EMPLOYMENT TRIBUNALS

Claimant: M Kumi

Respondent: Engie Regeneration Limited (1)
Johnsons Recruitment Solutions Ltd (2)

Heard at: London South Employment Tribunal by CVP

On: 24 February 2022

Before: Employment Judge L Burge

Appearances
For the Claimant: In person
For the First Respondent: G Hicks, Counsel
For the Second Respondent: Did not attend

RESERVED PRELIMINARY HEARING JUDGMENT

It is the Judgment of the Tribunal that:

1. The name of the Second Respondent is amended to Johnsons Recruitment Solutions Ltd;

2. The Respondents' applications for strike out and/or a deposit order are refused.

REASONS

1. The Preliminary Hearing took place over three hours. The Second Respondent did not attend and was not represented. The day before the hearing, the Second Respondent's legal representative had contacted the Tribunal to say that they were no longer on the record. The Tribunal unsuccessfully tried to contact the Second Respondent. There had already been two Preliminary Hearings in this case. Both the Claimant and the First Respondent wanted the hearing to continue

without the Second Respondent being present. I decided that it was in the interests of justice to continue in the Second Respondent's absence.

2. The First Respondent provided the Tribunal with an invoice from Johnsons Recruitment Solutions Ltd for the supply of the Claimant. I therefore decided to amend the name of the Second Respondent to Johnsons Recruitment Solutions Ltd.

3. A bundle of 162 pages was provided to the Tribunal and Ms Hicks provided a skeleton argument. A transcript of the conversation wherein the Claimant says he made a protected disclosure was provided to the Tribunal and during the hearing we listened to the audio recoding of it.

Strike out

4. The Respondents argued that the claims should be struck out under Schedule 1, Rule 37(1)(a) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") as the Claimant's claims had "no reasonable prospect of success".

5. The central question for the Tribunal was whether the claims have a realistic as opposed to a fanciful prospect of success: *Eszias v North Glamorgan NHS Trust [2007]*.

6. In *Abertawe Bro Morgannwg University Health Board v Ferguson* [2013] ICR 1108 the EAT remarked that:

> *"33. We would add this final note. Applications for strike-out may in a proper case succeed. In a proper case they may save time, expense and anxiety. But in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general it is better to proceed to determine a case on the evidence in light of all the facts. At the conclusion of the evidence gathering it is likely to be much clearer whether there is truly a point of law in issue or not…"*

7. Ms Hicks referred the Tribunal to *Ahir v British Airways plc* [2017] EWCA Civ 1392 wherein the tribunal's decision to strike out a claim was upheld by both the EAT and Court of Appeal in circumstances where the Claimant's case was inherently implausible. Underhill LJ said that a case should not be allowed to proceed on the basis of mere assertion, as follows (at [24):

> *"[I]n a case of this kind, where there is on the face of it a straightforward and well documented explanation for what occurred, a case cannot be allowed to proceed on the basis of a mere assertion that that explanation is not the true explanation without the claimant being able to advance some basis, even if not yet provable, for that being so. The employment judge cannot be criticised for deciding the application to strike out on the basis of the actual case being advanced."*

8. The striking out process involves a two-stage test: first the grounds for striking out must be established; second, the tribunal should decide, as a matter of discretion, whether to strike the claim out or order that a deposit must be paid: *HM Prison Service v Dolby* [2003] IRLR 694 EAT at [15].

Deposit Order

9. Under Rule 39(1) of the Rules, the Tribunal has the power to make separate deposit orders in respect of individual allegations or arguments, up to a maximum of £1,000 per allegation or argument. Rule 39(2) obliges the Tribunal to make "reasonable enquiries into the paying party's ability to pay the deposit and to have regard to any such information when deciding the amount of the deposit."

10. In considering whether to make deposit orders, the Tribunal is entitled to have regard to the likelihood of a party being able to establish facts essential to their case and, in doing so, to reach a provisional view as to the credibility of the assertions being put forward. In *Van Rensburg v The Royal Borough of Kingston Upon Thames* [2007] UKEAT/0096/07, Elias P held:

> *"…the test of little prospect of success…is plainly not as rigorous as the test that the claim has no reasonable prospect of success… It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response";*

11. In *Hemdan v Ishmail* [2017] IRLR 228, Simler J described the purpose of a deposit order as being:

> *"…to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails."*

The claims

12. To succeed in his claims, the Claimant needs to show that he made a qualifying disclosure as defined in section 43B of the Employment Rights Act 1996. The disclosure needs to disclose information. The Claimant needs to have (reasonably) believed that the disclosure of information was made in the public interest and the Claimant also must have (reasonably) believed it tended to show that:

    - a criminal offence had been, was being or was likely to be committed;
    - a person had failed, was failing or was likely to fail to comply with any legal obligation;
    - a miscarriage of justice had occurred, was occurring or was likely to occur;
    - the health or safety of any individual had been, was being or was likely to be endangered;

- the environment had been, was being or was likely to be damaged;
- information tending to show any of these things had been, was being or was likely to be deliberately concealed.

13. The disclosure must have been made in accordance with one of six specified methods of disclosure.

14. Detriment is not defined under the ERA 1996 but there will be a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment: *Jesudason v Alder Hay Children's NHS Foundation Trust* [2020] EWCA Civ 73, [2020] IRLR 374. A detriment is where the complainant has suffered a disadvantage of some kind (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337)

15. In the Claimant's grievance (which also served as his particulars of claim) he said

> *"The issue of the dead fox which I raised to Jo (SHEQ [Safety, Health, Environment and Quality] rep) is whistle blowing because of people's health and safety being in danger and risk to the environment. I feel that I raised a protective disclosure highlighting concerns about health and safety at work so I should not have suffered a detriment."*

16. According to the Claimant at this Preliminary Hearing, the health or safety of individuals had been endangered, were being and were likely to be endangered as there had been a decaying animal present on site, it was not certain how long it had been there for and it was not removed for 48 hours after its discovery. He had attended a health and safety training course that talked about animals and diseases. He felt it was hazardous for workers, university staff and students. The Claimant said that he had reported it to the Safety, Health, Environment and Quality representative was then told he should not have done so.

17. The First Respondent said that there were lots of people who knew about the dead fox and it was discovered by the firm hired to remove the scaffold tower on which the fox was found. Further, the fox did not pose a risk to health and safety, this was August 2020 during the pandemic and so students would not have been around. Further, the matter was addressed immediately and resolved within 24 hours.

18. Taking the Claimant's case at is highest, it is arguable that he believed that the decaying fox posed a risk to health and safety. He was trying to ascertain whether it had been on site for some time or whether it had been recently delivered with the scaffolding. He reported it to the Safety, Health, Environment and Quality representative. He was told he should not have spoken to him. The Claimant argues that he was subjected to a number of detriments, including being let go and says that it was because he had made this protected disclosure. The Respondents say that the Claimant was treated in the ways he was treated because he was being aggressive.

19. The central facts are in dispute and so this case is not one of those rare cases in which strike out is possible. It also cannot be said that the Claimant's claims have

"little" prospects of success. Without hearing evidence from the Claimant and the Respondents' witnesses there is no proper basis for doubting the likelihood of the Claimant being able to establish the facts essential to the claim. It is not for me to conduct a mini-trial based on submissions and without relevant witnesses giving evidence. It is better to proceed to determine this case on the evidence in light of all the facts and so the Respondents' applications are refused.

EJ L Burge

28 February 2022