



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs C Clegg

and

Respondent

Slough Borough Council

Hearing held at Reading on: 1, 4, 5, 20, 21 and 22 February 2019 (Hearing)
1 March 2019 (In chambers)

Appearances:

For the Claimant:

In person

For the Respondent:

Ms P Leonard, counsel

Employment Judge:

Mr SG Vowles

Members:

Mr J Cameron

Mr B Walter

RESERVED UNANIMOUS JUDGMENT

Evidence

1. The Tribunal heard evidence on oath and read documents provided by the parties. From the evidence heard and read the Tribunal determined as follows.

Direct Disability Discrimination – section 13 Equality Act 2010

2. The Claimant was not dismissed by reason of disability. This complaint fails.

Protected Disclosure Unfair Dismissal - section 103A Employment Rights Act 1996

3. The Claimant was not dismissed by reason of having made a protected disclosure detriment. This complaint fails.

Unfair Dismissal - section 98 Employment Rights Act 1996

4. The Claimant was not dismissed unfairly. This complaint fails.

Unauthorised Deduction from Wages - section 13 Employment Rights Act 1996

5. The Claimant did not suffer an unauthorised deduction from wages. This complaint fails.

Reasons

6. This Judgment was reserved and written reasons are attached.

Public access to employment tribunal decisions

7. All Judgments and reasons for the Judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant and Respondent.

REASONS

BACKGROUND

Case No. 3346870/2016

1. On 26 September 2016 the Claimant presented an ET1 claim form with complaints of unfair dismissal, unauthorised deductions from wages and breach of contract.
2. On 26 October 2016 an application for interim relief was refused.
3. On 3 November 2016 the Respondent presented an ET3 response and all claims were resisted.

Case No. 3347718/2016

4. On 23 December 2016 the Claimant presented a further ET1 claim form with complaints of unfair dismissal and disability discrimination.
5. On 31 January 2017 the Respondent presented an ET3 response and all claims were resisted.

Preliminary Hearing 15 August 2017

6. The claims were clarified at a preliminary hearing held on 15 August 2017.
7. The two cases were consolidated to be heard together.
8. The Claimant's application to amend the claims by adding complaints of discrimination arising from disability was refused.

9. The complaints of disability discrimination arising before the Claimant's dismissal were struck out for lack of jurisdiction.
10. The following claims were listed to be heard at a 5 day full merits hearing listed on 8-12 January 2018:
 - 10.1 Direct Disability Discrimination (Dismissal) - section 13 Equality Act 2010
 - 10.2 Protected Disclosure Unfair Dismissal - section 103A Employment Rights Act 1996
 - 10.3 Unfair Dismissal - section 98 Employment Rights Act 1996
 - 10.4 Unauthorised Deduction from Wages - section 13 Employment Rights Act 1996
11. Breach of Contract / Notice Pay – article 3 Employment Tribunals Extension of Jurisdiction 1994 - the Claimant withdrew this claim for notice pay and it was dismissed.

Full Merits Hearing 8-12 January 2018

12. This hearing was postponed on the joint application of the parties due to the unavailability of a key witness to give evidence due to unforeseen ill-health.

Full Merits Hearing 19-26 November 2018

13. This hearing was postponed on the application of the Claimant due to her ill-health.

EVIDENCE

14. The Tribunal heard evidence on oath on behalf of the Respondent from:
 - Mr Alan Sinclair (Director for Adults and Communities and Dismissing Officer)
 - Mrs Surjit Nagra (Service Lead – Head HR Team)
 - Ms Nicola Pennington (Human Resources Consultant)
 - Mr Ian Blake (Claimant's Line Manager - December 2014 to September 2015)
 - Mr Michael England (Strategic Director - Appeal Officer)
 - Belinda Collins (Human Resources Business Partner)
15. The Tribunal also read a witness statement from Ms Gemma Bailey (Head Corporate Human Resources) who did not attend the hearing.
16. The Tribunal heard evidence on oath on behalf of the Claimant from:
 - Mrs Carol Clegg (Claimant)

Mrs Deborah Viljoen (Former Colleague)

17. The Tribunal also read documents in a bundle provided by the parties.
18. From the evidence heard and read the Tribunal made the following findings of fact.

FINDINGS OF FACT

Case Number 3302858/2015

19. In case number 3302858/2015, the Claimant made complaints of protected disclosure detriments. The case was heard on 3 – 11 October 2016 and in a Judgment dated 3 November 2016 (the “earlier Judgment”) all claims failed.
20. The findings of fact in the earlier Judgment recount the history of the Claimant’s employment with the Respondent from 29 January 2011 to 5 October 2015. The Tribunal in this case took account of those findings of fact and they are adopted as part of this Judgment.
21. Additionally, this Tribunal considered itself bound by the findings at paragraphs 63 to 69 of the earlier Judgment in which five protected disclosures were found to have been made and to have amounted to protected disclosure under one or more provisions of section 43B Employment Rights Act 1996.
22. This Tribunal also took account of the decisions of the earlier Judgment where appropriate and where relevant to the matters to be determined by this Tribunal.

January 2011 to 5 October 2015

23. As stated above, the history of the Claimant’s employment during this period is dealt with in the earlier Judgment and that account is adopted by this Tribunal.
24. The Claimant was absent on sick leave from 22 June 2015 until her dismissal on 26 September 2016.

Grievance – 15 December 2015

25. The Claimant’s grievance dated 15 December 2015 ran to 18 pages and dealt with events from 3 July 2014 to 15 December 2015. The events of 3 July 2014 to 5 October 2015 are dealt with at paragraphs 37 to 61 of the earlier Judgment.
26. The grievance set out the Claimant’s complaints about the conduct of various colleagues towards her and also that the role of Business Continuity and

Response Manager she was offered and undertook, was not a genuine role and was not a substantive Grade 9 role as she had been promised.

27. The grievance was investigated by Ms Nicola Pennington, a Human Resources Consultant employed by Cripps LLP solicitors. She produced an outcome report on 16 February 2016 in which she addressed the main elements contained within the grievance. The headings were:

- The Arrears and Investigations Manager position;
- Reporting line;
- Ian Blake;
- Ian referring to your role as “less than a FTE” and had dedicated aspects of your role to other members of staff;
- Dean Trussler interview;
- Line management responsibilities;
- Emails sent by Karen Lewis;
- Information request;
- Your wellbeing;
- Sarah Richards;
- Occupational health referral.

28. The recommendations were as follows:

“Recommendations

I would ordinarily recommend that Slough Borough Council give sincere consideration to placing you in a level 9 manager’s position, at a similar level and scope to that of the Arrears and Investigations Manager’s position. This would be a reasonable compromise, given the situation.

However, with regards to your situation, I do not believe that this would be a very feasible remedy.

Having spoken with many of your co-workers, at various levels of seniority. I am clear that the working relationships between you and them are at best, severely fractured and at worse, irretrievably broken.

The feedback is consistent, from multiple courses and draws me to the conclusion that it would be extremely challenging to facilitate your return to Slough Borough Council.

I am of the opinion that the working relationships that you would require to effectively execute your duties are irrevocably broken.

I need to be clear Carol; I believe that elements of your behaviour were a direct reflection of the frustrations and dissatisfaction that you were experiencing and

the challenges you were facing. However, I am of the firm belief that it would have been more appropriate for you to address your frustrations through the appropriate conduits. By airing your issues so publicly, you effectively drew many people into the situation and indeed made them aware of the issues that they would have been otherwise oblivious to.

This concludes my findings.

You have the right to appeal this decision. If you wish to do so, please write to Roger Parkin, Strategic Director of Customer & Community Services, within five working days of receiving this letter, laying out the reasons for your appeal.”

29. On 21 April 2016 an occupational health report on the Claimant's circumstances was sent to Mr Griffiths and included the following:

“Background

As you know, Ms Clegg has been involved in a workplace conflict for the past 2.5 years. This culminated in her sick leave since June 2015. Ms Clegg has been certified as fit for work since mid-March 2016 but has not yet returned.

The information on the occupational health file (going back to 2012), the contents of your referral, and the information Ms Clegg gave me today suggest that the conflict arose over Ms Clegg's perceptions of unfair treatment and a lack of support from managers and colleagues, as well as perceptions of organisational and procedural injustice. You will have your own thoughts on this and I trust you are familiar with the details of this case. To date, the conflict remains unresolved. I understand Ms Clegg has just submitted an appeal against the outcome of her grievance. An employment tribunal is pending.

...

Current Fitness

Since going off sick, Ms Clegg has engaged with appropriate treatment, as directed by her General Practitioner. Despite this, she remains significantly affected by her stress reaction. This concerns, e.g. her sleep, her mood and her concentration levels. However, in my opinion, she is fit to participate in procedures aiming to resolve the ongoing conflict.

Recommendations and Future Outlook

I would not have any recommendations to make regarding Ms Clegg's treatment. I believe her outlook to be good, i.e. that she can make a full recovery. The earlier the conflict can be resolved, the earlier she is likely to recover.

Specific Questions

1. *Fitness for current job:*
Although not directly related to the fitness for the job, I note that the grievance process is ongoing and that an employment tribunal is pending. General occupational health experience teaches that retuning to work under such circumstances is likely to cause an employee to perceive additional pressure when at work. In the case of Ms Clegg, with her ongoing (albeit improving) stress reaction, the likelihood of an aggravation of her health is high, in my opinion. This is because on top of the aforementioned factors, Ms Clegg would need to return to her original job, without the possibility of adjusting the reporting lines, and into a work situation where relationships have been irretrievably damaged. Therefore, I recommend against a return to work at this point in time. Ms Clegg's health would not be robust enough for the workplace situation she would return into, in my opinion.

....

3. *Underlying medical conditions and likely prognosis:*
In my opinion, Ms Clegg suffers from the consequences of longstanding, distressing workplace-related perceptions as outlined above (e.g. unfair treatment, lack of support, organisational and procedural injustice). The outlook for this reactive psychological illness is good. A full recovery is likely provided an agreeable closure to the conflict could be found.

*Dr Christopher Giagounidis
Accredited Specialist in Occupational Medicine
Consultant Occupational Physician"*

30. The Claimant appealed against the outcome of her grievance and an appeal meeting was held on 4 August 2016 chaired by Mr Roger Parkin (Acting Chief Executive) as head of a three person panel. The Claimant attended accompanied by her trade union representative. Ms Pennington attended to provide evidence regarding her investigation and the grievance outcome report. The grievance appeal outcome was notified to the Claimant in a letter dated 9 August 2016 which included the following:

"Re: Outcome of Formal Stage Grievance

Further to your grievance appeal, you were dissatisfied with the outcome of the previous Formal Stage because you felt that the grievance was not conducted in an independent and unbiased manner.

...

You presented your appeal for the vast majority of the meeting and were given the time and opportunity to present your case as you saw fit. You invited two witnesses, both of whom were given free rein to respond to questions you posed. ...

...

Nicola Pennington was subsequently provided with the opportunity to give her evidence regarding the investigation she carried out.

...

The Panel is satisfied that Nicola carried out a thorough and proportionate investigation into your original grievance. She challenged evidence where appropriate and came to her conclusions independently without any undue influence from anybody within the Council.

Perhaps of the greatest concern, was your own personal conduct during the hearing itself, which the panel viewed as highly inappropriate. You often adopted what the panel considered as an extremely rude and sarcastic tone during your presentation. You made derogatory insinuations about Slough Borough Council employees that were both inappropriate and unsubstantiated. Whilst the panel understands that the whole process can be stressful, this type of behaviour is unwarranted, particularly to me as the chair of the panel and also to Nicola Pennington, the investigation officer. The events that occurred during the meeting have reinforced the view that your employment relationship with the Council is now irretrievably broken.

In summary, the view of the panel is that the investigation was carried out fairly and independently. You were unable to demonstrate that this has not been the case and your challenges were based on conjecture.

The Panel confirms that the final internal grievance appeal hearing has also been independent. Your appeal has therefore been denied and also your request for this matter to be investigated again by another independent person has already been rejected on the basis that a fair, independent and impartial investigation has already taken place.

This now concludes the internal grievance process.”

31. On 7 September 2016, Mr Sinclair wrote to the Claimant as follows:

“Further to the outcome letter dated 9th August 2016 in relation to your grievance appeal, I am now writing to invite you to attend a further meeting to discuss your future employment with Slough Borough Council.

We note that the appeal panel agreed with the findings of Nicola Pennington (the Investigating Officer in relation to your grievance) and in particular concluded that the employment relationship between you and the Council is now irretrievably broken. This meeting will be held in a final attempt to resolve matters and consider whether there are any opportunities which would allow you to continue working at the Council. However, I must advise you that if this is not possible, a potential consequence of this meeting will be the termination of your employment for Some Other Substantial Reason (SOSR) due to a breakdown in working relationships.

The Council does not have a formal written policy in relation to this type of meeting but we intend to follow best practice and are therefore providing you with at least 10 working days' notice of the meeting which is scheduled to be held on Wednesday 21st September 2016."

32. In response, on 9 September 2016, the Claimant submitted a statement (much of which repeated a complaint made on 8 September 2016 to Councillor Munawar, the Council Leader) in which she set out at length the background to her concerns about the conduct of the Respondent's senior managers. This covered events from September 2013 to August 2016. The conclusion included the following:

"Conclusion

18. The above is only an overview of what has taken place over the last three years. Despite the way I have been treated, I have always wanted to be loyal towards my employer. It was only with the greatest reluctance and after every attempt to resolve the matters internally that I referred my complaints to the employment tribunal and the Information Commissioner.

19. I submit that my dissatisfaction and distress at the way I have been treated by my employer is a symptom and not the cause in the 'break down in working relationship'. The cause is SBC's actions following my protected disclosure in September 2013. Following the breakdown in trust and confidence caused by unnecessarily suspending me and subjecting me to an unnecessary disciplinary hearing, SBC had the opportunity to heal the breach when Graeme Lever upheld my complaint in June 2014. However, the council chose instead to continue its vendetta against me by disregarding Graeme's outcome and recommendations. This is the real cause of the 'breakdown in the working relationship'. I believe that I have done everything I possibly could to maintain a positive working relationship in the face of managers determined to ensure that I failed. SBC has abused its grievance policy by ignoring outcomes it doesn't like and acting only on the recommendation of an investigator who gave them the result they wanted.

20. The council still has the opportunity to remedy this situation. If they will reconsider my proposals to enable me to return to work, I am prepared to engage in negotiations, despite the considerable stress they have caused me over the last three years.

21. The fact that most of the managers in HR and the neighbourhood and housing service who have subjected me to detriments are no longer working for the SBC could make this achievable. I would be pleased and grateful to see senior managers show genuine contrition for what has happened."

33. On 16 September 2016 Ms Collins prepared a management report which described the main events complained of by the Claimant which were:

- *The arrears and investigation manager position;*
- *The emergency planning position;*
- *The grievance and grievance appeal;*
- *Carol's current fitness for work.*

34. It concluded with:

"Final recommendation

Based upon the history of Carol as an employee and her obvious views about the council and many of its employees it is clear that she does not have a future with the council. This is due to an irretrievable breakdown of the working relationship which has no prospect of being resolved. It is therefore recommended that her employment with the council be terminated with immediate effect, unless Carol can present a solution which would work for the Council and is able to convince the panel that the working relationship could be repaired."

35. The Claimant, accompanied by her trade union representative, attended a meeting on 21 September 2016 chaired by Mr Sinclair.

36. In an outcome letter dated 23 September 2016, Mr Sinclair confirmed that her employment was terminated and the reasons given were as follows:

"I am sorry to inform you of our decision to terminate your employment. This decision is on the grounds that the employment relationship between you and the council is irretrievably broken and that the irreconcilable differences are significant enough that your continued employment would harm effective council business. I have elaborated on the reasons for our decision below.

The papers provided to us in advance of the meeting and the presentations from both you and Belinda outlined numerous employment disputes going back to September 2013. The depth of negativity, ill feeling and lack of trust you feel towards several council employees was clear to us during the hearing and is also evident from reading your statement, grievance form and grievance appeal. While we recognise that you feel you have been treated unfairly, we have genuine concerns about the number of issues that have been raised through formal and public routes without any real attempt to deal with matters in a collaborative and constructive way.

During the meeting we sought to establish whether there was a realistic prospect of drawing a line under the past three years and rebuilding positive working relationships. We noted a number of adversarial remarks about existing colleagues during your presentation and in your statement. This included stating that Surjit Nagra and John Griffiths had coerced you into submitting a grievance and telling us that you acknowledged the difficult circumstances Ian Blake and John Griffiths were in but going on to say this didn't excuse their behaviour and

suggesting that they had acted out of self preservation rather than professional integrity.

You also shared with us that you had recently submitted another whistleblowing complaint regarding the acting Chief Executive on the basis of his conduct as chair of the grievance appeal panel. Furthermore, you have raised your complaint with the Leader of the council rather than with the Monitoring Officer due to a lack of confidence in his willingness to progress your complaint. Your statement alleges that Roger Parkin behaved inappropriately towards you; barracking you preventing you from presenting your case and asking questions and generally acting more favourably towards the investigating officer. In response, Belinda confirmed that she was present at the appeal hearing and she disagreed with your recollection of the hearing. As a panel we were not convinced that your employment could continue in a harmonious and effective way as there continues to be substantial animosity towards council employees.

Our decision also took into consideration the scale of distrust across the council and we noted that relationships had broken down with several employees. As you identified, some of these individuals have since left the council including Kevin Gordon, Neil Aves, Hamid Khan and Sarah Richards. However, other colleagues remain in council employment including John Griffiths, Ian Blake, Roger Parkin, Surjit Nagra, Jane Rose, Gurpreet Anand and Jane Ward.

After the meeting Gemma and I spent considerable time weighing up the option of mediation. It is very difficult to see how mediation could bridge the gaps in relationships that exist, which span three years and several colleagues. We believe that the situation is simply too entrenched in order for mediation to have any realistic prospect of success.

We also carefully considered whether redeployment could be an alternative option to dismissal and we explored this with you during the meeting. You confirmed that a return to the Emergency Planning role would not be feasible and you outlined your dissatisfaction with not reporting to a Head of Service or Assistant Director. You also did not agree that the role could be as strategic as suggested by Roger Parkin and were unhappy with the lack of managerial responsibility. We also have concerns about a return to the housing division due to the break down in relationships with housing colleagues and we note Nicola Pennington's report, which refers to your co-workers and concludes that working relationships between you and them are at best severely fractured and at work irretrievably broken.

We explored alternative employment options and you outlined a number of proposals including:

- 1) *A Whistleblowing Champion*

This would be a new role. Unfortunately, it would not be financially viable to create such a new position especially as there would be insufficient workload for a dedicated position and support is already available from HR and the Monitoring Officer.

2) *Project Management*

The Council has a dedicated project management team, with project managers supporting a range of project activities across council directorates. We do not have any vacancies in the project management team at this time.

3) *Alternative roles*

At the hearing we asked if there were any other roles that you might be interested in. You referred us to the proposal included in your grievance document, which suggests a role should be made available where you can carry out tasks at home (although you confirmed that this was less important now due to improvements in your health), a level 9 position reporting to a Head of Service or Assistant Director. Following the meeting we have reviewed current vacancies and those which are due to be advertised shortly and unfortunately we have no such positions available at this time and do not envisage any vacancies in the immediate future.

Having carefully considered all alternative options it is with regret that we have concluded that there are no other reasonable measures that can be taken to allow your employment to continue. Your employment is therefore terminated with effect from 26 September 2016. You will receive payment in lieu of your 12 week notice period and any outstanding annual leave by direct transfer into your bank account on 31 October 2016. Your P45 will follow shortly. If you have any council belongings please contact Gemma to arrange their immediate return.

You have the right to appeal against the decision to terminate your employment. The grounds of any appeal should be submitted to Mr Mike England, Interim Strategic Director for RHR, within 5 working days of receipt of this letter.”

37. On 23 September 2016 the Claimant appealed against the decision to dismiss her and an appeal hearing was held on 31 October 2016 chaired by Mr England. The Claimant's union representative was unable to attend the hearing and the Claimant attended alone. The outcome of the appeal was contained in a letter dated 3 November 2016 from Mr England to the Claimant and included the following:

“Thank you for attending the hearing on 31 October 2016, at which your appeal was heard against the decision made on 23 September 2016 to terminate your employment with the council for some other substantial reason.

...

Whilst the Panel acknowledge the substantial history to your case, our focus for the appeal hearing was whether the decision to terminate your employment was the right decision, made in sound judgement, and that a fair dismissal process was followed.

The decision taken to terminate your employment was set out to you in a letter from Alan Sinclair dated 23 September 2016 and was based upon the following grounds:

- That the employment relationship between you and the council is irretrievably broken and that the irreconcilable differences are significant enough that your continued employment would harm effective council business; and*
- The decision taken also took into consideration the scale of distrust across the council and your employment relationships with several employees had broken down.*

In setting out your grounds for appeal against your dismissal, you alleged that your dismissal was unfair as you believed you had been dismissed for making protected disclosures. We explicitly considered this view at the hearing and recognised that you associate your dismissal with the protected disclosure regarding Roger Parkin. There was no evidence presented to the Panel to support this view.

You also asked the Panel to consider the following:

- That the Council concedes its contribution to the broken relationships;*
- That the Council concedes you did not deserve to be dismissed; and*
- That the purpose of your protected disclosures over the three years since 2013 was to show the Council was acting unlawfully and not that you were a 'difficult person'.*

...

In his presentation, Alan Sinclair advised that the purpose of the September 21 meeting was to try and establish if positive working relations could be repaired but the Panel concluded that the depth of negative ill-feeling was too strong towards the council and named managers. It should be noted that there was no new evidence from which the Panel could conclude that the working relationships between you and colleagues could be repaired. The Panel shares the concerns of the original Panel that reinstating you remains a harmful act to council business.

...

We were content that a fair dismissal process had been followed because you were accompanied at the original meeting by your union representative;

you were given every opportunity to prepare and present your case; and were given the right of appeal.

Therefore, after careful consideration of all the evidence, the Panel has decided to uphold the decision to terminate your employment for the reasons outlined in the letter to you from Alan Sinclair on 23 September 2016.”

DECISION

Protected Disclosures

38. Employment Rights Act 1996

Section 43A - Meaning of protected disclosure

In this Act a protected disclosure means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

Section 43B - Disclosures qualifying for protection

- (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 information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.*

39. In this case, the Claimant relied upon four protected disclosures referred to in the earlier Judgment which were found to be protected disclosures, and two further disclosures. The six disclosures were as follows:

- September 2013 – Paragraph 64 of earlier Judgment;
- 3 March 2014 – Paragraph 65 of earlier Judgment;

- 1 August 2014 – Paragraph 67 of earlier Judgment;
- 2 October 2014 – Paragraph 68 of earlier Judgment;
- 3 August 2016 – The Claimant disclosed to Gurpreet Anand (Monitoring Officer) that there was a continuing failure to comply with the Data Protection Act despite the Information Commissioner having upheld the Claimant's complaint. The Tribunal found that this amounted to a protected disclosure for the same reasons as the protected disclosure made on 2 October 2014 referred to above at paragraph 68 of the earlier Judgment;
- 9 September 2016 – The disclosure to the leader of the Council about the conduct of Mr Roger Parkin (Acting Chief Executive). This alleged disclosure was contained in the Claimant's statement dated 9 September 2016 referred to above which included "*Roger is in breach of the employee code of conduct and the DPA in using his position to prevent the notes being disclosed to me.*" The Tribunal found that the Claimant had a reasonable belief in Mr Parkin's failure to comply with a legal obligation under section 43B(1)(b) Employment Rights Act 1996 under the Data Protection Act and that there was a reasonable belief in the public interest because the Respondent is a public sector employer. Mr Parkin was the Acting Chief Executive Officer and therefore, the most senior officer in the local authority. The Tribunal found that it amounted to a protected disclosure.

40. Accordingly, all six disclosures relied upon by the Claimant amounted to protected disclosures within the meaning of section 43A and section 43B Employment Rights Act 1996.

Protected Disclosure Dismissal – Section 103A Employment Rights Act 1996

41. In her ET1 claim form the Claimant stated:

- *On 3 August 2016 I made a disclosure to Gurpreet Anand, SBC's current monitoring officer about SBC's continued failure to comply with the DPA, despite the Information Commissioner upholding my complaint. I have had no response from him and SBC continues to breach the Act.*
- *On 8 [9] September 2016, I made a disclosure to the leader of the council about my concerns about the conduct of the acting chief executive. I have had no response and this disclosure is specifically referenced in my letter of dismissal as a factor in the decision to dismiss me.*

42. In her witness statement, the Claimant stated:

“(Para 4.38) On 8th September 2016 I made a protected disclosure to the leader of the council Sohail Munawar concerning breaches of the employee code of conduct, in particular, inappropriate conduct in the appeal hearing by Roger Parkin. I have never received a response (pages 742 to 748).

(Para 4.43) On 23rd September 2016, the Respondent sent me a letter of dismissal, The justification for the decision includes my dissatisfaction with the monitoring officer, Gurpreet Anand not responding to the protected disclosure about the conduct of Roger Parkin in September 2016.”

43. In the Claimant’s closing statement, she stated:

“(Para 34) In my letter of dismissal the Respondent lists my dissatisfaction with Gurpreet Anand as a reason for my dismissal. My only reason for dissatisfaction with Mr Anand was his failure to respond to a protected disclosure. My letter of dismissal is the only communication I have received from the Respondent in relation to this disclosure.”

44. In his witness statement, Mr Sinclair said:

“(Para 20) The Claimant commented towards the end of the meeting on 21 September that she had made a complaint to the Leader regarding the conduct of the Chief Executive (Roger Parkin) as chair of the grievance appeal panel and that there was no point in her complaining to the Monitoring Officer (Gurpreet Anand) because he ignored her before (pages 767 – 768). This further emphasised her mistrust in the Council to act fairly. We did not see the email which the Claimant sent to the Leader, Councillor Munawar, on 8 September 2016 (pages 739 – 742) and we were not aware of the details of her complaint. It was not the case that we held it against the Claimant that she had made this complaint; what was of concern to us was that her comments showed her distrust towards Gurpreet Anand and that this was one of many relationships between the Claimant and Council employees which had broken down.

(Para 32) At the conclusion of the [appeal] hearing I was asked to sum up the management case (page 827). I said that we had concluded the employee relationship between the Claimant and the Council had broken down, and that the differences were significant enough that her employment would harm effective Council business. I confirmed that the decision was not based on any of the protected disclosures which the Claimant had mentioned in her appeal. It was based on there being no real prospects of drawing a line under the last three years or of the Claimant building a working relationship with the Council, in view of the depth of her negative ill-feelings and lack of trust towards the Council’s employees.”

45. There is also reference to this matter in the appeal outcome letter which is quoted above.

46. The Tribunal found that Mr Sinclair was provided with details of the Claimant's protected disclosure regarding Mr Parkin from the Claimant's evidence given during the meeting on 21 September 2016. It was therefore reasonable and necessary for him to refer to it in his outcome letter. He did not actually see the protected disclosure contained in the Claimant's letter dated 9 September 2016 to the Leader of the Council. The Tribunal found that he raised it because the Claimant raised it during the meeting and accepted Mr Sinclair's explanation that it had been mentioned not because he held it against her that she had made a disclosure but because it was of concern that it showed distrust towards the Council and its officers.
47. Mr Sinclair was aware of the existence of, but not the detail of, all of the Claimant's protected disclosures which she has relied upon above because they were mentioned in her grievance and he had a copy of that document. He was aware not only of the complaint regarding Mr Parkin and Mr Anand but also the earlier complaints.
48. The Tribunal also found that Mr England, similarly, was concerned about the same matter, that is distrust of other council officers, and he found no evidence to associate the dismissal with the protected disclosure regarding Mr Parkin.
49. The Tribunal took account of the decision of the Employment Appeal Tribunal in Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 in which it was said that existing case law recognises that a factor which is related to the disclosure may be separable from the actual act of disclosing the information itself. The Tribunal found that that was the case here.
50. Neither Mr Sinclair nor Mr England, both of whom the Tribunal found to be credible witnesses, made their decisions because of the fact of having made disclosures. The 2016 disclosures were mentioned because they showed mistrust of two further council officers which was the very heart of what they were called upon to determine.
51. The Tribunal found that it was implausible that Mr Sinclair or Mr England would be motivated to dismiss the Claimant and the appeal for protected disclosures she had made in 2013, 2014 and more recently in 2016.
52. As found below, there was a non-discriminatory reason for the dismissal which is considered under the heading of "Ordinary Unfair Dismissal".
53. The Tribunal was satisfied that the dismissal was not motivated in any sense whatsoever by any of the protected disclosures.

Direct Disability Discrimination Dismissal – Section 13 Equality Act 2010

54. Equality Act 2010

Section 13 – Direct Discrimination

- (1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

Section 136 – Burden of Proof

- (1) *This section applies to any proceedings relating to a contravention of this Act.*

- (2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

- (3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

Section 23 - Comparison by reference to circumstances

- (1) *On a comparison of cases for the purposes of section 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*

55. There is guidance from the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246. The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination, they are not without more sufficient material from which a Tribunal could conclude that on the balance of probabilities the Respondent had committed an unlawful act of discrimination. The Claimant must show in support of the allegations of discrimination a difference in status, a difference in treatment and the reason for the differential treatment.
56. If the burden of proof does shift to the Respondent, in Igen v Wong [2005] IRLR 258 the Court of Appeal said that it is then for the Respondent to prove that he did not commit or is not to be treated as having committed the act of discrimination. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof and to prove that the treatment was in no sense whatsoever on the prohibited ground.
57. In Ayodele v Citylink Ltd [2017] the Court of Appeal held that the burden of showing a prima facie case of discrimination under section 136 remains on the Claimant. There is no reason why a Respondent should have to discharge the burden of proof unless and until the Claimant has shown a prima facie case of discrimination that needs to be answered. Accordingly, there is nothing unfair about requiring a Claimant to bear the burden of proof at the first stage.

58. The Respondent conceded that at the time of her dismissal, the Claimant was a disabled person by reason of depression and anxiety.

59. The Claimant's closing submissions included the following:

“(Para 35) The Respondent has been aware that I have a mental health disability since around November 2012, although it was not something that impacted in any significant way on my working life with the Respondent until I made my first protected disclosure in 2013.

(Para 36) In September 2013, the head of HR, Kevin Gordon recommended to Neil Aves that I should be managed out of the organisation for being mentally unstable. This is advice from an officer who should have known better. A head of HR advising the Respondent in such a way cannot be ignored by the tribunal.

(Para 40) In January or February 2015, Kevin Gordon told the head of legal services to ignore me because ‘she’s a nutter’. The Respondent does not deny this. The tribunal must give this substantial weight, because it clearly evidences the attitude and behaviour of the Respondent’s senior management. Kevin Gordon was the head of HR. When this sort of behaviour comes from the top of an organisation the tribunal cannot just turn a blind eye and ignore such behaviour.

(Para 43) In August 2016, Roger Parkin complained to the head of legal services that he had to deal with one of ‘Neil Aves’ crazies’. He was referring to his chairing my grievance appeal hearing. As I have said previously, the discrimination is endemic within the Respondents. The tribunal cannot turn a blind eye to this.”

60. In his witness statement, Mr Sinclair said:

“(Para 33) I address the allegation made by the Claimant in the Further and Better Particulars (pages 126 – 127) that her dismissal was an act of direct disability discrimination by the Council. We did not make the decision to terminate her employment because of her medical conditions of depression and anxiety, or because she had been absent from work since June 2015. We reached this decision because there was an irretrievable breakdown in her relationship with the Council as her employer. We took into account the Occupational health report which recommended that the Claimant’s health would not be robust enough to return to work in her current role in a work situation where relationships had been irretrievably damaged (pages 651 – 652). The Claimant herself clearly ruled out the option of returning to work in her current role during the course of our meeting.”

61. Having considered the above, the Tribunal noted that Mr Kevin Gordon, Mr Neil Aves and Mr Roger Parkin did not take part in the dismissal of the Claimant.

62. Additionally, there is nothing in the Claimant's witness statement supporting her allegation that the dismissal was because of her disability.
63. The Respondent was aware of her depression because of the occupational health reports and because she was absent on sick leave from June 2015 to September 2016. However, the Claimant never complained of disability discrimination before presenting her complaints to the Tribunal. No mention was made of disability discrimination in the Claimant's grievances, meetings or at the appeal hearing.
64. It is clear that Mr Sinclair was aware of the occupational health report of 21 April 2016 but there is no evidence to support the suggestion that the dismissal was motivated in any way whatsoever by the Claimant's disability.
65. Additionally, the Tribunal has found below that there was a fair non-discriminatory reason for the dismissal.

Unfair Dismissal – Section 98 Employment Rights Act 1996

66. Employment Rights Act 1996

Section 94. The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 98. General

(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do.

(b) relates to the conduct of the employee, ...

(3) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

67. In Hutchinson v Calvert EAT 0205/6, the Appeal Tribunal said that so long as an employer can show a genuinely held belief that it had a fair reason for dismissal, that reason may be a substantial reason provided it is not whimsical or capricious and where the Respondent genuinely believed that the relationship between it and the Claimant had broken down and could not be retrieved, and the decision was within the range of reasonable responses, then this can be a fair reason.
68. In The Governing Body of Tubbenden Primary School v Mrs K Silvester UKEAT 0527/11/RN, it was said that context is highly important and it is entirely appropriate that a Tribunal should have regard to the immediate history leading up to the dismissal.
69. In Ezias v North Glamorgan NHS Trust [2011] IRLR 550 it was said that the tribunal should be alive to the refined but important distinction between dismissing the Claimant for conduct in causing the breakdown of relationships and dismissing the Claimant for the fact that those relationships had broken down.
70. Mr Sinclair and Mr England gave full reasons for their decisions and their outcome letters are quoted extensively above.
71. The Tribunal found that the Respondent had a genuine belief in the fact of the breakdown of relationships and that that was the reason for the dismissal. The Claimant's responsibility for the breakdown was incidental, it was the fact of the breakdown that was the reason for the dismissal. The Tribunal looked carefully at the Claimant's contentions that the reason for dismissal was motivated by protected disclosures and/or disability but could find no reliable evidence to support these contentions.
72. The Claimant accepted the fact of the breakdown of trust and confidence. She said so in paragraph 19 of her statement dated 9 September 2016 quoted above. That was at the heart of her case.

73. During the course of the meeting on 21 September 2016, the Claimant said: *“If there is a will, the Council could work with me for a resolution. The Council have a duty, there has been a breakdown of trust and confidence.”*
74. That was also the conclusion of Ms Pennington:

“Having spoken with many of your co-workers, at various levels of seniority, I am clear that the working relationships between you and them are, at best, severely fractured and at worst, irretrievably broken.”
75. Ms Collins said:

“Based upon the history of Carol as an employee and her obvious views about the Council and many of its employees, it is clear that she does not have a future with the Council. This is due to an irretrievable breakdown of the working relationship which has no prospect of being resolved.”
76. In his decision letter, quoted extensively above, Mr Sinclair noted the names of several employees with whom the Claimant’s relationship had broken down. That is: Kevin Gordon, Neil Aves, Hamid Khan, Sarah Richards, Don Griffiths, Ian Blake, Roger Parkin, Surjit Nagra, Jane Rose, Gurpreet Anand and Jane Ward.
77. The Claimant submitted that the first four people had left the Council but it was clear that the remaining people remained in employment.
78. Mr Sinclair did not apportion blame for the breakdown but referred to the fact of it.
79. The Tribunal did not find any procedural unfairness in the way in which the dismissal process had been conducted. There was no Council policy on SOSR dismissals and the ACAS Code of Practice does not apply to such dismissals.
80. However, at each stage (grievance investigation, grievance appeal, dismissal hearing and appeal hearing), the Claimant was involved and given a full opportunity to be accompanied, represented and to provide her account in response to the allegation that her relationship with the Council and several of its officers had broken down irretrievably. She did so orally at the meetings and in writing.
81. The Claimant also complained that Ms Pennington was not independent because she was employed by Cripps solicitors at the time, and the firm was employed on Council business regarding other matters. Also, that Ms Pennington had lost some of the statements which she had taken which the Claimant says may have painted her in a positive way. That is the statements of Ms Valjoen, Ms Lewis and Ms Richards.

82. The Tribunal noted however that Ms Valjoen gave evidence before Mr Parkin at the grievance appeal and Ms Lewis had previously given a very negative account of the Claimant's conduct in writing, describing the Claimant as extremely rude, very angry, and unprofessional.
83. The Tribunal noted the Claimant's concerns but did not take the view that it made the procedure as a whole unfair. Ms Pennington's report was full and detailed and, except for three lost statements as described above, provided supporting evidence for all her recommendations.
84. The Claimant also complained about the independence and conduct of Mr Parkin at the grievance appeal hearing. She said that she had not been given a fair hearing and that was what she said in her protected disclosure of 9 September 2016. That was, however, contradicted by Ms Collins at the hearing on 21 September 2016. She criticised the Claimant's conduct as highly inappropriate, extremely rude and sarcastic, making derogatory insinuations about Slough Borough Council employees that were both inappropriate and unsubstantiated.
85. The Tribunal had before it the record of the grievance appeal meeting before Mr Parkin on 4 August 2016. The Claimant was accompanied by her trade union representative at the meeting. It is clear that she was allowed to speak freely throughout the hearing, question witnesses and provide her own account in responses.
86. The Claimant was accompanied by her trade union representative at the hearing on 21 September 2016. Although she did not directly challenge Mr Sinclair's independence, she considered he had been given inaccurate and incomplete information about her. The Tribunal had no reason to doubt Mr Sinclair's statement of independence in the course of his evidence. He said that he was aware of the Claimant working across the Council as Business Continuity and Response Manager but otherwise his knowledge of her and her dealings with the Council's employees was limited to the documents that he was asked to review for the meeting.
87. The Tribunal found that during the meeting with Mr Sinclair on 21 September 2016 the Claimant was given a full opportunity to provide her response to the allegations of breakdown of trust and confidence and to give her own account. At the end of the meeting, she said: *"Just wanted to say this is the first time that I've felt I've been heard. Thankyou"*.
88. The independence of Mr England was not challenged by the Claimant. He said that he did not have any direct dealings with the Claimant before the appeal hearing or any detailed knowledge of her case and the first time that he had met her was at the appeal hearing. The Tribunal accepted that he was an independent appeal officer and that the Claimant was given a full opportunity to respond to the allegations of breakdown of trust and confidence and to give

her account before Mr England at the hearing on 31 October 2016. At the end of the meeting, the Claimant said: *"Thank you all for listening"*.

89. The Tribunal found that the documentation produced by the Respondent was full and comprehensive and had been disclosed to the Claimant before each of the meetings, other than the statements which had been lost by Ms Pennington and no-one had access to those. It was a well-documented process involving the grievance investigation, grievance appeal, SOSR hearing and appeal hearing. The Claimant attended all the meetings and was given all outcomes in writing with detailed reasons for each decision.
90. The Tribunal found that the procedure overall was fair.
91. The Claimant made reference to an email dated 5 June 2014 from Neil Aves to Kevin Gordon. It was of poor quality but was headed *"Progress of Investigation"*. Part of the narrative said:
- "For the record, you do appreciate that this is the same Carol Clegg who last year complained about HR resulting in the conclusion that she was mentally unstable and needed to be managed out of the organisation? You can therefore appreciate our concern when the corporate response does not appear to quite so resilient when the complaints are focused on us rather than yourselves."*
92. During cross-examination of Mr Sinclair and Mr England, this email was not put to them and there was no suggestion that either of them knew of the existence of this email or had any input into it. There was no evidence that they took account of the email or its contents in their decisions to dismiss and to reject the appeal.
93. Additionally, there was no evidence that Mr Aves or Mr Gordon had any involvement or input into the grievance outcome, the grievance appeal outcome, the dismissal or the appeal process.
94. A further complaint by the Claimant was that it had been assumed by Mr Sinclair and Mr England, and by others before them, that if the Claimant returned to her previous role, she would be line-managed by Mr Blake with whom the relationship had broken down. She found out later, however, that Mr Blake had moved from the role as her line manager in January 2016 while she was absent on sick leave. Accordingly, the Claimant asserted that if she returned to her previous role, she would be reporting to a line manager she had not previously met and with whom a relationship had not broken down. Neither Mr Sinclair nor Mr England were aware of this.
95. The Claimant put this to them in cross-examination. She said to Mr Sinclair:

Q - If I could have returned and reported to someone else?

A - I would still have dismissed, you have lost trust and confidence in the Council.

96. The same matter was put to Mr England in cross-examination:

Q - What if I could report to someone else?

A - Hypothetical question – issues broader than just the relationship with Ian Blake... we heard of a long period of difficulties. Ian Blake was only one of a number of people. Not based just on the relationship with Ian Blake.

97. The Tribunal noted that Mr Sinclair's dismissal letter referred to "*the employment relationship between you and the Council is irretrievably broken*" and not just with individual Council Officers.
98. The Tribunal found that in view of the above, even if Mr Sinclair and Mr England had known that Mr Blake had moved on in January 2016 and would not be the Claimant's line manager if she returned to her original role, that would have made no difference to their decisions. Mr Blake was only one of the several officers with whom relationships were broken and the Claimant's relationship with the Council as an employer was also irretrievably broken.
99. Although Mr Sinclair considered that these relationships were irretrievably broken, he nevertheless considered the Claimant's suggestions of alternative employment options. It is clear that he did this at the request of the Claimant, and not of his own volition in view of his overall finding of irretrievable breakdown of relationships.
100. The Tribunal considered the process, investigation, dismissal and appeal as a whole and found that it was not unfair. In the circumstances, it was within the range of reasonable responses.

Unauthorised Deduction from Wages – Section 13 Employment Rights Act 1996

101. Employment Rights Act 1996

Section 13

(1) An employer shall not make a deduction from wages of a worker employed by him unless -

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)

(3) *Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

102. There was nothing in the Claimant's witness statement which referred to this claim.

103. However, it was dealt with in her closing submissions at paragraphs 44 – 53:

“(44) Numerous occupational health referrals from June 2015 recommended my line manager should carry out a stress risk assessment and address the concerns about my role. The Respondent did not act on these recommendations.

(45) Their focus was solely on dismissing me as detailed in Neil Aves' instructions and Ian Blake's witness statement (following the sickness meeting on 28th September 2015).

(46) I could have returned to work in September or October 2015 if Mr Blake had been sincere about his intentions in carrying out sickness meetings and acting on recommendations. Instead the Respondent acted in such a way that they made my mental health worse.

(47) As a consequence I was not able to return to work and was unfairly and unlawfully reduced to half pay in October 2015.,

(48) The occupational health referral made by John Griffiths in March 2016 was contrived to get the outcome the Respondent wanted – a recommendation that my mental health would be adversely affected if I returned to work in the same conditions that made me ill the first place.

(49) As Ian Blake's line manager he must have been aware that Mr Blake was no longer responsible for managing my post and I hadn't been for at least two months. Nevertheless, Mr Griffiths told occupational health that a change of reporting line would be impossible and asked for their advice as to the advisability of me returning to work on those terms.

(50) Mr Griffiths also told occupational health in the same referral that they had carried out a stress risk assessment, which was not true.

(51) Occupational health confirmed I was ready to return if the working environment was suitable, but advised against me returning on the basis that there would be no change in reporting line (I would have to report to Ian Blake).

(52) As a consequence of the Respondent's refusal – under false pretences – to let me return from sick leave, I was unfairly and unlawfully reduced to nil pay in March 2016 and remained on nil pay until my dismissal in September 2016. (Meikle para 54)

(53) Oral evidence given to the tribunal by Ian Blake confirmed that his role changed in January 2016 and that he had taken in responsibility for housing regulation and was no longer responsible for civil contingencies. He confirmed that meant from January 2016 – that as business continuity and response manager – he was no longer my line manager.”

- 104. The Respondent said that the Claimant was paid in accordance with the written terms of her contract of employment. She was entitled, when on sick leave, to five months' full pay and five months' half pay, which she was paid. The Claimant agreed that those were the terms of her contract of employment.
- 105. The Claimant was absent on sick leave from June 2015 to September 2016.
- 106. The Tribunal found that the Claimant had received all that was properly payable under her contract of employment during her sickness absence leave.
- 107. There were no grounds from which it could find there was an unauthorised deduction from wages.

Employment Judge Vowles

Date: ...25 April 2019

Sent to the parties on

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For the Tribunal Office