EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000626/2023

Held via Cloud Video Platform (CVP) in Edinburgh on 5 April 2024

Employment Judge R King

Miss Nicole Hogg	**Claimant In Person**
DPD Group UK Limited	**Respondent Represented by: Mr P Bownes - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's claims of unfair dismissal and whistleblowing are struck under Rule 37(1)(a) out on the ground that they have no reasonable prospect of success.

REASONS

Background

1. The claimant's claims, as clarified at a case management preliminary hearing on 29 January 2024, are of unfair dismissal, whistleblowing, and sex discrimination.
2. This preliminary hearing was fixed in order to determine the respondent's application to strike out the claimant's claims of unfair dismissal and whistleblowing on the ground that they have no reasonable prospect of success.
3. The claimant gave evidence and made submissions. Mr Bownes made submissions on behalf of the respondent in support of his application. The

respondent produced a bundle of documents, which included the Tribunal's Note and Orders following the preliminary hearing on 29 January 2024 together with an email from the claimant dated 31 January 2024 in which she set out the further and better information requested in the Tribunal's Order.

Reasons

4. The clamant gave evidence that she had worked with the respondent on three occasions over the Christmas periods 2021/22, 2022/23 and 2023/24. On each occasion, she had been directly employed by Jobstore UK Limited who had assigned her to work with the respondent at its depot at Coatbridge. So far as this claim is concerned her assignment had commenced on 9 October 2023 and ended on 11 October 2023.

5. She described the circumstances in which her assignment had ended. She explained that at some point on 11 October 2023, she was informed by two of the respondent's managers, Scott and Daniel (she did not recall their surnames), that the respondent intended to offer her a contract of employment that same day. However, when she pressed each of those managers about when she would receive her contract, each referred her to the other manager. She believed that they were making fun of her. Nevertheless, as she believed that she would receive an offer of employment, she decided to continue with her shift.

6. At some point later that same day, another one of the respondent's managers, Sean (again, she did not recall his surname) approached her and told her to leave the premises straight away and not return. He told her to leave because she was not working fast enough and hard enough. Even though she offered to complete the task she was working on, Sean repeated his instruction to leave straight away.

7. The claimant told the Tribunal she believed the respondent had broken health and safety regulations by asking her to carry out single handedly the task that she was carrying out before Sean approached her and told her to leave. However, she did not say that to Sean, and she even offered to complete the task single handedly after she was told to leave.

8. She explained that she had also asked Sean if she could have a meeting because she did not think that this was fair, but he refused and he insisted that she leave the premises. He told her that if she did not leave as requested he would phone the police. She believed that Sean had been rude and disrespectful.

Respondent's submission

9. Mr Bownes referred to his written application for strikeout and narrated the history of the case to date. He referred the Tribunal to the order made for further information following the preliminary hearing on 29 January 2024 and to the claimant's response in an email dated 31 January 2024.

10. In respect of the unfair dismissal claim, in response to question 2a -

"Does the claimant say that she was employed by the respondent or by her agency, Jobstore UK Limited",

She had answered –

"I was employed by Job Store but was working DPD, I was also about to get a permanent contract with DPD."

In response to question 2b -

"If she was employed by the respondent, on what basis does she assert this",

She had answered,

"I was employed by Job Store but was working for DPD, I was about to get a permanent contract with DPD."

11. In Mr Bownes' submission, these answers were fatal to any claim of unfair dismissal against the respondent. If she was not employed by the respondent then she could not bring a claim of unfair dismissal against them. Her unfair dismissal claim should be struck out as there was simply no reasonable prospect of success when she did not meet even the basic criterion to bring such a claim.

12. In respect of whistleblowing, in response to question 4b -

"What protected disclosure did you make to the respondent; when, and to whom, and by what means did you make sure disclosures?",

She answered,

"I told them not to dismiss me due to it being unfair and for very small reason."

13. In Mr Bownes' submission that response did fall within any of the prescribed groups set out in the relevant section of the Employment Rights Act 1996. Even if (which he did not admit) her response did relate to one of the prescribed groups, it would properly be characterised as a personal matter and not a matter in the public interest. She had therefore failed to identify any public interest disclosure in her response and there were therefore no reasonable prospects that she would succeed in such a claim.

14. In respect of the evidence that she had given in relation to the circumstances in which she had been spoken to by Sean, Mr Bownes' position was that this was the first occasion on which she had made any mention of such a conversation. It had not been mentioned in her ET1, she had not mentioned it at the preliminary hearing when pressed by the Employment Judge about the basis of her whistleblowing claim and she had not mentioned it in her response to the Tribunal's order. He was concerned that the claimant had now changed her position. In any event, the introduction of this allegation did not change anything because it would still not amount to a protected disclosure and, even if it was, it was made *after* she was dismissed.

Discussion and decision

15. Rule 37 provides as follows -

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 prospect 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 or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible.

16. The Tribunal recognises that strike out is a "draconian power" that should not be exercised lightly by an employment tribunal – ***Blockbuster Entertainment Limited v James [2006] EWCA Civ 684***. The threshold for striking out a claim or response for having no reasonable prospects of success is therefore high. ***In Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330***, the Court of Appeal held that where there were facts in dispute, it would only be "very exceptionally'' that a case should be struck out without the evidence being tested.

17. ***In Balls v Downham Market High School & College UKEAT/0343/10***, the EAT stressed that "no reasonable prospects of success" does not mean the claimant's case is likely to fail, or that it is possible the claim will fail. It is not a test that can be determined by considering whether the other party's version of disputed events is more likely to be believed. Simply put, there must be *no* reasonable prospects of success.

18. The Tribunal is also conscious that particular care has to be taken when there are litigants in person who may present a poorly pleaded claim. In ***Cox v Adecco and others EAT/0339/19***, the EAT issued guidance that Tribunals must take reasonable steps to identify the claims and issues and not rely only on litigants in person explaining their case. Reasonable care has to be taken to read the pleadings (including additional information) and any key documents in which the claimant has set out their case. It is not possible to decide whether a claim has reasonable prospects of success if the Tribunal does not know what the claim is.

19. Mindful of the protection afforded to an unrepresented claimant facing an application for strikeout, the Tribunal was satisfied that it had fully identified the claims and issues having regard to (1) the contents of the ET1, (2) the information she provided at the case management preliminary hearing on 29 January 2024, (3) the further and better information that she produced on 31 January 2024 in response to the Tribunal's order of 29 January 2024 and (4) her evidence.

Unfair dismissal

20. It was clear from the claimant's response to the order for further and better information and in her evidence that she conceded that no offer of employment had been made. Even taken at its highest, her evidence only went as far as saying her DPD managers had told her that she would receive an offer of employment later on the day that Sean terminated her assignment before any offer was made. There was therefore no evidence that she ever received an offer of employment.

21. The Tribunal also took account of the claimant's answers to questions 2.a and 2.b the Tribunal's order in which she confirmed that she was employed not by the respondent but by Jobstore UK Limited.

22. In all the circumstances, there is no basis whatsoever upon which the claimant can argue that she was employed by the respondent in the first place. It follows that any unfair dismissal claim against the respondent has no

reasonable prospect of success and must therefore be dismissed under Rule 37(1)(a).

23. In respect of the claimant's whistleblowing claim, the Tribunal had regard to section 43B of the Employment Rights Act 1996, which provides –

> *"(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, is being or is likely to be deliberately concealed."*

24. The Tribunal noted the terms of the claimant's ET1, her response to the Tribunal's order, her evidence today and also the Employment Judge's note of her comments at the case management preliminary hearing on 29 January 2024 when asked to clarify the basis of her whistleblowing claim, which were as follows -

> *"15. With regard to the whistleblowing claim, the claimant was unable to identify any protected disclosure on which she was seeking to rely in*

this case, nor to show what the detriment was which took place because she had made a protected disclosure.

16. When I asked her to explain her position on this, she thought that the 15 reason for her employment ending was that the manager had seen Scott and Daniel joking about her shifts."

25. In the first place there is no mention whatsoever in the claimant's ET1 of any basis upon which she can claim to have made a protected disclosure. Further, when pressed by the Employment Judge at the case management preliminary hearing she was unable to identify any protected disclosure upon which she sought to rely. Having been given a third opportunity to provide relevant details, in response to the Tribunal's order dated 29 January, her response was –

"I told them not to dismiss me due to it being unfair and for very small reason."

That response plainly also fails to identify a relevant protected disclosure.

26. It was therefore only during her evidence today, at the fourth time of asking her to identify a protected disclosure, that she spoke of having had a concern about health and safety. However, it was clear from the account she gave of her concern that she had not raised that concern with the respondent's manager, Sean, and that she had even offered to complete single handedly the task that she now claims presented a danger to her health and safety. Even taken at its highest that is not enough to meet the statutory test.

27. The claimant has therefore failed to identify any protected disclosure upon which she can rely. It follows that her whistleblowing claim has no reasonable prospect of success and must therefore also be dismissed under Rule 37(1)(a).

Further Procedure

28. A hearing should now be fixed in relation to the claimant's remaining claim of sex discrimination.

Employment Judge: **R King**
Date of Judgment: **07 May 2024**
Entered in register: **09 May 2024**
and copied to parties