EMPLOYMENT TRIBUNALS

Claimant: Mr Ioan Sorin Pirlog

Respondent: Barchester Healthcare Limited

Heard at: Cambridge Employment Tribunal **On: 23 May 2024**

Before: Employment Judge Michell (sitting alone)

Appearances:

For the claimant: In person
For the respondent: Ms Erin Moncur (solicitor)

WRITTEN REASONS

Introduction

1. These are the written reasons for my judgment given orally at a public preliminary hearing on 23 May 2024. On that day, I dismissed the claimant's ordinary' unfair dismissal claim under s.94 of the Employment Rights Act 1996 ("ERA") on jurisdictional grounds (lack of continuity of service), and I struck out his claim of automatically unfair dismissal under s.103A ERA having found that it had no reasonable prosect of success.

2. I sent my judgment to the tribunal for promulgation on 23 May 2024. It was sent by the tribunal to the parties on 3 July 2024. Solicitors acting for the claimant - who was in person at the 23 May 2024 hearing- made a request for written reasons on 16 July 2024.

Reasons

Background

3. The respondent is a care provider, which operates care homes. The claimant was employed as a carer at the respondent's Brampton View care home from 12 September 2022 until his dismissal for alleged misconduct (sleeping on duty) with

a payment in lieu of notice ("PILON") on 8 June 2023. By a claim presented to the tribunal on 1 September 2023, the claimant asserted that he was unfairly dismissed. He ends his Particulars of Claim by asserting that on 7 November 2022 he "*tried to report a safeguarding matter*" about a colleague ("CK"), but that "*nothing has been done since*".

4. The 23 May 2024 public hearing was listed following a preliminary hearing before EJ Ord on 4 March 2024, at which time the claimant confirmed that he did not in fact make any protected disclosure to the respondent, even though it he had asked to see his manager in order to discuss safeguarding matters. As was put by EJ Ord:

> "… *I enquired of the Claimant what the events were around his reporting a safeguarding issue. He told me that he had asked to see his Manager Jessica Pateman urgently to raise a safeguarding issue, but was told she was in a meeting. He made two attempts to speak to Ms Pateman without success…. The Claimant says he did not tell Ms Pateman what the safeguarding issue was, nothing was done by the Respondent but he himself did not pursue the matter any further*…".

5. EJ Ord thus ordered that the tribunal would determine at a public preliminary hearing:

   (a) Whether the claimant's complaint that he was dismissed for making protected disclosures should be struck out on the basis that it has no reasonable prospect of success, alternatively, that the complaint should be subject to a deposit order on the basis that it has little reasonable prospect of success; and
   (b) Whether the claim for "ordinary" unfair dismissal should be struck out on the basis the claimant has less than two years' continuous service with the employer.

6. EJ Ord also ordered for a bundle to be prepared, and for witness statements to be exchanged by 7 May 2024 in so far as either party wished to adduce evidence.

The 23 May 2024 hearing

7. I was provided with a bundle comprising 69 pages, and was taken to any relevant documents by the parties. As it transpired, no witness statements were produced. However, the claimant explained to me in some detail why he considered that he had been unfairly treated. He did not seek to resile from what he had told EJ Ord on 4 March 2024, as set out above.

8. He also took me (page 34 of the bundle) to two emails he had sent on 7 November 2023 to Jessica Pateman- some 7 months before his dismissal. In the first (sent at 8:55am), he said "*Hi Jessica, my dear we need to talk*…". Her response (sent at 9:24am) was "*Hello- are you okay? Just doing care review meeting"*". In the second (sent at 10:15am), he said "*OK Jessica, can you please meet me when you finish the meeting to discuss a safeguarding matter*". This 'safeguarding matter' -issues he allegedly had with a colleague- was said by him to me to be his 'protected disclosure'. But he confirmed to me that no such meeting with Ms Pateman in fact took place, and he did not assert that he in fact told her or anyone else at the respondent about the "safeguarding matter" at any material time.

9. Other documents in the bundle to which I was taken show that on 28 April 2023, staff were reminded of the importance of not sleeping on duty when on night shift, and that sleeping on duty was regarded as gross misconduct because it compromised "*the safety and care of our residents, who do not deserve for their care to be compromised in this way"*. Also, that early on 8 June 2023 serious concerns were raised by three members of staff about the claimant -including an assertion that he had been asleep on duty on a 'waking night shift' the previous night- and that the unit (which contained residents with dementia) was thereby left "*in a vulnerable situation*" which *"could easily have been catastrophic*". One staff member ("DB") reported that a resident had been found wandering around, and had pulled a pillow from under another resident's head; also, that she had found the claimant asleep on a sofa.

10. Other paperwork in the bundle shows that following those concerns being raised, the management ("ST" and "JK") met with claimant on 8 June 2023, put the allegations of sleeping on duty to him, and decided to dismiss him summarily, with a PILON.

11. I explained to the claimant the key issues which fell for determination, and the importance of (amongst other things) showing he had 2 years' continuity, and -for s.103A ERA purposes- that he made a protected disclosure within the meaning of ERA. I heard submissions from both Ms Moncur for the respondent, and from the claimant in person. The claimant's focus was on alleged 'unfair' treatment.

<u>The Law</u>

12. An employee requires 2 years' continuity of service in order to bring a claim of 'ordinary' unfair dismissal under s.94 ERA- see s.108 ERA. 2 years' service is not required where the only or principal reason for a dismissal is a protected

disclosure within the meaning of s. 43 ERA. In such case, the dismissal will be automatically unfair -see 103A ERA. In such case, however, the burden is on the employee to show he made a protected disclosure.

13. Pursuant to r 37(1)(a) of Schedule 1 to the 2013 ET Regs, a tribunal can strike out all or part of a claim at any stage of proceedings, either on its own initiative or on the application of a party if, amongst other things the tribunal considers that it has no reasonable prospect of success.

14. Public policy reasons dictate that a tribunal should be slow to strike out a claim when allegations of whistle blowing are made. In particular, such cases should not, as a general principle, be struck out when the central facts are in dispute. See **Ezsias v North Glamorgan NHS Trust** [2007] EWCA Civ 330. Many weak cases will involve such a dispute of facts, which cannot (except exceptionally) be resolved on a strike out application and must be resolved at a full hearing on the merits. This is because at a strike out hearing the tribunal is in no position properly to weigh competing evidence and "*should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts*". See **Mechkarov v Citibank NA** [2016] ICR 1121. Taking the claim at its highest means taking it at its highest not just in the pleadings but in any relevant supporting documentation available to the tribunal.

15. However, as was said in **Mechkarov**, if the claimant's case is 'conclusively disproved' or is "*totally and inexplicably inconsistent' with undisputed contemporaneous documents*", it may be struck out. Moreover, where core facts are not in dispute -e.g. absence of a protected disclosure- strike out may nevertheless be appropriate, and indeed will save valuable public resource.

Application to these facts

16. The claimant accepted that he did not have 2 years' continuity of service as required by s.108(1) ERA. He was only employed for about 9 months. Accordingly, I found that the tribunal did not have jurisdiction to hear his claim of 'ordinary' unfair dismissal. That part of his claim therefore fell to be, and was, dismissed.

17. His claim for unfair dismissal could only succeed if the only or principal reason for his dismissal was because he made a protected disclosure pursuant to s.103A ERA.

18. As set out above, the burden was on him to show he made a protected disclosure within the meaning of ERA.

19. The delay between 7 Nov 2022 and the 8 June 2023 dismissal, and the on-the face-of-it strong bases for dismissing the claimant for conduct-related reasons which seemingly had nothing to do with a protected disclosure, all suggested to me that the s.103A ERA claim may have had significant difficulties -even assuming a protected disclosure was made.

20. The respondent had a paper trail making it clear to staff -in so far as clarity was needed- that sleeping on duty was viewed as gross misconduct. Two members of staff apparently saw the claimant asleep on duty on the morning of 8 June 2023. Other issues appear to have been identified and raised with the claimant on 8 June 2023 by a third member of staff. On those bases alone, the s.103A claim seemed to me to have had at best little reasonable prospect of success.

21. If this was the only issue with the claim, I would have very probably not have struck it out, given that the claimant disputed being asleep, and given what I have set out about not generally resolving disputes of fact at an interim stage.

22. However, more fundamentally, the claimant himself accepted that he made no protected disclosure within the meaning of s.43 ERA. This much was ascertained at the preliminary hearing before EJ Ord on 4 March 2024. It was repeated before me. The claimant apparently had safeguarding issues which he said he planned to raise in November 2022; but he accepted he did not end up sharing those issues. Accordingly, he cannot have been dismissed because he made a protected disclosure for s.103A ERA purposes. Applying my discretion under r.37(1)(a), therefore I considered the s.103A ERA claim ought to be struck out, as it had no reasonable prosect of success.

Employment Judge Michell

Date: 23 July 2024

SENT TO THE PARTIES ON

26 July 2024.....

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FOR THE TRIBUNAL OFFICE