EMPLOYMENT TRIBUNALS

Claimant: Mr D Farrell

Respondent: Shaw Trust Limited

Heard at: Birmingham by CVP on 1 September 2022

Reserved decision 7 September 2022

Before: Employment Judge Hindmarch

Appearances
For the claimant: In person
For the respondent: Mr Northall – Counsel

RESERVED JUDGMENT

1. The Tribunal does not have jurisdiction to hear the detriment claims which are dismissed.

2. The application for strike out is refused.

3. The Employment Judge considers that the Claimant's case has little reasonable prospects of success and the Claimant is ORDERED to pay a deposit of £250 no later than 14 days from the date of this order is sent, as a condition of being permitted to continue with his claim. The Judge has had regard to any information available as to the Claimant's ability to comply with the order in determining the amount of the deposit.

REASONS

4. This open Preliminary Hearing was listed before me for 3 hours on 1 September 2022 to consider the Respondent's application that the claims be struck out or whether a deposit order should be made, to consider whether the Claimant should pay the Respondent's costs and to consider whether the Claimant properly complied with ACAS early conciliation in relation to his whistle-blowing claim.

5. I was the Judge who dealt with the Preliminary Hearing for Case Management in this claim on 27 January 2022, so I did have some familiarity with the issues.

6. The Claimant is a litigant in person and the Respondent was represented by Counsel, Mr Northall. There was a bundle running to 500 pages. I also had an authorities bundle from the Respondent and the Claimant had also sent in some authorities and a Skeleton Argument. We spent the 3 hours available hearing the submissions of both parties and the Claimant's evidence as to means. There was no time to deliberate and give Judgment, so I reserved the case to 7 September 2022.

7. By an ET1 filed on 27 January 2021, the Claimant brought proceedings for automatic unfair dismissal and detriment on account of having made protected disclosures. He accepts he did not go to ACAS for early conciliation at any stage before or after the issue of proceedings.

8. The Claimant made an application for interim relief. This was heard by Employment Judge Britton on 18 March 2021 and his decision was reserved to 30 March 2021. A copy of his Reserved Judgment was at pages 63-74 of the bundle. He refused the application for interim relief on the basis he concluded it was not likely that the Tribunal would find the Claimant had been unfairly dismissed. I am told that witness statements were prepared for the interim relief hearing, although those witnesses did not give evidence. These included the statements of Jennifer Dillon and Jennifer Woodrow. I did not see those statements in dealing with the application that was before me.

9. Employment Judge Britton's Judgment sets out the factual matrix leading to the Claimant's dismissal on 21 January 2021. The decision maker at dismissal stage was Jennifer Dillon. The Claimant appealed the decision to dismiss him, and the appeal was heard (and dismissed) by Jenny Woodrow.

10. The Claimant was first employed by the Respondent in June 2008. His employment ended in December 2009 when the Claimant resigned, during a period whilst he was suspended pending investigation into an allegation of fraud.

11. In 2019, some 10 or so years later, the Claimant applied again to work for the Respondent. He was interviewed by Claire Tynan and Suki Gill of the Respondent. It is his case that towards the end of the interview he informed them that he had previously worked for the Respondent. He chose to make a recording of the interview and says the transcript demonstrates this.

12. The application that a recruitment agent made on the Claimant's behalf for the role did not reference his previous employment with the Respondent. It is the Claimant's case that he realised this mistake prior to the interview and that he

wrote to the Respondent with a revised CV, a matter to which I shall return to later.

13. The Claimant was successful at interview and appointed to the role of Support Manager commencing this role on 28 October 2019.

14. On 18 March 2020, the Claimant sent an anonymous email to the CEO of the Respondent (which he says amounted to a protected and qualifying disclosure). In the email he referred to criminal activity, health and safety concerns and bullying by senior leadership. This is what the Claimant contends is his first protected disclosure.
15. The Respondent nominated Anthony Pearce, Head of Safeguarding, to investigate the allegations made. He did so supported by HR Business Partner, Sharon Barton. During the investigation Mr Pearce met with the Claimant on 11 May 2020.

16. Mr Pearce did not find any wrongdoing on the part of the Respondent and informed the Claimant of this by email dated 31 July 2020. The Claimant takes issue with the extent of the investigation conducted by Mr Pearce and with his conclusions.

17. On 26 November 2020, the Claimant sent an email headed 'formal grievance' to Tori Matthews, Deputy Area Manager. The grievance largely repeated the allegations that the Claimant had made in Mach 2020. The Claimant says this was his second protected and qualifying disclosure. He asked for the correspondence to be forwarded to HR. It was forwarded to Sharon Barton. It appears Sharon Barton suspected the Claimant had previously worked for the Respondent and may not have declared this when applying for the role in 2019.

18. The Respondent took the decision to suspend the Claimant pending investigation. The allegations concerned the Claimant's conduct, namely allegedly wilfully omitting to provide information/providing false information. The suspension letter was signed by Sharon Barton on behalf of the Respondent.

19. Sharon Barton conducted an investigation and prepared an investigation report dated 15 December 2020. She concluded there was a case to answer at disciplinary hearing.

20. The Claimant was invited to a disciplinary hearing which took place on 6 January 2021. The decision maker was Jennifer Dillon. There is a full transcript of the hearing in the bundle. The Claimant contended that he had told those interviewing him in 2019 that he had previously worked for the Respondent and that he had a recording of this. He accepted the original application (made by the recruitment agency on his behalf) had failed to

mention his previous employment with the Respondent but said that was a mistake by the recruitment agent and that he had sent an updated CV which did include his previous employment with the Respondent. He said he sent this before the interview. The Claimant alleged his interviewers in 2019 had the CV with them at the interview. The transcript of the hearing at page 322 records the Claimant stating, 'before I was interviewed I sent Shaw Trust a letter with my up-to-date CV on it and it not only showed Shaw Trust but showed other things as well.'

21. After the disciplinary hearing, on 15 January 2021, the Claimant sent documents in support of his position to Jennifer Dillon. These included a document headed 'Evidence Submission Index – 15/01/2021' and the first two items in the index were described as '1. Letter sent to Shaw Trust on 28th August 2019' and '2. CV sent to Shaw Trust 28th August 2019'. The letter and CV were enclosed with the index. The letter is dated 28 August 2019 and is addressed to 'Dear HR' at 'Shaw Trust' at an address in Bristol.

22. The letter states 'I am writing to inform you that the above application (that was for Support Manager Vacancy Birmingham) was completed on my behalf by someone that works for Passion 4 Progression (HR Recruitment Agency). It was not until I received an acknowledgment email from you on 22/08/2019 that …I realised that they created a CV and application that was not accurate with my job history and experience. Please see my correct CV included in this letter.'

23. The CV was also provided to Jennifer Dillon. It starts with a 'profile' and refers to the Claimant as 'has worked on numerous programmes including New Deal, Flexible New Deal, The Work Programme and currently working on the Work and Health Programme'. The CV gave the Claimants job title as Support Manager.

24. The Index that the Claimant sent to the Respondent on 15 January 2021 at item 9 referenced a 'transcript of recording' detailing conversation where (the Claimant) discusses previous employment at Shaw Trust. The Claimant enclosed the transcript. It appeared to be a transcript of a recording he made at his job interview in 2019, but only 1 ¼ pages long and appears to be the end of the interview process. In this transcript, 'Suki' is noted to ask the Claimant 'questions from you Dion' to which the Claimant is said to reply 'no erm just really obviously you know I've worked at Shaw Trust erm and if your (sic) comfortable with that'. Suki is said to reply 'Sure so we've got erm another one more person to interview today and we will be making the decision by tomorrow'.

25. On 21 January 2021, Jenifer Dillon wrote to the Claimant with the outcome of the disciplinary hearing. Her decision letter confirms that she reviewed all of the evidence the Claimant had provided. She stated as follows "Having

reviewed all of the evidence presented both in the meeting and the documents you sent on 15th January 2021, I found there to be a number of discrepancies in your version of events. For example, in the job application we receieved a totally different company (In2Ambition) was mentioned for the 2008/2009 and did not mention Shaw Trust at all. We have a great deal of experience with agencies and recruiters and believe it is highly unlikely that this application from which was submitted to us was incorrect. Recruiters/agencies tend to use the information provided by the candidate."

26. She concluded that the CV the Claimant had claimed to have sent to the Respondent on 28 August 2019 could not gave been his current CV at that time as the profile referenced work, a job title, and (Support Manager) he could only have undertaken after starting work with the Respondent later in 2019. She concluded that the Claimant had purposefully hidden his previous employment with the Respondent and that he was dishonest when making the (2019) application. She determined that the Claimant should be summarily dismissed for gross misconduct.

27. The Claimant appealed this decision. Jenny Woodrow was appointed by the Respondent to be the decision maker and the appeal hearing took place on 17 February 2021. Following the hearing, Jenny Woodrow met with Claire Tynan, who had been one of the Respondent's employees who interviewed the Claimant in 2019 and with Jenifer Dillon, by way of further investigation. on 11 March 2021. Jenny Woodrow asked Claire Tynan about her interview with the Claimant in 2019. She recalled the interview but did not recall the Claimant saying towards the end of the interview that he had previously worked for the Respondent. She only recalled seeing a CV that she thought came from one of the Respondent's 'recruitment suppliers'. Jenny Woodrow sent her decision in writing to the Claimant. She upheld the decision to dismiss.

SUBMISSIONS

28. I heard oral submissions from Mr Northall. He referred me to his instructing solicitors application for strike out/deposit order which appeared at pages 87-91 of the bundle. Mr Northall confirmed it was his position that the claims had no reasonable prospects of success and that in the case of the detriment claims, the Tribunal had no jurisdiction to hear them as the Claimant had not complied with ACAS early conciliation. He proposed that the Respondent's application for costs be heard (if appropriate) after I had reached my decision on strike out/deposit.

29. Mr Northall referred me to the case of North Glamorgan NHS Trust v Ezsias (2007) IRLR 603 which confirmed that it will only be in exceptional cases that a Tribunal will strike out a claim where central facts are in dispute. His position

was that the facts in the case were not controversial. He referred me to Cox v Adecco and others EAT 0339/19 and which dealt with litigants in person and the fact that a Tribunal should take care to understand their claims. He submitted the Claimant this case was sophisticated, and this was bourne out by the filing of his Skeleton Argument on the morning of the hearing.

30. Mr Northall referred me to Pillay v Inc Research UK Ltd UK EAT/0182/1 where the EAT found the public policy described in Anyanwu and another v South Bank Students Union (2001) IRLR 305 also applies to whistleblowing claims (namely that such claims should not be struck out except in the most obvious and plainest cases). He referred me to Community Law Clinic Solicitors Ltd v Methuen UK EAT/0024/11 and submitted that where a claim genuinely meets the strike out test of no reasonable prospects of success, even if it is a discrimination/whistle-blowing claim, the Tribunal can strike it out.

31. The Claimant's case must be taken at its highest, but just because this claim involves whistle-blowing that does not mean the claim is immune from strike out.

32. Mr Northall submitted that the key issue in this claim is the reason for the detriments and/or dismissal – it is one of causation. The Claimant has insufficient service to bring an ordinary unfair dismissal claim so the Tribunal will focus on what was in the mind of the decision maker at dismissal. The reason for dismissal is set out in the dismissal letter. The Respondent's disciplinary policy listed examples of gross misconduct which expressly included 'wilful omission of information or provision of false information to gain employment'. The reason given by Jenifer Dillon is squarely covered by this.

33. Mr Northall argued that the Claimant was not offered the Support Manager role until 16 October 2019. The offer letter bearing this date was at page 194. The CV the Claimant alleged he supplied to the Respondent's Bristol address on 28 August 2019 cannot have been the up-to-date CV. That CV references a role the Claimant had not undertaken. In fact, his most recent role at that time was with Travis Perkins, the builders merchants. Mr Northall submitted that the only conclusion for the Tribunal at final hearing will be that the Claimant was lying, and simply could not have sent the CV he says he sent.

34. Mr Northall recognised that the Claimant was since trying to 'row back' from that position. In the Skeleton Argument for this hearing the Claimant said in fact that he periodically amends and updates his CV so that the one sent to the Respondent on 15 January 2021 would look different to the one he sent on 28 August 2019. Mr Northall noted the Claimant had not offered this 'new' explanation at the interim relief application.

35. Mr Northall submitted there was nothing to show that Jenifer Dillon or Jenny Woodrow was aware that the Claimant had made the alleged protected disclosures nor that these were the reason he was subjected to any detriment and/or dismissal. The Claimant was not running any argument that these decision makers were influenced by these disclosures and/or by those colleagues who knew about them. When the Claimant made his first alleged disclosure the Respondent did not shy from it. It conducted a thorough investigation.

36. On the ACAS early conciliation point Mr Northall referred me to s18A Employment Tribunals Act 1996. 'Relevant proceedings' in s18 (1) (b) includes Part 5 of the Employment Rights Act 1996 so covers whistle-blowing detriment claims. There is an exemption in the 2014 Regulations for Part 10 claims including applications for interim relief. His position was that the Tribunal had jurisdiction to hear the S103A claim but not the S47B claim. Mr Northall referred me to the case of Webster v Rotala PLC T/A Diamond Bus North West UK EAT/0015/20/VP and in particular paragraph 26. In his submission in the (admitted) absence of ACAS early conciliation the detriment claims must be dismissed.

37. As I have said I had a Skeleton Argument from the Claimant and I also heard oral submissions from him. The Claimant told me that Jennifer Dillon did in fact know about his protected disclosure(s) as she had said so in her witness statement prepared for the interim relief hearing.

38. In the Claimant's submission he ought to be provided with an opportunity to cross-examine the Respondent's witnesses at trial. He felt the mindset of the dismissing officer was important in circumstances where he believed she was aware that he was a whistle-blower. He was of the view that Sharon Barton, who had been involved in the 2009 investigation had taken a disliking to him from that point. He felt the investigation report and decision that he should face a disciplinary hearing was all 'retaliation'.

39. The Claimant did not accept he was a sophisticated litigant in person. He told me he only filed a Skeleton Argument as he believed from his experience at the interim relief hearing that this was usual protocol.

40. He referred to the 'audio-recording' he took of his 2019 job interview as being a 'smoking gun'. He had commissioned an expert report to verify its authenticity. He submitted it was clear from the recording and transcript that he had told those interviewing him in 2019 that he had previously worked for the Respondent.

41. After hearing submissions, the Claimant gave evidence about his means. He explained he was now working for a recruitment company on a self-employed basis with fluctuating income currently about £520 a week. He said his

outgoings outstripped his income and he had been in touch with a debt management company as he owed £11,000 on a credit card and both of his bank accounts were in overdraft. He owns his own home which has a mortgage. He has a dependent daughter.

THE LAW

42. I have referred to the relevant case law above in the section dealing with submissions.

43. Rule 37 (1) (a) Schedule 1 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 gives me the power to strike out a claim or claims where there is no reasonable prospect of success. A strike out is the ultimate sanction.

44. It provides "(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… on the following grounds (a) that it is scandalous or vexatious or has no reasonable prospects of success". For a strike out order to be appropriate the claim or claims must be bound to fail.

45. The threshold required is high. In Ezsias, the Court of Appeal held where facts are in dispute, a Tribunal should rarely strike out a claim without the evidence being tested at final hearing. Tribunals should not strike out claims as having no reasonable prospects of success, unless the facts as alleged by the Claimant disclose no arguable case in law.

46. Discrimination (and whistleblowing) claims should only be struck out in the plainest and most obvious cases – Anyanwu. The Claimant's case must be taken at its highest.

47. Tribunals must exercise particular care with litigants in person. This does not mean a Tribunal cannot strike out a claim by a litigant in person however the Tribunal needs to ensure it understands the case put forward by the Claimant before doing so.

48. Deposit orders are dealt with by Rule 39. A Tribunal may make a deposit order if a Judge considers that a Claimant's allegation have little reasonable prospects of success. It provides "Where at a preliminary hearing…the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospects 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 the case. (2) The Tribunal shall make reasonable enquires into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit".

49. Where such an order is made a Claimant should consider carefully whether to pay the deposit and proceed with the claim and perhaps should take legal advice.

50. The system of ACAS early conciliation became mandatory in 2014. Sections 18A to 18C were inserted into the Employment Tribunals Act 1996 by section 7 and Schedule 1 to the Enterprise and Regulatory Reform Act 2013. S18A sets out the early conciliation procedure that must be followed by prospective Claimant's before they issue a claim in the Employment Tribunal. Section 18 (1) refers to 'relevant proceedings' (which require early conciliation) which 'means employment tribunal proceedings' under (a) Part 5 of the Employment Rights Act. There are exemptions where a prospective Claimant need not participate in early conciliation (s18(7)) which are set out in Regulation 3 of the Early Conciliation Regulations 2014, and which include where an unfair dismissal claim is accompanied by a claim for interim relief.

51. In Webster v Rotala, the EAT had to consider a claim that contained complaints that were both exempt from early conciliation and those that were not. It confirmed the Tribunal was correct to have rejected the claims that were not exempt. At paragraph 26 of the Judgment the EAT noted "The Employment Tribunal was…unarguably required to reject (the claims that were not exempt)."

CONCLUSIONS

52. It is easiest firstly to deal with the detriment claims. The Claimant accepts he never applied for ACAS early conciliation in respect of these claims. Detriment claims such as those as 'relevant proceedings' requiring a Claimant to enter into ACAS early conciliation before presentation of the claims. This is a mandatory requirement. There is no applicable exemption here. The Tribunal should have rejected these claims as it has no jurisdiction to hear them.

53. The dismissal claim is different because the Claimant made an application for interim relief there was no requirement to enter into ACAS early conciliation and the Tribunal does have jurisdiction to hear this claim.

54. I turn now to the strike out application and remind myself I must take the Claimant's case at its highest. The Claimant alleges the dismissing officer, Jennifer Dillon, was aware of his protected disclosures. He says she confirmed this in her witness statement prepared for the interim relief hearing. Mr Northall contended she did not know about the protected disclosures. I did not have the statements that were provided for the interim relief hearing but, accepting the Claimant's case at its highest, it may be the dismissing officer had knowledge of the disclosure, at the time she made the decision to dismiss. The reason for the dismissal is said by the Respondent to be a crucial issue here and I agree. The Claimant's case must be that the

Respondent must have dismissed him because he made protected disclosures. He can only establish that by testing Jennifer Dillon's mindset in cross-examination and arguing that the reason the Respondent puts forward is false. The Claimant's case at its highest is that the reason must be false as he did in fact provide a correct CV in advance of his 2019 interview, that CV was in the possession of those interviewing him and that he has a transcript of the interview which proves he mentioned his previous employment with the Respondent. Bearing all that in mind, this is not a case that I can strike out. I cannot say there are no reasonable prospects of success.

55. I do however conclude there are little reasonable prospects of success. The Claimant provided a copy of a CV to the Respondent after his disciplinary hearing that cannot have been the CV he says he provided in advance of his interview. This is because it plainly refers to a job title and work experience he simply did not have as at August 2019. His explanation that he regularly updates his CV's has only been made relatively recently and the Respondent is right to argue that this appears an attempt to 'row back' from a position which will prove difficult to explain. This may give weight to the reasons put forward for dismissal. With that in mind, I am persuaded to make a deposit order on the basis the claim has little reasonable prospects of success. The Claimant must pay a financial deposit if he intends to pursue the claim. Having regard to the Claimant's means I order him to pay a deposit of £250.

Employment Judge Hindmarch
22 September 2022

Sent to the parties on:

22/09/2022
For the Tribunal Office:

L. O'Neill