EMPLOYMENT TRIBUNALS

Claimant: Mr Daniel Rogerson

Respondent: Erhard – Jensen Ontological / Phenomenological Initiative Limited (1)
Werner Erhard (2)

RECORD OF A PRELIMINARY HEARING

Heard at: by CVP at Croydon **On:** 18 April 2023

Before: Employment Judge Sekhon

Appearances
For the claimant: In person
For the respondent: Mr Edward Kemp, Counsel

RESERVED JUDGMENT

1. **The Claimant's complaints against the second respondent are dismissed as the Tribunal has no jurisdiction to hear them.**
2. **Allegations 16(e),16(f) and 22 are struck out from the Particulars of Claim as they refer to evidence that is inadmissible and cannot be relied on in the Employment Tribunal.**

REASONS

Introduction

1. The matter was listed before me as a public preliminary hearing to consider further to the respondents' application dated 19 January 2023 whether to strike out parts of the claimant's claims. The respondents clarified at the outset of the hearing that having received the claimant's skeleton argument that they were now pursing only two points at the hearing: -

(a) That the claimant's claims against the second respondent, namely paragraphs 16 (a) and 16 (b) of the Particulars of Claim should be struck out on the basis that the allegations had no reasonable prospect of success as they were out of time given that they are alleged to have occurred in March and July 2020, they do not form part of a series of similar acts with paragraph 16 (g) which is alleged to have been carried out by the first respondent, and it was reasonably practicable for the claimant to submit these claims in time. ("Issue 1")

(b) Paragraphs 16 (e), 16 (f) and 22 of the Particulars of Claim should be struck out as the paragraphs refer to inadmissible material on which the claimant cannot rely. ("Issue 2")

2. The respondents' application of 19 January 2023 set out in the alternative to strike out that that the Tribunal should consider whether to order the claimant to pay a deposit as a condition of proceeding with the allegation/s on the basis that they had little reasonable prospective success pursuant to Rule 39 of the Employment Tribunal Rules. However Mr Kemp did not seek this from the Tribunal and made no representations about this at the hearing.

Background

3. The claimant brings claims against both respondents by way of a claim form dated 15 November 2021 for suffering post-employment detriment after making protected disclosures under section 47B of the Employment Rights Act 1996.

4. Early conciliation commenced on 14 October 2021. ACAS issued the claimant with an ACAS certificate on 15 October 2021

5. An ET3 was filed on with the Tribunal on 6 January 2022, denying the allegations and stating that several claims are out of time. A case management hearing took place on 26 January 2023 before Employment Judge Martin and a List of Issues has been prepared by the parties and was provided to me part way through the hearing at my request. A final merits hearing has been listed to take place on 3 July 2023 for 5 days.

The Hearing

6. The respondent provided a bundle totalling 70 pages in advance of the hearing which had not been agreed by the claimant together with a skeleton argument, legal authorities, and witness statements from Barbara Stevenson (who resides in California, USA) and Fong Zhiwei Daryl (of Shook Lin & Bok LLP in Singapore). The claimant did not serve a witness statement but provided a skeleton argument prior to the hearing. He also stated that he wished to rely on a transcript of the first and second day of an arbitration hearing that the first respondent brought against him in Singapore.

7. The respondent confirmed that they had written to the Tribunal on 3 March, 17 March, 24 March and 5 April 2023 in line with the Presidential Guidance on the Taking of Evidence by Video or Telephone from Persons Located Abroad but they had not received a response from the Tribunal confirming that their witnesses could give evidence from abroad.

8. The respondent's clarified that for the purposes of today's hearing that they only wished Ms Barbara Stevenson to provide evidence as set out in paragraph 29 of her witness statement that in her role as General Counsel for the respondents in the Dr Grisley Proceedings that they have not consented to waiving privilege in respect of without prejudice communications. The claimant accepted that this was correct and that he did not have any questions for Ms Stevenson on this point. I therefore decided that no witness evidence was required at the hearing and that any issues relating to Ms Stevenson giving evidence from abroad were not relevant for the current hearing.

9. The claimant confirmed that on the basis that the respondent did not intend to proceed with all the issues they had raised in their application dated 19 January 2023 that the arbitration documents were no longer relevant for the current hearing but that they would be relevant

for the final hearing. Due to the short timescale until the final hearing, I listed a closed preliminary hearing to hear the claimant's application on 9 June 2023 and provided directions in advance of this hearing in a separate order.

10. The claimant and the Tribunal did not receive the legal authority of Sheeran -v- Chokri sent by the respondent until shortly before the hearing commenced. After Mr Kemp had made his submissions explaining the relevance of the case and the relevant paragraphs on which the respondents intended to rely, I provided the claimant with time to review the Sheeran Case and respond on the points raised.

11. The claimant attended without representation and Mr Kemp, Counsel, attended upon behalf of the respondents.

The Law

12. The legislation is as follows:

Strike Out

37(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 prospect 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 or with an order of the Tribunal.
(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.

13. Rule 37 enables a Tribunal to strike out a claim that has "no reasonable prospect of success". This power has rightly been described as a draconian one, and case law cautions Employment Tribunals against striking out a claim in all but the clearest cases, particularly where that claim involves or might involve allegations of discrimination and cases in which a strike out can properly succeed before the full facts have been found are rare. (**Abertawe Bro Morgannwg University Health Board v Ferguson 2013 ICR 1108, EAT** and **Anyanwu and anor v South Bank Student Union and anor 2001 ICR 391, HL**)

14. Tribunals should be slow to strike out a claim brought by a litigant in person on the basis that it has no reasonable prospect of success. In **Mbuisa v Cygnet Healthcare Ltd EAT 0119/18** the EAT commented that strike-out is a "draconian step that should be taken only in exceptional cases". The EAT said in that case that particular caution should be exercised if a case is badly pleaded by a litigant in person, especially one whose first language is not

English, or who does not come from a background such that they are familiar with articulating complex arguments in written form.

15. In **Ezsias v North Glamorgan NHS Trust 2007 ICR 1126, CA**, the Court of Appeal held that the same or a similar approach should be taken in protected disclosure cases, which have much in common with discrimination cases, and stressed that it will only be in an exceptional case that an application will be struck out as having no reasonable prospect of success when the central facts are in dispute.

16. When determining whether a discrimination or whistleblowing claim has no reasonable prospect of success, the Tribunal must take the claimant's case "at its highest" (**Silape v Cambridge University Hospitals NHS Foundation Trust EAT 0285/16**).

17. When dealing with strike out applications involving litigants in person, the onus is on the judge to consider the pleadings and other core documents that explain the case. The Tribunal must take reasonable steps to identify the claims and issues; it is not possible to decide whether a claim has reasonable prospects of success if the Tribunal does not know what the claim is (**Cox v Adecco and others EAT/0339/19**).

18. Mr Kemp referred the Tribunal to the case of **HHJ Kalyany Kaul KC v Ministry of Justice and others [2023] EAT 41 per Swift J at [22] [AB/99])** to support that the need for caution when considering a strike-out application does not prohibit realistic assessment where the circumstances of the case permit and **Ahir v. British Airways Plc [2017] EWCA Civ 1392, CA,** which I have considered.

19. The Court of Appeal's decision in **Aziz v FDA [2010] EWCA Civ 304** dealt with the procedural point of how the Employment Tribunal should approach the question of whether there is a continuing act at a preliminary hearing. The Court approved the approach laid down in **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548** that the test to be applied at the pre-hearing was whether the claimant had established a prima facie case, or, to put it another way, 'the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs'.

20. It is well established that ignorance or mistaken belief as to rights or time limit will not render it "not reasonably practicable" to bring a claim in time unless that ignorance or mistaken belief is itself reasonable. It will not be reasonable if it arises from the fault of the employee in not making inquiries that he or she should have made, or from the fault of the employee's solicitors or other professional advisers in not giving all the information which they reasonably should have done **(Wall's Meat Co Ltd v Khan 1979 ICR 52).**

21. Mr Kemp referred me to paragraphs 30, 31 and 32 of **Sheeran -v- Chokri [2022] EWHC 187 (Ch)** which sets out the principles relating to without prejudice material in the judgment of Newey J in **EMW Law LLP v Halborg [2017] EWHC 1014 (Ch).** I have considered this when making my decision set out below. I note paragraph 32 states,

"It is worthy of note that the policy to which I referred at point (2) above would prima facie be just as much at risk of being frustrated if without prejudice material could be relied upon by a third party in different legal proceedings, as it would if one of the parties to the negotiations were able so to rely upon it."

Discussion

Issue 2

22. Paragraphs 16 (e) and 16 (f) of the Particulars of claim (page 25 of the bundle) refers to the contents of without prejudice letters that Dr Grisley received on 25 June 2021 from the law firm representing the respondents in that case and to a without prejudice letter from Mr Giles to Dr Grisley on 16 July 2021. The claimant was acting as Dr Grisley's representative in her Employment Tribunal case. I find that the claimant had sight of these letters as a result of his position as Dr Grisley's representative. I have not had sight of these letters but the claimant states that the without prejudice letters set out that settlement with Dr Grisley was conditional upon the claimant agreeing *"to confidentiality and non-disparagement provisions".*

23. Paragraph 22 of the of the Particulars of claim (page 27 of the bundle) sets out that,

    "It is upsetting to the Claimant that the Second Respondent has threatened Dr Grisley and put enormous pressure on her as a way to retaliate against the Claimant. It was stressful for the Claimant to believe that Dr Grisley may not get the settlement she deserves without the Claimant signing an agreement with the Second Respondent (who is not a party to Dr Grisley's employment claim) which agreement would attempt to prevent the Claimant from speaking out about the Second Respondent's criminal and unethical acts. It felt to the Claimant like he was having to choose between helping a friend or allowing these acts to continue."

24. I find that paragraph 22 is referring to the without prejudice letters dated 25 June 2021 and 16 July 2021 referred to by the claimant at paragraphs 16 (e) and 16 (f) of the Particulars of Claim.

25. The claimant conceded that the respondents in Dr Grisley's case had not waived privilege for the without prejudice letters dated 25 June 2021 and 16 July 2021 (as set out in paragraph 29 of Ms Barbara Stevenson's statement). I find that therefore that this correspondence remains without prejudice as privilege cannot be waived unilaterally and requires the consent of both parties, which is lacking here.

26. Mr Kemp submitted that the respondent relies on the principles set out by Newey J at paragraphs 30,31 and 32 of the Sheeran -v- Chokri case. The claimant, having considered the case, submitted that the respondents in Dr Grisley's case were not genuinely trying to settle the case by suggesting settlement had to include confidentiality and non-disparagement provisions by the claimant. The real tactics behind the offers in the without prejudice correspondence was to essentially "silence the claimant".

27. The claimant referred to what he had stated at paragraph 22 of the Particulars of Claim (set out above) and that as result there was a "special reason" in this case not to follow the without prejudice rule as referred to by Robert Walker LJ in the Unilever case and set out in paragraph 30, subsection 36 of the Sheeran case. The claimant also submitted that this case involves different subject matter to Dr Grisley's case which involved a breach of contract whereas this case relates to whistleblowing.

28. Having considered all the evidence before me and having considered the legal principles set out in Sheeran -v- Chokri, I find that paragraph 16 (e), 16 (f) and 22 refer to without prejudice letters which are inadmissible and therefore cannot be used as evidence for the purposes of these Employment Tribunal proceedings.

29. I am not persuaded by the claimant's submissions. I do not find that this case falls within one of the established exceptions of the without prejudice rule or that it is just and equitable

to create a further exception or there is a special reason as the claimant submits to circumvent the without prejudice rule. I am persuaded by paragraph 32 of the judgment in Sheeran -v- Chokri (set out above) and find this to be relevant to this case. The fact that this case relates to different subject matter to Dr Grisley's case is therefore not relevant.

30. I find to allow the without prejudice letters on 25 June 2021 and 6 July 2021 in evidence in this case would be wholly inconsistent with the rationale for the without prejudice rule which is to encourage litigants to settle rather than litigate and that the policy would be negated if statements made in the course of settlement negotiations could later be relied upon in *any* legal proceedings.

31. Accordingly paragraphs 16 (e), 16 (f), and 22 are struck out and cannot be referred to in the Particulars of Claim as they rely on evidence that is inadmissible.

Issue 1

32. It is not in dispute that the claimant's allegations that any allegations of detriment prior to 15 July 2021 are prima facie out of time since the claimant sought early conciliation on 14 October 2021.

33. The claimant also accepted that allegation 16 (g) which related to a detriment he suffered on 21 July 2021 related solely to the first respondent and not the second respondent. The respondent accepts that this allegation has been bought in time and therefore that it is possible that any other allegations against the first respondent could have been bought in time as the Tribunal could find that there were continuing acts up until 21 July 2021. The respondent therefore does not seek to strike out claims against the first respondent at the preliminary hearing.

34. However it is the respondents' case that the case against the second respondent is clearly out of time. The respondent relies on allegations against the second respondent of 16 (a) which allegedly took place in or around March 2020 and on allegation 16 (b) which allegedly took place in July 2020 as both being significantly out of time by 12-15 months. This is not in dispute.

35. However upon discussion with the claimant, he informed me that allegations 16 (c) and 16 (d) (pages 24 and 25 of the bundle) also relate to the second respondent. The respondents' disputes this is correct. The claimant submitted that allegation 16 (c) specifically refers that it could have been the first or the second respondent who disclosed details of his personal circumstances and allegation 16 (d) refers to the second respondent lying to Landmark Worldwide about his behaviour.

36. This is a fact sensitive issue. Without hearing all the evidence, and as I must take the claimant's case at its highest, I accept this may be the case. Allegation 16 (c) relates to events on 14 July 2020 and has been bought approximately 12 months out of time. Allegation 16 (d) relates to events on 14 January 2021 and approximately 6 months out of time.

37. As set out above, I have struck out allegations 16 (e) and 16 (f) and they are no longer relevant to this discussion. Therefore even if the conduct by the second respondent was an ongoing state of affairs, the last allegation relating to the second respondent's conduct is on 14 January 2021 and is still 6 months out of time.

38. The question is therefore whether it was reasonably practicable for the claimant to bring his claim in time. The respondent states that the claimant's skeleton arguments did not explain

the reasons for his delay and that whilst the claimant is a litigant in person, he represented Dr Grisley in her Employment Tribunal proceedings, and he cannot claim that he did not understand the legal position.

39. The claimant submitted that the reason he did not bring his claims earlier was because he did not know that he could bring a claim for whistleblowing in the UK. The claimant explained that when the first respondent bought arbitration proceedings against him, he sought advice and support from a whistleblowing charity who told him about his rights. The Particulars of Claim set out at paragraph 34 (d) that,

    "It was not until June 2021 that the Claimant got confirmation that the First and Second Respondents could be considered his employers under UK law (after decisions made in the case of the Claimant's former colleague Dr Grisley, case no. 2305699/2019, where the claimant in that case, Dr Grisley, was considered an employee under a similar contract to the Claimant's). It was at this point that the Claimant understood he may have a viable Employment Tribunal claim."

40. It is well established that ignorance or mistaken belief as to rights or time limit will not render it "not reasonably practicable" to bring a claim in time unless that ignorance or mistaken belief is itself reasonable. Here however, the claimant has provided the Tribunal with no explanation why if he was aware of his legal position in June 2021, he did not commence early conciliation with ACAS until 14 October 2021, some 4 months later and what the reasons for his delay were. I note that the Particulars of claim state at paragraph 16 (g) that,

    "After leaving his job the Claimant was still ill and it took him until the spring of 2021 to have his condition effectively managed."

41. The claimant was therefore well enough to pursue his claim in June 2021 and had been well enough to represent Dr Grisley in her Employment Tribunal proceedings in 2021. I therefore find that the claimant has provided no reasons why he did not bring his claims against the second respondent in time and there is no evidence before me to satisfy me that it was not reasonably practicable for the claimant to present his claims earlier.

42. I therefore strike out the claims against the second respondent as the claims have not been bought in time. The List of Issues for the final hearing will need to be amended accordingly and if they cannot be agreed they can be considered further at the hearing on 9 June 2023.

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Employment Judge Sekhon
Date:19 April 2023