



EMPLOYMENT TRIBUNALS

Claimant: Mr A Murphy

Respondent: Delice de France

RECORD OF A PRELIMINARY HEARING

Heard at: Watford

On: 14 May 2019

Before: Employment Judge Alliott

Appearances

For the claimant: In person

For the respondent: Mr Joshi, Solicitor

JUDGMENT

1. The claimant has permission to amend the claim form to include a claim for automatically unfair dismissal because of making a protected disclosure (section 103a ERA 1996), the protected disclosure being set out at paragraph 2(i) of the list of issues in the case management summary dated 17 September 2018.
2. As regards the age discrimination and disability discrimination claims, I have made a deposit order. This will be in a separate document but the reasons will be given in this document.

REASONS

1. The claimant was employed by the respondent on 27 March 2017 as a sales rep. There is a considerable dispute between the parties as to when the effective date of determination of his contract of employment was. The respondents assert that his employment contract came to an end on 8 September 2017 whereas, the claimant asserts that his contract of employment came to an end on 12 December 2017.
2. By a claim form dated 12 December 2017, the claimant brought claims of automatically unfair dismissal on the grounds of asserting a statutory right, age and disability discrimination, notice pay/holiday pay and a claim for expenses. I

am informed that on the last occasion in front of Employment Judge Manley, the claims in relation to defamation and rental income were withdrawn by the claimant.

3. On 17 September 2018, Employment Judge Manley directed that an open preliminary hearing be heard to determine:
 - 3.1 Whether the application to amend the claim form to include a claim for dismissal because of having made a protective disclosure should be allowed;
 - 3.2 Whether any or all of the claimant's claims for age discrimination, disability discrimination, breach of contract and/or unlawful deduction of wages have no reasonable prospect of success and should be struck out.
 - 3.3 Whether any, or all of the claimant's allegations or arguments for age discrimination, disability discrimination, breach of contract and/or unlawful deduction of wages have little reasonable prospect of success and a deposit ordered should be ordered as a condition of those allegations or arguments proceeding.
 - 3.4 Any other jurisdictional issues identified.
 - 3.5 Any case management orders and listing for the final hearing.

Amendment

4. On 14 September 2018, the claimant wrote to the Employment Tribunal indicating that he would like to add a public interest disclosure claim, basically a claim of automatically unfair dismissal on the grounds of making a protected disclosure. As part of the case management orders made by Employment Judge Manley on 17 September 2018, the claimant was to state in writing whether he relies on alleged public interest disclosures other than the e-mail at paragraph 2(i) in the list of issues for his application to amend his claim.
5. In discussion with the claimant today, he informed me that the protected disclosures he sought to rely upon are two-fold. The first relates to the respondent's alleged threat to deduct a parking fine in the sum of £160 from his salary. This is alluded to in the e-mail of 25 August 2017 but is recited in the list of issues at paragraph 2(i). In addition, the claimant took me to an e-mail dated 14 August 2017 and point 10 in an e-mail dated 29 August 2017. In my judgment, neither of these e-mails adds anything to the point that the claimant seeks to make relying on the e-mail dated 25 August 2017. All three of the e-mails relate to the issue of the claimant complaining about the respondent's alleged proposal to deduct £160 from his wages on account of receiving a parking fine. The claimant's case is that this was a protected disclosure as it was an assertion that the respondent had failed, was failing or is likely to fail to comply with any legal obligation to which he is subject.
6. The second protected disclosure that the claimant sought to rely upon related to paragraph 6 of the e-mail dated 29 August 2017, namely an assertion that the

respondent's accounting practices as regards its customers were allegedly in breach of a legal obligation.

7. Irrespective of whether the e-mail dated 25 August 2017 was contained within the original claim form, it is a fact that it has been included in these proceedings as an allegation of fact that is to be relied upon in support of the claimant's claim that he was automatically unfairly dismissed for asserting a statutory right. Consequently, in my judgment, the application to amend should be granted in relation to that issue as I consider the amendment to be no more than a labelling exercise. The same fact will be relied upon as an allegation that the claimant was automatically unfairly dismissed for making a public interest disclosure.
8. As regards the second alleged protected disclosure, in my judgment, this is a new claim both factually and legally. I have a broad discretion to allow amendments at any stage of the proceedings. Such a discretion must be exercised in accordance with the overriding objective of dealing with cases fairly and justly.
9. I direct myself that in the determining whether to grant an application to amend, an Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interest of justice and to the relative hardship that would be caused to the parties by granting or refusing the amendment. I have taken into account the nature of the amendment, the applicability of time limits and the timing and manner of the application.
10. Dependent on who is correct as to the effective date of termination of the claimant's contract, the application to amend has come approximately six or nine months late. In considering this issue and the exercise of my discretion, I have determined that it was reasonably practicable for the claimant to bring this claim sooner. The claimant is clearly an articulate and intelligent individual who has conducted his own case with considerable skill in terms of analysing the appropriate legal basis of bringing it and the preparation of legal documents. In particular, I note that the claimant has already launched a claim for automatically unfair dismissal based on asserting a statutory right which, as it happens, is one clause separate from the automatically unfair dismissal for making a public interest disclosure that falls within the Employment Rights Act. The claimant candidly told me that the reason he had delayed was that he hadn't realised that he could bring such a claim prior to 14 September 2018 when he made the application. I have no reason to doubt him. However, I do not consider that this is a satisfactory explanation for the delay. Whistleblowing is a readily understandable concept as far as the general public are concerned and if the claimant genuinely had concerns that he had been dismissed as a result of whistleblowing then I have no doubt that he would have been able to research this and bring his claim in time.
11. As far as the balance of hardship is concerned, it is obvious that the claimant will be losing a potential claim but equally obvious that the respondent will be deprived of a defence. In terms of time, I find that it would not be in the interests of justice to extend time.

12. The timing and the manner of the application cannot be criticised in that it has not been a late application that in any way prejudices the hearing of the matter.
13. In my judgment, it is too late to make this extra claim and consequently I do not allow it.

Age Discrimination

14. The primary facts which the claimant relies upon in support of his age discrimination claim are set out in paragraph 3a-m of the list of issues. Those claims are presented on the basis that there are a series of connected events leading up to the dismissal of the claimant.
15. As regards the consideration of striking out the claimant's claims both for age discrimination and disability discrimination, I have taken into account what is set out at paragraph 34.94 of the IDS Discrimination at Work Employment Law Handbook, wherein it is recited:

“In Anyanuu and another the Southbank Students Union and another 2001 ICR 391 HL, their Lordships held it is a matter of public interest that discrimination cases are not struck out unless it is obvious that they will not succeed. The questions of law that require determination in discrimination cases are often highly fact sensitive. It is important in order to minimise the risk of injustice in such cases that they proceed to trials so that the facts can be established.”

Accordingly, I direct myself that it is only in the clearest of cases where it can be said that the claimant's claim is doomed to failure that a strike out is appropriate.

16. At this hearing, I invited the claimant to elaborate on the basis upon which he contends that he was subjected to discrimination on the grounds of protected characteristic of age. The claimant took me to his two important points:

16.1 In his form ET1, the claimant pleaded at paragraph 11(ii), discrimination due to age: “C is older than both his line managers who became increasingly uneasy with C's longer, broader, business and life experience; line manager's unhappy that C no longer able to suspend his disbelief.”

The claimant explained to me that the suspension of disbelief related to an e-mail that in effect he was asserting that his line managers were unhappy that the claimant saw through the sales spiel that he had to make to customers.

16.2 The second basis for alleging age discrimination was in relation to the weekly feedback that he was required to make. The claimant took me to an e-mail that he had sent on 29 August 2017 to his line managers, which highlighted ten negative aspects of his job. The claimant told me that his perception was that the managers did not like the fact that he was too clever.

17. Mr Joshi, on behalf of the respondents, submitted that all the factual matters that the claimant sought to rely upon were tenuous in the extreme and that it was

unlikely that the burden of proof would shift on the basis of what had been pleaded.

18. Having considered the factual matters that the claimant is seeking to advance in support of the contention that he was subjected to age discrimination, in my judgment, they do appear to be tenuous and, importantly, do not suggest to me that there is an age-related element to them. I can well envisage line managers being unhappy with an employee, irrespective of that employee's age, if that employee was manifesting an attitude that he had seen through a sales spiel that he had to make to customers and/or that he was perceived as being too clever when criticising the work environment of the respondent. I make plain that I am not making findings of that, I am merely assessing the case being advanced as it stands on the papers in front of me and in reliance upon what the claimant had to say to me today.
19. As already indicated, I decline to strike out this head of claim as it is always possible that the claimant may make out his claim once the oral evidence has been heard. However, in my judgment, the claimant's claim for age discrimination has little reasonable prospect of success and consequently I intend to make a deposit order as a condition of this head of claim proceeding.

Disability Discrimination

20. The claimant told me that unfortunately he sustained a serious head injury in 1997. Today, he has described to me his disability as "aphasia". He described this to me as an impairment in his brain that impairs his ability to produce and understand language. In particular, when asked how it affected him, he said that it may cause him to be rude to people with a lack of empathy, a brusque manner or a rude manner.
21. Much of what the claimant had to say about his disability was new to Mr Joshi at this hearing.
22. For the purposes of assessing the prospects of success of this head of claim, I assume that the claimant is disabled. I am not finding that he is disabled. I observe that in the ordinary course of events, it is quite often the case that a respondent will not admit that a claimant is disabled and the standard directions given provide for disclosure of medical documents and an impact statement and the determination in due course as to whether the claimant has a disability or not.
23. The claimant told me that as far as he is concerned, the effects of his disability had a direct bearing on the reasons given for his dismissal. He told me that he had had to be spoken to by his line managers about his e-mail protocol and that he may have been perceived to be impatient or intolerant of other peoples. The reasons given for his dismissal could be very well be taken to relate to his interpersonal skills. Crucially, the claimant told me that he did not consider himself to be disabled before starting the job with respondent. He stated that he was aware of the consequences from the head injury but due to having a completely different job prior to working for the respondent, (namely as an open-air pizza chef in France), any such problems had not manifested themselves.

24. In determining the prospects of success of the claimant, I have taken into account the specific wording of section 15 of the Equality Act. Section 15(2) states that sub-section (1) does not apply if the employer shows that it “did not know, or could not reasonably have been expected to know” of the employee’s disability. Going from paragraph 20.28 of the IDS Handbook, Discrimination at Work, it is stated:

“It is clear from this, however, that the employer cannot simply turn a blind eye to evidence of disability. While the Equality Act stops short of imposing an explicit duty to enquire about a person’s possible or suspected disability, the EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out if a person has a disability – para 5.15. It suggests that employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a “disabled person” – paragraph 5.14”.

25. In my judgment, it is open to the claimant to argue that the respondent, in some way, was put on a train of enquiry due to his work performance. Consequently, in my judgment this is not an appropriate case for a strike out order in that context. I also take account of the Employment Appeal Tribunal’s numerous decisions indicating that issues of discrimination are generally not appropriate for striking out orders.
26. That said, in my judgment, the claimant’s claim for disability discrimination has little reasonable prospect of success due to the very significant difficulties that I consider he will have in establishing that the respondent knew or ought to have known of his disability. It is notable in this context that the claimant, having successfully obtained the job, filled in a health questionnaire in which he declared that he had no mental health problems, that he did not need any special aids or adaptations due to a disability and that he did not have a disability. Consequentially, I have determined that the claimant should be subject to a deposit order in order to proceed on this head of claim.

The claimant’s breach of contract and/or unauthorised deduction of wages claims

27. In essence, this claim is advanced on the basis that the claimant disputes that the effective date of termination of his contract was on 8 September 2017 and that in fact and in law, his contract of employment subsisted until 12 December
28. 2017. The sequence of events appears to be as follows:

28.1 The claimant was notified of his dismissal orally on 8 September 2017.

28.2 I have been directed to a letter dated 14 September 2017, informing the claimant that he had been dismissed, although the claimant’s case is that he never received this letter as it had the wrong address on it. However, it would appear that that letter was sent as an attachment to an e-mail and the claimant says that he received that e-mail dated 22 September 2017.

28.3 A payment in lieu of notice was made to the claimant’s bank account on 24 November 2017.

29. On 12 December 2017, the claimant received a letter from the respondent's human resources terminating his contract of employment. As recited in the list of issues at paragraph 10, the claimant relies on the case of Jeyes v Society Generale 2012, UK SC 63. In essence, the claimant is maintaining that whilst his employment status was terminated on 8 September 2017, his contracted of employment subsisted. As I understand it, his argument is that the purported termination of his contract of employment on 8 September was a repudiatory breach of contract that he did not accept and that the termination of his contract was only effective once his payment in lieu of notice had actually been paid and he had been told his contract of employment was terminated.
30. It seems to me that the claimant's arguments on the law and on the facts will be determined in accordance with the construction of his contract of employment and the basis of the purported termination of it on 8 September 2017, or alternatively whenever it was communicated in writing.
31. In my judgment the claimant has an arguable case, which will turn on the construction of his contract of employment and an analysis of case law. I do not consider that in the absence of all the evidence on this issue and submissions from both sides on the law, I can determine that this argument has little prospect of success. Consequently, I neither strike out the claim, nor make a deposit order in relation to this head.

Deposit Order

32. On oath the claimant told me that he had no income, and no savings. He has no dependents but his wife began work recently. He told me was not on benefits. He told me that he owns a house in the UK which has a mortgage on it which costs approximately £450 per month. His essential outgoings on utilities and council tax probably come to some £300 per month and food may cost him £400 per month. He has a car and a van but he tells me they are essentially valueless, with one not working. He has a credit card with a credit limit of £7,000 of which approximately £1,500 is owing. The claimant and his wife also own a property in France. No bank statements or other corroborative evidence have been provided to me. The client showed a text from Metrobank to Mr Joshi for the respondent, indicating a minus £23 balance on this account.
33. It is clear to me that an individual with a property in the UK and a property in France will have substantial outgoings per year. In addition, given that the claimant's wife has only recently begun working I do not have a satisfactory explanation of what the claimant has been living on to pay monthly expenses that must be in excess of £1,000. It may well be that he has resources that he has not told me about. However, on the face of the sworn testimony of the claimant, he has precious little disposable income or savings and I am reluctant, potentially, to force him to increase his borrowing on his credit card. In discussion with the claimant, he indicated that he thought a payment of £300 total would be possible. Consequently, having taken into account the claimant's means, I have decided to order him to pay a Deposit Order of £150 in relation to the age discrimination claim and £150 in relation to the disability discrimination claim.

Employment Judge Allott

Date: ...28 May 2019.....

Sent to the parties on:

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For the Tribunal:

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