Case Number: 2207012/2018

EMPLOYMENT TRIBUNALS

Claimant **Respondents**

Mr A Moussa v **First Respondent:** First Great Western Limited
Second Respondent: Mr D Haynes
Third Respondent: Mr B White

Heard at: London Central (in public by video) **On**: 3 July 2020

Before: Employment Judge E Burns

Representation

For the Claimant: Mr J Singh (legal representative)

For the Respondent: Mr R Fitzpatrick (counsel)

JUDGMENT

1. The claimant's claim that he was subjected to a detriment on the ground that he made a protected disclosure on 2 March 2012 (as set out in paragraphs 73 – 101 of the particulars of claim attached to claim 2205166/2013) is struck out pursuant to rule 37(1)(b) of the tribunal rules.

2. The claimant's claim that he was subjected to a detriment on the ground that he made a protected disclosure on 16 March 2012 (as set out in paragraphs 102 – 109 of the particulars of claim attached to claim 2205166/2013) is dismissed on withdrawal.

REASONS

Hearing

1. Today's hearing was a preliminary hearing in public to determine whether the claimant's claim that he was subjected to a detriment on the ground that he made a protected disclosure pursuant to section 47B of the Employment Rights Act 1996 should be struck out.

2. Specifically, the respondent applied for the strike out under rules 37(1) (a), (b) and/or (d) of the tribunal rules, or in the alternative the respondent applied for a deposit order under rule 39.

3. Although the claimant's representative said at the start of the hearing that he had not been made aware of the specific grounds of the strike out or the fact that the application included a deposit order until the evening before the hearing, he did not seek additional time to prepare or apply for a postponement. I was satisfied that the arguments the respondent was relying on had been rehearsed during two telephone preliminary hearings held 1 and 8 April 2020 such that the claimant should have been well aware of them. I note that the respondent and the claimant had prepared detailed written submissions for the purposes of the hearing on 8 April 2020.

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way. There were no technical difficulties.

5. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. A member of the public attended the hearing accordingly, but did not make a request for access to any fo the documents.

6. The participants were warned in advance that it was an offence to record the proceedings.

7. There was a hearing bundle provided by the respondent. The claimant provided some additional documents in advance as well as emailing a key missing document to me and the respondent during the hearing. No witness evidence was heard. I refer below to key documents that I have relied on when reaching my judgment.

8. Both of the representatives provided very helpful written submissions and case law authorities.

Findings of Fact

9. The claimant is employed by the first respondent as a Gateline Operative based at Paddington Station. He has previously brought the following employment tribunal claims:

    (a) A claim submitted on 30 July 2013 under number 204462/2013 for detriment for having made a protected disclosure under section 47B of the Employment Rights Act 1996

    (b) A claim submitted on 29 October 2013 under number 2204984/2013 for (i) unfair dismissal, (ii) detriment for having made a protected disclosure under section 47B of the Employment Rights Act 1996 and (iii) race and religious discrimination/harassment. The particulars of claim referred to five separate alleged protected

disclosures that the claimant claimed to have made in 2012 (the "2012 disclosures").

(c) A claim submitted on 29 October 2013 under number 2205166/2013, which was later dismissal on withdrawal.

10. Claims 204462/2013 and 2204984/2013 were withdrawn following a settlement by way of a COT3 agreement.

11. This claim was presented on 12 December 2018. There is reference in the ET1 form in section 8.1 to the claim as constituting:

"*1. Victimisation (section 27 Equality Act 2019 (sic)) for bringing former complaints and legal claims for Race & Religious Discrimination & Harassment & 2. Victimisation for former complaints & legal claims of protected disclosure detriments."* (6)

12. The attached particulars of claim, however, go into more detail and suggest that is intended is a victimisation claim under section 27 of the Equality Act 2010 and a claim for detriments under section 47B of the Employment Rights Act 1996 because the claimant made qualifying disclosures as defined in section 43B of the Employment Rights Act 1996. The protected disclosures relied upon are expressly said to be the 2012 disclosures and a new protected disclosure made on 6 September 2018 (25).

13. The grounds of resistance presented by the respondent confirm expressly that the respondent understood the claimant's claim, in addition to the victimisation claim under section 27 Equality Act 2010, to include a section 47B Employment Rights Act 1996 claim relying on the original 2012 disclosures and a fresh disclosure made in 2018 (36, 39 – 40).

14. The case was case managed on 15 August 2019 by Employment Judge Davidson and she produced a case management order (containing a list of issues. The list of issues records the claim as being a claim of victimisation under section 27 of the Equality Act 2010 only.

15. The respondent says the claimant withdrew the section 47B Employment Rights XCt 1996 claim at the preliminary hearing, but it is impossible to tell from the case management order. It makes no reference to the section 47B Employment Rights CT 1996 claim at all (51-53) and I note that Employment Judge Davidson did not issue a judgment dismissing the claim on withdrawal. The claim cannot have been struck out as the preliminary hearing was conducted in private.

16. The list of issues was sent by email (copied to the claimant's representative) to Employment Judge Davidson by counsel for the respondent after the preliminary hearing (50) that same day. She incorporated the list into her order. The claimant did not raise a concern about the list of issues.

17. There was also further correspondence between the parties and the tribunal by email on that date concerning the dates for which the final hearing had been listed (48 – 49). Again, the claimant raised no concern about the list of issues in these emails.

18. The representatives for the parties exchanged emails in February 2020 about compliance with case management orders in preparation for the final hearing. In an email of 28 February 2020 dealing with a number of matters, the claimant's representative raised that the list of issues in the case management order referred only to a claim of victimisation under section 27 of the Equality Act 2010 whereas the pleaded claim and response clearly referred to "protected disclosure detriments as well." The claimant's representative sought the respondent's agreement to a revised list of issues (56). The respondent's representative replied on 6 March 2020 saying that the respondent did not agree to make any amendments to the list of issues set out in the case management order. (55)

19. The claimant did not reply on this point or write to the tribunal to raise any concerns. He conceded at the hearing that he had not written to the tribunal to raise the issue of the omission from the list of issues and should have done so. The explanation he gave for this was because of his own and a family member's illness, as well as the beginning of concerns about the COVID-19 pandemic.

20. The case was listed for final hearing which was due to commence on 1 April 2020. Because of the COVID-19 pandemic, it did not take place and instead a preliminary hearing conducted for case management purposes by me was held by telephone instead.

21. Prior to the hearing, the claimant's representative submitted a note raising the issue of the incomplete list of issues. The claimant's representative insisted the claim had not been withdrawn, whereas the respondent persisted in saying it had been,

22. I determined that to resolve this disputed issue there would need to be an open preliminary hearing. This was because the respondents were effectively asking the tribunal to strike part of the claimant's claim out.

23. At today's hearing, I have been invited to infer that the claimant's representative expressly withdrew the section 47B Employment Rights Act 1996 claim at the preliminary hearing and that he is deliberately and knowingly seeking to have it reinstated knowing that this is an abuse of procedure. I do not make that finding. There was insufficient evidence before me to reach this conclusion. I find that the most likely explanation for the omission in the list of issues, on the balance of probabilities, is that its preparation was based on a misunderstanding at the preliminary hearing which the claimant failed to try and correct for nearly six months.

24. I also find that the claimant's representative's personal circumstances do not offer sufficient excuse for the delay. The claimant's representative is providing a professional service. If his personal circumstances were having

an impact on his ability to provide that service to the appropriate standard, he should have taken steps to hand the case over to a colleague or to inform the claimant and enable him to seek assistance elsewhere.

25. The claimant's representative has today withdrawn reliance on one of the 2012 disclosures, namely the second one.

THE LAW

Protected Disclosures

26. Section 47B(1) of the Employment Rights Act 1996 says:

> "A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure."

27. According to section 43A " protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

28. Section 43B(1) says " qualifying disclosure " means 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—

    (a) that a criminal offence has been committed, is being committed or is likely to be committed,
    (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
    (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
    (d) that the health or safety of any individual has been, is being or is likely to be endangered,
    (e) that the environment has been, is being or is likely to be damaged, or
    (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

29. The words shown above in square brackets were added later and came into force from 25 June 2013 by virtue of an amendment contained in the Enterprise and Regulatory Reform Act 2013. Section 18(1) of that Act also amended sections 43C, 43E and 43F of the Employment Rights Act 1996. Prior to 25 June 2013, disclosures made in accordance with those sections needed to be made "in good faith" to attract protection. This requirement was removed from 25 June 2013 onwards.

30. The leading case dealing with when the public interest test is met is *Chesterton Chesterton Global Ltd & Anor v Nurmohamed & Anor* [2017] EWCA Civ 979. The Court of Appeal confirmed that where a disclosure relates to a breach of the worker's own contract of employment, or some other matter under section 43B(1) where the interest in question is

personal in character, there may be features of the case that make it reasonable to regard the disclosure as being in the public interest as well as in the personal interest of the worker.

Striking Out Claims

31. The relevant parts of Rule 37 say the following:

> (1) 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 or response 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;
>
> ……
>
> (d) that it has not been actively pursued.

32. Rule 37(1)(e) contains an additional ground, namely "that the tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out)". As can be seen below, this is incorporated into the test that is applied when considering a strike out under rule 37(1)(b).

33. The overriding objective in Rule 2 of the Tribunal Rules is also relevant at all times when considering an application of this nature.

Rule 37(1)(a)

34. The courts have repeatedly warned of the dangers of striking out discrimination and whistleblowing claims on the grounds that they lack prospects of success, particularly where "the central facts are in dispute" e.g. in *Anyanwu v. South Bank Student Union* [2001] ICR 391 at [24] and [37] and *Ezsias v. North Glamorgan NHS Trust* [2007] ICR 1126 at [29].

35. However, while exercise of the power to strike out should be sparing and cautious in discrimination claims, there is no blanket ban on such practice.

36. The question of striking out discrimination claims was recently considered by the Court of Appeal in *Ahir v. British Airways Plc* [2017] EWCA Civ 1392, where Underhill LJ stated at [16]: "*Employment tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context. Whether the*

necessary test is met in a particular case depends on an exercise of judgment."

Rule 37(1)(b)

37. The power to strike out under rule 37(1)(b) expressly includes the manner in which proceedings have been conducted *on behalf of* the claimant or the respondent, making it clear that a representative's conduct can be taken into account.

38. Three conditions must be met to strike out a claim for unreasonable conduct:

- The unreasonable conduct has taken the form of deliberate and persistent disregard of required procedural steps
- A fair trial is rendered impossible
- Striking out is a proportionate response to the unreasonable conduct.

(*Blockbuster Entertainment Ltd v James* [2006] IRLR 630, CA; *De Keyser Ltd v Wilson* [2001] IRLR 324, EAT; *Bolch v Chipman* [2004] IRLR 140, EAT)

Rule 37(1)(d)

39. This rule is triggered where there is a delay in pursuing a claim or part of it. In order to justify strike out, the delay must be excessive and inexcusable. Given that such delay is also likely to constitute unreasonable conduct, it is not surprising that the test that must be applied by a tribunal deciding whether to strike out a claim for delay under rule 37(1)(d), is similar to that under rule 37(1)(b). An order for strike out can only be made where it is also shown that a fair trial would be impossible or that there is or would be serious prejudice to the other party (*Birkett v* James [1978] AC 297, HL).

Lists of Issues

40. A list of list of issues is a case management tool enabling an employment tribunal and the parties to identify the matters that will be considered at a hearing so that they can focus their preparations accordingly. Their use has been considered in a number of cases, in particular *Parekh v London Borough of Brent* [2012] EWCA 1630, *Scicluna v Zippy Stitch Limited & O*rs [2018] EWCA Civ 1320, *Saha v Capita plc* UK EAT 0800/18/DM and *Mervyn v BW Controls Ltd* [2020] EWCA Civ 393, CA

41. In *Saha*, Mrs Justice Slade says at paragraph 37:

"*In my judgment, far from being authority for the proposition that the ET and the parties are bound by the list of issues, Mummery LJ in Parekh*

made it clear that the core duty of an Employment Tribunal is to determine the case in accordance with the law and the evidence."

I consider that the approach advocated by Mrs Justice Slade is correct in principle and means that where required in the interest of justice, a tribunal can and should consider whether an amendment to the list of issues is necessary, even at the point of a final hearing.

Deposit Orders

42. Rule 39 of the Tribunal Rules says:

"(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 £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit."

43. Similar considerations apply to those required as in a strike out application under rule 37(1)(a) where a claims is said to have no prospects of success.

44. If an order is made, it should be for payment of an amount that the paying party is capable of paying with the period set (*Hemdan v Ishmail* [2017] IRLR 228, EAT) taking into account his or her net income and any savings. The employment tribunal must give reasons for setting the deposit at a particular amount (*Adams v Kingdom Services Group Ltd* UKEAT/0235/18).

ANALYSIS AND CONCLUSIONS

Rule 37(1)(b) – Withdrawal

45. The first argument made by the respondent was that I should strike the section 47B claim out because it had previously been withdrawn. I was invited to find that allowing a representative to seek to resile from an express withdrawal of a claim constituted an abuse of process. As I have found, as a matter of fact, that there was no such express withdrawal, this argument falls away.

Rule 37(1)(b) and Rule 37(1)(d) - Delay

46. As an alternative, the respondent argued I should strike the section 47B claim out on the ground that the claimant's delay in raising the omission in the list of issue for six months was unreasonable conduct under section 37(1)(b) and/or triggered strike out under rule 37(1)(d).

47. I consider Mr Singh's failure to raise his concern about the list of issues with the respondent for six months to constitute unreasonable conduct. It was also unreasonable conduct that he failed to raise it with the tribunal until the day before what would have been the first day of the final hearing.

48. It was not unreasonable for him to raise it. As confirmed by the case law, a list of issues is set in stone. Having not withdrawn the section 47B claim claim (according to my findings of fact) he was duty bound to raise the omission. He should have done this much earlier, within 12 days of receiving the case management order of Employment Judge Davidson. It was the delay that was unreasonable and not the fact of raising the issue.

49. I have found as a matter of fact that the delay was inexcusable. As a professional representative, Mr Singh could have taken steps to prevent his personal difficulties having an adverse impact on his conduct of the case.

50. I do not consider the delay in isolation to be excessive in length. In this case the allegations concern events from 2012, which will already be difficult for the individuals involved to recall. It is unlikely that the delay caused by Mr Singh will make that existing problem much worse.

51. The impact of the delay, however, is that the parties are faced with having to undertake a further disclosure exercise and take further witness statements at a time when the case had been thought to be ready for a hearing. This will inevitably result in increased costs for the respondent who will have to go back over work, such as the drafting of witness statements that had already been completed. It is this aspect that it my judgment causes Mr Singh's conduct to be unreasonable.

52. The COVID-19 pandemic has caused a natural delay to when the hearing in this case can be heard. There is therefore time available to enable the parties to undertake this work.

53. I discussed at some length with the parties what exactly would need to be done to ensure that a fair trial could proceed in which the parties are on an equal footing. We also spent some time looking at the disclosures relied upon to see what work would be needed in relation to each disclosure.

54. My decision is that the respondent can relatively easily collate the evidence it might need in respect of the disclosure said to have been made in made 2018. The disclosure is in the form of a letter which speaks for itself. The good faith requirement does not apply to this disclosure.

55. I consider that it is possible to have a fair trial of question whether the claimant made the 2018 protected disclosure. The respondent's witnesses will need to have an opportunity to address whether their treatment of the claimant was connected with the disclosure, but this can be achieved with relative ease, albeit additional costs will be incurred. It would therefore, in my judgement, be disproportionate to prevent the claimant relying on this disclosure because of Mr Singh's unreasonable conduct.

56. Three of the alleged disclosures said to have been made in 2012 were made to the second respondent in the claim who is a currently employee of the first respondent and will be giving evidence. Two of them are in written documents. I am also told that there was an investigation into the allegations made in the written document which resulted in a written investigation report which has been preserved.

57. I consider the respondent can reasonably easily investigate and adduce evidence with regard to these three disclosures as to whether or not it accepts them to have been made and/or to be protected disclosures. This includes exploration of the good faith element which applies to these disclosures. This is made possible because of the involvement of the mr Haynes.

58. The respondents' witnesses will need to have an opportunity to address whether their treatment of the claimant was connected with the disclosures, but this can be achieved with relative ease, albeit additional costs will be incurred. It would therefore, in my judgement, be disproportionate to prevent the claimant to rely on these disclosure because of Mr Singh's unreasonable conduct.

59. The position is different in my view for the first of the 2012 disclosures. This disclosure is said to have been a verbal disclosure made in the course of a trade union meeting in early March 2012. None of the respondents or their witnesses are said to have been present at the particular meeting. Having to deal with this disclosure would, at this stage of the proceedings, put the respondent in a disproportionately difficult position. It would therefore, in my judgement, be proportionate to prevent the claimant to rely on these disclosure because of Mr Singh's unreasonable conduct.

Rule 37(1)(a) – Lack of Prospects of Success

60. The respondent argues that the disclosures in the 2018 letter upon which the claimant is seeking to rely does not comply with the requirements of section 43B(1), in that it fails to disclose a relevant offence or failure had occurred and/or that he had a reasonable belief that the disclosure was made in the public interest. On the face of it, the letter lists a number of complaints about a disciplinary process involving just the claimant.

61. I accept that I am required to be cautious when considering whether to strike out a whistleblowing claim for lack of prospects of success where there are disputed which have not yet been determined.

62. In this case, however, the factual dispute concerning whether the 2018 disclosure constitutes a protected disclosure within the meaning if section 43B(1) is limited. What is said to contain the protected disclosure(s) is a written letter sent to the first respondent so there is no dispute as to the content of the disclosure or to whom and how it was made. The only

element of the test is section 43B that remains to be determined is what was in the claimant's mind at the time of making it.

63. In my judgment, the claimant has little reasonable prospects of succeeding in convincing a tribunal that the disclosures meet the requirements in section 43B(1). The position is not sufficiently stark as to warrant a strike out, but a deposit order is appropriate in the circumstances.

64. The claimant is still employed by the first respondent. I am told that his current monthly income is in the region of £1,500 net. He has essential outgoings by way of housing and living costs which leave him with around £300 disposable income each month. He has no savings. I therefore make a deposit order for £150 to be paid within 28 days of receipt of the deposit order. In my judgment he has the ability to pay a deposit set at this level if he wishes.

Costs

65. One of the points of discussion throughout the hearings held to date has been the additional cost to which the respondent will be put by having to do extra work at such a late stage of the proceedings. Some of the costs would, of course, have had to be incurred if the claimant's concerns about the list of issues had been raised at the appropriate time. It is, however, highly likely that, because of the claimant's unreasonable delay, additional costs will be incurred by the respondent that could otherwise have been avoided.

66. As the respondent has not carried out the additional work required, the costs of that work are unknown. I do not have the power to make a costs award in the respondent's favour in anticipation of future unknown costs. I note for the record that the respondent wishes to reserve its position with regard to a future costs application.

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Employment Judge E Burns
7 August 2020

Sent to the parties on:

10/08/2020

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For the Tribunals Office