



EMPLOYMENT TRIBUNALS

Claimant: Mr T Fertsch
Respondent: Schutz (UK) Limited
Heard at: Nottingham
On: 26 and 27 April 2017
Before: Employment Judge Ahmed
Members: Mrs J C Rawlins
Ms J Johnson

Representatives

Claimant: In Person
Respondent: Mrs Fletcher, HR Officer

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Claimant's complaint of unfair dismissal for having made a protected disclosure is dismissed.
2. The Claimant's complaint of detriment for having made a protected disclosure succeeds. The issue of remedy is adjourned.

REASONS

1. In these proceedings Mr Thomas Fertsch brings a complaint of unfair dismissal as well as a complaint of having suffered a detriment for making a protected disclosure (whistleblowing). This hearing follows a preliminary hearing held on 1 March 2017 before Employment Judge Britton written reasons for which were sent to the parties on 11 April 2017. At that hearing Employment Judge Britton decided that the Tribunal had jurisdiction to hear the Claimant's complaint of unfair dismissal based upon the allegation of whistleblowing only, the Claimant not having the qualifying period of service for 'ordinary' unfair dismissal. He also decided that it was not appropriate to either strike out either of the unfair dismissal or detriment claims or to order a deposit. Although

Employment Judge Britton made it clear that his findings of fact at that hearing did not bind any future Tribunal, having heard the evidence in more detail there is no reason to depart from his findings as they are wholly consistent with the evidence we have heard.

2. Mr Fertsch is of Polish origin. He has worked in the UK for some time. For present purposes he was engaged by the Respondent as a Production Operative via an agency (HR Essential Limited, trading as 'Essential Recruitment') from 17 March 2014 to 29 August 2016. He became a direct employee of the Respondent on 29 August 2016 undertaking the same role. His employment ended on 6 September 2016.

3. The Respondent makes specialist containers for the shipping industry at its factory in Worksop. As Employment Judge Britton pointed out earlier, jobs in this particular industry or line of work are hard to come by. Having demonstrated his skill and efficiency as an agency worker, the Respondent decided to offer the Claimant direct employment in early August 2016. Mr Fertsch was overjoyed at the offer of direct employment. His joy might appear somewhat excessive but nonetheless genuine. In his witness statement he says that he "felt like the son of God. I was so happy that I finally had the contract".

4. On Tuesday 30 August 2016, at approximately 9.00 am, Mr Fertsch turned up unannounced in the company's reception area. He said he wanted to see the HR Manager but was told she was on leave. He then asked to see Mr Mark Wood, the Plant Manager, instead. Mr Wood thought it was a bit unusual for Mr Fertsch to thank him personally but it would be good for morale for him to personally welcome the Claimant as an employee of the business. Mr Wood met Mr Fertsch in the reception area and led him to his office where in the usual way he intended to ask the Claimant to sit down. Before he had the opportunity to do so however, he realised Mr Fertsch had followed him through the office door, walked right up the length of the office and positioned himself close to Mr Wood's desk standing no more than a metre or metre and half away. There was no physical barrier which there ordinarily would be if Mr Fertsch had sat down. Mr Wood felt distinctly uneasy at Mr Fertsch being so close to him but he nevertheless carried on. He welcomed Mr Fertsch to the company. Mr Fertsch in turn thanked Mr Wood for the job. At that point Mr Wood expected Mr Fertsch to leave. Instead, Mr Fertsch said that there were some things he wanted to say. He began by saying that he was unhappy that his colleagues knew that he would be moving shifts yet he was the last to know. He said he had suffered a lot of stress in the past. Mr Wood thought Mr Fertsch was angling to stay where he was instead of having to move to a different shift. Mr Wood said that he was unaware of any immediate arrangement to transfer to another shift but explained that it was sometimes necessary to do so in order to maintain a balance of experienced and less experienced workers on any given shift.

5. Mr Fertsch agreed and that what Mr Wood said made sense. Once again Mr Wood expected the conversation to end and for Mr Fertsch to leave. Mr Fertsch went on to say that whilst at work he was a quiet person, outside of the factory gates he knew how to handle himself. Mr Wood did not know quite how to react. There was an uncomfortable silence. Mr Wood began to wonder where the conversation was leading and his initial discomfort began to develop into a sense of apprehension. This was compounded by the fact that Mr Fertsch had now moved even closer and had begun to stare directly at him. Mr Fertsch said that he was unhappy with the way he had been spoken to whilst working at the

site by some fellow workers. Mr Wood asked for specific details. Mr Fertsch said he had suffered a lot of stress but these were matters for him and his lawyer. Mr Wood was somewhat startled by the reference to lawyers as he was unaware of any legal proceedings. He reassured Mr Fertsch that the company would not tolerate inappropriate behaviour but he needed more information as to what he was being alleged. Mr Fertsch agreed to provide a couple of examples but was adamant he did not want to name names. Mr Wood responded by asking Mr Fertsch to tell him what he felt comfortable in disclosing. Mr Fertsch said that whilst sitting in the canteen on a break one of his colleagues had told him to go home and have anal sex with his girlfriend. Mr Wood said that he could understand how such behaviour would be offensive and assured Mr Fertsch that it was not typical of the way in which company employees behaved nor would he find such behaviour acceptable. Mr Fertsch went on to add that there had been racist comments made both against him and in his presence about Polish people. Mr Fertsch said that he did not like the way team leaders spoke to him and that this stress had led him to consult his doctor. He mentioned once again that his lawyer was dealing with these things. Mr Wood said that he was able to support him if he wished to pursue a complaint but Mr Fertsch declined saying he would prefer to speak with his lawyer instead. Mr Wood reiterated that he was open to discuss matters if Mr Fertsch changed his mind. Mr Fertsch then left.

6. Mr Wood's evidence to us was that he had never encountered such a meeting or discussion in his entire working life. The manner in which the Claimant spoke to him was very composed and controlled. The Claimant was staring all the time, which Mr Wood found very unnerving and intimidating. Mr Fertsch was abrupt and always straight to the point. Mr Wood sensed that it was the Claimant's intention to ensure that he had control of the meeting throughout. He believed that the Claimant had come in to make certain threats that if things did not go his way, he knew how to handle himself which implied a physical confrontation or that he would refer things to his lawyer which implied a threat of legal proceedings.

7. Immediately after the meeting, Mr Wood sent an e-mail to Ms Fletcher the HR Officer whilst the incident was still fresh in his mind. He also went to speak to the Shift Leader and the Senior Shift Leader about the allegations. Mr Wood made it clear to both of them that the discussions were strictly confidential and must not to be relayed or discussed with any of the Claimant's colleagues. Both Shift Leader and Senior Shift Leader said they were unaware of any historic problems although on one occasion the Claimant had ignored the instructions of his Team Leader. Mr Wood wanted to undertake an investigation but did not feel confident of being able to do so with the scant information he had.

8. A few days later when the Claimant had not been absent from work Mr Wood discovered that the Claimant's then partner had visited the company and asked to see someone from management. She had reported that Mr Fertsch was not able to come to work and was suffering from a "deep depression". She said he had not been able to leave the house for several days. Mr Wood inferred both from the Claimant's absence and his discussion that Mr Fertsch was somehow seeking to engineer a legal case against the company for his depression which had not previously been identified in the years he worked via an agency. He immediately regretted the decision to offer Mr Fertsch direct employment. On 6 September 2016 he sent the Claimant a letter of dismissal. The relevant paragraphs of the dismissal letter are as follows:

"I am both surprised and disappointed at the nature of the allegations that you have raised. As I explained during our discussion, the company takes a very dim view of anyone demonstrating the behaviours suggested by you and indeed, our internal policies and procedures support our zero tolerance approach in this respect.

As a company our duty of care responsibility to employees remains our highest priority and as such and in the absence of definitive evidence, regretfully I am unable to allow you to continue to work under the circumstances."

9. We do not propose to repeat the facts set out in the preliminary hearing as to the alleged racist and sexist comments which the Claimant says were made by his non-Polish colleagues but simply adopt them for the purposes of our judgment. We are satisfied that the alleged comments were made not least as the Respondent has not called any evidence to rebut them which it could easily have done. The focus of the evidence at this hearing has been largely on the meeting between the Claimant and Mr Wood on 30 August which we have described above. What we do find as a fact is that after Mr Wood's meeting with Mr Fertsch, word somehow got out that Mr Fertsch had complained about the treatment he had been receiving and about the sexist and racist remarks by his colleagues. There is simply no other explanation for the Claimant being subsequently ostracised by his colleagues.

10. We accept that the comments made to the Claimant by his colleagues included the following:

"When will Polish people finally learn to speak English? Or maybe you Polish want us to learn Polish. Tom [the Claimant] did you ever have anal sex with your partner?."

11. The day after the Claimant's meeting with Mr Wood one of his colleagues began singing a line from a song:

"let's talk about sex, you and me, let's talk about sex!"

12. On another occasion when leaving the staff room a colleague said, in the Claimant's presence:

"Shush, let's be careful what we talk about now".

13. On 2 September whilst the Claimant was on the morning shift he was sent to the Rico site without explanation. The Team Leader was clearly surprised to see him which suggested that there had no planned decision to send him there.

THE LAW

14. Section 43A of the Employment Rights Act 1996 ('ERA 1996') states:

"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

15. Section 43B of ERA 1996, so far as it is relevant, states:

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:-

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

16. Section 47B of ERA states:

“A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.”

17. Section 103A of ERA 1996 states:

“An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.”

18. Section 48 (2) of ERA 1996 states:-

“On a complaint under subsection (1), (1ZA), (1A) or (1B)] it is for the employer to show the ground on which any act, or deliberate failure to act, was done.”

THE ISSUES

19. The issues in this case are as follows:-

19.1 Did the Claimant make a qualifying disclosure which amounted to a protected disclosure?

19.2 Was it a disclosure of information?

19.3 Did the Claimant have a reasonable belief in making the disclosure?

19.4 Was the disclosure made in good faith?

19.5 Was the protected disclosure the cause of the dismissal or detriment?

19.6 Was the disclosure for personal gain?

19.7 Was the disclosure in the public interest?

CONCLUSIONS

20. We are satisfied that the Claimant made a qualifying disclosure which amounted to a protected disclosure. The Respondent has a legal duty to prevent racist and sexist behaviour at the workplace. For the purposes of whistleblowing, it is irrelevant whether or not the alleged comments were actually made. All that is required is that the whistleblower must have a reasonable belief that the comments were made.

21. We are satisfied that the Claimant's belief as to the discriminatory comments was based on reasonable grounds. Mr Wood clearly believed that there could be some substance in the remarks being made which is why he wanted to launch an investigation. Clearly, if he thought it was entirely fabricated he would not have spoken to his managerial staff at all. One of the reasons he gives for dismissing the Claimant was because Mr Fertsch refused to co-operate in that investigation which again suggests that he believed there was a possibility of such conduct.

22. We are satisfied that the disclosure was indeed a disclosure of *information* and not a mere allegation. The Claimant was giving specific information as to

what had been said at the workplace rather than making a general allegation of unlawful behaviour.

23. We are also satisfied, insofar as it is necessary, that the Claimant made the allegations in good faith. Good faith as a requirement for disclosures has of course been removed for complaints that fall after 25 June 2013 and is now relevant only as to compensation. Insofar as it is suggested that the allegations were made in bad faith, the suggestion is rejected. The disclosure was not for personal gain.

24. The crucial issue in this case is of causation – that is whether or not any detriment was on the ground that the Claimant had made a protected disclosure and/or whether the principal reason for the dismissal was that the Claimant had made a protected disclosure.

25. Under section 48(2) ERA 1996 it is for the Respondent to establish (once the Claimant shown a prima facie case) that the reason for the treatment was not the making of the protected disclosure. Here the Claimant clearly establishes a prima facie case. The burden is then on the Respondent to show, in accordance with section 48(2) ERA, that the reason for the treatment was not the making of the protected disclosure

26. We have considered the possibility that the treatment of the Claimant by his colleagues might have been for reasons other than the making of the protected disclosure. We consider that unlikely because whilst the Claimant has complaints about being treated poorly by his colleagues, he does not complain of being isolated or cold shouldered until after the meeting with Mr Wood of 30 August.

27. Has the Respondent produced any evidence to rebut the prima facie case that it was the fact of making the protected disclosures which caused the Claimant to be treated in the way that he was by his colleagues? The answer to that is no. The Respondent could easily have called the work colleagues or supervisors to give evidence and rebut the Claimant's allegations that the treatment post 30 August was not because they had discovered he had been speaking to Mr Wood but for some other reason, but it has not done so. Equally, the Respondent has not provided any explanation as to why the Claimant was sent to a different site when he was not expected there. We infer that his colleagues became aware of the fact that the Claimant had made complaints about them to Mr Wood and treated him in the way that they did as a consequence. That would be consistent with the Claimant's evidence (which we accept) that it became 'even worse at work for him than it was before'.

28. We are satisfied that the Claimant suffered a detriment. The Claimant was cold shouldered and ostracised by his colleagues. They intensified their comments of a deeply personal and sexual nature which caused him stress and anxiety. The Claimant's description of that as a "deep depression" may be something of an exaggeration but there is no doubt that the Claimant went to see his GP who described the Claimant as having "low mood".

29. In relation to the unfair dismissal complaint the relevant legal test is different to detriment. The Tribunal must be satisfied that the reason or *principal* reason for dismissal was that the employee made a protected disclosure. On the facts we conclude that the reason for the dismissal was because Mr Wood had

found the Claimant's behaviour at the meeting on 30 August (whether intended or not) to be menacing, intimidating and threatening.

30. In that respect we do not find the reasons Mr Wood gives in the letter of dismissal to be completely true. The reasons given are firstly that the Claimant failed to provide information as to the allegations so that they could not be investigated and as such the company was unable to implement its zero tolerance approach. The second was the Claimant had failed to disclose depression in a pre-employment medical assessment questionnaire which he was now seeking to rely on. Without names Mr Wood might not have been able to undertake a full investigation but he had enough information that racist and sexist remarks were being made at the workplace and he had enough information to be able to speak to his managerial staff about it. If Mr Wood was sceptical as to the allegations there was no logical reason to punish Mr Fertsch for failing to provide more information. He could simply have said that the allegation could not be pursued for lack of information.

31. As to the second 'reason', the Claimant had not falsely represented that he had never previously suffered from depression. The Respondent had no evidence of any prior medical history before receiving the GP note as to the Claimant's mental condition. Mr Wood appears to have jumped to the conclusion that Mr Fertsch was somehow threatening to bring legal proceedings based on a condition he had not disclosed. But it is quite possible that the Claimant was referring to low mood which his GP mentions and which he may never have previously suffered from.

32. We find the principal reason for the dismissal to have been the Claimant's behaviour at the meeting on 30 August and not the protected disclosure. That is clear from Mr Wood's account of the meeting and his actions afterwards. Precisely why Mr Wood chose not to be completely frank in saying so in the dismissal letter matters which he now sets out in some detail in his witness statement is not clear. The disingenuous nature of the letter does not however taint the rest of his evidence. We accept that he felt very uneasy about the Claimant both during and after the meeting and wondered about the wisdom of employing him. In those circumstances the complaint of unfair dismissal is dismissed.

33. The issue of remedy as to the successful detriment complaint is adjourned to enable the Claimant to obtain advice. It may well be that given the rather limited extent of the complaint on which he succeeds that the issue of remedy can be agreed. We must make it clear to the Claimant, for the avoidance of doubt that any losses which flow from the dismissal cannot be the subject of compensation nor is the Claimant entitled to claim damages for injury to feelings arising out of the dismissal. His claim for injury to feelings must be limited to the detriment suffered only.

Employment Judge Ahmed

Date: 28 June 2017

JUDGMENT SENT TO THE PARTIES ON
15 July 2017

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S.Cresswell

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FOR THE TRIBUNAL OFFICE