EMPLOYMENT TRIBUNALS

Claimant: Mr C Jones

Respondent: Merthyr Tydfil County Borough Council

Heard at: Swansea **On: 1,2 and 3 May 2018**

Before: Employment Judge N W Beard **Members: Mrs L Thomas**
Mrs M Humphries

Representation:
Claimant: In Person
Respondent: Ms Williams (Counsel)

JUDGMENT

The Unanimous Judgement of the Tribunal is:

1. The claimant's claim to have suffered a detriment on the grounds of having made a protected disclosure pursuant to section 47B of the Employment Rights Act 1996 is not well founded and is dismissed.

2. The claimant's claim to have been dismissed on the grounds of having made a protected disclosure pursuant to section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.

3. The claimant's claim of disability discrimination pursuant to section 15 Equality Act 2010 is not well founded and is dismissed.

REASONS

Preliminaries

4. The claimant represented himself. The respondent was represented by Ms Williams of counsel.

5. At the outset of the hearing the tribunal discussed the issues with the parties and the following were identified as requiring the tribunal's resolution.
   5.1. In respect of the claimant's claim of unfair dismissal it is made solely pursuant to section 103A of the Employment Rights Act 1996 and does not extend to

ordinary unfair dismissal (confirmed by the claimant at the preliminary hearing before Employment Judge Cadney on the 18 August 2017). The issues identified were:

5.1.1. Did the claimant make a qualifying disclosure?

5.1.2. If the claimant made a qualifying disclosure did the respondent dismiss the claimant in response to that disclosure?

5.2. The claimant also contended pursuant to section 47B of the Employment Rights Act 1996 that he had suffered detriment because he had made a disclosure. The issues were as follows:

5.2.1. Did the claimant make a qualifying disclosure?

5.2.2. If the claimant made a qualifying disclosure did the respondent commence proceedings to dismiss the claimant on the grounds of some other substantial reason (third party pressure) or because the claimant had made a protected disclosure.

5.2.3. If the claimant made a qualifying disclosure did the respondent commence disciplinary proceedings because of a data protection issue or because the claimant had made a protected disclosure.

5.3. The claimant contended that he had been discriminated on the grounds of disability pursuant to section 15 of the Equality Act 2010. The following were in issue:

5.3.1. Did the claimant suffer adverse behavioural effects as a consequence of his disability which led to a lack of focus and confusion leading to the claimant making the errors in relation to data protection?

5.3.2. Did the respondent commence and continue disciplinary proceedings into a data protection breach because of those behavioural effects? As part of this the claimant also asked us to decide that this could be found even if the treatment was on the grounds of having made a disclosure and that we would have to consider whether this claim could only be an alternative or could run concurrently.

5.3.3. Was the claim presented in time, the claimant contending that the treatment overall was a continuing act up to the time of his dismissal, the respondent contending that the disability claim was made out of time.

5.3.4. If the claim was not in time was it just and equitable to extend time in all the circumstances of the case.

5.3.5. The respondent relied on the defence of justification arguing that:

5.3.5.1. Complying with data protection requirements was a legitimate aim;

5.3.5.2. It was proportionate to use disciplinary processes because of the risk of penalties that the respondent was placed in jeopardy of where there was a breach of data protection legislation.

6. The tribunal was provided with a bundle of documents which, after discussion on the first day of hearing, extended to nearly 600 pages. We heard oral evidence from the claimant. The respondent called the following witnesses to give oral evidence. Alexandra Beckham, a Safeguarding Officer; Fran Donnelly, the claimant's line manager; Lisa Richards; the respondent's Data Protection Officer; Simon Jones; Senior Solicitor with the respondent, who provided legal advice to the dismissing officer; Gary Thomas, who conducted both dismissal hearings involving the claimant; Ellis Cooper who conducted the appeals against both dismissal decisions and Rosemary Lazell, Chair of Governors at a Primary School connected to these claims "the school".

The Facts

7. The claimant began his employment with the respondent on 10 June 2002. The claimant was dismissed on 7 February 2017. The claimant was employed as a "Human Resources Business Partner and a key part of his role at the time of dismissal was providing human resources advice to a group of schools. Part of that role is to advise on the disciplinary and other processes to be adopted when dealing with safeguarding issues at a school. The respondent concedes, that the claimant is a disabled person within the meaning of the Equality Act 2010; the claimant's disability is depression.

8. The teachers (and indeed headteacher) of maintained schools in the respondent's area are, contractually, employees of the Local Education Authority "LEA". However, the governing body of a school is deemed the employer of teachers for certain matters under the provisions of the **Education (Modification of Enactments Relating to Employment) (Wales) Order 2006**; this can lead to a complexity of relationships. In this case: a headteacher (who will form part of the narrative below) is a member of the school's governing body, and for a number of purposes is the point of contact between that governing body and the LEA. Budgets for schools are devolved to the school, however, the school along with other schools in the area purchased human resources advice from the respondent (the schools were entitled to purchase that advice elsewhere if they chose to do so). The claimant provided that advice to the school on behalf of the respondent. The respondent provides those human resources services on a quasi-commercial basis. The respondent, as Local Education Authority, also has statutory duties in relation to the safeguarding of children which will, of course, connect to its role as the headteacher's contractual employer and the employer of the claimant in the advice he provides.

9. Child protection allegations were raised against the headteacher of the school (it is important to record that they were later withdrawn and there is no indication that there was any substance to those allegations).
   9.1. On the 24 February 2016 the claimant attended a safeguarding strategy meeting in respect of these allegations.
   9.2. On the 25 February 2016 the claimant attended a follow up meeting with the Chair of Governors of the school and the school's child protection officer. The purpose of this meeting was to decide the appropriate steps to be taken in terms of disciplinary procedures or otherwise.
   9.3. The claimant was, as part of his role, required to provide advice following Welsh Government guidance which schools are required to follow.
   9.4. There were some factual disputes about aspects of this meeting which we do not need to resolve for the purposes of this judgment. The following facts are not in dispute: the claimant advised the chair of governors that the school should commission an independent investigation into the allegations; the chair of governors disagreed fundamentally with this advice and informed the claimant of this.
   9.5. No investigation was commissioned.
   9.6. In our judgement the claimant gave his advice in good faith on his then understanding of the facts.

10. Later the same day the claimant had a conversation with his line manager Ms Donnelly informing her of his concerns about the chair of governors' failure to accept his advice. There is a dispute as to what was said at this meeting.
    10.1. The claimant contended that he had told Ms Donnelly that he had given advice in line with Welsh government guidance. He also stated that the chair of governors had not paid sufficient regard to the statutory guidance.
    10.2. He contended that he had set out to Ms Donnelly that he had explained the statutory guidance to the chair of governors. He further said that he provided Ms Donnelly detail of the allegations and told her of some physical evidence which potentially supported the allegation.
    10.3. Ms Donnelly told us that the claimant had merely informed her, as an update, that the chair of governors had failed to follow the statutory guidance.
    10.4. We preferred the claimant's evidence on this point.
        10.4.1. Ms Donnelly displayed a degree of flippancy in answering the claimant's questions which did not enhance her credibility before the tribunal.
        10.4.2. In contrast the claimant displayed an earnestness in his approach which lent credibility to his answers.
        10.4.3. Although the claimant did expand a little on his answers in cross examination we did not consider that this undermined his evidence.
        10.4.4. In particular the claimant had prepared a note following the meeting of the 24 February which shows that he intended to raise the issue of gross misconduct and an investigation at the meeting the next day.
        10.4.5. The tribunal conclude that the claimant had considered the issue seriously and when advice was not followed it is more probable than not that he would consider this serious and raise it as such with his line manager.

11. The school was involved with a group of schools described as a cluster. The cluster, as we understand it, met to discuss issues including the issue of where the schools should source human resources support. The headteacher of the school was a representative of the school in these meetings. There had been discussions in the preceding year about the possibility of the schools obtaining HR support from other sources than the respondent. The respondent had been made aware of these discussions and was concerned about the effect of the schools stopping their arrangements with the respondent. Soon after the claimant had given his advice to the chair of governors the headteacher of the school was informed of that advice. It appears that the headteacher was provoked by that advice into later using it as an argument for making what appears to be ultimatum to the respondent. She argued that if the claimant was not dismissed then the school would stop using the respondent's HR support. The headteacher was also seeking to persuade the cluster to take the same course. In addition to this there was involvement by union representatives for headteachers also pressing for the removal of the claimant.

12. It was clear to us that Ms Donnelly was concerned about the potential loss of the contract to provide HR services to the schools. The statement she gave in the investigation stage of the respondent's process considering whether the claimant should be dismissed for some other substantial reason shows particular concern about the financial impact of withdrawal. She clearly took the ultimatum seriously as she was engaged in dealing with the schools over this issue from March 2016 onward. In our judgment this was the prime motivating factor in her approach to

dealing with the situation and starting the dismissal process involving the claimant. The claimant told us that he believed that the reason behind the approach of Ms Donnelly was because he had raised the matter of the governor not following his advice. The claimant was unable to point to any specific evidence to support that belief. The evidence of the continuing discussions between Ms Donnelly along with other officers of the respondent and the school and the cluster, all point to the respondent's concern being the loss of the contract to provide HR support.

13. The respondent began the process of considering whether to dismiss the claimant because of "third party pressure" at the beginning of June 2016. By this stage the respondent had the following information about views on the claimant emanating from the headteacher of the school, the cluster and trade union representatives of the headteachers:
    13.1. On 5 April 2016 Ms Donnelly was informed that the personnel providing the service, and in particular the claimant, were an issue for the cluster.
    13.2. On 10 May Ms Donnelly was informed that the claimant was the main reason for schools withdrawing from the contract.
    13.3. On the same day the headteacher of the school informed her that if the claimant were sacked the school would be happy to use the respondent's HR services as she had lost complete trust and confidence in the claimant.
    13.4. On the 28 June 2016 a union representative of the headteacher wrote to Ms Donnelly in reference to the claimant as follows "*in one instance the headteacher considers, with good reason, that the aberrant advice, if followed by the governing body, would have threatened her position as headteacher*".
    13.5. On the balance of probabilities that complaint related to the advice given by the claimant to the school in February 2016.

14. The tribunal were concerned about the processes adopted by the respondent, in particular in respect of assessing redeployment, or re-organising the department to ensure that the claimant could remain employed. Had the claimant raised an ordinary unfair dismissal claim, this would have been of significance. However, given the way in which the claim has been pursued we do not consider the evidence in relation to the process further.

15. The claimant gave evidence about his medical condition. His position was that his disability, depression, led to him being prone to error in during his handling of the "some other substantial reason" dismissal process. The claimant accepts that he breached data protection provisions (by passing a document to his union), however told us that he considered this was because of the fact that he was prone to error arising out of his condition.

16. We have examined the medical evidence provided by the claimant. Those demonstrate that the claimant has suffered from anxiety and depression since 2004. The evidence demonstrated that he suffered low mood, poor sleep and panic attacks. The evidence indicated that his concentration was reduced with difficulty focusing. However, there was nothing in the evidence to indicate that the claimant's decision to pass documentation to his union was a decision made because of this condition. The claimant's evidence was that he had made a conscious decision to pass this information as he thought it related to his arguments in respect of defending the some other reason dismissal process. In our judgment that points to the claimant making a rational decision about the material in question. On that

basis the tribunal consider that there is no specific evidence on the claimant's condition which would allow us to conclude that this decision was made as a consequence of his disability. Further, we conclude that the evidence as a whole does not point to the sending of the material as a consequence of his disability.

The Law

17. In ***Fecitt & Ors v NHS Manchester EWCA Civ 1190*** Elias LJ held that liability arises if the protected disclosure is a material (more than trivial) factor in the employer's decision to subject the claimant to a detrimental act. Dealing with an argument realted to the applicability of interpretation of discrimination law this area he considered that the reasoning in EU analysis is that unlawful discriminatory considerations should not have any influence on an employer's decisions and that the same principle is applicable where the objective is to protect whistleblowers.
    17.1. This creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair.
    17.2. The PID provisions also raise issues on the burden of proof. In respect of detriment there is a reversal of the burden of proof once a claimant has proved that they have made a protected disclosure and suffered a subsequent detriment, section 48(2) Employment Rights Act (ERA) 1996 places the burden of proof on the respondent to prove, on the balance of probabilities, that the treatment was "*in no sense whatsoever"* on the ground of the protected disclosure.
    17.3. The tribunal must answer these questions when considering the burden of proof in a PID dismissal case. Has the claimant shown that there is a real issue that the reason advanced by the respondent is not the real reason for dismissal? If so, has the respondent proved his reason for dismissal? If not, has the employer disproved the section 103A reason advanced by the claimant? If not the dismissal is for the section 103A reason. This is set out in ***Kuzel v Roche [2008] IRLR 530*** on that approach it is possible to find that an employer has disproved the section 103A reason without establishing its own reason (i.e. both reasons advanced are not the real reason for dismissal).
    17.4. In our judgment, following the above, the tribunal will have to consider whether the alleged detriment was in no way whatsoever because the claimant had made a disclosure. In the case of unfair dismissal we will have to consider whether the disclosure of information was the sole or principle reason for dismissal. In both case we will have to ask whether the conduct relied upon by the respondent is properly separable from the provision of information. We must be careful that the sheer number of incidents of disclosure does not cloud our judgment as to that essential question.

18. There must be a link between the detrimental treatment or dismissal and the disclosure. Also, this must be "deliberate" in the sense of a conscious or unconscious motivation on the part of the respondent ***London Borough of Harrow v Knight [2003] IRLR 140.***

19. Section 15 of the Equality Act 2010 which provides so far as relevant:

    (1)A person (A) discriminates against a disabled person (B) if—

(a)A treats B unfavourably because of something arising in consequence of B's disability

20. The tribunal have in mind ***Royal Bank of Scotland v Morris UKEAT/0436/10.***
    20.1. The tribunal consider that although that authority deals with the definition of disability, nonetheless it points the way as to the care which must be taken in deciding facts on aspects of mental health in the absence of medical reports which deal specifically with factual events.
    20.2. ***RBS*** demonstrates that the tribunal must be clear that it has sufficient evidence on issues relating to such matters as recurrence, long term effects and deduced effects and that evidential basis must include expert evidence where the tribunal is unable to draw clear conclusions from medical notes.
    20.3. However, the reference there is to specific matters which are requirements under the Act to establish disability, here we deal with requirements to establish causation.
    20.4. We do not consider that a lesser evidential test is required for different aspects of the statutory requirements. The specific problems of recurrence, long term effects are in effect seeking a prognosis require a conclusion based on opinion about the future course of the illness. The issue of deduced effects requires a professional opinion based on the known effects of medication and their application to the specific patient.
    20.5. However, what we are examining is not whether the conditions for a disability exist or would exist because of prognosis or the impacts of medication. Rather what we are considering is whether that disability has a specific characteristic, if the medical evidence establishes that characteristic on the balance of probabilities that will be sufficient for the first question as to whether this was a symptom of the claimant's condition.
    20.6. We must consider whether the medical evidence in conjunction with other evidence is sufficient to establish that characteristic. Thereafter we must consider whether, if that element is a characteristic of the disability, whether the behaviour on this specific occasion arose from that disability.

21. The tribunal has in addition sought to remind itself of the statutory reversal of the burden of proof in discrimination cases, we need to consider the reasoning in the cases of ***Igen Ltd v Wong 2005 IRLR****,* ***Barton v Investec Henderson Crosthwaite Securities Ltd 2003 IRLR*** *and* ***Madarassy v Nomura International Plc 2007 IRLR****.*
    21.1. These cases demonstrate that the tribunal needs to consider (unless the reason why the treatment has occurred is clear) a two-stage process.
    21.2. The first stage of which requires the claimant to prove facts which could establish that the respondent has committed an act of discrimination.
    21.3. The word "could" on the basis of ***Johnson v South Wales Police [2014] EWCA Civ 73[2014] All ER (D) 79*** does not mean simply raising a possibility of establishing the fact but a *prima facie* case that fact was established.
    21.4. It is only after a claimant has proved such facts that the respondent is required to establish, again on the balance of probabilities, that it did not commit the unlawful act of discrimination.
    21.5. The ***Madarassy*** case makes it clear that the conclusion, once a *prima facie* case is established, requires an examination of all the evidence both from the respondent and the claimant, to decide whether there is a non-discriminatory explanation for the treatment.
    21.6. We examine the evidence as a whole for both stages of the test.

Analysis

22. Because of our findings on the linkage we treat (without making a finding) the disclosure relied upon by the claimant as amounting to a qualifying, protected disclosure.

23. Was the claimant subjected to any detriment or dismissed because he had made this disclosure?
    - 23.1. The approach taken by the respondent in instituting the "some other substantial reason" process and dismissing the claimant for that reason was in our judgment the concern of the respondent that schools would withdraw from the HR services provided by the respondent. The claimant's disclosure was not connected to that process, the attitude of the headteacher to the claimant was not based on the fact that he had made the disclosure but because he had given the advice in the first instance.
    - 23.2. For the purposes of the section 47B ERA claim we have applied the reverse burden of proof in coming to this conclusion. The claimant having established (for the purposes of this argument) both disclosure and detriment, we asked ourselves whether the respondent had established that the treatment was in no way whatsoever because of the disclosure. We concluded that the respondent had shown that the treatment of the claimant was entirely because of the pressure brought to bear by the school's cluster in withdrawing from the agreement for the respondent to provide HR support.
    - 23.3. Similarly, the respondent has established that as the factual reason for the claimant's dismissal.
    - 23.4. On that basis neither the process leading to or the dismissal itself was because the claimant had made a protected disclosure.
    - 23.5. On that basis the claimant's claim to have suffered a detriment on the grounds of having made a protected disclosure pursuant to section 47B of the Employment Rights Act 1996 is not well founded and is dismissed.
    - 23.6. Further the claimant's claim to have been dismissed on the grounds of having made a protected disclosure pursuant to section 103A of the Employment Rights Act 1996 is not well founded and is dismissed.

24. Was the claimant treated unfavourably because of something arising in consequence of B's disability?
    - 24.1. The claimant has not established that his actions in sending material to his union arose because of his disability of anxiety/depression.
        - 24.1.1. Whilst there was evidence that the claimant's concentration and focus were affected by his disability there was no further detail about that condition within the medical evidence.
        - 24.1.2. The tribunal cannot, without further medical information as to the impact of the concentration and lack of focus, assume that it expressed itself in the claimant's decision making process with regard to communications with his union.
        - 24.1.3. In any event, on the balance of probabilities, the fact that the claimant had a rational basis for sending the material militates against it being sent because of a lack of concentration or focus.

24.1.4. Therefore, the tribunal are neither able to conclude that sending the material was as a result of a characteristic of the disability nor that the claimant sent the material because of that characteristic.

24.1.5. In those circumstances even if the tribunal were to conclude, without deciding that the treatment was unfavourable we are unable to say that the treatment was because of something that arose as a consequence of the claimant's disability.

24.1.6. In our judgement, therefore, the claimant's claim of disability discrimination pursuant to section 15 Equality Act 2010 is not well founded and is dismissed.

25. The tribunal feel it necessary to make the following observations. Although the question of relationships between the LEA and schools fall outside our remit in respect of this case and our general jurisdiction, nonetheless matters came to light in the evidence which we consider to be of general public concern and those with responsibility may wish to consider them.

25.1. The LEA has a general duty to ensure safeguarding of children is properly attended to in maintained schools.

25.2. The claimant, as an employee of the LEA, therefore has a duty (over and above that of providing advice to the school) to advance that general duty.

25.3. The headteacher is a contractual employee of the LEA, albeit a deemed employee of the governing body of the school exercising its employment powers: those powers are set out in article 2 of the Education (Modification of Enactments Relating to Employment) (Wales) Order 2006 as

> ***2.*** *(2) In this Order references to employment powers are references to the powers of appointment, suspension, conduct and discipline, capability and dismissal of staff conferred by the 2006 Regulations.*

25.4. The headteacher is also, *ex officio,* a member of the school's governing body.

25.5. The decision as to whether to dispense with the respondent's services as HR provider was in this case, at the very least, influenced by the headteacher. Further, it was clearly the case that the headteacher was motivated, at least in part, by the advice given by the claimant about investigating her conduct to seek his dismissal.

25.6. The respondent was motivated by the financial impact of the withdrawal of the school from contracting with it for HR services in its decision to dismiss the claimant.

25.7. In this case, as we have indicated, the headteacher has been entirely exonerated. However, that does not mean that the claimant's advice was incorrect at the time it was given.

25.8. The tribunal are concerned at the conflicts of interest that arise in the complex arrangements we have described. We are also concerned at the potential that LEA HR advisers would not give advice which they deem appropriate because of fear of the consequences should their advice be unwelcome. This must be of particular concern in the area of the safeguarding of children. It appears to the tribunal that had the facts been different to this case a headteacher who had been guilty of a safeguarding breach could avoid the consequences by bringing such pressure to bear on the LEA; that cannot be right. We would urge those with responsibility for such matters to consider the systemic difficulties that this case illuminates.

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Employment Judge N W Beard
Dated: 27 June 2018

ORDER SENT TO THE PARTIES ON

……2 July 2018…….

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS