Case No: 1402549/2018

EMPLOYMENT TRIBUNALS

Claimant: Miss L Netherton

Respondent: Tewkesbury Town Council

Heard at: Bristol **On:** 25 to 28 March 2019

Before: Employment Judge C H O'Rourke
Mrs L B Simmonds
Dr J Miller

Representation
Claimant: In person
Respondent: Mr C McDevitt - counsel

JUDGMENT

The Claimant's claims of unfair dismissal and automatic unfair dismissal and detriment, on grounds of protected disclosure, fail and are dismissed.

REASONS

(having been requested subject to Rule 62(3) of the Employment Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant was employed as an administrative support officer by the Respondent Council. For a couple of months prior she had been engaged in the same role, via an agency [211]. It is a point of contention as to whether or not that period of employment was just under or just over two years.

2. She was apparently dismissed, with immediate effect, by letter of 18 April 2018 [156-157], allegedly for breach of confidentiality, although the date of dismissal is also a matter of dispute.

3. As a consequence, she brings claims of unfair dismissal and detriment and automatic unfair dismissal, related to protected disclosure.

4. The issues in these claims were set out by Employment Judge Ford QC, in his case management summary of 9 October 2018 [34-41], to which reference should be made, as required.

5. There was a preliminary issue in respect of alleged non-inclusion by the Respondent of relevant documents in the bundle. The Claimant brought additional documents which were reviewed and as thought appropriate included in the bundle. During the hearing, further queries arose as to disclosure and at the end of the first day, the Tribunal ordered additional disclosure by the Respondent which was complied with.

The Law

6. We were referred to ss. 43B, 47B, 48(3) and 103(A) of the Employment Rights Act 1996, as the definition of protected disclosure and the requirements for showing a detriment and/or automatic unfair dismissal. The Claimant is relying on s.43(b)(1) as to a failure to comply with a legal obligation.

7. Mr McDevitt referred us to the following precedents:

   7.1 **Blackbay Ventures Limited v Gahir [2014] UKEAT ICR 47**, which sets out the ‘road map’ approach as to how the issue as to whether a disclosure is protected or not, should be considered, emphasising, in particular, the need to identify the precise alleged breach of a legal obligation alleged, by reference to statute or regulation. It also stressed the need to determine whether or not the Claimant had at the time the reasonable belief that the disclosure was made in the public interest.

   7.2 **Fincham v HM Prison Service [2002] UKEAT 0925/01,** which reiterated the requirement of identifying the breach of legal obligation, stating, per Elias J (as he then was) ’*33. But there must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of the legal obligation on which the employee is relying. In this case the Tribunal found none. We have no reason to conclude that they erred in law in reaching that conclusion.’*

   7.3 The same point is raised in **Eiger Securities LLP v Korshunova [2016] UKEAT 0149** in which the headnote states ‘*the identification of the obligation did not have to be detailed or precise, but it had to be more than a belief that certain actions were wrong. Actions could be considered wrong because they were immoral, undesirable or in breach of guidance without being a breach of a legal obligation.’*

   7.4 Finally, in the recent case of **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436**, the principle was re-emphasised by the Court of Appeal, which quoted with approval from the case of **Cavendish Munro** ‘*that a statement which merely took the form ‘you are not complying with Health and Safety requirements’ would be so general and devoid of specific factual content that it could not be said to fall within the language of s.43B(1), so as to constitute a qualifying disclosure.’*

The Facts

8. We heard evidence from the Claimant and on her behalf from Miss Helen Price, the former Town Clerk of the Respondent and the Claimant's former line manager. On behalf of the Respondent, we heard evidence from Mrs Deborah Hill, the current Town Clerk and also at a relevant time the Claimant's line manager and from Mrs Christine Danter, a Councillor involved in the Claimant's dismissal.

9. Length of Service and Jurisdiction as to a Claim for Unfair Dismissal. We find that the Claimant did not have the requisite two years' service to claim unfair dismissal, for the following reasons:

   9.1 It is clear to us from the evidence of Miss Price and the documentary evidence [71 and 72] that the original intention of the Respondent was to take over the Claimant's employment from the Agency on 1 April 2016. However, we find that intention was not followed through.

   9.2 The evidence of Miss Price was that she had made a mistake in not cancelling the Agency contract, which resulted in the Claimant being paid twice, hence also the issue to her, by the Respondent, of a pay-slip for April 2016, which included an employee number [177]. The Agency accepted that they continued to be the employer for April [211] and that they had paid her until 29 April.

   9.3 Miss Price decided to let that situation remain as it was and sought repayment of the net pay paid to the Claimant by the Respondent, because she considered it more administratively easy to do so, than arrange repayment to the Agency and which was done. In answer to a query from the Tribunal as to whether payments made on the Claimant's behalf by the Respondent for tax, National Insurance and pension had been processed for April, they provided disclosure at the conclusion of the Hearing, which, in our view, conclusively show that such payments were not made to Government agencies or the pension scheme [235]. There was some contention by the Claimant that the correct pension scheme was not being referred to, but we consider this irrelevant because, firstly, the figures for pension shown on her pay-slip matches that in the financial records of the Respondent and in any event, no payment was made to any pension scheme. The Claimant disputed the date of such records (with the implication that they may have been created more recently), but several iterations of the same documents show that they were created at the end of the April 2016 accounting period and were sent at that time to the Respondent's Borough Council, for payroll processing [244]. We have no reason, therefore, to doubt that that was the case. Additionally, the Claimant queried the fact that the Borough Council only refunded the net salary payment (£761.29) in March 2017, but it was explained that this payment had been made to the Borough Council, who recognised, at financial year-end that it should be refunded to the Respondent.

9.4 Part of the records [240] showed that the only employees for the month of April were Miss Price and two others, both by the surname Thomas.

9.5 The Claimant's contract [73] shows a start date of 1 May 2016 and is signed by her on the same day. She could offer no explanation as to why she did not dispute the start date at the time. This is also the case with a form of appraisal, in November 2017 [120], which shows the start date as 1 May 2016, again uncorrected by the Claimant.

9.6 The Claimant also asserted that her Effective Date of Termination (EDT) was 22 May 2018, not 18 April. She did so for two reasons: firstly, she disputed that Mrs Danter had the authority to dismiss her and that therefore her employment continued, regardless of the letter of dismissal and secondly that because she continued to receive payments after the dismissal and did not receive her P45 and her final pay slip until 22 May, her employment continued to that date. Firstly, dealing with the authority to dismiss, Mrs Danter said that the Personnel Committee of the Council, of which she was the Chair, had authority to dismiss employees. She referred to the Terms of the Committee [229] which state that it may deal with '*all personnel matters relating to all members of staff*' and '*issues relating to Sickness, Discipline, Grievance and Capability*'. This had previously been the remit of the Financing and Staffing Committee, to which the Personnel Committee was subordinate, but the responsibility was delegated down to the Personnel Committee, as shown by a document entitled 'Constitution of Committees' dated June 2017 [224]. There is an email from Mrs Danter to other Committee members dated 8 April 2018 [229A] which records that '*after a lengthy discussion when all options were discussed, it was agreed the Town Council terminate the contract of employment it has with Lisa Netherton*.' The Committee then met on 9 April [230], at which that decision was carried, unanimously. The minutes do not directly refer to the Claimant by name, as the matter is noted as being confidential and the minutes are a public document, but we were satisfied, on Mrs Danter's evidence that it related to the Claimant and her dismissal. There was some query as to when these minutes were produced and following disclosure of metadata from the computer on which the minutes were typed, that showed a production date of 9 May. It also showed that the minutes were placed on the Council's website in January 2019, which Mrs Hill said was an oversight on her part, due to pressure of work. We see nothing suspicious in these matters. The subsequent letter of dismissal [156] was crystal clear that her employment ended on 18 April 2018. Secondly, in respect of the further receipt of pay, following the alleged dismissal, such payments as the Claimant received were only in relation to notice pay and arrears of holiday pay and some back-pay, due to a recent pay rise. Such payments did not prolong her employment, but were merely the tidying up of and accounting to her for sums that were due to her. The date upon which an employee receives a P45 is irrelevant to the EDT, which is correctly recorded on the P45 as 18 April [185]. While the Claimant was rightly concerned about the lack of procedure adopted by the Respondent in dismissing her, either of their own procedures, or of the ACAS Code, the Respondent accepted, at the point of the Case Management Hearing that if it was shown that the Claimant had the requisite two years'

service, they conceded that she had been unfairly dismissed. However, as we have found, the Claimant did not have such service and the Tribunal accordingly does not have jurisdiction to hear her claim. It was, as accepted by Mrs Danter, a deliberate decision by the Respondent, on HR advice, to act quickly to dismiss the Claimant, to avoid her accruing the necessary service, which step an employer is perfectly entitled to take.

Protected Disclosures

10. The Claimant asserted that she made six protected disclosures, as set out in the Case Management Summary [36], with which we will deal in turn, applying the 'road map' approach suggested in the case of **Blackbay**.

10.1 The Claimant said that in about January 2017 (corrected from July 2017) she had informed Miss Price by email that she believed that Town councillors had accessed her office, shredded documents and made unauthorised alterations to the Precept Report (budget report), which she considered could amount to fraud or breach of the legal duties owed by councillors. Miss Price said (5) that she too considered the matter serious and that she contacted the Borough Council to rectify a mistake in the Precept. Miss Price also said that while she had responsibility for forwarding the Precept to the Borough Council, she was on sick leave at the time and therefore there would be some delay in doing so. The email to which the Claimant refers could not be located and therefore we are dependent on the oral evidence of the Claimant and Miss Price. In this respect, we note the submissions of Mr McDevitt as to the credibility of their evidence. We concur that on occasions, we found the Claimant's evidence unreliable and evasive. For example, most egregiously, on the Claimant being asked whether or not she had discussed the TUPE arrangements of two employees with them, when, as she agreed, she had been expressly instructed not to do so, she said 'no', then dissembled, by stating that '*I just told them not to worry*'. When repeatedly asked how she could, in one breath, deny having discussed the matter with them, but clearly, in fact, having had some discussion with them, she declined to answer. In respect of Miss Price, we found her evidence to be straightforward and direct, but we are conscious that she herself had a dispute with the Respondent and that therefore there may be a degree of overinvestment on her part in this case, indicated by her having to be instructed not to attempt to communicate with the Claimant while she was giving evidence. It seems likely to us that councillors, due perhaps to Miss Price's absence on sick leave, did engage in examination and perhaps amendment of the Precept. However, there is no evidence, even on the Claimant's oral evidence that at the time, or even now, she identified the alleged failure by the councillors to comply with a legal obligation. While she now says that she considered these actions to be potentially '*criminal deception for financial or personal gain*', there is no evidence that she thought, or said this at the time. Miss Price simply states that it was '*potentially very serious*', without any elaboration. She elaborated by saying that '*there could have been serious repercussions on the income of the Council for the following financial year*'. This does not, in our view, identify the legal obligation allegedly not complied with, but seems more likely, if genuine,

to have lead, at worst, to a rectifiable accounting error. This is against a general background of the Respondent being effectively a parish council, with only three office staff, some working part-time. It is clear that both the councillors and the staff were under some pressure of work, with little by the way of administrative assistance. As a consequence, councillors, it is clear, were more 'hands-on' than perhaps in larger organisations and this, on occasion, lead to conflicts with staff, who felt that their roles were being eroded and also that councillors were involving themselves in matters outside their remit. Accordingly, turning to whether or not the Claimant's disclosure was made in the reasonable belief that it tended to show a breach of a legal obligation (and applying **Kilraine** et al), we consider that this is not the case, but was instead some breach of internal procedures, in the context of perhaps on-going concerns as to the boundaries of the remits of staff and councillors. We were never referred, either in respect of this disclosure, or any of the others, to any specific statute or regulation that may have been breached. We do not consider, in the context set out above that the Claimant can show, even subjectively that she had a reasonable belief that the disclosure was made in the public interest.

10.2 In October 2017 the Claimant said that she made oral disclosures to Miss Price as to alleged unauthorised access to the office and use of staff computers, by councillors accessing them outside office hours. She repeated very similar disclosures to Mrs Hill in November and again, in March 2018, this time in the presence of Councillor Danter. As we consider these disclosures to be of similar content we therefore deal with them together. There was no dispute that such computer use was taking place and indeed Mrs Hill said that when she took over, she facilitated it, issuing passwords as required, as she considered that within her remit to do so. Mrs Danter recalled the March 2018 complaint of the Claimant, as she was in the office at the time, but her only concern was not about councillors having access *per se*, but that when doing so, they should not tamper with work recorded by the officers. As a consequence, Mrs Danter said that Mrs Hill contacted IT to arrange for councillors to be given separate log-in details. There is therefore, in essence, no dispute about the nature of the disclosures. Both the Claimant and Miss Price said that their concerns at the time were in relation to data protection of sensitive information contained on the computer system and also breach of cyber-security in terms of access to the system. Neither, however, identified any specific breach of a legal obligation, by for example, setting out what particular data that could have been accessed by any particular councillor would have breached data protection and, when they sought advice on the matter from the Gloucestershire Association of Parish and Town Councils, were simply told to monitor the situation, not that it was unlawful and should immediately cease. We note also that the Council's Member/Officer Protocol states that '*a member may for the purpose of his or her duty (but not otherwise) view any document in the possession of the council or a committee or working group …'* [96] and the Claimant had no evidence that any councillors were exceeding this Protocol (in itself, in any event, not a 'legal obligation', but an internal procedure). In terms of cyber-security that is an internal procedural matter for any organisation using IT, not a breach of a lawful obligation. Nor did the Claimant identify what the public interest may be

in preventing such activity. We repeat our findings above as to the Respondent being a small organisation with very limited administrative backup, perhaps explaining councillors' need to access the computers.

10.3 In either December 2017 or January 2018, the Claimant said that she complained orally to Mrs Hill about a councillor taking away a set of 'emergency keys' that should be retained at all times in the council offices. The purpose of doing so was to allow access out of hours to the offices, in the event of an emergency in the Town, with flooding mentioned as a real possibility. Mrs Hill said that she was aware that the councillor had the keys, but that it was appropriate to his role, and on the occasion complained of in an email from the Claimant [131], the councillor needed the keys to access grit bins. In essence, therefore, there was no dispute about the facts of this allegation. What the Claimant has, however, completely failed to do is to identify the alleged breach by the councillor of any lawful obligation. It may or may not be (and we do not know) a breach of the Respondent's internal procedures, but that does not amount to a breach of a lawful obligation.

10.4. In about November 2017, the Claimant said that she became aware that a cheque for £3000 intended for a charity had not been paid into the charity's account, as it had not been debited from the Respondent's bank account. The case management summary states that this occurred in June or July 2017, but that does not match the Claimant's evidence or documentary evidence and we assume therefore is in error. The cheque had originally been given to a Councillor Brennan to pass onto the charity, but she'd obviously not done so. Miss Price said that she had instructed the Claimant to find out the whereabouts of the cheque and to inform the finance committee. The Claimant emailed the Mayor, a Ms Clatworthy, on 3 November [103], recounting the situation and asking her to ask Ms Brennan as to where it was. Ms Clatworthy responded by stating that she would '*call in her shop and try and ask*'. However, a minute later, the Claimant also emailed all members of the finance committee, reiterating the query and account of the missing cheque. Mrs Danter responded [104] two days later, querying why the matter could not have been dealt with directly with Ms Brennan and that she was sure the matter could be explained. The Claimant was asked why, having put the query to the Mayor, who had said she would make enquiries, she nonetheless then immediately informed the entire finance committee. She said she been instructed to do so by Miss Price, as confirmed by Miss Price in her evidence, but also when further pressed as to the speed with which she acted, instead of waiting for the Mayor to make her enquiries, she said that '*Peggy (the Mayor) had told me that Karen (Ms Brennan) was not in*'. This however cannot be true, as only one minute had passed between her email to the Mayor and her subsequent email to the Committee. This was clearly an untruth on her part, further reflecting poorly on her credibility, generally. The overall context, however, of this incident indicates to us a willingness on both Miss Price's and the Claimant's part not to miss an opportunity, when presented with one, to criticise publicly a councillor. It should have been obvious to any fair-minded person that firstly, there was no fraud here, as the cheque had not been cashed and secondly that the more obvious explanation was error or forgetfulness on Ms Brennan's

part. Thirdly, there seemed no reason to involve the entire finance committee, when contact could have been made directly with Councillor Brennan, or to await the Mayor's enquiries. It's clear to us therefore that the choice of communication in this case was malicious and designed to cause maximum embarrassment. Councillor Brennan subsequently complained about this communication to Miss Price [139], stating that she felt it *'unprofessional and offensive*'. This was one of the triggers for a letter of concern being sent to the Claimant and her fellow support officer, Ms Ryan [130], on 14 December 2017, although the letter, however, does not mention the complaint. This disclosure therefore cannot have been subjectively made by the Claimant with a reasonable belief that it was done so in the public interest, but instead was done as part of the ongoing dispute between Miss Price and Miss Netherton, on one part and the councillors, collectively, on the other.

11. <u>Conclusion on Protected Disclosures</u>. We conclude therefore that such disclosures as the Claimant may have made were not 'protected' under the terms of the Act, either because they exposed no breach of a 'legal obligation', or were not made in the reasonable belief that they were in the public interest, but instead motivated by a long-running dispute between these two officers and the councillors as to the respective remits of their roles.

12. <u>Detriments</u>. Strictly speaking, having concluded that no protected disclosures were made, we do not need to consider whether or not they lead to any detriments, but for the avoidance of doubt and in the event that one or more disclosures may, contrary to our findings, be protected, we now do so. Three detriments were alleged:

    12.1 Following the October 2017 disclosure as to office access by councillors, the Claimant asserted that Councillor Danter and the new Town Clerk, Mrs Hill, '*were not open with her and kept checks on everything she and Miss Ryan did'.* By this time, Miss Price had been suspended, for reasons unknown and was not to return. Mrs Danter accepted that they were '*keeping things back, specifically about Helen Price'*. She also accepted that they '*were keeping an eye on the Claimant and Ms Ryan, because we didn't want them communicating with Helen Price.'* That, she said, was her only concern with the Claimant at the time. She said that she accessed the office at weekends, because she was '*dealing with sensitive matters relating to Ms Price that we didn't want them to see'.* We can understand why, at the time, the Claimant considered that she was being excluded by Mrs Danter and Mrs Hill. However, we are satisfied, on Mrs Danter's evidence that she and Mrs Hill had good reasons, entirely unrelated to any disclosures by the Claimant, to do so, namely the need for confidentiality in respect of the pending termination of Miss Price's employment, which, in view of the Claimant's admitted subsequent breaches of confidentiality, they had good cause to hold. Generally, we found the evidence of Mrs Hill and Mrs Danter to be credible. Mrs Hill's evidence was entirely to the point and forthright. Mrs Danter's was occasionally more confused, but she was clearly endeavouring to assist the Tribunal, rather than obfuscate. When confronted with inconsistencies in her evidence, she readily admitted and corrected them.

12.2 On 14 December 2017, Mrs Danter, on behalf of the personnel committee, issued the Claimant and Ms Ryan a 'letter of concern' [130]. It refers in general terms to the disruption caused by Miss Price's departure and specifically to a complaint received against the Claimant by a member of the public who alleged that she had been rude to him. There was also reference to the curiously-named '*Cat Discipline Group*' and some incidents as to a cat being allowed in the offices. The Claimant asserts that this letter contained '*inaccurate and malicious information'* and it is not disputed, was subsequently discussed at a full council meeting. She said she found the contents '*extremely distressing, exacerbated by being handed it just before Christmas. It ruined my Christmas holiday and made me unwell'.* It is correct that she did not know the background to the complaint, or have the opportunity to have it dealt with it under the complaints policy. As stated, the letters were subsequently discussed at a council meeting, due to the Claimant and her colleague's concerns about them and as a consequence, while the letters were not revoked, they were assured by Mrs Hill that the letters were not disciplinary in nature and that they would not remain on their personnel files after six months. While the Claimant considered that she received an email containing an apology, no such email could be located and we prefer Mrs Hill's recollection of this event. Mrs Danter said that the committee had felt that while they didn't wish to invoke the disciplinary procedure, letters of concern were appropriate, both because of the 'cheque' incident (even though not referred to in the letter) and the complaint from the member of the public. We conclude that in the circumstances of an employee receiving a letter of concern, directly raising one complaint and also failing to mention another complaint, but which formed part of the letters' rationale, but without the opportunity to know the details of the complaints or respond to them, that is a detriment. However, firstly, we have found that the Claimant did not make protected disclosures, to which such detriment could be linked and secondly, of course, her colleague, who, it was not asserted, made any disclosures of any kind, also received such a letter. This indicates to us, therefore that the true reason for the issue of the letters were general concerns as to working relationships between the officers and the councillors, particularly following the departure of Miss Price and, in the Claimant's case, specific concerns about her behaviour. While not dealt with fairly, this cannot constitute a detriment of the grounds of protected disclosure.

12.3 Finally, the Claimant asserted that a complaint made against her by Mrs Brennan, in relation to the cheque incident, in January 2018, was 'malicious' and therefore a detriment. As we have already found, Mrs Brennan was quite entitled, in our view, to feel aggrieved by the manner in which the issue had been dealt with and therefore, accordingly, to complain about it. We see nothing 'malicious' in such a complaint and accordingly therefore the mere receipt of a complaint, with at least the possibility of some merit to it, cannot constitute a detriment.

12.4 Accordingly, therefore, even if the Claimant had made protected disclosures, which we have found she didn't, such detriments as she may have suffered were not on the grounds of any such disclosures.

13 Automatic Unfair Dismissal. As with the claim for detriment, we do not, strictly speaking, need to consider this claim, as we have found that no protected disclosures were made, but again, for the avoidance of doubt, we nonetheless go on to consider the possibility. The Claimant said that the reason, or principal reason, for her dismissal were the disclosures already referred to. Mrs Danter said in her statement that '*In March 2018, the personnel committee were made aware of serious alleged breaches of confidentiality committed by the Claimant. These involved discussion with potential members of staff about a possible TUPE transfer and more worryingly the release of sensitive confidential information to persons outside the council including but not limited to a local journalist.'* Mrs Danter in cross-examination, said the following: '*I don't remember her (the Claimant) moaning about computers in particular: she moaned about everything.' I had no idea she was classing her moans so seriously'.* She was asked about the final paragraph of her statement, where she rather sweepingly said '*While I was not aware of the concerns raised by the Claimant, in respect of such matters, as computer access etc. These issues did not influence the decision to dismiss that was taken purely on the grounds of the actions of the Claimant regarding the breaches of confidentiality.'* When challenged on this, she accepted that this statement was incorrect, as she did know about the Claimant's complaints about computer use, as she was present on at least one occasion when she raised the issue. She also accepted, following questioning that what she described as '*general moaning'* did form at least part of the Committee's rationale for dismissal. She said in answer to a question as to whether or not they had considered following a disciplinary/capability procedure that '*yes, we thought about whether the situation was retrievable, with reference to the appraisal form. The letter of concern was meant to give a heads up about what was required. It didn't work. By the end of February, the situation felt irretrievable'.* This is, we consider, an accurate summation of the position the Respondent found itself in at this point. They felt that the Claimant was uncooperative and even obstructive and that that situation was not going to improve. They were faced with the fact that if they did not act promptly, the Claimant's legal status would change, permitting an unfair dismissal claim and therefore making her dismissal more problematic and accordingly they decided to proceed urgently to dismissal. We are satisfied that the general background (described vividly by exasperated hand gestures by Mrs Danton) and her use of the word '*moaning*', combined with the two admitted breaches of confidence by the Claimant, were the reasons for her dismissal, not any alleged protected disclosures of hers. Accordingly, therefore, she cannot have been automatically unfairly dismissed for the reason, or principal reason of making a protected disclosure.

14 Conclusion. For these reasons, therefore, the Claimant's claims of unfair dismissal and automatic unfair dismissal and detriment on grounds of a protected disclosure fail and are dismissed.

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Employment Judge O'Rourke

Date: 28 March 2019