Case Number: 3309578/2023

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Nigel Birkett	v	**Birkett Electric Limited**

Heard at: Watford (By CVP) **On: 26 July 2024**

Before: Employment Judge Bansal (sitting alone)

Representation:

Claimant: **In person**
Respondent: **Mr C Milson (Counsel)**

JUDGMENT

1. The claimant's complaint of automatic unfair dismissal pursuant to s103A of the Employment Rights Act 1996 has no reasonable prospects of success and is struck out pursuant to Rule 37(1)(a) of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

2. The claimant's complaint of unfair dismissal under s98 of the Employment Rights Act 1996 has little prospect of success. The claimant is ORDERED to pay a deposit of £50 within 28 days of the date of this Judgment as a condition to be permitted to continue to pursue this complaint in accordance with Rule 39 of Schedule 1 to the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013

REASONS

Introduction

1. Following a period of ACAS early conciliation started on 12 July 2023 which ended on 8 August 2023, the claimant presented a Claim Form (ET1) on 8 August 2023 bringing complaints of ordinary unfair dismissal and automatic unfair dismissal for making a protected disclosure. By a Response Form (ET3) filed on 24 October 2023, the respondent contends the claimant was dismissed for a potentially fair reason namely conduct and that the dismissal was fair substantively. The respondent deny the claimant made a protected disclosure.

2. The preliminary hearing today was listed following a case management preliminary hearing held on 17 April 2024 before Employment Judge Matthews. At that hearing Employment Judge Matthews discussed with the claimant the factual basis of the disclosure relied upon; explained the relevant statutory test and relevant authorities and gave the claimant an opportunity to provide further information by way of clarification of his whistleblowing complaint. In essence the claimant asserted he was dismissed because he made a protected disclosure. Also at that hearing the respondent representative made an oral application to strike out the automatic unfair dismissal complaint. Employment Judge Matthews listed this application for a preliminary hearing for 30 May 2024 to consider whether the claim or any part of it should be struck out because it has no reasonable prospect of success and/or if the claimant should be ordered to pay a deposit as a condition of continuing with the claim.

3. The preliminary hearing held on 30 May 2024 before Employment Judge Boyes was postponed at the request of the claimant as he had not received the hearing bundle in sufficient time and required further preparation time. The hearing, was, therefore, re-listed to be heard today.

Hearing

4. The claimant represented himself, and the respondent was represented by Mr Milson of Counsel. I was presented with a bundle of documents of 320 pages, which included a witness statement provided by the claimant, a witness statement of Mr Neal Birkett for the respondent, and the parties skeleton argument. These statements had been prepared on the direction of Employment Judge Boyes given at the hearing on 30 May 2024. To assist me in my reading of the documents the claimant and Mr Milson provided a reading list to the hearing bundle.

5. Before hearing the application, the claimant raised the issue about the procedure to be followed. He referred to Para 11 of the Order made by Employment Judge Boyes, (sent to the parties on 17 July 2024) which the claimant said he received about a week ago. In accordance with the guidance given in Para 11, the claimant was of the understanding that he would be given the opportunity to cross examine Mr Neal Birkett given that he has provided a witness statement . Mr Milson confirmed he did not intend to call Mr Neal Birkett, and that he would be making submissions relying on the skeleton argument contained in the bundle. In view of the issues I had to determine, I did not consider it was necessary to hear from Mr Neal Birkett. Also I did not consider the claimant would be caused any prejudice or unfairness by not being able to cross examine Mr Neal Birkett. I assured the claimant that he would be given full opportunity to present his case; make his representations and that his witness statement would be taken as his evidence in chief upon which he may be cross examined by Mr Milson. The claimant confirmed his acknowledgment and agreed to proceed.

6. I heard submissions from Mr Milson consistent to the skeleton argument in the bundle. As the claimant was acting in person, I was mindful to give him sufficient time and full opportunity to make his representations which he did do. In my deliberations I took into account these submissions and considered carefully each of their arguments as advanced.

The Application

7. Firstly, regarding the automatic unfair dismissal complaint, the respondent argues this complaint has no reasonable prospect of success, firstly because the claimant did not make a disclosure of information and secondly the alleged disclosure does not amount to a protected disclosure in accordance with the statutory test. Therefore for that reason this complaint should be struck out as it has no reasonable prospects of success in accordance with rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"). If the Tribunal considers that this complaint has little reasonable prospect, then a deposit order should be made under rule 39 of the Rules. In respect of the ordinary unfair dismissal, the application is limited to a deposit order under rule 39

Background facts

8. To add context to this application, it is helpful to summarise the background to the claimant's dismissal. As I did not hear oral evidence I have not resolved any disputes of fact. I therefore set out what I consider to be uncontested matters based on the pleadings and contents of the bundle.

9. The respondent company is a family business that manufactures underground cable joints and cable jointing accessories based at its Princes Risborough factory office. The respondent is owned and run by the parents of the claimant, namely Mr Brian Birkett and Mrs Christine Birkett. Mr Brian Birkett is the respondent's Managing Director. Mrs Birkett is retired. The claimant has a brother, Mr Neal Birkett who is also employed by the business and continues in employment with the respondent. The respondent employs two other employees.

10. The claimant commenced employment with the respondent on 1 May 1986 and sometime in 1986 he was appointed a Statutory Director. On 2 June 2023 the claimant's employment was summarily terminated on the grounds of gross misconduct. At the date of termination the claimant held the role of Sales & Quality Director. The claimant disputes the date of termination of his employment arguing it was on 9 June 2023. This date coincides with the letter of termination.

11. On or about January 2023, Mr Brian Birkett was in discussion with a potential buyer of the respondent's manufacturing part of the business. On or about 1 February 2023, Mr Brian Birkett discussed the potential sale issue with their Mr Golding of Haines Watts Accountants and Auditors. Mr Brian Birkett claims that

in that month (i.e February 2023) he made the claimant aware of this potential sale and continued to keep him informed of the ongoing discussions. The claimant disagreed with the proposed sale and restructuring of the business and according to Mr Brain Beckett the claimant did not engage about this. This is disputed by the claimant who asserts that the first he was informed or became aware of the sale and restructure was on 30 May 2023.

12. On 30 May 2023 Mr Brian Birkett spoke with the claimant about the preparation for the sale and restructure of the business. The claimant expressed his objection and dissatisfaction to Mr Brian Birkett. It is asserted by the respondent that some hours later that day the claimant, in the presence of a fellow employee was verbally abusive and highly offensive to Mr Brian Birkett and told him that he was quitting. He then left the premises. The claimant has asserted he has no recollection of his verbally abusing or using offensive language towards Mr Brian Birkett.

13. On 1 June 2023, at 12.31pm, the claimant sent an email to Haines Watts complaint portal writing, *" I've being a customer off 35 years with a HW office. The limited company business is very profitable but the owner wishes to restructure and conceal assets. I'm a director and walked out at 3:00 pm on Tuesday as I see malpractice, negligence, conspiracy to commit fraud and gross misconduct by a HW director. Can you put me in contact with a compliance manager and contact details of GroupMD Michael Davidson. Thank you".* The claimant confirmed this email is the disclosure he relies upon for his whistleblowing complaint.

14. On 2 June 2023 at 16.06pm, the claimant sent an email to the respondent, the subject matter being – *"Conspiracy to conceal assets and misconduct by HainesWatts"* The email states, *"At last have contacted HW Head Office and chief auditor (financial compliance officer). They are very guarded as human nature. I've charged Tony Golding at Head Office with malpractice, negligence, conspiracy to commit fraud, and gross professional misconduct. If I can get him on one the charges to stop the restructuring of the family firm that would be positive…… I'm clean, no convictions a whistleblower and will fight until I get satisfaction as cannot allow proposed shell sales company to go into administration and bring the rest down, whilst trying to conceal the buildings… "*

15. On 2 June 2023 at 18.00pm Mr Brian Birkett sent to the claimant an email, which states, *"…Do not come to the factory on Monday morning as you are sacked. You are sacked for gross misconduct insubordination. I have already spoken to a solicitor. I have spoken to Tony Golding to apologise for your behaviour. Do not make any more contact with Haines Watts. What you have said to them is potentially grounds for them to take you to court for libel. All emails to stop."* A letter confirming the claimant's dismissal was sent by the respondent solicitors BlaserMills Law dated 9 June 2023.

16. The claimant's appeal against his dismissal was dismissed.

The Law
Strike Out

17. Rule 37(1) provides as follows:
" *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 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 of these Rules or with an Order of the Tribunal;*
(d) *That it has not been actively pursued;*
(e) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response or the part to be struck out

18. In dealing with an application to strike out all or part of a claim a Tribunal must be satisfied that there is *"no reasonable prospect of success"* in respect of that claim or complaint. It is not sufficient to determine that the chances of success are remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to be appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained the case of ***Balls v Downham Market High School and College [2011] IRLR 217 (Paragraph 6)***
"When strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success, the structure of the exercise that the tribunal has to carry out is the same; the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word "no" because it shows that the test is not whether the claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects..."

19. Claims or complaints where there are material issues of facts which can only be determined by an Employment Tribunal at a full hearing will rarely, if ever be apt to be struck out on the basis of having no reasonable prospect of success before the evidence has been ventilated and tested at a full merits hearing. (***Anyanwu and anor v South Bank Student Union and anor [2011] ICR 391 UKHL & Ezsias v North Glamorgan NHS Trust [2007] ICR 1126.***

20. ***Mitting J in Mecharov v Citibank NA [2016] ICR 1121 EAT*** provided the following guidance at paragraph 14: *"the approach that should be taken in a*

strike out application in a discrimination case is as follows: 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, A tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts."

21. However, there are some caveats to the general approach of caution towards strike out applications. In ***Ahir v British Airways plc [2017] EWCA Civ 1392 CA***, it was held that, when a tribunal is satisfied that there is no reasonable prospect of the facts needed to find liability being established, strike out may be appropriate. This is caveated by the need to be aware of the danger of reaching that conclusion without having heard all the evidence.

22. In ***Morgan v Royal Mencap Society (2016) IRLR 428*** Mrs Justice Similar reminded the tribunals at paragraphs 13 and 14 that there are cases where if one takes claimants case at its highest and it cannot succeed on the legal basis on which it is advanced then it will be appropriate to strike out.

23. 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 tribunals ought not be taken up by having to hear evidence in cases that are bound to fail."*

24. It is important to take into account that a claim form entered by a litigant in person may not put that claimant's case at its best as had it been properly pleaded – ***Hasan v Tesco Stores Ltd UKEAT/0098/16***. The best course of action in such a scenario is to establish exactly what the claimant's claim is, and, if still in doubt about prospects, make a deposit order – ***Mbiusa v Cygnet Healthcare Ltd UKEAT/0119/18.***

25. The EAT issued guidance on how tribunals should deal with litigants in person and strike out applications in ***Cox v Adecco and others EAT/0339/19***. It was stated that litigants in person should not be expected to explain their case and take the judge to relevant materials, rather the onus is on the judge to consider the pleadings another core documents that explain the case. The tribunal must take reasonable steps to identify the claims and issues: it is not possible to decide whether claim has reasonable prospects of success if the tribunal does not know what the claim is. The parties roles were clarified: legally represented respondents are required to assist the tribunal in identifying documents which set the claim out and claimants should attempt to explain their claims clearly and focus on core claims rather than trying to argue every conceivable point.

Deposit Order

26. The Tribunal has the power to make deposit orders against any specific

allegations or arguments that it considers has little reasonable prospect of success under r39 of the Rules:

"(1) *where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument."*

27. The rationale of a deposit order is to warn a claimant against pursuing claims with little merit, which may leave them open to a risk of costs should they proceed with the claim and lose on the same basis as identified as the reason for the making a deposit order.

28. The purpose of such an order is not to restrict disproportionately access to justice, hence any order made must be for an amount that is affordable by a party, and can be realistically complied with – ***Hemdan v Ishmail and anor [2017] IRLR 228.***

29. If a deposit order is made, reasons must be given, not only for the fact of the order, but also for the amount of that order – ***Adams v Kingdon Services Group Ltd EAT/0235/18.***

Protected Disclosure

30. Section 43A of the Employment Rights Act 1996 ("ERA") defines a "protected disclosure" as a qualifying disclosure made by a worker in accordance with one of sections 43C to 43H.

31. Section 43B then defines what counts as a "qualifying disclosure". For the purposes of this case, this is 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 –
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

32. A "qualifying disclosure" requires first of all a disclosure of information by the worker. Once a tribunal is satisfied that information has been disclosed, the next question is whether the two remaining requirements of section 43B set out above are satisfied, namely;
(i) whether the claimant reasonably believed that the disclosure of the information was in the public interest, and

(ii) whether the claimant reasonably believed that the information he disclosed tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation,

33. On the first of these requirements, as made clear in ***Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2018] IRLR 837***, the test is whether the claimant reasonably believed that his disclosure(s) were in the public interest, not whether they were in fact (in the Tribunal's view for example) in the public interest. The worker must actually believe that the disclosure is in the public interest and the worker's belief that the disclosure was made in the public interest must have been objectively reasonable. Why the worker makes the disclosure is not of the essence, and the public interest does not have to be the predominant motive in making it. Tribunals might consider the number of people whose interests a disclosure served, the nature of the interests affected, the extent to which they were affected by the wrongdoing disclosed, the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer.

34. The second of these requirements is assessed very similarly. In order for the claimant to demonstrate that he reasonably believed the information he disclosed tended to show (for example) that a person had failed, or was likely to fail to comply with a legal obligation, it is not necessary that this actually be true, although of course the factual accuracy of what is disclosed may be relevant and useful in assessing whether he reasonably believed that what he said tended to show that there was a failure to comply with a legal obligation. This is a question of fact for the Tribunal, looking at the claimant's state of mind at the time he made the disclosures.

Analysis & Conclusion

35. I now turn to my analysis and conclusion having taken into account the legal framework and case law as set out above. In determining the issue whether the claimant made a protected disclosure I am taking the claimant's case at its highest, which I am required to do.

36. First, I considered the alleged protected disclosure relied upon, namely the email sent on 1 June 2023 to Haines Watts, which the claimant asserts in his belief shows a failure by Haines Watts to comply with a legal obligation arising from their fiduciary duty to the respondent.

37. I considered whether the email shows a "disclosure of information" applying the guidance in the case of *Cavendish Munro Professional Risks management Ltd v Geduld 220 ICR 325.* I concluded the email does not amount to a disclosure of information but is an allegation against Mr Golding. The allegation is against Mr Golding that he is allegedly committing *" malpractice, negligence, conspiracy to commit fraud and gross misconduct".* This is unspecific and lacks any factual information which is a key requirement as confirmed by the Court of Appeal in *Kilraine v London Borough of Wandsworth (2018) EWCA Civ 1436.* Further I find this allegation expresses a personal view held by the claimant. That does not amount to disclosure of information. Therefore, this alleged disclosure cannot amount to a protected disclosure.

38. I also considered whether the claimant believed the alleged disclosure to be in the public interest. In his submission the claimant asserted the public interest related to the protection of the employees employment. I find this disclosure does not contain any indication to a public interest element. The email makes no reference to the interests of the employees. I find the email was personal to the claimant. His motive was to stop the business sale and restructure going ahead as reconfirmed in his oral submission. This is also evident from the claimant's emails to Mr Brian Birkett and his brother Mr Neal Birkett. For example, in the email to Mr Neal Birkett dated 2 June 2023, the claimant writes, *".. if I can get him (i.e Mr Golding) on one the charges to stop the restructuring of the firm that would be positive"….."call it off dad" … "will fight Haines Watts until I get satisfaction as cannot allow proposed shell sales company to go into administration and bring the rest down …."* It is clear from the parties correspondence this issue became a private dispute with the claimant and his father. There can be no public interest in a private dispute. The claimant has shown no evidence of any arguable reason for him to believe that there was a public interest element to his alleged disclosure.

39. On the question whether the claimant in his reasonable belief believed the alleged disclosure tended to show Mr Golding and/or Haines Watts had failed or was failing or was unlikely to comply with any legal obligation they were subject to, I find the claimant did not, at the time of the alleged disclosure hold this belief. He did not identify the specific legal obligation he had in mind and neither did he describe in what circumstances the legal obligation arose. The claimant in his oral submission admitted at that time he did not know about the law, and that after issuing this claim he researched the law and educated himself on this subject matter. This belief has been gained subsequently. Further, the claimant in his oral submissions said, *" I did not want my life to go down the pan so I made the protected disclosure"*. This submission is a further example of the claimant's motive and the lack of reasonable belief in held.

40. For the reasons stated, I am satisfied that the claimant has not established his disclosure amounts to a protected disclosure for the purposes of s43B of the Employment Rights Act 1996. I am mindful the claimant is a litigant in person and the legal authorities direct that the striking out of a whistleblowing complaint should be approached with great caution. However, in my judgment, having taken the claimant's case at its highest, it has no reasonable prospect of success. Thus having regard to the judgment in Ahir v *British Airways plc [2017] EWCA Civ 1392 CA*, and being mindful that *"the time and resources of the tribunals ought not be taken up by having to hear evidence in cases that are bound to fail."* I consider it appropriate to strike out the whistleblowing complaint pursuant to r37(1)(a) of the Rules. I also gave consideration to whether as a matter of discretion to order some less draconian sanction. Given the complete absence of an arguable case by the claimant. I declined to do so.

Ordinary unfair dismissal

41. In relation to the unfair dismissal complaint, it is not in dispute that the claimant was dismissed.

42. Mr Milson submitted that on the facts a Tribunal is likely to find that the decision to summarily dismiss the claimant was within the band of reasonable responses and that any procedural irregularity found is unlikely to render the dismissal to be outside the band of reasonable responses. The respondent therefore argues that on the merits this complaint has little reasonable prospect of success and therefore the respondent seeks a deposit order under r39 of the Rules.

43. I have noted the claimant's primary case is that the real reason for his dismissal was because he made a protected disclosure. Notwithstanding this, the claimant argues that the dismissal was substantively and procedurally unfair. The claimant denies he used highly offensive language to his father on 30 May 2023 or that he acted insubordination. He contends that he does not have any recollection of the incident notwithstanding the incident occurred and was witnessed by another employee. Procedurally, the claimant takes issue at being dismissed without a formal investigation and disciplinary procedure and that he was denied a face to face appeal hearing.

44. In determining the issue of conduct and fairness of the dismissal the Tribunal will be obliged to have regard to the questions identified in British Home Stores Ltd v Burchell (1978) ICR 303 and the test of fairness under section 98(4) of the Employment Rights Act 1996. I carefully considered the documents contained in the bundle relating to the reason for dismissal and the dismissal process and applied the legal principles as stated above to the facts. In my preliminary assessment there is sufficient evidence for the respondent to to show the reason for the claimant's dismissal was his conduct which is a potentially fair reason. Further, notwithstanding that he was dismissed without any procedure being followed, had the respondent carried out a formal disciplinary process the claimant would have been summarily dismissed. I have noted the claimant's length of service, his work ethic and his exemplary disciplinary record. This may persuade a Tribunal to find that the sanction was harsh in all the circumstances. However, I conclude that in the circumstances the claimant has little reasonable prospect of success in persuading a Tribunal that the decision to dismiss him was outside the band of reasonable responses open to the respondent.

45. I therefore consider it appropriate to make a deposit order. Notwithstanding my provisional assessment, the claimant may succeed at a final hearing. Hence, I am mindful that the deposit order I make should not operate to restrict disproportionately the claimant's fair trial rights or access to justice. As to the amount of the deposit to be paid, the claimant described his financial situation to be dire. He said he is currently unemployed and is not in receipt of any benefits.

He draws a monthly income of £1800 from his pension, and his outgoings are some £3000 per month. He has substantial outstanding loans and credit card debts. He confirmed that there is no money left over at the end of each month and that he will not be able to afford paying any deposit amount.

46. I am aware the purpose of a deposit order is to make the claimant think carefully before deciding whether or not to pursue his complaint further. I am conscious that I should not order an amount that would act as a further deterrent or obstacle to his pursuing this complaint. Given the claimant's precarious financial position, I consider that a proportionate order would be for the claimant to pay a deposit not exceeding £50 as a condition of pursuing this complaint.

47. A Case Management Order confirming the agreed case management directions as discussed for the final hearing will be issued separately.

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Employment Judge Bansal
Date: 5 August 2024

Sent to the parties on: 9 August 2024

For Secretary of the Tribunals