EMPLOYMENT TRIBUNALS

Claimant: Mr Dimitar Chenulov

Respondent: Bidvest Noonan (UK) Limited

Heard at: in public by CVP

On: 11 October 2024

Before: Employment Judge Adkin

Appearances

For the Claimant: In person
For the Respondent: Miss G Rezaie, of Counsel

REASONS

1. These are the written reasons for the judgment for (i) strike out of the complaint of failure to make reasonable adjustments, (ii) non-strike out of other elements, (iii) grant of the Claimant's application to amend the claim, given orally on 11 October and confirmed in writing on 13 October 2024.

2. Reasons for a deposit order also made on the hearing on 11 October was sent in a separate deposit order on 23 October 2024.

History of the claim

3. The claim form itself was presented on 28 December 2023.

4. In that claim form the Claimant on page 9 of the form ticked the box that says this – there is a heading "10 – information to regulators in protected disclosure cases" and then the detail narrative says

> "10.1 if your claim consists of or incudes a claim that you are making a protected disclosure under the Employment Rights Act 1996 (otherwise known as whistleblowing claim) please tick the box if you want a copy

> of this form or information from it to be forwarded on your behalf to arrange relevant regulator"

5. The Claimant ticked that box but then has not provided any narrative in the claim form to support a claim of protected disclosure.

6. It should be noted that the detail that he has provided about his other claims is fairly limited, there is a claim of unfair dismissal and disability and sexual orientation discrimination.

7. In box 8.2 he has provided a short factual narrative about the circumstances of his claim which is only half a page of close type and there is additionally about a quarter of a page of close type under the heading "additional information".

8. In summary he has not provided a great deal of detail in that form.

Hearing 9 April 2024

9. There was a preliminary hearing on 9 April 2024 in front of Employment Judge Elliott.

10. Other claims were discussed and in fact the claim of unfair dismissal was withdrawn but the claim of protected disclosure was not discussed at that hearing.

Second hearing 25 June 2024

11. There was a further hearing on 25 June 2024 in front of Employment Judge B Smith.

12. It seems that a potential protected disclosure claim was identified during that hearing in which the claims were identified in some detail. There was an application to add a claim of failure to provide further particulars which was not opposed and granted but the Claimant was given directions if he wished to make an application to amend to include a protected disclosure detriment claim, which is at paragraph 16, page 80 of the agreed bundle and it said this:

> "by the 9 July 2024 the Claimant must make any written application to amend his claim to include protected disclosure detriment (whistleblowing) it must include all details including when he made the disclosure i.e. blew the whistle, how and who too and exactly what the Claimant says the Respondent did as a result. He must explain why it was not included in the original claim form and not mentioned before the case management hearing on 25 June 2024."

Application to amend

13. The Claimant did make an application to amend his claim in an email sent on 9 July 2024. In that application what he says is

> "as I am not a solicitor I did not know I had to fill in all details about all allegations on the ET1 form. I am apologising about that to the Judges from ET, we did not comment anything about this protected disclosure

> because I was not asked to explain and elaborate further by Judge Elliott.
>
> We did not have enough time and this is why for the next preliminary hearing on 25 June 2024 she allocated 3 hours not 2 hours as the previous with her. We did not comment at first the protected disclosure because I was following Judge B Smith agenda and his professional was (I think that should say way) of conducting the hearing and thankful that he opened the topic for the protected disclosure and he did ask me questions about it".

14. On that email which is at page 90 of the bundle for this hearing the Claimant forwarded an email which he himself had sent to his line manager on 11 October 2023 at 19:29 and the title of the email re: invite to probationary review meeting. That sent to Elliana Deluca and Georgina Galley. The Claimant in that email which was about a page in length talks about his time at Broadgate Quarter as being very stressful overall and in that email he says this

> … Plus those WhatsApp messages I have sent you already today and I think part of the email can be considered as **protected disclosure**
>
> [emphasis added]

and then he sets out a quote apparently from a WhatsApp message:

> Hi Eli, I just wanted to say that there is no coffee in the luxury and strict environment building also the only available locker is almost with a broken locker and all sides are in rust, the electric kettles and sandwich toasters cable are often covered in water in the staff kitchen which may cause electrical shock and death. Thank you".

15. The Claimant has not explained the precisely in his written application to the Tribunal, what he has explained in this hearing is he relies as a relevant failure on health and safety was in danger so that would fall under **s.43D(1)(d)** of the Employment Rights Act 1996 i.e. the health and safety of any individual has been, is being or is likely to be endangered.

16. We also discussed what the consequence of that was which was not clear from his email, initially he said that the Respondent did not really care about this email, they decided that I was already be dismissed and did not pay attention to this email. It was clarified by him later that in fact although no action was taken his belief was that the "tone" had changed in the way that he had been dealt with and in fact he says that it is the dismissal which he says is the consequence of that protected disclosure, in other words he is bringing a claim under **s.103A of the Employment Rights Act 1996**.

History of employment

17. The Claimant commenced working as a temporary acuity support team manager on 10 August 2023 on 5 October 2023 he had his month two meeting which it appears is a probationary review meeting.

18. The Respondent's pleaded case on this is that the Claimant had received negative feedback from clients in relation to his work.

19. In the agreed bundle the note taken following that meeting, the Respondent's pleaded case partly reflects what the meeting actually covered which seems to be something more of a mixture, in a document which appears in the bundle for this hearing at page 122 and 123 which is typed and written by a team leader and signed on 5 October 2023. To summarise it, it says that they are happy with the Claimant's progress but he needs to improve in coming months in ADM skills, attention to details, it said he needs support and is being sent on an Excel course, there are some positive messages it says he has "great customer services skills" "positive attitude". The Claimant in that meeting reported some inappropriate comments made to him. The manager recorded a problem from the client about how quickly he had done things, so in summary it seemed like a mixture of different positive and more less positive messages. In the meeting note on 5 October the month 3 meeting was set down for 7 November 2023. It seems at this stage there was an intention to have a third probationary meeting.

20. There is an email which is sent to the Claimant on 10 October 2023 which he responds to saying with some concern that he had been written to about potential termination.

21. On 11 October we have the alleged protected disclosure which I have already described, that is the Claimant's email sent at 19:29 and then the Claimant attended a probation review meeting on 12 October 2023 at which he was dismissed, that dismissal taking effect on 18 October 2023.

22. It is impossible for me and it would not be appropriate for me to try to work out whether the events had been set in train leading to the dismissal before or after the protected disclosure that is obviously something that would have to be decided at a final hearing and I cannot do that at this hearing. Based on the documents I have seen that it is arguable either way. I think the documents are perhaps incomplete and there is some interpretation that needs to be placed on them which I cannot do at this stage.

23. What the documents do not suggest is that the Claimant's claim is hopeless, which might be a reason to exercise discretion not to grant the amendment.

Law

Principles to be applied in dealing with application to amend

24. I have considered this application to amend applying the tests set out in ***Selkent Bus Company Ltd (trading as Stagecoach Selkent) v Moore*** [1996] IRLR 661 and the guidance in ***Galilee v Commissioner of Police of the Metropolis*** [2018] ICR 634

as well as the **Presidential Guidance on General Case Management** (2018) Guidance Note 1: Amendment of the Claim and Response.

25. When considering an application to amend, a tribunal must take into all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. The relevant circumstances include:

    25.1. The nature of amendment;

    25.2. The applicability of time limits;

    25.3. The timing and manner of the application.

26. In ***Vaughan v Modality Partnership*** [2021] IRLR 97 HHJ Tayler considered the balance of hardship and suggested that a relevant question is "what will be the real practical consequences of allowing or refusing the amendment": [paragraph 21].

Application to amend

Nature of amendment

27. This is a new head of claim so it is not a minor alteration, it obviously relies upon the dismissal which is already factually pleaded but it is a new head of claim.

Time limits

28. As to time limits I am going to follow the decision of the Employment Appeal Tribunal in the case of **Galilee** and say that time limits on this point should be considered at a final hearing.

Timing & manner of application

29. As to the timing and manner of the application I can see that the Claimant has ticked the box at 10.1. Experience shows that that ticking this box often tends to indicate someone thinks there is a protected disclosure and so I do think that counts in the Claimant's favour, he believed that he had raised protected disclosure and the Respondent ought to have understood that this was a possibility especially in the context of the communication that the Claimant had made in the period shortly before his dismissal.

30. I have had regard to the slightly confusing way in which the Claimant has described the consequences of this protected disclosure. I make some allowance for the fact that English is not his first language. I am satisfied that what Mr Chenulov is saying is that dismissal was the consequence of the protected disclosure.

31. Eventually after some backwards and forwards in this hearing, it was clarified that that is what the claim is i.e. a **section 103A** claim. I also bear in mind that the language of detriment is perhaps somewhat confusing to a non-lawyer.

32. I do take on board Counsel's point that ordinarily applications to amend should be put in writing. The disclosure itself has been provided in full, so that is dealt with,

and clear to the Respondent. In terms of the consequences since it is a dismissal, that is the crucial detail that only became absolutely clear during this hearing. It seems to me that that further particulars of that aspect are not required. It is the dismissal that is said to flow from the alleged protected disclosures. It must follow that the Claimant is saying that the sole or principal reason for his dismissal was the protected disclosure (per section 103A).

33. I bear in mind the overriding objective to try to avoid unnecessary formality and delay. I cannot see it is in the interests of justice to have a further hearing so that the Respondent can respond to the fact that it is an alleged automatic unfair dismissal rather than a detriment type claim. For these reasons, unusually therefore I am prepared to overlook the fact that that has not been set down in writing although I did appreciate that Counsel has had to respond to it to some extent as the hearing has gone along.

Balance of hardship

34. Looking finally at the balance of hardship and what is the practical effect on the parties, the Respondent said there is forensic prejudice caused by the delay.

35. I note that the document on the 11 October 2023 does refer to a protected disclosure so the Respondent's management were aware at the time that the Claimant was referring to an alleged protected disclosure. The Respondent within this litigation has become aware and if they had not noticed the box on the ET1 had been ticked they were certainly aware from 25 June 2024 that there was a potential protected disclosure claim. I do appreciate that absolute clarity on the nature of this claim has only come in this hearing.

36. I have borne in mind that the dismissal was a documented process. The probation review process is documented. The protected disclosure is documented. It is not going to be in my view substantially reliant on Respondent's witnesses' memories. This is not a "he said she said" sort of factual dispute but rather it is about reasons for dismissal, which are set out in a documented process. The dismissing manager will have to answer whether the alleged protected disclosure was a factor in their decision. That is the only part that is unlikely to be documented, but I would expect them to recall whether or not this was something in their mind.

Conclusion on amendment

37. I have decided that consideration of the balance of hardship tips me granting the application. I am going to allow the application, subject to two caveats.

Caveats

38. The two caveats are these.

39. First because the claim appears to be out of time I am going to say that time point should be dealt with at the final hearing so that the Tribunal at that hearing will decide whether it was not reasonably practicable to present the claim.

40. The second point is the Respondent may at this hearing make any submissions on strike out or deposit order in relation to this amended as part of their general application.

Respondent's application for strike out and/or deposit order

41. I have considered making a strike out and deposit orders further to an order made by Employment Judge B Smith on 25 June 2024 on the Tribunals own initiative.

42. I have had the benefit of a 142 page bundle of documents together with several additional documents which have been sent by the Claimant by email which I have also had reference to.

43. I have had the benefit of submissions from both sides. The Respondent produced a submission of some 22 paragraphs. The Claimant provided an email response to that which I have considered. Both sides have made submissions orally in this hearing.

Respondent's application

44. In summary, the Respondent argues that there are no reasonable prospects/little reasonable prospects given:

    44.1. taken at its highest the Claimant's evidence does not demonstrate that at the material time he was suffering from a mental impairment, and accordingly the claim of failure to make reasonable adjustments would fail;

    44.2. the harassment claim does not meet the definition of harassment set out at section 26 (1) of the Equality Act 2010, nor is there less favourable treatment so as to establish a section 26 (3) claim.

History of claim

45. The claim was presented on 28 December 2023.

46. On 9 April 2024 Employment Judge Elliott considered the claims and in her order she described the claim of sexual harassment as falling under s.26(3) of the Equality Act i.e. that is a type of complaint arising from rejection of unwanted sexual conduct which leads to less favourable treatment. I have found that a bit difficult to understand based on the narrative in that case management order as I cannot easily identify the less favourable treatment but it should be said that that was a short order and did not attempt to clarify all the elements of the claim.

47. At the next case management hearing in June Employment Judge Smith formulated a list of issues which seemed to include unwanted conduct which looks either like a s.26(1) or a s.26(2) claim but again there is nothing in the wording that suggests that there is an element of "retribution" (my word) which would mean that this is a s.26(3) so I will come back to those points.

Further particulars

48. Employment Judge Smith asked the Claimant to provide further particulars of his claim which he did in a document which appears at pages 98-99 of the bundle. That is an email dated 9 July 2024 and there are various details that are provided in that document which I will come back to but in particular details about the reasonable adjustment claim.

Submissions

49. The Respondent's written submissions in this hearing were provided on 13 September and the Claimant's response by 5 October.

Reasonable adjustment claim

50. I have heard quite a lot of submissions on the question of disability and also knowledge of disability.

51. I note that quite a lot of this medical evidence falls outside the material period but it still helps me to form a picture of whether the Claimant would be likely to be found disabled at the material time of his employment which between 10 August 2023 and 18 October 2023.

Evidence on disability

52. I have received during the course of this hearing a letter from Dr Felicity Saunders dated 14 June, she is a clinical psychologist based at the Mortimer and Market Centre, Capper Street, London W1. She carried out a psychologist assessment in March 2021 that suggested a score of 19/27 on the PHQ measure of depression and was characterised by her as moderately severe level of low mood and depression, the Claimant scored 10/21 on the GAD measure of anxiety that was described as a moderate level of anxiety. It said he was low and anxious since 2015 and his anxiety became more severe in 2018 due to difficult working conditions, it was said he left a company in 2018 and was stressed by current litigation ongoing in June 2021.

53. Moving closer to the material period on 5 July 2023 the GP fit note noted anxiety and depression and the Claimant was signed off for one month. During the Claimant's employment so during the material period there is a letter dated 14 September 2023 which appears at 129 which suggests that the Claimant had resumed talking therapy. His impact statement says that he has anxiety and depression that says of HR that they did not care about that at all, this is something he had notified them on 16 October 2023. I also have been referred to a letter from the GP Dr Lucy Boggish dated 24 October which refers to a diagnosis of depression and anxiety and referred to recent work events which had caused him a significant increase in symptoms. There was a letter of 15 April 2024 which refers a diagnosis of depression and anxiety to August 2020.

54. I note the Respondent's point that is made that some of these dates are not consistent, I also bear in mind of course that the last two letters are letters which the Claimant has asked his doctor to write, so although they are professionals they are not independent experts they are his treating doctors.

55. That is a summary of the evidence on disability. I have borne in mind that the threshold test for disabilities based on a mental impairment is not particular high. It is no longer the case as it used to be of having to be a particular mental-health or psychiatric condition that has been diagnosed. What there needs to be is a mental impairment which has more than trivial affect on day to day activities which has a long term effect. Ultimately I am considering not making a decision but looking at likelihood, I do bear in mind what the Claimant has said about the Tribunal needing to look at the likelihood of recurrence and looking at this on the balance of probabilities my impression is that the Claimant would be likely to be found to be disabled although that is just my impression based on the evidence.

Knowledge

56. It seems to me that knowledge of disability creates a far more significant hurdle for the Claimant.

57. The employer in this case says that they only knew about the Claimant's disability two days before the dismissal took effect and they had already made the decision to dismiss him. The Claimant's own case is that the employer knew about his disability "before the last working day". I note he does not allege in the claim form that they knew at point of taking the decision about dismissal.

Conclusion on reasonable adjustments claim

58. I have concluded that there is no reasonable prospect of this claim succeeding for the following reasons.

59. First, as discussed above, even on the Claimant's own case the decision to dismiss him have been taken before he told them about the disability.

60. The Claimant has been given the opportunity to specify what the substantial disadvantage is, he has done that at page 99 that is the tail end of an email dated 9 July, what he says about it is this:

> why the Respondents practices as identified below put him at a substantial disadvantage because of his disability and then the Claimants answer is because they have decided already that I have to be out of the company. Also as Mr Dearden was prejudice to me as a was recommendation made by Mr Benichou please see first paragraph of this email where I elaborate. The Respondent did not care about me when I disclosed my disabilities and protected characteristics.

61. I bear in mind that the Claimant has put in a claim form, two sets of further particulars, there have been two previous preliminary hearings and this document is an attempt to explain it. I have formed the conclusion and based on the facts that I have understood that there simply is not a substantial disadvantage or it is unlikely to be found to be a substantial disadvantage based on the PCPs that were identified by Employment Judge Smith back in June.

62. The Claimant has also had the opportunity to set out what adjustments were required that is also in a letter on page 99 it says here, what steps he said should have been

taken by the Respondent to avoid the disadvantage i.e. the reasonable adjustment and the Claimant says this:

> to better understand my limitations and better understand my impairments and work together in a friendly way how they could help me as an employer.

63. That is a commendable sentiment but it seems to me is not a cogent measure that the Respondent could have taken in this case to alleviate a substantial disadvantage.

64. This leads me to the conclusion that even if the Claimant has proved all of the facts he alleges about his disability I do not see that a claim of reasonable adjustments as has been described would succeed, there is no reasonable prospect of success and so that claim is struck out.

Harassment claims

65. Turning to the claims of harassment relating to sex or sexual orientation.

66. I made a deposit order in relation to two specific allegations which has already been sent to the parties with brief written reasons, which is the format for that order. I gave a longer oral judgment which has come back from typing and it seems to me that I ought to give the parties benefit of that those oral reasons in written form, not least because it in part provides an explanation why I did not strike these allegations out (i.e. providing an explanation to the Respondent why that part of their application did not succeed) and furthermore more detailed reasoning for the quantum of the deposit order. Nothing in this written reason should be seen to undermine or replace what has already been sent out to the parties in a document dated 13 October 2024, but there is some additional reasoning here which complements that reasoning.

67. I have already described the history of how this claim has come into being.

68. For the benefit of the Claimant that I ought to assume that this is a claim of either sub section 1, 2, 3 under s.26 of the Equality Act 2010. I am not going to say it has to be any one particular type of harassment.

69. What the Respondent says about this claim the principal submission is that this relies upon the treatment by the Claimant of a third party and they say that the Respondent should not be liable for the actions of that third party. The third party is Mr DBA (I have used his initials at this stage, since no findings of fact are being made by me, and it seems to me unfair to put into public domain an allegation of this sort unanswered at this stage. I anticipate that if a tribunal his evidence on it they would publish that name in full). Mr DBA who was an employee of another company Cushman and Wakefield Facilities Management Trading. That is an allegation which appears at paragraph 6.1.1 on page 88.

70. I have had to consider whether it is possible that the Respondent could be liable.

71. The allegation is exposing the Claimant to an environment in which Mr DBA, an employee of another company did four numbered allegations. First on the Claimant's first day of work and then on 6-7 September which are all allegations of essentially

inappropriate conduct that would be likely to be found to be inappropriate if established that they happened. I do not need to say anything more about that.

Allegation 6.1.1

72. Is it possible that the Respondent could be liable for that? I have considered that it is possible that by inaction which is related to a protected characteristic and is unwanted an employer could harass an employee. I do have significant doubts about whether that could succeed however not least because these problems appear to have occurred fairly early on.

73. In my assessment there is little reasonable prospect of the Claimant demonstrating that the Respondent was aware of this and that there is a culture and that they were in effect tolerating it. In effect what he is doing is seeking to make this employer liable for the actions of a third party. I think there is a possibility of this succeeding I cannot say that it has no reasonable prospect so I am not going to strike it out but I am going to make a deposit order in relation to that part of the claim 6.1.1.

Allegation 6.1.2

74. I am going to deal separately with 6.1.2 this is also on page 88 and the allegation is this: on 6 October 2023 another security guard and it says (the Claimant is unaware if he is an employee of the Respondent or not) said to the Claimant in respect of an open air gym commented on who had a boyfriend, who did not and was expecting the Claimant and his colleague Maria and said do you like the muscles of that man or words to that effect.

75. There is a real difficulty here it seems to me for the Claimant if a Tribunal cannot specify who it is who said this and which employer they worked for they are going to have a practical difficulty in making a finding that could lead to legal liability.

76. The Claimant has helpfully clarified that it is the conduct of his colleague Maria who was an employee of the Respondent which is complained of. It has been further clarified that this was three way conversation which certainly on the Claimant's case involved at least one employee of the Respondent I have looked at the allegation it seems to me it may be open to a Tribunal to form a view that this was no more than chit chat it is going to be dependent on the context the Claimant may wish to argue that the context suggests that that was unwanted conduct. For the reason set out in the document 13 October 2024 (referring to the guidance in the case of **Richmond Pharmacology v Dhaliwal**), it seems to me that there is little reasonable prospect of success and I am going to make an order for a deposit order, I am not going to strike it out because it seems to me that there may be more to the context and I have understood that the Claimant may wish to pursue that allegation.

Quantum of deposit order

77. I have had a brief enquiry with the Claimant asking about his circumstances. He says he does not have any savings; he is not at work at the moment, he is surviving by the support of family and friends. I have asked him a couple of times if that is a regular amount and it is unclear to me whether it is what the Claimant says is he is spending £200/£300 a month on food.

78. In response to Counsel's suggestion that he could pay £100 for each of the two allegations in which I have made a deposit order, the Claimant says he thinks that his family would manage to help pay that if need be. Accordingly I am going to make an order for £100 for each of the two allegations. It seems to me that that strikes a balance between making sure it is a figure that the Claimant can afford on the one hand and not being set at such a low level that it is a completely trivial sum. I hope that figure will give the Claimant pause for thought about whether he should pursue those particular allegations.

Employment Judge Adkin

2 December 2024

Sent to the parties on:

12 October 2024
…….
For the Tribunal Office:

……..……..