EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr Thomas Fertsch	**v**	**Schutz (UK) Limited**

RECORD OF OPEN ATTENDED PRELIMINARY HEARING

Heard at: **Nottingham** **On: 1 March 2017**

Before: **Employment Judge Britton (sitting alone)**

Appearances
For the Claimant: **In person**
For the Respondent: **Ms Michelle Fletcher (Human Resources)**

JUDGMENT

1. The tribunal has jurisdiction to hear the claim of unfair dismissal, it being based upon whistle blowing and thus two years qualifying service not being needed.

2. For the avoidance of doubt, there is also a claim of detrimental treatment by reason of whistle blowing short of dismissal.

3. Directions including the listing of the main Hearing are hereinafter set out.

REASONS

Introduction

1. The claim (ET1) was presented by Mr Thomas Fertsch, who is Polish, to the Tribunal on 13 December 2016. He pleaded that he had been employed by the Respondent as a production operative from 20 June 2014 to 6 September 2016. He ticked the box for unfair dismissal. The claim is in time and ACAS early conciliation compliant. His claim read as far as this judge is concerned as being one relating to having been dismissed, having raised issues that prima facie could constitute whistle blowing.

2. Turning to the Response (ET3) it was pleaded that he did not have 2 years' qualifying service. As it turns out before me that is not in dispute. The reason why it was so pleaded, is that the claimant had actually been previously working at the respondent via an Agency, Essentials, from 17 March 2014 up to 29 August 2016. Thus at the dismissal he had only been an employee of the Respondent, for about 2 weeks thus he had not got two years' qualifying service to bring a claim of unfair dismissal and so the claim should be struck out. It was also pleaded that in any event his claim had no merit as he had raised issues because he didn't like the thought that he might have to change shifts but which contractually, he could be required to do. Thus this was not whistle blowing. This was to be hardened up in the subsequent submissions that the tribunal received.

3. In those circumstances another judge asked the claimant to agree that he didn't have the necessary 2 years qualifying service. The claimant replied accepting that he had been employed previously by Essentials, but from the content of his reply it was absolutely clear that he was raising that he didn't need qualifying service because his claim was based upon whistle blowing.

4. As I say, the respondent at this stage also additionally provided information setting out inter alia that it considered that this claim was vexatious and had no reasonable prospect of success and refuting that there was element in terms of the dismissal which related to whistle blowing.

5. The Notice of Hearing for today that went out made it plain that today would be to adjudicate upon whether the claimant had qualifying service, but implicit from the preceding correspondence to which I have now referred would be as to whether or not the Claimant needed any qualifying service depending upon what was the reason for the dismissal. This is because if the scenario prima facie engaged whistle blowing, then he would not need qualifying service to bring his claim. I appreciate that that was not perhaps understood to be on the agenda by the respondent, but I have given it full opportunity to address the issue and which I have explored with not only the claimant, but the 2 senior employers for the respondent present today, Mr White and Mr Wood. I want to make it plain that when dealing with this type of issue as to jurisdiction and whether a case has prima facie merit at a preliminary hearing sworn evidence is not usually taken and the matter is adjudicated upon from the papers before the judge and the making of submissions. This is the course that I have adopted.

6. Thus as is clear from that which I have already rehearsed, the claim is clearly predicated upon dismissal following whistle blowing. Therefore, pursuant to section 103A of the Employment Rights Act 1996 (the ERA) the claimant does not need the usual 2 years' qualifying service in order to bring his claim. So that dispenses of that issue because he was of course dismissed.

7. Therefore the issue becomes was a reason, and it doesn't have to be the only one, for the claimant's dismissal because he had raised what constitutes public interest disclosures. The respondent submits that I should strike out the claim because there is no merit in the whistle blowing contention. But is there a prima facie case? Conversely is the claim one which has no reasonable prospect of success? In making my adjudication I remind the parties that a claim based upon whistle blowing is to be viewed as per one of discrimination. It should only be struck out in exceptional cases[1]. In other words where for example it is clear that whistle blowing as a matter

[1] Ezsias v North Glamorgan NHS Trust [2007] ICR 1126 CA.

of law from the undisputed documentation simply was not engaged: thus the claim is based on a misunderstanding of what constitutes whistle blowing and it is obvious that the pleaded scenario and the source documentation simply doesn't engage the concept. But if it is prima facie engaged, then as to whether it was a reason for the dismissal will require findings of fact which is the province of the tribunal at the Hearing.

8. The following is the scenario as I find it to be. I make clear that my findings do not bind the tribunal at the full Hearing.

8.1 The respondent makes specialist containers i.e. for the shipping industry, at its factory in Worksop. It has approximately 123 of its own workforce on site. On top of that, subject to production demands, agency workers average between 12 and 18 per shift. Its main supply of agency labour at the material time was Essential. Not in dispute, is that the Claimant, who is Polish, had been a first rate worker whilst engaged for some 2 ½ years via Essentials. That of course is why, the respondent decided to directly employ him from 29 August 2016, albeit subject to a 6 months probationary period. Such jobs are highly sought after as was made plain before me today.

8.2 What the claimant tells me by way of further explanation of the claim , is that as an agency worker, he and in particularly the eastern Europeans were singled out for detrimental treatment by one or 2 of the team leaders employed by the respondent. This would involve what on the face of it would be bullying and harassment; so perfunctory ordering around; interfering with their privacy on lunch breaks; clicking of fingers and matters of that nature. It was coupled says the claimant, with at least once him being told to "go back home". Furthermore the deeply offensive suggestion, that he "should go home and have anal sex with his partner". He kept what was happening to himself. The respondent quite understandably says to me, why? In all that time whilst working for Essentials, which has its own Dignity at Work Policies, why didn't he complain? In essence, what the claimant says to me is "Well, that's because I was an agency worker and, I feared that if I did, my chances of getting a job with Schutz would not be fulfilled, so I kept my powder dry."

8.3 Not really in dispute is that on 30 August, which would be his actual first day of working post the bank holiday, when he started his shift Mr M Wood, who is the plant manager, knowing that the claimant had come to reception to hand in his signed contract thought he'd just have him in his office to congratulate him. This he did and shook his hand. Suffice it to say the picture I get is that the claimant said he'd something he would like to tell Mr Wood and then spilt the beans, so to speak, on what I have just described. Mr Wood was understandably taken aback and said that he would need more information if he was going to formally investigate the matter.

8.4 There is then a conflict. The Claimant says that Mr Wood wanted names. He was reluctant to provide them because he was still a "new boy" so to speak as an employee of the respondent, on a probation period, and thus he did not want any repercussions. In raising what had happened with Mr Wood he had not intended do so formally albeit he "wanted the employer to know these concerns and because it shouldn't happen to the workforce and they shouldn't be treated in this way i.e. agency workers." Mr Wood tells me that he did not ask for names, but that he did say that he would need more information if the matter was to proceed, but the claimant was reluctant to give it and said

something about he might need to get legal advice. However, to cut a long story short in that conversation it does not now appear to be in dispute that there was not any specific statement made by the claimant about not wanting to change shifts from where he usually worked whilst employed via Essentials. . Mr Wood got the feeling that that might be what was behind it, but he didn't ask.

8.5 That brings me to Michael White who is the Production Manager. In the run up to the claimant starting his employment with the respondent, Mr White had explained to the claimant that now he was going to be on the Schutz payroll he would have to expect that from time to time he might have to go on other shifts or to other parts of the factory floor. What the claimant refers to as "other side". Mr White says that the claimant said he didn't have a problem with that and which the claimant confirmed to be the case today.

8.6 In the next few days post the disclosure by the Claimant on the 30th August, Mr Wood first of all asked discreetly, one or 2 of the shift managers, I stress not team leaders, as to whether they had seen anything going on so to speak and including such as the anal sex remark and they said no. He then decided to wait until the HR Manager, Michelle Fletcher**,** returned from her holiday and talk it through further with her, she returned to work on 6 September.

8.7 But in the interim post 30th August the Claimant says that from the following day up to his last day worked, Friday 2 September, he was now cold shouldered and subjected to upsetting remarks which could only be as a consequence of what he had disclosed to Mr Wood having leaked back to the team leaders and the factory floor. If proven to be correct, this would constitute detrimental treatment pursuant to section 47B. As a consequence of this treatment on the Monday 5 September, the claimant's partner had come into the factory and explained that he had been taken unwell. She referred to him having "deep depression". In due course, the claimant was to obtain a "fit note" from his GP who he saw on the 6th. The fit note describes the claimant as having "low mood". It seems that the respondent didn't have the fit note when it dismissed him.

8.8 On the 6th Mr Wood and Mrs Fletcher decided to dismiss the Claimant. As to why is clearly set out in the dismissal letter before me (bundle page (Bp) 78-79). It refers to 2 reasons for the dismissal; first in summary is the raising of the allegations on the 30th August but then not being prepared to back them up. It is implicit from that letter that in the context of a failure to previously complain Mr Wood was sceptical as to the genuiness of the complaint. The second reason refers to not making full disclosure to the nurse for the purposes of the health assessment which the claimant underwent in the run up to being offered the permanent post. This appears to be based on the premise that the claimant had an underlying depressive medical condition. But when the claimant was dismissed the respondent did not have any fit note. All it knew is that the claimant's partner had said that he was in "deep depression". It did not it seems, interview that partner. It didn't have the health documentation that the claimant sent in to the tribunal about himself circa 25 January and which was copied to the respondent. This does not show any mental history before presenting to the GP with "low mood" in the 6th. And of course the phrase in "deep depression" in itself can mean all manner of things. It can mean that somebody is just knocked back by something that has happened to them, it doesn't mean they are actually clinically depressed.

> 8.9 As to the dismissal he was not afforded an appeal. That is of course because the Respondent didn't think it needed to because of his lack of qualifying service.

Conclusions for the purposes of today

9. Prima facie, that which the claimant raised to Mr Wood on the 30th August would come within the definition of whistle blowing at section 43B of the ERA in that first he has disclosed information. He did not just make an allegation. He clearly from what he is telling me today reasonably believed in what he was saying. What he said, clearly would tend to show that at the very least 43B (1) (b) was engaged; that is to say that the respondent was "failing or like to be failing to comply with a legal obligation to which it e was subject" i.e. the prevention of racial or nationality based discrimination or sex discrimination at work pursuant to the Equality Act 2010.

10. Therefore, on the face of it and no more than that a reason for this dismissal prima facie appears to be that he was dismissed because he had made that disclosure to his employer. I only say that because to what extent is he then obliged to go through the naming of names without such as a guarantee of confidentiality? Thus prima facie section 103A of the ERA applies.

> "An employee who is dismissed shall be regarded for this part as unfairly dismissed, if the reason or if more than one, the principle reason the dismissal is that the employee made a protected disclosure."

I repeat that qualifying service it is not required as to which see section 108(3) (f).

11. Thus it cannot be said that this claim has no reasonable prospect of success. As for making a Deposit Order, it equally cannot be said that it only has little reasonable prospect of success as this is a case where it is going to be very much dependent on findings of fact by the tribunal at the substantive hearing. I have said before a full tribunal because as is now clear, this claim also encompasses detrimental treatment short of dismissal pursuant to section 47 of the ERA which thus means as per the jurisdiction that it must be heard before a full tribunal.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. The trial bundle is actually already being prepared.

2. The claimant will by **Friday 18 March 2017**, provide a numbered paragraphed full witness statement to the respondent setting out his case. I have explained what I expect to see. There is no need to refer to the "ALMIGHTY" or matters of that nature as he has previously. I want him to provide a statement which simply deals with the narrative of events; what happened leading all the way through to his going off work on 2 September, and seeing his doctor and why he did so. The respondent will then reply with its witness statements by **Friday 15 April 2017**. The claimant then has a **right of reply by 22 April.** This means that if there is anything in the witness statements that the respondent sends him which he didn't know about, then he is entitled to comment about it in writing.

3. I see no need for a chronology, cast list or reading in as the issues are straight forward, the paperwork not extensive and only 4 witnesses in total are envisaged.

4. The hearing will now take place before a full tribunal at on **26-27 April 2017** at the Nottingham Tribunal centre full details of which have already been provided in the first notice of hearing issued on 22 December 2016. The claimant has a good command of English and has not requested the services of an interpreter.

NOTES

(i) The above Order has been fully explained to the parties and all compliance dates stand even if this written record of the Order is not received until after compliance dates have passed.

(ii) Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.

(iii) The Tribunal may also make a further order (an "unless order") providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

(iv) An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative. Any further applications should be made on receipt of this Order or as soon as possible. The attention of the parties is drawn to the Presidential Guidance on 'General Case Management': https://www.judiciary.gov.uk/wp-content/uploads/2014/08/presidential-guidance-general-case-management.pdf

(v) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise). The Tribunal may order a departure from this rule where it considers it in the interests of justice to do so.*" If, when writing to the tribunal, the parties do not comply with this rule, the tribunal may decide not to consider what they have written.

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Employment Judge Britton

Date: 11 April 2017.

Sent to the parties on:

18 April 2017

For the Tribunal:

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