EMPLOYMENT TRIBUNALS

Claimant: **Mr. M Hale**

Respondent: **Wilko Limited**

Heard at: **Via Cloud Video Platform (Midlands East Region)**

On: **20th June 2023**

Before: **Employment Judge Heap (Sitting alone)**

Representation
Claimant: **Mr. J Chambers - Solicitor**
Respondent: **Mr. A Hodge - Counsel**

JUDGMENT having been sent to the parties and written reasons having been requested on 26th June 2023 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 the following reasons are provided:

REASONS

BACKGROUND & THE ISSUES

1. This Preliminary hearing was listed to determine an application for specific disclosure made by the Claimant and an application to strike out complaints of automatically unfair dismissal and detriment by the Respondent who contends that they have no reasonable prospect of success.

THE HEARING

2. The claim was listed for one day of hearing time and was conducted remotely via Cloud Video Platform ("CVP"). There were no apparent issues as to connectivity or other problems and I am satisfied that we were able to have a fair hearing.

3. I have summarised the respective positions of the parties in respect of the application that the above referenced complaints should be struck out. Whilst those are a summary only the parties should be assured that I have considered carefully each of the arguments advanced on each side.

4. Before hearing the application, I obtained further details from Mr. Chambers as to what the Claimant is said to have disclosed, to who and when because without that detail it was not possible to properly consider the merits of the whistleblowing complaints. Mr. Chambers confirmed that the Claimant relies on the following which he contends amounted to protected disclosures:

a. An oral disclosure on 1st March 2018 to the Claimant's line manager, Mr. Toal, and to a Director, Lisa Wilkinson, in which he conveyed that violent storms were a risk to health and safety and there was an obligation on the Respondent to deal with it; and

b. An oral disclosure on 17th February 2022 in which he conveyed the same information, albeit about a different storm, to Alison Hand, Managing Director, and Jerome Saint-Marc, Chief Executive Officer.

5. The Respondent contends that the complaints advanced have no reasonable prospects of success. They say firstly that the decision to close the DC2 depot (which the Claimant says came as a consequence of his disclosure) was not made by the Claimant but by Chris Ryan who was responsible for that depot.

6. That is denied by the Claimant who says that he was the person responsible at Board level for Health and safety and Mr. Ryan was his direct report to whom he gave the instruction to close DC2. This issue is relevant because the Respondent says that there was no issue about closure of DC2 and therefore if the Claimant had made a disclosure there would equally have been no issue about that.

7. Secondly, the Respondent says that there is no evidence of the Claimant having made a protected disclosure. The Claimant says in response that that is not unusual because the disclosures that he made were both oral and the Tribunal will need to hear evidence about that.

8. Thirdly, the Respondent says that it is improbable that there could be any causal link between a disclosure made in 2018 to either the detriment claimed or his dismissal.

9. The Claimant says that following the 2018 disclosure he was effectively taken to task and that set the scene for what came later when he made the disclosure and then decided to make a further disclosure and closed DC2 for a second time. That was all done he says on 17th February 2022. The Claimant says that on the same date his personnel file was sent to the Head of Human Resources, the next day there was an instruction not to pay him his agreed bonus and a few days later he was suspended.

THE LAW

Striking out a claim or part of it – Rule 37 Employment Tribunal Constitution and Rules of Procedure Regulations 2013

10. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 when considering whether to strike out a claim.

11. Rule 37 provides as follows:

"At any stage of the proceedings, either on its own initiative or on the application of a party, the 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;
(b) For non-compliance with any of these Rules or with an order of the Tribunal;
(c) That it has not been actively pursued;
(d) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)"

12. The only consideration for the purposes of this Preliminary hearing is whether the claim, or any part of it, can be said to have no reasonable prospect of success.

13. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is "no reasonable prospect" of success in respect of that claim or complaint. It is not sufficient to determine that the chances of success are remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (see 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…"

14. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal at a full hearing will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested (see **Anyanwu v South Bank Student Union [2001] ICR 391** and **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**.

15. Particular care is required where consideration is being given to the striking out of discrimination claims, which are in reality analogous to whistleblowing complaints, because of the public policy interest in having those claims substantively determined and that will rarely, if ever, be appropriate in cases where there are disputes on the evidence. However, if a claim can properly be described as enjoying no reasonable prospect of succeeding at trial, it will nevertheless be permissible to strike out such a claim (see ***Ahir v British Airways* Plc [2017] EWCA Civ 1392**). Each case will, however, turn on its own facts.

CONCLUSIONS

16. In order to strike out the whistleblowing complaints I need to be certain that they have **no** reasonable prospect of success.

17. I am not satisfied in that regard because there are clearly triable issues which can only be resolved by hearing evidence from the Claimant and relevant witnesses for the Respondent. That is the case given what is now known about the way in which the Claimant says that he made the disclosures. Oral evidence will be needed about that and the evidence of both parties tested. It may be that the Respondent says that no oral disclosures were made but the evidence of the Claimant and those to whom he made the alleged disclosures will be necessary to resolve that factual dispute.

18. Equally, evidence is needed about the issue of the causal link. Given the timeline in respect of the second alleged disclosure and what occurred on the following day or within the next few days it cannot be said that the complaints have no reasonable prospect of success.

19. Finally, there is the question of who gave the instruction to close DC2. I have paid careful attention to the email at page 126 of the Preliminary hearing bundle but that alone does not persuade me that the complaints have no reasonable prospect of succeeding without evidence being given. The Claimant says that he was the line manager of Mr. Ryan and that he gave him the instruction to close DC2.

20. Whilst the comms message that Mr. Ryan asked to be put out suggested that he himself had made the decision, what is in an email alone without further context does not persuade me that there is no possibility that what was written was in fact done on the instruction of the Claimant. Again, evidence from the Claimant and from Mr. Ryan will be necessary about that.

21. I am therefore not persuaded that the complaints of automatically unfair dismissal and detriment have no reasonable prospects of success such that the Respondent's application to strike them out must be refused.

22. The Claimant's application for specific disclosure has been dealt with separately and the reasons already embodied within case management Orders.

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Employment Judge Heap

Date: 5th July 2023

Notes:

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.