EMPLOYMENT TRIBUNALS

Claimant: Ms G Wright

Respondent: Mid Yorkshire Hospitals NHS Trust

HELD AT: Leeds **ON:** 22 June 2018

BEFORE: Employment Judge D N Jones
Ms L C Fawcett
Mr K Lannaman

REPRESENTATION:

Claimant: Mr P Cook, Friend
Respondent: Mr Boyd, Counsel

JUDGMENT having been sent to the parties on 28 June 2018 and written requests having been made by both parties in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the tribunal provides the following

REASONS

1. The tribunal considered an application for reconsideration of the decision that a detriment the claimant was subjected to because she had made a protected disclosure on 9 October 2015 was a claim which was presented out of time, and what the appropriate remedy should be in respect of the finding that the claimant had been unfairly dismissed.

The application for reconsideration

2. Within 14 days of receiving the judgment the claimant's representative, Mr Cook, submitted a written application for reconsideration of the judgment in respect of the out of time point. That application was to be dealt with at the same hearing the issues of remedy were to be determined. The grounds upon which it was made are fully set out in the letter submitted by Mr Cook on 27 June 2017. It is responded to by a letter of the respondent on 13 October 2017.

3. Under rule 70, a tribunal may reconsider any judgment if it is necessary in the interests of justice to do so. “Necessary in the interests of justice” captures

considerations of proportionality, the merits of the issue to be reconsidered, why the matter had not been raised at an earlier stage and any respective hardship to the parties of revisiting the original decision. As with all rules, the overriding objective must be considered.

4. The tribunal heard evidence from Ms Wright as to why she contended it was not reasonably practicable for her to have presented that detriment claim in time and that she had presented it within a reasonable period thereafter. That evidence was not adduced at the previous hearing. The detriment arose on 9 October 2015 but the claim to the Tribunal was not submitted until 11 July 2016. Section 47B of the Employment Rights Act 1996 (ERA) provides that a complaint of that nature shall be presented within three months of the act complained of (the detriment) and, if the tribunal was satisfied that it was not reasonably practicable for the complaint to have been presented before the end of that period of three months within such further period as was reasonable.

5. The claimant said in evidence she had not presented that detriment claim before 11 July 2017 because she was unaware that the comments made by Ms Jennings were a consequence of the earlier protected disclosures she had made.

6. The written application made no such suggestion. Rather, in the grounds seeking the permission of the Tribunal to reconsider the claim emphasis was placed upon the public interest in considering whistle-blowing complaints as against the NHS, the stigma attached to those who had the courage to stand up and raise issues of public concern, as well as the principal reason that the claimant was fearful of repercussions had she raised that matter at an earlier stage. Reliance was also placed upon Ms Wright's state of health during the period, and in addition the fact she did not have access to legal advice.

7. The application of this provision has been considered in a number of cases, two of which have been referred to us by Mr Boyd on behalf of the respondent: **Northampton County Council v Entwistle** and **Hunwicks v Royal Mail Group PLC**. It is for the claimant to establish it was not reasonably practicable, and not the respondent, and as is clear from the authorities "practicable" means "more than possible".

8. We are not satisfied on the evidence we have heard that the claimant has established that it was not reasonably practicable to present her claim in time. That is principally because of the inconsistency in the matters advanced in paragraph 8 of the grounds of application and the evidence presented to the Tribunal today that it was only during a discussion with ACAS in May 2016 that the claimant drew any connection between the detriment of 9 October and her earlier protected disclosures. We would have thought that matter would have been very pertinent and form the main plank of the written application had it been correct, on 27 June 2017. As Mr Boyd points out, the positive assertion that she was fearful of repercussions, against the background of the earlier narrative concerning fear of whistle-blowers in the NHS, leads to the clear inference that the claimant was aware of the connection but was fearful of raising it because of actions taken against whistle-blowers. That is wholly inconsistent with the reason advance for not bringing the claim earlier, in evidence. We therefore do not accept the current explanation for the delay in bringing the case earlier.

9. The state of health of the claimant at the time, and in the following weeks and months, does not explain why the claimant could not have presented this claim earlier. In February 2016 Ms Wright commenced a phased return to work. For the unfortunate circumstances which are set out in our earlier reasons that did not succeed, but we are satisfied that if she was sufficiently well enough to commence work she could have taken steps to present a claim.

10. The claimant had access to advice through the GMB. The GMB is a substantial trade union with access to legal resources. The information the claimant had at the time was sufficient for her to be able to take advice on the strength of a whistle-blowing claim. The claimant made a complaint to the GMB about her representative and that she had been advised to exhaust internal procedures before legal advice would be provided. With the limited information we have it is not possible to make any observation about the quality of such advice. A letter in response from the GMB to the complaint has been submitted, but we have no detail as to the substance of the communications between the claimant and her representative or that representative's comments. Mr Boyd makes the point that the respondent was not responsible for the advice the claimant received and it would be harsh for it to have to face a late claim because of any inadequacy in that respect.

11. Mr Cook submits that it was only after the discussion with ACAS that the claimant drew the connection between the detriment and the protected disclosures. Nothing is identified as having come to light to draw the causal connection in May 2016 rather than earlier. In other words, the claimant has not explained what it was, at that time, to make her recognise that the events of 9 October 2015 were related to, and caused by, her previous protected disclosures. There can be no doubt that by 11 July 2016 she had drawn the connection because she makes it clearly in the claim form.

12. Had the claimant raised the time limit argument in the liability hearing, we would not have accepted she had established a sufficient reason for not having brought that claim earlier. That is only one consideration in our determination as to whether it is reasonably necessary in the interests of justice to allow an application for reconsideration, albeit a fundamental one. Other considerations include the fact that this point could have been raised by the claimant in July 2017 at the liability hearing of this claim. At that time the claimant had the benefit of specialist counsel throughout the hearing. We can only speculate as to why that point was not raised then, such as that it was recognised by the claimant's legal advisor that the argument would not have succeeded, but the fact it was not raised means that the respondent is now disadvantaged because it is faced with meeting arguments about time limits 12 months down the line. Evidence is less reliable than it would have been a year ago. That is apparent from the inconsistency we have referred to in the claimant's evidence and written grounds for her application.

13. For all these reasons we are not satisfied it is necessary in the interests of justice to reconsider our earlier judgment that the claim was out of time.

Remedy

14. The parties agree that the basic award is £7,185. The parties have submitted respective Schedules of Loss. It is the respondent's contention that the claimant has

only lost a sum of £523.67 being the remainder of her entitlement to sick pay between 12 and 25 October 2016, by which stage she was on half pay. Thereafter her entitlement to sick pay would have been exhausted and so if she had remained in the employment of the respondent and been off sick she would not have received any remuneration. To that sick pay, the respondent has added a 14.38% contribution for her pension loss. It contends that the loss of statutory rights should be £350.

15. The claimant, on the other hand, contends for a very substantial loss including a pension loss. This case is one brought under section 98 of the Employment Rights Act 1996 and the compensatory award is subject to a statutory cap of 52 weeks' pay, see section 124 of the ERA. That will include the pension contributory payments made by the respondent. The statutory cap would be £41,462.75 comprising the gross pay at the effective date of termination of £36,250 and a 14.38% pension of £5,212.75.

16. We must determine what losses have arisen and should be awarded pursuant to the provisions of section 123 of the ERA:

> "*Subject to the provisions of this section and section 124, 124A and 126, the amount of any compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer."*

17. Mr Boyd draws our attention to the decision of the Court of Appeal in **GAB Robins UK Limited v Triggs [2008] IRLR 317**. In that case the claimant sought to recover the loss of her earning capacity which she said was attributable to the actions of her employer which were in fundamental breach of contract and led to her personal injury. She resigned as a consequence of those actions and successfully recovered the losses attributable to that future reduced earning capacity. The Court of Appeal rejected that approach upon consideration of the wording of section 123 of the ERA. It held that the loss of future earning capacity was sustained as a consequence of the conduct of the employer which breached the contract, but was not damage suffered in consequence of the dismissal. The loss of earning capacity was a loss in respect of which the employee already had an accrued cause of action, separate and apart from the dismissal. Lord Justice Rymer said it was fallacious to regard those antecedent breaches as constituting the dismissal. The dismissal was effected, purely and simply, by her decision in May 2005 that she wished to discontinue her employment. On a claim for unfair dismissal that entitled her to compensation for whatever flowed from that dismissal.

18. It is not disputed by the respondent that the claimant is unable to work and has been unable to work since she left the employment of the respondent. Its own computation that she would be in receipt of sick pay for a short period confirms that position. The respondent has not argued in this case that the claimant could reasonably have mitigated her loss, in the light of her ill health.

19. The evidence before the Tribunal as to the claimant's health is set out in medical reports of her General Practitioner, Dr Higgins, dated 26 June 2017 and 14 February 2018. In the first report the GP confirms that the claimant initially presented

in July 2014 when she was a manager in the respondent's employment. She was then not sleeping, stressed at work, had low mood and was tearful, but had no other problems in life at that time. She commenced on a prescription of antidepressants in October 2014 and she continued to demonstrate symptoms of anxiety, stress and low mood. She was reviewed in November 2014 and prescribed with further antidepressants and reviewed again in October 2015 when she was diagnosed with anxiety secondary to work related stress. By that time she was unable to sleep, had poor appetite and was prescribed further antidepressants. She was reviewed later that month by Dr Higgins and she was tearful and had ongoing work related problems and was anxious. Throughout 2016 she was reviewed and prescribed antidepressants and, according to Dr Higgins, they all related to issues from work and the pending court case. Her mood had deteriorated over those months. She said that the claimant was not fit to work for that period or fit to apply for other jobs. She could not say whether she would be able to look for work in the future. Dr Higgins said she would hope that the claimant would make a complete recovery but it was not guaranteed.

20. In February 2018 in a direct letter to the Judge of this tribunal concerning adjustments to the proceedings, Dr Higgins recited the position as of that date. She said that over the last two years the claimant's mental health had deteriorated dramatically. She said she was now significantly depressed and attended surgery in the company of another and had little eye contact. She gave her opinion that the main reason and trigger for the illness was the dispute with the respondent and the court proceedings and, until it was resolved, she would struggle to make any improvement with her mental health. She suggested a video link for the purpose of admitting the claimant's evidence, which has been the means by which we have proceeded. She suggested postponing the proceedings would delay her recovery. It is quite clear from that report that the doctor considered that the conclusion of this case can only be helpful to the claimant's mental health, and until that position is reached there will be no improvement at all.

21. We turn, therefore, to the claim made by the claimant that she should recover substantial past and future losses including a pension loss and an increase to that award as a consequence of the respondent's unreasonable failure to comply with the ACAS Code of Practice in the handling of her grievances.

22. Applying section 123 of the ERA and the authority to which we were referred, the proper approach is to ask ourselves what the claimant lost as a consequence of the dismissal. In determining the proper sum for compensation in a tortious claim, the court's starting point is to have regard to what would have happened had the unlawful act not occurred. That principle applies to a statutory tort as it does to a common law tort, such as negligence. What would have happened to Ms Wright had she not chosen to resign and bring this contract to an end?

23. When she resigned she had outstanding grievances against Mr Melia, Miss Wright and Miss Wood. The grievances she had brought against Miss Jennings had been determined, and not as the claimant would have wished. In due course the grievances against the others were determined against the claimant but after she had resigned and without her involvement. There would have been an opportunity to appeal them.

24. Had the claimant remained in employment and those grievances taken their course, it is reasonable for us to infer that, if conducted fairly and objectively, criticisms would have been made of the handling of some of the actions of the claimant's managers. The respondent would have picked up on the failings we identified in our findings, insofar as they reflected, or covered, the same ground. She would not have succeeded in all, such as her complaint about the handling of her emails while she was off, about which we were critical, but she would have recovered some satisfaction in knowing her senior managers had recognised that mistakes had been made; for example, the mismanagement of her return to work from sick leave. We are satisfied this would have meant her health would have fared better. She would have felt partly vindicated, such that trust could have been re-established to facilitate a return to work from sick leave.

25. Moreover, had she remained in employment she would not have had the stress of this contested litigation. As this has caused her health to deteriorate it is reasonable to infer that in the absence of a contested tribunal hearing the claimant would have been far better, in her wellbeing. Remaining in employment, and with the real prospect of repairing her relations with her managers and her employer, we are satisfied that, but for the bringing of this contract to an end by the claimant, she would have returned to work from sick leave and continued in the employment of the respondent for the foreseeable future. She had worked there for ten years and there was no reason to consider that employment would have come to an end within the next few years. That distinguishes the circumstances from the case of **Triggs**. In that case, Ms Triggs' earning capacity had been irreparably damaged as a consequence of the breaches of contract which led to her resignation. We do not regard the claimant's earning capacity as having been comparably damaged, irredeemably. Had she not resigned, she would have recovered her working and earning capacity.

26. We therefore consider whether any deduction should be made from what would have been a continuing remuneration had the employment continued. Mr Boyd submits that because the claimant's illness is significantly contributed to by the litigation, we should discount any continuing loss of earnings. He submits because the bringing of the claim and the proceedings is not action attributable to the employer in consequence of her dismissal, within the meaning of section 123 of the ERA, the continuing losses are not recoverable. We do not agree. Reliance on the Court of Appeal authority of **Triggs** is not apposite**.** This submission is an invitation to find that by bringing and pursuing the proceedings the claimant has taken an act which has broken any causal connection between the continuing losses and the dismissal. We agree with the argument of Mr Cook that that would be a remarkable proposition. The only avenue available to the claimant to obtain redress from the unlawful conduct of her employer in unfairly dismissing her was to resort to a claim in the employment tribunal. We do not consider that can properly be characterised as a new act which has broken the chain of the losses arising from the dismissal insofar as losses are attributable to actions taken by the respondent. The effect of the proceedings having adversely affected the claimant's health is no more than an example of a tortfeasor having to take its victim as it finds her. Nor do we think it could be argued, and in fairness to Mr Boyd he did not put it this way, that the bringing of the proceedings was an unreasonable failure to mitigate loss.

27. In the circumstances we are satisfied that the claimant's case that the dismissal has caused her to have a substantial continuing loss of earnings to date and in the future is a good one.

28. We are unable to say when the claimant will recover. The prospects are uncertain but not bleak. The implication of Dr Higgins' opinion is that this litigation's conclusion will assist Ms Wright's recovery.

29. Loss of earnings from 11 October 2016 to 22 June 2018, being 88 weeks at a net income of £538.85, give rise to a past loss of £47,418.80. Future losses, an increase for failure to comply reasonably with the ACAS Code of Practice, and what sums should be added for pension loss are academic, because that sum already exceeds the statutory cap.

30. The compensatory award is £41,462.75. We apportion £500 of it to reflect the loss of statutory rights. That sum is taken into account in evaluating the prescribed element. The prescribed element is that sum that the respondent must retain in order to account to the Secretary of State for such sums as have been certified as received by the claimant by the Secretary of State in the form of Employment Support Allowance pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996. Once the respondent has accounted to the Secretary of State for the DWP for such ESA, which it is certified the claimant received, it shall then pay the balance to the claimant in satisfaction of this judgment. The sum which becomes immediately due and payable is £7,685: being the basic award and that part of the compensatory award relating to loss of statutory rights. The sum of £40,962.75 is to be retained and the balance paid after that exercise is concluded.

Employment Judge D N Jones

Date 8 August 2018