



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mrs C Arthur**

**v**

**Hertfordshire Partnership Universities NHS  
Foundation Trust**

**Heard at:** Watford

**On:** 7 December 2018

**Before:** Employment Judge Manley

**Appearances:**

**For the Claimant:** Mr N Bidwell-Edwards, Counsel

**For the Respondent:** Ms N Moutraghi, Counsel

## JUDGMENT

- 1 The above named respondent is now the only respondent in these proceedings. The other individually named respondents are dismissed from the proceedings, the claim against them having been withdrawn by the claimant.
- 2 The claims for public interest disclosure detriment and dismissal have no reasonable prospect of success and are struck out.
- 3 If I had not found that the public interest disclosure detriment and dismissal claims had no reasonable prospect of success, I would have found that those allegations or arguments have little reasonable prospect of success and ordered that the claimant pay a deposit in the sum of £250 for the dismissal claim and £250 for the detriment claim to be allowed to proceed.
- 4 A further preliminary hearing has been listed on Wednesday 13 March 2019 to determine whether the claimant was disabled at the material time and the merits hearing has been listed between 4-8 November 2019.

## REASONS

### Introduction and issues

1. This was a preliminary hearing listed to determine several issues which had

been agreed at a telephone hearing on 29 October 2018. The summary of that preliminary hearing indicated that there might be an application to amend the claim but that is not pursued because there has been agreement between the parties and the claimant has withdrawn against individually named respondents.

2. What remained a matter for determination was whether the public interest claims have no reasonable prospect of success and, if so, whether they should be struck out. If that is not my conclusion, I will consider whether any allegations or arguments in the public interest disclosure claims have little reasonable prospects of success and whether to order a deposit. There are also other matters of case management indicated to be decided.
3. By way of introduction, I should say that the parties have cooperated considerably since we discussed matters on 29 October and this has led to some matters which might have needed my consideration no longer needing resolution today. The claimant has withdrawn against the individually named respondents and the only respondent left is the one named above. No amendment is needed as there has been clarification that the further and better particulars refer to the detriments already set out in the particulars of claim at paragraph 13 (pages 14-16).
4. After further discussion between the representatives, the claimant is not pursuing public interest disclosure allegations 1,5 and 6. The ones she wishes to pursue are those that have become known as public interest disclosures (PID) 2, 3 and 4 and they appear at pages 55 to 58 of the bundle before me. The quotations below have some names redacted or initials are used.
5. PID 2 is:
  6. *“On 1 September 2016 the claimant had a one-to-one meeting with MM in the Hatfield site. In this meeting the claimant repeated to MM what she had discovered and mentioned copying MM into an email outlining the claimant’s discovery. The claimant stated her belief that this meant there were doctors in the organisation which haven’t been cleared from transmittable diseases and then replied that she had seen the email and the doctors had been outsourced before her time and she would look into it.”*
6. It was agreed at the hearing that that the reference to an email above was the one at page 143 of the bundle. That document references immunisation for new doctors and the procedures to be used with respect to that matter. MM disputes that there was such a conversation and so that is a factual dispute between the parties.
7. PID 3 reads:

*“On 11 October 2016 the claimant disclosed her discovery that there had been breaches of the data protection laws in that person identifiable information had been sent out to non-authorised individuals.”*

8. There is then some further explanation of the background and it goes on at paragraph 11 of the further particulars (page 57):

*“The claimant disclosed to MM orally on 11 October 2016:*

- a) The panel pack contained unredacted service user information in the appendices including dates of birth, NHS numbers, mental health history, current state of health, GP details and partners names;*
- b) Copies of the Panel Pack had been sent out to Dr N and the Disciplinary Panel prior to 6 October 2016 which also included the unredacted service user information. The Panel Pack had been sent out both to Dr N’s work and personal email address in February. The Panel Pack had also been sent to external individuals as well. And;*
- c) The sending of the Panel Packs amounted to a data breach which would need to be reported on the Datix system.”*

9. PID 4 is at paragraph 12 and reads:

*“Also on 11 October 2016 the claimant forwarded the unredacted version of 6 October 2016 Panel Pack to MM in response to MM’s request that the claimant forward the unredacted email to her so she could report it on Datix.”*

10. The first question for determination is whether the claimant has no reasonable prospects of showing that those three matters amounted to public interest disclosures as defined in the Employment Rights Act 1996. In summary, I need to consider whether she has no reasonable prospect of showing that she has disclosed information which tends to show one or more of the matters in s43B, for example, that a criminal offence has been committed or is likely to be committed, that there was a failure to comply with a legal obligation and so on and that was, in her reasonable belief, in the public interest.
11. If she does have a reasonable prospect of showing that there were public interest disclosures, the second question I will then consider is whether she has no reasonable prospect of showing that those disclosures were causally connected to the detriments that she relies on and/or her dismissal. In total the claimant relies upon 29 detriments including the dismissal.
12. Thirdly, if I do not find she had no reasonable prospect of success, I will then consider whether she has little reasonable prospect of success, applying the same legal tests for public interest disclosure claims as referred to above. If I find that there is little reasonable prospect of success, I may then consider whether to make an order that she pays a deposit as a condition of those allegations or arguments continuing.

## Facts

13. The claimant commenced employment with the respondent in July 2015 and was dismissed by the respondent in June 2017. She was employed as “HR business partner – Resourcing” and became “Head of Medical Staffing” on 6 June 2016. MM was the claimant’s line manager.
14. In August 2016 there was an exchange of emails involving the claimant, MM and other managers about the immunisation/vaccination process for new starter doctors. The emails I have seen show that one manager suggested that “issues need rectifying” and MM asked that she be “filled in”. I understand that MM may either deny that there was a meeting on 1 September or the content of it as described by the claimant.
15. There was a meeting on 11 October between MM and the claimant. I have seen what appears to be MM’s contemporaneous note at page 160 of the bundle. That document says this in relation to the conversation:

*“I then asked CA to send me the email which contained the Medical Staff Hearing Pack that had been sent out to the panel members as I had been advised that some of the information in the hearing pack appendices had not been redacted.*

*CA advised me that service user information that had not been redacted had been sent out.*

*I asked CA when she had become aware of this and she replied that she had realised this either on Friday or Monday when making up hard copies of the hearing packs for the panel.*

*I asked CA what she had done about this and she advised that she had redacted the printed packs. I asked CA what she had done about the emails she had sent containing this information and she advised that she had done nothing. I asked CA why she had not made me aware of this at the time that she had become aware as it was a data protection breach which has to be reported on datix. I advised CA that this was serious breach of service user’s data and that she should have reported it to me as soon as she became aware.”*

16. The claim form states that the claimant disclosed the information to MM whereas I understand that the respondent will say that she was aware of the data breach when they met on 11 October.
17. The claimant was on sick leave from 12 October to 27 October and a further meeting was held with MM about the data breach. In the meantime, the respondent had received several expressions of concern about the claimant’s management and leadership style. The claimant was placed on paid leave and there were further meetings in early November when the claimant was told the concerns would be investigated. The claimant was suspended and raised a grievance in November 2016. She subsequently raised grievances in February and April 2017.
18. Disciplinary hearings were arranged in February, March and then finally

held, in the claimant's absence, on 19 June 2017. A detailed letter of dismissal was sent to the claimant on 23 June 2017 (page 272). The panel found that the claimant's "*behaviours constituted bullying and harassment*". Under "*Additional allegations and issues*", there were two issues. The panel stated that the claimant was responsible for the data breach and had accessed trust property while suspended. The panel found that those two additional allegations amounted to gross misconduct. They also found that there was a loss of confidence and breakdown in working relationships warranted dismissal for some other substantial reason.

## **The Law**

19. The relevant rules for my consideration of strike out and/or whether to make an order for a deposit are at rules 37 and 39 of schedule 1 of Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013. The relevant parts read as follows:-

### **Striking out**

**37.**—(1) *At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—*

(a) *that it is scandalous or vexatious or has no reasonable prospect of success;*

(b) -

(c) -

(d) -

(e) -

(2) *A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.*

(3) *Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.*

### **Deposit orders**

**39.**—(1) *Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

(2) *The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*

(3) *The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*

(4) *If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.*

*(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—*

*(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*

*(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.*

*(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.*

20. My task is first to consider, largely based on undisputed facts, whether any part of the claimant's case, when put at its highest (Mechkarov v Citibank NV [2016] ICR 1121), cannot hope to succeed. If that is my conclusion, I may decide to strike out that part of the claim. It is settled law that it is only in exceptional circumstances that a claim with contested facts will be struck out (Eszias V North Glamorgan NHS Trust [2007] ICR 1126). Strike out is a draconian sanction because it means that the claimant cannot take that claim further so I must consider the matter with considerable care.
21. This part of the claimant's claim relates to protection for those who have made public interest disclosures as in sections 43A-H and 47B Employment Rights Act 1996. I need to consider the tests for determining what would amount to a disclosure as well as what evidence there is, or might reasonably be expected to be, for determining that there was a causal connection between any public interest disclosures as found and the alleged detriments and/or dismissal. I am guided in the question of what would amount to a disclosure of information by the case of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325, where the distinction of making an allegation and providing information was drawn.
22. If I do not find that the public interest disclosure claims have no reasonable prospect of success, I move on to consider, under rule 39, whether it has little reasonable prospect of success and, then, whether to order a deposit, having made reasonable enquiries into the claimant's ability to pay. The question is now whether any parts of the claim have little reasonable prospect of success. Again, I must bear in mind that I have not heard oral evidence but do have contemporaneous documents. I also may consider where the burden of proof lies. I have a wider discretion here as the sanction is not as serious as strike out. The question is whether I assess, at this early stage, that the claims lack merit and, if they do, whether that should be marked by the making of a deposit order.

## Submissions

23. The respondent had prepared written submissions and reminded me of the law largely as set out above. I also heard oral submissions. In summary, it is argued by the respondent that there was no disclosure of information in any of the PIDs relied upon. The respondent points out that the claimant did not dispute MM's record of the meeting in October 2016 for many months.

Even if there were disclosures, the respondent submits that they were not the principal reason for the dismissal as the outcome letter shows. Most of the detriments are linked to the process that was begun after the October meeting and concerns raised by other staff. The respondent also submits that many of the alleged detriments have been presented out of time and that is a factor I can take into account when considering merits.

24. The claimant was not present at the preliminary hearing but was represented by counsel who had legal assistants with him. It was submitted that the contents of the meeting in October 2016 are disputed and that the facts for PID 2 need to be decided after evidence is given at a merits hearing. The claimants' representative also submitted that there should be opportunity for the respondent's witnesses to be cross examined at a full merits hearing on PIDs 3 and 4 and the detriments and dismissal. I was referred to the case of Morgan v Royal Mencap Society UKEAT/272/15 which states that where the question of the claimant's reasonable belief in the information being in the public interest arose, it would need to be examined at a merits hearing. I was also taken to Hemdan v Ismail [2017] ICR 486 on deposit orders which states at paragraph 13 "*If there is a core factual conflict, it should properly be resolved at a full merits hearing where evidence is tested and heard*".
25. Finally, both representatives made reference to the case of Bolton School v Evans UKEAT/648/05 which is a case where the claimant sought to rely on the disclosure of his own misconduct as a public interest disclosure. The representatives agreed that case might assist with the question of causation rather than whether the disclosure amounted to a public interest disclosure.

## **Conclusions**

26. I will deal with PID 2 first. There is a clear factual dispute here. MM does not accept that this conversation took place. I cannot determine today whether it took place or not. It is possible, at a hearing where evidence is given, that the claimant might show that there was such a conversation. I also accept that it might amount to a disclosure of information which tended to show a breach of a legal obligation and, in her reasonable belief, it was in the public interest. I cannot say, at this stage that the claimant has little or no reasonable prospect of showing PID2 was a public interest disclosure.
27. However, my consideration of prospects of success does not stop there. On the evidence before me, there is no connection whatsoever between that information and what subsequently happened to the claimant. Put simply, I cannot see that it was mentioned again, and it was certainly not a matter which was referred to in the dismissal letter. I am satisfied that the claimant has no reasonable prospects of showing any causal connection between that disclosure, if it is made out, and subsequent events. Putting this part of the claimant's claim at its highest and bearing in mind that strike out is exceptional, my finding is that the claimant has no reasonable prospect of success in showing PID led to any detriments or her dismissal. I have decided to strike that part of the claim out.
28. Taking then PIDs 3 and 4 together as they are essentially the same issue. PID 4 is just forwarding the details of the data breach discussed in PID 3.

I first consider whether the claimant has no reasonable prospect of showing that she disclosed information. My view is that the claimant has no reasonable prospects of showing PIDs 3 and 4 amounted to disclosure of information. It is clear to me that MM was aware of the data breach when she met with the claimant on 11 October and that it was the responsibility of the claimant. I do accept that, if the matters discussed do amount to a disclosure of information, that information would tend to show a breach of legal obligation and the claimant is likely to show that it is in the public interest.

29. I go on, therefore, to consider causality in case what was said in PID 3 and 4 does amount to a public interest disclosure. I can see that it could be argued that there is more of a connection to what followed with these PIDs than with PID 2, because that data breach was investigated and did form part of the decision to dismiss the claimant. However, I can see that it was only one of several matters investigated and formed only part of the dismissal decision. What is more, the respondent showed no sign of any concern with any disclosure made by the claimant. Rather the concern was the data breach itself, the claimant's own misconduct. Some of the matters raised, indeed the main part of what was raised, emanated from staff concerns which were unconnected to any facts which were connected to the alleged breach of data. There was a further matter about the conduct of the claimant during her suspension. My view is that she has no reasonable prospect of showing that any PIDs, if there were any, were causally connected, that is that they were the principal reason for the dismissal.
30. The other detriments are a little more difficult. As I have indicated there are 28 of them; they range from matters which seem relatively insignificant to the possibly more significant. They start with the meeting on 11 October and concern the investigation and disciplinary process that the respondent undertook. These arose from the allegations which came from staff about the claimant's conduct and the investigation which took place in to the whole matter. The data breach only formed a small part of that. As indicated I can see no causal connection at all between PID 2 and any of the detriments. There is only a very limited connection between PIDs 3 and 4 and that connection is about the data breach itself, not that the claimant told MM about it.
31. I have decided that it might be useful to state an alternative finding in the event that it might be found that my primary finding to strike out the public interest disclosure claim was wrong. I am quite clear that these allegations or arguments, if they do not have no reasonable prospect of success, have little reasonable prospect of success, for the reasons outlined above.
32. I had only very limited information about the claimant's ability to pay, despite the respondent's reminding the claimant that she could give that information at this hearing. The claimant was not in attendance today, but her representative discovered that she is in receipt of Job Seekers Allowance. I also believe she has child benefit for a child, but I have little information about any other incomings or outgoings. I was told her partner lived with her but did not contribute to household expenses.
33. If I had not struck the public interest disclosure claims out, I would have



ordered a deposit to be paid for the allegations or arguments for the 28 detriments, apart from the dismissal in the sum of £250 and a deposit of £250 for the allegations or arguments that the public interest disclosures were the principal reason for the dismissal. That would have been a total of £500. I do not make that order because it is not my primary finding.

34. That part of the claimant's claim that relates to a public interest disclosure detriment and dismissal claim has no reasonable prospect of success and is struck out. Other matters proceed to be dealt with as agreed.

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Employment Judge Manley

Date: .....25/01/19

Judgment sent to the parties on

.....29/01/19.....

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For the Tribunal office