EMPLOYMENT TRIBUNALS

Claimant: Mr. A. Wright

Respondent: Hilton Foods Solutions Ltd

OPEN PRELIMINARY HEARING

Heard at: Bury St Edmunds Employment Tribunal (remote via CVP)
On: 25 May 2022

Before: Employment Judge Mason

Appearances

For the Claimant: In person.
For the Respondent: Mr. Bloom, solicitor

RESERVED JUDGMENT

1. S99 ERA and Reg 20 MPL Regs: Automatic Unfair dismissal (family reasons/parental leave):
   This claim is not struck out or subject to a deposit order.

2. s80 ERA (prevention of taking parental leave):
   This claim has no reasonable prospects of success and is struck out

3. s104 ERA Automatic unfair dismissal: Asserting a statutory right
   This claim has no reasonable prospects of success and is struck out.

4. s103A ERA: Automatic unfair dismissal: Protected disclosure.
   This claim has little prospects of success and the Claimant is required to deposit £500 as a condition of continuing to advance this allegation. A separate deposit order will be issued.

5. s13 EqA: Disability Discrimination by Association
   This claim is not struck out or subject to a deposit order.

REASONS

Background

1. The Claimant was employed by the Respondent from 4 February 2019 until 13 March 2020; his role was Logistics/Supply Chain Manager. The Respondent now accepts that the Claimant's son is disabled; the impairment is autism.

2. The Claimant says he had informal discussions with various personnel at the Respondent regarding unpaid parental leave. He met with the Managing Director. Mr. Peter Hounsome (PH) on 14 February 2020 and says he discussed with PH taking unpaid time off to help care for his son; he says PH was negative in his response. The Respondent denies this.

3. On 18 February 2020, the Claimant met with Ms Kelly Pope (HR) ("KP"). He says at that meeting he told KP what PH had said at the meeting on 14 February.

4. On 13 March 2020, the Claimant was advised his employment was terminated with immediate effect by reason of redundancy.

5. On 4 June 2020, the Claimant contacted Acas and an Early Conciliation Certificate was issued on 16 June 2020.

6. The Claimant presented this claim on 9 July 2020 and on 4 December 2020 the Respondent submitted a response defending all claims.

7. The particulars of claim are set out in a letter dated 19 May 2020 from Roythornes, solicitors; this letter accompanied the claim form (ET1). The final paragraph of that letter is headed "Employment Claims" and states that the Claimant has the following "potential" claims:
"*1) Breach of Regulation 19 Maternity and Parental Leave (etc) Regulations 1999 (the right not to be subjected to a detriment by the employer for taking or seeking to take parental leave);*
2. Regulation 20 of the MPL Regulations 1999 (automatic unfair dismissal where reason for dismissal is connected with the fact that the employee took or sought to take parental leave;
3. Section 80(1) Employment Rights Act 1996 (where employer prevents or attempts to prevent the employee from taking parental leave);
4. Section 13(1) Equality Act 2010 (direct disability discrimination by association);
5. Section 103A Employment Rights Act 1996 (unfair dismissal for making a protected disclosure i.e. "whistle blowing"). "

8. In essence the Claimant says he was dismissed because he made the Respondent aware of his intention to take parental leave (although he accepts he did not make a formal application) and/or that he was dismissed for whistle blowing to KP on 18 February 2020. The Respondent says this played no part in the decision to dismiss the Claimant and says he was dismissed by reason of redundancy and points out that the Claimant did not in fact apply for parental leave.

9. On 23 February 2021, EJ Tynan (on the papers) ordered the Claimant to provide details of his "whistleblowing" claim by 16 March 2021.

10. On 14 March 2021, the Claimant wrote to the Tribunal (and the Respondent) with the following information:

10.1 He says the disclosure was made at the meeting with KP on 18 February 2020.

10.2 He disclosed to KP the details of his meeting with PH on 14 February 2020.

10.3 He says he thereby disclosed that a person has failed or is likely to fail to comply with any legal obligation.

10.4 He says this disclosure was in the public interest because the Respondent is a major supplier of meat products and consumers would want to believe products come from a reliable source who treats their employees fairly.

Issues for the Open Preliminary Hearing

11. This hearing was listed by EJ Bartlett at a closed Preliminary Hearing on 17 May 2021. The purpose of this hearing today was to decide whether or not to make strike-out or deposit orders in respect of the following claims:

"(i) that the claimant was automatically unfairly dismissed under section 99 of the Employment Rights Act 1996;

(ii) that he suffered a detriment under s47C of the Employment Rights Act 1996 and/or Regulation 19 of the Maternity and Parental Leave Regulations 1999 (the alleged detriment is dismissal);

(iii) that the claimant was unfairly dismissed under regulation 20(3)(e)(ii) of the Maternity and Parental Leave Regulations 1999;

(iv) did the claimant make a qualifying disclosure under section 43B ERA? The Claimant submits that there is a public interest in knowing that the respondent as a large provider of meat to supermarkets, is the sort of organisation that does not comply with the Maternity and Parental Leave Regulations 1999*. Is this capable of being in the public interest for the purposes of section 43B of the ERA?*

(v) In relation to s43B of the ERA the claimant asserts that the protected disclosure was in in relation to the respondent's failure to comply with a legal obligation. The respondent submits that there was no legal obligation on the respondent because the claimant did not submit an application for parental leave. The question for the preliminary hearing is, in light of the undisputed fact that the claimant did not make a written application for parental leave, can it be argued that the respondent failed to comply with the legal obligation?

12. EJ Bartlett did not include in this list a claim that the Claimant says he was dismissed for asserting a statutory right (s104 ERA). The Claimant confirmed he was bringing such a claim and Mr. Bloom said that this was the Respondent's understanding and that this was discussed at the PH with EJ Bartlett. On this basis, I proceeded to consider also whether this claim should be struck out or subject to a deposit order.

13. The Respondent did not initially accept that the Claimant's son was disabled (s6 Equality Act 2010) but having considered medical evidence provided by the Claimant, Mr. Bloom confirmed to me that the Respondent now accepts that his son was disabled at the relevant time.

Procedure at the Open Preliminary Hearing

14. The Respondent provided a bundle of documents which the Claimant confirmed he had received and had access to; this included the Respondent's submissions and case law relied on.

15. The Claimant provided a witness statement which he told me was accurate and truthful. He was cross-examined by Mr. Bloom.

16. After a short break, Mr. Bloom made verbal submissions expanding on his written submissions and the Claimant also made brief verbal submissions. I then reserved my judgment which I now give with reasons.

The relevant law

17. Despite the relatively brief factual background, the law in this area is complex and requires close scrutiny. I have referred to the Employment Rights Act 1996 as "ERA"; to the Maternity & Parental Leave Regulations 1999 as "MPL Regs"; to the Equality Act 2010 as "EqA; and to the Employment Tribunal Rules of Procedure 2013 as the "Tribunal Rules".

18. Rule 37 Tribunal Rules: Striking Out

18.1 *"(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;
(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;
(c) for non-compliance with any of these Rules or with an order of the Tribunal;
(d) that it has not been actively pursued;
(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).
(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing
(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

18.2 In **Hack v. St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:
"The words are "no reasonable prospect". Some prospect may exist, but be insufficient. The standard is a high one."

18.3 Lady Smith explained **in Balls v Downham Market High School and College** [2011] IRLR 217, EAT (paragraph 6):
"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…."

18.4 In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

18.5 The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. 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, order it to be amended or order

a deposit to be paid. See also **Hassan v. Tesco Stores UKEAT/0098/19/BA** at paragraph 17 the EAT observed:

"There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of Dolby the test for striking out under the Employment Appeal Tribunal Rules 1993 was interpreted as requiring a two-stage approach."

18.6 It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

18.7 In **Mechkarov v. Citibank N A** UKEAT/0041/16, the EAT set out the approach to be followed including: -

(i) Ordinarily, the Claimant's case should be taken at its highest.

(ii) Strike out is available in the clearest cases – where it is plain and obvious.

(iii) Strike out is available if the Claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

19. <u>Rule 39 Tribunal Rules: Deposit orders</u>

19.1 *"(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.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order."

19.2 In **Hemdan v. Ishmail** [2017] IRLR 228, Simler J, pointed out that the purpose of a deposit order '*is 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'* (para 10), she stated that the purpose *'is emphatically not to make it difficult to access justice or to effect a strike out through the back door'* (para 11)

20. <u>Automatic Unfair dismissal (family reasons/parental leave)</u>

20.1 S99 ERA: Leave for family reasons

"(1) An employee who is dismissed shall be regarded … as unfairly dismissed if –

(a) the reason or principal reason for the dismissal is of a prescribed kind, or

(b) the dismissal takes place in prescribed circumstances.

(2) In this section "prescribed" means prescribed by regulations made by the Secretary of State.

(3) A reason or set of circumstances prescribed under this section must relate to –

…

(c) parental leave"

20.2 Reg 20 MPL Regs: Unfair dismissal

"(1) An employee who is dismissed is entitled under section 1999 of the 1996 Act [ERA} to be regarded for the purposes of Part X of that act as unfairly dismissed if –
(a) the reason or principal reason for the dismissal is of a kind specified in paragraph (3).
…
(3) The kinds of reasons referred to in paragraphs (1) and (2) are reasons connected with –
The fact that she took or sought to take
(e)(ii) parental leave…"

21. Prevention of taking parental leave

S80(1)(b) ERA
"(1) An employee may present a complaint to an employment tribunal that his employer –
(a) has unreasonably postponed a period of parental leave requested by the employee, or
(b) has prevent or attempted to prevent the employee from taking parental leave"

22. Automatic unfair dismissal: Asserting a statutory right

22.1 s104 ERA: Assertion of statutory right

"(1) An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –
(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
(b) alleged that the employer had infringed a right of his which is a statutory right.
(2) It is immaterial for the purposes of section (1) –
(a) whether or not the employee has the right, or
(b) whether or not the right has been infringed;
But, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.
(3) It is sufficient or subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was."

22.2 s104(4) identifies "relevant statutory rights" which includes parental leave pursuant to s47(2)©

23. A detriment (family and domestic reasons)

23.1 S47C(2) ERA: Leave for family and domestic reasons

"(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.
(2) A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to –
(c) parental leave"

23.2 Reg 19 MPL Regs: Protection from detriment

"(1) An employee is entitled under section 47C of the 1996 Act [ERA] not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done for any of the reasons specified in paragraph 2.
(2) The reasons referred to in paragraph (1) are that the employee –
(e) took or sought to take -
(ii) parental leave.
(4) Paragraph 1 does not apply in a case where the detriment in question amounts to dismissal within the meaning of part X of the 1996 Act [ERA]."

24. Automatic unfair dismissal: Protected disclosure

24.1 S103A ERA: Protected disclosure

"An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or principal reason) for the dismissal is that the employee made a protected disclosure"

24.2 s43A ERA Meaning of "protected disclosure"

" … means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H".

24.3 s43B ERA Disclosures qualifying for protection

"(1) … a "qualifying disclosure" means any disclosure of information which, in he reasonable belief of the worker making a disclosure is made in the public interest and tends to show one or more of the following –

…

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."

24.4 s43C Disclosure to employer or other responsible person

"(1) A qualifying disclosure is made … if the worker makes the disclosure …

(a) to his employer … "

24.5 **Chesterton Global Ltd v Nurmohamed** [2018 ICR 731 is the leading authority in the meaning of "*made in the public interest*"; Underhill LJ gave the following guidance:

(i) The Tribunal has to ask (a) whether the worker believed, at the time he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

(ii) That exercise requires the Tribunal to recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest. The Tribunal must be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. The Tribunal's own view is not determinative.

(iii) The reasons why the worker believes the disclosure is in the public interest are not of the essence. All that matters is that his (subjective) belief was (objectively) reasonable.

(iv) The worker's belief that the disclosure is in the public interest does not have to be the predominant motive in making the disclosure

(v) It is for the Tribunal to apply the phrase "*in the public interest*" as a matter of educated impression. The essential distinction is between disclosures which serve the private or personal interest of the worker and those that serve a wider interest.

24.6 The guidance in **Chesterton** was recently considered and followed in **Dobbie v Feltons** UKEAT/0130/20/00

25. Disability Discrimination by Association

Direct S13 EqA

"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others"

The protected characteristic may be either A's or someone with whom the worker or employee is associated (EHRC Employment Code).

Discrimination by association occurs when a person is treated less favourably because they are linked or associated with a protected characteristic. The person does not have the protected characteristic but they are treated less favourably than others because of a protected characteristic of a friend, spouse, partner, parent or another person with whom they are associated.

Findings of fact

26. I am mindful that this is a Preliminary Hearing and I have therefore limited my findings of fact to the issues. I have made these findings having considered the pleadings and the Claimant's evidence.

27. The Claimant was employed by the Respondent from 4 February 2019 until 13 March 2020; his role was Logistics/Supply Chain Manager and he reported to Justin Marshall (JM). PH is the Managing Director.

28. The Respondent prepares and supplies meat products for (amongst others) Tesco supermarket. The Claimant confirmed on cross-examination that although the Respondent prepares food for Tesco the name of the Respondent does not appear on the packaging and therefore anyone buying from Tesco would not know where it came from.

29. The Claimant has two children; his son is disabled; the impairment is autism.

30. The Claimant had informal discussions with various personnel at the Respondent (including his Line Manager and HR) regarding unpaid parental leave; these discussions took place in November 2019, late 2019 and early 2020.

31. On 7 February 2020, Ms Pietruszewka (HR) emailed the Claimant (page 43)
"*Subject: Unpaid Parental Leave*
"Referring to your question regarding Unpaid Parental Leave – if you wish to apply, you need to write a request to your manager, stating the date you would like o start your parental leave. Please be aware you need to allow 21 days' notice before the start day of your leave. You are entitled to 18 weeks' leave for each child, however you can take up to 4 weeks per year. Please see GOV website with Unpaid Parental Leave Guidance: https://www.gov.uk/parental-leave . Please be aware that if your request is approved you may be asked to take your Unpaid Parental Leave in one week blocks.
If you have any further questions, please do not hesitate to let us know."
On 10 February 2020, the Claimant responded (page 43):
"Thanks for that. I think the only thing different is with a disabled child you can take leave in days rather than weeks according to the policy"

32. The Claimant met with PH on 14 February 2020. The Claimant says he mentioned to PH that he would be seeking parental leave and that PH's response was negative and he told the Claimant that he would need to be in the office "*Monday to Friday, 8-5pm with no exceptions*". The Claimant says he suggested to PH that he was eligible to take parental leave to which PH replied "*so you want to go f*ing legal then*". The Respondent denies this and I have made no findings of fact as to what was said as it is not necessary for the purposes of determining the preliminary issues.

33. On 17 February 2020 the Claimant emailed KP (page 45):
"Do you have 15 mins this week we can sit down and have a quick chat about Parental Leave?"
The Claimant then met with KP on 18 February 2020. The Claimant says he explained to KP what had happened at the meeting with PH; he says Ms. Pope *"dismissed the conversation as "Pete just being Pete*".
Again, I have made no findings of fact as to what was said as it is not necessary for the purposes of determining the preliminary issues.

34. The Claimant accepts that he did not at any time make a formal written application for parental leave. He also confirmed on cross-examination that he knew he had to make a formal application in writing. He told me he was in discussions with his ex-wife to work out how it would work.

35. The Respondent had a whistleblowing policy (pages 37-38) which sets out a procedure for raising matters of concern. The Claimant confirmed on cross-examination that he was aware of the policy.

36. The Claimant was dismissed on 13 March 2020 and paid 3 months pay in lieu of his contractual notice. The reason relied on by the Respondent is redundancy.

Submissions

Respondent

37. Mr. Bloom says all the claims should be struck out and a summary of his submissions is set out below.

38. s99 ERA and Reg 20 MPL Regs (automatic unfair dismissal: family and domestic reasons) and s80 ERA (prevention of taking parental leave)

38.1 Any claim brought under these regulations is dependent upon the Claimant making a formal application for Parental Leave, not merely informal references to it as was the case with the Claimant.

38.2 Para 1(1)(b) of Schedule 2 of the MPL Regs states:
"*an employee may not exercise any entitlement to parental leave unless he has complied with any request made by his employer to produce for the employer's inspection evidence of his entitlement … he has given his employer notice, in accordance with whichever of paragraphs 3 to 5 is applicable, of the period of leave he proposes to take…* "

38.3 Para (3) of Schedule 2 of the MPL Regs states that the notice required for the purposes of paragraph 1(b) is notice which (a) specifies the dates on which the period of leave is to begin and end and (b) is given to the employer at least 21 days before the date on which that period is to begin.

38.4 No such notice was given by the Claimant and without such notice the Claimant cannot exercise any entitlement to Parental Leave.

(i) His dismissal cannot be of a "prescribed kind" or in "prescribed circumstances" as required by s99(1) ERA as "prescribed" means compliance with the statutory provisions.

(ii) He cannot be said to have "taken or sought to take" Parental Leave as required by Reg 20(3) MPL regs.

(iii) He cannot be said to have attempted to take Parental Leave for the purposes of s80(1)(b) ERA as he did not submit a statutory notice.

39. s47(B) ERA and Reg 19 MPL Regs (A detriment : family and domestic reasons)
This does not apply as the detriment in question amounts to a dismissal (Reg 19 (4) MPL Regs).

40. S104 ERA (Automatic unfair dismissal: Asserting a statutory right)

40.1 This claim must fail for two reasons:

(i) The Claimant had no statutory right to take parental leave in the absence of a statutory notice. He never followed the prescribed process.

(ii) The Claimant has not provided any evidence that the Respondent actually infringed a statutory right; an allegation that the Respondent proposed or threatened to infringe such a right is not sufficient. In **Mennell v Newell & Wright (Transport Contractors) Ltd** [1997] ICR 1039), (an unauthorised deductions from wages claim) the Court of Appeal said

"… *the employee must have made an allegation of the kind protected …..; if he had not, the making of such an allegation could not have been the reason for dismissa*l"

41. s103A ERA (Automatic disclosure: whistleblowing)

41.1 The reason or principal reason for the Claimant's dismissal was because his role was redundant.

41.2. In any event, the Claimant did not make a qualifying disclosure. He did not comply with the Respondent's whistleblowing policy; there was therefore no disclosure.

41.3 In the absence of the Claimant taking the prescribed step of submitting a statutory notice to take parental leave, it cannot be concluded that the Respondent failed or was likely to fail to comply with any legal obligation i.e. to consider and/or grant a request for parental leave.

41.4 If he did make a disclosure (which is denied) he did not believe at the time of making the disclosure that it was made in the public interest and if he did (which is denied) that belief was not reasonable.

Mr. Bloom relies on **Cox v Adecco & Others UK** EAT/0339/19/AT, **Chesterton Global Ltd v Anor** [2018] ICR 731 and **Dobbie v Feltons** UKEAT/0130/20. In **Dobbie**, the EAT referred to and relied on the guidance given by Underhill LJ in **Chesterton**.

Mr. Bloom says, relying on these authorities, as follows:

"The Claimant's assertion that there is a public interest in knowing that the Respondent, as a large provider of meat to supermarkets, is the sort of organisation that does not comply with the 1999 Regulations is farfetched and not credible. Members of the public buying meat from Tesco will not know or be interested to know where the meat is sourced from and provided by the Respondent. Members of the public will have no interest in such circumstances where an employee has failed to submit a statutory application to take Parental Leave. The Claimant's case is based purely on his own "personal/private interests"".

42. Associative disability discrimination

42.1 The less favourable treatment complained of is dismissal. The Claimant has failed to identify a comparator, actual or hypothetical, but in any event there is no evidence that he was treated less favourably than any other employee who did (or might have made) any request (formal or informal) for any form of statutory leave including parental leave. The Claimant has therefore failed to show that his dismissal was less favourable treatment

42.2 The Claimant has failed to prove any facts upon which a claim of direct discrimination could be brought; he had failed to show a prima facie case (s136 EqA) and the burden of proof does not shift to the Respondent.

42.3 Discrimination "arising from" (s15 EqA) and indirect discrimination (s19 EqA) and the duty to make adjustments (ss20and 21 EqA) are not applicable to discrimination by association claims.

Claimant

43. The Claimant made brief verbal submissions. The Respondent knew he had an autistic son. He did not have time to put in an application for parental leave; he was in the process of talking to his ex-wife about it.

44. He does not accept his role was redundant; he says former colleagues are busy and the Respondent has carried on recruiting and has back-filled his role; salaries

are up 30%. He says the Respondent dismissed him because he wanted to take parental leave.

Conclusions

45. Applying the relevant law to the findings of fact to determine the issues, I have reached the following conclusions in respect of the Claimant's claims.

46. S99 ERA and Reg 20 MPL Regs: Automatic Unfair dismissal (family reasons/parental leave)

46.1 I do not agree with Mr. Bloom that the Claimant's failure to exercise his entitlement to parental leave by complying with the provisions of Schedule 2 of the MPL Regs is fatal to the Claimant's case that he "sought" to take parental leave:

(i) This protection is not analogous to s104 (asserting a statutory right). The wording in s104 is different and requires the employee to show either that he brought proceedings to enforce a relevant statutory right or that he alleged that the employer *had* infringed a statutory right. The wording in reg 20 on the other hand is wider and requires the employee to show that his dismissal was connected with the fact that he "*took or sought to take*" parental leave.

(ii) The meaning of "*sought to take*" was considered in a detriment case, **Tavernor v Associated Co-operative Creameries Ltd** ET case no. 1902341/00. It was held that in order to be able to claim to have suffered a detriment as a result of taking, or seeking to take, unpaid parental leave, the employee must have made it clear that he or she was relying on the right to take unpaid parental leave. In that case, the claimant had not at any time mentioned parental leave and had been unaware of his parental rights; the claimant had not therefore "sought" to take parental leave. In my view if follows, that had the claimant in that case made it clear he was relying on the right to take unpaid parental leave, he would have overcome the hurdle of showing that he "sought" to take parental leave.
The wording in Reg 19 MPL Regs (protection from detriment) is the same as reg 20 MPL (dismissal) i.e. "took or sought to take" and it is therefore reasonable to apply this analysis to Reg 20.

(iii) In this case, it is agreed that the Claimant made informal enquiries about taking parental leave and made it clear on a number of occasions that this was his intention. It is certainly arguable that he thereby "sought" to take parental leave despite the lack of a written application and due notice.

46.2 The Claimant will also of course need to show a causal connection between dismissal and seeking to take parental leave; that connection must be stronger than merely associated with parental leave but less stringent than the "but for" test (**Atkins v Coyle Personnel plc** [2008] IRLR 420). It is for tribunals to determine as matter of fact whether there is a connection between the taking of leave and the dismissal and that must be determined by the Tribunal in the light of all the evidence at a final hearing.

46.3 For these reasons, I am not striking out this claim or making a deposit order as I cannot conclude that there are no prospects of success or little reasonable prospects of success.

46.4 For the avoidance of doubt, if the Claimant is making a claim pursuant to s47C(2) (a detriment (family and domestic reasons)) this is struck out as the only detriment the Claimant relies on is dismissal and reg 19(4) MPL Regs specifically states reg

19 MPL Regs does not apply where the detriment in question amounts to a dismissal.

47. s80 ERA: Prevention of taking parental leave

47.1 S80(1)(b) ERA requires an employee to show that his employer unreasonably postponed a period of parental leave requested by the employee or that his employer had prevented or attempted to prevent the employee from taking parental leave.

47.2 In this case, the Claimant did not request parental leave – only make enquiries – and therefore he cannot show that there was a postponement or that the Respondent prevented or attempted to prevent him from taking parental leave

47.3 For this reason, this claim has no reasonable prospects of success and is struck out as it is obvious that it cannot succeed.

48. s104 ERA Automatic unfair dismissal: Asserting a statutory right

48.1 In **Mennell** the Court of Appeal held that s104 is not confined to cases where a statutory right has actually been infringed. It is sufficient if the employee alleges that the employer has infringed a statutory right and that the making of that allegation was the reason or the principal reason for the dismissal.

48.2 However, s104 requires the employee to have alleged that the employer has actually infringed a statutory right; there must be an (alleged) infringement *before* the allegation is made. An allegation that the employer has proposed or threatened to infringe such a right is not sufficient (as recently confirmed by the EAT in **Spaceman v ISS Mediclean Ltd Ltd (**t/a ISS Facility Service Healthcare) [2019] ICR 687).

48.3 Therefore, even taking the Claimant's case at its highest - that he alleged to KP that PH had threatened to infringe his statutory right to take parental leave – s104 is not satisfied as there was only a threat of future infringement.

48.4 For these reasons, it is obvious that this claim has no reasonable prospects of success and is struck out.

49. s103A ERA: Automatic unfair dismissal: Protected disclosure.

49.1 Taking the Claimant's case at its highest, and assuming that his version of his conversation with KP is unchallenged, I do not accept Mr. Bloom's submission that by not following the Respondent's own internal whistleblowing procedure, the Claimant failed to make a disclosure in accordance with s43C. It is sufficient that the Claimant made the disclosure to KP in her capacity as HR.

49.2 s43B(1)(b) ERA requires the Claimant to show that the disclosure tended to show that "*(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.*" It is clear from the words "*is likely to fail*" that the alleged failure to comply does not have to have crystallised. It is therefore arguable in the Claimant's case that his discussion with PH (which he says he disclosed to KP) was an indication that the Respondent was "likely to fail" with a legal obligation to allow the Claimant to take parental leave. I do not therefore agree with Mr. Bloom that the lack of a formal application for parental leave is fatal.

49.3 However, it is essential to the success of this claim that the Claimant can show that he reasonably believed at the time of his meeting with KP that the disclosure was in the public interest. I have considered and applied the guidance in **Cox, Chesterton** and **Dobbie** and concluded that the Claimant has little prospect of success in persuading the tribunal at a full hearing that:

(i) he genuinely believed at the time of the disclosure that the information he disclosed was in the public interest; and
(ii) that belief was objectively reasonable.

49.4 His state of mind at the time of his meeting with KP will need to be considered by the tribunal at the full hearing. But even if he is successful in proving that he genuinely believed at his meeting with KP that the information he disclosed was in the public interest, his assertion that members of the public have an interest in whether or not the Respondent, as a supplier of meat to supermarkets, complies with the MPL Regs in my view has little prospect of success.

49.5 For these reasons, in my view this claim has little prospects of success. Having made enquires as to the Claimant's means, I have made an order requiring the Claimant to pay a deposit of £500 as a condition of continuing to advance this allegation. A separate deposit order will be issued.

50 s13 EqA: Disability Discrimination by Association

50.1 Mr. Bloom points out that the Claimant has failed to identify a comparator, actual or hypothetical. However, this is potentially remedied by an appropriate case management order requiring the Claimant to identify an actual comparator or construct a hypothetical comparator i.e. another employee who requested (or made enquiries about) parental leave and who did not have a disabled child but was not dismissed.

50.2 In the absence of this information, it is premature to consider striking out or making a deposit order but this does not preclude a further application to do so at a later date when the Claimant has clarified his comparator and the issues have been properly identified.

EJ Mason
30 May 2022

Sent to the parties on:

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For the Tribunal Office:

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