EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr O Ahmed	v	(1) Carbon60 Ltd (2) Mitie FS (UK) Ltd

Heard at: Watford (Remote via CVP) **On**: 26 November 2021
Before: Employment Judge Hanning (sitting alone)

Appearances
For the Claimant: In Person
For the First Respondent: Mr J Keeble (Counsel)
For the Second Respondent: Mr A MacMillan (Counsel)

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals
This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

JUDGMENT

1. All the claimant's claims against the first respondent for detriment on account of his having made a protected disclosure are struck out.

2. The claimant's claims against the second respondent for sick and/or holiday pay are struck out

3. The claimant's claim against the second respondent for detriment on account of his having made a protected disclosure in the form of (1) ignoring and not dealing with his complaint and (2) not being shown the result of his complaint are struck out

REASONS

1. At the end of the hearing and after I had given brief oral reasons for the above judgments, the claimant asked for full written reasons so these are set out below.

Background

2. This was an Open Preliminary Hearing to consider the following:

    a. Whether there are reasonable prospects of success in the public interest disclosure claims against the first and/or second respondent,

    b. Whether there are reasonable prospects of success in the claims for holiday and sick pay against the first and/or second respondent

    c. To give further case management directions thereafter

3. The same issues had been intended to be dealt with at a hearing in October but that had to be postponed. Usefully the ambit of the claimant's claims had been discussed then.

4. At this hearing, the claimant appeared in person while both respondents were represented by Counsel. A bundle running to 513 pages was filed and both Counsel had helpfully submitted skeleton arguments.

5. There was no formal taking of evidence but although the claimant was not on oath nor was he cross-examined during the hearing I questioned him at some length to understand the precise nature of his complaints. I found him to be a considered and helpful participant. I was satisfied that he understood the nature and purpose of the hearing, was able to articulate his case and was ready to accept points 'against' him when appropriate.

6. During the hearing the claimant referred to his having made other, oral, complaints which he felt had influenced the attitude of the respondents towards him. This presented a difficulty as, while his ET1 did mention some complaints, they were not there characterised as having been protected disclosures and, at the hearing in October, he had very clearly confirmed the only protected disclosure on which he relied was an email he had sent on 19 April 2020.

7. I explained to the claimant that if he wished to alter his position then he would need to make a formal application to amend his claim. We could not deal with that there and then because he would need to spell out, and give notice to the respondents of, exactly what disclosure had been made and when. The application would likely be contested and, without giving any view, would face some challenges.

8. On reflection the claimant declined to take that point further and confirmed again that he relied exclusively on the email of 19 April 2020.

The Claims

9. The claimant was hired by the second respondent as a packer at Edmonton Ambulance Station. The first respondent was the agency who placed him in the role from 6 April 2020. The claimant was thus employed by the first respondent and provided by them to the second respondent.

10. By a claim form presented on 12 August 2020, following a period of early conciliation with each of the respondents, the claimant brought complaints of unfair

dismissal, holiday pay, unlawful deductions from pay (sick pay) and public interest disclosure detriment.

11. The claim for unfair dismissal was struck out by way of an order dated 20 April 2021 because the claimant lacked the required period of service. The residual claim is essentially about the claimant raising issues of health and safety and being subject to a detriment as a result with some additional claims relating to pay on termination of the claimant's employment.

12. The financial claims arise because, while the first respondent says the claimant's employment ended on 18 April 2020, the claimant says he was not notified of this until 26 April 2020. He was unwell from 19 April 2020 but says that he should have received some sort of sick pay for that period. He also says that period should be taken into account in working out his accrued holiday pay.

13. As to the protected disclosures, the claimant says the email he sent on 19 April 2020 was a protected disclosure and that in consequence he suffered detriment in 3 respects. He says the complaints he made in his email of 19 April 2020 were ignored, that he was not told of the outcome of the investigation into the complaints and, most importantly of all, that he was 'sidelined' by which he says he meant that his engagement was terminated.

14. For the purposes of the application to strike out, the position taken by the respondents is that, whether the claimant made a protected disclosure or nor, there are no reasonable prospects of the claimant succeeding in establishing that he suffered the detriments alleged.

The Law

15. As the attack on the prospects of success focuses on the factual elements of the claimant's case, it is not necessary for me to consider the legal technicalities of protected disclosures. Instead, I have to be mindful of how and when the power to strike out should be exercised.

16. The power to strike out a claim on the ground that it has no reasonable prospect of success arises under Rule 37(1)(a) of the Rules of Procedure 2013. The authorities are clear that it is a power which should be exercised sparingly, particularly where there are allegations of discrimination or whistleblowing.

17. In the case of *Anyanwu v South Bank University* [2001] IRLR 305 HL, the House of Lords emphasised that in discrimination claims the power should only be used in the plainest and most obvious of cases.

"… vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society . In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."

18. That said, where it is plain that a discrimination claim has no reasonable prospects of success (which is a high threshold), then the tribunal does have and, in a plain and obvious case, may use the power to strike out the claim so that the respondent and the tribunal system are not required to spend any more resources on a claim which is bound to fail . As Lord Hope said at paragraph 39 of *Anyanwu*:

    "I would have held that the claim should be struck out if I had been persuaded that it had no reasonable prospect of succeeding at trial . The time and resources of the employment tribunals ought not to taken up by having to hear evidence in cases that are bound to fail."

19. In commenting upon the introduction of the threshold of "no reasonable prospects of success" into the then 2001 Rules of Procedure, Maurice Kay LJ in *Ezsias v North Glamorgan NHS Trust* [2007] ICR 1126 CA accepted it as meaning that the claim had "a realistic as opposed to merely a fanciful prospect of success". He went on to add in para.29:

    "It would only be in an exceptional case that an application to an employment tribunal 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 were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level."

20. In *Timbo v Greenwich Council for Racial Equality* [2013] ICR D7 EAT, the employment tribunal was criticised for striking out the claim at the end of the claimant's evidence on the basis that it was inappropriate for them to conclude that they could not in any circumstances believe her evidence without hearing the respondent's witnesses cross-examined upon their statements.

21. There is no hard and fast rule against striking out a claim where there are factual issues although it can be difficult at the preliminary stage for the issues to be sufficiently clear that it can be confidently argued that disputed areas of fact have no reasonable prospects of affecting the outcome of a discrimination claim. The Employment Tribunal should not engage in a mini-trial of the facts at such a hearing. The above remarks about discrimination claims apply equally to whistleblowing claims and I have applied that principle in coming to my judgment.

22. Where a Tribunal does not consider that the claim (or part of it) should be struck out as having no prospect of success, it may consider making a Deposit Order. Rule 39 of the Rules of Procedure 2013 provides that:

    1) *Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

    2) *The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*

23. There are no statutory rules requiring a Tribunal to calculate a deposit order in any particular way; the only requirement is that the figure be a reasonable one taking into account all the relevant circumstances. The amount must be such that the payer can afford to pay it.

24. The deposit ordered must not operate to restrict disproportionately the right to a fair trial. The object of a deposit order is not to make it difficult for a party to pursue a claim to a full hearing. A party without the means or ability to pay should not therefore be ordered to pay a sum he or she is unlikely to be able to raise.

25. The Tribunal must undertake a proportionality exercise, i.e. any order made must be a proportionate and effective means of achieving its purpose of signalling to the payer the assessment of little reasonable prospects of success and of being a warning as to costs.

The Sick/Holiday Pay Claims

26. As the first respondent was the claimant's employer, it rightly acknowledges that it is responsible for dealing with the claim for sick and/or holiday pay. There is a factual dispute between the parties as to the date of termination of the claimant's employment.

27. The first respondent rightly observes that the Tribunal has no power to determine entitlement to SSP (see *Sarti (Sauchiehall St) Ltd v Polito* UKEATS/0049/07) but while the claimant has referred to SSP in the ET1 it is entirely conceivable that he intended to refer to sick pay more generally. In the absence of his conditions of engagement it is not possible to say now that he had no entitlement.

28. So, while both claims appear to be of nominal value, it cannot be said that there are no prospects of success in claims for some pay and for an additional period of employment to be taken into account for the purposes of accrued annual leave. In fairness, the first respondent did not seek to persuade me differently.

29. As for the second respondent however, as it had nothing to do with the payments being made to the claimant, there is no basis on which it could ever be liable for sick or holiday pay.

30. Therefore, while I decline to strike out those claims as against the first respondent, there can be no reasonable prospects of success in such claims against the second respondent and so I strike them out as against the second respondent.

The Whistleblowing Claims

31. It is fair to say that the precise extent and nature of the protected disclosure(s) made by the claimant is not fully particularised but the nature of the email he sent on 19 April 2020 is such that it is tolerably clear that it would amount to a protected disclosure (or perhaps more than one).

32. However, taking the claimant's case at its highest and assuming there to have been a protected disclosure, the respondents say the claim must fail because the detriment claims are fatally flawed.

33. The alleged detriments are:

    1) That the complaints the claimant made in his email of 19 April 2020 were ignored

    2) That the claimant was not told of the outcome of the investigation into the complaints

    3) That the claimant was 'sidelined' i.e. his engagement was terminated

34. In respect of detriments 1 and 2, the respondents point to a series of emails from April through to the end of June 2020 which show the complaints were investigated and culminated in the claimant being sent an outcome. These were set out in the skeleton argument of the first respondent and copies were in the bundle.

35. Referred to them, the claimant complained that there had been issues with who was to undertake the investigate and that he had had to chase. Equally he acknowledged that the emails addressed to him had been sent and that he had, in particular, received the outcome which was sent to him on 30 June 2022.

36. It may not have been the outcome the claimant wanted but it is obvious from the documents that the alleged detriments simply did not occur. Moreover, even if the complaints had not been investigated or if they had been but the claimant was not told of the outcome it is difficult to see that this would have been a detriment in any case. A whistleblower is not entitled as of right to demand an investigation or to be notified of the outcome of any such investigation so there is no obvious detriment even if the respondents had chosen to ignore the complaints or to investigate without any communication with him.

37. Be that as it may, there clearly was an investigation and the claimant was notified of the outcome. I am therefore satisfied there is no prospect of success in those 2 claims and I strike them both out.

38. The most important allegation is that the engagement was terminated as a result of the email of 19 April 2020. On this score, the first respondent says that it had nothing to do with the decision to end the engagement. The first respondent's role was only to supply the claimant and it could do so only for so long as the second respondent wanted him. Therefore, it says it can have no conceivable liability for this claim even if the claimant establishes it.

39. I agree that must be right. The second respondent acknowledges it took the decision to terminate the engagement. As the second respondent had nothing to do with that, there is no reasonable prospect of the claimant succeeding in a claim against the first respondent. I therefore strike out the protected disclosure claims in their totality against the first respondent.

40. Accepting it made the decision to terminate the engagement, the second respondent says it cannot conceivably have been as a result of the claimant's protected disclosure on 19 April 2020 because the decision to terminate had been made on 17 April 2020. It says that on that day, a Dennis O'Keefe of the second

respondent telephoned Mr Sat Mander at the first respondent and told him that the claimant's engagement was to be ended.

41. The difficulty is that the documentary evidence does not clearly and uncontrovertibly support that. Understandably there is no recording of that call but nor has any phone record been produced which might at least verify its timing. What is clear from the messages produced in the bundle is that on 17 April 2020 Mr Mander told the claimant not to go to the site. But he did not tell the claimant the engagement had been terminated. In fact, the claimant actually asked if the engagement had been ended but he received no reply.

42. On 20 April 2020, the second respondent emailed the first respondent and asked that the claimant be removed from the site immediately. In reply, the second respondent confirms this had been done "on Friday evening following a conversation with Dennis".

43. That appears to support the second respondent's case as too does the content of an interview with Mr O'Keefe in May 2020 in which he explains why he wanted the engagement terminated. He offers highly unflattering reasons which are hotly challenged by the claimant who is understandably very offended by Mr O'Keefe's allegations.

44. What the claimant says is that Mr O'Keefe is dishonest, that the call on 17 April 2020 did not happen at all (which would mean Mr Sander is also lying) and that the truth is the decision was only made after he sent his email.

45. In my judgment the claimant is unlikely to prove that. Some communication must have taken place for the claimant to be told not to go to the site and the response to the email of 20 April 2020 may well be read as being consistent with the first respondent having been told the engagement had been ended. Much as I empathise with the claimant's objections to what Mr O'Keefe says, it is going to be hard for him to convince a Tribunal that 2 people in different companies with no obvious motive would conspire to lie in the way that is suggested.

46. All the same, I cannot definitively rule it out. There is an obvious factual dispute and it would be inappropriate for me to prejudge the Tribunal's decision which will be reached after hearing all the witnesses being cross-examined.

47. While the documentary evidence may be seen as indicative of an earlier decision it is not definitive when it could easily have been. Even the 20 April 2020 email does not explicitly refer to termination of the engagement and it is not beyond the realms of possibility that the claimant could show that while he had initially been asked not to go the site, the decision to terminate the engagement altogether was only made afterwards. The paperwork is as consistent with that scenario as it is of the second respondent's case.

48. On balance then, and not without some hesitation, I am not persuaded that there are no reasonable prospects of success in this final element of the protected disclosure claim as against the second respondent. Therefore I do not strike it out.

49. I am however satisfied that there is little prospect of success and so I consider that a Deposit Order is appropriate. During the hearing I asked the claimant about his financial circumstances. Happily he is working again and he indicated that he had savings of some £2,000.

50. The maximum deposit which may be ordered in respect of a single allegation is £1,000. The purpose of the order is to signal to the claimant my assessment of little reasonable prospects of success and to be a warning as to costs. In this context, given my views on the prospects, I conder the maximum amount would be appropriate.

51. Based on the claimant's information I am satisfied that payment of that amount is within the claimant's means and would neither restrict his right to a fair trial nor make it difficult for him to pursue the claim to a full hearing.

52. I am satisfied a Deposit Order of £1,000 meets the goal of being a proportionate and effective signal and warning to the claimant. As I recognise that whether to pay it or not is a difficult decision for him to reach I allowed more time than usual to make the payment so that he could take advice (during the rapidly approaching holiday season).

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Employment Judge Hanning

Date: …2 December 2021……..

Sent to the parties on: ....

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For the Tribunal Office

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