EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr Sundeep Sharma	ICT Infotech Ltd

v

PRELIMINARY HEARING

Heard at: Reading, by video **On**: 6 March 2023

Before: Employment Judge Cotton, sitting alone.

Appearances

For the Claimant: Mr Sundeep Sharm (in person)
For the Respondent: Ms Swords-Kieley of Counsel

JUDGMENT

1. The claimant's claim that he was subjected to detriments contrary to section 47B of the Employment Rights Act 1996 for having made one or more public interest disclosures are dismissed because they were not brought in time.

2. The claimant's claim that he was automatically unfairly dismissed contrary to section 103A of the Employment Rights Act 1996 is struck out because it has no reasonable prospect of success.

REASONS

Introduction

1. The claimant was employed, as an employee, by the respondent, an IT consultancy service provider which provides specialise IT consultancy services to clients globally, as a Lead Consultant from 28 June 2015 until 17 November 2021. He was 'assigned' to a client of the respondent, Santander, from 28 June 2015 to 20 April 2021.

2. Early conciliation started on 16 February 2022 and ended on 18 February 2022. The claim form was presented on 12 March 2022.

3. This claim concerns unfair dismissal contrary to section 94 of the Employment Rights Act 1996 ('the 1996 Act"); automatically unfair dismissal for having made a public interest disclosure, contrary to section 103A of the 1996 Act; and public interest disclosure detriment contrary to section 47B(1) of the 1996 Act.

4. The purpose of this open preliminary hearing included the determination of the following matters:-
   4.1 Whether the claimant should be permitted to amend his claim:-
      4.1.1 To add a claim of wrongful dismissal, ie dismissal without notice.
      4.1.2 To add the following detriments to his list of public disclosure detriments:-
         4.1.2.1 the detriment of not getting paid a bonus which he was expecting to get in April to May 2021.
         4.1.2.2 the detriment of the respondent delaying sending to the claimant his P45 until14 December 2021, after the claimant had escalated the matter to the CEO.
   4.2 Whether the claimant's claim for public interest disclosure detriment and – if the amendment request is allowed – wrongful dismissal should be dismissed as being out of time.
   4.3 On the respondent's written application dated 6 February 2023, and copied into the claimant, whether the following aspects of his claim should be struck out or made the subject of a Deposit Order pursuant to Rules 37 or Rule 39 of the Employment Tribunal Rules of Procedure on the basis that they have little or no reasonable prospect of success:-
      4.3.1 His claim for public interest disclosure detriment.
      4.3.2 His claim for automatically unfair dismissal contrary to section 103A of the 1996 Act.

Public interest disclosure detriment claim - limitation

5. I first considered whether the claimant's claim that he was subjected to a number of detriments for having made a public interest disclosure, as originally pleaded, should be dismissed because it is out of time.

6. Section 48(3) of the 1996 Act says that the tribunal shall not consider a complaint of public interest disclosure detriment unless it is presented before the end of the period of 3 months beginning with the date of the act or failure to act to which the compliant relates or, where that act or failure is part of a series of similar acts or failures, the last of them; or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of 3 months.

7. The claimant says that the respondent subjected him to detriments for having said, to a colleague the following words on the telephone on 23

February 2021: 'Should I commit suicide or kill my family to make you happy?' The alleged detriments were:-

7.1 On 20 April 2021, terminating his assignment to Santander and disabling his access to the Santander systems without prior notice.

7.2 On 30 June 2021, in a grievance report, telling the claimant that (i) he was not a team player, (ii) he diverted the topic when his conduct was talked about and (iii) he threatened team members in a reply to the claimant's grievance of 4 June 2021.

7.3 From 20 April 2021, the claimant's line manager, Mr Alagappan, did not talk to the claimant or respond to his correspondence.

8. The detriment at 7.3 above concerns a failure to act. Unless there is evidence to the contrary – which there is not in this case – a failure to act occurs when the employer does an act inconsistent with doing the failed act; if no such inconsistent act is done, the employer will be taken to have decided on a failure to act when the period expires within which it might reasonably have been expected to do the failed act. In the absence of an inconsistent act, I find that Mr Alagappan might reasonably have been expected to talk to the claimant by 11 May 2021 - three weeks after his assignment with Santanter was terminated. This takes account of the possibility of delay due to other work commitments or annual leave.

9. On this basis, the very latest date by which the claimant should have brought his detriment claims is 30 September 2021 – three months from the date of the last detriment complained of (30 June 2021). His claim was brought on 12 March 2022, therefore the claims are significantly out of time.

10. The claimant gave evidence about why it was not reasonably practicable to bring his claims prior to 12 March 2022. He said that he had been waiting for the outcome of his grievance. He said he did not seek legal advice. He referred to his poor mental health and the stress he had suffered due to his treatment from the respondent; he suffered also from heart problems; his wife was out of the country during February 2022, leaving him to take care of his children alone. He said that March 2022 was the earliest date that it was reasonable for him to bring his claim.

11. The respondent said that the evidence for physical or mental illness was not present. The bundle included one sick note, which appears to say that the claimant was not fit for work, due to work related stress and anxiety, on 6 March 2021 or from 6 April 2021 to 9 April 2021. The sick note is confusing, because it is dated 31 March 2021. However, the time period is prior to any of the detriments, and only concerns a matter of days.

Findings with reasons

12. I find that the claimant has failed to demonstrate that it was not reasonably practicable for him to bring his claims for public interest disclosure in time. test sets a high threshold.

13. The question is whether it was reasonably *feasible* for the claimant to have brought the claim in time. The test sets a high threshold. The claimant did not explain clearly why it wasn't. He referred in quite vague terms to factors which he felt had hindered him. He mentioned illness, but provided no evidence that he was ill at the relevant time. In relation to his grievance, the law is clear that awaiting the outcome of a grievance or appeal against a grievance decision is not in itself a sufficient reason in this context. I heard no cogent evidence to explain why he did not seek legal advice.

14. I then considered whether the claim was presented within a further period that was reasonable. That is to say, was the period between the expiry of the time limit and the eventual presentation of the claim reasonable in the circumstances. I find that the claimant has failed to satisfy me that it was. He did not give a full and convincing explanation of the reasons for his delay, or explain why he did not seek legal advice, or why he did not bring the claim at least soon after he knew the outcome of his grievance (30 June 2021.) Although his wife was away, leaving him to manage the household, this was not until February 2022.

15. In conclusion, the claimant's claim for public interest disclosure detriment was not presented within the time limit, or within a reasonable further period; therefore, it should be dismissed.

Claimant's application to amend his claim

16. I then considered the claimant's applications to amend his claim.

17. As set out in a Case Management Order dated 5 December 2022, the claimant applied to amend his claim to:-
    - 17.1.1 Add, as a public interest detriment, the detriment of not getting paid a bonus which he was expecting to get in April to May 2021.
    - 17.1.2 Add, as a public interest detriment, the detriment of the respondent delaying sending to the claimant his P45 until14 December 2021, after the claimant had escalated the matter to the CEO.
    - 17.1.3 Add a claim for wrongful dismissal – that the claimant was entitled to one month's notice pay and did not receive this.

18. The case of Selkent Bus Co v Moore 1996 ICR 836, EAT, sets out the factors the Tribunal should take into account when considering whether to allow an amendment. These factors are the nature of the amendment, the applicability of time limits, and the timing and manner of the application. Crucially, the Tribunal must balance the injustice or hardship of allowing or refusing the amendment, and take all the relevant circumstances into account.

Amendments concerning detriments

Bonus

19. The claimant said that he had expected to receive a bonus of about £500 in April or May 2021, but had not received it. Refusing this amendment would deprive him of the opportunity to argue his case, with the potential of receiving this sum from the respondent. `

20. The respondent said that this claim was first raised in December 2022 and, if allowed, would take effect on 6 March 2023; therefore it was significantly out of time. They said that it was unparticularised and confused, and therefore difficult to respond to. They were baffled by the application because the claimant had been entitled to only one bonus, and that was in August, and he received it. The respondent said that they do not give bonuses in April or May.

21. I find that the amendment should not be granted because the balance of hardship favours the respondent, and because it is significantly out of time.

22. The claimant said he would have expected to receive the bonus by 31 May 2021. On that basis, the claim should have been brought by 30 August 2021 and, if allowed, would take effect from 6 March 2023. Therefore it is almost a year out of time.

23. The alleged detriment of not getting a bonus is an entirely new factual and legal area which will need to be explored and understood by the respondent. During that period, records may have been lost or be difficult to exhume; memories will have faded. Since the claimant's other claims for public interest disclosure detriment have been dismissed for being out of time, allowing this amendment would re-introduce the claim, requiring the respondent to defend it.

Delay in sending P45

24. The claimant said that the respondent failed to send him his P45 until 14 December 2021, when his employment terminated on 17 November 2021; and that this failure to act was because he had made a public interest disclosure. Because of this, he was unable to look for work during that period.

25. A refusal of this amendment application would mean the claimant could not seek damages referable to this loss.

26. The respondent acknowledged that the claimant had mentioned in his claim that his P45 was sent on 14 or 15 December 2021, but he did not at that time suggest that this was a detriment or was unlawful in some other way.

The respondent did not accept that the claimant did or would have sought work during that period, so as to have suffered any loss.

27. I find that the amendment should be refused because the balance of hardship favours the respondent, and it is significantly out of time.

28. As regards the date upon which the alleged detriment took place – the claimant said that it was a continuing 'failure to act' which ended on 14 December 2021. Even on this basis, it should have been brought by 14 March 2022. When asked why he had not included this in his original claim, he said that he had only thought of it later. This amendment raises a new area of factual enquiry which the respondent would have to explore and which might not be straightforward – by now, the reasons for the delay may be difficult to determine. Also, since the claimant's other claims for public interest disclosure detriment have been dismissed for being out of time, allowing this amendment would re-introduce the claim, requiring the respondent to defend it.

<u>Amendment to introduce claim for wrongful dismissal</u>

29. The claimant applied to add a claim that he was dismissed without the one month's notice to which he said he was entitled.

30. I decided that the claimant should not be granted leave to amend for the following reasons:-
    - 30.1 The claim would be significantly out of time. Article 7 of the Employment Tribunals Extension of Jurisdiction Order says that a breach of contract claim must be presented within three months from the termination date – in this case, 17 November 2021. The respondent said that, taking early conciliation into account, the latest day for making the claim was 1 May 2022. It was first raised, formally, at the case management hearing on 5 December 2022. The claimant's reason for this was that he was in a poor mental state at the time that he submitted his application, and had not sought in-depth legal advice. However, he was sufficiently well, and well-informed, to bring his main claim.
    - 30.2 I balanced the hardship which the respondent would suffer were the amendment to be allowed against the hardship the claimant would suffer were the amendment to be refused, and concluded that the balance of hardship favours the respondent. This is because:-
        - 30.2.1 The respondent would have to defend an entirely new claim they had not expected to defend – one which would involve new areas of factual and legal enquiry. The legal position on notice is likely to be complicated by the fact that the respondent is a wholly-owned subsidiary of an India-based company, ITC Infotech Ltd, which may, arguably, have concurrently employed the claimant.
        - 30.2.2 These difficulties would be exacerbated by the fact that the claim is poorly particularised. The claimant does not indicate when he

should have received his notice pay. It was common ground that he was at home on full pay from 20 April to 17 November 2021, while his grievance and appeal were investigated (a period described by the claimant as 'gardening 'leave' and by the respondent as 'rolling notice'). The question of how this period should be characterised would need to be explored.

Strike out application – automatically unfair dismissal contrary to section 103A of the Employment rights Act.

31. Having decided that the claimant's claims for public interest disclosure detriment are out of time, I do not need to determine the respondent's application that they should be struck out as having no reasonable prospect of success. However, the claim for automatically unfair dismissal is a distinct claim.

32. The law says that, in considering whether to strike out a claim or part of a claim, the case advanced must be considered at its highest. The power to strike out should only be used in the plainest and most obvious of cases. The threshold is a high one. In cases of public interest disclosure in particular, a strike out should be exceptional. For example, in the case of Ezsias v North Glamorgan Trust 2007 ICR 1126, it was found that, in whistleblowing cases where the central facts are in dispute, the case should be struck out for having no reasonable prospect of success only in exceptional circumstances.

33. The task of the tribunal at this stage is not to make substantive findings about whether the alleged disclosure was a qualifying disclosure ie, whether it included information, or whether the claimant subjectively believed that the information tended to show a relevant failure, or whether this was reasonable, or whether the claimant subjectively believed his disclosure to be in the public interest and whether this was objectively reasonable.

34. As noted above, the claimant claims that the respondent subjected him to detriments for having said, to a colleague, Mr Anandram Kaipa, the following words on the telephone on 23 February 2021: 'Should I commit suicide or kill my family to make you happy?' He says that this was a disclosure which he believed tended to show that the health and safety of an individual has been, is being or is likely to be endangered; and that it led to the termination of his assignment with Santander on 20 April 2021 and, ultimately, to his dismissal from the respondent on 17 November 2021.

35. In an undated document headed 'chronological details of my claim', provided in June 2022, the claimant writes that the subject of the relevant telephone conversation was Mr Kaipa's escalation of the claimant's mistake in failing to copy him in on a particular email. Mr Kaipa had believed this was deliberate; the claimant said it was a mistake. The claimant says that, after a prolonged discussion of 20-30 minutes, the claimant asked 'Should I

kill my family to please you? Should I commit suicide because I failed to copy you on just one email and you are not even accepting my apology even when its not a mistake.' He claims that the termination of the assignment at Santander (on 20 April 2021) and, ultimately, his dismissal by the respondent on 17 November 2021, was 'a direct effect of this use of suicide clause in the aforementioned call.'

36. During the hearing, I took evidence from the claimant about the context in which this question was asked. He confirmed that it was asked during a telephone conversation about his failure to copy Mr Kaipa into an email, apparently a protracted conversation which became heated.

37. The respondent denies that the claimant said these words to Mr Kaipa. Therefore, this is a case in which the central facts are in dispute. However, even if the words were said, and taking into account the context in which they are alleged to have been said, there is no reasonable prospect of a tribunal finding that they constituted a disclosure of information within the meaning of section 43B(1) of the 1996 Act. The case of Kilraine v London Borough of Wandsworth [2018] IRLR 846 says that whatever is disclosed must contain sufficient information to be capable of tending to show one of the matters set out in section 43B(1). Although this is an evaluative judgement to be made in light of all the facts of the case, what the claimant describes as a disclosure was a question. There is nothing to suggest that he might have believed that it included factual information capable of showing any of the matters listed in section 43B(1), including the endangerment of health and safety – apart from, perhaps, the safety of himself and his family at his own hand. If the claimant's question includes any information at all, it is indirect information about his own frustration about a management-related discussion, or his state of mind at the time.

38. Accordingly, this part of the claimant's claim should be struck out because it has no reasonable prospect of success.

The claimant's claim for unfair dismissal

39. The claimant's claim that he was unfairly dismissed contrary to section 94 of the 1996 Act proceeds. The issues are set out in a separate case management order issued following the preliminary hearing.

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Employment Judge Cotton

Date: 15 March 2023

Sent to the parties on: 26 March 2023
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For the Tribunal Office