EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr P Hedlund	v	**(1) Governing Body of Garfield School** **(2) London Borough of Merton**

HEARING

Heard at: London South **On: 23 January 2019**

Before: Employment Judge Truscott QC

Appearances:

For the Claimant: no appearance
For the Respondent: Mr N Cameron case worker

JUDGMENT on PRELIMINARY HEARING

1. The claims of detriment under section 47BA, unfair dismissal under section 103A and unfair dismissal under section 94 of the Employment Rights Act based on an alleged protected disclosure and all ancillary claims are struck out as having no reasonable prospects of success, the bringing of the claim being an abuse of process as the Claimant is attempting to re-litigate matters that have already been decided by this Tribunal on 8 June 2018.

2. An award of costs in favour of the Respondent is made under Rule 76(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

3. The Claimant is ordered to pay £3273.80 to the Respondent in respect of costs incurred in defending the Claimant's claim within 28 days of the date of this judgment.

REASONS

Preliminary

1. The Claimant presented his claim to the Employment Tribunal on 15 June 2018. He claims: -
(i) Unfair dismissal for having made a protected disclosure contrary to s.103A ERA 1996.

(ii) Detriment for having made a protected disclosure contrary to s. 47BA ERA 1996.
(iii) Ordinary unfair dismissal contrary to s. 94 ERA1996. [1-10, see 6]

2. On 15 August 2018, the Respondents applied for a strike out of the claims or, in the alternative, deposit orders and costs.

Basis of claim

3. The First Respondent School is a community school. The Second Respondent is the London Borough of Merton ("Merton") is the local authority for the geographical area in which the School is situated. Merton is the relevant local authority under s.35(2) Education Act 2002.

4. The Claimant was a temporary worker supplied by Prospero Group Limited (Prospero") to work at the Garfield Primary School ("School") in the role of a teacher; the period of supply started on 27 March 2018 and ended on 8 June 2018. These dates match the dates given by the Claimant in box 5 of the ET1. [4]

5. Merton were not party to the supply arrangements between Prospero and the School and no connection between Merton and Prospero is alleged by the Claimant.

6. There was no contractual relationship between the Claimant and Merton and the Claimant does not assert such a relationship.

7. On 3 May 2018, the Claimant applied in writing for a permanent position at the School. The Claimant made a considerable effort in his job application. [67-72] On 8 May 2018 the School notified the Claimant that it wanted to interview him and sent him details of the assessment process which consisted of a lesson observation and an interview [73]. On 9 May, the Claimant was observed and interviewed by a panel comprised of 3 senior members of staff. After the interview, the Claimant was told he had been successful and that a job offer would be made.

8. On 15 May, the Claimant chased the School saying he needed a conditional job offer and that technically, he was not confirmed in post [80]. Later that day the School made a provisional offer of employment subject to clearances and two satisfactory references. Had the Claimant's candidacy proceeded to appointment, the School would have requested Merton to issue a contract of employment to the Claimant but the School never made the request.

9. One of the Claimant's referees was Prospero. On 17 May 2018, Prospero said they would not recommend the Claimant - not at all. The School sought clarification of Prospero's reference, however, Prospero did not provide a clarification. Other concerns about the Claimant's suitability emerged. On 8 June 2018, the School withdrew the provisional offer giving its reasons [88].

10. The contemporaneous documents are: -
(i) The Claimant's full job application for a permanent position at the School which he submitted on 3 May 2018. The Claimant made a considerable and genuine effort in his job application. [67-72]

(ii) Notification of interview on 8 May 2018. [73]
(iii) Interviewed notes of 9 May interview by a panel comprised of 3 senior members of staff. [74-79]
(iv) On 15 May, the Claimant chased the School saying he needed a conditional job offer and that technically, C was confirmed in post. [80]
(v) Later on 15 May 2018 the School made a provisional offer of employment subject to clearances and 2 satisfactory references. [81]
(vi) The Prospero reference and the School's attempt to clarify the reference. [82-85]
(vii) School's letter withdrawing job offer with reasons [88]

11. The Claimant was at all material times an agency worker and he says in his ET1 that he was employed by the agency. [6A].

12. The Claimant was the Claimant in **Mr Per Hedlund -v-London Borough of Lambeth** Case Number 2302383/2016 (the "Lambeth case"). In the Lambeth case, the Claimant alleged that he had made a protected disclosure on 29 January 2016, this is the protected disclosure upon which the Claimant relies in the instant Claim for both his detriment and dismissal claims. [39]

13. The Claimant says in his ET1 in the instant case Employment Judge Martin was involved in a previous case. Employment Judge Martin gave Judgment in the ***Lambeth** case*. [10 & 38] The Tribunal in the **Lambeth** *case* heard full argument about the alleged protected disclosure, indeed, it was central to that case. The Tribunal made a unanimous finding of fact that the Claimant had not made a protected disclosure holding that he had been motivated by personal gain (para 55). This finding of fact has not been disturbed. [39 & 49] The Claimant attempted to appeal the **Lambeth** *case*. In a Rule 3(10) hearing on 8 January 2019 the EAT (HHJ Auerbach) ruled that the Claimant could not pursue an appeal as it had been submitted out of time.

Submissions

14. The Tribunal received both oral and written submissions from the Respondents.

Law

15. For the Claimant's claim under section 103A to succeed, he must establish:

a. That he has made a protected disclosure(s) within the statutory meaning.

b. That, as a matter of causation, the reason or principal reason for the dismissal was that he made a protected disclosure(s).

16. Section 43B (1):
"In this Part a "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, or is likely to be deliberately concealed."

17. It has been held that a qualifying disclosure must be a disclosure of information, which means the conveying of facts, as opposed to mere allegation: **Cavendish Munro Professional Risks Assessment Ltd v. Geduld** [2010] IRLR 38. In **Kilraine v. London Borough of Wandsworth** [2018] ICR 1860 CA, the Court of Appeal supported the EAT's view that a rigid dichotomy between information and allegation should not be read into section 43B, but that a disclosure must contain sufficient detail and content to be capable of tending to show one of the prescribed categories of information in section 43B (1). Ultimately, this will be an evaluative judgement for the Tribunal to make, see paragraphs 30 – 36. Further, it was held that the context in which the disclosure is made is a relevant consideration, see paragraph 41.

18. The editors of Harvey at CIII(4)(C) [21] summarise the position as follows:
> "… in effect there is a spectrum to be applied and that, although *pure* allegation is insufficient (the actual result in *Cavendish*), a disclosure may contain sufficient information even if it also includes allegations… The question therefore is whether there is *sufficient* by way of information to satisfy s 43B and this will be very much a matter of fact for the tribunal. Clearly, the more the statement consists of unsupported allegation, the less likely it will be to qualify, but this is as a question of fact, not because of a rigid information/allegation divide."

19. Once a disclosure has taken place it becomes necessary to consider whether or not that disclosure can be categorised as a qualifying disclosure. This largely depends upon the nature of the information revealed. As an initial starting point, it is necessary that the worker making the disclosure has a reasonable belief that the disclosure tends to show one of the statutory categories of 'failure' (ERA 1996 s 43B (1)). It needs to be stressed that what is required is only that the worker has a reasonable belief and it is not necessary for the information itself to be actually true. It follows that a disclosure may nevertheless be a qualifying disclosure even if it subsequently transpires that the information disclosed was incorrect. This was made clear by the Employment Appeal Tribunal in **Darnton v. University of Surrey** [2003] IRLR 133 EAT. In that case the employment tribunal had held that the claimant had not made a qualifying disclosure because the allegations relied upon were not factually correct. In allowing the employee's appeal, the Employment Appeal Tribunal confirmed that the proper test to be applied is whether or not the employee had a reasonable belief at the time of making the relevant allegations. Although it was

recognised that the factual accuracy of the allegations may be an important tool in determining whether or not the employee did have such a reasonable belief the assessment of the individual's state of mind must be based upon the facts as understood by him at the time.

20. The determination of whether a belief is reasonable is dependent on his subjective believe, but that belief must be objectively reasonable: **Babula v Waltham Forest** College [2007] IRLR 346.

21. In **Chesterton Global Ltd. v. Nurmohamed** [2018] ICR 731 CA at paragraphs 35 - 37, on the issue of public interest, it was held:

> "[35] …It is in my view clear that the question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the numbers of people sharing that interest. That is in my view the ordinary sense of the phrase "in the public interest"…
> [36] The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be… The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.
> [37] Against that background, in my view the correct approach is as follows. In a whistleblower case where the 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 nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

22. The 'Laddie factors' referred to are: (a) the number of workers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; (c) the nature of the wrongdoing disclosed; and (d) the identity of the wrongdoer.

Detriment and Unfair dismissal

The law in relation to these claims is not set out here.

STRIKING OUT

23. Rule 37(1)(a) provides:

"(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—

that it is scandalous or vexatious or has no reasonable prospect of success;"

24. As a general principle, discrimination cases should not be struck out except in the very clearest circumstances, **Anyanwu v. South Bank Students' Union** [2001] IRLR 305 HL. Similar views were expressed in **Chandhok v. Tirkey** [2015] IRLR 195, EAT, where Langstaff J reiterated (at paras 19–20) that the cases in which a discrimination claim could be struck out before the full facts had been established are rare; for example, where there is a time bar to jurisdiction, where there is no more than an assertion of a difference of treatment and a difference of protected characteristic, or where claims had been brought so repetitively concerning the same essential circumstances that a further claim would be an abuse. Such examples are the exception, however, and the general rule remains that the exercise of the discretion to strike out a claim should be 'sparing and cautious'.

25. As whistleblowing cases have much in common with discrimination cases, in that they too are fact-sensitive and involve similar public interest considerations, (see **Ezsias v. North Glamorgan NHS Trust** [2007] ICR 1126 CA, applications to strike out should be approached with great care.

26. In **Abertawe Bro Morgannwg University Health Board v. Ferguson** [2013] ICR 1108 EAT, at paragraph 33, it was said "Applications for strike out may in a proper case succeed. In a proper case they may save time, expense and anxiety. But in a case which is always likely to be heavily fact sensitive, such as one involving discrimination or the closely allied ground of public interest disclosure, the circumstances in which it will be possible to strike out a claim are likely to be rare. In general, it is better to proceed to determine a case on the evidence in light of all the facts."

27. An employment judge has power under Rule 37(1)(a), at any stage of the proceedings, either on its own initiative or on the application of a party, to strike out all or part of a claim or response on the ground that it has no reasonable prospect of success. In **Hak v, St Christopher's Fellowship** [2016] ICR 411 EAT, the then President of the Employment Appeal Tribunal said, at paragraph 54:

> Rule 37 of the Employment Tribunal Rules 2013 provides materially: -
>
> > "(i) At any stage in 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) Where it is scandalous or vexatious or has no reasonable prospect of success…"
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> 55. The words are "no reasonable prospect". Some prospect may exist, but be insufficient. The standard is a high one. As Lady Smith explained in Balls v Downham Market High School and College [2011] IRLR 217, EAT (paragraph 6):
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> > "The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the

> Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects…"
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> 56. In **Romanowska v. Aspirations Care Limited** [2014] (UKEAT/015/14) the Appeal Tribunal expressed the view that where the reason for dismissal was the central dispute between the parties, it would be very rare indeed for such a dispute to be resolved without hearing from the parties who actually made the decision. It did not however exclude the possibility entirely.

28. The EAT has held that the striking out process requires a two-stage test in **HM Prison Service v. Dolby** [2003] IRLR 694 EAT, at para 15. The first stage involves a finding that one of the specified grounds for striking out has been established; and, if it has, the second stage requires the tribunal to decide as a matter of discretion whether to strike out the claim, order it to be amended or order a deposit to be paid. See also **Hassan v. Tesco Stores** UKEAT/0098/19/BA at paragraph 17 the EAT observed:

> "There is absolutely nothing in the Judgment to indicate that the Employment Judge paused, having reached the conclusion that these claims had no reasonable prospect of success, to consider how to exercise his discretion. The way in which r 37 is framed is permissive. It allows an Employment Judge to strike out a claim where one of the five grounds are established, but it does not require him or her to do so. That is why in the case of *Dolby* the test for striking out under the *Employment Appeal Tribunal Rules 1993* was interpreted as requiring a two stage approach."

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29. It has been held that the power to strike out a claim on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances (**Tayside Public Transport Co Ltd (t/a Travel Dundee) v. Reilly** [2012] IRLR 755, at para 30). More specifically, cases should not, as a general principle, be struck out on this ground when the central facts are in dispute.

30. In **Mechkarov v. Citibank** UKEAT/0041/16, the EAT set out the approach to be followed including:-

(i) Ordinarily, the Claimant's case should be taken at its highest.
(ii) Strike out is available in the clearest cases – where it is plain and obvious.
(iii) Strike out is available if the Claimant's case is conclusively disproved or is totally and inexplicably inconsistent with undisputed contemporaneous documents.

DEPOSIT ORDERS

31. A deposit order can be made if the specific allegation or argument has <u>little</u> reasonable prospect of success. It was noted in **Van Rensburg v. Royal Borough of Kingston-Upon-Thames** UKEAT/0095/07/MAA at paragraph 27 that:

> "Moreover, the test of little prospect of success in r 20(1) is plainly not as rigorous as the test that the claim has no reasonable prospect of success found in r 18(7). It follows that a tribunal has a greater leeway when considering whether or not to order a deposit. Needless to say, it must have a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim or response."

32. In **Hemdan v. Ishmail** [2017] IRLR 228, Simler J, pointed out that the purpose of a deposit order 'is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails' (para 10), she stated that the purpose 'is emphatically not to make it difficult to access justice or to effect a strike out through the back door' (para 11).

33. As a deposit order is linked to the merits of specific allegations or arguments, rather than to the merits of the claim or response as a whole, it is possible for a number of such orders to be made against a claimant or respondent in the same case.

Contract of employment

34. Pursuant to s.35(2) of the Education Act 2002, any contract of employment would have to be made between C and the local authority.

Costs

Rules 75 and 77 contain the relevant provisions.

DISCUSSION and DECISION

35. The Claimant relies on an alleged protected disclosure made in January 2016 which has been and was, at the time of his ET1, the subject of litigation. The outcome of the litigation was that the Claimant was found not to have made a protected disclosure. The Claimant says that on 20 April 2018 he accepted an offer of employment made by the School's Headteacher. The Claimant further says the offer was neither provisional nor subject to any terms and later he took part in a pretend interview with the School. The Claimant does not allege a contract between him and Merton. Indeed, a copy of the School visitors' book for 7 June 2018 shows a number of visitors to the School none of whom were from Merton's legal department as the Claimant alleges in his ET1. [86-87]

36. Further, there is no material before the Tribunal suggesting any causal link between the alleged protected disclosure in January 2016 and the events which the Claimant relies on over 2 years later. The contemporaneous documents are undisputed. Indeed, many of these documents were created by the Claimant himself. The inconsistency between the Claimant's case and the documents is not capable of explanation and that the documents make plain and obvious that there was a genuine recruitment process leading to a conditional offer of employment. Furthermore, the recruitment documents amply demonstrate that there was no pre-existing job offer.

37. Further, pursuant to section 35(2) of the Education Act 2002 any contract of employment would have to be made between the Claimant and Merton. Any other arrangement (including the 20 April 2018 arrangement which the Claimant asserts) would be contrary to s.35(2) EA 2002. Therefore, it was not legally possible for the Claimant to have become an employee employed by either Respondent to work at the School by accepting an offer made by the Headteacher. Any offer of employment would have had to have come from Merton and the contract would have had to be between the Claimant and Merton. The Claimant does not contend that there was an offer from Merton or that he communicated an acceptance to Merton, let alone that there was a contract between him and Merton. On the contrary, it is the Claimant's case that there was a contract between him and the School, a case that runs directly in contradiction to the EA 2002 and is bound to fail.

38. Furthermore, the Claimant's later conduct in in the May 2018 recruitment process and chasing for a conditional offer conclusively disprove his case that he was employed on 20 April 2018 and his case is inconsistent with the undisputed contemporaneous documentation.

39. The Tribunal concluded that the claims made by the Claimant had not the slightest prospect of succeeding. The Tribunal considered how to exercise its discretion in the light of its findings. It determined to strike out all the claims relying on the alleged protected disclosure with their ancillary claims such as notice pay or wrongful dismissal.

40. The Tribunal considered that a deposit order was not appropriate.

41. As the claim was utterly without merit, the Tribunal awarded the costs specified by the Respondents as follows:
(i) Work associated with Interim Relief application - £1,524.60
(ii) Work associated with preparing and presenting - R's ET3's - £706.20
(iii) Work associated with instant application - £1,043

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Employment Judge Truscott QC

Date 29 January 2019