EMPLOYMENT TRIBUNALS

Claimant: **Mr Iftakhar Aslam**

Respondent: **Accor UK Business & Leisure Hotels Ltd**

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds (in private by telephone) **On: 22 September 2023**

Before: **Employment Judge R S Drake**

Appearances
For the Claimant: In Person
For the Respondent: Ms E Mayhew-Hills (Litigation Consultant)

JUDGMENT

1. The Claimant's claim of detriment including dismissal because of making a protected disclosure is dismissed in accordance with Rule 37(1)(a) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"), on the grounds that I find that the claim has no reasonable prospect of success. I make this finding on the basis of the pleadings, the parties' arguments/concessions and the materials produced to me today.

Reasons

2. I heard detailed argument from both sides after clarifying with the Claimant ("C") that his claim was limited to being under Section Part IVA of the Employment Rights Act 1996 ("ERA"). I also noted that C accepted he had presented the claim BEFORE commending the Early Conciliation procedure

with ACAS as required under Section 18A of the Employment Tribunals Act 1996 as amended ("ETA").

Findings and Submissions

3. Based on C's own admissions as to how he pleaded his claim in his ET1, and Ms Mayhew-Hill's arguments and submissions, I can make the following findings :-

3.1 C was employed by the Respondent ("R") as a head chef at York from 16 September 2021 to 22 June 2023 (i.e. less than 2 years) when he was dismissed on notice, the effective date of termination being that same date;

3.2 C freely accepts that he presented his claim to Tribunal before approaching ACAS to seek Early Conciliation;

3.3 C says in his ET1 that his dismissal resulted from a "whistle-blowing investigation" but does not say he was the person blowing the whistle. ; When this apparent absence of clarity was explained and that Part IVA ERA provides protections only to those parties making the disclosure, he tried to argue that it was he who had made disclosures (by way of grievances), but that he freely accepts that he did so anonymously;

3.4 R submits that if, as C admits, his disclosure is made anonymously, C cannot argue that he was subjected to any form of detriment because of the making of such disclosure, if R didn't know it was C making it; I accept this submission;

3.5 Furthermore, R submits that C has not alleged in his ET1 nor shown that his alleged disclosure, which he now says that he made fell within any of the subsections to Section 43B ERA which define what constitutes a "qualifying" disclosure capable of becoming "protected" depending on to whom it is made; Similarly, I accept this submission;

3.6 C freely admitted that he no longer had access to any evidence to support his allegation that he made a protected disclosure, and therefore, R submitted he could not succeed in his claim in any event and could face a Costs Warning or Order if his claim were not withdrawn;

Relevant Statute Law and its application

4. Section 43A(1) ERA provides –

"In this Act a "protected" disclosure means a "qualifying" disclosure as defined by Section 43B which is made by a worker in accordance with any of the sections 43C to 43H"

5. Section 43B ERA provides –

> "(1) in this part a qualifying disclosure means any disclosure of information which in the reasonable belief of the worker makes 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 it 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 an any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed;"

6. I note in this case that none of the requirements of Section 43B(1) are met in the way C has pleaded his case.

7. Section 47B ERA provides –

> "(1) a worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done <u>on the ground that the worker</u> has made a protected disclosure" (my emphasis)

8. I note in this case that as pleaded; C does not plead he made the disclosure, and I find that though he now says hat he did, he did so by his own admission anonymously. By logic, this must mean he cannot show that R treated him detrimentally because it could not do so if it didn't know he made the disclosure.

9. For the sake of completeness, I set out below the basis upon which I had to consider the position as far as set out in Rule 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 or response on any of the following grounds –
>
> (a) that it … <u>has no reasonable prospect</u> of success - (*my emphasis*) ;
> (b) … (c) … (d) … *(not relevant*)";

Case Law cited and/or considered.

12. Again neither side referred me to it, but I took account of the Court of Appeal's finding in **Swain v Hillman [2001] 1 All ER 91** in which it was held that a Court (or Tribunal in this case) must consider whether a party " … has a realistic as opposed to fanciful prospect of success …" in the context of assertions, as in this case, that C's case has no, as opposed to little prospect of success. In this case there is clearly on my examination no conflict of pleading on the key points such as would necessitate ventilation of evidence necessary to make factual findings on contested allegations at a full hearing. On C's own pleadings, there are no such factual disputes to be determined one way or another at a full hearing.

13. **A v B (and another) [2011] ICR D9, CA** - In this case the Court of Appeal held that a Tribunal was wrong to find a claim had no reasonable prospect of success basing this conclusion on a finding that on proper analysis it had "more than a fanciful prospect" of success. From this I derive a distinction between "no prospect" and no more than a "fanciful prospect." If a point is clear cut to show that a case as pleaded is such that C is not making it clear he made a disclosure, then C's claim MUST be doomed to fail. I conclude that this is a clear example of no prospect as opposed to no more than a fanciful prospect of success.

14. **Anyanwu (and another) v South Bank Students' Union [2001] ICR 391**. - In this case the House of Lords highlighted the importance of not striking out discrimination claims except in the most obvious cases as they are generally fact sensitive and usually require full examination to make a proper determination. I note in this case C is not clearly in Question 8 of the ET1 making a discrimination claim nor clarifying any part of his claim to shoe how he could argue some form of unlawful discrimination by linking a protected characteristic to any action of R.

15. **Anyanwu** was followed by the Court of Appeal's decision in **Community Law Clinic Solicitors v Methuen [2012] EWCA Civ 571**, in which it was held that and employee's claim for age discrimination should not be struck out because the case required further examination of the facts so as to properly consider whether age discrimination could be inferred. C's case before me today as currently pleaded is easily distinguishable from **Methuen** because C has not pleaded acts of discrimination clearly.

16. In **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**, the Court of Appeal again held 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. However, in the current case, C's claim as pleaded does not show any material form of arguable dispute.

17. I considered the balance of prejudice facing C if I struck out his case leaving him with no further way of arguing here his views as to what has happened, or to R if the case were not struck out causing them to have to devote considerable time and energy to meeting claims which on what I have seen and heard today, and also based on C's admissions, has no prospect of success.

18. On this analysis, I conclude that the balance of prejudice favours R leading me to conclude it is right I should strike out the claims.

19. I have considered as an alternative to striking out some other form of finding which would permit C to proceed with his claim. I note his admission he does not have evidence to adduce to support what he now says but had not pleaded was the making of a disclosure by he himself. Thus by application of logic his claim is therefore doomed to fail at any hearing whatever order I make today. It is in the interests of justice and fulfilling the overriding objective to achieve finality where it is possible and necessary to do so and I conclude that it is not in C's interests to pursue a claim which is doomed to fail.

20. For all the reasons set out above, I conclude that paragraph (a) of Rule 37(1) is engaged and empowers me to strike out the discrimination claims in accordance with Rule 37. Therefore, I find that I have no alternative but to dismiss the claims of alleged unlawful discrimination.

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Employment Judge R S Drake

Signed 22 September 2023