EMPLOYMENT TRIBUNAL

Claimant: Mr Donskoi

Respondent: Hogan Lovells International LLP

HELD AT: Birmingham (CVP) **ON:** 11 April 2023

BEFORE: Employment Judge Kelly

REPRESENTATION:

Claimant: In Person

Respondent: Ms Duane (Counsel, St Philips Chambers)

ORDER

1. The claimant's claim against the respondent is hereby struck out.

2. The claimant shall pay the respondent the sum of £4,000 in respect of the respondent's costs, on account of the claimant's unreasonable behaviour, such sum to be paid by 9 May 2023.

REASONS

1. This is the respondent's application made under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"), to strike out the claimant's case under Rule 37. The claimant represented himself and Ms Duane of counsel represented the respondent.

2. The strike-out application is made on two principal grounds. It is said that the claimant's case:

a. is scandalous or vexatious or has no reasonable prospects of success; and

b. that the manner in which the proceedings have been conducted by or on behalf of the claimant has been scandalous, unreasonable or vexatious.

3. The claimant was engaged by the respondent to provide services relating to a significant legal matters being worked upon by the respondent. It is neither necessary nor appropriate to set out the underlying details of the legal matters worked upon by the claimant in this judgment.

4. There is a dispute over the claimant's employment status, in the sense of whether he was an employee or a worker, but for reasons that will become apparent, it was not necessary to address that issue in the context of this application.

5. In relation to second latter limb, it is suggested that there is a risk that there is no prospect of a final hearing being a fair hearing given the way in which the claimant has dealt with matters.

6. I am not persuaded that there is no prospect of a fair hearing in relation to the issues that are raised by reason of the way in which the claimant has conducted himself to date. Ms Duane was unable to provide any meaningful basis upon which a final hearing could not be said to be conducted fairly.

7. However, the other ground, that the claim itself is scandalous or vexatious or has no reasonable prospects of succeeding, this is very much a different matter.

8. The key focus is in relation to whether there is a reasonable prospect of the Claimant succeeding at a final hearing. The claimant's claims are essentially threefold.

9. Initially, there was a claim for ordinary unfair dismissal which of course required the two-year qualifying period. That claim was dismissed at a preliminary hearing on 14 July 2021 by Employment Judge Broughton. The claimant was not so clear that the claim had been dismissed, but it was clear from the fact of the order by Employment Judge Broughton, that it was, and indeed, to the extent that it was not dismissed, I would have struck it out today. To the extent that the claim had not been previously dismissed, I strike it today as it is clear that the Claimant does not have the requisite two-year qualifying period. The claimant sought to suggest that this Tribunal should change that qualifying requirement of two-year continuous service, but he seems to now recognise that this tribunal simply has no power to do that. The two-year qualifying period is written into primary legislation in the form of s. 108(1) of the Employment Rights Act 1996 ("the 1996 Act").

10. There is an claim for automatic unfair dismissal by reason of a protected disclosure, under section 103A of the 1996 Act, for which a qualifying period of two years is not required, but relevant to that would be whether there has been a protected disclosure that causes or relates to the dismissal in some way. In respect of that, the Respondent says that there can be no nexus between the dismissal in this case and any protected disclosure, put simply, because any potentially protected disclosure relied upon comes after the dismissal.

11. Further, there is a claim for detriment arising by reason of a protected disclosure under s. 47B of the 1996 Act, with the detriment under that section being identified as the termination of his engagement.

12. In his Grounds of Complaint, the claimant referenced a disclosure made in early November 2020 (in three iterations), some 2 ½ months after being dismissed, following further review being taken of the underlying matters that said to have caused him concern. His engagement was terminated in August 2020.

13. Despite my efforts in seeking to drill down into what disclosures might have been made prior to November 2020, to ascertain whether there was a basis of claim that any such disclosure might have resulted in dismissal, the claimant was unable to identify one. Indeed, the claimant's position was that he was suggesting at best that some steps could have been taken in a different way in terms of reviewing the underlying matter with which he was involved, but that at best, he was "on his way" to being able to identify issues and make a disclosure – he was only able to do so following his dismissal and after a thorough review of the underlying matter.

14. The respondent additionally referred to the guidance in *Blackbay Ventures v Gahir [2014] IRLR 416* as to how tribunals should approach the issue of determining whether there was a protected disclosure. Essentially, the steps are as follows:

    a. the disclosure should be identified by reference to its date and content (in this case, the only specific disclosure upon which the claimant can and did rely occurred on 2, 3 and 4 November 2020 and they related to the way in which the respondent was handling the underlying case);

    b. the alleged failure or likely failure to comply with a legal obligation should be identified;

    c. the basis upon which the disclosure is said to be protected and qualifying should be addressed;

    d. each failure or likely failure should be separately identified;

    e. save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute of regulation;

    f. the tribunal should determine whether or not the claimant had the reasonable belief referred to in s.43B(1) and whether it was made in the public interest;

    g. where it is alleged that the claimant has suffered a detriment, short of dismissal, it is necessary to identify the detriment in question and where relevant, the date of the act or deliberate failure to act that is relied upon.

15. In this case, at the last hearing before Employment Judge Broughton, the claimant accepted (amongst other things) that:

a. he only became to the belief that some legal obligation was breached some 2.5 month after his engagement was terminated; and

b. He had not made a disclosure of information to any person prior to his dismissal.

16. Hence, I am quite satisfied that the Claimant's claim for any detriment arising by reason of any protected disclosure must fail, because the detriment in this case, being the dismissal, arose well before the alleged protected disclosure. It is not, therefore, strictly necessary to consider the specific elements of whether the disclosure made was in fact a disclosure that qualified as a protected disclosure.

17. In my determination therefore, there can be no reasonable prospect of the Claimant's claim succeeding at a final hearing in relation to a protected disclosure and alleged detriment of dismissal.

18. Accordingly, the claim for automatic unfair dismissal under s.130A of the 1996 must fail, as indeed, must the detriment claim under s.47B of the 1996 Act.

Costs

19. I was invited to make a costs order against the Claimant by reason of his unreasonable behaviour in the way in which he had engaged with the Respondent post dismissal and in the course of these proceedings.

20. The Respondent drew my attention to the fact that Employment Judge Broughton made clear to the Claimant at the hearing on 14 July 2021 that it was inappropriate to make serious allegations of impropriety against solicitors without a clear and proper basis for doing so. In this case, the Claimant has made numerous attacks on the professional integrity of Mr Ed Bowyer, a partner of the Respondent, by referring to him in terms, following the warning of Employment Judge Broughton, as follows: "Mr dear deceptive friend" (email of 11 August2021 to Mr Bowyer), "your greediness and lies have made me a bit tired", "My dear deceitful Ed" (email of 19 August 2021), "My dear dodgy friend Ed" (email of 18 August 2021 and there are many more such examples.

21. The Claimant made attacks upon the Respondent itself too, referring to it as "liars and scammers".

22. The material before the Tribunal was voluminous, the Claimant had submitted substantial numbers of documents, which he clearly expected the Tribunal to read, so much being clear from questions put by me, that I was told the answers were within the paper supplied and that they needed to be read. Several hours had been spent by me trying to review the Claimant's materials prior to the hearing, most of which, it transpired, was irrelevant, a point the Claimant made when it can be considering whether a costs order should be made against him and if so, in what sum. The Claimant's acceptance of this principally arose when seeking to argue that any costs order should be minimal, because most of the material before the Tribunal was irrelevant.

23. The clamant had additionally copied in all of (or certainly a significant number of) partners at the respondent into communications, he suggested, for the purpose of seeking to prevent Mr Bowyers from lying. This is not an appropriate way for the claimant to be have behaved.

24. I am conscious that the Claimant has some legal qualifications, albeit, not in the jurisdiction of England and Wales, and I treat him as a litigant in person, with a reasonable margin of appreciation for compliance with the Rules. However, the Claimant must have appreciated that the substantial volume of documentation in these proceedings, with his own statement of case being c. 78 pages, the majority of which was his analysis completed 2 ½ months after his dismissal was entirely unnecessary and it was unreasonable to include it. To the extent there were material points to be identified within it, they could have been extracted and referred to.

25. Ultimately, I am satisfied that the claimant has behaved unreasonably in nature of his communications with the respondent, the unnecessary amount of material put before the tribunal and of course, the pursuit of a hopeless claim which would have been apparent after the hearing with Employment Judge Broughton on 14 July 2021. As such, and that such opens the door to the Tribunal making a costs award against him. I consider in the circumstances of this case and the exercise of my discretion, it would be appropriate to make a costs award against the claimant.

26. The respondent sought the sum of £20,000 be ordered against the claimant. That would represent the bulk of the costs incurred in these proceedings, which were said to be £21,120 inclusive of VAT. Ms Duane agreed with my suggestion that the respondent had not provided a service and thus, VAT was unlikely to be chargeable on their costs, what was really being asked for was compensation for their time. There is no doubt that solicitors acting for themselves are entitled to recover costs orders in the courts in appropriate cases and I see no reason why costs should not be recovered in the same way in the Employment Tribunal.

27. As to the amount, removing the VAT, the sum sound realistically was £17,600.

28. I am prepared to give the claimant the benefit of the doubt that he had a genuine claim to start with, although as I say, this realisation must have dissipated after the 14 July 2021 hearing, but yet, the claim was pursued to this strike out hearing and continued his barrage of unreasonable correspondence with Mr Bowyers. Although it is open to tribunal to award all costs from all started in the proceedings, I consider this inappropriate in light of the observations made, and will therefore limit the costs to those costs that are likely to be incurred post 14 July 2021. In that respect, the respondent was unable to provide a useful breakdown as to what those might be, what time was spent or the hourly rates that were applied in seeking the sums of costs it did. Accordingly, and with the desire to achieve a degree of rough justice in respect of costs, the sum of £4,000 costs is a reasonable sum to award to the respondent in respect of the works carried out post 14 July 2021 and this is the sum I award.

Employment Judge Kelly
13 April 2023