THE EMPLOYMENT TRIBUNALS

Claimant: **(1) Mr D Hazel**
(2) Mr C O'Driscoll

Respondent: **Lift Gear engineering limited**

PRELIMINARY HEARING (OPEN)

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **2 November 2022**

Before: **Employment Judge P Britton**

Representation
Claimant: Mr A MacMillan (counsel)
Respondent: Ms C Davies (counsel)

JUDGMENT

1 The claim of Mr Hazel is not struck out and a deposit is not ordered, the claim having more than little reasonable prospect of success

2 The Claim of Mr O'Driscoll is not struck out, but a deposit order is made on the basis that it only has little reasonable prospect of success. Having consider his means, I order that as a condition precedent to continuing with his claim, he will pay a deposit of **£500 within 56 days of the issue of these orders. The appropriate notice as to how to pay the deposit accompanies.**

REASONS

1 Present during the hearing today were the Claimants and also Mr Chris Buckenham the sole director and shareholder of the Respondent.

2 I heard a case management hearing on this matter by telephone on the 23 May 2022. My findings and order were published on the following day as to which see pages (Bp) 102-5 in the joint bundle before me today. I do not intend to rehearse in any detail what I set out, but I had to deal first of all with whether or not the response (ET3)

to the claim of Mr Hazel should have been rejected by the Tribunal. For the full reasons which I gave I ruled that the response should have been permitted and thus I so ordered. Having done so I did observe that it appeared to me that on the face of it both of the claims for reasons I briefly touched upon were weak, hence my decision to order an open preliminary hearing to consider whether the claims should be struck or in the alternative deposit orders made. It is however important to stress that having made those observations as to which see paragraph 6 in particular, that I did say at paragraph 10. '*Of course, the position may change once the further particularisation and documentation in support that I am ordering from both Claimants has been received and responded to again with further documents which gainsay the contentions of the Claimants.".*

3 Hence this hearing today. The Respondent understandably given my observation, applies for strike out and or deposits as to both claims and as to which I have before me the Skeleton argument of Ms Davies. This is a helpful document in terms of in particular setting out the core jurisprudence to be considered. The Claimants oppose the applications. I have also paid close regard inter alia to the submissions of Mr MacMillan and I grateful for the assistance in the way both Counsel have approached the issues for me to determine.

The rules of procedure as to strike out and in the alternative making a deposit order

4 Rule 37(1)(a) of the Employment Tribunals 2013 rules of procedure (the Rules) set out the circumstances in which a claim may be struck out namely if it has no reasonable prospect of success. It is set out fully by Ms Davies in her submissions starting at paragraph 31. Mr MacMillan does not disagree with the legal structure as referred to therein by her. As to a deposit order, I can so make under rule 39(1) if I consider that the claim has little reasonable prospect of success. Again, this is fully set out in the Skeleton submissions of Ms Davies at paragraph 25 including consideration of a Claimant's ability to pay said deposit which is a maximum of £1000 per claim or having considered means can be a lesser sum. There are costs implications for a Claimant if he proceeds following a deposit order and loses the claim at the main hearing as is made plain in the notice that is issued if a deposit order is made.

Striking out: the core jurisprudence

5 This is again helpfully set out by Ms Davies at paragraphs 21-24. I am of course aware that in cases such as whistleblowing, and which engages in these claims, that to strike out should be treated with great caution as such cases are generally fact sensitive and there is a public interest in the examination on the merits.

6 However as per paragraph 24 and the reference to ***Ahir v British Airways Plc (2017) EWCA Civ 1392*** the Court of Appeal held (at para 16) that in the right circumstances tribunals should not be deterred from striking out discrimination claims

(for which also read whistleblowing) even where they involve a dispute of fact:

Employment tribunals should not be deterred from striking out claims, including

discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided that they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context."

And as to the making of a deposit order

7 I am well aware that the Tribunal has greater leeway when considering whether or not to make an order for a deposit as opposed to striking out and that I can make an assessment of the credibility of the parties case and in that respect. Ms Davies has at her paragraph 26 referred me *to* ***Van Rensburg v Royal Borough of Kingston-upon- Thames and others UKEAT/0096/07; UKEAT/0095/07*****.** Also, to Wright ***v Nipponkoa Insurance (Europe) Ltd UKEAT/0113/14*** and that: " *The test of little reasonable prospect connotes a lower threshold than the test of no reasonable prospects."*

8 I take on board however, the point made by Mr MacMillan, that I should bear in mind the guidance from the case of ***Sharma v New College Nottingham*** **EAT 0287/11** that I should not make such a conclusion solely on the basis of contemporaneous documentation even if it might be inconsistent with a Claimant's account if for instance there were underlying facts of dispute. That I must avoid straying into making findings of fact which is the function of the Tribunal at the main haring and not that of the judge at a preliminary hearing in determining whether or not a deposit order should be made. But I do observe that as per such as ***Van Rensburg*** a deposit order may well be applicable if on the face of it the documentary evidence is material inconsistent with the Claimant's stated case and thus begs the question as to his prospects of success.

My assessment first observations as to Mr O'Driscoll

9 The two Claimants worked for the Respondent which is a small but specialised business primarily engaged in the repair and servicing of lifts. Mr Hazel was employed between 1 February 2021 and 7 July 2021 as a lift engineer's mate. Mr O Driscoll was similarly employed between 12 April 2021 and 12 July 2021 as a lift engineer. As per their contracts of employment each was subject to a probationary period of three months. The business has been operating for many years and has to maintain inter alia a high safety standard and in that sense a qualificatory regime as it works in a safety critical environment. But as to whether or not it did so all the time is in terms of what the Claimants allege is in dispute.

10 It seems by and large the Claimants worked together as a team. For the purposes of today only, it seems to not be in dispute that they would in turn answer to Darren Royce. There is an issue flagged up by the Claimants as to whether or not Mr Royce owns the business**,** Mr Buckenham is quite clear that Mr Royce he does not and that he is the sole shareholder and director. If that remains in dispute, obviously the Claimants can do a search at Companies House.

11 In any event, the Claimants were on a job on the 23 June 2021 at 9 Warwick Square, London, SW1V 2AA. On site, it does not appear to be in dispute by the

Claimants there was also Mr Royce and William Buckley. The first issue becomes did Mr O'Driscoll suffer in the course of his duties on that day an accident thus damaging his back. That he had a back problem beforehand is not in dispute. As to whether he did so hurt his back is in dispute.

12 Dealing with the next few days thereafter, Mr O'Driscoll was in text communication with Mr Royce and about how he was getting on with his back and when would he be returning to work. Those exchanges were friendly. At bundle page (Bp) 223 is the text that Mr O'Driscoll sent Mr Royce circa the 27 June. It followed a first one which I think was a day or so after the complaining about his back and having to go off sick. Thus, the first is at Bp228,[1]. In it Mr O'Driscoll says

> *"…My back has ended up being really bad, its taking forever and the doctor signed me off until Monday with a not fit for work slip and got to go in today so they can have another look but they said it could take 2 weeks to be a back to normal …"*

13 He makes no reference to any accident at work.

14 Then there is the text (Bp 223) which I can work out from the bundle was circa 27 June. In it Mr O'Driscoll is giving Mr Royce an update. Having talked about that his back was still 'absolutely shot" Later on in that text he says:

> *"… I've done it properly, just don't understand how it even happened, worst I've have ever had…."*

15 I emphasise: '***just don't understand how it even happened".*** One might think that given that core to his claim of automatic dismissal because of whistleblowing[2] and relating to the accident and thus a failure to provide a safe system of work that , he would have at least told Mr Royce that he suffered the accident and of course, Mr Royce had he been there, doubtless would have been able to confirm one way or another as to whether he had, so there is a point as to credibility. Why did Mr O'Driscoll not raise the accident in those texts?

16 That brings me to that on the 24 June, so the day after he suffered the back problem, Mr O'Driscoll emailed Mr Hazel who is formally his line manager, but they were after all only a two-man crew and they clearly had a friendly relationship. He recounted (Bp222) how he had spoken to a lift NVQ learning provider

> '*and he told me that British standard code bla bla bla states that it is illegal for someone without a minimal level 3 NVQ should be working on lifts without a fully qualified engineer supervising*'

and Mr Hazel replied:

[1] Bp = bundle page.

[2] As I observed last time at paragraph 6 both Claimants bring claims of automatic unfair dismissal because of whistleblowing pursuant to s103A of the Employment Rights Act 1996. They cannot bring claims of "ordinary" unfair dismissal pursuant to s94 as they do not have the necessary two years qualifying service.

> *"Yeah, I know makes me worry, we will get fucked if something goes wrong*
>
> *"need to ask the question if we get fucked or he does? X*

As to which Mr O'Driscoll replied: replied**:**

> ***"** I know mate this dude sounded well confused, went all detective on the phone, googled lift gear and started asking me questions about Darren x*
>
> *Might have dropped in it by saying I'm not qualified and do jobs…"*

17 Now, this exchange is relied upon by Mr O'Driscoll as a protected disclosure pursuant to section 43 B (1 of the Employment Rights Act 1996. In her submissions Ms Davies argues that prima facie it cannot be. I am not sure about that because albeit he might have been wrong about the requirement within the Respondent business for such as Mr O'Driscoll or Mr Hazel to have a level a 3 NVQ qualification and if not a fully qualified engineer supervising and in which respect prima facie the evidence appears clear that he is indeed mistaken, it does not matter if he reasonably believed in what he was saying and because of what he had been told by the NVQ supervisor.

18 He does not of course say that Mr Hazel dismissed him because he made a public interest disclosure to him. He relies upon that because Mr Hazel relayed on his concerns, thus the Respondent dismissed him as a consequence.

19 However, I do observe the following as to what the disclosure was stated to be in the particulars of claim and the further and better particulars (Bp113). As it is the same, I will use Bp 113: Both pleadings were drafted by the Claimant's solicitors who also act for Mr Hazel.

> *a) On 24 June 2021, the Claimant made a protected disclosure to Danny Hazel, his manager, that the working practices of the Respondent were concerning, dangerous and risky to the health and safety of the public, himself , and the staff. The practices in question related to the lack of lifting equipment, lack of health and safety precautions and allowing unqualified persons work on lifts without supervision, breaching health and safety regulations and risking Public Liability Insurance."*

20 As is self-evident that description of what was disclosed is considerably greater than that in the texts to which I have referred.

21 I will return to Mr O' Driscoll in due course

Mr Hazel

22 Taking his case at its highest, which I of course must do in terms of evaluating whether it has no reasonable prospect of success so as to mean it should be struck out or only little reasonable prospect of success thus meaning that I consider making a

deposit order, I now turn to the the original particulars of claim (Bp 22) and the further and better particulars (Bp 108) as to what happened on the 28 June 2021. This was when the alleged conversation between Danny Hazel and Mr Buckenham[3], and with present Jackie Seymour, who assists in an HR and admiin capacity, took place and which say both Claimants led to their dismissals them occurring as to Mr Hazel on the 7 July 2021 and Mr O'Driscoll on the 12th. Mr O'Driscoll was not present at this meeting him remaining off sick because of his back.

23 Mr Hazel consistently pleads (see Bp22 and Bp 108) that he raised at that meeting:

. *' i. The Respondent may be risking its Public Liability Insurance by sending workers alone to complete work without appropriate supervision or without equipment and,*

ii) The Respondent was making him work too many hours which was both a health and safety risk and contrary to the Working Time Regulations 1998, in particular Regulation 4 (1)."

24 I observe that Mr O'Driscoll made no reference to excess hours worked in the text exchanges to which I have already referred. There is a great deal more being alleged by Mr Hazel. Having so observed and albeit he does not plead that he raised the accident, I am with Mr Macmillan that what Mr Hazel pleads that he said on the 28 June is prima facie a public interest disclosure as per s43B (1) (b) or (d) of the ERA in that he is raising matters that explicitly alleged failure to comply with health and safety obligations , and implicitly in terms of Public Liability Insurance in all probability failure to comply with a legal obligation to which the Respondent is subject.. I so observe bearing in mind the nature of the work including working in lift shafts serving lifting gear. And given as the Respondent makes plain that it undertakes work for such as London Underground such a disclosure would therefore be in the public interest.

25 That there was any such discussion on the 28 June is in dispute as is that there . was an accident on the 23 June. But determination of those issues requires the hearing of evidence and thus making findings of fact, and which is not the function of a Judge at a preliminary hearing to determine such as strike out.

26 I do observe, and it goes only to that I am not ordering strike out or a deposit , that as to possible corroboration in terms of it being contemporaneous that following his dismissal from the employment on the 7 July 2021 Mr Hazel was texting Mr O'Driscoll (Bp369-370). He clearly is linking the disclosure to his dismissal thus:

'funny this has happened since I brought up legalities, public law liability and health and safety…"

And in a subsequent text:

" I said about how I spoke to Chris's and Jackie about health and safety working

[3] He said |Christopher Howard in the particular and Christopher Buckenham in the further particulars. I work on the assumption that the reference to Howard was an error.

hours about not being happy about not having the tools and doing dangerous things to get the job done that I said I wasn't happy about not having had my pay rise or even a acknowledgement of my 3 month probation ended blah blar blar then said even my friend was dismissed for the same unfounded excuses out of the blue and he had been signed off because of said dangerous takes with a bad back.'

27 Made plain to me today for the Claimant is that this is not a reference to to Mr O'Driscoll's accident but another former employee. It cannot of course be Mr O'Driscoll as he had yet to be dismissed.

28 The Respondent contends that it did not dismiss Mr Hazel because of this disclosure but because it had justified concerns as to his performance and including lateness and such as speeding in the company vehicles or abusing them. I am with Mr Macmillan that there is an argument as to whether the Respondent will satisfy the Tribunal that the reasons it gave for the dismissal will pass muster For example in the bundle are text messages between him and Darren Royce which show no real concerns. There was an occasion when Mr Hazel was late because he had overslept after a row with '*the Mrs'* but on the other hand there is praise from Mr Royce that the Claimant and Mr O'Driscoll have gone the extra mile so to speak in terms of a job that they had done. And as to recordings from the trackers to suggest that he was on occasion travelling well over the speed limit, the point made to me on his behalf is that these vehicles were not solely driven by him, i.e. other employees would use them. So, the Respondent of course is going to have to break down the tracking details to show that it was Mr Hazel driving the said vehicle and or that he was the one who must have abused it in terms of a dent to a new van or oil inside where a piece of gear had been left carelessly. Also, I note Mr Royce was praising him for having passed his probationary period a matter of a week or so before he was dismissed.

29 It follows that I have decided in relation to Mr Hazel that this is not a case that on the face of it, and no more than that, has no reasonable prospect of success. It requires findings of fact and by the same token, I cannot therefore conclude that it has only little reasonable prospect of success.

Back to Mr O'Driscoll

30 I have already observed as to his credibility being at risk on the accident issue and his pleaded disclosure and in terms of the texts that I have rehearsed.

31 The second point of significance to me is the most detailed email (p240-241) that he sent to the Respondent on the 13 July 2021 following his dismissal by letter (Bp 239) on the 12th. There was no dismissal meeting as he of course remained off sick and never returned to work. So this was his first opportunity to address the reasons given for not extending his probationary period. He covers every aspect in terms of rebutting the reasons given for his dismissal and which are similar to those given for the dismissal of Mr Hazel. He talks about how 'shocked and insulted' he is. And he is not backward in coming forward in his criticisms of the way that he had been treated by the Respondent. Throughout that document, which runs to two pages and is closely typed and well-written (bp 240-41), there is not a single reference to the

accident or more important that he is being dismissed because of that he had made a disclosure to Mr Hazel who had in turn so informed the Respondent on the 28 June, and that accordingly a reason for his dismissal was because of the raising of those concerns. And this is despite the text exchanges with Mr Hazel immediately after the latter had been dismissed. It has been suggested on his behalf that he might have been fearful so to do. Why? On the face of it, and no more than that, this does not square with the tone and detail of his e-mail. Thus, he has not raised whistleblowing at all therein as a reason for his dismissal. Given that he could so eloquently set out his position in that email of the 13 July, I think that on this issue his credibility is also at considerable risk.

32 What it means is that I distinguish him and his case from that of Mr Hazel because there are these question marks to which I have referred. Of course, he may hold up in cross examination and be able to explain away these issues, but of course he has the primary burden of proof. And of course, the Respondent may in event be undermined at the main hearing. But for the reasons I have now given I do conclude that at present on the face of the papers his claim has only little reasonable prospect of success.

33 Having so concluded I come to the exercise of my judicial discretion as to whether to order the payment of a deposit pursuant to rule 39(1) An important reason for making a deposit order is that it focuses the mind of the relevant Claimant in that there are potential costs consequences if having paid the deposit he pursues the claim but loses it as to which see rule 39 (5)... That is made plain in the notice which is issued by the Tribunal that accompanies the deposit order.

34 It follows that I therefore make a deposit order.

35 Pursuant to rule 39 (2) I must make reasonable enquires as to the Claimant's means to decide the amount of the deposit to be paid and which is capped at £1000. Thus, this has been explored before me. He now works as a courier and is currently restricted to working only three days a week because of a reoccurrence of problems with his back. However, I take note that he is in a stable relationship and that he and his partner has managed to build up substantial savings towards buying a house. However, I am going tailor my deposit order so that I do not interfere with those savings because they are in a Government scheme which would otherwise mean that they will suffer a penalty. But taking into account his share of the overheads as to the accommodation in which he lives with his partner including food etc and that from what I have heard today he is clearly a very hard working and resourceful person, I am of the opinion that he would be able within a reasonable period, which I am going to grant him, to be able to raise the deposit that I am ordering. Therefore, I limit the deposit order to £500 and I am going to order that he will pay it within 56 days of the date of the issuing of this order. That is longer than a judge might usually order but it is to reflect the short term working whilst the back problems is further investigated, and that Christmas is upon on us and in order that he can raise the necessary funds.

The way forward

36 Finally, I am going to order that there should be a further case management

hearing in this matter. It can be by telephone. It will be to give final directions to the main hearing, discuss time estimate and list the same.

ORDERS

Made under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

1. There is to be listed by the Tribunal, **a further case management hearing by telephone** to give final directions for the main hearing including time estimates. **It is to be listed on a date at least one month after the deadline for the payment of the deposit order.**

Other matters

Public access to employment tribunal decisions All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTE

1. Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

2. Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

3. You may apply under rule 29 for this Order to be varied, suspended or set aside.

Employment Judge Peter Britton
Dated: 24 November 2022