EMPLOYMENT TRIBUNALS

Claimant: Mrs A McDonagh

Respondent: Lancashire Care NHS Foundation Trust

HELD AT: Manchester **ON:** 31 August 2017

BEFORE: Employment Judge Tom Ryan

REPRESENTATION:

Claimant: Mr B Beyzade, Solicitor
Respondent: Mr E Nuttman, Solicitor

RESERVED JUDGMENT

1. The claimant is ordered to pay a contribution to the respondent's costs of the application of the hearing. The amount of the costs shall be determined by the tribunal at the final hearing.

2. The claimant's application for costs were refused.

REASONS

1. These are the reasons both for the decisions made at the preliminary hearing in respect of the claimant's application to amend the claim and in respect of the order set out above. The judgment in respect of the applications for costs was reserved to enable the claimant to provide evidence of her financial circumstances. This judgment and reasons should be read in conjunction with the reserved judgment sent to the parties on 20 September 2017.

2. By a claim presented to the Tribunal on 28 April 2017 the claimant alleged that her employment ended on 30 January 2017 and that she was unfairly dismissed and subjected to a detriment due to making protected disclosures. She also alleged a breach of the Working Time Regulations 1998, a breach of Section 1 of the Employment Rights Act 1996 and Section 38 of the Employment Act 2002 and a complaint of breach of contract and wrongful dismissal.

3. The claimant set out detailed grounds of complaints asserting a constructive unfair dismissal, in that the claimant said that she gave written notice terminating her contract of employment on 30 January 2017 (paragraph nine). Under the heading of protected disclosure the claimant referred to raising an issue with the respondent by telephone on 14 November 2016 and lodging a complaint in writing on 5 December 2016 in accordance with the grievance process.

4. At paragraph 17 the claimant said this "The claimant asserts that the reason or principal reason for the dismissal was the disclosure she made to the TS Investigation Team on 14 November 2016 and/or the disclosures she made in her letter of grievance that was lodged on 5 December 2016. Further or alternatively the said disclosures led the claimant to suffer detriments in terms of being unable to work her shifts once again thus losing further pay, being humiliated on Facebook which was a public forum, delays in terms of the progress of her grievance, and the failure of the respondent to follow its grievance process and/or its whistle blowing policy".

5. The respondent submitted a response disputing that the claimant was an employee but stating that it was on 5 December 2016 that the claimant had notified the respondent "I have no choice but to end my contract as this has made it impossible to continue working with the Trust" (paragraph 2 of the grounds of resistance). The respondent disputed that the claimant had made protected disclosures or that she was dismissed or subjected to any detriment as a result of making disclosures. The claims were defended in their entirety.

6. On 28 June 2017 a Preliminary Hearing was conducted by telephone by Employment Judge ("EJ") Horne. Mr Beyzade attended for the claimant. Mr Hayre attended as Solicitor for the respondent. The typed written record of that hearing signed by EJ Horne speaks for itself. It is necessary to consider parts of it in connection with one of the claimant's applications before me and I shall refer to the document at that point. I have also had sight of Employment Judge Horne's manuscript notes. At a brief adjournment during this preliminary hearing Mr Beyzade procured and produced to me a copy of his attendance note for that earlier hearing. I have been able to compare all three of those documents.

7. At this stage it is sufficient to note that at his preliminary hearing EJ Horne gave the claimant permission to amend her claim and to make a further protected disclosure which was set out at paragraph 5.3 and to allege that on the ground of making that further disclosure she was subjected to detriment as set out at paragraph 7 of the discussion.

8. EJ Horne recorded the three protected disclosures namely the telephone call on 14 November 2016 the written grievance of 5 December 2016 together with one further disclosure. So far as that further disclosure was concerned that disclosure which was based on the Working Time Regulations was withdrawn in between the two preliminary hearings and I ned not refer to it further.

9. At paragraph 6 of the discussion EJ Horne recorded that the alleged detrimental acts and failures to act that were said to have been on the ground of the

first two disclosures are set out in paragraph 17 of the grounds of claim. That is the paragraph that I have already quoted.

10. On the face of the record no order for further information or requiring the claimant to set out any further details of the detriments that she allegedly sustained on the ground of those two protected disclosures was made by Employment Judge Horne. He also made further Case Management Orders and listed the case for hearing.

11. On 5 July 2017 Mr Beyzade wrote to the Tribunal explaining that the claimant did not wish to pursue the third protected disclosure namely that relating to the Working Time Regulations nor any claim under the Working Time Regulations themselves. Mr Beyzade went on as follows:-

> "However the claimant continues to pursue her claim under S.47B and S.103A relating to the events that took place between November 2016 - February 2017, following the suspension of her shifts and the unlawful disclosure by the respondent of her personal and confidential data which is particularised in the ET1 in the grounds of complaint".

12. He went on to say that attached was a marked up and clearer version of the amended grounds of complaint clarifying the detriments relied upon by the claimant in a list format at paragraph 17.

13. It is the preparation of that amended grounds of complaint described as "clarifying the detriments relied upon" that has occasioned this preliminary hearing.

14. In the revised grounds of complaint in addition to the matters that were originally pleaded and which I have described as paragraph 17 of the grounds of the claim, Mr Beyzade on behalf of the claimant added a further thirteen sub-paragraphs. It is common ground that some of those are repetition or duplication of matters already pleaded but some it is said by the respondent are not.

15. On 7 July 2017 Mr Nuttman for the respondent wrote to Mr Beyzade and to the Tribunal asserting that the claimant was now seeking to amend the claim in a manner not permitted by the Tribunal's order. Mr Nuttman said this "… the claimant has sought to amend the claim form by adding to the list of protected detriments suffered by the claimant. No order permitting such an amendment has been made and no application to allow such an amendment has been made. The detriments were specifically discussed and agreed at the preliminary hearing". Mr Nuttman went on in his letter to protest that the claimant now sought to go beyond those agreed matters including, by way of example: seeking to hold the respondent responsible for a patient's actions, complaining at the lack of support in an NMC investigation, and complaining about not being provided with an exit interview.

16. Mr Nuttman described those as being all new matters which would require additional evidence. He pointed out that there had been no explanation why they were not raised in the grounds of complaint or at the Preliminary Hearing and that they were significantly out of time. He submitted that they were not mere re-labels but substantive additional allegations. He asserted the respondent was prejudiced in

having to defend them and based upon the principles in **Selkent** the amendment should not be allowed.

17. On 13 July 2017 Mr Beyzade wrote further, he disputed the way in which the respondent's solicitors had set out the matter and said that although there was no reference to it in the summary version of the orders provided by the Tribunal he stated "according to our Attendance Note the following matters were discussed at the preliminary hearing." He then listed three points, that: the respondent's solicitor advised that there was insufficient particulars provided in relation to the claimant's claims for detriments that she relies upon; second, it was the claimant's position that a list of detriments was provided within the grounds of complaint and third, notwithstanding this the Tribunal ordered that the claimant provide a list of detriments relied upon together with the names of the people concerned and dates.

18. Mr Beyzade added "May I request that the Tribunal provides clarification as to whether this was part of its Orders for avoidance of any doubt?" He then made an application for permission to amend the grounds of complaint, or permission to file a list of particularised detriments or for a further telephone preliminary hearing to be listed for twenty minutes to consider the matter. He submitted that it was clear that the claimant was not seeking to add a new claim but merely clarifying an existing claim. He said that it was denied that the matters to which the respondents referred were out of time.

19. By way of a side issue Mr Beyzade objected during the course of this preliminary hearing that although he had given notice of this and application to the respondent they had not notified an objection pursuant to his letter and therefore could not be heard on the matter. In my judgment that was a manifestly ill conceived submission. It is clear that the way in which the matter had arisen did not require the respondent to submit a further objection. They had already foreseen the application to amend and had already raised objection of which Mr Beyzade was fully aware.

20. On 19 July 2017 a letter was sent on the direction of EJ Horne that this preliminary hearing should be listed to determine the following issues:-

> (a) whether the claimant is required to amend her claim to pursue the allegations in the "marked up version of the grounds of claim" and
>
> (b) if so, whether such amendments should be granted.

21. It was listed for hearing for two hours. Regrettably the hearing of the application together with the consequent applications for costs took over three and a half hours and I had to reserve judgment and reasons at the end of it.

22. The first issue effectively then is whether the claimant does need to amend to plead any of the matters contained in the additional paragraphs submitted by the claimant under the cover of the letter of 5th July 2017.

23. Prior to commencing the oral hearing I had considered the matter set out in the sub-paragraphs. I had formed a preliminary view that the matters set out at

paragraphs 1, 5, 6, 7, 9, 10, 11 and 12 could be said to have already been included in the list of detriments previously provided.

24. At the start of the oral hearing I informed the parties that was my provisional view. Mr Nuttman agreed that additionally the allegations set out at new sub-paragraph 2 was also included. But he disputed that allegation 7 was included. In the event therefore the argument focussed on sub-paragraphs 3, 4, 7, 8 and 13.

25. During the course of argument in relation to those matters Mr Beyzade said that his attendance note prepared during EJ Horne's hearing or immediately after it showed that EJ Horne had made the orders or directions that he asserted were made in his letter of 5 July 2017. I offered Mr Beyzade the opportunity to provide a copy of that attendance note if he wished. I enquired whether Mr Nuttman's firm had an attendance note. Mr Nuttman explained that there was no attendance note on behalf of the respondent firm. His colleague Mr Hayre had briefed him upon his return from holiday and their understanding was that the record signed by EJ Horne to which I have already referred was an accurate and comprehensive list of what was ordered. The respondent's position was that Employment Judge Horne had not directed or ordered as Mr Beyzade asserted. I adjourned the proceedings briefly to enable Mr Beyzade to bespeak the attendance note and it was sent up to the Tribunal by email and I was asked to consider it.

26. Mr Beyzade drew attention to the following passages on the first page of his attendance note. They read as follows.

> "- Claim that there were three protected disclosures. Earliest was complaint on a date to be specified by the claimant in relation to the information disclosed and matters contained in paragraphs 3 and 4.
>
> - Detriments were restriction of shifts in December 2015, Fb posts which she discovered on 14 November; putting confidential information on Fb. Can probably not fully list the issues now.
>
> - Whether disclosure of any information; if so whether protected or not. Can disclose information by 5 July 2017. Date, means and towhom information disclosed."

27. Below that I note there is a further discussion of the Working Time Regulations aspect and it was said that that was to be confirmed if it was pursued within seven days. Mr Beyzade's note continues on the second page as follows:

> "In 7 days, the C will write to the Tribunal clarifying the claim for dismissal and/or detriment on the basis of breaches of the WTR". He also recorded "Amended response within 7 days."

28. I accept that Mr Beyzade's note does not refer to paragraph 17 of the grounds of complaint as listing the detriments but I am satisfied that EJ Horne's handwritten note does so and so does the order that I have recited above.

29. Based on all those documents and not withstanding Mr Beyzade's argument to the contrary I am not satisfied that EJ Horne indicated or made a direction or order that the claimant should provide further information in relation to the existing detriments.

30. Therefore in my judgment to the extent that the list of detriments raises new matters that were not in the grounds of complaint, I am satisfied that the claimant needs permission to amend to pursue them.

31. I therefore turn to the application to amend itself. I was referred to a number of authorities. They included: Recent disclosure had indicated [1996] IRLR 661; **The Housing Corporation v Bryant** [1999] ICR 123 CA; **Ali v Office of National Statistics** [2005] IRLR 201 CA and **New Star Asset Management Holdings Limited v Evershed** [2010] EWCA Civ 870. I was also reminded of the Presidential Guidance on case management which included a section on amendment to the claim and response and was issued in 2014.

32. The guidance summarises the principles enunciated by the Court of Appeal in **Selkent**. The Tribunal is required to carry out a balancing exercise weighing all relevant factors having regard to the interests of justice and the relative hardship that will be caused to the parties by granting or refusing the amendment. The relevant factors include the nature of the amendment, the effect of time limits and the timing and manner of the application. I have had regard to the entirety of the guidance.

33. In relation to sub-paragraph 3 that contained some repetition of earlier matters and one additional allegation namely that the claimant was being required to attend a meeting upon her shifts being reinstated. Although Mr Nuttman had no instructions to make a concession and did not do so he did not argue against that relatively minor amendment. In my judgment this is effectively part and parcel of the claimant's case in respect of having been suspended from performing the shifts. I granted permission to amend in that respect only.

34. I considered whether to grant permission in respect of sub paragraphs 4, 7, 8 and 13.

35. In respect of sub paragraph 4 this was refined in discussion whereby Mr Beyzade on behalf of the claimant agreed that it was not alleged that there was a freestanding detriment that the respondent failed to investigate the allegations which had been made by a patient against the claimant. The genesis of that complaint seems unclear since she was not an in-patient and was not a person that the claimant had apparently treated or attended to. It appears that the patient was in fact in a relationship with the claimant's ex husband or partner.

36. To the extent that it was to be considered by the Tribunal, by agreement with the claimant it was treated as further information of an example of the respondent's failure properly to carry out the grievance and whistle blowing procedures. For that reason I did not grant permission to amend since it was not necessary. It is to be treated only as further information and the respondent did not object to that.

37. In relation to sub paragraphs 7, 8 and 13 I refused permission to amend. In my judgment each of those allegations raises new matters of factual enquiry that have never been pleaded before. I accept the respondent's submission that these are not relabeling amendments.

38. It appears correct that the allegation in paragraph 7 about the Trust permitting the disclosure of information to a patient that amounted to personal data and that the respondent had taken no apparent steps to try to prevent the posts on Facebook could amount to a detriment. This is not the original Facebook posting in respect of which the first grievance/protected disclosure was made but an allegation that the patient continued to put posts on Facebook. The claimant in her second grievance said that some 30 posts a day were being posted, including complaints against the claimant's daughter. I have no doubt that Mr Beyzade is right in saying that these would be matters that would be extremely distressing to the claimant, but it is not suggested, as I understand it, that the patient was an inpatient or that the Trust was responsible for the additional postings on Facebook.

39. It was clearly a matter that arose at the point when the claimant first intimated an intention to resign and, according to the respondent, did in fact resign. Insofar as the allegation is that the respondents took no apparent steps to try and prevent the posts appearing on Facebook it seems unlikely that the claimant would establish that that was a detriment by the respondent.

40. It is not suggested that they are liable for the first posting on Facebook which is already an allegation of fact within the proceedings. What is clear is that the respondent’s contention that this has no reasonable prospect of success is certainly not an ambitious submission. It does seem to me that before saying that the failure to take steps to prevent the postings can be said to amount to a detriment, the claimant would have to establish there was some duty upon the employer to intervene in respect of a matter involving a third party, namely the patient for whom they are not legally responsible, particularly in respect of making postings that appear to have nothing to do with the claimant's work.

41. The claimant had clearly not brought these matters to the respondent's attention prior to her resignation. Even if I take the most favourable date of the claimant's resignation as being the last point in time at which that detriment might have occurred, it is clear that when the claim was intimated for the first time on 5 July it was still substantially out of time by a matter of weeks. It had not been raised in the claim form. It had not been raised in the earlier Preliminary Hearing and it would require the respondents to meet a speculative case and would undoubtedly involve the consideration of further evidence and further cost.

42. In respect of sub-paragraph 8 that referred to the fact that the claimant received a letter from the NMC (the Nursing and Midwifery Council) advising her that a referral had been made to them and that on 28 December 2016 they were notifying the claimant that no further action would be taken against her.

43. The claimant's allegation is that she was not supported by the respondent in relation to that referral and by way of example the respondent did not contact the NMC or provide a supporting statement in relation to the matter.

44. In submissions I was told that although disclosure had taken place no documents between the NMC and the respondent had been disclosed. It was not even clear to me that the claimant could assert that the respondent had any cause to refer to the NMC. Again, I am not satisfied that the not being supported by the respondent necessary amounts to a detriment given the fact that at a fairly early stage it appears that the NMC decided to take the patient's complaint no further.

45. Again there was delay in making this allegation that was not explained. It would require the respondent to carry out further disclosure and further enquiry.

46. I should say in relation to this part of the application and because of the lack of evidence I did invite Mr Beyzade to put in abeyance this part of his application so that he could ask for disclosure from the NMC to see whether in fact there was correspondence between the respondent and the NMC on the matter which might make his client's case on that point stronger. He declined that opportunity and asked me to rule upon the application to amend at this stage.

47. In my judgment the same points that were made in relation to paragraphs 7 and indeed can be made in relation to paragraph 13 apply, namely: there was no attempt to include this at the earlier stage; the claimant has been advised by solicitors throughout; she did not raise it before EJ Horne as an application to amend and she raised it by purporting to be providing information pursuant to a tribunal order when that was not in fact the case.

48. Finally, I turn to sub-paragraph 13. That allegation is that the respondent on 1 February 2017 simply acknowledged the claimant's resignation and removed her from the staff bank. The allegation is that there was no exit interview, nor an attempt by the respondent to encourage the claimant to stay engaged with the respondent.

49. The same points in my judgment that are made are made in respect of earlier paragraphs apply here. Further, it seemed to me that if the claimant's allegation that her constructive unfair dismissal was as a result of protected disclosures has merit then this allegation adds nothing to it. Whereas if that allegation fails then it seems to me it is extremely likely that the allegation of these points as free standing detriments would also likely fail. Mr Beyzade did not accept that. Mr Nuttman agreed with the proposition that I postulated. It would require some limited further enquiry by the respondent if I allowed the application to amend in order that somebody would have to be asked why there was no exit interview and why they did not encourage the claimant to stay engaged with the respondent.

50. Overall I was not satisfied that the balance of hardship weighed against the claimant in refusing the application to amend on these points. The claimant is a represented litigant who has had two opportunities prior to this to put her claim forward. In my judgment this was an attempt to expand the claim by Mr Beyzade, perhaps recognising that some of the earlier allegations would be difficult to sustain.

51. I note that in respect of at least one allegation in the amended list to which no objection was taken it appears that at least one act occurred prior to the first protected disclosure. Be that as it may, in my judgment there is no real hardship in

to the claimant in not being allowed to pursue these specific allegations. There would be some degree of hardship to the respondent if now it had to address them. In those circumstances I declined permission to amend.

52. At the conclusion of the proceedings Mr Nuttman applied for the costs of the Preliminary Hearing in the sum of £750. By way of response Mr Beyzade first applied for the costs incurred by the claimant in attending the Preliminary Hearing before EJ Horne. He drew attention to the fact that the respondent had sought a Preliminary Hearing on the question of employment status and time limits which had been refused by implication at least he was suggesting that the respondent had acted improperly at that stage of the proceedings and asked the Tribunal to make an order for those costs.

53. Having in mind the rules governing applications for costs it appeared to me that there was no basis for that application being made to me. That application if it had merit should have been made within 14 days of the first Preliminary Hearing decision and it should have been made to EJ Horne. In those circumstances without more I declined to consider that application.

54. The respondent's application for costs of this hearing was met by a counter application by Mr Beyzade.

55. Mr Beyzade said that he had intimated his application for costs but the respondent had not intimated its application to him and therefore I should not countenance it. In my judgment such a technically rigorous approach is not necessary. If it is right to make any order for costs it may be done irrespective of whether it has been intimated in advance. There is no requirement that an application be intimated in advance. It can be made at the hearing under the rules.

56. The respondent's application was that the conduct of the claimant's representative in bringing forward these proposed amended grounds of complaint was unreasonable. The claimant had no basis on which to argue that EJ Horne had given permission for that to occur and the claimant had purported to submit amended grounds of complaint without authority or permission of the Tribunal to do so. Whatever the merits of that application it all should have been discussed at an earlier stage and then there would be no need for this further Preliminary Hearing.

57. Mr Beyzade objected that the respondents had not identified which of the grounds in Rule 74 was relied upon. In my judgment it was plain that it was an allegation of unreasonable conduct in relation to the application with which I had to deal.

58. On the face of it I was satisfied that the respondent had demonstrated that the conduct of the claimant's solicitor, particularly the continued insistence that a Judge had given permission for something or had ordered something which in my judgment simply did not occur, amounts to unreasonable conduct of the proceedings. It falls far short of any attempt at compliance with the overriding objective. To the point that I think it can be properly said that the conduct of the claimant's solicitor was to that extent unreasonable. I take into account the fact that some parts of the proposed amendment have as it were been incorporated as further

information but that is substantially because they were duplicative of matters that were already pleaded. On the face of it I was satisfied that my discretion to award costs was triggered.

59. Mr Beyzade objected to an order for costs saying that it would prejudice the claimant a great deal, it would seek to cause her to decide whether to continue. He did not have full information about the claimant's means, he suggested that she was now not working and was in receipt only of a Personal Independence Payment. He submitted that she was in poor health and it was proper to consider the claimant's state of health and that I should take in to effect not only the fact there was no schedule and no costs warning but that there had been some confusion about the preparation of bundles. In my judgment the preparation of bundles was not germane to the issue.

60. I adjourned the application for costs in order to allow the claimant the opportunity to put before me evidence of her capital and financial position.

61. Mr Beyzade by way of counter argument applied for the claimant's costs of the hearing on the grounds the respondents conduct was unreasonable in the sense that it was misconceived because elements that were included in part of the proposed amended grounds were already in the ET1 and it was merely re-labelling or providing further information. In my judgment there was no merit in the claimant's argument on that point. As I have already indicated and for the reasons I have indicated this was not a re-labelling exercise or providing further information of existing matters pleaded already. The very fact that the respondent put the claimant's position to the test and succeeded in both limbs of the issues before me shows that any application, any suggestion that their conduct was unreasonable is itself fallacious.

62. I have received now correspondence from the parties that establishes the following points. In addition to personal independence payments the claimant receives a monthly pension. Her monthly income appears to be about £1050. The figures for expenditure are not clear. She asserts a credit card debt of £1500. She has included a figure of £3000 from holiday. Taking the remainder of the figures at face value they appear to represent expenditure of about £860 per month. I have no information about the claimant’s capital position, which would include any interest she may have in property. I note that she does not include mortgage or rent expenditure in her outgoings. I therefore infer that she probably lives in rented accommodation and the rent is paid by someone else.

63. Mr Beyzade sought to persuade me in addition to the claimant's financial position that she was represented by means of an insurance policy and he asserted to me in Tribunal that there was a term in that policy which meant that where an order for costs made the insurers would no longer cover the claimant's costs of representation or that he would have to report the matter so that the insurers could consider whether to do so. I asked Mr Beyzade to send at least part of the policy to the Tribunal in order that I can see the terms in which that particular condition was imposed. Mr Beyzade explained that it was confidential and asked if I was prepared to order that that part of the policy be disclosed. I indicated that I was prepared to make such an order if it assisted him in putting his client's case forward.

In the event I have not seen any policy term. An email from the insurers dated 12 September 2017 suggests that if an award of costs is made due to the conduct of the solicitor the insurers may need to "review the claim."

64. I therefore have to consider what to do in the light of the information that I have received subsequently in relation to the claimant's means.

65. In the course of the rival submissions in respect of the application for costs I indicated that there were a number of alternatives. I could grant or refuse the application at this stage or I could decide that some costs should be awarded but leave it to the Tribunal concluding the matter to determine whether that should be a nil sum or a sum of an award of costs in part. Mr Nuttman resisted that saying that there was a matter that should be dealt with at this stage. However I noted that the final hearing is due to take place on 9 -12 October 2017.

66. In those circumstances I think the following are the material points. The claimant has some means to meet the order for costs. Her means are not such that it would be unjust to make some order. For the reasons I have explained my discretion to make an order is triggered. However the claimant does not appear to be able to meet the entire sum claimed prior to the outcome of the final hearing. It appears that making an order for costs at this stage could affect the claimant's representation at the final hearing. The purpose of the costs regime is not to be punitive. It is not to be used to deter the bringing of a claim to trial. There is no suggestion that the respondent would suffer hardship if the determination of the amount of costs were deferred. By the end of the final hearing the tribunal will have a better understanding of the claimant's financial position. The outcome of the case will be known. The claimant can attend prepared to give more complete information about her financial circumstances.

67. For these reasons I order that the claimant shall pay some contribution to the respondent's costs incurred in respect of this application and hearing. The precise amount to be ordered shall be determined by the tribunal at the final hearing.

_____
Employment Judge Ryan

Date 29 September 2017

REASONS SENT TO THE PARTIES ON

29 September 2017

FOR THE TRIBUNAL OFFICE