Case Numbers: 1310271/2022
1310270/2022

EMPLOYMENT TRIBUNALS

Claimants: D.G.Nistor (1)

D.C. Nistor (2)

Respondent: Euro Car Parts Ltd

WRITTEN REASONS - JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: Birmingham via CVP **On:** 13 November 2023

Before: Employment Judge **Algazy KC**

Appearances
For the claimants: **In person**
For the respondent: **Mr H. Sheehan – Counsel**

INTRODUCTION

The Judgement below was handed down on 13 November 2023
A request for Written Reasons was made by the Claimants on 20 November 2023.
The request was communicated to EJ Algazy KC on 25 January 2023.

The Written Reasons below constitute the Oral Reasons given at the time of handing down the Judgment and are supplied pursuant to the Claimants' request.

JUDGMENT

Upon an Application to strike out the claims for Automatic Unfair Dismissal and/or for a Deposit Order

The judgment of the Tribunal is that:

1. The claims for Automatic Unfair Dismissal are dismissed pursuant to Rule 37(1) (a) on the grounds that they have no reasonable prospects of success.

2. The List of Issues set out in the Tribunal Order following a Preliminary Hearing on 2 June 2023 is amended by:

   2.1 the deletion of paragraphs 2, 3, 4 and 5.5.
   2.2 the deletion of the words "**or victimisation**" at paragraph 6.

3. The Case remains listed for 5 days commencing on 15 April 2024. Disclosure and Witness Statements for the Final Hearing are to be limited to the issues set out in the Amended List of Issues.

WRITTEN REASONS

1. There is before me an Application to strike out the Claimants' claims for automatic unfair whistleblowing dismissal - S103A Employment Rights Act 1996 ("ERA"). It is said that because of the chronology of events, it is impossible for the Respondent to have been motivated by the Claimants' letter dated 26 September 2022 regardless of the merits of its contents.

2. The Claimants represented themselves and had the assistance of a Romanian interpreter. The Tribunal sought to assist the Claimants, as Litigants in Person , with the Hearing today commensurate with the guidance and limitations set out in cases such as **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531. As will be apparent, the Tribunal also took account of the correct approach in such cases in accordance with the principles set out in **Cox v Addeco UKEAT/0339/19/AT** and went beyond the task of simply addressing the Application on the case as pleaded or even as it might be amended in accordance with a claim advanced in the Claimant's response to the Application but not yet formally amended.

3. The Respondent was represented by Mr H . Sheehan of counsel.

4. The case is presently listed following a Preliminary Hearing on 2 June 2023 for 5 days commencing on 15 April 2024.

The Law

5. Rule 37 of the Rules provides insofar as is material:

> ***'Striking out***
> ***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 is scandalous or vexatious or has no reasonable prospects of success …*
>
> *(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.'*

6. In **Malik v Birmingham City Council UKEAT/0027/19,** the EAT held:

> **"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."

7. **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126** confirmed that *"reasonable prospect of success"* means realistic as opposed to a merely fanciful prospect of success.

8. HHJ Tayler reviewed the relevant case law and set out a number of general propositions in **Cox v Adecco Group & Others (op cit)** at paragraph 28 of the Judgment:

(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 prospect 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 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.

Discussion

9. On 5 June 2023 the Respondent wrote to the Tribunal, copying in the Claimants [106].Attached to that email was the Respondent's application for strike out [107-108]. That application set out the basis for the application, and the consequences if it is successful.

10. The Claimants replied to the application by letter dated 26 June 2023 [116-120]. The Claimants' 4 page response does not engage with the principal basis of the application. In today's Hearing, I took the time to clearly explain to the Claimants the obstacle that they face and invited them to make any submissions that they wished to make. In that response they raise for the 1st time a claim under S 104 (1) (b) ERA – assertion of a statutory right in addition to the S 103A ERA – automatic unfair whistleblowing dismissal.

11. I also floated the possibility of an alternative cause of action based on s 100 of the ERA and spent some time positing how that claim might be advanced and

invited Mr Sheehan to respond notwithstanding that no such claim had been advanced or considered until I raised it. However, apart from fact that the specific facts of this case do not readily lend themselves to such a claim, it suffers, in any event, from the same fatal defect advanced by the respondent in respect of the s103A and s104(1) ERA

12. The Claimants' had 8 months' continuous employment and so have no right to bring a claim for ordinary unfair dismissal because of a lack of qualifying service. They can pursue a claim under s.94 of the Employment Rights Act 1996 if their dismissal was automatically unfair. Their basis for so alleging is contained in a letter dated 26 September 2022 ('the Letter') entitled constructive dismissal letter in which they make some 8 complaints about alleged breaches of the Working Time Regulations, health and safety obligations on the part of the Respondent as well as alleging that they had been treated less favourably on the basis of their sex.

13. The Letter also stands as the Protected Disclosure and, if formally amended, the act of assertion of statutory rights. The Claimants resigned with immediate effect and rely on the Respondent's conduct as helpfully set out in the List Of Issues at §2.1.1:

> a) That there were products at the warehouse that had to be picked that exceeded 25kg and there was no permanent colleague available to lift these heavy objects
>
> b) That performance targets were changed without any study being done by a special commission.
>
> c) That there was a lot of dust at the warehouse.
>
> d) That other colleagues in the warehouse were made to do lighter jobs and the Claimants were not paid more for the heavier work that they did.
>
> e) That there was a lack of management engagement with issues in the workplace, including issues with the equipment at the warehouse.

14. To succeed in their constructive unfair dismissal claim, the Claimants s would have to show that the acts of the Respondent which are said to amount to a repudiatory breach of contract were carried out because of the Protected Disclosure / Assertion of statutory right contained in the Letter.

15. That is simply not possible. The matters the Claimants complain about in the Letter had already happened.

16. The Respondent submits that, though the threshold for strike out is high, it is easily met in the present case where the Claimants' case is quite literally impossible. The prospects of success do not reach even the level of being fanciful much less reasonable.

17. I agree and the automatic unfair dismissal claim is struck out accordingly. The Deposit Application is rendered otiose and not further considered. The claim for sex discrimination will proceed as listed next April.

Jacques Algazy K.C.
On 28 January 2024