EMPLOYMENT TRIBUNALS

Claimant: **Ms P Melville**

Respondent: **London School of Management**

Heard at: **East London Hearing Centre (in public; by CVP)**

On: **10 March 2023**

Before: **Employment Judge Gordon Walker**

Appearances

For the claimant: represented herself

For the respondent: Mr J Sykes, consultant lawyer

JUDGMENT having been sent to the parties on **15 March 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Introduction

1. On 2 August 2022 the respondent made a written application to strike out the claims pursuant to rule 37(1)(a) of the Employment Tribunal Rules of Procedure 2013 or, alternatively, for deposit orders pursuant to rule 39 of the Employment Tribunal Rules of Procedure 2013. The respondent's main submission in its written application was that the claimant's pleadings were defective and did not provide the essential details of her claims.

2. At the outset of the preliminary hearing of 10 March 2023 the claimant defined her claims. These are set out in the list of issues in the case management order dated 10 March 2023.

Submissions

3. The parties made oral submissions at the hearing.

4. In summary, the respondent submitted that:

a. The claimant had not met the threshold set out in ***Ezsias v North Glamorgan NHS Trust*** [2007] ICR 1126 of showing a core dispute of fact that can only be determined at a final hearing by evaluating the evidence.

b. The claimant's whistleblowing claim had no reasonable prospects of success because:

   i. She did not disclose information about covid-19 (first protected disclosure ("PD1")).

   ii. She did not reasonably believe any disclosures were made in the public interest and/or that they tended to show a relevant failure:

      1. PDs 1 and 7: these were just about the use of safe household cleaning products.

      2. PDs 2 and 5: these were about (1) CCTV cameras which were visible and necessary for security; and (2) annual leave and sick forms which were required by the respondent. It was immaterial whether the claimant had to provide those through HR or reception.

      3. PDs 3 and 6: there was no obligation on the respondent to discipline a student about academic misconduct, this was a discretionary matter.

      4. PD4: the issue raised in the 12 November 2021 email was closed and resolved in the email of 17 November 2021. It was based on a misunderstanding and the claimant accepted the respondent's explanation. There was no harassment.

   iii. The claimant did not satisfy section 43F or 43G Employment Rights Act 1996 ("ERA") for PDs5-7:

      1. PD5: the ICO does not apply to the respondent as they are not a public authority.

      2. PD6: was sent to the student union president who was probably a student, and not the claimant's employer. The claimant cannot reasonably have believed she would be subject to a detriment, as evidenced by the tone or the emails from the respondent.

      3. PD7: there was no evidence that the claimant made the disclosure to HSE or that the respondent was made aware of this. Given the size of HSE the respondent would not have been notified of the disclosure before the claimant's dismissal a few days later. This submission is relevant to the issue of causation also.

c. The claimant's section 100 ERA health and safety claim has no reasonable prospects of success. There was no serious or imminent danger for the reasons set out above about PDs 1 and 7.

d. The claims of automatic unfair dismissal have no reasonable prospects of success. The terms of the termination letter are clear. There was also misconduct (stolen data) discovered after dismissal. The claimant has put forward various theories as to why she was dismissed, which weakens her case, and she has no reasonable prospects of succeeding on any of those claims at trial.

e. The claimant's one alleged detriment claim does not meet the threshold of what qualifies as a detriment in law. It therefore has no reasonable prospects of success.

f. The harassment related to disability claim and victimisation claims have no reasonable prospects of success for the reasons set out above at PD4. The matter was explained and resolved. The conduct could not have the proscribed purpose or effect for section 26 Equality Act 2010 ("EA") and the claimant cannot establish causation for the section 27 EA claim.

5. The claimant made brief submissions in reply, disputing the respondent's submissions about her alleged misconduct; the health and safety risks; and the alleged breach of GDPR.

The law

6. The respondents apply to strike out the claims pursuant to rule 37(1)(a)) of the Employment Tribunal Rules of Procedure 2013, which states:

> ***37.— Striking out***
>
> *(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.*

7. In the alternative, they apply for a deposit order pursuant to rule 39 of the Employment Tribunal Rules of Procedure 2013, which states:

> ***39.— Deposit orders***
>
> *(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.*

8. Discrimination claims should not be struck out except in the very clearest of circumstances: ***Anyanwu v South Bank Students' Union*** [2001] IRLR 305 (paragraphs 24 and 37):

"For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest." (Lord Steyn at paragraph 24)

" … discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact-sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence." (Lord Hope of Craighead at paragraph 37)

9. In ***Ezsias v north Glamorgan NHS Trust*** [2007] ICR 1126 the Court of Appeal held that a comparable approach should be applied in protected disclosure cases as they have much in common with discrimination cases (paragraph 29).

10. The relevant legal principles for striking out claims pursuant to rule 37(1)(a)) of the Employment Tribunal Rules of Procedure 2013 have been by the EAT on a number of recent occasions:

    a. Choundhury P (as he then was) in ***Malik v Birmingham City Council*** (unreported) 21 May 2019 at paragraphs 30-33:

    30. It is well-established that striking out a claim of discrimination is considered to be a Draconian step which is only to be taken in the clearest of cases: see Anyanwu & Another v South Bank University and South Bank Student Union [2001] ICR 391 . The applicable principles were summarised more recently by the Court of Appeal in the case of Mechkarov v Citibank N.A [2016] ICR 1121 , which is referred to in one of the cases before me, HMRC v Mabaso UKEAT/0143/17.

    31. In Mechkarov , it was said that the proper approach to be taken in a strike out application in a discrimination case is that:

    (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."

    32. Of course, that is not to say that these cases mean that there is an absolute bar on the striking out of such claims. 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 ET's ought not be taken up by having to hear evidence in cases that are bound to fail."

    33. A similar point was made in the case of ABN Amro Management Services Ltd & Anor v Hogben UKEAT/0266/09, where it was stated that, " If a case has indeed no reasonable prospect of success, it ought to be struck out." It should not be necessary to add that any decision to strike out needs to be compliant with the principles in Meek

v City of Birmingham District Council [1987] IRLR 250 CA and should adequately explain to the affected party why their claims were or were not struck out.

b. ***Cox v Adecco*** [2021] ICR 1307, HHJ Tayler at paragraph 28:

(1) No one gains by truly hopeless cases being pursued to a hearing.
(2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate.
(3) If the question of whether a claim has reasonable prospects of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate.
(4) The claimant's case must ordinarily be taken at its highest.
(5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is.
(6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim.
(7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing.
(8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer.
(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances.

c. ***Twist DX limited (and others) v Armes (and others)*** UKEAT/0030/20/JOJ, Linden J at paragraph 43 (adopted and approved in ***Carr v Bloomberg LP*** [2022] EAR 49 at paragraph 94):

43. The relevant principles relating to the application of this provision for present purposes can be summarised as follows:
a. A decision to strike out is a draconian measure, given that it deprives a party of the opportunity to have their claim or defence heard. It should, therefore, only be exercised in rare circumstances: see, for example, ***Tayside Public Transport Company Limited v Reilly*** *[2012] IRLR 755 at paragraph 30 .*
b. The power to strike out on the no reasonable prospect ground is designed to weed out claims and defences, or parts thereof, which are bound to fail. The issue, therefore, is whether the claim or contention "has a realistic as opposed to a fanciful prospect of success" : see, for example, paragraph 26 of the Judgment of the Court of Appeal in the ***Ezsias*** *case (supra) .*
c. The court or tribunal should not conduct a mini-trial of the facts and therefore would only exceptionally strike out where the claim or contention has a legal basis, if the central or material facts are in dispute and oral evidence is therefore required in order to resolve the disputed facts. There may, however, be cases in which factual allegations are demonstrably false in the light of incontrovertible evidence, and particularly documentary evidence, in which case the court or tribunal may be able to come to a clear view: see, for example, paragraph 29 of ***Ezsias*** *.*
d. Subject to this point, the court or tribunal must take the case of the respondent to the application to strike out at its highest in terms of its factual basis and ask whether, even on that basis , it cannot succeed in law.

> *e. The court or tribunal generally should not seek to resolve novel issues of law which may not arise on the facts, particularly in the context of a developing area of the law: see, for example,* ***Campbell v Frisbee*** *[2003] ICR 141 CA.*
> *f. The fact that a given ground for striking out is established gives the ET a discretion to do so – it means that it "may" do so. The concern of the ET in exercising this discretion is to do justice between parties in accordance with the overriding objective and an ET, therefore, would not normally strike out a claim or response which has a reasonable prospect of success simply on the basis of the quality of the pleading. It would normally consider the pleading and any written evidence or oral explanation provided by a party with a view to determining whether an amendment would clarify or correct the pleaded case and render it realistic and, if so, whether an amendment should be allowed. In my view, this last point is important in the context of litigation in the employment tribunals, where the approach to pleading is generally less strict than in the courts and where the parties are often not legally represented. Indeed, even in the courts, where a pleaded contention is found to be defective, consideration should be given to whether the defect might be corrected by amendment and, if so, the claim or defence should not be struck out without first giving the party which is responding to the application to strike out an opportunity to apply to amend: see* ***Soo Kim v Yong*** *[2011] EWHC 1781 .*
> *g. Obviously, particular caution should be exercised where a party is not legally represented and/or is not fully proficient in written English (see the discussion in* ***Hassan v Tesco Stores Limited*** *UKEAT/0098/16 and* ***Mbuisa v Cygnet Healthcare Limited*** *UKEAT/0109/18), but these principles are applicable where, as here, the parties are legally represented, albeit less latitude may be given by the court or tribunal.*

11. In ***Carr v Bloomberg LP*** at paragraph 93 the EAT accepted the submission that when applying the guidance not to strike out fact sensitive points, there is a distinction between a causation question and a question about the objective limbs of a statutory test (paragraph 93). At paragraph 98-99 the EAT explained that for the purposes of establishing that a disclosure qualifies for protection under the whistleblowing legislation, the objective elements are the first, third and fifth of the elements that must be satisfied for there to be a qualifying disclosure (as per ***Williams v Michelle Brown AM*** UKEAT/00044/19/OO) namely (1) there must be a disclosure of information; (2) the worker's belief in the public interest must be reasonable; and (3) the worker's belief in the relevant failure must be reasonable.

12. On deposit orders, in ***Jansen Van Rensburg v Royal Borough of Kingston upon Thames and others*** UKEAT/0096/07 – the EAT provided the following guidance:

    a. The employment judge can have regard to the likelihood of the facts being established when making a deposit order;
    b. The test is less rigorous than for a strike out;
    c. The Tribunal has greater leeway when considering a deposit order rather than a strike out; and
    d. The Tribunal must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response.

Conclusion

13. Applying the guidance in ***Cox v Adecco*** at paragraph 28(5)-(9) and ***Twist DX*** at paragraph 43(f)-(g), I began the hearing by clarifying the claims with the claimant. These are set out in the list of issues in the case management order dated 10 March 2023.

14. I considered the parties' submissions about each of the claims set out in the list of issues. Applying the legal principles above, I dismissed the application. I did not conclude that the claims had little or no reasonable prospects of success.

15. First, the qualifying disclosures. I had regard to the written evidence of the first five disclosures. I read the first four disclosures as set out in the email correspondence. I read the correspondence from the ICO about PD5. I did not see evidence of the latter two disclosures, but they appeared to largely repeat the first and third disclosures. I considered each of the three objective questions as set out in ***Carr***. I rejected the submission that the claimant had little or no reasonable prospects of success on these questions, because:

    a. There was evidence of the disclosure of information. The claimant did not explicitly refer to covid-19 in PD1. But, she provided an explanation for this and the context in which she says the email of 20 October 2021 should be read. This is a factual issue for the final hearing.

    b. The claimant explained why she says she believed the disclosures were made in the public interest (as set out in the list of issues at paragraph 1.1.3). The claimant says the disclosures were about matters relating to health and safety, data protection, academic integrity, and disability discrimination. These are matters which, if proven, would ordinarily be capable of being in the public interest. There may be factual issues for the final hearing, for example about the visibility and necessity of the CCTV cameras, and the legal duties on the respondent in relation to academic misconduct.

    c. The claimant says she believed the disclosures showed a relevant failure (as set out in the list of issues paragraph 1.1.5). PD1 is about health and safety. The extent of the risk exposed by the chemicals is a factual issue for trial to be decided after hearing evidence. Once that issue is decided, the Tribunal will be able to assess the reasonableness of the claimant's belief in the risk to health and safety. In respect of the alleged failure to comply with legal obligation(s), the issue is the reasonableness of the claimant's belief rather than the existence of a legal obligation. It may be objectively reasonable for the claimant to believe that the respondent, as a higher education institution, had legal obligations about academic misconduct, even if that belief was wrong.

16. Second, I rejected the submission that the claimant had little or no reasonable prospects of establishing that any qualifying disclosures was protected pursuant to sections 43C, 43F and 43G ERA, because:

    a. The first four disclosures were made to the claimant's employer and would therefore be protected pursuant to section 43C ERA.

    b. PDs 5 and 7 are to prescribed persons (ICO and HSE) for the purposes of section 47F ERA. Given the claimant says these disclosures were about data protection and health and safety, if proven, the disclosures appear to relate to matters within the specific remit of those prescribed

persons. The respondent submitted that the respondent was not a public authority and therefore was not under the jurisdiction of the ICO. However, the issue is about the claimant's reasonable belief. There may be an issue for the final hearing as to exactly what the claimant must reasonably believe in order to obtain the protection of section 43F ERA. The claimant must also establish that she reasonably believed that the disclosures were substantially true. The respondent produced evidence about the action it took with the cleaners about PD1 (meeting notes with recommendations about dilution of bleach), and the initial response of the ICO (that there was more work for the respondent to do). On the basis of this evidence, I do not conclude that the claimant has no or little reasonable prospects of showing that she reasonably believed PDs 5 and 7 were substantially true.

c. PD6: I have not seen evidence about the employment relationship between the respondent and Chichester University, or, more specifically, the claimant and its student union president. There may be a factual issue for the final hearing as to whether they were the claimant's employer, as the claimant claims. It seems more likely that the claimant will need to rely on section 43G ERA. I do not conclude that the claimant has no or little reasonable prospects of success on this issue. The respondent submitted that the claimant had no reasonable prospects of showing that she reasonably believed she would be subject to a detriment as required by section 43G(2)(a). The respondent relied on the tone of the email correspondence. This is a factual issue to be determined at trial. In any event, I note that the claimant may have disclosed similar information to her employer by way of PD3, which is required by section 43G(2)(c) ERA as an alternative mechanism by which the claimant could satisfy the conditions of section 43G(1)(d) ERA.

17. Third, health and safety cases. I rejected the submission that the claimant had little or no reasonable prospects of success on section two of the list of issues because:

a. There is evidence, which, if proven, shows that the claimant left her place of work or took steps to protect herself against toxic fumes. PD1 itself states that the claimant avoided sitting in an unventilated office as it had started to cause her irritation.

b. There is an issue about whether the claimant reasonably believed the toxic fumes posed a serious or imminent risk. The claimant may not succeed on this point at trial, but this is a matter for the final hearing after hearing evidence about the extent of the toxic fumes, the relevance of covid-19 to the claimant's allegation, and the claimant's vulnerability to such risks.

18. Fourth, I do not conclude that the claimant has no or little reasonable prospect of success on her claims of automatic unfair dismissal, because:

a. The chronology could support the claimant's claims. The respondent dismissed the claimant on 27 November 2021. The PDs were in the month from 20 October to 20 November 2021.

b. The claimant says she was not given evidence or a warning about her poor performance. In its comments on her grounds of complaint, the respondent says this was not required by law as the claimant had less than two years' service. If the respondent does not have evidence of the stated reason for dismissal this may assist the claimant's case about the reason for dismissal.

c. The claimant has given two theories for the reason for dismissal for this claim. But these reasons do overlap because PD1 is about health and safety. The claimant also says the dismissal was victimisation, but she does not need to show that was the sole or principal reason.

d. The respondent referred to the termination letter. I do not take that at face value. The reason for dismissal is a factual issue for the final hearing.

e. The respondent referred to a document about alleged misconduct discovered after termination. The claimant denies this. This may be a relevant issue for the final hearing. But, if the respondent did not know about this at the time of dismissal, it may be relevant to remedy rather than causation.

19. Fifth, I do not conclude that the claimant has no or little reasonable prospects of success on her claim of whistleblowing detriment because:

a. The chronology. The alleged detriment (the meeting of 2 November 2021) was on the same day as PD2.

b. The respondent says that the claimant has no or little reasonable prospects of proving that the meeting was a detriment. I reject that submission given the relatively low threshold of what can amount to a detriment, and the fact that (1) the respondent stated in submissions that the claimant was not informed of her right to bring a companion to the meeting, but that she ought to have known this as she was familiar with her rights; (2) the respondent submitted that the meeting may have become "heated"; and (3) the claimant alleges that she was shouted at during the meeting.

20. Fifth, I do not conclude that the claimant has no or little reasonable prospects of success on her claim of disability related harassment because:

a. There is a contemporaneous record of the claimant complaining about this, which could prove that the conduct was unwanted.

b. The subject matter was, on the face of it, disability related.

c. The respondent's contemporaneous explanation was that the statements had been taken out of context. That may explain the

respondent's purpose. The effect that this had on the claimant will be a factual issue for the final hearing.

21. Sixth, I do not conclude that the claimant has no or little reasonable prospects of success on her claim of victimisation because:

    a. PD4 is capable on the face of it of being a protected act as it is a complaint about disability related harassment.

    b. There is a factual issue for trial as to whether this was the reason, or part of the reason, for the claimant's subsequent dismissal.

Employment Judge Gordon Walker

14 March 2023