EMPLOYMENT TRIBUNALS

Claimant: Mr O Ezeh

Respondent: John Lewis plc

Heard at: Reading **On:** 8 February 2023

Before: Employment Judge Shastri-Hurst

Representation
Claimant: in person
Respondent: Mr D Hobbs (counsel)

JUDGMENT having been given at the hearing on 8 February 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 at the end of that hearing, the following reasons are provided:

REASONS

Introduction

1. The claimant commenced employment with the respondent, as a Warehouse Partner at Waitrose & Partners Distribution Centre in Bracknell on 13 March 2022. That employment ended on 14 April 2022, when the claimant was summarily dismissed for gross misconduct.

2. The ACAS early conciliation process started on 11 June 2022 and ended on 13 June 2022. The claim form was presented on 6 July 2022.

3. The claimant initially presented claims for age, race and disability discrimination, as well as unfair dismissal and whistleblowing (dismissal and detriment). However, at today's hearing, the claimant withdrew all his discrimination claims, leaving the following as live claims:

   3.1. Unfair dismissal – s98 Employment Rights Act 1996 ("ERA");
   3.2. Automatic unfair dismissal – s103A ERA;
   3.3. Detriments – s47B ERA.

4. The respondent defends the claims, relying on the potentially fair reason of conduct as the reason for the claimant's dismissal. In terms of the detriments

claim, the respondent argues that there was no protected disclosure and, in any event, the reason for the alleged detriment (and dismissal) was in no way connected to the alleged disclosure.

5. The preliminary hearing today was listed in order to consider the respondent's application to strike out the claimant's claims in their entirety, or, in the alternative, for a deposit order.

6. The claimant represented himself, and the respondent was represented by Mr Hobbs. I am grateful to both parties for the professional manner in which they dealt with the hearing today. In reaching my conclusions, I had before me a bundle of documents of 73 pages. I also had the benefit of hearing submissions from both parties, and had sight of a skeleton argument produced by Mr Hobbs.

Issues

7. The respondent's application to strike out the claimant's claims has two limbs to it:

   7.1. Regarding the unfair dismissal claim under s98 ERA, it is said that the Tribunal lacks jurisdiction to hear this claim. Under s108 ERA, a claimant must have two years' service with an employer before they can bring a claim of unfair dismissal. Given that the claimant in this matter was employed for little over four weeks, the respondent says that this precondition is not met. Therefore, the claim should be struck out as the Tribunal does not have jurisdiction to hear this claim.

   7.2. Regarding the whistleblowing claims, the respondent argues that these claims have no reasonable prospect of success, and so for that reason should be struck out. This is in line with rule 37(1)(a) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Rules"). If the Tribunal considers that the whistleblowing claims have little reasonable prospect, the respondent seeks a deposit order, under r39 of the Rules.

Law

Strike out

8. In terms of the ordinary unfair dismissal claim, the respondent relies on s108 ERA, which provides:

> "(1) Section 94 [the right not to be unfairly dismissed] does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than two years ending with the effective date of termination."

9. The respondent applies to strike out the claimant's whistleblowing claims under one ground found within r37(1) of Sch 1 of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the Rules"). R37 provides as follows:

> "37(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 any of the following grounds –

> a. That it is scandalous or vexatious or has no reasonable prospect of success; …"

10. The Tribunal has the power to make deposit orders against any specific allegations or arguments that it considers has little reasonable prospect of success under r39 of the Rules:

> "(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 £1000 as a condition of continuing to advance that allegation or argument."

11. For discrimination claims, the starting point regarding case-law is **Anyanwu and anor v South Bank Student Union and anor [2011] ICR 391 UKHL**. Here, the House of Lords emphasised that discrimination claims are often fact-sensitive and require close examination of the evidence at a full merits hearing. Same approach is to be taken in whistleblowing cases - **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**.

12. I am also assisted by the case of **Balls v Downham Market High School and College [2011] IRLR 217**, in which Lady Smith held:

> "When strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; 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 word "no" because it shows that 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 submissions and deciding whether there 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."

13. Mitting J in **Mecharov v Citibank NA [2016] ICR 1121 EAT** provided the following guidance at paragraph 14:

> "…the approach that should be taken in a strike out application in a discrimination case is as follows:
>
> 1. Only in the clearest case should a discrimination claim be struck out;
> 2. Where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence;
> 3. The claimant's case must ordinarily be taken at its highest;
> 4. If the claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and,
> 5. A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

14. However, there are some caveats to the general approach of caution towards strike out applications. In **Ahir v British Airways plc [2017] EWCA Civ 1392 CA**, it was held that, when a tribunal is satisfied that there is no reasonable prospect of the facts needed to find liability being established, strike out may

be appropriate. This is caveated by the need to be aware of the danger of reaching that conclusion without having heard all the evidence.

15. In **Community Law Clinics Solicitors Ltd & Ors v Methuen UKEAT/0024/11**, it was stated that, in appropriate cases, claims should be struck out and that:

> "the time and resources of the tribunals ought not be taken up by having to hear evidence in cases that are bound to fail."

16. It is important to take into account that a claim form entered by a litigant in person may not put that claimant's case at its best as had it been properly pleaded – **Hasan v Tesco Stores Ltd UKEAT/0098/16.** The best course of action in such a scenario is to establish exactly what the claimant's claim is, and, if still in doubt about prospects, make a deposit order – **Mbiusa v Cygnet Healthcare Ltd UKEAT/0119/18**.

Deposit order

17. The rationale of a deposit order is to warn a claimant against pursuing claims with little merit, which may leave them open to a risk of costs should they proceed with the claim and lose on the same basis as identified as the reason for the making a deposit order.

18. The purpose of such an order is not to restrict disproportionately access to justice, hence any order made must be for an amount that is affordable by a party, and can be realistically complied with – **Hemdan v Ishmail and anor [2017] IRLR 228**.

19. If I decide to make a deposit order, I must give reasons, not only for the fact of the order, but also for the amount of that order – **Adams v Kingdon Services Group Ltd EAT/0235/18**.

Findings of fact

Background

20. The claimant was originally employed by the respondent from 2011 to 2017. His contract was terminated, the respondent says, by reason of serious misconduct, including dishonesty. The claimant says that he was dismissed in 2017 for making a public interest disclosure.

21. The public interest disclosure was made at some point between 2015-2017, and related to the claimant's belief that the management of the respondent had put in place a policy to reject any complaint made by any employee, both at first instance and at appeal stage. The claimant says that this was a protected disclosure that was made both in writing and verbally.

22. The claimant brought a claim in the tribunal for unfair dismissal, discrimination and whistleblowing following his dismissal in 2017. That claim was struck out by Employment Judge Morton on 18 September 2020, under r37(1)(b), that the manner in which proceedings had been conducted was scandalous, unreasonable or vexatious. EJ Morton did not comment on the prospects of the claims succeeding.

23. The claimant has appealed the strike out decision to the Employment Appeal Tribunal ("EAT"). The initial response from the EAT was that the 2017 ET1 had not been sent in its complete form, and so the appeal could not proceed. The claimant has, last month, responded to this and is awaiting the EAT's decision as to whether his appeal can proceed.

24. In the meantime, on 27 January 2022, the claimant completed a Primary External Application Questionnaire using the name Ananeckwu Ezeh, for a job as Warehouse Assistant at the respondent's Bracknell site. On his CV, the claimant said he had been employed by Sainsburys Supermarkets between 2011 and 2018, and DHL/Trade Team since 2018. He made no reference to his earlier employment with the respondent between 2011 and 2017.

25. On 8 February 2022, the claimant attended an interview for the job. In that interview, the claimant was asked if he had ever been employed by the respondent before: he said no.

26. On 13 March 2022, the claimant commenced employment as a Warehouse Partner at Waitrose & Partners Distribution Centre in Bracknell. Shortly after the claimant started his new job, on 19 March 2022, he was asked by Richard Serne, a Security Team Leader who recognised him, whether they had worked together previously: the claimant said no, stating that he could be mistaking the claimant for his (the claimant's) brother.

27. Mr Serne raised concerns with Paul Barnes, Security Operations Manager, that the claimant had previously been employed and had not disclosed this. On 30 March 2022, an investigation meeting was held, at which the claimant admitted he had deliberately used a different name on his application, and lied about his prior employment with the respondent. The claimant was suspended.

28. Ahead of the disciplinary hearing, the claimant asked for information that related back to his misconduct charge from 2017. This material was not relevant to the index misconduct issue in 2022, and so was not provided.

29. The disciplinary hearing was held on 14 April 2022. The claimant left after 20 minutes: there is a difference between the parties as to why he left, but the decision maker continued in the claimant's absence.

30. On 14 April 2022, the decision was made to summarily dismiss the claimant after just over 4 weeks of employment.

31. The claimant appealed the decision to dismiss him and the appeal hearing was held on 24 May 2022. By letter of 8 June 2022, the respondent wrote to the claimant to inform him that his appeal had been rejected.

32. It is the claimant's case that his dismissal in 2017 was due to him blowing the whistle some time between 2015 and 2017. He says that the charge against him, regarding not properly clocking time sheets, was a sham. He told me he wanted to return to the respondent's employment to investigate whether others were dismissed for the same reason. He believed he could prove that other employees were guilty of the same misconduct but were not dismissed. That would enable him to show that he was dismissed for another reason, namely whistleblowing.

Nature of claims

33. I spent some time understanding the detail of the claimant's claims today: the claimant was very helpful in this process (and has also withdrawn all discrimination claims as per the separate judgment issued). We established that the particulars of the claimant's claims are as follows:

    33.1. Unfair dismissal – s98 ERA:

        33.1.1. The respondent failed to follow proper procedure;
        33.1.2. The respondent failed to give the claimant the opportunity to submit mitigating circumstances (in that the claimant asked for documents in advance of the disciplinary hearing, and they were not provided);
        33.1.3. The decision to terminate the claimant's employment was made in his absence.

    33.2. Protected disclosure:

        33.2.1. The protected disclosure is said to have been made sometime between 2015 and 2017. The substance of the disclosure was the claimant telling the respondent that the respondent's management team implemented a policy whereby they deliberately made the "wrong" decisions on grievances and grievance appeals, so that employees' complaints did not succeed.

    33.3. Automatic unfair dismissal (whistleblowing) – s103A ERA:

        33.3.1. The respondent dismissed the claimant;
        33.3.2. The reason for the dismissal was that the respondent knew the claimant was trying to get information about his dismissal in 2017, and was trying to stop him.

    33.4. Detriments (whistleblowing) – s47B ERA:

        33.4.1. The one detriment the claimant alleges was the respondent's decision to continue with the claimant's disciplinary hearing in his absence on 14 April 2022.
        33.4.2. The reason for this detriment is said to be the same reason as the reason behind the claimant's dismissal: that the respondent was trying to stop him from getting information about his previous dismissal.

34. It is those claims to which I apply the test for strike out initially.

Conclusions

Ordinary unfair dismissal

35. S108 ERA requires that an employee has two years' service as a prerequisite for presenting a claim for unfair dismissal, as set out above. The claimant was employed from 13 March 2022 to 14 April 2022. Therefore, he falls short of this requirement, and does not have the qualifying service to pursue a claim for ordinary unfair dismissal under s98 ERA.

36. I therefore must strike out this claim for lack of jurisdiction.

Whistleblowing claims

Protected disclosure

37. First, I will consider the alleged protected disclosure itself.

38. The disclosure here is said to be that the claimant told the respondent that management implemented a policy whereby it would deliberately make the "wrong" decision on any complaints employees brought to it, at both the first hearing, and then at appeal, so all complaints were rejected.

39. If that were to fit within any gateway under s43B ERA, it would seem to fit best within the gateway of "failure to comply with a legal obligation". It could possibly be said to be a failure to comply with the implied term of trust and confidence between employee and employer. However, the alleged disclosure does not fit very comfortably within any gateway of s43B, and it is not at all obvious to me whether my current interpretation of it being a failure to comply with legal obligation could in theory work.

40. This is the only disclosure that the claimant relies upon. From what he has told me about discussions during his employment in 2022, I cannot identify anything else that has the potential to be a protected disclosure.

41. I will however leave the issue of whether there was a qualifying protected disclosure made by the claimant between 2015 and 2017. I consider that the more crucial issue is the link between the alleged protected disclosure and the claimant's dismissal and detriment. I will therefore move on to focus on that required causal link.

Automatic unfair dismissal – s103A ERA

42. For such a claim to succeed, the protected disclosure must have been the reason or principal reason for the dismissal.

43. In such a claim, usually, once the issue of a protected disclosure being the reason for dismissal has been raised by the claimant, it is for the respondent to prove that the reason for dismissal was not the protected disclosure – s48 ERA.

44. However, in a case where the claimant does not have the required 2 years' service under s108 ERA, the burden of proof is on the claimant to show that the reason for dismissal was the protected disclosure – **Smith v Hayle Town Council [1978] IRLR 413** (followed by **Kuzel v Roche Products Ltd [2008] EWCA Civ 380**, a claim under s103A ERA). In **Kuzel**, the correct approach to the burden of proof was for the Tribunal to consider the following questions:

    44.1. Has the claimant shown that there is a real issue as to whether the reason put forward by the respondent was not the true reason?
    44.2. If so, has the employer proved his reason for dismissal?
    44.3. If not, has the employer disproved the s103A reason alleged by the claimant?
    44.4. If not, the dismissal is automatically unfair under s103A ERA.

45. I consider the claimant has no reasonable prospect of showing that there is a real issue as to whether his dismissal was because of his protected disclosure.

46. In any event, even if the claimant does get over that initial burden, I consider that there is no reasonable prospect of the respondent failing to prove that the reason for dismissal was conduct. Here, it came to the respondent's notice that the claimant had not been honest about his identity or his work history. The claimant attended an investigation at which he admitted this, and also admitted that the reason he had wanted to come back to work was to get evidence to show that "*what was said [in 2017] was untrue*". In other words, his sole purpose in working for the respondent again was to gather evidence against it, to show that his dismissal in 2017 was a sham.

47. The respondent says it dismissed the claimant for gross misconduct (including dishonesty). The decision maker was Mr Kettley and, even on the claimant's highest case, Mr Kettley did not know about the protected disclosure. All Mr Kettley knew (on the claimant's case) was that the claimant wanted to prove the respondent had been wrong in dismissing him in 2017.

48. I find that there is no reasonable prospect of success of it being found by a tribunal that Mr Kettley knew about the alleged protected disclosure made some time between 2015 and 2017. Mr Kettley could not have acted on knowledge he did not have.

49. I therefore consider there is no reasonable prospect of success of a tribunal finding that Mr Kettley knew of the protected disclosure specifically, or that he was motivated to dismiss the claimant because of that disclosure, particularly given that the claimant admitted the misconduct for which he was dismissed.

<u>Detriment – s47B ERA</u>

50. For this claim to succeed the protected disclosure must have been a "*material factor*" in the respondent's decision to continue with the disciplinary hearing in the claimant's absence.

51. Once the claimant has raised that the disclosure may have been a material factor in the detriment he suffered, it is for the respondent to prove that the detriments were for another reason – s48 ERA.

52. On the claimant's highest case, he told Mr Kettley at the disciplinary hearing that he wanted to seek advice about not being given the documents which he had asked for in advance of the meeting, and that Mr Kettley then continued in his absence.

53. As I have said, I consider that there is no reasonable prospect of success in the argument that Mr Kettley was aware of the alleged protected disclosure. It therefore follows that his decision to continue with the meeting could not have been materially influenced by a protected disclosure of which he had no knowledge.

54. In fact, the claimant's case is more nuanced even than saying he was dismissed or suffered a detriment because of the protected disclosure. In fact, he says that this was all an attempt by the respondent to stop him getting the information he needed to vindicate himself, and show his previous dismissal

had been a sham. On the claimant's own case, if that is the motivation, then the respondent's motivation is not the protected disclosure itself, but the desire to stop the claimant obtaining certain information.

55. For all those reasons, I find that there is no reasonable prospect of success of the facts required for the claimant's claims to succeed being established.

56. I therefore strike out the whistleblowing claims (s103A and s47B ERA), as having no reasonable prospect of success.

Employment Judge **Shastri-Hurst**

Date: 14/3/2023

REASONS SENT TO THE PARTIES ON

24/3/2023

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FOR THE TRIBUNAL OFFICE