EMPLOYMENT TRIBUNALS

Claimant: **Mr S Rezaian**

Respondent: **The Economist Newspaper Limited**

Heard at: **East London Hearing Centre**

On: **18 January 2022**

Before: **Employment Judge Russell**

Representation
Claimant: **Mr C Umezeruike (Counsel)**
Respondent: **Mr K Wilson (Counsel)**

JUDGMENT

The Judgment of the Employment Tribunal is that:-

(1) The claim for detriment on grounds of making a protected disclosure is struck out as it has no reasonable prospects of success.

(2) The claim of direct discrimination because of age is struck out because it has no reasonable prospects of success.

REASONS

1 By a claim form presented to the Employment Tribunal on 8 February 2021, the Claimant brings claims of ordinary unfair dismissal, protected disclosure detriment, direct discrimination because of race and direct discrimination because of age. The Respondent resists all claims. There was an initial issue as to whether the claim should be struck out as the Tribunal lacked jurisdiction because the claims had been brought against the wrong legal entity. That application was refused by Employment Judge Green on 27 September 2021. The Respondent's application to strike out and/or for deposit orders on the prospects of success could not be heard on that occasion as the Tribunal lacked sufficient time and were relisted for today.

2 In addition to the contents of the claim form, I took into account the Claimant's further information on 11 August 2021 in which he set out the way in which he advances each of the claims relied upon. I also had regard to the Claimant's and Respondent's submissions for the September 2021 hearing and the further written submissions by Mr Wilson for today's hearing.

Law

3 An Employment Judge has power to strike out a claim on the ground it has no reasonable prospect of success under Employment Tribunal Rules of Procedure 2013 rule 37. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances.

4 The test for strike out imposes a very high threshold: there must be **no** reasonable prospect of success. This requires the Tribunal to consider whether on a careful consideration of all available material it can properly conclude that the claim has no reasonable prospects of success. It is not a matter of whether the Claimant's claim is likely to fail nor of asking whether it is possible that the claim will fail. It is not a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. A hearing to consider strike out should not be a mini-trial. The Claimant's case should be taken at its highest unless conclusively disproved by (or totally and inexplicably inconsistent with) undisputed contemporaneous documents. Strike out imposes a high test given its draconian nature.

5 As made clear in **Ukegheson v Haringey Borough Council** [2015] ICR 1285, Tribunals should be cautious in exercising the power to strike out, particularly in discrimination claims where there is a public interest in them being heard and because they are likely to be fact sensitive. I took into account that the same considerations apply in whistleblowing claims.

6 As was made clear in **Cox v Adecco** [2021] ICR 1307 EAT, before considering strike out, reasonable steps should be taken to identify the claims and the issues in the claims having regard to the pleadings and any core documents that set out the Claimant's case.

Findings of Fact and Conclusions

7 This is a case which has not to date been set out with a great deal of clarity. The Claimant was acting in person when he presented his ET1 and it does not clearly set out the way in which the claim is put. Whilst his subsequent further information adds some further detail, it is not in itself sufficiently clear to identify the issues. However, I was greatly assisted by the submissions of Mr Umezeruike today in clarifying the way in which the claim is put by the Claimant.

The protected disclosure claim

8 The Claimant relies upon a single disclosure made in November 2019 to Mr

Schwedtner. The information disclosed is that Mr Goldfinch had not paid him the commission due to him on the Saudi Arabian general investment deal and that Mr Goldfinch had told him that, if he went to HR, he would have to go through a formal procedure. The Claimant says that this information tended to show breach of a legal obligation, one of the relevant matters within section 43B.

9 The Claimant's case is that he reasonably believed that it was in the public interest because all employers should comply with their duty of good faith, trust and confidence and honour their contractual obligations to their employees. Given the draconian nature of a strike out application and the need to take the Claimant's case at its highest, I also took into account the additional way in which Mr Umezeruike described the public interest belief today. Namely, that it was in the public interest to expose a manager who threatened to subject a subordinate employee to detriment for reporting to HR that the manager would not pay the employee his commission.

10 When considering a protected disclosure claim, the Tribunal must take a logical and linear approach. There are essentially five elements which must be satisfied for there to be a qualifying disclosure: (1) there must be a disclosure of information; (2) the worker must believe that the disclosure is made in the public interest; (3) that belief must be reasonably held; (4) the worker must believe that the disclosure tends to show one of the relevant matters; and (5) that belief must also be reasonably held.

11 In **Simpson v Cantor Fitzgerald Europe** [2020] EWCA Civ 1601, two of the grounds of appeal before the Court of Appeal were the proper application of the reasonable belief requirements and the public interest test in s.43B. In reaching its Judgment, the Court of Appeal considered and approved the well-known case of **Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837. The Tribunal must first ask whether the worker believed, at the time he was making it, that the disclosure was in the public interest and whether, if so, that belief was reasonable. Second, the Tribunal must recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest. Third, the necessary belief is simply that the disclosure is in the public interest, the particular reasons why the worker believes that it is so are not of the essence. All that matters is that the subjected belief was objectively reasonable. Fourth, whilst the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be his or her predominant motive for making it.

12 The Court of Appeal expressly cited as relevant paragraph 62 of the Judgment in **Chesterton** as follows:

> **"In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter within s43B(1) where the interest in question is personal in character) there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest, as well as in the personal interest of the worker."**

13 The four factors set out at paragraph 34 of **Chesterton**, whilst not exhaustive, provide some helpful guidance. Firstly, the numbers in the group whose interests the disclosure served. Secondly, the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed. Thirdly, the nature of the

wrongdoing disclosed (disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people). Finally, the identity of the alleged wrongdoer. The Employment Appeal Tribunal recently applied these principles in **Dobbie v Felton t/a Felton Solicitors** [2021] IRLR 679.

14 It is also relevant that the requirement for a reasonable belief that disclosure is in the public interest was introduced by amendment to the statutory provisions to prevent protected disclosure protections from applying in private employment disputes which do not engage the public interest, essentially reversing the line of authority following **Parkins v Sodexho**.

15 Finally, for the claims to succeed the Claimant would not only have to establish that he made a protected disclosure, he would also need to establish that he had been subjected to a detriment because of it. The detriment in this case is said to be the requirement that there would be a formal process through HR to investigate his complaint and a threat to the Claimant's job security.

16 Applying the law as set out above to the Claimant's case at its highest, I am prepared to accept that on the evidence provided that the Claimant will be able to show that he made a disclosure of information to Mr Schwedtner and that he reasonably believed that the information disclosed showed a breach of a legal obligation to pay him the commission contractually due to him. Even on the Claimant's case at its highest, however, the second part of the information said to have been disclosed was Mr Goldfinch telling him that it he went to HR, he would have to go through a formal procedure. I consider that this is the very opposite of information tending to show breach of a legal obligation. It is entire in accordance with the implied term of trust and confidence that a serious allegation of breach of contract taken to HR should be dealt with by way of formal procedure. For this reason, I consider that the Claimant has no reasonable prospects of successfully establishing that his belief that this information disclosed a breach of a contractual obligation was reasonably held.

17 I then considered whether the Claimant's prospects of establishing that the disclosure of information tending to show a breach of contract in respect of commission was made with a belief that it was in the public interest and that any such belief was itself reasonable. Again taking the Claimant's case at its highest, I have proceeded on the basis that he will show that he actually believed that it was in the public interest to disclose the information because he believed that all employers should comply with their contractual obligations and that a manager threatening to subject a subordinate to a formal process if he went to HR with his complaint should be exposed.

18 Applying the non-exhaustive **Chesterton** factors to the Claimant's case at its highest, there is no suggestion that any employee other than him would be or had been affected by similar conduct of Mr Goldfinch. The information related solely to the Claimant as was the nature of the interest affected, namely his personal commission. I explored with Mr Umezeruike whether there was any suggestion that the Claimant had believed that other employees at the Respondent were being treated in the same way when he made his disclosure of information. Mr Umezeruike said that there was not. I conclude that this is a paradigm example of the **Sodexho** type case where the alleged breach of contract and potential handling of any complaint to HR relates exclusively to

the Claimant's own contract of employment and personal interests. As Mr Wilson submitted, this is the classic private employment dispute which should not attract the public interest protection.

19 I also took into account the nature of the wrongdoing disclosed. Mr Umezeruike relied upon this **Chesterton** factor as conferring the necessary public interest on the Claimant's disclosure. He accepted that the failure to pay commission on its own would not satisfy the requirement for there to be a reasonable belief in public interest but submitted that the added element of the threat for assertion of a statutory right takes the nature of the wrongdoing beyond a purely personal matter.

20 With respect to the careful submissions of Mr Umezeruike, I disagree. The nature of the wrongdoing is said to be two-fold. Firstly, failure to pay the contractual commission due to the Claimant individually. Secondly, that there would have to be a formal process if the Claimant went to HR. The nature of both is inherently specific to the Claimant and is typical of many individual employment disputes. There is no suggestion, for example, that the nature of the wrongdoing by this employer discloses any action in contravention of its publicly stated position (for example, if a disability charity were to refuse reasonable adjustments to one of its employees). Moreover, an indication that a formal process would be followed if the complaint were taken to HR is could not objectively reasonably be seen as a threat but an entirely proper response to an employee's grievance. Even if deliberate, the nature of the wrongdoing is not of a sort which would confer any public interest in addition to the private interest of the Claimant.

21 It was not suggested that the identity of the Respondent was such as to confer a public interest and I can see no reason why it would on the facts of the Claimant's case at its highest.

22 Belief that a disclosure is in public interest must be subjectively established and also objectively reasonable. Taking the Claimant's case at its highest, I have assumed that he will show that he will establish the subjective belief relied upon in the further information and the further belief relied upon by Mr Umezeruike today. I do not, however, consider there to be any reasonable prospect at all of him showing this was objectively reasonable even on the facts of his own case.

23 Further, and in the alternative, even if the Claimant were able to show that he made a disclosure which was protected, he will have to show that he was subjected to a detriment because of it. The detriment relied upon by the Claimant is what he describes as a threat to his job security by reason of Mr Goldfinch's statement that if he went to HR, the complaint would be dealt with by formal process. No separate threat to job security is asserted by the Claimant to have been made by Mr Schwedtner or anybody else at the Respondent. As Mr Wilson noted, the threat is relied upon both as part of the disclosure and the detriment. Even if an objectively reasonable employee could properly regard as a detriment the suggestion that HR would follow a formal procedure to investigate a complaint, and I consider that they could not, on the facts of the Claimant's case there was no detriment *after* any protected disclosure was made to Mr Schwedtner. For these reasons, the Claimant has no reasonable prospects of success in his claim that he was subjected to a detriment on grounds that he had made a protected disclosure.

24 For those reasons therefore, I conclude that this is one of the rare cases in which it is appropriate to strike out the protected disclosure claim in its entirety as having no reasonable prospects of success.

The age discrimination claim

25 Before considering strike out, I clarified the precise way in which the Claimant puts his claim of age discrimination. Mr Umezeruike confirmed that it is a complaint of direct discrimination. The sole detriment is that the Claimant was removed from the Middle East and North Africa territory and placed into the European territory in March or April 2020. The Claimant's case is that an ongoing consequence of the territory move was to put him at a significant disadvantage as he was the youngest and least experienced member of the team, which adversely affected his ability to close deals leading to criticism of his performance.

26 I have assumed, for the purposes of this strike out application, that the Claimant will show that he was moved into the MENA territory and that this was a detriment as it made it more difficult form him to close sales. To establish the necessary causal link for the detriment, the Claimant would bear the burden of producing evidence from which the Tribunal could conclude that there had been discrimination because of age and thereby shift the burden of proof to the Respondent. I took the Claimant's case at its highest and considered the content of his pleadings and Mr Umezeruike's submissions today as to what would be relied upon to show the necessary causal link.

27 The Claimant attached a solicitor's letter dated 16 November 2020 to his ET1 form which he relied upon as setting out the basis of his claims. It makes reference to the territory move from MENA to Europe in early 2020 as background to the subsequent performance process and refers to the failure to pay him commission and allegations of poaching deals by Mr Goldfinch. The letter alleges generally age discrimination (amongst the other claims) but does not identify in respect of which complaints or why it is said to be due to age. The further and better particulars provided on 11 August 2021 identifies the move to the Europe territory as the sole detriment, relies upon Mr Brampton, a white male, as a comparator but does not state Mr Brampton's age. As this is a strike out application, I have assumed that Mr Brampton is older than the Claimant. There, as orally by Mr Umezeruike today, the Claimant's entire case is that the move put him at a significant disadvantage as he was the youngest and least experienced member of the team, which adversely affected his ability to close deals and earn commission. In written submissions on behalf of the Claimant prepared for the previous Preliminary Hearing, no further facts are put forward as evidence of less favourable treatment on grounds of age.

28 I accept Mr Wilson's submissions that the Claimant has done no more than to assert a difference in treatment and a difference in age despite having several opportunities to do so (by solicitors in correspondence, the contents of the claim form and the further and better particulars). Whilst the consequences of being moved to the Europe territory may have been detrimental because of the Claimant's lack of experience due to his younger age, the detriment relied upon is the change of territory. A direct discrimination claims requires that the reason for the move be the Claimant's age to some material extent, not simply that an otherwise non-discriminatory act had a

particular detrimental effect due to age. Taking the Claimant's case at its highest, his case is simply that a hypothetical comparator or an actual comparator of a different age would not also have been transferred but without putting forward any evidential basis for the assertion. Nor is there any document in today's bundle dealing with the change of territory or suggesting that age played any material part at all in why the Claimant had been moved.

29 In addition, the sole detriment relied upon occurred at the latest in April 2020. The claim form was presented on 8 February 2021. The claim is significantly out of time and the Tribunal would have to be satisfied that it was just and equitable to extend time. Mr Umezeruike submitted that such an extension would be sought on the basis that all of the conduct pleaded in the other claims is intertwined and will be before the Employment Tribunal in any event but no other grounds for an extension are put before me. In deciding whether to extend time, the Tribunal would need to consider whether the claims were strong or weak. It is also relevant to note that on 13 July 2020, solicitors acting for the Claimant wrote to the Respondent asserting various claims (although not age discrimination) and a different firm of solicitors acting for the Claimant wrote again on 16 November 2020 asserting his claims (this time including age discrimination generally).

30 In all of the circumstances, taking the Claimant's case as put today and assuming that all that is asserted will be established, I consider that he has no reasonable prospects of success on the merits and no reasonable prospects of successfully having time extended in any event. The age discrimination is struck out.

31 The race discrimination claim is not struck out for failure to comply with the order of Employment Judge McLaren. The race claims have now been clarified, a fair trial is still possible, it would be unduly draconian to strike it out in all the circumstances of the case.

Employment Judge Russell
Date: 24 February 2022