EMPLOYMENT TRIBUNALS

Claimants: Mr A Collins
Mr D Pitala

Respondent: IFG Cucina

Heard at: Watford by Cloud Video Platform
On: 17 January 2024

Before: Employment Judge Caiden

Representation
First Claimant: In person
Second Claimant: Did not attend
Respondent: Mr T Radcliffe (Trainee Employment Law Consultant)

JUDGMENT

The claims are struck out under rule 37(1)(a) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("ET Rules") because they have no reasonable prospect of success.

REASONS

a) Background

1. By an ET1 presented on 16 June 2023, the First Claimant completed a multiple claim form (which included the Second Claimant) which ticked the box at paragraph 8.1 "*I am making another type of claim….*" and wrote in the accompanying narrative "*Health's and safety breaching health concerns. And defamation of character*". In the background section he stated

> *I have a small piece of evidence that the hr department have said things about my character and person that is not true at all.*
> *I also have evidence that my employer did not notify us of working along side asbestos related material. We have been cleaning and making dust in areas and still only found out after. We have an outdated report that needs to be investigated fully by HSE.*

We have to spend the rest of my days worried about if we will die early from an asbestos related disease.

2. On 19 July 2023, the parties were informed that only part of the claim, the ET1, had been accepted. It stated "*Employment Judge Ord…has decided that only the following complaints can be accepted, namely health and safety*".

3. The Respondent defended the claim in an ET3 that was received by the Tribunal service on 15 August 2023. This was more or less as brief in nature as the ET1 to which it was responding. In paragraph 6.1 it stated

> *This Response is also filed in relation to case number 3307092/2023, Mr D Pitala, as appears in the Schedule to the ET1. This claim does not appear to have followed the Early Conciliation (EC) process. We would request that the Tribunal Orders Mr Pitala to show cause as to why the claim should not be struck out if the EC process has not been followed.*
> *All claims are denied as alleged or at all. That said, the Tribunal does not have jurisdiction to deal with a defamation claim. Beyond that, there is no discernible claim pleaded to respond to.*
> *The Respondent would also request that the Tribunal Orders Mr A Collins to show cause as to why his claim should not be struck out as there is no identifiable claim pleaded.*

4. By letter sent to the parties on 27 November 2023 a notice entitled "*Preliminary Hearing for Case Management by Video Hearing*" was sent. This included the standard wording in relation to case management and also sent a Case Management Agenda. However, at the end of this letter it was stated in bold:

> *Employment Judge Shastri-Hurst has directed as follows:*
> *"It appears that the claimant's complaint is that they were not notified of the fact they were working in an environment containing asbestos. If this is correct, the Tribunal cannot see how that complaint fits within its jurisdiction. A public preliminary hearing will therefore be listed to consider the issues in the claim, and whether the claim should be struck out for lack of jurisdiction".*

b) What occurred at the Preliminary Hearing

5. The hearing took place by Cloud Video Platform. There was no bundle or other documents provided. Mr T Radliff appeared for the Respondent and could see and hear the Tribunal as he was using the video and audio function. The First Claimant however joined by telephone, audio only. The First Claimant explained that he was having technical issues so could not join via a computer (to have video and audio). The Tribunal was satisfied for the purposes of the hearing that both parties could clearly hear and engage in the process.

6. The Tribunal checked with the parties, and the First Claimant, in particular that he had access to the ET1, ET3, the notice for the Hearing and the notice saying only part of the claim had been accepted (these being the matters set out and extracted at paragraphs 1-4 above). The First Claimant confirmed he did and the relevant extracts of it were read out, as the Respondent did not have access to the Notice of Hearing as at the time of the Hearing taking place.

7. The Tribunal explained to the Claimant that the defamation claim was outside the jurisdiction of an Employment Tribunal and that claim had not been accepted. It further explained that the Respondent, and another Employment Judge, were querying whether in fact there was any claim which could be dealt with by an Employment Tribunal. For that reason the Tribunal explained it wanted to explore the claim in the Claimant's own words. Below the Tribunal summarises this discussion:
   7.1. the First Claimant confirmed he was not representing the Second Claimant. He stated that the Second Claimant was not attending today as he alleged he had some form of pressure exerted by the Respondent and so no longer wanted to take any part of the claim. Pausing there, the Tribunal considered whether it needed to contact the Second Claimant, send out a separate letter or show cause type notice or dismiss the claim brought by the Second Respondent under rule 47 ET Rules. In the end the Tribunal concluded that as the Second Claimant had not played any active part and given the claim appears to be completely in parallel from the ET1 the matter would stand or fall with the claim being brought by the First Claimant in relation to the jurisdictional issue it was having to consider;
   7.2. the First Claimant stated "*I want to make the claim for Health & safety breach*". When asked to provide details he set out "*We were working inside and environment in asbestos material and not given any training*". He explained he was working at school premises.
   7.3. The Tribunal enquired as to when the First Claimant alleges he became aware of the alleged asbestos and he responded it was "*February / March 2023*". In terms of what happened after this date he stated "*We raised concerns with management – they fully assured us that there was no point of concern and that the school had taken everything to get the reports and seal the area and so on*". He continued by stating that after this "*I then did some diffing and spoke to companies, which led me to ask for the report from the school. When the report was provided I could see it was outdated*". The Tribunal clarified what when this occurred and was told "*March 2023*", and that it was about a "*month*" after discovering the alleged asbestos.
   7.4. In terms of the chronology, the First Claimant confirmed that he commenced employment in or around February/March 2022. So it was about a year later that he found out about the alleged asbestos. He also confirmed that he left the Respondent's employment shortly after finding out, and after having the report, as it was on or around 24 April 2023. Accordingly, the First Claimant had just over a year's continuous employment.
   7.5. The Tribunal enquired as to the circumstances of him leaving the Respondent. The First Claimant stated that a Health and Safety auditor was not happy with the way he spoke to her and she had made a complaint against him. This led to the Respondent having to investigate the complaint. He went on to say that it was "*enough from me*" and he left. It was clarified that he resigned. The Tribunal enquired as to the reason for this resignation and the First Claimant stated he believed he did something in writing and may have worked his notice, he stated that "*They claim to be a very people kind of company – we see the future – we do use right tools, methods but that was not the case. So for me it was another company with a promise not to deliver – regardless of the situation*".

7.6. Given the phrasing of his response the Tribunal asked in a few different ways whether the alleged asbestos issue was part of the resignation. The First Claimant's final response was "*there is no claim as against the resignation. No this has always been about the health and safety implications – they have refused to follow health and safety*". He made it very clear that he was not seeking anything that related to the dismissal and that his concern was that the Respondent's breaches of health and safety by allegedly exposing the First Claimant to asbestos had health consequences.

8. The Tribunal explained to the First Claimant that its jurisdiction was limited by statute and that whilst some matters of 'health and safety' could fall within it other matters, such as the health repercussions for alleged asbestos exposure had to be dealt with in Civil Courts.

9. The Respondent was invited to make observations or set out what it wanted to occur and Mr Radcliffe stated that he was limiting it to what was said in the ET3. There was no claim in relation to the dismissal and the matter should be struck out.

c) Conclusions

10. The Tribunal took some time to consider matters but ultimately decided that the claims should be struck out for having no reasonable prospects of success as it appeared that there was no jurisdiction to consider matters. It stated that it would set this all out in writing given the importance of the conclusion reached for both parties.

11. The Tribunal at the hearing explained that the ACAS Early Conciliation point raised against the Second Claimant by the Respondent was not correct as the claim had been made on the same claim form and there was an exemption to the need for an individual claimant to have or set out the number of an ACAS Early Conciliation Certificate (reg.3 The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 and *Sainsbury's Supermarkets Ltd v Clark* [2023] EWCA Civ 386). However, as already mentioned it appeared that the two claims stood or fell together as the ET1 did not set out any other jurisdictional basis for the Second Claimant. Therefore if there was no jurisdiction found in the ET1 both claims had to be struck out.

12. In terms of the Tribunal's jurisdiction, given the clarification provided by the First Claimant and the wording in the ET1 there did not appear to be any claim for which the Tribunal had jurisdiction. An employer not following health and safety in and of itself does not mean that there is a claim that can be pursued in an Employment Tribunal. A health and safety detriment claim at s.44 Employment Rights Act 1996 ("ERA") is all about detriments *after* having raised the health and safety issue in the manners prescribed. The same is true for a whistleblowing claim under s.47B ERA. The First Claimant however in the ET1 nor in his explanation to the Tribunal appeared to encompass such a claim. He was not saying that his then employer after having raised the issue treated him detrimentally (for example by refusing holiday or not allowing him to attend training). Rather he is saying that his then employer simply breached health and safety and that was his claim. The Tribunal explored also whether, given

the shortness in service, there was a claim for automatic unfair dismissal for a 'health and safety' dismissal – s.100 ERA. However, that too was not the claim the First Claimant was bringing. He was clear he was not bringing anything to do with dismissal. In the circumstances given what was stated the Tribunal considered that there was no claim that was being pursued from which it had jurisdiction and further questioning would go beyond its function and amount to descending into the arena in an attempt to strain and get a claim to fit. Ultimately, the First Claimant's claim is really that his former employer exposed him to asbestos and they should compensate him for any such damage. That is not a claim for which the Employment Tribunal has jurisdiction.

13. Finally, the Tribunal considered whether given the way the hearing was listed or occurred any striking out was possible within the rules and in accordance with the overriding objective. It decided that it was for the following reasons:
    13.1. ultimately no one is assisted in claims for which a Tribunal has no jurisdiction continuing and if there is an issue as set out below it can be addressed at a reconsideration stage;
    13.2. rule 37 ET rules allows a Tribunal to strike out a case at any stage on its own initiative or on application by a party. This includes a claim having no reasonable prospects of success. That is something which can be assessed from ET1 and ET3 and does not require live evidence, although it did get in effect the First Claimant's account given how the hearing was conducted. That of course is subject to the First Claimant to make representations. This is what occurred at the hearing with the First Claimant maintaining that a Tribunal should have jurisdiction if employer's knowingly breach health and safety exposing him, and his colleagues, to asbestos;
    13.3. rule 53 ET Rules set out that at a Preliminary Hearing a tribunal can determine a preliminary issue or consider whether a claim should be struck out. This appears to be what Employment Judge Shastri-Hurst intended to occur. It is acknowledged that Employment Judge Shastri-Hurst thought the matter should be by way of a jurisdictional decision once and for all and this Tribunal has adopted a no reasonable prospect approach. The reason for that is that whilst it was clear what was being assessed it did not have all documentation before it and wider no reasonable prospects approach was the basis that this Tribunal felt able to make a decision. Taking this approach did not in any way on the face of it prejudice the parties as after all the ET1 should contain such material;
    13.4. rule 54 ET Rules set out that parties need to be given at least 14 days notice of a hearing involving any Preliminary issue. That potentially is not applicable as in the end the 'no reasonable prospects' route was adopted. However, in any event, the First Claimant make clear that he understood this to be one of the matters that was going to be determined at the Preliminary Hearing for which he had long since had notice. Equally, rule 6 ET Rules allows the Tribunal to waiver or vary the requirement and if necessary the Tribunal would adopt that approach. The First Claimant had the requisite notice and was able to deal with the matter;
    13.5. rule 56 ET Rules requires such a hearing to be in public. The fact that it was by CVP in effect is a public hearing and the Tribunal can of course convert a hearing from private to public, in addition to the rule 6 ET Rules allowing any issue to be waived.

14. Finally, the Tribunal concludes by drawing the First and/or Second Claimant's attention to the fact that if he considers the summary above as to what was

stated to be inaccurate (see in particular the points at paragraph 7 above) he can apply for reconsideration. Rules 70-73 ET Rules relate to reconsideration of judgments. Equally, in so far as the First and/or Second Claimant believe that there is any error of law contained in the Judgment and Reasons of the Tribunal a potential recourse is to pursue an appeal to the Employment Appeal Tribunal.

Employment Judge Caiden
17 January 2024

JUDGMENT AND REASONS
SENT TO PARTIES ON 7 February 2024

FOR EMPLOYMENT TRIBUNALS

Notes

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If a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings. You can access the Direction and the accompanying Guidance here: https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/