EMPLOYMENT TRIBUNALS

Claimant: Mr L Wingate

Respondent: (1) Perrys Motor Sales Limited

(2) Mr Anthony Restall

HEARD AT: CAMBRIDGE ET **ON**: 16th June 2017

BEFORE: **Employment Judge Finlay**

REPRESENTATION

For the Claimant: Mr W Brown, Solicitor.

For the Respondent: Miss N Owen, Counsel.

PRELIMINARY HEARING JUDGMENT

The Employment Judge gave Judgment as follows:-

1. The Employment Tribunal does not have jurisdiction to hear the Claimant's complaint under Section 47B of the Employment Rights Act 1996 which is struck out.

2. The Respondent's application to strike out the Claimant's complaint of automatic (constructive) unfair dismissal fails, as does the application for a deposit order in respect of that complaint.

3. The Respondent's application to strike out the Claimant's complaint of racial harassment contrary to Section 26 of the Equality Act 2010 fails, as does the application for a deposit order in respect of that complaint.

4. The Claimant's complaint of unlawful deduction from wages is struck out on the grounds that it has no reasonable prospect of success.

REASONS

1. In their particulars of response, the Respondents applied for the claim to be struck out, or in the alternative, for the Claimant to pay a deposit or deposits. The grounds for the application are set out in paragraphs 4, 8 and 29 of those particulars. In summary, the Respondents asserted that Claimant's complaints had no (or little) reasonable prospect of success either because they had been presented outside the relevant time limits or because they had little or no merit. The preliminary hearing originally listed for a case management discussion on 4 May 2017 had been cancelled and replaced by the preliminary hearing today. The parties were notified of today's hearing by letter dated 3 May 2017.

2. The Claim is particularised sparsely and in relation to one complaint, not at all. It is of course not unusual for claim forms to be somewhat lacking in detail, something which is normally dealt with by the provision of further and better particulars. On this occasion, the Claimant had been put on notice by the Respondent of the inadequacy of the pleading in the response lodged at the end of March 2017 and he had almost six weeks' notice of this application. In the intervening period, he had taken no steps whatsoever, despite access to the solicitor named in the ET1, and he gave no reason for his inactivity. He was not in attendance today: Mr Brown on his behalf advised that he had not been able to get time off work which may of course be a valid reason, but the Claimant had not applied for a postponement of the hearing when he realised this.

3. Mr Brown appeared for the Claimant and Miss Owen for both Respondents. I was provided with an agreed bundle of documents and Miss Owen had prepared a written skeleton argument. Both Mr Brown and Miss Owen made helpful oral submissions. Miss Owen confirmed that her submissions related to both Respondents, in so far as complaints were made against the second Respondent. She advised that the only difference between the positions of the two Respondents today was that since not all the allegations of detriment implicated the second Respondent directly, it ought to be harder for the Claimant to persuade the Tribunal that discretion should be exercised in his favour to allow those complaints to proceed where those complaints are out of time.

4. Following the submissions and before I made my decisions, Mr Brown was given the opportunity to speak to the Claimant by telephone, in particular to obtain some information relating to the Claimant's means, in case I were minded to order him to pay one or more deposits. He did so and reported the information he had obtained. He also confirmed that although there had been some discussion with the Claimant regarding the other issues discussed, Mr Brown was not able to provide any further information to the Tribunal.

5. At the outset, Mr Brown articulated the various complaints made by the Claimant as follows, amplifying the statement which is appended to the claim form. There are four distinct complaints.

6. The first is a complaint that he suffered detriments as a result of acts or omissions done by the Respondents on the ground that he had made protected disclosures, contrary to Section 47B of the Employment Rights Act 1996 (ERA). Mr Brown confirmed that the Claimant had made the following protected disclosures:-

   6.1 Disclosure of a direction given to him not to record the discovery of metal damage to a car (paragraph 5 of the statement appended to the ET1);

   6.2 Disclosure of a direction not to take wheels off a car when checking brakes (also paragraph 5 of the statement appended to the ET1); and

   6.3 Repeated disclosures of concerns that ramps used in repairing cars were worn (paragraph 6 of the statement appended to the ET1).

   Mr Brown also confirmed that these are the extent of the disclosures relied on.

7. As for detriments, B confirmed that C relying on the following five matters only, all of which appear in paragraph 6 of the statement appended to the ET1;

   7.1 Being given menial jobs;

   7.2 Being pressured in his work;

   7.3 Public criticism in front of other staff;

   7.4 False accusations; and

   7.5 Being described by the second Respondent as a “terrorist” for constantly raising his concerns.

   The final detriment was the last in time, occurring in August 2016, although Mr Brown was not aware of the exact date in August. Mr Brown further confirmed that each of the alleged detriments was related to each of the alleged protected disclosures.

8. The second claim is for automatic (constructive) unfair dismissal, the Claimant’s case being that the detriments taken individually and cumulatively constituted a fundamental breach of contract which the Claimant accepted by resigning. They were not the only reason for the

resignation – the alleged acts of racial harassment also played a part – but were the principal reason for his resignation and therefore his dismissal. The term of the contract broken was that related to trust and confidence and this was not a case of a "last straw". Each of the detriments constituted a breach of contract entitling the Claimant to resign.

9. The third claim is for harassment related to race under Section 26 of the Equality Act 2010 (EqA). Mr Brown explained that the conduct relied on and complained of is set out in the second and third paragraphs of the Claimant's claim form statement and the last instance took place on 4 November 2016, when the second Respondent made an offensive racial statement to the Claimant. Paragraphs 2 and 3 of the claim form statement set out the extent of the allegations of harassment.

10. Finally, the Claimant claims unlawful deduction of wages, although the only information that Mr Brown had was that the complaint related to non-payment of a bonus entitlement and that it occurred throughout the Claimant's employment. Mr Brown indicated that if the claim proceeded, the Claimant would apply to amend his claim form to give further particulars of this complaint, but he had not done so to date, nor was he in a position to do so today.

Complaint of detriments contrary to Section 47B ERA

11. By Section 48(3) ERA:-

> "An Employment Tribunal shall not consider a complaint under this section unless it is presented –
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> a before the end of the three months beginning with the date of the act or failure to act to which the complaint relates, or, where that act of failure is part of a series of similar acts or failures, the last of them, or
>
> b 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 three months."

12. It was agreed that any complaint which occurred before 13 October 2016 was out of time, and that as the last act or failure to act had occurred in August 2016 (somewhere between around six and ten weeks before that date), then all of these complaints are out of time. The issue was therefore whether it was not reasonably practicable for any of those complaints to have been presented before that date, and if so, whether that complaint had been presented within a reasonable period thereafter.

13. The question of whether it was not reasonably practicable to have presented the complaint in time is one of fact for the Tribunal to

determine. The phrase "reasonably practicable" should be interpreted liberally in favour of the Claimant, but it is for the Claimant to show precisely why it was that he did not present the complaint in time.

14. Even after speaking to the Claimant during the break in proceedings, Mr Brown was unable to shed any light on why the Claimant did not present his complaint within the time limit and I have therefore no basis to conclude that it was not reasonably practicable to do so. In these circumstances, the Tribunal does not have jurisdiction to hear the complaint which is struck out in accordance with Section 48(3) ERA.

15. For completeness, and as the point was argued before me I will add that had the complaints survived I would not have been minded to strike them out or order a deposit on the basis that they had no, or little, reasonable chance of success. Miss Owen argued that there was no, or insufficient, information to demonstrate any link between the alleged acts of detriment and the protected disclosures, that the contemporaneous documentation did not support there being any such link and there was nothing before the Tribunal on which to base a finding that the reason for the Claimant's treatment was the disclosures. Although it is unusual for a whistleblowing claim to be struck out before a final hearing, she asserted that it can be done if there is no real substance to the complaint. For the Claimant, Mr Brown asserted that these issues are matters of evidence for the consideration of a full Tribunal at a final hearing. On balance, I agree with the Claimant and I could not have concluded that there was no, or even little, prospects of the complaints succeeding, on the basis solely of the pleadings and information before me.

Automatic unfair dismissal

16. It was agreed by all parties that this complaint was presented in time. Miss Owen argued, nevertheless, that it had no reasonable chance of succeeding due to the absence of any link between the resignation and the protected disclosures. Both parties referred me to the Claimant's resignation letter (page 59 in the bundle). Miss Owen recognised that the letter refers to "risking technicians health and safety" but asserted that a Claimant has to do more than this and what was missing was any suggestion that the Claimant had been subjected to the wrongful treatment because he had raised those concerns.

17. Mr Brown pointed to the fact that the list of reasons for resignation cited by the Claimant in his letter should not be seen as exhaustive and that in any event, it is unrealistic to expect an employee in the Claimant's circumstances to craft a resignation letter in such a way that it stands the scrutiny of lawyers at an Employment Tribunal Hearing.

18. Having heard both submissions and considered the documentation, I agree with Mr Brown. I cannot say that the complaint has no, or even little, reasonable chance of success based on what I have before me

(nor indeed what is missing) and it would not have been appropriate to strike out the complaint or order that a deposit be paid.

Racial Harassment

19. The relevant parts of the EqA are in Section 123:-

> "(1) ….Proceedings on a complaint within Section 120 may not be brought after the end of –
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> (a) The period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) Such other period as the Employment Tribunal thinks just and equitable.
>
> (3) For the purposes of this section –
>
> (a) conduct extending over a period is treated as done at the end of the period"

20. At least one of the allegations of harassment is in time, having occurred on 4 November. In relation to the others, Miss Owen pointed out that we have very little information about when they took place or how many there are. There is therefore nothing from which the Tribunal can determine whether there was a "continuing act" or not, so as to bring them within the limitation period. However, I consider that it can be said that there is an element of consistency between the allegations, in that although there may have been numerous employees of the first Respondent making the offending statements, the second Respondent is a consistent presence throughout. Furthermore, there is some similarity between the allegations, which appear to involve offensive references to the Claimant supposedly being Chinese. I therefore do not conclude that the remaining complaints have no or little reasonable prospect of success based on them being out of time, even before needing to consider whether it would be just and equitable to extend time.

21. As for the merits of these complaints, Mr Brown pointed out that the Respondent does not deny that offensive racial comments were made, but asserts that they were part of "banter" within the organisation. He pointed me to the notes in the bundle at pages 99, 101 and 105 which appear to confirm this point. Although Miss Owen argued that we do not know what comments were made or when, and that they may not therefore tally, I believe this is something best dealt with by further and better particulars and no sensible conclusion can be made about the merits of these complaints without hearing extensive evidence from all parties.

Unlawful deduction from wages

22. All the Tribunal knows about this complaint is the information provided by Mr Brown this morning, namely that it relates to non-payment of bonus throughout the Claimant's employment. Even if, for whatever reason, the Claimant may not have been able to particularise this complaint when his claim was issued in February, nearly four months have elapsed since then. Mr Brown said that the Claimant would wish to apply to provide further particulars but he was not able to do so today, despite being on notice of the first Respondent's application for a number of weeks and even after speaking to the Claimant in the break in proceedings this morning. I therefore conclude that this complaint has no reasonable chance of success and order that it be struck out under Rule 37(1) of the Employment Tribunal Rules of Procedure 2013.

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Employment Judge Finlay, Cambridge.

JUDGMENT SENT TO THE PARTIES ON

Date: 6th July 2017

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