclosure. The claimant was given until 31 July 2020 in which to comply with these orders.

9. The claimant did not comply with these orders and a further private preliminary hearing was conducted by telephone on 22 September 2020 by EJ Truscott QC. The claimant did not attend this hearing and EJ Truscott QC listed the matter for a public preliminary hearing on 29 January 2021 at which the Tribunal would consider whether to strike out her claim.
10. In the event that hearing did not go ahead due to lack of judicial resources and was relisted for today.
11. By 10 am, the claimant had not joined the CVP hearing. I directed my clerk to telephone her and remind her that the hearing was today at 10 am and to either join the hearing immediately or provide some explanation as to why she was unable to do so and to warn her that subject to what she said I may well decide to continue with the hearing in her absence. My clerk reported that the claimant's phone went straight to voicemail and so she left a message to this effect. Indeed, Mr Roddy indicated that he was not surprised by the claimant's lack of attendance given that he had attempted to call her yesterday but to no avail.
12. I commenced the hearing at 10.15 am, by which time the claimant had not contacted the Tribunal and was not in the CVP room. In the circumstances I decided that it was appropriate to proceed in the claimant's absence in accordance with the powers available to me under rule 47 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.
13. I have before me the following documents: a bundle of documents by the respondent which contained 86 pages; the respondent's supplementary bundle containing 6 pages; an earlier bundle of documents for the case management discussion containing 11 pages; a bundle of documents from the claimant dated 15 July 2020 containing 12 pages.
14. Essentially under Rule 37(1)(a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, I am required to form a view on the merits of certain elements of the claimant's claim and only where I am satisfied that those elements have no reasonable prospect of succeeding can I exercise my power to strike out.
15. In **North Glamorgan NHS Trust v Ezsias** [2007] IRLR 603, CA, the Court of Appeal said that it would only be in an exceptional case that a claim would be struck out as having no reasonable prospects of success when the central facts are in dispute.
16. In **Anyanwu v South Bank Student's Union** [2001] IRLR 305, the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact-sensitive and require full examination to make a proper determination. In **Ezsias**, the Court of Appeal said that the same or a similar approach should generally inform whistleblowing cases, which have much in common with discrimination cases, in that they involve an investigation into why an employer took a particular step. The Court stressed that it will only be in an exceptional case that an application

will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant are totally and inexplicably inconsistent with the undisputed contemporaneous documentation.

17. In **Tayside Public Transport Company Ltd v Reilly** [2012] IRLR 755, the Court of Session noted that almost all unfair dismissal claims are fact-sensitive and that, where the central facts are in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute, it is not for the Tribunal to conduct an impromptu trial of the facts. The Court observed that there may be cases where it is instantly demonstrable that the central facts in the claim are untrue -such as where the alleged facts are conclusively disproved by the evidence adduced- but in the normal run of cases, where there is a “crucial core of disputed facts”, it is an error of law for the Tribunal to pre-empt the determination of a full hearing by striking out the claim.

18. In **Mechkarov v Citibank NA** UKEAT/0041/16, the EAT, having reviewed the above authorities, set out the approach that should be taken in a strike out application in a discrimination (at paragraph 15 of the judgment):

*“(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.”*

19. On a general level of course similar principles apply to all types of claims.

20. Turning then to look at the claimant's complaints individually.

### **Breach of contract**

21. The claimant has not responded to the case management order seeking to establish whether she is continuing with this claim or not, and if she is, what she is seeking and on what basis. She has not disputed the payment of one week's notice paid by the respondent and is not here to put forward the case as to whether or not this extinguishes her right to damages for the failure to provide her with notice. On that basis, there is nothing to indicate to me that her complaint has a reasonable prospect of success and so I strike it out.

### **Protected interest disclosure**

22. The claimant has not responded to the case management order seeking to establish by reference to her pleaded ET1 claim form the necessary elements required to establish a complaint of public interest disclosure. It was made clear in the Case Management Summary of the hearing held on 15 July 2020, that this was not the opportunity for the claimant to expand her case. EJ Wright effectively set out the issues which the Tribunal at the full hearing would need to determine and indicated the elements that the claimant needed to particularise. Namely, whether there was a qualifying disclosure, whether that was a protected disclosure, whether the claimant reasonably believed that it was made in the public interest, and who the disclosure was made to.

23. Whilst there are documents before me, these do not provide the particulars that were ordered and, in any event, go beyond the claimant's pleaded case. The claimant's own bundle contains a narrative at page 2 which obliquely refers to whistleblowing on the first day of her employment but in insufficient detail. There is a grievance email from the claimant dated 1 October 2019 at page 77 of the respondent's main bundle. This essentially sets out what amounts to unfair treatment and wrongful dismissal, and whilst it refers to a conversation with someone called Charlotte on the 25<sup>th</sup>, which I assume is of September 2019, this contains insufficient detail to support a public interest disclosure complaint. The claimant appears to be saying that this conversation was relayed to Joanna but not as a public interest disclosure complaint and she was subsequently dismissed for that reason. This is at odds with the contention in the narrative that the whistleblowing was to Joanna on the first day of her employment. Further, there is no explanation given for the pleaded claim that the information that the claimant had as to concerns about a fraudulent practice was not information that she was aware of until after her employment come to an end.
24. Having considered the powers available to me under rule 37 and the above case law, in the circumstances I reached the conclusion that the public interest disclosure has no reasonable prospect of success and I therefore strike it out.
25. As a result the claimant's claim is struck out in its entirety.

Employment Judge Tsamados  
20 July 2021