EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr P Ikong	**Beechwood Property Services Limited**

RESERVED PRELIMINARY HEARING JUDGMENT

Heard at Watford by CVP **On: 16 December 2022**

Before Employment Judge Manley

Appearances
For the Claimant: Mr D Ibekwe, caseworker
For the Respondent: Mr A Shellum, counsel

JUDGMENT

1 The claims for detriments and dismissal for making a public interest disclosure have no reasonable prospect of success and are struck out. They are not struck out because of the manner in which proceedings have been conducted.

2 If I had not struck those claims out, I would have ordered that deposits be paid in the sums of £500 for the detriments claim and £500 for the dismissal claim as a condition of the allegations or arguments for those claims proceeding.

3 The claim for detriments for having brought a health and safety concern to the respondent's attention has no reasonable prospect of success and is struck out. It is not struck out because of the manner in which proceedings have been conducted.

4 If I had not struck that claim out, I would have ordered that a deposit be paid in the sum of £500 as a condition of the allegations or arguments for that claim proceeding.

5 The claims for direct race discrimination, harassment related to race and victimisation are not struck out as having no reasonable prospect of success. Those claims do have little reasonable prospect of success. I

order a deposit is paid in the sum of £500 for each of the claims, making a total for those claims of £1500 for the allegations or arguments under each head of claim being allowed to proceed.

6 The response to the second claim does not have no or little reasonable prospect of success and no order for a deposit is made as a condition of the response proceeding to be considered at the merits hearing.

7 The claims for unfair dismissal and wrongful dismissal proceed to a full merits hearing and preparation is made for that hearing in the orders accompanying this judgment. If the claimant pays the deposit for the direct race discrimination, harassment related to race and victimisation claims, they will be determined at the same merits hearing to be listed at Watford for 3 days on the first available date.

REASONS

Introduction and issues

1 This hearing was listed after a previous hearing in September 2022 to consider the following issues:

1) To consider any application made by the respondent to strike out or order a deposit for parts of the claims;

2) To consider any applications made by the claimant;

3) To consider whether the third claim was presented in time, allowing for the early conciliation procedure and, if not, whether to allow that claim to proceed;

4) To draw up a final list of factual and legal claims and issues;

5) To make any necessary orders in preparation for the merits hearing.

2 The September preliminary hearing recorded this. "*The claimant has presented three claim forms as identified above. The first claim form was presented on 1 March 2021 and brought claims of public interest disclosure detriment; health and safety detriment and harassment related to race. The second claim, presented on 27 March 2022, brought claims of automatic unfair dismissal arising from public interest disclosure and health and safety concerns; ordinary unfair dismissal and wrongful dismissal for failure to give notice. Although there was a tick in the disability discrimination box, it was confirmed today that was an error and there is no such claim. The third claim, presented on 29 July 2022, brought claims of a further public interest disclosure detriment and direct race discrimination, harassment related to race and victimisation, all arising from the appeal against dismissal determined on 19 April 2022*"

3 For reasons set out in the summary, this hearing was listed to ascertain whether any claims should be considered for strike out or deposit and to

progress the claims to a merits hearing. Orders were also made at that hearing to ensure this hearing was effective. The claimant withdrew a claim for automatic unfair dismissal on health and safety grounds but all other claims remain. It is agreed that the third claim was made in time because it relates to the outcome of the appeal. The respondent applied for strike out or deposit of the claims for public interest disclosure detriments and dismissal; detriment for bringing a health and safety matter to the employer's attention and all Equality Act claims. It was made clear there was no application for such orders for the unfair dismissal and wrongful dismissal claims.

4 The claimant applied for a deposit to be ordered for the allegations or arguments in the response to the second claim to be allowed to continue.

The hearing

5 Before this hearing, several documents had been sent to me. These included a bundle of documents and a skeleton argument from the respondent, two written submissions from the claimant and further documents (which were sent only a very short time before this hearing).

6 I pre-read those documents and heard relatively extensive oral submissions from both representatives. The claimant decided not to provide any information on his means for any decision I made on the making of a deposit order. I decided to reserve my judgment and, after discussion with the representatives, said I would take steps to list the matter for hearing, depending on the judgment. The parties may apply for a short telephone hearing for case management purposes if necessary.

Submissions

<u>The respondent</u>

7 The respondent applied for a strike out or deposit of the claims, apart from unfair and wrongful dismissal, on two grounds. The first was that the claims had no or little reasonable prospect of success and the other was the manner in which the proceedings had been brought and conducted. As far as the public interest disclosure claims were concerned, the respondent's representative submitted that the claimant had no reasonable prospect of overcoming the first hurdle as he could not show, even when taking his claim at its highest, that he had made a protected disclosure. The single disclosure was that, on 8 December 2021, he had called the respondent whilst he was in Cameroon, to tell them he had had a positive Covid test. Although there have been some attempts by the claimant, made in late further particulars on 8 August 2022, to expand the nature of the disclosure, this is the pleaded case and was confirmed in writing by the claimant upon enquiry by the tribunal (p86 and p50). That information, submitted the respondent's representative, did not tend to show any of the matters in section 43B a) to f) Employment Rights Act 1996 (ERA). There is no suggestion of any wrongdoing for which the respondent could be believed to be

responsible. The respondent's representative also submitted that, even if the claimant could show a protected disclosure, the claimant could not show that any of the detriments pleaded at 2.1 d i) to iii) (as recorded in the list of issues at page 149 between 4 i) to iii)) had any connection to the disclosure. Indeed, the claimant's case, as stated there appeared to be that there was race discrimination. What is more, submitted the respondent's representative, the respondent did not question the 8 December 2021 test at all. Questions of veracity only arose when the second test, said to have been taken on 23 December 2021, was shown to the respondent.

8 The respondent also submitted that the health and safety detriment claim has no reasonable prospect of success for similar reasons, the matter relied upon being the same 8 December 2021 discussion. At that point the claimant was in Cameroon and there are no pleaded facts, nor any that can be imagined, which would show anything that was a "serious or imminent" danger. For similar reasons to those above, the respondent's representative submitted, the claimant cannot show any detriments connected to the information he provided on 8 December 2021.

9 As for the Equality Act claims, the respondent's representative submitted that the pleaded case cannot succeed as a matter of law. The respondent questioning the veracity of the second test of 23 December 2021 could not be because of race as countries do not have protected characteristics. The reason for suspension was because the respondent saw something suspicious in the second test (namely the same download date of 8/12/21 and, when scanned the QR code, was identical to that recorded for the 8 December 2021 test). That had no connection to race. The respondent submitted that the claimant made bald assertions which are not enough to sustain a discrimination claim and all those claims have no reasonable prospect of success.

10 The respondent also submitted that the manner of bringing the proceedings was unreasonable and vexatious. A total of three claims were presented on largely the same facts, three sets of further particulars had been provided and an unmeritorious application made to the regional employment judge between the last hearing and this one. The scattergun approach had used up both the respondent's and the tribunal's resources. What should be a relatively straightforward unfair and wrongful dismissal claim has caused significant extra prejudice to the respondent and should be struck out under Rule 37 1) b). Finally, the respondent submitted that the claimant's application to order a deposit for the response in the second claim (the dismissal) to be allowed to continue should be dismissed. The respondent submitted that the response was clear, that is that the claimant was dismissed because there was a genuine belief that there was dishonesty and the test result of 23 December 2021 had been tampered with. There was no challenge to it being from a bona fide company. The grounds of resistance, submitted the respondent, are clear.

<u>The claimant</u>

11 The claimant's representative submitted I would have difficulty in determining the prospects of success in the claims for public interest disclosure, health and safety and race discrimination at this stage. He repeated concerns about the respondent's case and stated that the respondent had alleged that the claimant had manipulated or fraudulently altered the Covid test result to make it a negative result. I asked the claimant's representative about that as the information I had was that both the results showed a positive test. The claimant's representative then stated that the respondent had alleged some collusion between the claimant and the Covid test organisation in Cameroon. The claimant's representative submitted that the details of the disclosure had been made clear in the further particulars provided on 26 September (page 154) and reminded me that his organisation was a not for profit one and he was not legally qualified. He asked me to allow the claims to proceed so that all the facts could be put forward. He pointed out that, as the respondent disputed a test carried out in Cameroon, the claimant could be offended as that was his home country, it indicated a stereotypical view, and would amount to race discrimination.

12 The claimant's representative also said that the health and safety claim was clear as government guidelines consistently provided information on workplace safety. The concern was about the claimant returning before a risk assessment was carried out. The claimant's representative submitted that the harassment claim was clear as the claimant was entitled to be offended by the suggestion that the Cameroon test was tainted whereas the British one was not. (This was discussed later as there is no current evidence that the respondent saw or referred to any British tests). He said it amounted to direct race discrimination and harassment. The claimant's representative also submitted that the victimisation claim was compelling because the claimant had brought grievances before his appeal was dismissed. There was an extra document at the appeal stage, (disclosed for this hearing yesterday) which was an important factor.

13 The claimant's representative also submitted that the response to the second claim had little reasonable prospect of success and a deposit should be ordered. He stated that the Cameroon Covid test organsiation was bona fide and the respondent was incapable of challenging the veracity of any tests it carried out. He repeated the suggestion that the respondent alleged the claimant had changed the test result from positive to negative but I pointed out that was not accurate as the test dated 23 December 2021 clearly says positive as had the one dated 8 December 2021. In summary, the claimant submitted there should be no strike out or deposit for any of his claims but there should be one for the response to the second claim.

The Law

Strike out and deposit

14 Rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of

Procedure) Regulations 2013 ('the Rules') provides as follows:

"37(1) At any stage of the proceedings…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"

Rules 39(1) and 39(2) of the Rules provide that:

"39 (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."

15 When determining a strike out application, I should have regard to the pleaded case which the claimant is bringing, as contained in the ET1, taken at its highest. I should not determine the strike out application on the basis of other material and was referred by the respondent's representative to Chandhok and another v Tirkey (Equality and Human Rights Commission intervening) [2015] ICR 527 on this point.

16 When the central facts in a claim are not in dispute, it is often more straightforward to assess prospects of success. In assessing prospects in this case, I was referred to the case of Madarassy v Nomura International plc [2007] ICR 867 where Mummery LJ said "*on the case as pleaded, there is really no more than an assertion of a difference of treatment and a difference of protected characteristic which only indicate a possibility of discrimination.*

17 The test of "little reasonable prospect of success" is a less rigorous test than the "no reasonable prospect of success" test for strike out, and I have more flexibility when considering whether to order a deposit.

18 Rule 37(1)(b) provides that a claim (or part) may be struck out if *"the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent… has been scandalous, unreasonable or vexatious".*

19 When considering the conduct of a party's representative upon an application for strike out under Rule 37(1)(b), I should assess the party and/or their

representative's conduct; the way in which the proceedings are being conducted by them or on their behalf; how far it is attributable to the party and how significant the conduct is and whether the party can separate the representative's conduct from their own. I must consider whether the conduct amounts to a misuse of the legal process and whether strike out is a proportionate response. I must also bear the overriding objective in mind.

Public interest disclosure detriment and dismissal

20 In order for a disclosure to attract the protection of s.43B ERA 1996, it must be a disclosure of information, must be qualifying in that, in the reasonable belief of the worker, it is in the public interest and tends to show one or more of six "relevant failures" has occurred or is likely to occur.

21 s.47B(1) ERA 1996 provides that a worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his or her employer on the ground that the worker has made a protected disclosure.

22 s.103A ERA 1996 provides that an employee who is dismissal shall be regarded as automatically unfairly dismissed if the reason, or principal reason, for the dismissal is that the employee made a protected disclosure.

Health and safety detriment

23 s.44 ERA 1996 provides:

"(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 on the ground that—

…..

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the worker reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his or her place of work or any dangerous part of his or her place of work…

Equality Act 2010 (EQA) claims

24 The claimant seeks to bring claims under EQA, as set out in the list of issues, in the first and third claims. The first claim alleges that the suspension and commencing disciplinary action was harassment. The harassment claim falls under s26 EQA and here there must be unwanted conduct that relates to race and which has the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. For the victimisation claim in the third claim, s27 EQA provides that, where the claimant has done a protected act, he should not be subjected to a detriment because he did that act. That third claim also includes claims for direct race discrimination and harassment. The direct race discrimination claim falls under s13 EQA where there must be a finding of less favourable treatment because of race and an actual or hypothetical comparator must be identified.

25 For all the EQA claims, under s136 EQA, the claimant bears the initial burden of proving facts from which the tribunal could conclude there has been discrimination. If he does so, the burden shifts to the respondent to show any treatment or detriments are without discrimination.

Conclusions

26 As I stated in the summary of the earlier preliminary hearing, matters have become unnecessarily complicated by the way this litigation has been conducted by the claimant and his representatives. I start, therefore, with considering whether any parts of the claim should be struck out because that conduct was scandalous unreasonable or vexatious. I have taken into account that the claimant's current representative is from a not-for-profit organisation and that the claimant changed from one representative to another as matters proceeded. Although it has not been the best way to bring claims and there has been time spent which was not necessary, I have determined the manner in which the proceedings have been conducted is not serious enough for me to strike out any claims and I do not strike anything out on that ground.

27 I now turn to the public interest disclosure detriment and dismissal claims. This is a relatively complex area of law and I appreciate I may not

have all the facts before me. However, I do have those that are pleaded and were contained in ET1s and further particulars. The disclosure is a single piece of information made on 8 December 2021, when the claimant was in Cameroon, that he had a positive Covid test. That does not tend to show, in anyone's reasonable belief, much less the claimant's, that the employer had any responsibility for any alleged wrongdoing. No questions were raised about that test. The claim that there was a qualifying disclosure, even when taken at its highest, has no reasonable prospect of success. Even if I am wrong about that, the claim that there was any detriment or that the dismissal was caused by that information provided on 8 December 2021 has no reasonable prospect of success. I have decided this claim must be struck out under Rule 37 1) a). If I am wrong about that, I would have made an order that a deposit be paid as a condition of these claims proceeding. As the claimant has decided to provide no information on his means, I would have ordered £500 deposit for the detriment claim and £500 for the dismissal claim.

28 As for the health and safety detriment claim, I have formed the same view. The claimant was in Cameroon and was informing the respondent of his positive Covid test as he could not return to work when he was expected. There were no harmful or dangerous circumstances at that point and no detriment flowed from that information. This has no reasonable prospect of success and will be struck out under Rule 37 1) a). If I am wrong about that, I would have made an order that a deposit be paid as a condition of this health and safety detriment claim proceeding. As the claimant has decided to provide no information on his means, I would have ordered £500 deposit for this claim.

29 I now consider the Equality Act claims. I agree that the discrimination claims may be very difficult to prove and that the initial burden of proof rests on the claimant. However, I do not consider them to be as weak as the public interest disclosure claims, in part because the claimant has been consistent in arguing that he perceived any criticism of the Covid tests to be a criticism of tests carried out in Cameroon. In my view, this was his focus and, whilst it may ultimately be found not to be justified, I do not feel those claims can be struck out.

30 My assessment is that they have little reasonable prospect of success and I order a deposit be paid in the sum of £500 for each head of claim, that is £500 for direct race discrimination, £500 for harassment and £500 for victimisation, making a total of £1500 for those allegations or arguments to be allowed to proceed. The claimant has indicated that he does not intend to pay any deposits but, if he does pay any of those amounts, that claim can proceed with the unfair and wrongful dismissal claims.

31 Finally, I considered the claimant's application for a deposit order for the

response to the second claim. This application is wholly without merit. The response is clear and gives the respondent's reasons for dismissing the claimant. There are no grounds for the suggestion that such a response has little reasonable prospect of success. It may or may not be successful after a hearing but I do not order any deposit.

32 Orders for the hearing and a revised list of issues is contained in a separate document sent to the parties with this judgment.

Employment Judge Manley

Dated 19 December 2022
Sent to the parties on:

21/12/2022

For the Tribunal: