EMPLOYMENT TRIBUNALS

Claimant: **Mr Draper**

Respondent: **Co-operative Group Limited**

Heard at: Manchester **On:** 15 December 2021

Before: Employment Judge Ord

Representation:

Claimant: In person
Respondent: Ms Amartey (Counsel)

JUDGMENT

1. The detriment claim in relation to an alleged protected disclosure is struck out as it has no reasonable prospect of success;

2. The automatic unfair dismissal claim in relation to an alleged protected disclosure is struck out as it has no reasonable prospect of success;

3. The wrongful dismissal claim is struck out as it has no reasonable prospect of success.

REASONS

The Application

1. The respondent applied to strike out the claimant's complaints of detriment, automatic unfair dismissal and wrongful dismissal on the basis that they had no reasonable prospect of success..

Evidence

2. The tribunal had before it the following:

   (a) From the claimant:
      i. A 6 paged document entitled "Questions for HR: split under

each section of investigation"

(b) From the respondent:
   i. An 85 paged bundle of documents

3. The tribunal heard oral submissions from both parties.

Background Information

4. By a claim form dated 4 May 2021 the claimant brought complaints of detriment and automatic unfair dismissal for making a protected disclosure, and for ordinary unfair dismissal and wrongful dismissal. This was after contacting ACAS on 11 March 2021 and obtaining a certificate on 22 April 2021.

5. Within the Grounds of Resistance, the respondent raised the issue of potentially making an application for strike out. There was a Preliminary Hearing for Case Management on 15 September 2021 before Employment Judge Ross, where the issue of strike out was again raised and the matter listed for Preliminary Hearing on 15 December 2021.

6. The following two paragraphs within the Case Management Summary are of particular note:

   "The claimant was made redundant with effect from 18 December 2020. The claimant considers that his redundancy was connected to a disclosure he had made to Robert Bignold, Head of Acquisitions and New Store Development in or around September 2014. The claimant therefore alleges that he was automatically unfairly dismissed pursuant to Section 103A Employment Rights Act 1996.

   The claimant also says he was subjected to a detriment for making the same disclosure of information. He says his line manager gave him an unacceptable performance rating – "partially achieving" – for the 2014 end of year appraisal (and the original end of year appraisal in 2014 had been "unacceptable")."

7. The "Protected Disclosures" section in the Annex of Complaints and Issues contained just one disclosure that the claimant was relying on, which was worded as follows:

   "The claimant relies on his conversation with Mr Bignold where he told him at a meeting in or around September 2014 at the Co-op's Head Office in Manchester that Tony Hind was "in bed" with a developer. The claimant explained to him how concerning that close relationship between Mr Hind and a particular developer was."

8. The Case Management Summary made it clear that it was important that the list of complaints and issues was accurate and complete and that the tribunal should be notified if it was not. The claimant did not make any such notification.

9. The tribunal has considered all other documents before it to ascertain whether there was anything more that could be construed as a protected

disclosure. From the Particulars of Claim it can be gleaned that the claimant's case is that he heard rumours that Tony Hind had a corrupt relationship with a developer. He told Robert Bignold about this in September 2014 and pointed out that he felt it was concerning how close Tony's relationship was with this developer. There is nothing else within the documentation that could be considered as a disclosure.

10. After hearing the respondent's submissions at the hearing, the claimant made his own submissions in response. He was asked to confirm exactly what disclosures he was relying on and he repeated that they were based on the rumours he heard in 2014, about which he immediately told Robert Bignold. These were that Tony Hind was "in bed" with a developer and that the relationship was corrupt and he felt this was concerning. He said he believed it was a qualifying disclosure because corruption is a criminal offence.

11. With respect to the automatic unfair dismissal complaint, the dismissal letter was signed by Stuart Hookins. In both the Particulars of Claim and at the hearing the claimant submitted that it was reasonable to assume that Robert Bignold (Head of Department) would have told Stuart Hookins (Head of Property Services) about the claimant's disclosure and that is why the claimant was dismissed.

12. As for the wrongful dismissal, in both the Particulars of Claim and at the hearing, the claimant made clear that his claim was not for notice pay. Instead it was for the tax he had paid on his Payment In Lieu of Notice (PILON) because he was deprived of the opportunity of paying any of this money into pension, which would have been tax free.

13. It was common ground that the claimant's contract of employment did not provide for a PILON but that the respondent had consulted and agreed with the Trade Unions that PILONs would be made. Whilst the claimant was not a member of a Trade Union, he was aware of the PILON agreement and did not object at the time.

14. The tribunal also notes that the claimant's dismissal letter of 18 December 2020 contained a paragraph entitled "Pensions" which indicated that he could choose to invest some or all of his termination payment into his pension scheme and it referred to potential tax liability.

The Law

Strike Out

15. Schedule 1 of The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 provides the relevant rules (the ET Rules).

16. **Rule 37** sets out the provisions for **strike out**, the most pertinent of which are:

> (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds-
>
> (a) that it is scandalous or vexatious or has no reasonable prospect

of success;

17. In ***HM Prison Service v Dolby [2003] IRLR, 694*** and ***Hassan v Tesco Stores Ltd UKEAT/0098/16*** the EAT held that the striking out process requires a two-stage test. The first stage involves a finding that one of the specified grounds for striking out has been established; and if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In ***Hassan*** Lady Wise stated that the second stage is important as it is "a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit."

18. In terms of caselaw in relation to rule 37(1)(a), the following are noted:

19. In ***A V B and anor 2011 ICR, D9*** the Court of Appeal considered whether there was a "more than fanciful" prospect of proving the case.

20. The House of Lords in ***Anyanwu and anor v South Bank Student Union and anor 2001 ICR, 391*** said that discrimination claims should not be struck out except in the most obvious cases as they are generally fact sensitive and require a full examination to make a proper determination.

21. In ***Ezsias v North Glamorgan NHS Trust [2007] ICR, 1126*** the Court of Appeal said that the same or a similar approach should generally inform protected disclosure cases. It stressed that it would only be in an exceptional case that an application would be struck out as having no reasonable prospect of success when the central facts were in dispute.

22. In ***Mbuisa v Cygnet Healthcare Ltd EAT/0119/18*** the EAT notes that strike-out is a draconian step that should be taken only in exceptional cases. Particular caution should be exercised if a case is badly pleaded, for example, by a litigant in person.

23. In ***Cox v Adecco and ors 2021 ICR 1,307*** the EAT spoke about cases where the claimant was a litigant in person and there were facts in dispute. It stated that " The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claims and issues are. There has to be a reasonable attempt at identifying the claim and the issues before considering strike out or making a deposit order."

24. However, in ***Ahir v British Airways plc 2017 EWCA, Civ. 1392,*** the Court of Appeal asserted that the tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored. It went on to say that the test in s37(1)(a) of "no *reasonable* prospect of success" was lower than the test in previous versions of the strike out rule, which referred to "no prospect of success".

25. In ***Kaur v Leeds Teaching Hospitals NHS Trust 2019 TCR 1,*** Lord Justice Underhill in the Court of Appeal observed (in concluding that an Employment Judge had correctly struck out a constructive dismissal claim) that "Whether [striking out] is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically

be disputed. There were in this case no relevant issues of primary fact."

26. In ***RMC v Chief Constable of Hampshire EAT 0184/16***, where strike out was considered at a preliminary hearing and the facts were not in dispute, Judge Eady QC said that the tribunal had been as well placed to determine the merits of the case as it was ever going to be. In the light of the way the case had been argued, the tribunal's conclusions concerning the lack of any reasonable prospect of success was one to which it was entitled to come.

27. The Tribunal is also required to have regard to the **overriding objective**, which is set out in **Rule 2**. The most relevant parts provide that:

    The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable:
    (a) ensuring that the parties are on an equal footing;
    (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
    (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
    (d) avoiding delay, so far as compatible with proper consideration of the issues; and
    (e) saving expense.

    A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by these Rules.

    Protected Disclosure

28. The aim of the legislation, contained within the Employment Rights Act 1996, is to protect workers who make qualifying disclosures from detriments and dismissal.

29. Section **43B** covers the meaning and scope of what amounts to a protected disclosure. The relevant provisions are:

    (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [is made in the public interest and] tends to show one or more of the following:

    (c) that a criminal offence has been committed, is being committed or is likely to be committed,
    (d) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
    (e) that a miscarriage of justice has occurred, is occurring or is likely to occur,
    (f) that the health or safety of any individual has been, is being or is likely to be endangered,
    (g) that the environment has been, is being or is likely to be damaged, or
    (h) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

30. The information must contain facts and the tribunal must be satisfied that the disclosure contains sufficient factual content.

31. In ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325,*** the EAT expressed the view that the ordinary meaning of giving "information" is "conveying facts".

32. In ***Kilraine v London Borough of Wandsworth 2016 IRLR 422,*** the EAT indicated that to be a qualifying disclosure, a statement must have sufficient factual content to be capable of tending to show one of the matters listed in s.43B(1)(a)-(f).

33. Section **47B** confers on the worker the right not to be subjected to a detriment on the ground they have made a protected disclosure. The relevant provisions are:

    (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker had made a protected disclosure.
    (2) ….this section does not apply where:
    (i) the worker is an employee, and
    (b) the detriment in question amounts to dismissal (within the meaning of [Part X]).

34. Section **48** provides for complaints to employment tribunals. The relevant parts are:

    (1) [(1A) a worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.]

    (3) An [employment tribunal] shall not consider a complaint under this section unless it is presented:
    (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
    (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before that period of three months.

    (4) For the purposes of (3):
    (a) Where an act extends over a period, the "date of the act" means the last day of that period, and
    (b) a deliberate failure to act shall be treated as done when it was decided on;…….

38. In ***Arthur v London Eastern Railway Ltd EWCA/Civ/2006/1358*** the Court of Appeal considered the fact-sensitive nature of a "series of similar acts" where there was a succession of alleged acts/failures spread over a period of time. It indicated that in reasonably arguable cases the issue should be determined after hearing evidence at the Final Hearing, whilst acknowledging that there would be exceptions.

39. Under section **103A** employees have a right to claim that a dismissal was automatically unfair if it was because of the making of a protected disclosure. The section states:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Wrongful Dismissal

40. A breach of contract needs to be proven. Damages payable for breach of contract have one basic purpose, which is to put the claimant into the position he or she would have been in had both parties to the contract performed their obligation according to that contract. This entails compensating a wrongfully dismissed employee by an amount of money equivalent to that which he or she would have earned had the contract not been wrongfully terminated.

Discussion

Protected Disclosure

41. To be a qualifying disclosure, the information the claimant gave must contain facts. The disclosure that Tony Hind was "in bed" with a developer and that the relationship was corrupt and concerning was only based on rumours and was vague and lacked specifics. Therefore, without more, it could not tend to show that an offence relating to corruption was committed.

42. Under these circumstances it is unlikely that a tribunal would determine that the disclosure contained the facts required to be classed as information tending to show a criminal offence. Consequently, it has no reasonable prospect of being considered as a protected disclosure.

Detriment

43. Even if the tribunal is wrong in this, the detriment complained of (poor performance review) took place around the end of 2014. Therefore, the primary limitation period would be around the end of March 2015. The claimant did not contact ACAS until March 2021, prior to presenting his Claim Form in May 2021. This is about six years out of time.

44. There are no other detriments which could be said to constitute a series of acts so as to extend time. The only other act relied on is the dismissal, which is discrete from the appraisal six years beforehand. It is not even reasonably arguable that the appraisal and the dismissal were part of the same series of similar acts. Therefore, in these circumstances, there was no need to wait until the Final Hearing to hear evidence on the nature of the acts.

45. The claimant has not explained why there was a delay. Nor has he suggested that it was not reasonably practicable to present this claim within the usual three month period. This was despite the issue being raised in the respondent's oral submissions at the hearing and the claimant being given the opportunity to respond. The tribunal can find no basis for arguing that it was not reasonably practicable to present the claim in time.

46. Therefore, the first hurdle in extending time cannot be overcome. Moreover, the tribunal would inevitably find that the claim was not presented within a reasonable further time period thereafter. Accordingly, the tribunal does not have jurisdiction to hear the claim.

47. For the above reasons, the complaint of detriment has no reasonable prospect of success.

Automatic Unfair Dismissal

48. As there was no protected disclosure, there can be no automatic unfair dismissal.

49. Even if there were a protected disclosure in 2014, it would be unlikely that a tribunal would make a causal connection between that disclosure and the dismissal in 2020.

50. The claimant relied on the assumption that Robert Bignold would have told Stuart Hookins of the disclosure, and Stuart Hookins signed the dismissal letter. However, no evidence was presented to demonstrate this and nor was any other evidence of a causal connection put forward.

51. Of course, it is possible that such evidence might emerge by the time of a final hearing. But even if it does, all it would show is that Mr Hookins knew of the disclosure. If the claimant's assumption is correct, and he established by evidence that Mr Bignold told Mr Hookins, the overwhelming likelihood is that such communication would have occurred shortly after the original disclosure was made in 2014. That leaves a gap of six years between Mr Hookins discovering the disclosure and his allegedly using it as the sole or main reason for dismissing the claimant.

52. On this basis, the respondent is bound to prove that the sole or principal reason for the dismissal was not that the claimant made a protected disclosure, and the claimant has no reasonable prospect of achieving a different outcome.

Wrongful Dismissal

53. Even if there were a breach of contract, the damages payable to the claimant would only be the claimant's wages for his notice period. It is not disputed that the respondent has made a PILON to cover the full amount due for the notice period and this extinguishes the respondent's liability.

54. The claimant is not entitled to claim damages for the tax he paid on the PILON. He cannot claim on the basis of not being able to pay a tax free sum from his PILON into his pension scheme. Even if this were a legitimate claim, it is clear from the dismissal letter that he was offered the opportunity to make such a payment into his pension scheme if he so wished.

55. Consequently, there is no reasonable prospect of his claim for wrongful dismissal succeeding.

Conclusion

56. Having determined that there are no reasonable prospects of the complaints of detriment, automatic unfair dismissal and wrongful dismissal succeeding, the tribunal has turned to the second stage of the strike out process and the use of its discretion. It has considered the overall evidence before it as a cross check to avoid striking out any of the claims that might yet have merit. However, taking

the claimant's case at its highest, the tribunal finds no merit in these claims.

57. Consequently, having considered the overriding objective to act fairly and justly, and taking a cautious approach in accordance with caselaw, the tribunal, nonetheless in its discretion, strikes out the complaints of detriment, automatic unfair dismissal and wrongful dismissal.

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Employment Judge Liz Ord

Date 20 January 2022

JUDGMENT SENT TO THE PARTIES ON

14 February 2022

FOR THE TRIBUNAL OFFICE

Notes

1. Neither party objected to the hearing taking place on a remote video platform.