Neutral Citation Number: [2024] EAT 61

Case No: EA-2022-000325-BA

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 28 March 2024

Before:

JUDGE KEITH

Between:

MS DONNA EDINBORO	**Appellant**
- and -	
JAMMA UMOJA (RESIDENTIAL SERVICES) LTD	**Respondent**

- -
- -

Mr S Liberadzki, Counsel for the **Appellant**
Mr M Jackson, Counsel (instructed by **Markel Law LLP**) for the **Respondent**

Hearing date: 28 March 2024

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JUDGMENT

- -

SUMMARY

PRACTICE AND PROCEDURE - Striking out and procedural irregularity

1. The Employment Judge erred in dismissing the Appellant's claims of detriment contrary to **section 47B** of the **Employment Rights Act 1996** and breaches of her contract of employment. The notice of the preliminary hearing at which the EJ considered the Respondent's strikeout application, had indicated that the EJ would decide whether the Appellant's claim of unfair dismissal should be struck out and whether the Appellant had brought any other claims. The notice made no reference to a potential strike out of the other claims. The EJ failed to consider whether the Appellant, a litigant in person, had a reasonable opportunity to make representations at the hearing, when she had not appreciated that her claims other than for unfair dismissal might be struck out. The breach of contract claims were not, in any event, bound to fail.
2. The EJ also failed to direct herself to, and failed to apply, **Rule 37** of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** when considering the Respondent's strike-out application. The EJ failed to take the Appellant's claims at their highest and instead made findings on, and determined the substantive claims, instead of considering whether the claims had no reasonable prospect of success. In doing so, the EJ deprived the Appellant of the opportunity of preparing for a substantive hearing, at which the EJ would make findings of fact.
3. Finally, the EJ erred in considering whether the information disclosed by he Appellant tended to show that a colleague was likely to fail to comply with a legal obligation to which she was subject, rather than whether the Appellant's

belief that the information tended to show a likely failure was reasonable, for the purposes of **Section 43B ERA.**

4. The EJ's errors were material, such that her decision was not safe and was set aside. A decision on the Respondent's strike-out application was remitted back to be considered afresh by a different Employment Judge, with no preserved findings.

5. Permission to appeal to the Court of Appeal was refused in respect of the Respondent's application that this Tribunal had arguably erred in concluding that the EJ's error in dismissing the breach of contract claims was immaterial. The Respondent argued that on the evidence, the only finding open to a Judge would be to dismiss the claims of breach of contract, even if the EJ had procedurally erred by failing to give the Appellant sufficient notice of strike out and had failed to apply **Rule 37**. Contrary to that assertion, and without making any findings, there was more than one conclusion open to the EJ on the case which the EJ had treated as pleaded. In particular, the evidence at least arguably supported allegations of a contractual right to a grievance and a disciplinary hearing, and the head of loss was at least arguably not excluded under **Article 3** of the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**. There is therefore no arguable error in this Tribunal's decision.

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JUDGE KEITH:

Introduction

1. These written reasons reflect the full oral decision which I gave to the parties at the end of the hearing.

2. The Appellant appeals against the decision of Employment Judge Wright, (the 'EJ') sent to the parties on 1 March 2022, in which she dismissed the Appellant's claims in their entirety. The decision states that:

> "The claimant does not have a claim for breach of contract and no protected disclosure was made. The claims are dismissed."

Background

3. The Appellant presented a claim form which was received on 16 December 2020 (page 30 of the Bundle). The Appellant indicated that she had only been employed from 6 July to 1 November 2020 but nevertheless claimed unfair dismissal. She also claimed discrimination. The precise nature of her claims was unclear but appeared to include a letter by the Appellant to the Respondent, her former employer, its response and a diary compiled by the Appellant about events of which she complained.

4. The Respondent entered a response form on 16 March 2021 (p.49) in which it accepted that it had employed and dismissed the Appellant, but queried the basis of any claim for automatically unfair dismissal and asked the Appellant to clarify what, if any, claim she was seeking to bring.

5. There then followed correspondence between the parties in which the Respondent, which was professionally advised, appeared to be seeking to clarify matters by drafting a list of issues. The Appellant referred in a letter

dated 7 December 2021 (p.63) to claims of automatically unfair dismissal; breach of contract by the Respondent in failing to apply its grievance policy and in dismissing her without a hearing; and an apparent detriment on the basis that, having made a protected disclosure, the Respondent refused to arrange a meeting with the Appellant to address her grievance.

6. In reply, on 9 December 2021 (p. 65), the Respondent argued that the Appellant's claims had little or no reasonable prospect of success and that this should be considered at a primary hearing, which had previously been listed, namely, to consider:

> "whether the Appellant's claim of unfair dismissal should be struck out, whether the Appellant had brought any other claims and the name of the Respondent." (p.97).

7. Prior to the primary hearing, the Respondent prepared submissions which included a response to the claim of automatically unfair dismissal contrary to **Section 103A** of the **Employment Rights Act 1996 ('ERA')** and a claim for breach of contract. The Appellant prepared a statement (p. 75) with a copy of her contract of employment and excerpts from the Respondent's employee handbook (p.81).

The ET's decision

8. In her decision, the EJ made no reference to **Rule 37** of **the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.** She referred to the purpose of the preliminary hearing as being to consider whether the Appellant's claim of unfair dismissal should be struck out and whether the Appellant had brought any other claims. Despite concluding in the judgment that the Appellant did not have claims for breach of contract, at paragraph [4]

of the reasons, the EJ stated that the Appellant had claimed for breach of contract and had identified, as specific breaches, a failure to address her grievance and that she was dismissed without a hearing. The EJ went on to make findings that the Respondent's handbook was not contractual, and its policies were not binding. The EJ elaborated on this conclusion at para [8], stating that there was no contractual right to have a hearing before being dismissed. The EJ went on to consider whether the Appellant had made a protected disclosure at paras [15] to [18], concluding that there was no general legal obligation to tell the truth. Even if a colleague had lied, it did not automatically mean that colleague would not carry out their professional duties in compliance with their legal obligations. I observe that it was implicit that the EJ was considering **Section 43(B)(1)(b) ERA**. The EJ went on to make specific findings at para [19] that there was no disclosure of information that tended to show that there was failure or likely to to be a failure in respect of a legal obligation. The EJ concluded that there was speculation by the Appellant, but nothing which tended to show the colleague was likely to fail to comply with a legal obligation. The EJ concluded that the matter was no more than a private disagreement between two colleagues. It was, at most, a 'spat,' which did not come within the remit of **Section 43B ERA**.

The Appellant's grounds of appeal

9. The Appellant raised four grounds of appeal which I do no more than summarise, which were granted permission at a preliminary hearing in this Tribunal by Judge Barry Clarke in a decision dated 3 May 2023 (p.26). The

Appellant has since sought to amend these grounds in a late application, which I address later. The four grounds are as follows:

10. **Ground (1)** – the EJ erred by holding that the Respondent's handbook was not contractual and its policies were not contractually binding, when they had been expressly stated as such and so had erred in striking out the Appellant's breach of contract claims.

11. **Ground (2)** – the EJ erred by dismissing the Appellant's detriment claims in circumstances where the notice of hearing had only indicated that the EJ would consider dismissal of the unfair dismissal claim as opposed to any other claims so that the Appellant had no warning that she would be required to respond to a wider strike-out application.

12. **Ground (3)** – the EJ erred in dismissing the protected disclosure claims because she failed to consider, let alone apply, the test under **Rule 37** of the **ET Rules.**

13. **Ground (4)** – in considering the detriment claims, the EJ misapplied **Cox v Adecco Group** [2021] ICR 1307, in failing to take the Appellant's case its highest and purporting to resolve factual issues. Alternatively she had misapplied the test in **Kilraine v Wandsworth LBC** [2018] ICR 1850 by imposing a test of whether the Appellant's disclosure amounted to disclosure of information tending to show a failure, instead of whether the Appellant had a reasonable belief that the information, which had sufficient factual content, tended to show one of the matters listed in **section 43B ERA**.

The Appellant's amendment application

14. On 14 March 2024, following exchange of skeleton arguments in preparation for the hearing before me, the Appellant applied for permission to add to her grounds, namely the EJ had erred in dismissing the Appellant's claims for breach of contract, for the same reasons that she had erred in dismissing the detriment claims, namely because the EJ had failed to apply **Rule 37** and had misapplied **Cox v Adecco Group**.

The Parties' positions

The Appellant

15. In respect of the amendment application, the Appellant argues that the matters relied on in relation to the additional grounds are the same as those within the grounds relating to the detriment claim and the Respondent had already anticipated this within its Answer. The Appellant also argues that the grounds have strong merit.

Ground (1)

16. In respect of the original ground (1), the Appellant argued that the EJ had ignored the evidence before her in the Respondent's handbook, which was stated as forming part of the Appellant's contract of employment (p. 78).

Ground (2)

17. To deprive the Appellant of the opportunity to prepare to make representations, pursuant to **Rule 37** was procedurally unfair in the extreme (**Hassan v Tesco Stores**, unreported, (UKEAT/0098/16/BA). The fact that the Respondent had applied for a strike out of the wider claims did not cure the unfairness where the ET had already set down the parameters for the preliminary hearing.

Grounds (3) and (4)

18. The Appellant cited **Ezsias v North Glamorgan NHS Trust** [2007] ICR 1126 and **Cox v Adecco,** as authority for the propositions that ETs had to be particularly cautious about striking out whistleblowing claims, which were fact sensitive; and any substantive disputes of fact, except in the most obvious circumstances, should be resolved at a full trial. The EJ had failed to refer to **Rule 37** at all. Instead of considering whether the Appellant's claim of unfair dismissal had no or little reasonable prospect of success, the EJ had made findings and dismissed the claims on the basis of those findings. Those findings ought only to have been made at a full trial.

19. In making findings, in any event, the EJ had erred in considering whether a particular disclosure tended to show a matter, rather than whether the Appellant reasonably believed that the information tended to show that it did.

The Respondent's position

20. I have considered the Respondent's Answer and skeleton argument as well as the submissions made to me. First, in respect of the amendment application,

the Respondent notes that no explanation is provided for the lateness of the application.

21. The Respondent seeks to contextualise the primary hearing where the Respondent had sought to clarify what the claims were, the result of which it remained unclear whether there was a separate detriment claim (p.19).

Ground (1)

22. In relation to ground (1), even if the EJ had erred in concluding that terms relating to a grievance and a pre-dismissal hearing were contractual, there was no breach and in any event there was no loss. To the extent that the breach of contract claim relied on related to dismissal, this fell within the so-called 'Johnson' exclusion zone (see **Johnson v Unisys Ltd** [2003] 1 AC 518).

Grounds (2) and (3)

23. In relation to grounds (2) and (3), the EJ did not purport to dismiss a detriment claim but simply decided whether there was a reasonable prospect of proving a protected disclosure. In terms of what the claimed detriments were, the EJ was entitled to rely on the pleadings (see **Chandhok v Tirkey** [2015] ICR 527). Moreover, the claims based on protected disclosures were bound to fail as the Appellant had never pleaded any public interest in her disclosure, which was entirely personal.

Ground (4)

24. In relation to ground (4), the EJ had taken the Appellant's claim at its highest. The EJ did not ask herself whether the Appellant had proven her case, but

whether the Appellant's claim of what was said amounted to a protected disclosure. As the EJ concluded that it did not, the EJ was entitled to conclude that the claim could not hope to succeed.

The applicable rules

25. **Rule 37** of the **ET Rules** states:

> "(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 prospects 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;
>
> (c) for non-compliance with any of these Rules …
>
> (d) that it has not been actively pursued;
>
> (e) 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).
>
> (2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.
>
> (3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above."

Conclusions

26. I do not recite all of the parties' written and oral submissions in the hearing before me, except to explain why I have reached my decision. I take each ground in turn.

27. I first granted the application to extend time for the Appellant to amend the grounds and I granted permission. The application was made late, and while

the explanation for the delay is honest, as Mr Jackson accepts, the lack of legal representation for large periods of the litigation does not wholly answer the question of why there was such a delay. Nevertheless, the additional grounds, while raising new issues, substantially replicate grounds (3) and (4), but relate to the breach of contract claims rather than the detriment claims. The Respondent was put to no practical detriment in responding to these grounds and had already anticipated and responded to them in its pleadings. The Respondent had anticipated this in its Answer. While I do not condone the lateness of the application, it put the Respondent to no practical prejudice.

Ground (1)

28. The consequence of the amendments to this ground is that the Appellant says that the EJ ought never to have made findings on, and struck out her breach of contract claim, but even had she been so entitled, the findings were essentially perverse. Mr Jackson accepted that the EJ did go beyond a **Rule 37** consideration and make substantive findings, as seen as paras [5] and [6] of the judgment. I conclude the EJ erred procedurally in striking out the breach of contract claims where the notice of hearing made no reference to that as a possibility. I accept that the Appellant, as a litigant in person, could not have anticipated that if she pursued her breach of contract claims, the EJ was considering whether to strike out her claims. She was not prepared to deal with the strike out of those claims and her lack of preparation was reasonable. In any event, the judgment is inconsistent, saying on the one hand in the order that the Appellant does not have a claim for breach of contract, while on the

other, referring at para [4] of the reasons to the Appellant claiming breach of contract.

29. Mr Jackson's alternative submission is that the breach of contract claims were bound to fail for a number of reasons. First, the EJ lacked jurisdiction to hear them, (see **Article 3** of the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994**) on the basis that no damages were identified and the Appellant appeared to be bringing a personal injury claim. Second, the evidence showed that no contractual term had been breached and any EJ would have reached the same conclusion. Finally, the claims lacked particularity.

30. In conclusion, while I do not go so far as to make any finding as to whether the original claim form included a breach of contract claim, such a claim was clearly referred to in subsequent correspondence from the Appellant, in answer to requests for clarification (see p. 61 and 63) and the EJ clearly treated the claims as including allegations of breaches of contract, in her reasons. I also do not accept that there is only one answer, on the evidence before the EJ, namely that there was no breach of contract. The evidence in relation to the grievance and disciplinary processes at least arguably implies a right to a hearing: see p. 90: "you will then be invited to a meeting [in response to a grievance]; and p. 92, paras 4(c) to (e) all arguably assume a disciplinary hearing.

31. Moreover, it is at least arguable that the EJ had jurisdiction, as the claim might arguably be read as not being a personal injury claim. I reiterate that I am making no findings, or binding a future EJ. Rather, such a claim was not

bound to fail. The EJ considered the Appellant to have presented breach of contract claims and before striking such claims out, the EJ needed to ensure that the Appellant had sufficient notice of the risk of strike out and to have applied the correct test under **Rule 37**.

32. Ground (1) discloses a material error of law by the EJ in her decision on the breach of contract claims.

Ground (2)

33. I turn to the question of whether the EJ erred in dismissing the claims of pre-dismissal detriments, as opposed to the claim of unfair dismissal, because the Appellant had not been given a reasonable opportunity to make representations, because the notice of hearing had given her no warning that the detriment claims might be dismissed. I accept Mr Jackson's submission that the EJ did not err in considering whether she could strike out a claim of unfair dismissal. This is because the notice of hearing can reasonably be understood as referring to the Appellant's claim of automatically unfair dismissal, because that was the only basis on which the Appellant could make a claim, given the limited length of her continuous service and because **Section 98 ERA** does not distinguish between so-called 'automatic' and 'ordinary' unfair dismissal. The EJ's consideration of whether the Appellant's case that she had made a protected disclosure had reasonable prospects (see **Rule 37**) would have been permissible, had she done so, so that the absence of notice to the Appellant that her claims of pre-dismissal detriment were at risk of being dismissed, and so the Appellant was deprived of the reasonably opportunity of making representations, might have been immaterial (ground

(2)). However, the EJ did not consider whether the claims which included having made a protected disclosure had reasonable prospects (ground (3)). The error in ground (3), which I come on to discuss, therefore means that the error on ground (2) is material.

Ground (3)

34. The EJ went beyond a consideration of reasonable prospects, and particularly in paras [18] to [21] and made findings on the substance of the claims. Taking the Appellant's claim at its highest, at para [14], the EJ recorded that the Appellant claimed to have told the Respondent:

> "I asked if in his investigation into the incident whether he checked CCTV to see if I had entered the room. He said he had not as there was no reason to do so due to the fact [a colleague] had apologised to him, admitting that I did not enter the room, and that I had only put my head around the door! I said that in a professional and moral way that was a concern to me; as vulnerable residents rely on staff giving true representation in their cases, and [the colleague] had not given a true representation of what had occurred in my involvement in a residents' issue."

35. At para [18, the EJ concluded:

> "There is no general legal obligation to tell the truth. Even if (no finding is made [the colleague] did mislead the respondent over the incident in question) the event was not correctly recounted, that does not automatically mean that CN would not carry out her professional obligations in a way which breaches a legal obligation. Colleagues are entitled to disagree or fall-out, without it meaning that they would not carry out their professional and even regulated duties conscientiously…"

36. At para [19], the EJ added:

> "The Tribunal finds that there was no disclosure of information which 'tended to show' there was a breach or a failing in respect of a legal obligation."

37. At para [21], the EJ stated that:

> "as it was not a qualifying disclosure the claimant cannot rely on any claimed detriments (the probation review meeting and dismissal) which she says flowed from it."

38. The EJ's analysis went beyond taking the Appellant's case at its highest, in assuming that the Appellant's recollection of events was correct, and considering whether there were reasonable prospects of success in the claim that the Appellant had a reasonable belief that the information she had disclosed tended to show a likely failure. Instead, the EJ decided whether the disclosed information tended to show a likely failure. Even if the EJ had not misapplied the law in her analysis of the substantive claim, that the analysis went beyond one of reasonable prospects.

39. With this and the other claims, the EJ erred by failing to consider and explain clearly what claims were included in the pleadings; what claims were not, but might be the subject of an amendment application; and for those claims which were "in", by failing to consider whether they had reasonable prospects, of which the Appellant had proper warning that strike-out was being considered. That risked the confusion (which led in part to Mr Jackson's submissions) on whether parts of the claims had been taken at their highest or were never included in the pleadings. Ground (3) also discloses a material error.

Ground (4)

40. I turn to the final ground and whether the EJ erred in failing to consider whether the Appellant reasonably believed that information tended to show a relevant failure, as opposed to whether it did. As I have already said in my conclusion on ground (3), I accept Mr Liberadzki's submission that the EJ erred in failing to analyse the Appellant's reasonable belief, when referring to

"speculation" from the Appellant, which was no more than a "disagreement" (para [19]), a "spat" (para [20]) or a "vague allegation", without considering whether the Appellant's belief was reasonable that the information she had disclosed that a colleague, working in a professional environment which was highly regulated, might have intentionally lied, tended to show that that colleague was likely to fail to comply with legal obligations to which they were subject. I make no findings on the issue, but I am satisfied that the EJ did not undertake that analysis and instead considered whether the disclosure tended to show a failure (para. [19]).

Disposal of the appeal

41. The Appellant urged me to remake the decision by refusing to strike out her unfair dismissal claim. Both representatives agreed that if I were to remit the decision back to the ET it should not be before EJ Wright, given the passage of time and that she had made a clear decision dismissing the claims and so had reached a conclusive view, which would risk a "second bite" ie. because she had made up her mind, the EJ would find it difficult, if not impossible to change that view (see **Sinclair Roche & Temperley v Heard** [2004] IRLR 763). I do not accept that it is appropriate that I remake the decision, on the basis that there was only one answer to the questions of what the claims where before the EJ and whether the Appellant's claims which were before the EJ had reasonable prospects of success. I indicated to the parties that the issue of what claims the Appellant had actually presented to the ET remained a matter for the EJ to whom the remaking is remitted.

42. I regard it as appropriate that the appeal is remitted to an Employment Judge other than EJ Wright. No findings are preserved.

Application for permission to appeal to the Court of Appeal

43. Following my decision, Mr Jackson applied for permission to appeal to the Court of Appeal on one narrow issue. I refused permission to appeal to the Court of Appeal on that issue, namely that I had arguably erred in concluding that the EJ's error in dismissing the breach of contract claims was material. The Respondent argued that on the evidence, the only finding open to a Judge would be to dismiss the claims of breach of contract, even if the EJ had procedurally erred by failing to give the Appellant sufficient notice of strike out and had failed to apply **Rule 37**. Contrary to that assertion, and without making any findings, there was more than one conclusion open to the EJ on the case which the EJ had treated as pleaded. In particular, the evidence at least arguably supported allegations of a contractual right to a grievance and a disciplinary hearing, and the head of loss was at least arguably not excluded under Article 3 of the Employment Tribunals Extension of Jurisdiction Order 1994. There is therefore no arguable error in this Tribunal's reasons.