EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111342/2021

Held at Aberdeen on 30 September 2022 (V)

Employment Judge N M Hosie

Mr P Jurgiel	**Claimant** **In Person**
Robertson Facilities Management Ltd	**Respondent** **Represented by** **Ms C Maher,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

1. the claim has no reasonable prospect of success; and

2. it is struck out under Rule 37(1)(a), in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

Introduction

1. The claim form was submitted on 9 September 2021. At that time he was still employed by the respondent. As I understand it he was dismissed in 2022.

2. After various case management procedures, it was established that the claim was one of being subjected to detriments for making protected disclosures in terms of s. 47B of the Employment Rights Act 1996 ("the 1996 Act").

3. This case called before me by way of a preliminary hearing to consider an application by the respondent for the claim to be struck out on the ground that it has "no reasonable prospect of success", in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rule of Procedure"); or, in the alternative, that the claimant should be required to pay a deposit as a condition of continuing to advance his claim, on the basis that it has "little reasonable prospect of success", in terms of Rule 39.

4. The hearing was conducted by video conference using the Cloud Video Platform ("CVP")

5. It was not necessary to hear any evidence at the hearing as, for the purposes of the issues with which I was concerned, I took the claimant's factual averments at their highest value. I also remained mindful that the claimant was not represented and had no experience of Employment Tribunal proceedings.

6. Accordingly, I considered submissions by the parties, both orally and in writing, with reference to a joint bundle of documentary productions which was lodged ("P").

Respondent's submissions

7. The respondent's solicitor made oral submissions at the hearing and submitted these in writing subsequently. Her written submissions are referred to for their terms. The following is a summary.

Chronology

8. The case has something of a history, the claim form having been submitted over a year ago. The respondent's solicitor detailed the chronology in her written submissions. I was satisfied that this was reasonably accurate. It is in the following terms:-

"*The Employment Tribunal received the claimant's ET1 on 9 September 2021 (P.1). The respondents submitted its ET3 on 13 October 2021 (P.14). In the ET3 the respondent indicated that the claimant had not adequately specified his claims, that it was unclear what the statutory basis of his claims were and called upon him to specify his claims.*

A Preliminary Hearing was held on 10 November 2021. The claimant was advised at this hearing that there were no identifiable claims in respect of which the Employment Tribunal has jurisdiction to hear in the claim form or in the claimant's Agenda (P.27). The claimant was given 14 days from the date of the Order of 15 November 2021 to specify his claim (P.39). The claimant provided Better and Further Particulars on 1 December (P.42).

A further Preliminary Hearing was heard on 3 February 2022. At this Hearing the claimant was advised that he had not adequately specified his claim and that he was required to set out the dates on which each specific protected disclosure was made, to whom, what the alleged detriment was and the factual basis on which the alleged detriment was because of his making a protected disclosure. The claimant was given 14 days from the date of the Order of 7 February to provide Further and Better Particulars (P.53).

The claimant failed to comply with this time limit and the Tribunal e-mailed him on 8 March to advise him that he had failed to comply with the Order and gave him a further 7 days to provide the Further and Better Particulars (P.57). The claimant provided these on 16 March 2022 (P.58).

By e-mail on 21 March 2022 the respondent requested a Preliminary Hearing to decide whether the claim should be struck out (P.65). The Preliminary Hearing was held on 9 May 2022. Prior to the Judgment the claimant provided further specification of his claim by e-mail on 14 July 2022 (P.86)."

9. The respondent's solicitor submitted that, despite being given a number of opportunities to do so, the claimant had still failed, "*to adequately specify his claim, failed to demonstrate that he made any qualifying disclosures and crucially to identify any detriment to which he alleges he was subjected to and to outline any facts which show that any alleged detriment was linked to a protected disclosure. The respondent's position is that the facts presented by the claimant disclose no arguable case in law.*"

10. In support of her submissions, she referred to the following cases:-

Anyanwu & Another v. Southbank Student Union & Another [2001] UKHL/14;
Romanowska v. Aspirations Care Ltd UKEAT/0015/14;
Mechkarov v. Citibank NA [2016] ICR 1121;
Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285

11. She submitted, with reference to ***Anyanwu*** and ***Romanowska***, that a strike-out by way of summary Judgment, without hearing evidence, might be appropriate in some circumstances. She referred in particular to the following comments of Lord Hope in ***Anyanwu*** at para. 29: "*The time and resources of the Employment Tribunals ought not to be taken up by having to hear evidence in cases that are bound to fail.*"

12. She referred to ***Mechkarov*** in which the EAT summarised the approach that should be taken when considering a strike-out application in a discrimination

case: "*If the claimant's case was 'conclusively disproved by' or 'totally and inconsistent' with undisputed contemporaneous documents, it could be struck out.*"

13. She submitted that that test had been met. At three Case Management Preliminary Hearings the documentary evidence was carefully considered by the Tribunal and the claimant was afforded "*ample opportunity to explain his case*". Although the claimant had expressed unhappiness at the content of the joint bundle, he made no attempt to prepare his own bundle and failed to respond to a request by the respondent's solicitor to provide any documents which he wished to be included in the bundle, in accordance with the Tribunal's Order.

Qualifying disclosure

14. It was submitted that in his pleadings the claimant had failed to satisfy the statutory test. He had not made a qualifying disclosure under s.43B of the the 1996 Act; he was not subjected to any detriment as a result of having made a disclosure.

15. The main thrust of the respondent's submissions was that basis for the claim was the claimant's unhappiness at the conduct of and outcome of his grievances, despite the fact that some of his grievances were upheld.

16. The claimant was afforded a number of opportunities to set out his case in writing with the required specification. However, it was submitted that what he alleged in his Further and Better Particulars of 14 July (P.90), "*did not amount to detriments; there is no attempt to link the treatment to the making of a particular protected disclosure.*"

17. It was submitted that the claimant's allegations appear to relate primarily to the outcome of his two grievances and the manner in which they were investigated by the claimant. However, the claimant was advised by the Employment Tribunal that "*an employer has considerable discretion how it investigates a grievance*" and "*the respondent's position, as evidenced by the documents in the bundle* (P.95-133) *is that the claimant's grievances were very carefully considered through the course of two grievances, which were the subject of an appeal. All the contemporaneous documents are totally and inexplicably inconsistent with the claimant's claim.*"

Causative link

18. It was also submitted that the claimant had failed to show a causative link between a protected disclosure and his alleged detriments, despite having been advised "*repeatedly*" that this was required. "*The burden of proof is on the claimant to provide facts which could establish that he had made a protected disclosure, that was detrimental treatment and that the detrimental treatment was on the ground that he had made a protected disclosure. The claimant has completely failed to provide any facts which would establish a causative link in the year since these proceedings commenced.*"

19. In ***Shamoon*** it was held that an "*unjustified sense of grievance*" is not enough to amount to a detriment.

20. The respondent's solicitor submitted that, "*the respondent should not be forced to defend the case, at a no doubt lengthy final hearing, when at its highest the claimant is complaining about a grievance outcome and disagreeing with the content of Minutes from the grievance procedure.*"

21. She submitted that the claim has no reasonable prospect of success and should be struck out in terms of Rule 37(1)(a). In the alternative, she submitted that the claim has "*little reasonable prospect of success*" and that

the claimant should be required to pay a deposit, (in terms of Rule 39) in order to continue with his claim.

Conclusion

22. Finally, the respondent's solicitor said this:-

"*We consider that an Order in the terms requested, whether in respect of strike-out or, alternatively, in respect of a deposit order, would assist the Tribunal in dealing with the proceedings efficiently and fairly and in accordance with the Overriding Objective because:*

- *The respondent is being subjected to considerable expense in defending this action. The respondent has had to pay legal fees in defending this matter and despite there having been now four preliminary hearings the claimant has still not adequately specified his claim. At its highest the claimant is alleging that the detriment which he had been subjected to is the respondent failing to deal with his grievance as he would have liked and disagreeing with the Minutes from the grievance procedure. These simply do not amount to a detriment. The claimant has also failed to specify a causal link between any protected disclosure and a detriment. Any final hearing would incur considerable legal fees and lost management time for the respondent.*

- *The Tribunal is required to avoid delay so far as compatible with the proper consideration of the issues. We are now well over 12 months from the date on which the claimant lodged the ET1 and there is still not an adequately specified claim.*

- *The claimant has been given ample opportunity to specify his claim. Therefore we feel that to date the Tribunal has made every effort to ensure that parties are on equal footing. In fact, as the claimant has consistently failed to adequately specify his claim the respondent has not had 'fair notice' of the claim which it is required to defend.*"

Claimant's submissions

23. The claimant made oral submissions. The following is a summary. He submitted that the Minutes of all the meetings which the respondents had produced were, "*not the ones I signed*". He maintained that he was only sent drafts of the Minutes and his responses were not taken account of. He claimed that the Minutes were "*forged*". He referred in particular to the Minutes of the Grievance Appeal Hearing on 13 July (P.123 – 131) which he claimed he had "*never seen before*" and included alleged comments by him which he maintained he had never made. He maintained that the documents, "*did not reflect the state of the investigation*"; that there was a significant difference between the Minutes and what actually had happened and that they amounted to a "*forgery*". Further, the joint bundle omitted a number of documents.

24. The claimant submitted that the assumptions made by the respondent's solicitor were "*wrong*"; he did not continue to work; he still had concerns about health and safety issues; he refused to do NHS work.

25. He submitted that the information which he had submitted to the Tribunal was "*mostly the same*". All the information which the respondent maintained was not included "*was there*".

26. He referred to the e-mail of 5 April 2022 from Tim Skyrme to Fiona Hogg, Director of People & Culture at NHS Highland (P.139). In his e-mail Mr Skyrme said this about the claimant's complaint:

"*I was originally involved in this whilst Ops Manager for RFM and I am now Head of FM with UHI.*

I don't see any reason why this should be a whistleblowing issue. I believe that this is simply a vexatious enquiry and don't see that NHS H (or anyone else for that matter) has a case to answer."

27. The claimant explained that when he worked for the respondent Mr Skyrme had heard his first and second appeals against the outcome of his grievances. "*Without saying why*", he had decided that the claimant had not made protected disclosures, "*and this outcome is not included in the bundle*".

Detriments

28. The claimant referred to the "*list of detriments*" which he had provided along with his Further and Better Particulars on 14 July (P.87-89). He referred in particular to detriment 7 (P.88). He disputed the assertion by the respondent's solicitor that this related to the respondent's handling of the grievance. He explained that this detriment related to the manner in which the manager had dealt with his second grievance and "*misrepresented me*". He maintained that the manager had "*omitted parts of my claim. At the same date I had health and safety issues. I asked for procedures. He said he would get them for me. I was suspended. He said I'd been aggressive towards him.*"

29. However, the respondent ignored his claim that he had been misrepresented and told him that his recording of the disciplinary hearing was "*illegal*".

30. He submitted that, "*that type of misrepresentation happened at every step*".

31. Further, he explained that he submitted his appeal against his first grievance on 5 May and not 28 May as the respondent's solicitor had maintained. He did not receive the outcome until 13 July, despite making requests on 12 and 14 May by e-mail about the progress of his appeal. He did not accept that this delay was due to the fact that he had raised a second grievance, as the respondent maintained.

32. He also disputed the contention by the respondent's solicitor that his first grievance had been resolved and that some of his complaints had been upheld.

33. He further disputed the contention that he had refused to engage in mediation. He maintained that he had proposed mediation on 3 occasions but "*it never happened*".

34. He claimed that he was never told about the investigation of his grievances; he only got the witness statements with the outcome of the grievance; and his proposal to look at the CCTV to establish who had been "aggressive" was never allowed. He claimed that the respondent had been selective about the way they investigated his grievances and that there was a "*cover up*".

35. His grievances were about the lack of consistent procedure and "*mismanagement*". He claimed that there was a "*lack of training and breach of legal obligations.*"

36. In support of his submissions he referred to ***Martin v. London Borough of Southwark*** EA-2020-000432-JOJ.

Discussion and decision

Relevant statutory provisions

37. Rule 37(1)(a) in Schedule 1 of the Rules of Procedure is in the following terms:-

"***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*** (my emphasis)."

Rule 39(1) is in the following terms:-

"***39 Deposit Orders***

> *(1) Where at a preliminary hearing (under Rule 53) the Tribunal considers that any specific allegations or argument in a claim or response has* ***little reasonable prospect of success*** (my emphasis), *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.*"

38. I also remained mindful of the "overriding objective" to deal with cases "fairly and justly" in terms of Rule 2; and the guidance on striking out a whistleblowing claim, conducted by a litigant in person, from the EAT in ***Cox v. Adecco & Others*** UKEAT/0339/19/AT.

The claim

39. As HHJ Tayler said in ***Cox***: "*You can't decide whether a claim has reasonable prospects of success if you don't know what it is.*"

40. After a number of Preliminary Hearings and Case Management procedures it emerged that the claimant was alleging that he had been subjected to detriments for making protected disclosures. The relevant statutory provisions are s.47B and s.43B of the 1996 Act.

41. In his Judgment, dated 20 June 2022, EJ Hendry addressed the contention by the respondent's solicitor that the claim had no reasonable prospect of success (P.82-84). He identified the nature of the claim and also recorded that there was possibly a claim under s.44 of the 1996 Act, whereby an employee has the right not to be subjected to any detriment as a consequence of the employee bringing to his employer's attention concerns in relation to health and safety.

42. At para.39 of his Judgment EJ Hendry directed the claimant to "*set out his final position*". The claimant responded to that direction by providing Further and Better Particulars on 14 July 2022 (P.86-90). Those Further and Better Particulars, therefore, the claimant's "*final position"*, were my principal point

of reference. However, following the guidance of HHJ Tayler in ***Cox***, not only did I read the pleadings, I also considered the relevant documents.

43. So far as the documents were concerned, although the claimant maintained that they were not comprehensive, that he was not afforded an opportunity of including any documents in the joint bundle, I had no reason to doubt the assertion by the respondent's solicitor that she had invited him to do so.

44. Further, as I recorded above, for the purposes of determining the issues with which I was concerned I took the claimant's factual averments at their highest value.

Did the claimant make qualifying disclosures?

45. The respondent's solicitor submitted that he had failed to do so. The disclosures qualifying for protection are set out in s.43B of the 1996 Act.

46. Further, in ***Martin*** to which I was referred by the claimant. The EAT re-iterated the 5-stage test for determining if there has been a "*qualifying disclosure for whistleblowing purposes:*

1. *Firstly, there must be a disclosure of information.*
2. *Secondly, the worker must believe that the disclosure is made in the public interest.*
3. *Thirdly, that belief must be reasonably held.*
4. *Fourthly, the worker must believe that the disclosure tends to show one or more of the matters set out in s.43B(1)(a) – (f) of the 1996 Act (for example, that a person has failed to comply with a legal obligation).*
5. *Fifthly, that belief must be reasonably held.*"

47. The claimant was afforded a number of opportunities of providing details of "all the instances of whistleblowing on which he relies". I issued an Order to

that effect following the Case Management Preliminary Hearing on 10 November 2021 (P.40-41); in my Note following a Case Management Preliminary Hearing on 3 February 2022 I recorded further specification was still required (P.54) and I directed him to provide further details of his claim as follows:-

"*He is directed to specify under separate headings for each alleged disclosure:-*

'What information was disclosed, to which individual, on which date and the manner in which it was communicated; the detriments to which he alleges he was subjected as a consequence of making a particular disclosure and; the facts he offers to prove that show or tend to show that the alleged detriment was BECAUSE OF the making of the particular disclosure.'"

48. Despite these directions, and also EJ Hendry's directions in his Judgment dated 20 June 2022 (P.82-85), in my opinion, the claimant failed in his response to demonstrate that he had made any qualifying disclosures (P.86-89) which satisfy the statutory test.

49. Nor, apparently, did the claimant have regard to the guidance in ***Blackbay Adventures Ltd t/a Chemistree v. Gahir*** [2014] IRLR 416 (P.83), to which he was referred by EJ Hendry (P83), which held that each disclosure needs to be separately identified by reference to date and content to decide whether it is "protected".

50. I was mindful that in his response under the heading "*Backstory and clarification"* the claimant had referred to the terms of his grievances and I did consider their terms. However, there was still insufficient specification to enable me to conclude that the claimant had made a qualifying disclosure as defined in s,43B.

51. It follows from my conclusion, that his claim has no reasonable prospect of success and should be dismissed.

52. I did consider whether, as a litigant in person, the claimant should be afforded another opportunity of providing the necessary specification. However, it is clear from the history of the case that he had been afforded more than ample opportunity to do so. I was satisfied that not allowing him another opportunity was consistent with the "overriding objective" in the Rules of Procedure. The requirement to deal with cases "fairly and justly" applies equally to both parties and I was mindful of the considerable expense which must have been incurred by the respondent to date, primarily due to the claimant's repeated failures to specify his claim properly.

53. I was also mindful in arriving at this decision of what the Honourable Mr Justice Langstaff (President) said in ***Chandhok v. Tirkey*** UKEAT/0190/14/KN at para.16:-

> "*The claim, as set out in the ET1, is not something just to set the ball rolling as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case.*"

54. While the claimant is a litigant in person, a line has to be drawn at some point, in accordance with the "overriding objective", and I was in no doubt that it would not be appropriate, in all the circumstances, to afford the claimant "one last chance".

55. Although I decided that the claimant had not specified any "qualifying disclosures" which meant the claim should be dismissed, for the sake of completeness I shall address the remaining issues.

Detriments

56. I found favour with the submission by the respondent's solicitor that the alleged detriments were no more than a complaint about the manner in which the respondent had dealt with his grievances. He was unhappy with the outcome and sought to revisit his grievances by way of an Employment

Tribunal application. Indeed, he said as much at the Grievance Appeal meeting on 13 July on 20 July 2021 (P.124): "*That's why I'm going to Tribunal about the first grievance…….The first grievance is being dealt with through Tribunal.*"

57. In ***Warburton v. The Chief Constable of Northamptonshire Police*** [2022] EAT 42, the EAT, following ***Shamoon,*** held that the key test for deciding whether a claimant has suffered a detriment is *"whether the treatment is of such a kind that a reasonable worker would, or might take the view that in all the circumstances it was to his detriment".* Further, as the respondent's solicitor submitted, the House of Lords held in ***Shamoon*** that an unjustified sense of grievance is not enough to amount to a detriment.

58. An employer has considerable discretion as to how it deals with a grievance and it is clear from the documents that the respondent went to considerable lengths to address the claimant's grievances. At least on the face of it, it is difficult to understand the basis upon which the claimant complains of "very limited investigation".

59. In his final Further and Better Particulars he claimant did make reference to his dismissal as being a detriment (P87) but s.47B does not apply to a dismissal (s.47B(2)(b)). This is a new cause of action in terms of s.103A, not previously pled; the claim has not been amended to include such a claim; in any event like the s. 47B claim, it lacks the required specification.

Causation

60. Finally, even if the claimant had been able to establish that he had made a qualifying disclosure and that he had been subjected to a detriment and indeed dismissal, he still requires to establish the causal link. It had been made clear to him that he had to establish "*that the alleged detriment was BECAUSE OF the making of the particular disclosure*" (P.54, para. 5). This he singularly failed to do so.

61. For all these reasons, therefore, I arrived at the view that the claim, as pled, has no reasonable prospect of success and it is struck out in terms of Rule 37(1)(a). I was satisfied, by and large, that the submissions by the respondent's solicitor were well-founded.

62. Finally, I should say that I arrived at this view mindful that the test for strike out is a high one. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. In ***Anyanwu*** (a discrimination case but equally apposite, in my view) the House of Lords emphasised the importance of not striking out claims except in the most obvious cases. In my view, the present claim was one such obvious case.

Employment Judge: N M Hosie
Date of Judgement: 12 October 2022
Date sent to Parties: 13 October 2022