



EMPLOYMENT TRIBUNALS

Claimant: Mr Waqar Mohammed
Respondent: (1) Vision Care Services (UK) Ltd
(2) Mr Usman Amir

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds (by telephone) **On:** 21 January 2022
Before: Employment Judge R S Drake (sitting alone)

Appearances

For the Claimant: No Attendance
For the Respondent: Ms C Hill (Litigation Executive)

JUDGMENT

1. The Claimant's claims of breach of contract and detriment on the grounds of him having made a protected disclosure are both struck out in accordance with Rule 37(1) paragraph (a) and (d) of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules"), on the grounds that the claim has no reasonable prospect of success and have not been actively pursued.

Reasons

2. There was no attendance by the Claimant and therefore I had to discuss the terms of his claim and the Grounds appended to his ET1 with the Respondents' representative Ms Hill in the absence of the Claimant, though I delayed slightly the start of the hearing to enable him to arrive. As he had not arrived within 15 minutes of the scheduled start time I concluded it was reasonable to proceed in his absence.

3. I was informed by Ms Hill and accept that since the Respondents filed their ET3 on 7 October 2021 their representatives have had no contact with the Claimant despite their several attempts to correspond with him to discuss the agenda for today's hearing.
4. I also learned from Ms Hill that the Claimant resigned from employment with the first Respondent at the start of this calendar year, but I noted that in any event as at the date that proceedings were commenced 7 September 2021 he was still in employment with the first Respondent. Therefore, I concluded that he could not pursue a claim for breach of contract issued whilst still in employment and therefore such claim had no reasonable prospect of success.
5. I noted in the Claimant's Grounds of Complaint appended to his ET1 and in particular in the 6th paragraph in which he is articulating a "whistleblowing" complaint but alleging that the complaint was made by "an employee" thus distinguishing that employee from himself. Therefore, I concluded he was arguing that the complaint was made not by him but by another person. Section 47B of the Employment Rights Act 1996 as amended ("ERA") provides as follows:

“(1) a worker has the right not to be subjected to any detriment by any act or any deliberant failure to act by his employer done on the ground that the worker has made a protected disclosure” (my emphasis)

Thus, I infer that use of the definite article is significant and means that the person making the disclosure must be the person who derives the cause of action claimed. In this case, because the Claimant is not asserting that he himself made the disclosure, he does not have a viable cause of action protected by this provision, and therefore his claim under this head has no reasonable prospect of success.

8. For the sake of completeness, I set out below the basis upon which I had to consider the position so far as set out in Rule 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 ... has no reasonable prospect of success;
 - (b) ...
 - (c) ...
 - (d) that it has not been actively pursued” (my emphases)
9. I took account of the Court of Appeal's finding in **Swain v Hillman [2001] 1 All ER 91** in which it was held that a Court (or Tribunal in this case) must

consider whether a party “ ... has a realistic as opposed to fanciful prospect of success ...” in the context of assertions as in this case that the Claimant’s case has no, as opposed to little, prospect of success. In this case there is clearly on my examination no conflict of evidence on the key points such as would necessitate ventilation at a full hearing. I considered the balance of prejudice facing the Claimant if I struck out her case leaving him with no further way of arguing his views as to what has happened, or to the Respondent if the case were not struck out causing them to have to devote considerable time and energy to meeting a claim which on what I have seen and heard today and based on the Claimant’s admissions has no prospect of success. On this analysis I conclude that the balance of prejudice favours the Respondent leading me to conclude it is right I should strike out the claims.

10. For all the reasons set out above, I conclude paragraphs (a) and (d) of Rule 37(1) are engaged and empowers me to strike out the claims in accordance with rule 37. Therefore, I have no alternative but to dismiss the claims.

Employment Judge R S Drake

Signed 21 January 2022