



EMPLOYMENT TRIBUNALS

Claimant: Miss A Brassard

Respondent: Stable Family Home Trust

Heard at: Southampton **On:** 25/2/2019

Before: Employment Judge Wright

Representation:

Claimant: In person

Respondent: Mr I Wheaton of Counsel

JUDGMENT

The respondent's application to strike out the claimant's claim succeeds. Accordingly, the claim is struck out in its entirety.

Oral reasons were given at the hearing. On 12/3/2019 the claimant requested written reasons in accordance with Rule 62(3) Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (ET Rules). Accordingly, those reasons are produced in writing below.

REASONS

1. The claimant presented a claim form on 10/7/2018. She made claims of unfair dismissal by reason of having made protected disclosures under s.103A of the Employment Rights Act 1996 (ERA). The claimant was employed (according to the respondent) between 27/11/2017 and 16/4/2018.
2. Disclosures qualifying for protection, s. 43B ERA provides:

- (1) In this Part a “ qualifying disclosure ” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—**

 - (a) that a criminal offence has been committed, is being committed or is likely to be committed,**
 - (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
 - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
 - (d) that the health or safety of any individual has been, is being or is likely to be endangered,**
 - (e) that the environment has been, is being or is likely to be damaged, or**
 - (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.**
 - (2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.**
 - (3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.**
 - (4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.**
 - (5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).**
3. The hearing commenced by the Tribunal asking the claimant to explain how the information she disclosed to the respondent amounted to a protected disclosure under s. 43B ERA. It was confirmed the claimant had been referred to the legislation and understood the legal test which needed to be satisfied. In response, the claimant went through a summary of the allegations she says she made and for which she contends amounted to a protected disclosure.
 4. Further to the Order of EJ Maxwell, the claimant had produced a table of some 23 allegations in respect of NJ and 14 in respect of KH.
 5. The Tribunal asked the claimant to explain what was her basis for saying those allegations amounted to protected disclosures (putting her case at the highest, accepting them for the purpose of this hearing and noting that the respondent only concedes some complaints were made by the claimant during the time she worked for it; and it does not accept that all of the allegations the claimant says she made were in fact made).

6. The claimant referred the tribunal to her letter of 3/1/2019 to which she appended 6 documents (alongside a schedule of loss). The claimant said it was those documents, (becoming an appointee, advocacy, psoriasis, Care Act 2014, and care worker offence) which lead her to conclude she had made a protected disclosure during her employment with the respondent and she agreed they only came to her attention after her employment had terminated.
7. Mr Wheaton contends this is a case where the claimant has sought to 'morph' complaints about working conditions at the respondent, into a protected disclosure.
8. The Tribunal agrees with him. In order that a disclosure qualifies for protection under s. 43B ERA, there has to be a disclosure of information which, in the reasonable belief of the worker making the disclosure..." The Tribunal finds on the basis of what the claimant said at the hearing, that she did not have a reasonable belief that when she made her complaints, that they showed or tended to show, any one of the matters listed at s.43B (1)(a) to (f). That part of the legislation was highlighted in EJ Maxwell's Order and the claimant was specifically asked to address that point by him. She did not do so and she said that she only concluded that she had made a protected disclosure once she had read the documents to which she referred.
9. The Tribunal finds that the claimant's complaints, were no more than complaints at the time about her working conditions and that she therefore did not have the requisite 'reasonable belief' when she made her complaints.
10. In the alternative, the Tribunal was persuaded by Mr Wheaton's argument that the remaining part of the test for a qualifying disclosure in s.43B (1) was not satisfied. Not only does the claimant have to have had a reasonable belief when providing the information that it showed or tended to show a matter which falls within s.43B (1)(a) to (f); but also, the disclosure has to have been made in the public interest.
11. In her table, the claimant had a column headed 'public interest'. She was unable to identify for NJ how 5 allegations were in the public interest and for KH she only identified 4 out of 14. The Tribunal fully accepts that poor standards in a house where people with learning disabilities live or are supported can amount to a matter of public interest. Here however, the discrete individual allegations upon which the claimant relies, do not amount to being made in the public interest. They are matters of personal interest for NJ or KH, but for example, an allegation that NJ asked to go to the GP, is not something on its own, which falls within the public interest.
12. For those reasons the claimant's claim was struck out.
13. For completeness' sake, had the claimant overcome the hurdle of satisfying the definition in s. 43B (1), the Tribunal would have accepted Mr Wheaton's submission that the claims have little reasonable prospect of success for the same reasons and would have ordered the claimant to pay a deposit under Rule 39 ET Rules as a condition of continuing to advance her claim. Taking into account the claimant's means and the comments of Mrs Justice Simler Hemdan -v- Ismail & another UKEAT/0021/16/DM, purpose of a deposit order is:

“...to identify at an early stage claims with little prospect of success, to discourage the pursuit of those claims by requiring a sum to be paid, and by creating a risk of costs if the claim *fails*.”

14. On the facts of that case, where the claimant had limited means, the EAT decided that the Employment Judge had erred as a matter of law in setting the level of each of the three deposit orders it had made at such a level (£75 each) so as to make it difficult for the claimant to realistically comply with the same. The sum of £500 (which Mr Wheaton asked the Tribunal to set the deposit at) would equate to such a sum for this claimant, based upon her means. If her claim had not been struck out the Tribunal would have been persuaded to make a deposit order of £25.

Employment Judge Wright

4 April 2019