EMPLOYMENT TRIBUNALS

Claimant: Mrs D Gagic

Respondent: Modo Creative Limited

Heard at: Leeds **On:** 6 to 8 February 2018

Before: Employment Judge Cox
Members: Ms L Fawcett
Mr M Elwen

Representation:
Claimant: In person
Respondent: Mr Sangha, counsel

REASONS

1. On 11 June 2017 Mrs Gagic presented a claim to the Tribunal alleging that her former employer, Modo Creative Limited ("the Company") had unfairly dismissed her and subjected her to disability discrimination. The Company is owned by Mr Andrew and Mrs Emma Tucker. It specialises in the design and production of gifts and homeware. It employs around 11 people as designers, creative assistants and team leaders. Mrs Gagic worked as a creative assistant, which involved carrying out production processes, including operating a heat press and laser machine.

2. Mrs Gagic entered into the ACAS early conciliation procedure in relation to her claim on 5 April 2017 and an Early Conciliation Certificate was issued on 5 May 2017.

3. During the course of a Preliminary Hearing on 14 August 2017 and again at the main Hearing the Tribunal clarified the nature of the claim with Mrs Gagic. She claimed that she had been unfairly dismissed under the test of reasonableness in Section 98(4) of the Employment Rights Act 1996 (the ERA). That claim was dismissed at a further Preliminary Hearing on 9 November 2017 on the ground that she did not have the qualifying service to bring that claim. Mrs Gagic also claimed that her dismissal was unfair because the principal reason for it was that she had brought to her employer's attention by reasonable means circumstances connected with her work she reasonably believed were harmful or potentially harmful to health or safety (contrary to Section 100 ERA) or because she had made a protected disclosure (contrary to Section 103A ERA). She also alleged that she had been subjected to detriments on those grounds (contrary to Sections 44 and 47B ERA).

4. The alleged health and safety concerns she raised and/or protected disclosures she made were as follows:

    a. On 20 May 2016, in notes she emailed to the Tuckers in preparation for an appraisal meeting on 23 May 2016, Mrs Gagic said that: “heat pressing is a very physical job which effects my lower back at times”; “maybe the dispatch notes and printed heat press designs could print out in the fabric processing area so there is less leg work on the stairs”; and “A tall stool would be helpful to sit down occasionally when cutting out printed designs when waiting for the heat press to reach working temperature”.

    b. At the appraisal meeting on 23 May 2016 she made comments to a similar effect.

    c. In an email dated 25 May 2016 to Mr Tucker giving her understanding of what was discussed at the meeting, she said: “Heat pressing is a very physical job which effects my lower back at times – this has much improved since the adjustment of the heat-press machine this week, although I do feel that both Maxine and I have put up with quite a bit of uncomplaining discomfort.”

5. Mrs Gagic alleged that as on the ground of her raising those concerns or making those disclosures:

    a. In the appraisal meeting on 23 May 2016 she was told that it would go against her if she was not able to perform all the job roles including operating the laser machine, which required her to stand for protracted periods.

    b. In around July 2016 she was told that she ought either to ask for a demotion or behave more like her work colleague, Maxine.

    c. On 1 August 2016 Emma Tuck said to her that the Company did not have the time or capacity to deal with her complaints.

6. In relation to her claims of disability discrimination, Mrs Gagic alleged that she was disabled as a result of a squashed disc in her spine. She alleged that she was dismissed on 29 March 2017 because of something arising in consequence of her disability, namely her difficulties in carrying out the full range of duties required of her (contrary to Section 39(2)(c) read with Section 15 of the Equality Act 2010 – EqA). She also alleged that the Company had failed to meet its duty to make reasonable adjustments for her disability (contrary to Section 39(2)(d) read with Section 21(2) EqA). She said that requiring her to carry out the full range of duties including the operation of the heat press put at her at a substantial disadvantage because the requirement to stand and the pressure involved in pulling down the press caused her significant pain and discomfort in her back. She said that her heat press duties should have been reduced or removed and shock absorbent matting should have been provided beneath the press.

7. At a Preliminary Hearing on 9 November 2017 the Tribunal decided that Mrs Gagic was a disabled person for the purposes of the definition in Section 6 EqA because of a squashed disc in her mid-thoracic spine. The

Tribunal found that the effect of the general lower back pain that resulted from this condition was generally no more than minor or trivial. There were infrequent and short-lived occasions, however, when her condition was exacerbated and her neck went into spasm. At those times the effect on her day-to-day activities was substantial. Because of the recurring nature of those substantial effects, her back condition amounted to a disability by virtue of para.2(2) of Part 1 Schedule 1 EqA.

8. At the main Hearing, the Tribunal heard oral evidence from Mrs Gagic and her husband Mr Gagic. For the Company, the Tribunal heard oral evidence from the Tuckers and from Mr Oliver Firth, who worked for the Company as a Designer and then Team Leader.

9. On the basis of that evidence and the documents to which the witnesses referred it, the Tribunal made the following findings on the issues in the claim.

Time limit

10. Under Section 48(3) ERA, the Tribunal has power to deal with a complaint of detriment contrary to Section 44 or 47B ERA only if it is presented before the end of the period of three months beginning with the date of the detriment or, if the detriment is part of a series of similar acts, the last of them. In this case, the last detriment of which Mrs Gagic complained happened on 1 August 2016. She did not present her Tribunal claim until 11 June 2017, seven months out of time. (The statutory provisions that extend the period for presentation of a claim to accommodate the ACAS early conciliation procedure did not apply to Mrs Gagic's claim because she did not contact ACAS under that procedure until after the time limit had already expired.)

11. The first question for the Tribunal was whether it should exercise its discretion to allow a late claim. A Tribunal can hear a late claim only if it is satisfied that it was not reasonably practicable for the complaint to be presented in the three-month time limit and it was presented within a further reasonable period (Section 48(3)(b)).

12. Mrs Gagic's evidence on the delay in bringing her claim was that she and the Tuckers had a lot of mutual friends and she did not want to upset that social group or "make things worse for everybody".

13. The Tribunal accepted that that was an understandable reason why Mrs Gagic was reluctant to launch litigation against the Company. The Tribunal did not accept, however, that it made it not reasonably practicable for her to present her claim within three months. The Tribunal therefore concluded that it had no power to deal with her detriment claims. As will be apparent from the further findings below, these claims would have failed even if they had been dealt with on their merits.

Health and safety concerns and protected disclosure

14. It was agreed that there was no health and safety representative or committee at the Company. In order for Mrs Gagic to be protected from detriment or dismissal on health and safety grounds, the Tribunal needed

to be satisfied that she had brought to the Company's attention by reasonable means circumstances connected with her work that she reasonably believed were harmful or potentially harmful to health or safety (Section 44(1)(c) ERA). In order to have made a protected disclosure, Mrs Gagic needed to have disclosed information to the Company that in her reasonable belief was made in the public interest and tended to show that one or more of the circumstances set out in Section 43B(1) ERA applied. The sub-paragraph on which Mrs Gagic relied was Section 43B(1)(d), namely "that the health or safety of any individual has been, is being or is likely to be endangered".

15. The Tribunal accepted that in the notes Mrs Gagic made before the appraisal meeting, at the meeting itself on 23 May 2016 and in her email of 25 May 2016 she did mention that operating the heat press affected her lower back at times. The Tribunal also accepted that she reasonably believed that operating the heat press was harmful to her health and safety and/or tended to show that her health was being endangered. The Tribunal does not accept, however, that it was reasonable for Mrs Gagic to believe that the same applied to the leg work involved in going up and down stairs or the fact that she would like a stool for when she was waiting for the heat press to reach working temperature. Whilst this information indicated that Mrs Gagic thought there were things about her working environment that were an inconvenience or could be improved upon, the Tribunal did not accept that she could reasonably believe that these circumstances were harmful to health and safety or that they indicated that her health and safety was endangered or was likely to be so.

16. During the course of the Hearing it emerged that in a further email of 27 May 2016 Mrs Gagic told the Tuckers that they "underappreciated the amount of machine (smoke and noise) and location adjustment issues that some staff have had to contend with". The reference to location adjustment related to the fact that the Company had moved premises in April 2016 and Mrs Gagic was referring to the uncomfortable working conditions at the time the Company was moving into its new premises. In recognition of the fact that Mrs Gagic was an unrepresented party, the Tribunal decided to consider whether this might amount to raising a health and safety concern or making a protected disclosure for the purposes of Section 44(1)(c) or 47B ERA, even though this had not been raised before. The Tribunal heard no evidence to establish, however, that the conditions referred to in this email could reasonably be believed to be actually or potentially putting Mrs Gagic's health and safety at risk. Mrs Gagic explained at the Hearing that the reference to "smoke" in the email was to smoke produced by the laser machine, which was situated at the back of the ground floor, behind the area used by the Company as a shop to sell its products. She alleged at the Hearing that the smoke could endanger the health and safety of the public using the shop. The Tribunal accepted Mr Tucker's evidence that the laser machine produced a small amount of smoke only and no customers in the shop had even commented upon it. The Tribunal did not accept that it was reasonable for Mrs Gagic to believe that this smoke actually or potentially endangered anyone's health and safety.

17. In any event, the Tribunal did not accept that Mrs Gagic believed when disclosing any of the information set out above, even that relating to the heat press, that she was doing so in the public interest. She was

complaining about her own working conditions. Even if she had believed that she was making the disclosures in the public interest, that belief would not have been reasonable. The heat press affected only herself; there was no evidence that it was actually or potentially affecting the health or safety of any other employee who operated it. There was no wider public interest involved.

18. In summary, the Tribunal found that the only complaint or information that fell within Sections 43B(1)(d) and 44(1)(c) ERA were the comments Mrs Gagic made about the effect of the heat press on her back at around the time of her appraisal meeting on 23 May 2016. The Tribunal did not, however, accept that these amounted to protected disclosures because Mrs Gagic did not believe they were made in the public interest, and, even if she had, it would not have been reasonable for her to do so.

Detriments on ground of disclosure

19. The Tribunal was not satisfied that Mrs Gagic was in any event subjected to any detriments on the grounds of raising any of these concerns. A detriment is something that an employee could reasonably view as a disadvantage in her employment.

20. At the appraisal meeting on 23 May 2016, Mr Tucker did say that if Mrs Gagic did not want to work on the laser machine that would limit her job progression, because that was the growth area in the Company's business. This is not something that an employee could reasonably view as amounting to a disadvantage; it merely amounted to the provision of information. Further, Mr Tucker did not make the comment on the ground of Mrs Gagic's comments about the heat press but because she had indicated she did not want to operate the laser machine.

21. On 30 July 2016, in response to Mrs Gagic's expression of dissatisfaction with her work duties, Mr Tucker emailed her to explain the Company's position. He said: "To progress as a creative assistant there are things we can discuss (extra responsibilities, flexibility on overtime and departments to cover busy periods etc) We could also move you back in to a Studio Assistant role and will honour your current pay rate. This will mean changes to your contract but if you are interested let us know and we can provide you with more detail." The Tribunal did not accept that this amounted to telling her she needed to ask for a demotion. It was the Company's attempt to accommodate Mrs Gagic's dissatisfaction with the content of her work. Effectively, it was prepared to restrict the work she did to reflect her preferences and not reduce her pay. This could not reasonably be viewed as amounting to a disadvantage. Further, Mr Tucker did not send his email on the ground of Mrs Gagic's comments about the effect of the heat press on her back but because she had complained about the content of her work.

22. In relation to the third alleged detriment, the Tribunal accepted Mrs Tucker's evidence, which was clear and credible and supported by the documentary evidence, that on the weekend of 30 and 31 July there had been an exchange of emails in which Mrs Gagic had made comments about her work content and pay. Mrs Gagic went into Mrs Tucker's office on 1 August to talk about these emails and also challenged the accuracy

of what Mr Tucker had been saying to her. Mrs Tucker said she could not continue the conversation at that time. This was because she wanted Mr Tucker to be with her when she discussed these matters with Mrs Gagic. She was not refusing to discuss the issues with Mrs Gagic at all. A manager's statement that she was not immediately able to conduct a discussion on the first occasion that an employee asked her to do so could not reasonably be viewed as putting Mrs Gagic at a disadvantage. Further, Mrs Tucker's comments were not on the ground of what Mrs Gagic had said about the heat press.

23. In summary, Mrs Gagic's complaints of detriment on grounds of raising health and safety concerns or a protected disclosure failed because they were presented out of time, she had not made a protected disclosure, the acts of which she complained had not occurred as she alleged and/or did not amount to detriments and in any event were not done on either of the alleged unlawful grounds.

Dismissal

24. Mrs Gagic said that the sole or principal reason she was dismissed was that she had raised health and safety concerns or made a protected disclosure. In addition to the concerns and alleged disclosures she relied upon in relation to her detriment claims (set out in paragraph 4 above), she relied on an email she sent on 23 March 2017 to Mr Tucker. (The alleged detriments could not have occurred on the ground of this email as it post-dates them.)

25. In that email Mrs Gagic said this: "I am presuming that after checking my medical records (as I am aware employers are now able to do) you will have noted that I have a squashed disc in my upper mid back, hence my niggling pain when using the heat press machines and from mainly constantly having to stand up all day to fulfill my job role. I made it clear last year that using the heat press machines aggravated my back pain and we talked about reducing or breaking up my time spent using them but this wasn't actually put into practice. I remember Joanne [Vose, an external consultant employed to carry out risk assessments and provide the Company with other human resources support and advice] recommended putting some shock absorbing matting onto the work station floor areas to help counteract the extreme jolt which passes through the floor and up my back each time the main heat press machine releases, this recommendation was also not put into place."

26. The Tribunal accepted that Mrs Gagic had a reasonable belief that the information in this email indicated that these were circumstances that were harmful to her health safety and/or that her health and safety was being endangered, and that the email fell within Sections 43B(1)(d) and 44(1)(c) ERA. The Tribunal did not accept, however, that this information amounted to a protected disclosure. There was no evidence before the Tribunal that Mrs Gagic believed she was disclosing this information in the public interest: she was raising it because she was concerned about her own situation.

27. The Tribunal was in any event satisfied that neither the comment about the heat press made at the time of the appraisal meeting nor this more recent email was the principal reason for Mrs Gagic's dismissal.

28. On 20 March 2017 Mrs Gagic and the Tuckers had an acrimonious meeting at which they were unable to agree on whose idea it was for the Company to develop a new product, an etched mirror. Mrs Gagic would not accept that the Company had already started developing the idea before she put her idea for the mirror into the staff suggestions box. At the meeting Mrs Gagic also raised the fact that she did not like working in the heat press room. At the end of the meeting Mrs Gagic said that she quit.

29. Mr Tucker emailed Mrs Gagic asking her if she really intend to resign, given that it was in the heat of the moment. Mrs Gagic said that she was not confirming anything in writing until she had received some advice. Later the same day she said that she was retracting her resignation. On 23 March Mr Tucker emailed to say that the Company accepted the retraction of her resignation because it was made in the heat of the moment and to act on it would be unfair. He suggested that they meet, along with the Human Resources adviser, to discuss the issues she had raised so that they could try to reach a mutual understanding. In particular, he proposed that they discuss intellectual property and sharing ideas in the workplace, with Joanne helping Mrs Gagic to understand the subject from a contractual point of view; and communication and conduct, and specifically how to raise concerns in a productive way.

30. Mrs Gagic replied that she would agree to meet but added: “I have not as yet fully decided if I actually wish to remain a member of the Modo team”. She then set out two grievances, one as set out in paragraph 25 above and the other that she had been bullied by the Tuckers at their meeting on 20 March.

31. At the meeting on 29 March the Tuckers found that they were still unable to reach any clear understanding with Mrs Gagic about what her job duties should be. Mrs Gagic was still insisting that the etched mirror was her idea. At the end of the meeting, the Tuckers decided that it would be best if they parted company, and Mrs Gagic’s employment was terminated.

32. Against this background, the Tribunal accepted as entirely credible the Tuckers’ evidence that their decision to terminate Mrs Gagic’s employment was based on their conclusion, reached after Mrs Gagic’s frequent complaints about her work and the acrimonious and unproductive meetings on 20 and 29 March, that they were unable to make the Company’s relationship with Mrs Gagic work. The Tribunal was provided with a transcript of a telephone conversation that Mrs Tucker had with an employer advice line on how to manage Mrs Gagic after the meeting on 20 March. This confirmed that Mrs Gagic’s negative attitude towards her employment with the Company was uppermost in Mrs Tucker’s mind. The Tribunal found that the sole reason for Mrs Gagic’s dismissal was the breakdown in the relationship between herself and the Company and the inability of the Company, despite the Tuckers’ best efforts, to make that relationship work.

33. From the evidence it heard, the Tribunal found that, far from being an employer that was likely to penalise its staff for raising health and safety concerns, the Company took its staff’s welfare seriously. When Mrs Gagic raised in May 2016 that she would appreciate a stool, she was provided

with one. When she mentioned that the heat press was affecting her back, Mr Tucker adjusted it. As Nancy Cannon confirmed in an email of 21 July 2017 to Mrs Gagic, when Ms Cannon raised concerns about the noise associated with the laser machine, Mr Tucker promptly measured the noise level to establish that it was within recommended limits and then provided her with a good pair of ear defenders. Mr Tucker also investigated when he was told that the laser machine was producing smoke and took steps to address this. When Mrs Gagic complained about the heat press the Company commissioned an external human resources consultant to carry out a risk assessment in relation to the heat press. When the consultant recommended shock-absorbent matting should be placed under the heat press to reduce the impact when it released, Mr Tucker looked into this but decided that it would be inadvisable as it would amount to a trip hazard near a machine operating at a high temperature. When Mrs Gagic complained in December 2016 that the fabric she was using might be carcinogenic, the Company changed to a new fabric, at some cost and inconvenience, even though on researching the issue it had been satisfied that there were no actual health and safety risks in using the existing fabric.

34. As the principal reason for Mrs Gagic's dismissal was not her raising a health and safety concern or a protected disclosure, her unfair dismissal claim failed and was dismissed.

Disability discrimination

35. Both aspects of Mrs Gagic's disability discrimination claim turned on what knowledge the Company had of her disability. An employer does not discriminate against an employee because of something arising in consequence of the employee's disability, nor is it under a duty to make reasonable adjustments, if it can show that it did not know, and nor could it reasonably have been expected to know, that the employee had the disability (Section 15(2) and paragraph 20 of Schedule 8 EqA).

36. The first time Mrs Gagic mentioned that she was having back pain was in her comments about the heat press at the time of her appraisal meeting. She did not, however, mention that the pain was connected with a back condition she had. The email Mrs Gagic sent the Company on 23 March 2017 was the first time the Company knew that she had a squashed disc in her spine. The Tribunal did not accept that the Company knew or could reasonably have been expected to know that Mrs Gagic was disabled simply because she had mentioned she experienced back pain on occasions. The Tribunal's finding at the Preliminary Hearing on 9 November 2017 that Mrs Gagic was disabled was based on the effect of her neck spasms; it found that the effect of her back pain at other times was no more than minor or trivial. Mrs Gagic had not informed the Company that she had neck spasms and nor did she have any spasms while she was at work. Given the limited information that the Company had about the source and nature of Mrs Gagic's back pain, the Tribunal accepts that it neither knew nor could reasonably have been expected to know that Mrs Gagic was disabled.

37. For that reason, both aspects of Mrs Gagic's claim of disability discrimination failed and were dismissed.

Preparation time order

38. Under Rule 76 of its Rules of Procedure, the Tribunal has power to order a party who has conducted proceedings unreasonably to pay towards the preparation time of the other party. Mrs Gagic applied for a Preparation Time Order on the ground that the Company had acted unreasonably in conducting the proceedings. She said that this unreasonable conduct had resulted in 100 additional hours' work for her in preparing for the Hearings.

39. Mrs Gagic's first complaint was that the Company had acted unreasonably in not providing its witness statements for the Preliminary Hearing on 9 November 2017 by the due date, which was 23 October 2017. The Company sent Mrs Gagic its witness statements on 1 November 2017, eight days late but still eight days in advance of the Preliminary Hearing. DAS Law had come onto the Tribunal's record as acting for the Company on 6 October 2017. On 24 October the firm wrote to Mrs Gagic saying that due to an oversight it had not complied with the Order for exchange of witness statements. It apologised and said that it would have no objection to her amending the witness statement she had already sent and that it would not be reading hers until it sent her the Company's. An email Mrs Gagic sent to the Tribunal on 30 October indicated that she had agreed to DAS Law's suggested revised deadline of 2 November, which it then met.

40. The Tribunal accepts that the delay in the Company's provision of its witness statements for the Preliminary Hearing was due to an oversight by its legal advisers and that when that oversight was identified the advisers did all they could to put it right and minimise the impact on Mrs Gagic. The Tribunal does not consider that this amounts to unreasonable conduct of the proceedings.

41. Mrs Gagic complained that the Company had made a threat of a costs application through ACAS. The Tribunal was not permitted to hear any evidence on what the Company might have communicated to a conciliation officer in connection with the performance of the officer's conciliation functions (Section 18(7) of the Employment Tribunals Act 1996).

42. Mrs Gagic complained that DAS Law had changed the page numbers in the hearing bundle three times. On discussion and clarification by reference to the documentation, the Tribunal was satisfied that an initial paginated paper version of the bundle had been sent to Mrs Gagic on 23 December. A further bundle, which was not paginated, was sent to her on or around 12 January 2018. The final version was sent on 20 January 2018. This was paginated and incorporated the transcript of the conversation between Mrs Tucker and an adviser and photographs of the Company's heat press machines. These were inserted at the end of the bundle so most of the page numbers from the initial paper bundle were not disrupted. Although the Company did not explain why these pages had not been included in the original paper version of the bundle, they were provided two-and-a-half weeks before the Hearing, meaning that Mrs Gagic had sufficient time to familiarise herself with the location of documents in the bundle before the Hearing. This did not amount to unreasonable conduct such as to justify the Order Mrs Gagic sought.

43. Mrs Gagic complained that the Company had sent her two different versions of Mrs Tucker's witness statement. The Tribunal accepts that the Company's first set of witness statements were incomplete because they lacked the page numbers of documents that appeared in the bundle. The second version of Mrs Tucker's statement was not the most up-to-date version and was sent to Mrs Gagic due to an administrative error, which was then corrected. Again, whilst this would have inconvenienced Mrs Gagic to some degree, the Tribunal does not accept that it amounted to unreasonable conduct of the proceedings such as to justify a Preparation Time Order. Mrs Gagic had the final version of Mrs Tucker's witness statement by 25 January 2018, allowing her two weeks to prepare any questions she wanted to put to Mrs Tucker about it.

44. Finally, Mrs Gagic complained that on 20 December 2017 the Company's legal adviser Mr Thompson had sent her an email threatening to apply to the Tribunal for a costs order if she would not agree to an extension of the deadline for exchange of witness statements so that he had to make an application for an extension. The deadline was set at 8 January 2017 but as the run-up to Christmas was a very busy time for the Company's business his clients would not have time, Mr Thompson said, to finalise their witness statements. The Tribunal did consider that this was unreasonable conduct. Mr Thompson had known of the deadline for witness statement exchange for some weeks. Mrs Gagic was entitled not to agree to an extension. Even if the Company had applied for a variation of the deadline, the application would not necessarily have been granted. Further, it appeared that the Company was in fact able to provide its witness statements on time as they were exchanged on 8 January 2018.

45. The Tribunal nevertheless concluded that it was not appropriate to make a Preparation Time Order against the Company because of this email. It did not result in Mrs Gagic spending any extra time on preparing for the Hearing. Witness statements were exchanged on 8 January in any event so there was no delay to her preparations. The Tribunal also considered it appropriate to take into account that the overall tone and content of Mr Thompson's emails that preceded this one indicated that he was trying to be helpful towards Mrs Gagic and displayed patience and understanding of her difficulties as an unrepresented Claimant. He also acknowledged and apologised for the administrative errors that he had made.

46. The Tribunal therefore dismissed Mrs Gagic's application.

Employment Judge Cox

Dated: 21 March 2018