Neutral Citation Number: [2020] EWHC 480 (QB)

Case No: QB-2019-002868

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MEDIA AND COMMUNICATIONS LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/03/2020

Before :

THE HONOURABLE MRS JUSTICE STEYN DBE

- -

Between :

MR TARIQ ALSAIFI	**Claimant**
- and -	
(1) NPOWER LIMITED	**Defendants**
(2) MS COLETTE LAND	
(3) MR STEPHEN BANKS	

- -
- -

The Claimant appeared in person
Rupert Beloff (instructed by **Npower Legal Department**) for the **First, Second and Third Defendants**

Hearing date: 10 February 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MRS JUSTICE STEYN DBE

Mrs Justice Steyn :

A. Introduction

1. The claimant, Mr Alsaifi, is a former employee of the first defendant, Npower Limited. The second and third defendants, Ms Land and Mr Banks, were employees of the first defendant. Mr Alsaifi has brought a claim in defamation, negligence and for a data protection breach (or breaches).

2. This judgment addresses three applications, namely:

   i) The claimant's application for an extension of time to file his Particulars of Claim and for relief from any sanctions under CPR 3.8;

   ii) The claimant's application for a determination of the meaning of the words complained and whether it raises an inference of serious harm within s.1(1) of the Defamation Act 2013; and

   iii) The defendants' application for summary judgment on the defamation claim, pursuant to section 8 of the Defamation Act 1996 and for summary judgment and/or strike out of the negligence and data protection claims pursuant to CPR 3.4(2)(a), (b) or (c) and CPR 24.2(a)(i) or (b).

3. I shall consider the defendants' application first as they seek the summary disposal of the entire claim which would, if successful, render the claimant's applications academic.

B. The facts and procedural history

4. Mr Alsaifi was employed as a data analyst by the first defendant from 23 April 2018, following a telephone interview on 19 January 2018 and an interview in-person on 31 January 2018. He was dismissed on 24 July 2018 on the ground that, in applying for the position, he submitted a curriculum vitae (CV) which, it was said, was misleading about his employment history and because, it was said, the reference declaration had been incorrectly completed.

5. An issue was first raised with Mr Alsaifi regarding his CV and references by his line manager, Ms Land, on 7 June 2018. Shortly thereafter, Ms Land asked her line-manager, Mr Banks, to investigate. On 10 July 2018, Ms Land provided Mr Alsaifi with a letter explaining the outcome of the investigation and asking him to attend a disciplinary hearing on 19 July 2018.

6. It was following the hearing on 19 July 2018 (at which Mr Alsaifi, Ms Land and a note-taker were present) that Ms Land sent the letter of 24 July 2018 which is central to the claim ("the dismissal letter"). In the dismissal letter, Ms Land stated that Mr Alsaifi was dismissed for gross misconduct, stated her reasons and informed him that he had an internal right of appeal.

7. Mr Alsaifi appealed, submitting a statement dated 29 July 2018 in response to the dismissal letter. The appeal hearing was held on 2 August 2018. Mr Alsaifi, Brian Queen and a note-taker were present. On 13 August 2018, Mr Queen wrote to Mr Alsaifi, notifying him that the appeal was dismissed.

8. Mr Alsaifi sent a letter of claim to the first defendant on 11 December 2018 and then to Ms Land and Mr Banks on 18 December 2018.

9. Mr Alsaifi issued the claim on 12 August 2019. He served the claim form on the defendants on 11 December 2019. In accordance with CPR 7.4(2), the particulars of claim were required to be filed by no later than the latest time for serving the claim form i.e. by midnight on 13 December 2019. The defendants agreed to extend time by 14 days, giving Mr Alsaifi until 27 December 2019 to serve his particulars of claim. On Friday 27 December 2019 Mr Alsaifi asked the defendants to agree a further extension of one working day, to Monday 30 December 2019. The defendants informed Mr Alsaifi he would need to apply to the court for an extension and he filed such an application the same day.

10. The claimant's application for meaning to be determined was filed on 7 January 2020.

11. The defendants filed and served their summary judgment/strike out application on 10 January 2020 and their defence on 23 January 2020.

12. On 10 January 2020 the claimant's applications were listed to be heard on 10 February 2020 and, on 22 January 2020, Master McCloud made an order releasing the defendants' application to be heard at the same time, subject to the Court's permission and time allowing.

C. The defamation claim

Limitation

13. Section 4A of the Limitation Act 1980 provides that no action for libel "*shall be brought after the expiration of one year from the date on which the cause of action accrued*". It is well established that, in the case of libel, the cause of action accrues on the date of publication: *Gatley on Libel and Slander* (12th ed.), paragraph 19.13; *Duncan and Neill on Defamation* (4th ed.), paragraph 24.01.

14. In this case, the defendants submit that there has not been any publication – and none is pleaded – but if there has been it took place before 13 August 2018 and so the claim was issued out of time.

15. Paragraph 6 of the particulars of claim states:

> "In a letter dated 24 July 2018, written and signed by D2, emailed to C on the same day and posted to C on the following day, approved and adopted by D1, D2 wrote and published the following words which are severe (sic) defamatory of C…"

16. The dismissal letter is quoted in full and then paragraph 6 continues:

> "…The letter was confirmed (and adopted) by the D's appeal process outcome letter dated 13 August 2019…"

17. I shall address the question whether Mr Alsaifi has pleaded publication in the next section. At this stage, it suffices to note that insofar as it is suggested that the dismissal letter came to the attention of anyone, it did so by means of (and certainly

no later than) the internal appeal process. It is evident that Mr Queen must have seen the dismissal letter by the time of the hearing on 2 August 2019 and probably a day or a few days earlier when he would have received the claimant's appeal documents.

18. In oral argument, Mr Alsaifi did not take issue with the defendants' submission that publication occurred (if it occurred at all) about 10-14 days before 13 August 2018. His submission was that the cause of action accrued on the 13 August 2018 because that was the date on which his dismissal was confirmed and so, he contended, it was then that he sustained serious harm within the meaning of s.1(1) of the Defamation Act 2013.

19. As I have said, the cause of action in libel accrues on the date of publication. That has not been altered by the Defamation Act 2013. A statement is defamatory in accordance with s.1(1) if its publication "*has caused or is likely to cause serious harm to the reputation of the claimant*" (emphasis added). Moreover, if confirmation were needed that (subject to a tighter time limit where the cause of action relates to a subsequent publication) the cause of action accrues on the date of publication, it is provided by s.8(3) of the Defamation Act 2013.

20. The defamation claim was not brought within the limitation period provided by s.4A of the Limitation Act 1980.

21. Mr Alsaifi has not made a formal application, supported by evidence, seeking the disapplication of s.4A, but he submitted in oral argument that if he was wrong about the date on which his cause of action accrued, then he would ask the court to extend time. Accordingly, I shall consider whether to disapply s.4A pursuant to s.32A of the Limitation 1980.

22. Section 32A of the Limitation Act 1980 provides:

> "(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –
>
> (a) the operation of section 4A of this Act prejudices the plaintiff or any person whom he represents, and
>
> (b) any decision of the court under this subsection would prejudice the defendant or any person whom he represents,
>
> the court may direct that that section shall not apply to the action or shall not apply to any specified cause of action to which the action relates.
>
> (2) In acting under this section the court shall have regard to all the circumstances of the case and in particular to—
>
> (a) the length of, and the reasons for, the delay on the part of the plaintiff;
>
> (b) where the reason or one of the reasons for the delay was that all or any of the facts relevant to the cause of action did

> not become known to the plaintiff until after the end of the period mentioned in section 4A—
>
> > (i) the date on which any such facts did become known to him, and
> >
> > (ii) the extent to which he acted promptly and reasonably once he knew whether or not the facts in question might be capable of giving rise to an action; and
>
> (c) the extent to which, having regard to the delay, relevant evidence is likely—
>
> > (i) to be unavailable, or
> >
> > (ii) to be less cogent than if the action had been brought within the period mentioned in section 4A."

23. The proper approach to the application of s.32A was explained by the Court of Appeal in *Bewry v Reed Elsevier UK Ltd* [2015] 1 WLR 2565 by Sharp LJ (with whom Lewison and Macur LJJ agreed) at [5] to [8]:

> "5. The discretion to disapply is a wide one, and is largely unfettered: see *Steedman v British Broadcasting Corpn* [2002] EMLR 318, para 15. However it is clear that special considerations apply to libel actions which are relevant to the exercise of this discretion. In particular, the purpose of a libel action is vindication of a claimant's reputation. A claimant who wishes to achieve this end by swift remedial action will want his action to be heard as soon as possible. Such claims ought therefore to be pursued with vigour, especially in view of the ephemeral nature of most media publications. These considerations have led to the uniquely short limitation period of one year which applies to such claims and explain why the disapplication of the limitation period in libel actions is often described as exceptional.
>
> 6. *Steedman v British Broadcasting Corpn* was the first case in which the Court of Appeal had to consider the manner in which a judge exercised his discretion pursuant to section 32A of the Limitation Act 1980. Brooke LJ said, at para 41:
>
> > "it would be quite wrong to read into section 32A words that are not there. However, the very strong policy considerations underlying modern defamation practice, which are now powerfully underlined by the terms of the new Pre-action Protocol for Defamation, tend to influence an interpretation of section 32A which entitles the court to take into account all the considerations set out in this judgment when it has regard to all the circumstances of the case …"

> 7. The Pre-action Protocol for Defamation says now, as it said then, at para 1.4, that
>
> > "There are important features which distinguish defamation claims from other areas of civil litigation … In particular, time is always 'of the essence' in defamation claims; the limitation period is (uniquely) only one year and almost invariably, a claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation": see Civil Procedure 2014, vol 1, para C6–001.
>
> 8. The onus is on the claimant to make out a case for disapplication: per Hale LJ in *Steedman v British Broadcasting Corpn* [2002] EMLR 318, para 33. Unexplained or inadequately explained delay deprives the Court of the material it needs to determine the reasons for the delay and to arrive at a conclusion that is fair to both sides in the litigation. A claimant who does not "get on with it" and provides vague and unsatisfactory evidence to explain his or her delay, or "place[s] as little information before the court when inviting a section 32A discretion to be exercised in their favour … should not be surprised if the court is unwilling to find that it is equitable to grant them their request", per Brooke LJ in *Steedman v British Broadcasting Corpn*, para 45.

24. In this case, Mr Alsaifi sent letters of claim on 11 December 2018 and 18 December 2018. Thereafter, he has not sought swift remedial action. On the contrary:

    i) He then took no further action to progress his claim until he issued the claim form on 12 August 2019. In his oral submissions he explained that he believed that was the last day on which he could file the claim.

    ii) Having issued the claim on what he believed to be the last possible day, but which I have found was at least 10 days out of time, Mr Alsaifi then chose to wait a further four months before serving the claim form on 11 December 2019.

    iii) As I have said, Mr Alsaifi was required to serve his particulars of claim by 13 December 2019. He did not do so.

    iv) The defendants agreed to extend time by 14 days, giving him until 27 December 2019 to serve his particulars of claim. He did not comply with that deadline, but applied (on the day it was due to expire) for a further extension until 30 December 2019.

25. Mr Alsaifi's explanation for the delay is, first, he believed he was acting in time in filing and then serving the claim form, secondly, he was very busy with looking for work and with other litigation in which he was engaged at the time, and thirdly, that preparing the particulars of claim took him a considerable period of time and he had to work very long hours, without any days off, to submit them when he did.

26. I am not prepared to disapply s.4A in this case. First, while I accept that Mr Alsaifi believed that his defamation claim accrued on the date of the dismissal, by leaving it until the last possible day (as he believed it to be) to issue the claim, he chose to take the obvious risk of his claim being found to have been issued out of time. Secondly, Mr Alsaifi has not acted swiftly since he issued the claim. He served the claim almost as late as possible and has sought extensions of time from the defendants and now the court to enable him to serve his particulars of claim 17 days after they were due. Thirdly, although I do not doubt that he has had work to do preparing for other litigation, and seeking work, he has not provided any good reason for not issuing the claim earlier or progressing it more speedily once he had issued it. Fourthly, this is a weak claim for the reasons given below.

27. Accordingly, the defendants are entitled to judgment on the defamation claim on the ground that it is barred by s.4A of the Limitation Act 1980.

Merits of the defamation claim

28. Rule 3.4(2) of the Civil Procedure Rules ("CPR") provides:

> "(2) The court may strike out a statement of case if it appears to the court—
>
> (a) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (b) that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
>
> (c) that there has been a failure to comply with a rule, practice direction or court order."

29. CPR 24.2 provides:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that -
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

30. Section 8(1) of the Defamation Act 1996 provides that a court may dismiss a claim "*if it appears to the court that it has no realistic prospect of success and there is no reason why it should be tried*".

31. Section 8(4) of the Defamation Act 1996 provides:

> "In considering whether a claim should be tried the court shall have regard to –
>
> (a) whether all the persons who are or might be defendants in respect of the publication complained of are before the court;
>
> (b) whether summary disposal of the claim against another defendant would be inappropriate;
>
> (c) the extent to which there is a conflict of evidence;
>
> (d) the seriousness of the alleged wrong (as regards the content of the statement and the extent of publication); and
>
> (e) whether it is justifiable in the circumstances to proceed to a full trial."

32. I have quoted above paragraph 6 of the Particulars of Claim which is Mr Alsaifi's only attempt to plead publication. The Particulars of Claim do not state that the dismissal letter was published by Ms Land to anyone. What is said is that it was emailed to the Claimant. In addition, it is evident from the copy of the dismissal letter that is attached to the Particulars of Claim at Schedule 1 that the letter, marked "*private and confidential*", was sent to Mr Alsaifi (and no one else) at his home address (as given by him on the claim form). Sending the letter to Mr Alsaifi alone obviously does not constitute publication. There is no pleading that the dismissal letter was published to anyone.

33. If I were to take the view that Mr Alsaifi may be able to amend to plead that the dismissal letter was published to Mr Queen, who conducted the internal appeal hearing – albeit at present it is unclear whether Mr Alsaifi himself provided the letter when he instituted his appeal – Mr Alsaifi would face further insuperable hurdles.

34. First, any such publication would have the benefit of qualified privilege. Mr Alsaifi acknowledges that malice is a serious allegation, tantamount to an accusation of dishonesty, and should not lightly be made. In my judgment, his plea of malice at paragraph 10 does not state facts more consistent with the presence of malice than with its absence and has no realistic prospect of success.

35. Secondly, in any event, any publication has been very limited indeed. The harm claimed to have been suffered is the dismissal itself; "*this claim is about the unfair dismissal of the Claimant*", as Mr Alsaifi put it in paragraph 1 of his case summary. The claim for damages for loss of reputation arises from what was said in the dismissal letter itself. No such claim can be brought because the unfair dismissal legislation occupies the unfair dismissal territory: see *Johnson v Unisys Ltd* [2003] 1 AC 518 and *Edwards v Chesterfield Royal Hospital NHS Foundation Trust* [2012] 2 AC 22.

36. Accordingly, even if a limitation bar did not apply, I would strike out and give summary judgment for the defendants on the defamation claim.

D. The data protection claim

37. Mr Alsaifi has pleaded breaches of the Data Protection Act 1998 ("the 1998 Act"). The only provision pleaded is s.10 of the 1998 Act which provided:

> "Subject to subsection (2), an individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, nor not to begin, processing, or processing for a specified purpose or in a specified manner, any personal data in respect of which he is the data subject, on the ground that, for specified reasons –
>
> (a) the processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or to another, and
>
> (b) that damage or distress is or would be unwarranted.
>
> …
>
> (3) The data controller must within twenty-one days of receiving a notice under subsection (1) ("the data subject notice") give the individual who gave it a written notice –
>
> (a) stating that he has complied or intends to comply with the data subject notice, or
>
> (b) stating his reasons for regarding the data subject notice as to any extent unjustified and the extent (if any) to which he has complied or intends to comply with it.
>
> (4) If a court is satisfied, on the application of any person who has given notice under subsection (1) which appears to the court to be justified (or to be justified to any extent), that the data controller in question has failed to comply with the notice, the court may order him to take such steps for complying with the notice (or for complying with it to that extent) as the court thinks fit."

38. First, s.10 of the 1998 Act was repealed on 28 May 2018 and has no application to a claim issued on 12 August 2019. Secondly, even if that were not the case, there is no pleading that Mr Alsaifi has served a data subject notice on any of the defendants, nor any pleading that they (or any of them) have unjustifiably failed to comply with any such notice. Insofar as the Particulars of Claimant seek to rely on breaches of "any other relevant Data Protections Act", the pleaded case is wholly inadequate and discloses no valid cause of action. Accordingly, it falls to be struck out pursuant to CPR 3.4(2)(a).

E. The negligence claim

39. The Particulars of Claim state:

> "D1, as the employer and potential employer, owed C a duty to exercise all reasonable professional case and skills including: duty of care; duty of confidentiality; the role of the data controller and all Data Protection Act principles and responsibilities; a statutory duty according to the contract between D1 and C; and/or any other duties that may arise from their position as an employer, potential employer and/or former employer. The accumulated actions by D1, D2 and D3 form negligence towards C on number of occasions according to common law and in particular, the prima facie test of Causation: "But-For". Without prejudice to the generality of the foregoing, C will rely in particular upon the following facts and matters:
>
> PARTICULARS OF NEGLIGENCE
>
> 12.1 D1 was negligence in obtaining 3 references from C's submitted 4 References Declaration.
>
> 12.2 D1 had enough time of more than 6 weeks between 7/3/2018 (date of C submitting references declaration) and 23/4/2018 (the actual start date of C's employment) to obtain any references and/or to raise any concern regarding references or any other issues prior to C's starting employment.
>
> 12.3 Applying the prima facie test of Causation: "But-For", D1 caused C damage in causing loss to C in other employments' opportunities.
>
> 12.4 D1 caused C damage in causing loss to C in missing the funded PhD opportunity.
>
> 12.5 D1 share the responsibility of Defamation by delegating managerial power to D2 and D3 who misused such power severely and unfairly.
>
> 12.6 D1 was negligence in considering all information presented to them on 19/7/2018 when D1's HR representative attended the meeting between D2 and C.
>
> 12.7 Further, D1 was negligence in considering all extra information and audio recordings presented to them during the appeal process, which included most of above.
>
> 12.8 D3 was reckless and/or negligent in recognising D2's actions.
>
> 12.9 D1 was reckless and/or negligent in recognising D2's and D3's actions. Therefore D1 bear D2's and D3's actions

> including causing defamation and breaching Data Protection Acts.
>
> 12.10 D1 failed to consider that C's conduct, behaviour and achievements during his employment's time at D1, as data analyst, did not attract any misconduct. Alternatively, D1 could end C's contract based on the ground of "satisfactory references" only instead of "misconduct" or "gross misconduct". However, that would still trigger negligence since they had over 6 weeks to obtain such references.
>
> 12.11 All Defendants were at least reckless and/or negligent in dealing with the matter." (Errors in the original.)

40. This claim is hopeless. It is manifestly a claim for unfair dismissal brought in the form of a negligence claim. It is well established that no such claim can be brought because the unfair dismissal legislation occupies the unfair dismissal territory to the exclusion of the common law: see *Johnson v Unisys* and *Edwards v Chesterfield*. All aspects of this claim fall squarely within the *Johnson v Unisys* exclusion area. Particulars 12.3 to 12.11 seek to impugn, directly, the fairness of the decision to dismiss Mr Alsaifi from his employment. Particulars 12.1 and 12.2 refer to the prior conduct regarding the allegedly negligent conduct in failing to obtain references from Mr Alsaifi's referees. However, the damage claimed to arise from these alleged failings is the damage consequent on Mr Alsaifi's dismissal. Thus these particulars are also firmly within the *Johnson v Unisys* exclusion area.

F. Conclusion

41. For the reasons that I have given, the entirety of the claim is struck out pursuant to CPR 3.4(2)(a). In addition, the defendants are entitled to summary judgment (pursuant to CPR 24.2) and summary disposal (pursuant to s.8 of the Defamation Act 1996) of the defamation claim. Accordingly, it is unnecessary to determine the claimant's applications for the determination of meaning or an extension of time.