EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100223/17

Held in Glasgow on 30 August 2017

Employment Judge: F Jane Garvie

Mr David Wilson	**Claimant** **Represented by:** **Mr S Smith - Solicitor**
Gas Call Services Ltd	**Respondent** **Represented by:** **Ms J Sabba - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that

(1) the application to strike out the claim in terms of Rule 37(1)(a) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused;

(2) the claim will now proceed to a Final Hearing and

(3) arrangements for that Final Hearing are set out below.

REASONS

E.T. Z4 (WR)

1. In this case a Preliminary Hearing was held on 16 June 2017 before Employment Judge Ian McPherson. He issued various orders following that discussion and further information was set out in the Note which is dated 16 June 2017.

2. There was also a direction made that there should be a Preliminary Hearing as to whether the claim or any part of it should be struck out under Rule 37 of Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, ("*2013 Rules*").

3. The claimant was representing himself in June 2017. Mr Smith is now the claimant's representative.

4. A joint bundle was provided. Ms Sabba had a written submission on which she wished to address the Tribunal orally. Thereafter, Mr Smith gave his submission orally. Both representatives provided a number of authorities.

5. It was confirmed that no evidence would be heard by the Tribunal at this Preliminary Hearing. One other issue which arises is that the claimant appears to consider that he is still entitled to outstanding pay following termination of his employment. He did not receive a payslip from the respondent for the final week of employment. As I understood it, a spreadsheet had been provided. It was agreed that Ms Sabba will clarify the position further with her client and it may be that this matter can be resolved between the parties. Ms Sabba agreed that, following the Preliminary Hearing, she would arrange for her submission to be emailed. She duly did so and it is therefore set out in full below.

<u>Respondent`s Submission</u>

The Claimant had 6 weeks' service in his role as gas service engineer for the Respondent but asserts that the Employment Tribunal has jurisdiction to hear his claim of automatic unfair dismissal, due to the fact that he has made a protected disclosure, under the Employment Rights Act 1996 (ERA), section 103A. The Respondent refutes that proposition and asks that the Tribunal strikes out the Claimant's claim under Rule 37(1)(a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as it is contended that it has no reasonable prospects of success.

The Respondent's position is based on the following grounds:

1. There has been no disclosure of information.

2. The Claimant has not suffered a detriment.

3. The Claimant has not demonstrated a causative link between any alleged disclosure and any alleged detriment.

There has been no disclosure of information

4. The first step in establishing that an individual has protection under the whistleblowing legislation is to demonstrate that there has been a qualifying disclosure, which requires amongst other features, for there to be a disclosure of information. The Claimant contends that his written grievance, dated 13 November 2016 (production 5), is such a qualifying disclosure, in that it disclosed information that there was a danger to the health and safety of individuals. It is accepted that such a document is potentially capable of amounting to a qualifying disclosure (ERA section 43B(d)).

5. It is the Respondent's position, however, that the Claimant did not raise a grievance because he was actually concerned about the

health and safety of himself and others. Instead, it is asserted that the Claimant was unhappy about being asked to work in Glasgow, rather than Aberdeen, where he had been working for the previous 6 weeks. The grievance was therefore a personal complaint regarding the Claimant's place of work and did not amount to a disclosure of information, based on health and safety concerns.

6. When determining whether there has been a disclosure of information, an analysis of the content of the disclosure is necessary. Significantly, a 'disclosure' is more than merely a communication and 'information' is more than merely an allegation or statement of position. The individual making the disclosure must actually convey facts (*Cavendish Munro Professional Risks Management Ltd. v. Geduld [2010] IRLR 38 EAT).*

7. It is therefore important to consider in detail the Claimant's grievance letter. It begins with the following line:-

> *"It is with regret that after careful consideration, I have no option but to bring to your attention an official complaint in relation to an ongoing issue that the operations manager seems to have with me."*

8. It is submitted that this summarises the Claimant's grievance as a personal one, relating to a perceived clash of personalities between him and the operations manager. It is contended that it therefore amounts merely to an allegation of perceived mistreatment and does not convey facts. Notably, there is no reference to health and safety in the Claimant's introduction.

9. Indeed, the Employment Appeal Tribunal set out in *Cavendish* at paragraph 29:-

> *"If an employee is feeling badly treated, the solicitor may write to say that the employer is in breach of the contract… the solicitor may say if the situation does not improve, we have advised our client that he can resign and claim constructive dismissal. In those circumstances, in our judgement, no protected disclosure is made in such a letter. Similarly, if the individual met the employer without the intervention of the solicitor and made the same points, there would be no protected disclosure by that employee to the employer."*

10. It is therefore submitted that the Claimant is simply aggrieved at the way he is being treated; underlined by the Claimant's admission that he has the requisite qualifications to conduct commercial gas work but, essentially, does not feel confident or experienced enough to undertake commercial work:-

> *"Whilst I may have the qualifications, I lack the experience and do require Practical training … (it would) not be good mutually for myself or Gas Call to put me in a position where I have no commercial practical experience."* (production 5, page 35, paragraph 3)

11. This is the nub of the Claimant's grievance but it does not convey facts; it states the position of the Claimant and the way that he feels in relation to having to conduct commercial work. It is contended that, even taken at its highest (which is that the Claimant was going to be made to perform commercial work) it cannot amount to a health and safety breach, as he was appropriately qualified to do so. The Claimant only imparts that he feels nervous about undertaking this work, not that undertaking it would be a health and safety issue.

12. In any event, although it is the Respondent's position that to require the Claimant to perform work which he was qualified to do was not a health and safety risk, by the time he raised the grievance he was

being asked to perform domestic work. This was clarified with the Claimant, a fact which he acknowledges:-

> *"I received an email (on) Friday, 11 November, at the time of requesting I report for duty to work in Glasgow on Monday, 14 November at 8am. This time it was to work on the domestic side and to assist in other areas". (*Production 5, page 35, paragraph 5)

13. Essentially, when the Claimant raised his grievance he knew that he would not have to perform commercial work – he just did not want to work in Glasgow, a fact he made clear:-

> *"Suddenly receiving an email outwith working hours and changing the goalposts from being required to work commercially in Glasgow to domestic is confusing to say the least and this highlights that no matter what the operations manager determined to have me work in an unfamiliar area and is also being very unfair with the sudden lateness of the request."* (production 5, page 36, paragraph 6, bullet point 6)

14. Furthermore, the Claimant concludes:-

> *"I would like for you to take on board when going through my issues/concerns that I am happy to continue my service with the company and wish to simply be treated like any other engineer in Aberdeen".* (production 5, page 36, paragraph 7)

15. It is asserted that the Claimant's grievance was really about being moved to work from Aberdeen to Glasgow and was not, ultimately, motivated by any health and safety concerns. The Claimant's grievance does not therefore amount to a qualifying disclosure, as it does not contain a disclosure of information in any sense; it is

singularly a statement of the Claimant's personal position, outlining that he feels badly treated regarding the proposed temporary change of location.

16. Indeed, whilst it is accepted that a disclosure of information can include allegations, as in practice they are often intertwined (*Kilraine v London Borough of Wandsworth UKEAT/02601/15/JOJ),* any suggestion by the Claimant that his grievance letter contained anything more than mere allegations is refuted.

No Detriment

17. Even if it is accepted that the Claimant did make a protected disclosure he also has to show that, because of that disclosure, he suffered a detriment. What constitutes a detriment is not defined in the ERA but guidance is taken from discrimination case law. Indeed, a detriment has been described as the circumstances in which a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work. This was, however, distinguished from having an unjustified sense of grievance, which was held not to be enough to amount to a detriment (*Shamoon v. Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285).*

18. It is not entirely clear what detriment the Claimant insists he has suffered but it is submitted that, taking into account the circumstances, the Claimant had an unjustified sense of grievance, rather than having suffered an actual detriment.

19. The Claimant states at page 2, in the first paragraph of his Jurisdiction Claim Submissions document (production 7, page 38):-

> "*This time to assist as a domestic engineer – this showed that for whatever reason Mr. Lamont was making it difficult for me as the goalposts were changed from commercial request to domestic work, no other engineer was asked to attend to work in Glasgow."*

The Claimant reiterates that what he is unhappy about it being asked to work in Glasgow. Yet, the Claimant had a mobility clause (production 4, page 25) and accepted that the work which he was being asked to do there was domestic gas work. There is therefore no detriment to the Claimant by being asked to work in Glasgow.

20. Secondly, the Claimant states the following in his Submissions (production 7, paragraph 39):-

> *"… this left me no other option but to leave as health and safety was being breached along with non interest of investigating my grievance which highlighted potential risk for the public, myself and Gas Call Services Ltd."*

21. The Claimant cannot assert that there has been a fundamental breach of his contract of employment, as there was no actual or potential health and safety breach at the time when he resigned. When the Claimant resigned he knew he was being asked to perform domestic work, which he was comfortable with. He cannot therefore assert that he was forced to resign due to health and safety concerns and that his resignation amounts to a detriment.

22. Similarly, the Claimant cites the fact that his grievance had not been investigated as contributing to his decision to resign. The Claimant raised his grievance on the afternoon of Sunday, 13 November 2016. He resigned on the morning of Tuesday, 15 November 2016, having not been in work until that moment. The Respondent had simply not

had an adequate opportunity to formally acknowledge the Claimant's grievance and therefore this cannot amount to a detriment. Furthermore, the Claimant's grievance letter ends with a request that he receive a response within 5 working days. That deadline had not yet passed.

Causation - no link between alleged disclosure and alleged detriment

23. By the point at which the Claimant raised his grievance, he knew that he would only be required to perform domestic work in Glasgow. This meant that when the Claimant resigned there was no 'live' health and safety concern (if there ever had been) but simply annoyance, on behalf of the Claimant, that he was being requested to work in Glasgow rather than Aberdeen. There is therefore no link between any alleged health and safety disclosure in the grievance letter and any alleged detriment, as described by the Claimant or at all.

Conclusion – no reasonable prospects of success

24. In summary, it is contended that the Claimant's assertion that he is protected under the whistleblowing legislation is refuted and therefore the Employment Tribunal does not have jurisdiction to hear the Claimant's claim of unfair dismissal. We therefore ask that the Tribunal strikes out the Claimant's claim under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, as it is contended that it has no reasonable prospects of success.

25. It is accepted that the threshold for striking out a claim for having no reasonable prospects of success is high. In *Ezsias v North Glamorgan NHS Trust [2007] EWCA Civ 330*, the Court of Appeal held that where there are facts in dispute, it would only be "very

exceptionally" that a case should be struck out without the evidence being tested. Indeed, the particular nature and scope of the factual issues in that matter revealed 'diametrically opposed cases on the reasons for dismissal' (page 1 summary, paragraph 3). It upheld the EAT's decision that tribunals should not be overzealous in striking out a case as having no reasonable prospect of success, unless the facts as alleged by the claimant disclosed no arguable case in law.

26. I therefore make reference to the fact that the Claimant has presented his grievance letter to the Tribunal as evidence today, having had the opportunity to be guided and represented by a qualified solicitor. That his grievance letter is his protected disclosure is a crucial fact, which is not in dispute by either party. Neither is the date of his resignation. The Claimant's case hangs on whether or not that document amounts to a protected disclosure within the terms of the legislation. The Respondent argues that it does not. There is no more evidence that can be produced by the Claimant to allow this particular issue to be determined by the Tribunal and it is therefore argued that the facts, as alleged by the Claimant and taken at their highest, disclose no arguable case in law that he 'blew the whistle'.

27. Indeed, in *Balls v Downham Market High School & College UKEAT/0343/10*, the EAT stressed that, "no reasonable prospects of success" does not mean the claimant's claim is likely to fail, or it is possible the claim will fail, and it is not a test that can be determined by considering whether the other party's version of disputed events is more likely to be believed. Strike out is also, however, noted as being an 'important weapon in an Employment Judge's available armoury…(which allows) proper regulation of access to Employment Tribunals' (paragraph 4). It is a high test: there must be no reasonable prospects of success. Yet, it is advanced that this application for strike out meets that high test: for the reasons

expounded above, the Claimant's case has no reasonable prospect of success.

Final Week's Wage

28. Any allegation that the Claimant has not been paid his final week's wage is refuted and, in any event, is out of time under section 230 of the Employment Rights Act 1996. It is also contended that the Claimant cannot argue that it was not reasonably practicable to comply with the time limit, as the Claimant has had various opportunities to allege this underpayment – notably the ET1 and again at the Preliminary Hearing held on 16 June 2017 – but made no mention of it. Indeed, paragraph 1 of EJ McPherson's Note on the PH outlines that the Claimant withdraws his claim for holiday pay but insists on a claim for notice pay. Even at that point, the Claimant did not assert that he was owed a week's wage for work that had been performed.

29. Moreover, it is also submitted that this is not the forum for this discussion, as the purpose of this PH is to hear submissions on strike out. The Tribunal cannot strike out a claim that has not been raised.

6. As indicated in her written submission, Ms Sabba`s position is that there was no disclosure of information by the claimant; he had not suffered detriment and there was no causal link between any alleged disclosure and any alleged detriment. The claimant`s written grievance dated 13 November 2016, (Production 5) is accepted as being a document that is potentially capable of amounting to a qualifying disclosure in terms of the Employment Rights Act 1996, Section 43B(d).

7. The respondent`s position is the claimant did not raise a grievance because he was concerned about the health and safety of himself and others, rather

he was unhappy about being asked to work in Glasgow rather than Aberdeen where he had previously been based.

8. Reference was made to ***Cavendish Munro Professional Risks Managements Ltd –v- Geduld [2010] IRLR 38***. Reference was made specifically to paragraph 29. The respondent`s position is that the claimant was aggrieved at the way he was being treated and this was the nub of his grievance but this did not convey facts amounting to a disclosure.

9. Reference was made to Production 5 at page 35, paragraph 8 being a communication from the claimant and also to paragraph 7 on page 36.

10. Reference was made to ***Kilraine –v- London Borough of Wandsworth UK/EAT/0260/15/JOJ***.

11. The respondent denies there was anything more than allegations made by the claimant.

12. In relation to detriment it was submitted that a non justified sense of grievance is not enough to amount to a detriment see ***Shamoon –v- Chief Constable of The Royal Ulster Constabulary [2003] IRLR 285***.

13. Reference was made to the first paragraph of the claimant`s submission set out at Production 7, page 38 and then at paragraph 39. The respondent's position is that there was no actual or potential health and safety breach when the claimant resigned from employment. This grievance letter requested a response within 5 working days but that deadline had not passed.

14. It was submitted that there was no link between the alleged disclosure and the alleged detriment.

15. Accordingly, it was submitted that any suggestion that the claimant had a whistleblowing complaint was refuted and the Tribunal did not have jurisdiction to consider the complaint of unfair dismissal.

16. Therefore, an application was made to strike out the claim under Rule 37(1)(a) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations on the basis that it has no reasonable prospect of success.

17. It was accepted the threshold for striking out a claim is high see ***Ezsias –v- North Glamorgan NHS Trust [2007] EWCA Civ 330***, where the Court of Appeal held that where facts are in dispute it would only be "*very exceptionally*" that a case would be struck out without the evidence being tested.

18. The respondent`s position is that the claimant`s grievance letter cannot amount to a protected disclosure.

19. Reference was also made to ***Balls –v- Downham Market High School & College UK/EAT/0343/10*** where the Employment Appeal Tribunal stressed that "*no reasonable prospects of success*" does not mean the claim is likely to fail, or it is possible the claim will fail, and it is not a test that can be determined by considering whether the other party`s version of disputed events is more likely to be believed.

20. Reference was made to paragraph 4 in that judgment where it was noted that strike out "t*his important weapon in an Employment Judge`s available armoury…".*" It was accepted that it is a high test and there must be no reasonable prospect of success. However, in this case Ms Sabba submitted that the application for strike out meets that high test and the case can have no reasonable prospect of success.

Claimant`s Submission

21. Mr Smith referred first to ***Tayside Public Transport Co Ltd [t/a Travel Dundee] –v- Reilly [2012] SLT 1191*** a decision of the Inner House where it was held that there were a number of live factual issues, the existence of which sufficiently demonstrated that the respondent's claim could only properly be resolved by a hearing before a full tribunal and the employment judge had not been entitled to strike it out but should have considered whether a full tribunal, conducting a formal hearing into the claim might have fuller information before it than the Judge did. His decision had been correctly set aside, and the appeal was refused and the case remitted for a full hearing on the merits of the case.

22. There is reference to the Employment Appeal's Tribunal decision, (Lady Smith presiding) and specifically reference was drawn to paragraphs 23 and 24 of ***Tayside*** where it states:-

> *"[23] Lady Smith observed that the employment judge`s decision had a lengthy section headed "[F]acts". However, it was important to remember that, as this was a pre-hearing review, no firm findings in fact could be made beyond the parties' admissions (para.4). The employment judge said that Mr Brown`s evidence would have been relevant to culpability, but discounted it as the respondent had not referred to it at the disciplinary hearing or at his appeal. It was not apparent from the documents that the respondent knew that Mr Brown had spoken to the investigating officer (para.5).*
>
> *[24] Her Ladyship was readily satisfied that the employment judge had gone too far and too fast in concluding that the claim had no reasonable prospects of success*."

23. Also reference was drawn to paragraph 29 where it was pointed out that the power of an Employment Tribunal to strike out a claim may be exercised only where the tribunal determines that the claim has "*no reasonable prospect of success*", this being a reference to Rule 18(7)(b) of the 2004 Rules that were then in force. Reference was also made to paragraph 31 of ***Tayside*** where it is states:-

> *"[31] … On the papers that are before us, it is obvious that all of these are live issues*."

24. At paragraph 32 it states:-

> *"[32] The existence of these factual issues sufficiently demonstrates, in my opinion, that the respondent`s claim can be properly resolved only by a hearing before a full tribunal*."

25. Also paragraph 34 where it states:-

> "*[34] It is quite clear, in my view, that the employment judge was not entitled to take it upon himself to strike out the respondent`s claim. In his conclusion, which I have quoted, he says that his decision is based on "the information that I have before me at present" (supra). In my view, he should have considered whether a full tribunal conducting a formal hearing into the claim might have fuller information before it than he had*."

26. Mr Smith referred to IRLR Volume 41 No 9 September 2012 Highlights and the reference to guidance provided in ***Tayside***, (see above). There, the Lord Justice Clerk is quoted as saying:-

> "*In almost every case the decision in an unfair dismissal claim is fact sensitive. Therefore where the central facts are in dispute, a claim*

should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts…. There may be cases where it is instantly demonstrable that the central facts in the claim are untrue; for example, where the alleged facts are conclusively disproved by the productions… But, in the normal case where there is a `crucial core of disputed facts`, it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out." This judgment has now been included in the list of `familiar authorities` published by the EAT on 20 June 2012, which do not need to copied for the EAT."

27. It was noted by Mr Smith that in ***Tayside*** the Inner House had been referred to ***Balls*** (see above) and **Ezsias** (also see above).

28. next, Mr Smith referred the Tribunal to the Employment Appeal Tribunal in ***Mr S Sajid –v- Bond Adams LLP Solicitors Appeal Number UK/EAT/0196/15/BA***. In the summary, there is reference to *Tayside,* (see above).

29. Mr Smith referred the Tribunal to an extract from Harvey at HIREL Issue 259 at paragraph 633 under the heading, "*T. Striking out*". Reference is made there to ***Tayside***, (again see above), ***Ezsias***, (*again see above) and* **Romanowska –v- Aspirations Care Ltd UK/EAT/0015/14** (25 June 2014, unreported). At paragraph 633 it is pointed out that the power to strike out a claim under Schedule 1 of Rule 37(1)(a) of the current Rules on the ground that it has no reasonable prospect of success should only be exercised in rare circumstances.

30. Harvey continues as follows:-

"*The reason for this is that on a striking-out application (as opposed to a hearing on the merits), the tribunal is in no position to conduct a*

mini-trial, with the result that it is only in an exceptional case that it will be appropriate to strike out a claim on this ground where the issue to be decided is dependent on conflicting evidence."

31. Mr Smith then referred to paragraph 633.01 in Harvey where it states:-

"*No exceptional circumstances were found in either Ezsias, where an employment judge`s order striking out a whistleblowing claim was overturned on appeal as there was a `crucial core of disputed facts` that was `not susceptible to determination otherwise than by hearing and evaluating the evidence*`."

32. At paragraph 633.02 there is reference to ***Tayside***, (again see above) and also to **Sajid**, (again see above).

33. Next, at paragraph 633.07Harvey continues as follows:-

"[633.07] As whistleblowing cases have much in common with discrimination cases, I that they too are fact-sensitive and involve similar public interest considerations, the comments made by Lord Steyn and Lord Hope in ***Anyanwu –v- South Bank Students` Union [2001] IRLR 305****, HL have been held to apply equally to them (see* ***Ezsias –v- North Glamorgan NHS Trust [2007] EWCA Civ 330, [2007] IRLR 603, [2007] ICR 1126****). Accordingly, when considering whether to strike out public interest disclosure claims, tribunals are advised to approach the matter with the same degree of caution as with discrimination claims, and they ought not, other than in exceptional circumstances, strike out such claims on the ground that they have no reasonable prospect of success without hearing evidence and considering them on their merits (see paras 30-32)."*

34. Next, Mr Smith referred to the section in Harvey at HIREL Issue 258 at Ciii - 2 under the heading, "*Introduction to Whistleblowing*".

35. Specifically he referred the Tribunal to paragraph 5 as follows:-

> ***"[5]*** *One procedural indication of the importance of these rights and the potential complexity (especially in establishing the crucial causative link between the alleged ill-treatment and the act of whistleblowing) is that the courts have cautioned that it should be rare for a tribunal ever to strike out a complaint based on whistleblowing without a full hearing of the facts; Ezsias –v- North Glamorgan NUS Trust [2007] EWCA Civ 330, [2007] IRLR 603 (per Maurice Kay LJ, drawing a parallel with discrimination cases); Romanowska –v- Aspirations Care Ltd UK/EAT/0015/14 (25 June 2014, unreported); Morgan –v- Royal Mencap Society [2016] IRLR 428, EAT*."

36. Next, Mr Smith referred to ***Morgan***, (see above) and where it is pointed out as follows:-

> "*It is well established that a tribunal`s power to strike out a claim as having no reasonable prospects of success is contained in Reg 37(1)(a) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, SI 2013/1237. The threshold is high, as has been emphasised repeatedly and it is an unusual discrimination case where it is appropriate to strike out such a claim without hearing the evidence. Courts at all levels have stressed the draconian power represented by an order striking out a claim before the merits have been determined. Whistleblowing cases have much in common with discrimination cases, involving as they do an investigation into why an employer took a particular action or decision. Claimants in such cases run up against similar sorts of difficulties as those facing discrimination. In the same way that courts*

have expressed a reluctance to strike out fact-sensitive claims of unlawful discrimination in order to avoid injustice, the same or a similar approach has been held to be appropriate in whistleblowing cases.

In the present case, the tribunal had failed to take the facts at their highest. The judge had rejected Ms Morgan`s case that she had held the subjective belief for which she had contended. While Ms Morgan`s disclosures had been about her own predicament and the fact that she had an earlier injury that made her working conditions dangerous in her view, she had also asserted a belief that others might be affected by the working conditions, and had made other assertions that had not been tested by evidence and should have been accepted at the present stage. It was reasonably arguable that an employee could consider health and safety complaints – even where they were the principal person affected – to be made in the wider interests of employees generally."

37. Mr Smith then directed attention to Mrs Justice Simler at paragraph 24 as follows:-

"*It seems to me that this submission does not take the claimant`s case as a whole, at its highest. Although the employment judge referred at paragraph 4 to the particulars document I have referred to (and identified it as pp 43-45) when he came to set out the facts at paragraph 17 no reference whatever is made to the beliefs asserted by the claimant as to how the public interest was engaged*."

38. Mr Smith then referred to paragraph 25 as follows:-

"*It seems to me that this is not a case where the employment judge took all aspects of the claimant`s case at its highest. The employment judge omitted altogether the claimant`s case as to how*

and why the public interest was engaged in the paragraph that sets out the evidence the claimant was advancing, and I am unpersuaded for the reasons just given, that this is a case where it can be said that no reasonable person could have believed that the matters the claimant was raising engaged the public interest as Mr Crow submits."

39. Then reference was made to paragraph 26 as follows:-

"*As HHJ Richardson said when dealing with this case on the sift, and as the Minister observed in the course of the debates in Parliament about this amendment to the whistleblowing regime, it is reasonably arguable that an employee may consider health and safety complaints - even where they are the principal person affected – to be made in the wider interests of employees generally*."

40. Next, Mr Smith referred to the Employment Appeal Judgment in ***Ms R Ghumra –v- The Home Office (Secretary of State for the Home Department) UK/EAT/0077/15/RN*** before his Honour Judge Peter Clark where at paragraph 24 he refers to "*For an analysis of the principles laid down in those cases (and their application) see the recent judgment of Simler P in* ***Morgan –v- Royal Mencap Society [20116] IRLR 428****, paragraphs 13 to 14*." Judge Clark continued thus:-

"*In short, it will only be in an exceptional case that such a claim will be struck out under Rule 37(1)(a) where the central facts are in dispute, for example, where the claimant`s account is wholly inconsistent with contemporaneous documents (****Ezsias****, paragraph 29)."*

41. Then Mr Smith referred to ***Kilraine –v- London Borough of Wandsworth***, (again see above) where Mr Justice Langstaff pointed out that there were

four disclosures scheduled to the Tribunal decision. At paragraph 30 he continued thus:-

> "*I turn now to the case in respect of the third and the fourth disclosures. These were rejected. So far as the third is concerned, this was upon the basis that it was an allegation and not a matter of information. I would caution some care in the application of the principle arising out of* ***Cavendish Munro****. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the claimant`s solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between `information` and `allegation` is not one that is made by the statute itself. It would be a pity if tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but it is to be determined in the light of the statute itself. The question is simply whether it is disclosure of information. If it is also an allegation, that is nothing to the point*."

42. Next, Mr Smith referred to Volume 45, Number 6 June 2016, Highlights for June 2016 at page 385. There is reference to ***Kilraine***, (see above) as well as ***Cavendish Munro*** and the paragraph above cited.

43. He also noted the reference to ***Morgan***, (see above) and the specific reference to the President saying:-

> "`*The question is not whether the disclosure is actually in the public interest but whether the worker making it has the belief and whether the belief is reasonable. Both subjective beliefs must be reasonably held by the worker but yet may be wrong`. She goes on to hold that: `It is not therefore necessary for a tribunal to determine the public*

interest; rather, it is for a tribunal to determine whether a claimant`s subjectively held belief that the disclosures were in the public interest was, when objectively viewed, reasonable. That is a fact sensitive question`."

44. Mr Smith then referred further to the commentary at page 386:-

"*Mrs Justice Simler points out that `it is reasonably arguable that an employee may consider health and safety complaints – even where they are the principal person affected – to be made in the wider interests of employees generally. Whether that is so in a particular case is a question of fact`. This, with respect, must be right. It is the antecedent issue of whether work colleagues can amount to the "public" that is the more contentious point. If they are, it is a small step from an employee claiming that their own terms and conditions have been interfered with to asserting that this is of interest to others in the workforce. That after all, is what solidarity and trade unionism is based upon*."

45. Mr Smith referred to page 7 of the claim form, (the ET1) which is set out at page 8 of the bundle where the claimant refers to the following:-

"*On my days off i* (sic) *noticed an email sent after my working hours finished and after our telephone conversation on Friday 11 November from Mr Laming, stating that I was to report to the Glasgow office to assist and work in Glasgow… Mr Laming had previously discussed his dislike of me, this was openly discussed so much so that admin staff who allocated work from Glasgow to Aberdeen were instructed to hold back any work from me should i* (sic) *call up looking for work when the overtime in evenings commenced. I have a statement at hand from staff declaring this to be true and to declare Mr Laming had a personal issue with me. I wrote a grievance letter by email to Alan Lowe, General Manager on*

Sunday 13 November expressing my grievances and how I felt that I was being forced to work in a sector i (sic) *had no experience in and how i* (sic) *felt victimised as my place of work had been changed without the months notice as per my contract states.*"

46. Mr Smith submitted that this was the first actual area of dispute between the parties.

47. His next point was that the only document available is the email of 12 November 2016, (page 43) from Mr Laming to the claimant which states as follows:-

"*Subject: Fwd: Work week beginning 14/11/16*

David

You are required to work from Glasgow next week doing domestic servicing/breakdowns and assisting where required. Please report to the Glasgow office at 8.00am on Monday morning, I tried calling you and left a voice mail."

48. In Mr Smith`s submission much would turn on what was meant by this.

49. He referred back to the claim form at page 8 of the bundle and the section already quoted from beginning "*On my days off ..".*

50. The third point from Mr Smith was that the Tribunal requires to hear evidence as to the background and the fourth point is the issue of the grievance, (see page 35). This is a letter to Mr Lowe from the claimant dated 13 November 2016 set out at pages 35 and 36.

51. Specifically, Mr Smith referred to page 35 where it states:-

> "*I have been asked on more than one occasion to work in the commercial sector*."

52. Also, on the final paragraph of that page as follows:-

> "*However on Saturday 12 November 2016 I received and* (sic) *email from the Operations Manager (dated Friday 11 November at the time of requesting) I report for duty to work in Glasgow on Monday 14 November at 8am. This time it was to work on the domestic side and to assist in any other areas.?*"

53. Mr Smith`s position was that this was a factual dispute and evidence would have to be given. In his submission, it was similar to the first point as it refers to conversations the claimant had with Mr Laming. It was his submission that the latter point sets out in the letter i.e. "*To work in the domestic side and to assist in any other areas?*" is something that changes entirely the meaning of that service in that was it a statement or was it asking a question. The Tribunal would require to hear from the claimant on that.

54. Turning to the second page of the letter, (page 36 of the bundle) there were a number of bullet points and specifically the penultimate bullet point which reads as follows:-

- "*Suddenly receiving an email outwith working hours and changing the goalposts from being required to work Commercial in Glasgow to Domestic is confusing to say the least and this highlights that no matter what, the Operations Manager is determined to have me work in an unfamiliar area, and is also being very unfair at the sudden lateness of the request*."

55. In Mr Smith`s submission the claimant is apparently very unhappy with the way he has been treated but it is also part of the same factual matrix of the claimant being required to work on the commercial side and this links to the reference in the claim form at page 8 of the bundle where the claimant refers to:-

> "*I was being forced to work in a sector i* (sic) *had no experience in and how i* (sic) *felt victimised as my place of work had been changed without the months notice as per my contract states*."

56. The claimant therefore makes a connection between what he was required to do and what caused him to resign.

57. Mr Smith explained that the claimant was asked to provide further information by Judge McPherson. This is set out at pages 38 to 40 of the bundle. At page 39 the claimant refers to the following:-

> "*This time to assist as a DOMESTIC ENGINEER – this showed that for whatever reason Mr Laming was making it difficult for me as the goalposts where* (sic) *changed from commercial request to domestic work, no other Engineer was asked to attend to work in Glasgow and there was no months` notice as per my contract in relation to changing place of work."*

58. Next, he referred to the claimant writing as follows:-

> "*On reporting for work on Tuesday 15 November 2016 I was disappointed to find that Mr Lowe did not acknowledge my grievance or discuss any plans to investigate my concerns for safety in the workplace. One staff member when I arrived said she had my days work ready for me to attend. When I looked at this I seen this was for Commercial Boilers, no pairing up with any other engineers I was working solo*."

59. Later, at page 39 the claimant states:-

> "*At this point I approached Mr Lowe and said that I couldn`t possibly work on Commercial and that I had explained this in a grievance letter he received*."

60. While this specifically was not set out in the ET1 it is clear linkage and specification of facts that the claimant`s grievance was connected to this discussion and that there was a conversation.

61. Next, Mr Smith referred to page 22, this being the Paper Apart to the respondent`s response, (the ET3). Specifically, he referred to paragraph 13 which states as follows:-

> "*The Claimant was asked to report for work in Glasgow on Tuesday, 15 November 2016. When he duly reported for work he spoke to Alan Lowe, General Manager, and verbally resigned with immediate effect. Mr Lowe asked him to think carefully before making such a decision but the Clamant stated that he had made up his mind*."

62. In Mr Smith`s submission there was no specification and no denial that there was a discussion about commercial work whether the commercial work was relevant. The claimant says it was, and so, albeit his grievance was a couple of days earlier, factually there appears to be a link as this is the next time that the claimant spoke to the employer, namely Mr Lowe. That was Mr Smith`s fifth point. His sixth point was in relation to detriment and here he referred the Tribunal to page 9 being page 8 of the ET1 where there is reference to:-

> "*Wage costs and holiday pay that is due, also loss of wages being put into financial difficulty and most importantly for Gas Call to review the way they operate and to take safety seriously and ensure qualified engineers carry work out and not place engineers in a*

position they have no option but to either work without experience or feel they have to leave employment."

63. In Mr Smith`s submission, everything was there that the respondent could want to know, the reason is set out there.

64. In his submission, there was not much specification in the ET3 regarding wages.

65. In his submission, some of the points raised are not set out in the response form and that is the claimant`s seventh point. Reference was made to paragraph 7 of the claim form, (pages 21/22). This states as follows:-

> "*7. Indeed, this work was related to (name redacted) Housing Association, which provides sheltered housing to the elderly. The majority of their property is made up of multi residency homes, which may share heat from either a commercial boiler or a series of domestic boilers*."

66. The claimant maintains that he was not experienced in dealing with commercial work and so this is put at issue with the respondent.

67. Paragraph 8 of the ET3, (again page 22) refers to health and safety accreditations and, in Mr Smith`s submission, evidence would have to be heard from witnesses about this matter.

68. Next, dealing with paragraph 9 of the ET3 this indicates that the claimant while describing his usual place of work at Aberdeen, the contract allowed for the claimant to be required to work at other locations as reasonably determined by the respondent and this was something else about which the Tribunal would require to hear evidence.

69. The next point was the issue regarding health and safety accreditation and then his ninth point was the claimant`s contract itself and whether the respondent was entitled to ask the claimant to do what was being required of him, namely to work in Glasgow at this site.

70. In Mr Smith`s submission, there were therefore nine issues arising where evidence would have to be heard by a tribunal before it could reach a decision as to whether or not there was a protected disclosure as is alleged by the claimant.

71. Ms Sabba accepted that the grievance letter, as she understood it, was said to be the disclosure i.e the public interest disclosure.

72. In response, Ms Sabba accepted that it is a high test in relation to strike out of a claim but, in her submission, the issue in law is whether the grievance set out a protected disclosure. In her submission, it is for this Tribunal to determine whether or not the case should proceed to a Final Hearing in the event it concluded that it was not appropriate to strike out the case.

73. It was confirmed that there has been no Schedule of Loss prepared at this stage. In the event that the case was to proceed to a Final Hearing neither representative thought it would be necessary to convene a further Preliminary Hearing in relation to preparation for that Final Hearing. A Schedule of Loss will be prepared and a joint bundle to be exchanged at least 21 days in advance of the Hearing.

74. It was also confirmed that, in the event the case does proceed to a Final Hearing, then date listing letters should be issued. The representatives between them would revert to the Tribunal with mutually agreeable dates for that Final Hearing.

75. Ms Sabba confirmed that the claimant had worked for the respondent for 6 weeks. Her understanding was that he was paid monthly. If there was any outstanding pay then this could be a matter of discussion between the representatives and it may well be that this could be resolved between them without it requiring to be considered further by a Tribunal. The claimant and possibly one other witness will give evidence for the claimant. There will be 2 witnesses for the respondent. It was agreed that it would be appropriate to allocate 3 days given the potential number of witnesses. It was also confirmed that the representatives will confirm within 21 days of the date of this Judgment whether or not they would be interested in Judicial mediation given the Final Hearing is likely to last 3 days should it be the Tribunal`s decision that the case should not be struck out at this stage.

76. There was no objection to a copy of this Judgment being sent to ACAS for information.

The Law

77. The provisions in the Public Interest Disclosure Act 1998 are set out in the Employment Rights Act 1996. Section 103A deals with automatic unfair dismissal where an employee asserts that he/she has been dismissed for making a protected disclosure. For the avoidance of doubt, Ms Sabba was not seeking a deposit order in terms of Rules 37 and 39 of the 2013 Regulations.

Deliberation & Determination

78. The Tribunal was grateful to the representatives for providing such detailed submissions and the various references to the relevant parts of the joint bundle and to the authorities set out above.

79. In reaching its determination the Tribunal took into consideration that the claimant has set out further specification as he was directed to do by Judge McPherson, (see pages 38 to 40 of the joint bundle).

80. It further noted that the reference to the place where the claimant was to be assigned to work in Glasgow was at a Housing Association and it does not appear to be in dispute that it had premises where there were both domestic boilers for some of the houses within the housing association complex but other properties apparently shared heat from a commercial boiler. Whilst the respondent`s position is that the claimant was experienced in that type of work, the claimant disputes this was so. His position is as set out as explained above in the grievance letter dated 13 November 2016.

81. In reaching its decision the Tribunal took into consideration the terms of that letter as well as the further information provided by the claimant since it seemed necessary to do so given that further information had been provided by the claimant following the direction from Employment Judge McPherson. Whilst this therefore was not part of the claimant`s original information set out in the ET1 the Tribunal was alert to the fact that the claimant is a lay person who did not have the benefit of representation when he drafted the grievance letter nor when he prepared the claim form, (the ET1). Subsequently, he did as he was directed to do and provided the further information as referred to above.

82. The Tribunal concluded that it is not for it only to interpret the terms of that grievance letter but rather for it to consider whether or not this claim has no reasonable prospect of success in relation to the allegation that the claimant made a protected disclosure.

83. Having given careful consideration to all that was said by both Ms Sabba and Mr Smith, the Tribunal concluded that it cannot say that there is no reasonable prospect of success in relation to the allegation of a protected disclosure having been made and the assertion that there was an

automatically unfair dismissal as a result of making such a disclosure. The Tribunal concluded that in this case evidence will have to be given and the appropriate time and place to do so is at the Final Hearing.

84. In reaching this conclusion the Tribunal took into account the test that has been applied as set out by the various authorities to which its attention was drawn. It has been repeatedly pointed out by the higher courts and appellate tribunals that the power to strike out is a draconian one and just as when considering discrimination claims complaints in this case an allegation of a protected interest disclosure/whistleblowing should not be struck out unless the Tribunal is satisfied that there is no reasonable prospect of success.

85. In this case the Tribunal was not persuaded that it could say that there is no reasonable prospect of success. As indicated above, the respondent does not seek to have a deposit order put in place had the Tribunal reached the conclusion that there was little reasonable prospect of success. Accordingly, since it was not asked to consider this alternative the Tribunal has concluded that it cannot say that the claim has no reasonable prospect of success and therefore the application for strike out is refused.

86. In relation to further procedure there was, as indicated above, a discussion with the representatives on the basis it was sensible to do this on 30 August 2016 rather than have to correspond further with the parties or alternatively fix a further case management discussion.

87. It is to be hoped that the representatives can, as they have indicated, now proceed with their preparation for the Final Hearing. Date listing letters will be issued separately from this judgment. If there are any matters on which the parties require further orders or directions they are, of course, entitled to apply in writing to the Tribunal, ensuring that they comply with the requirements of Rule 92 to copy any such requests to one another at the same time as writing to the Tribunal.

88. Finally, it is appropriate for a copy of this judgment to be sent to Acas for information.

Employment Judge: F Jane Garvie
Date of Judgment: 12 September 2017
Entered in register: 13 September 2017
and copied to parties