EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100441/17

Held in Glasgow on 19 July 2017

Employment Judge: James Hendry

Mr Kevin J Hastings	**Claimant** **Represented by:** **Mr L Moodie - Solicitor**
Henry Schein Animal Holdings Ltd t/a Henry Schein Animal Health	**Respondent** **Represented by:** **Mr L G Cunningham - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal finds that:-

(1) The information given by the claimant to the respondent in relation to the criminal charges he faced could not amount to a protected disclosure in terms of Section 43B of the Employment Rights Act 1996.

(2) That in the circumstances given that the claimant has less than 2 years service and in the absence of what could amount to a protected disclosure the claim has no reasonable prospects of success and is struck out.

REASONS

E.T. Z4 (WR)

1. The claimant in his ET1 sought a finding that he had been automatically unfairly dismissed from his employment because he had made a protected disclosure to them. The claimant had less than 2 years qualifying service and was required to rely on the provisions of Section 103A of the Employment Rights Act 1996 (ERA) for the Tribunal to have jurisdiction. The respondent company denied a protected disclosure had been made.

2. A Preliminary Hearing was arranged to discuss two issues, namely:-

   (1) If a protected disclosure (under the provisions of the Employment Rights Act 1996) was made by the claimant when he informed the respondents that he had been charged with rape?

   (2) Whether the claim should to be struck out or whether a deposit order should be made?

3. The Tribunal heard evidence from Rachel Milligan the respondents` HR Manager and from Derek Henderson the respondents` Warehouse Manager. The claimant gave evidence on his own behalf. The Tribunal had the benefit of productions agreed by parties IP-20.

Facts

4. The claimant was employed by the respondent company as a Warehouse Worker in their factory premises in Dumfries. He was issued with terms and conditions of employment (**IPp38-53**) which he signed on 19 February 2015. He was subject to the company`s various rules and policies which staff had access to through the company intranet.

5. The claimant had had a clean disciplinary record. He was hard working and well thought of.

6. The respondent is a large company involved in the provision of products to medical and veterinary services. They have a factory/warehouse in Dumfries.

7. On 29 November 2016 the claimant appeared on Petition at Dumfries Sheriff Court charged with attempted rape. He had arranged for his father to alert his managers at the factory to the fact that he was in custody and was going to miss work. The claimant made no plea or declaration and was released on bail later that day.

8. On 30 November 2016 he received a telephone call from Rachel Milligan one of the respondents` HR Managers to attend the factory to meet.

9. The claimant went to the factory. He met Rachel Milligan and Mr. Eric Henderson the Warehouse Manager and his line manager . He told them that he had appointed a solicitor. He said that the alleged victim was not an employee and that the matter would not impact on his work.

10. The claimant was advised at the meeting that it was not the company`s intention to decide whether he was guilty or innocent of the charge but to consider the impact on him, on his work and on other employees. They were concerned about the impact of the claimant facing serious charges and that in a small community it would be common knowledge. The claimant confirmed that the incident had occurred some 5 weeks earlier. He confirmed that he had been charged and was pleading not guilty. He explained that he had an appointment with his solicitor to make a statement. The respondent's managers were aware that the news of the claimant`s arrest had become known to some of the employees. Ms Milligan set out what had been discussed at the meeting with the claimant in an email of 30 November 2016 (**IPp66**) to the Head of HR function Helen Kaye. The claimant was suspended pending an investigation into the circumstances.

11. The respondent gave the claimant a letter dated 30 November 2016 (**IPp69**). The letter confirmed that he was suspended from work pending an investigation. The claimant was on full pay but not required to carry out any

work. Ms Milligan tried to telephone the claimant on the 8 and 9 of December but was unable to contact him. She therefore wrote inviting him to a further meeting ion the 14

12. The claimant`s solicitor Mr Colledge telephoned Ms Milligan on 12 December 2016 to give her an update on the claimant`s position regarding the criminal charges brought against him. She made notes of the telephone conversation (**IPp71**). He explained that the Procurator Fiscal had a year and a day to bring the claimant to trial. He indicated that the claimant wanted to come back to work.

13. The claimant attended a further meeting with Rachel Milligan and Eric Henderson at the factory on 14 December 2016. Ms Milligan noted what had been discussed (**IPp72**). Mr Hastings had moved to live at his grandmother`s house because of the bail conditions. He told them that his solicitor was confident that the matter would turn out well for him as there were flaws and inconsistencies in the alleged victim`s statement. He told them that he the full support of his family and discussed with them the potential impact on his work and colleagues. Ms Milligan explained to the claimant that the company was concerned about the risk to the businesses` reputation, the risk to other employees and the potential ‘‘fall out’’ generally. The claimant did not feel that would impact on the xx work as no one knew anything.

14. The respondent’s managers considered the position. In their view it was likely that staff would learn about the situation and some had already done so. They were concerned about the reputation and damage to the company if they continued to employ the claimant and on the effect on other staff including female staff. They were aware that their actions would be known in the community. They wrote to the claimant on 16 December 2016 terminating

his employment (**IPp73**). The letter stated:-

> "*I would like to stress that the decision had nothing to do with innocence or guilt and this was not discussed in reaching a decision. It is on the basis of reputation of the business internally and externally, what will be the perceived wishes of other TSMs (employees) in the business and also for your own security which we cannot guarantee. All in all, it is felt there is too much potential to harm and cause disruption to the business*."

15. The claimant subsequently raised Employment Tribunal proceedings.

Witnesses

16. I found the respondents` witnesses wholly credible and reliable. Neither expressed any antipathy towards the claimant and indeed both were sympathetic to the situation in which he found himself. They gave their evidence in a straightforward and clear manner. Ms Milligan had overall a better recollection of the events than Mr Henderson and was a more reliable historian in relation to detail.

17. I found the claimant to be generally credible and reliable. However I was not convinced that he had made it clear to the respondents` witnesses that there was in his view any miscarriage of justice. Although that phrase was used in evidence by him his position seemed to change and ultimately the claimant`s position was that he said something that amounted to those words but perhaps had not used the exact words. This was the only part of his evidence that I found some difficulty with. I preferred the evidence of Ms Milligan and Mr Henderson where it conflicted with that of the claimant on this matter and I noted that there was no reference to a miscarriage of justice in Ms Milligan's notes which otherwise seem to have recorded accurately the gist of the meeting.

Submissions

18. Mr Cunningham divided his submissions into 5 areas namely (1) the purpose of the hearing, (2) comments regarding the witnesses, (3) what was required for a public interest disclosure, (4) why strike out should be granted and finally (5) the issue of a deposit order.

19. The purpose of the hearing was clear in his view in that the Tribunal had to consider whether or not there had been a public interest disclosure and if so what the consequences of this were. If there had been no public interest disclosure then the claim required to be struck out as the Tribunal would not have jurisdiction to hear the unfair dismissal claim. Mr Cunningham then invited the Tribunal to find the respondents` witnesses credible and reliable and that their recollection in relation to the use (or non use) of the phrase miscarriage of justice to be accurate. He referred the Tribunal to Ms Milligan`s notes at page 72. Mr Cunningham then turned to what was required for a qualifying disclosure reminding the Tribunal of the terms of Section 43A(b) and (c) of the Employment Rights Act 1996. Information had to be conveyed which in the reasonable belief of the party making the disclosure satisfied the various criteria in fact. We turn first of all to the question of the claimant being charged with attempted rape and advising the respondents of this fact. His position seemed to be that he had falsely accused. This appeared to be more of an allegation rather than being any particular facts. His position was that he was falsely accused. This in Mr Cunningham`s submission was simply not sufficient.

20. The Tribunal had to make a proper assessment of the situation. The employer had to consider the merits of the allegations being made and they did not do so. Mr Cunningham then took me to his various authorities and way the case has developed referring to the case of ***Cavendish Munro Professional Risks Management Ltd v Geduld (2010) ICR 325***. It was clear that the facts require to be conveyed rather than allegations. He submitted a List of Authorities.

21. The respondents had acted in accordance with their policies which the Tribunal had been taken to but they had to bear in mind the whistleblowing

legislation. It was very unusual for an employer to be told about a situation that doesn`t involve the employer at all but a third party. An example of this was the case of ***Leech v Office of Communications (2012) EWCA Civ 959***. It is set out in that case what the duties of the employer are when such allegations are made. In paragraph 6, Mummery L.J. states:-

> *"As we shall see, this case shows the need for an employer, to whom a third party discloses information or makes allegations, to assess itself, as far as practicable, the reliability for what it has been told. The employer should check the integrity of the informant body and the safeguards of its internal processes concerning the accuracy of the information supplied. The employer should consider the likely effect of the disclosure where there is cogent evidence of a pressing need for disclosure to the employer."*

22. Mr. Cunningham referred the Tribunal to the ACAS Code at paragraph 4.18. This section is relating to the charges and convictions and the employer had to look at the impact this had on the employee and the business. In relation to the more recent case of ***Chesterton Global v Nurmohamed (2017) EWCA Civ 979*** that case revolved around issues of good faith. He also referred the Tribunal to the IDS Handbook on Whistleblowing at 4.21. He accepted that the disclosure need not relate to the employer. In this case the claimant had not as a matter of fact told the respondents that he had been falsely accused or the factual basis of this. There was no public interest in this case. This matter was purely a matter for his own welfare. The issue of what was in the public interest was discussed at paragraph 35 in ***Chesterton***. That referred to an earlier submission which the Court had accepted which is set out in paragraph 34. The case had no reasonable prospects of success. Striking out in these circumstances was discussed in the case of ***Williams v Real Care Agency Ltd UKEAT/51/11.*** In summary therefore the position was that first of all no public interest disclosure was made as no factual information was conveyed and secondly, there was no public interest.

23. Mr Cunningham then went on to deal with the issue of a deposit order. He accepted that the claimant had no income. This is something the Tribunal would have to take into account in his ability to pay. Some deposit, in his view, should be considered.

24. Mr Moodie responding in relation to the issues raised in the ***Williams*** case that this case was quite different. This was a Preliminary Hearing . Strike out was a 'draconian' measure. Mr Moodie then turned to the statutory basis of the claim. The claimant was relying on two parts of Section 43A, first a criminal offence had been committed, secondly there had been a miscarriage of justice. I asked Mr Moodie whether or not the phrase was properly applied here as ''justice'' had not yet been delivered in the sense that there had been no verdict in the case. In Mr Moodie`s submission the phrase was wide enough to cover that the claimant had been falsely accused, arrested, detained and so forth. It was in the public interest to ventilate these matters in that this could happen to other people. Attempting to pervert the course of justice was surely a matter of public interest. Sex offences he suggested are treated very seriously, indeed the public reaction to sex offences could be regarded as a witch hunt. The claimant was falsely accused and then ends up losing his job. He is in a very unfortunate position. He was entitled to the protection of public interest disclosure which would allow him then to explore the reasons why his employers dismissed him.

Discussion and Decision

25. The development of the law in this area is summarised by Lord Justice Underhill in the recent case of ***Nurmohamed***.

26. The starting point is the definition of Protected Disclosure defined in Section 43B of the Employment Rights Act 1996 ('the Act'). The Act affords protections to 'Whistleblowers':-

"43 B Disclosures qualifying for protection.

(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, [F2 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."*

27. In ***Nurmohamed*** Lord Justice Underhill discussed the amendment to the original provisions brought in to amend Section 43B by the addition of a public interest test. At paragraph 15 he discusses the requirement for the disclosure to have a public interest element and not just to be made for reasons such as personal antagonism.

28. There was no material dispute about the facts of this case except in relation to what exactly the claimant told his employers at the meeting on the 30 November and 14 December. Bearing in mind that a disclosure can be communicated over a period of time the whole circumstances required to be considered. The matter can be summed up as the claimant told the employers about the charges and a little of the background and said that he had pled not guilty. I did not accept that he used the words miscarriage of justice. That I suspect is a later gloss. Nevertheless Mr. Moodie was correct that but the circumstances need close examination. His position was that what the claimant had said amounted to conveying to his employers that it was a miscarriage of justice. Indeed the purpose of the tow meetings was just to tell them what the position was and I am sure that at the time the claimant

had no idea that he was 'whistleblowing' in some way. After all what could the employers have done, even if they were so minded to accept his position, about a prosecution that had just reached it's initial stages. He had instructed a solicitor who was dealing with the matter and it is not as if he was seeking their help in relation to these matters.

29. I would also record that, rightly, there was no detailed evidence of the circumstances leading up to the alleged assault . It was not my role to consider these matters or come to a view on whether the claimant was innocent.

30. I regret that I do not accept that what was said is capable of amounting to a disclosure either on the grounds that charging a possibly innocent person necessarily amounts in itself to a miscarriage of justice or that, stretching matters further, that telling the employer he was innocent and the Crown's witness was possibly lying, and by doing so committing a criminal office. amounts to s disclosure . I accept that on public policy grounds it can be argued that a wide meaning should be ascribed to these phrases but I cannot accept that at the point the claimant was telling the employer about these matters that any miscarriage of justice had occurred. The Crown no doubt had evidence on which they were relying to raise the proceedings and if innocent then the claimant would be acquitted or the Crown might not ultimately proceed after weighting matters.

31. Even if I had come to the view that I was wrong on this aspect of the case I found Mr. Cunningham's arguments persuasive. There was insufficient information given to the employers to amount to a protected disclosure.

32. The one submission that I could not accept in full was that there could be no public interest here, if that was indeed the submission, as it was a personal matter for the claimant that he had been prosecuted. If a disclosure about a miscarriage of justice or a criminal act had been made I am not sure that a litigant in the claimant's position could not overcome the hurdle. Although the

Act was amended with the purpose of raising the bar as it were to ensure that only disclosures that had a strong public interest could be pursued I am not convinced that that has been the result. An employee need only show that they have a reasonable belief that the disclosure was made in the public interest and that is what the Tribunal is required to objectively assess. If the claimant had gone with evidence of a criminal act then it must almost always be in the public interest that such a matter comes to light (***Ellis v Home Office*** (1953) 2QB 135 CA).

33. The case of Chesterton which dealt with the public interest in a breach of an employee own contract did not itself go as far as to suggest that a matter personal to one employee might never have such a public interest element. Lord Justice Underhill while endorsing as useful the four tests set out by him in paragraph 34 of the Judgement adds, at paragraph 26, a cautionary word of advice as follows: -

> ***"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. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the Parkins v Sodexho kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B (1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never."***

34. The claimant's case also faced the difficulty, if it continued to a full hearing on the merits, in that there was no indication in the correspondence or in the evidence I heard that he was not subjected to a detriment, dismissal, because of his disclosure. The employers already had the information that he had been charged with rape. It was a matter of public record. His dismissal did not flow from the discussions he had with the employer's managers but from the fact that he had been prosecuted.

35. The claimant is not entitled to the protection of 'ordinary' unfair dismissal and they could have given him notice. They did however set out the reasons why they acted as they did in a letter sent to him on the 16 December. It was an action that the employers did not want to take and I noted that even at the stage of the Preliminary Hearing it was said that the employer would probably give the claimant a job once, and if, the matter concluded with a finding on not guilty or confirmation that the matter was not going to be prosecuted further.

36. In the circumstances of the present case I had regard to the powers the Tribunal had in terms of Rule 37 of the Employment Tribunal Rules of Procedure:-

> ***"Striking 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;***

> ***(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."***

37. I accept that the power of strike out should be used sparingly and there are often good public policy grounds to hear claims of whistleblowing and discrimination. Nevertheless in this case I am firmly of the opinion that the claimant's case has no reasonable prospects of success in persuading a Tribunal that he made a protected disclosure for the reasons I have set out above.

38. In the absence of such a crucial finding the claimant cannot not maintain his application for unfair dismissal as he has less than two years qualifying service and accordingly the Tribunal has no jurisdiction in such circumstances.

Employment Judge: James Hendry
Date of Judgment: 28 August 2017
Entered in register: 31 August 2017
and copied to parties