EMPLOYMENT TRIBUNALS

Claimant: Ms Sasha Burn

Respondent: Alder Hey Children's NHS Foundation Trust

Heard at: Manchester via Cloud Video Platform **On:** 20 September 2023
Before: Employment Judge Dennehy

REPRESENTATION:

Claimant: Mr Gareth Price, Counsel
Respondent: Mr Simon Gorton, KC

RESERVED JUDGMENT

The judgment of the Tribunal is that the respondent's application's fails.

REASONS

Introduction

1. This was a one day open preliminary hearing to hear the respondent's application for (i) strike out and/or deposit orders in relation to the claim for automatic unfair dismissal contrary to the claimant's claim for allegedly having made a protected disclosure and dismissal under s103A of Employment Rights Act 1996, and (ii) for deposit orders in relation to the claim for unfair dismissal for allegedly having made a protected disclosure.

2. The alleged protected disclosure is highlighted at pg 246 of the bundle.

3. I had sight of a bundle of documents consisting of 597 pages which was split into two bundles and I considered those pages to which I was referred by the parties. Any pages references in this judgment are to the pages in the bundle.

4. Both the claimant and respondent submitted skeleton arguments and provided a list of authorities, The respondent also provided Harvey's guidance on strikeout and a chronology.

Background Chronology

5. The claimant was employed by the respondent as a consultant neurosurgeon from 08 June 2009 until her dismissal.

6. The respondent commenced an investigation into seven incidents concerning the claimant's conduct and practice between 2017 and 2020 and the claimant was removed from clinical duties with effect from 30 January 2020.

7. The investigation was stayed for 18 months whilst the claimant brought proceedings in the High Court regarding disclosure of documents which failed. The respondent then recommenced its investigation under Maintaining High Professional Standards in the Modern NHS guidance.

8. A disciplinary hearing was held from 22 through to the 24 November 2022. The respondent issued its outcome letter on 02 December 2022.

9. The claimant appealed her dismissal on the 14 December 2022 and she was advised that her appeal was dismissed on 15 February 2023.

10. The early conciliation certificate is dated 13 January 2023.

11. The claimant lodged an ET1 on 10 March 2023 for unfair dismissal seeking: a declaration that she has suffered a detriment contrary to section 47B of the ERA 1996; a declaration that she has been automatically unfairly dismissed under section 103A of the ERA 1996 or unfairly dismissed under section 98 of the ERA 1996; compensation for detriment suffered during employment; compensation for unfair dismissal and an uplift due to the respondent's unreasonable failure to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures of up to 25%.

12. The respondent lodged an ET3 on 18 April 2023 and denies any liability to the claimant and suggests that elements of the claimant's claim should be struck out or subject to a deposit order.

13. A case management conference was held on 26 May 2023 before Employment Judge Cline and orders were given for today's preliminary hearing.

14. At that preliminary hearing, the claimant's claim that she was subjected to a detriment following a protected disclosure contrary to Section 47B of the Employment Rights Act 1996 (as set out at paragraphs 83(s) and (u) of the grounds of complaint dated 10thMarch 2023) was dismissed upon withdrawal by consent and a judgment was issued on 31 May 2023.

Relevant Law

Striking out

15. Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) regulations 2013 provides:

"*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 vexatious or has no reasonable prospects 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;
(c) for non-compliance with any of these Rules in order of the Tribunal:
(d) that it has not been actively pursued;
(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)."

Deposit Orders

16. Rule 39 of the Employment Tribunals (Constitution and Rules of Procedure) regulations 2013 provides:

"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.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order."

Whistleblowing

17. Section 43B of Employment \Rights Act 1996 -Disclosures qualifying for protection.

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being

committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

Respondent Submissions

18. In relation to the issue of the whistleblowing claim the respondent submits that the claimant's claim is baseless and should be struck out as it is without merit or substance because it is improbable that the Claimant has made a protected disclosure and the first time the respondent becomes aware of the protected disclosure is in the claimants claim form on 10 March 2023 at para 30 of the ET1.

19. In the alternative, the claimant's whistleblowing claim has little reasonable prospect of success and should be the subject of a deposit order.

20. Looking at the alleged protected disclosure made and her dismissal, the respondent says the claim is misconceived and has no reasonable prospect of success. The respondent says that the investigation has been extensive and thorough, the claimant has been legally represented throughout, is alert to her legal rights, had the opportunity to raise the protected disclosure earlier but chose not to do so, either in interviews, statements of case submitted during the disciplinary and appeal meetings, none of the reports commissioned have mentioned the protected disclosure allegation, the protected disclosure is merely a difference of opinion by two professionals regarding the best course of action rather than a factual assertion against her colleague. Had it been a protected disclosure then the claimant should have raised the matter via the respondent safety mechanisms.

21. In summary the respondent says the protected disclosure is a "*belatedly concocted matter only emerging in the ET1"* and the facts don't support it and the claimant is trying to expand her unfair dismissal case and the reason for the claimant's dismissal was gross misconduct and this is a simple unfair dismissal case.

22. In relation to the deposit order for the automatically unfair dismissal claim the respondent says that the dismissal was due to the claimant's conduct based on a clear body of evidence which followed on from an exhaustive

investigation and there is no evidence that the dismissing officer acted on the basis of the protected disclosure. The case is one of straight forward conduct based on facts. The respondent says this claim "*is fanciful*" and if it was a material and relevant matter why was it not mentioned earlier than 10 January 2022 and that the dismissing officer was not aware of it, so it could not have been in his mind at the time. The respondent says that the complaints made by the claimant are "*fanciful and hopeless*" and by way of one example cites insufficient particulars of TOR1 (pg 29).

23. The following cases were recited and/or referred to:
Williams v Michelle Brown AM UKEAT/0044/19/OO para 9:
Kilraine v London Borough of Wandsworth [2018] ICR 1850
Kong v Gulf International Bank in the EAT at para 72
Kuzel v Roche paras 48-61
Harrow LBC v Knight [2003] IRLR 140 para 16
Kaul KC v MoJ & others [2023] EAT 41 – see paras 18-22.
Van Rensburg v Kingston Upon Thames RBC UKEAT/0096/07
Hemdan v Ishmail [2017] IRLR 228 paras 12-13
Wright v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14

Claimant Submissions

24. The claimant resists the respondent's application.

25. In relation to the issue of the whistleblowing the claimant says that the protected disclosure (pg 246) conveys sufficient information although it might be described as an opinion or allegations. The information on page 246 clearly showed that a patient's safety was endangered, the claimant 's view that the surgeon has not been honest demonstrated that the matter endangering patient safety was likely to being deliberately concealed. Further, the claimant's reasonable belief and that that disclosure was made in the public interest are matters of fact in issue and should be challenged by way of cross examination of the claimant by the respondent.

26. Re the reason for dismissal, the claimant says that the respondent must have known about the protected disclosure because it was in each party's statement of case. The claimant avers that her concerns re bullying, collusion, treatment of the patient, and misdescription of the patient's condition were identified during the disciplinary hearing (pg 403- 404; 411-412; 426; 437). Accordingly, the burden will be on the respondent to establish the reason for dismissal at the final hearing.

27. The claimant says the respondent's reasonableness of the investigation was unfair due to the time between the patients death and the investigation, the conflicting accounts of the incident, failure to investigate the allegations of mistreatment and collusion by the claimants colleagues further, request for further particulars of allegations were denied, accuracy of the disciplinary minutes, and the use of KC counsel at the disciplinary hearing.

28. The claimant says that no explanation has been given for the numerous reviews, reports and investigations (pg 71 (MPS); pg84 (Bassi Report); pg98 (RCS report); pg112 (RCA report); and pg 124 (Campbell Report). It was not until the Campbell Report were misconduct allegations raised against the claimant. A similar case only had one investigation report done. The claimant says the respondents have acted unfairly by investigating the matters as conduct rather than capability.

29. In summary, the claimants' allegations of collusion and bullying were discounted, the dismissing officer reached flawed conclusions and undermined the reasonableness of his belief on the claimant's guilt, the claimant was not allowed reasonable opportunity to challenge the Campbell Report and there were procedural irregularities with the disciplinary hearing.

30. The following cases were referred to in skeleton arguments:

Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330.

Balls v Downham Market High School & College UKEAT/0343/10.

Mechkarov v Citibank NA [2016] ICR 1121

Pillay v INC Research UK Ltd UKEAT/0182/11.

Hemdan v Ishmail [2017] ICR 486

Kilraine*; *A McDermott v Sellafield Ltd [2023] EAT 60.

Kulkarni v Milton Keynes Hispital NHS Foundation Trust and another [2009] EWCA Civ 789

Conclusions

31. After hearing submissions, I agreed to make a reserved judgment as we had run out of time.

Striking out

32. In addition to the cases referred to in the written and oral submissions, I also considered the case law below.

33. The EAT held that the striking out process requires a two-stage test in **HM Prison Service v Dolby** [2003] IRLR 694, and in **Hassan v Tesco Stores Ltd** UKEAT/0098/16. The first stage involves a finding that one the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim. In Hassan Lady Wise stated that the second stage is important as it is a fundamental cross check to avoid the ending prematurely of a claim that may yet have merit.

34. The ground being relied on here by the respondent is under 37 (1) (a) that the claimant claim has no reasonable prospects of success.

35. Many of the authorities on striking-out under rule 37(1)(a), such as **Ezsias v North Glamorgan NHS Trust** have stressed that it will only be in an

exceptional case that a claim will be struck out as having no reasonable prospect of success when the central facts are in dispute.

37. In **Cox v Adecco and Ors EAT** 0339/19 the EAT stated that, 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. The claimant's case must ordinarily be taken at its highest and the tribunal must consider, in reasonable detail, what the claim(s) and issues are. Thus, there has to be a reasonable attempt at identifying the claim and the issues before considering strike-out or making a deposit order.

36. In **Ahir v British Airways plc** 2017 EWCA Civ 1392, CA, the Court of Appeal asserted that tribunals should not be deterred from striking out even discrimination claims that involve disputes of fact if they are entirely satisfied that there is no reasonable prospect of the facts necessary to find liability being established, provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been explored.

37. In **Kaur v Leeds Teaching Hospitals NHS Trust** 2019 ICR 1, CA, Lord Justice Underhill observed that '*Whether [striking out] is appropriate in a particular case involves a consideration of the nature of the issues and the facts that can realistically be disputed*…".

38. Finally In **Machkarov v Citibank NA** 2016 ICR 1121 it was summarized that if the claimant's case is 'conclusively disproved by' or is 'totally and inexplicably inconsistent' with undisputed contemporaneous documents, it may be struck out.

39. The respondent says "*there are numerous factual assertions in the ET1 that are refuted*". The claimant says that "*essential and uncontroversial facts … are evidently not agreed*." I find that there are several facts that appear to be in dispute between the respondent and the claimant. By way of example, the reasons for repeated investigations, the lack of investigations of the claimants' allegations of mistreatment and collusion of her colleagues; whether the claimant had made a protected disclosure, different version of events of an exchange between the claimant and the consultant anaesthetist, the handling of the disciplinary and appeal hearing and the accuracy of the disciplinary hearing minutes.

40. These matters are factual conflicts that should be properly resolved at a full merits hearing where oral evidence can be heard and challenged by both parties.

41. I also considered that the preliminary hearing is not a mini trial and I must avoid conducting a mini-trial of the facts; **Hemdan v Ishmail** [2017] ICR 486. These facts cannot be resolved at a preliminary hearing.

42. I must take the claimants case at its highest **Mechkarov v Citibank NA** [2016] ICR 1121. As I have found that there are facts in dispute and I must avoid a mini trial and take the claims case at its highest.

43. Taking all of the above into consideration I cannot find that the claimant has no reasonable prospects of success and am exercising my discretion not to strike out the claimants claim.

Whistleblowing

44. Qualifying disclosures have two key elements: (i) an information element and (ii) a belief element. The information must relate to one of the five areas of actual or potential wrongdoing or suggest that there is deliberate concealment of such a matter. The whistleblower must believe that the information tends to show the wrongdoing and must believe that disclosure is in the public interest. Both beliefs must be reasonable.

45. In addition to the submissions I considered the case law below.

46. A belief may be a reasonable belief even if it is wrong: **Babula v Waltham Forest College** [2007] ICR 1026.

47. In **Chesterton Global Limited v Nurmohamed** [2018] ICR731 a disclosure could be in the public interest even if the motivation was to advance the worker's own interest.

48. The reason for dismissal connotes the factors in the mind of the decision maker which caused them to dismiss, or which motivated them to do so: **The Co-operative Group V Baddeley** [2017] EWCA Civ 658.

49. The respondent says that there had been no mention of whistleblowing until the ET1 submitted in March 2023 and it is no more than an assertion and does not meet any element of the 43B test and was never raised by the claimant through internal channels. The claimant has said the protected disclosure was first referred to in the investigatory meeting with the claimant on 10 January 2022, it does meet all elements of the statutory test and it must have been known to the dismissing officer as it was in the minutes of the investigatory meeting. No reason was given by the claimant for not raising the matter through internal channels or in the disciplinary or appeal hearings. The investigation was delayed due to the claimant bringing proceedings re disclosure.

50. The exercise of my discretion is a fundamental cross check to avoid the bringing to an end prematurely of a claim that may yet have merit.

51. I find that the protected disclosure element of this claim will turn on whether inferences can be drawn only once full factual findings have been made. Accordingly, the application to strike out is refused.

Deposit Orders

52. The respondent has pleaded in the alternative that if I do not exercise my discretion to strike out then I should consider making deposit orders.

53. With regards to deposit orders I have to conduct a provisional and non-binding review of a case or defence and the specific allegation or argument identified, but not to such an extent that I must make conclusions or be certain as to its outcome (factually or legally) I must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim.

54. The test is that the claimant has "*little reasonable prospect of success*" in relation to the protected disclosure argument in contrast to the test for strikeout which require me to be satisfied that there is "*no reasonable prospect of success*".

55. The respondent has asked for one thousand pounds deposit and the claimant for what is in proportion to the claim, but no evidence was presented re the means to pay by the claimant.

56. The respondent says that the whistleblowing claim is an adjunct that only appears in the ET1 and the face that she has now withdrawn her detriment claim shows how strategic and lacking in merit her claim is. Her unfair dismissal came after an intensive and highly ordered investigation and her complaints are hopeless and fanciful.

57. The claimant says that there are multiple discrete allegations of unfairness regarding the dismissal of the claimant and the protected disclosure has more than adequate prospects.

58. In consideration of all the above and due to the number of points that appear to be in conflict I cannot find that the claimant has little reasonable prospect of success and I make no deposit orders.

Employment Judge Dennehy
Date 27 September 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON:
2 October 2023

FOR THE TRIBUNAL OFFICE

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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