EMPLOYMENT TRIBUNALS

Claimant: Mr A Finn

Respondent: Sciemus Ltd

PRELIMINARY HEARING

Heard at: Central London Employment Tribunal

On: 16 February 2016

Before: EJ Wade (sitting alone)

Representation
Claimant: Mr G Anderson (Counsel)

Respondent: Mr M Lee (Counsel)

RESERVED JUDGMENT

1. The claim of automatic unfair dismissal under the Employment Rights Act section 103A is struck out.

REASONS

1. The respondent applies for the claim of automatic unfair dismissal under the Employment Rights Act section 103A to be struck out on the basis that it has no reasonable prospect of success, or a deposit ordered because there is little reasonable prospect of success. The basis of the application is that the claimant did not make a protected disclosure and that his argument that the alleged disclosure caused his dismissal is hopeless.

Background facts

2. I did not hear any evidence although I read a witness statement from the claimant who argues that he made a protected disclosure about a breach of a legal obligation. The basic facts set out below are very limited and I accept that if I need to know more of the context before reaching a decision on the prospects of success it is not appropriate to strike the claim out. I also recognise that strike out is a draconian step which I should take only in unusual circumstances and after careful consideration.

2.1 The claimant was first employed in 2003 and he was the founding CEO of the company. He continued as CEO until his dismissal on 27 January 2016.

2.2 In late 2015/early January 2016 Messrs Duckworth and Attard-Manche were appointed to the Board although the claimant says that he does not believe that they were validly appointed. They made a loan to the company of £1,350,000. This was a turbulent time and relationships were difficult.

2.3 On 25 January 2016 the Operations Director circulated to board members, excluding the claimant, a draft request for him to attend a meeting of the Board at 10am on 27 January "to discuss your future with the company as a consequence of your AMEX expenses payments". Also included was a draft letter of dismissal, already dated 27 January, to be signed by Mr Duckworth; the reason given was that his expenses were excessive and falsified.

2.4 On 27 January at 7am the invitation was duly issued to the claimant.

2.5 At 7.22am White and Case, Solicitors, emailed a letter dated 26 January to Messrs Duckworth and Attard-Manche which is said to contain the protected disclosure; more of that below. I do not know when the letter was planned or who, if anyone, instructed them to write it apart from the claimant. The claimant says that the COO had access to his emails and so could have known that the letter was being planned.

2.6 The Board met at 10am and duly resolved to dismiss the claimant that day. He says that the draft letter of dismissal circulated on 25 January is not consistent with the board resolution of 27 January which means that the decision was possibly not made until after the alleged protected disclosure. I disagree; they are internally consistent and all part of a package of documents setting up the dismissal. Of course this has quite some relevance to the general fairness of the dismissal.

The alleged disclosure

3. The letter was 1.5 sides and the following features are relevant:

3.1 It was written by White and Case on behalf of "Our Client: Sciemus Ltd".

3.2 It was headed "Without prejudice".

3.3 The addressees, Messrs Duckworth and Attard-Manche, were referred to as "the Lenders".

3.4 The subject of the letter is "Proposed loan by inter alia the addressees of this letter (the "Lenders") in the sum of £1,350,000 to Sciemus ("the Proposed Loan")".

3.5 The letter says:

> "***Proposed loan***
> *We understand that loan monies have been advanced to Sciemus notwithstanding that formal documentation has not been agreed between the*

Lenders and Sciemus. Our client has now forwarded a draft convertible loan stock instrument which should reflect the terms of the Proposed Loan ("Draft Agreement") which we will provide our comments on as soon as possible. In relation to the Draft Agreement we understand that this has been progressed without the involvement of the CEO or Simon Maskell - the current serving Non Executive Board Member. Clearly any such purported agreement of terms, if any, is therefore invalid as unauthorised by the CEO or aforementioned Non Executive.

[The letter then sets out the alternative "commercially agreed position on the Proposed Loan" and continues…]….*As mentioned above, we will provide detailed comments in due course, however, we note certain proposed terms in the Draft Agreement are inconsistent with the above terms. Until such time as the formal documentation is agreed in respect of the Proposed Loan we consider the commercially agreed position to be the basis upon which the Proposed Loan has been advanced and will be governed.*

Director appointment rights – roles

Specifically, in relation to board appointment rights, we note the following key issues:

(a) Any appointees of the Lenders should be in a non-executive capacity…..

(b) Your proposal that the lenders control the board would put Sciemus in breach of its arrangements with its key stakeholder Quinetiq so would not be acceptable to Sciemus as it would eradicate a large proportion of shareholder value. It is in any event, disproportionate given the aggregate sum to be lent and the value of Sciemus.

We look forward to discussions in due course. We understand EC3 legal have been retained by the Lenders, we do not have contact details but upon receipt we will of course correspond directly with them."

4. The protected disclosure is said to be paragraph (b) highlighted above. It is said to contain information about a likely breach of a legal obligation. The agreed meaning of the paragraph is that if the Draft Agreement is ratified the loan could be converted into shares which would dilute the current shareholding. If not approved by Qinetiq this would be in breach of the shareholders' agreement with Qinetiq as it is a term of clause 7 and schedule 2 that any increase in share capital has to be approved.

Conclusions

Information about a likely breach, ERA section 43B(1)(b)

The respondent says that "the letter is no more than a comment by lawyers on a commercial proposal". It says that it does not convey *"information which tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject"* as required by section 43B. The claimant warns against taking a restrictive view of "information" and I appreciate that this has been the approach of cases post *Cavendish.*

However, I do think that the claimant has no reasonable prospects of establishing that the letter provided information about a likely breach. There had not yet been a failure to comply with the Qinetiq shareholders' agreement nor was the

respondent yet failing, so to succeed the claimant has to show that the letter disclosed a *likely* breach. The letter is challenging to the Lenders and so is less neutral than "a comment on a commercial proposal" but the respondent rightly points out that those instructing White and Case chose, or at least approved, both the restrained and unthreatening tone that it adopts and the fact that it was written "Without prejudice". It falls short of alerting the company to the likelihood of unlawful behaviour, not least because the letter is written on behalf of the company, the very body which would be breaching the legal obligation, to external Lenders; the company is not writing to itself. It talks of a possible but not a likely event, an event which would only happen if at some future date the company ratified the Draft Agreement, unmodified, once it has chosen between that and the "commercially agreed position".

In this context "likely" means possible but not more likely than not which does not satisfy the legal test. I am supported in this view by Her Honour Judge Eady who in *Western Union v Anastasiou* (UKEAT/1035) quoted with approval HHJ McMullen's reference to the headnote to *Kraus v Penna* which says:

> *"In this respect "likely" requires more than a possibility or risk that the employer (or other person) might fail to comply with a relevant obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable, or more probable than not that the employer (or other person) will fail to comply with the relevant legal obligation. If the claimant's belief is limited to the possibility or risk of a breach of relevant legislation, this would not meet the statutory test of likely to fail to comply".*

Public interest

Unless and until *Chestertons* is overturned I cannot say that if there was a disclosure it was not in the public interest. The interest of the other shareholders would be affected by dilutions in the shareholding.

Was the disclosure compliance with section 43C?

Under section 43C the disclosure must be "to the employer or other responsible person". The claimant does not argue that some other section is relevant.

It must also be made by the worker. A disclosure may be made by a worker's lawyer, however it is very difficult to see how this claimant can argue that the letter was written on his behalf because is written on behalf of the company, albeit or partly on his instructions as the CEO.

It is also very hard to see how he can say that it was written to his employer because it was being written *by* his employer as a warning that the activity of the Lenders was invalid (this warning is not alleged to be a protected disclosure). The Lenders are separately represented by EC3 legal. The Lenders were Board members as well but they were being written to at arm's length in a different capacity and the claimant did not recognise them as board members in any event.

The claimant says that the Lenders, if separate from the company, come within section 43C(1)(b) which says that a disclosure may also be made:

> *"Where the worker reasonably believes that the relevant failure relates solely or mainly to –*

(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility,
to that person.

The problem here, however, that is the relevant failure/ breach of legal obligation would be by the company if it ratified the Draft Agreement and not by the Lenders and so the failure relates to the employer and not to another person. As the claimant says in his witness statement, he did not at that time believe that the Lenders were validly directors of the company empowers to make decisions on the Draft Agreement and so their activity was a "condition precedent" to the failure but not the failure itself.

I conclude that the claimant has no reasonable prospect of showing that the disclosure was made to a person identified as an appropriate person in the section 43C or otherwise.

The causal connection between the dismissal and the disclosure

Finally, the question of whether the claimant has any reasonable prospect of showing that the decision to dismiss was caused by the disclosure. In this regard, I agree with the respondent that the words of section 27 of the Equality Act should not be read across to entitle the claimant to argue that the dismissal would be unfair if the respondent thought that he was likely to make a protected disclosure even if he had not yet made it. This is not least because the definition of a protected disclosure, as amply demonstrated above, is far more complex than the definition of a protected act for the purposes of a victimisation claim and so it is hard correctly to anticipate all of the elements of a disclosure.

Therefore, the question would be whether the letter of 26 January, sent to the Lenders on 27 January at 7.22am was the principal cause of the dismissal. In my view the claimant has no reasonable prospect of establishing that the rather anodyne phrase on page 2 of the letter triggered the dismissal which had been planned from at least 25 January. Clearly the correspondence I have seen was part of a wider war being waged between the claimant and his erstwhile colleagues, and whilst there is of course a very small chance that on 27 January the board was not going to ratify the process which was already underway, there is no reasonable prospect of this. The claimant was doomed from 25 January and the question was when rather than whether he would be dismissed.

In conclusion, I have stood back and looked at the letter of 26 January from White and Case as a whole. The positioning of the alleged protected disclosure in a closing section, the fact it raises a possible problem but not a likely one and that it is a letter from the company to its lenders give so little prominence to the alleged disclosure that there is no reasonable prospect of the respondent perceiving it to be one. This is another reason why the prospect of success are so very low.

Oppression

Both sides argue that the other has behaved oppressively. The claimant says that he has been threatened with costs all the way along and now he is facing this strike out application. The respondent says that the whistle blowing claim is opportunistic given that the claimant did not appeal his dismissal and certainly did

not argue at the time that he had been dismissed because he blew the whistle. Oppression is not a factor to be taken into account the claimant's favour when deciding whether to strike the claim out.

Futility

The claimant also says that since he has a perfectly valid ordinary unfair dismissal claim a strike out would be futile because there will be a hearing anyway. I am afraid that this is a rather disingenuous argument because of course the statutory cap is what makes some parties argue that they are whistleblowers and when removed resolution is far more possible (and affordable). I strongly support and urge the parties to try to resolve matters in this case, or at the very least narrow the issues.

DIRECTIONS

1. Disclosure is to take place within seven days of the date that this Judgment is promulgated.

Employment Judge Wade
20 February 2017