



EMPLOYMENT TRIBUNALS

Claimant

Miss E Popplewell

v

Respondent

AS&T Limited

(in voluntary liquidation)

Heard at: Leeds

On: 17 & 18 September 2019

Before: Employment Judge O'Neill

Members: Mr W Roberts

Mr D W Fields

Appearance:

For the Claimant: In person

For the Respondent: Did not attend

JUDGMENT having been sent to the parties on 20 September 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Claims

The claimant has made the following claims

- (a) Unfair dismissal (section 98)
- (b) Unfair dismissal (PID section 103)
- (c) Detriment (PID) section 47)
- (d) Failure to provide written reasons (section 92)

The section numbers all relate to the Employment Rights Act 1996

2. Issues and Law

Public interest disclosure

- 2.1. Did the claimant make one or more protected disclosures under ERA section 43B:

- 2.1.1. On 20 October 2018 by text message, informing Rebecca Russett of Down to Earth Accountancy of her concerns about the potential theft of monies due to certain Royal Mail drivers, on the basis that they were all owed back pay but the respondent intended to withhold payment from drivers no longer on its books?
- 2.1.2. On 22 October 2018 by telephone, informing Rebecca Russett of Down to Earth Accountancy of her concerns on the above same basis?
- 2.1.3. On 8 November 2018 by telephone, informing Kerry Jacques, the respondent's HR contact at Royal Mail, of her concerns on the above same basis?
- 2.2. In any or all of the above, was information disclosed which in the claimant's reasonable belief tended to show one of the following:
 - 2.2.1. A criminal offence of theft was likely to be committed?
 - 2.2.2. The respondent was likely to fail to comply with a legal obligation to which it was subject, namely to pay certain Royal Mail drivers their back pay?
 - 2.2.3. That any of those things were likely to be concealed, as the claimant had been advised by Lauren Guy, one of the respondent's managing directors, in around August 2018?
- 2.3. If so, did the claimant reasonably believe that the disclosure was made in the public interest? The claimant maintains so because it involved the theft of monies due to a number of Royal Mail drivers.
- 2.4. If so, was that disclosure made in accordance with section 43C(1)(b)(ii) to another person other than the employer who had legal responsibility for the failure? The claimant currently maintains that Rebecca Russett amounted to such a person.
- 2.5. If not, according to section 43G ERA was it made in circumstances where:
 - 2.5.1. it was made other than for personal gain, and
 - 2.5.2. the claimant reasonably believed that the information disclosed and any allegation contained in it were substantially true, and
 - 2.5.3. it was reasonable for her to make the disclosure, and where:
 - 2.5.4. the evidence would be destroyed or concealed by the respondent if the disclosure was made to them?
- 2.6. In the alternative, according to section 43H ERA, did the disclosure relate to an exceptionally serious failure? If so,
 - 2.6.1. did s/he reasonably believe that the information disclosed and any allegation contained in it was substantially true, was it made other than for personal gain, and

2.6.2. was it reasonable in all of the circumstances to make the disclosure?

ERA section 47B detriment

2.7. If protected disclosures are proved, was the claimant, on the ground of any protected disclosure, subjected to any detriment by the respondent by:

2.7.1. suspending her, and/or

2.7.2. subjecting her to a disciplinary meeting in November 2018?

2.8. If the claimant's employment status is in dispute, the next issue will be: was the claimant an employee or a worker?

2.9. If the claimant was a worker, did the respondent subject her to a detriment by terminating her contract on 21 November 2018?

ERA sections 103A and 98 unfair dismissal

2.10. If the claimant was an employee, was the making of any proven protected disclosure the principal reason for her dismissal?

2.10.1. Did the claimant have at least two years' continuous employment?

2.10.2. If not, the burden is on the claimant to prove that the reason or the principal reason for the dismissal was the protected disclosure(s).

2.11. If the claimant had at least two years' service:

2.11.1. Has the claimant produced sufficient evidence to raise the question as to whether the reason for the dismissal was the protected disclosure(s)?

2.11.2. Has the respondent proved a potentially fair reason for the dismissal? The respondent says that the claimant was dismissed for a reason relating to her conduct. It must therefore prove that it had a genuine belief in the claimant's misconduct and that this was the reason for dismissal.

2.11.3. If the claimant was dismissed for a potentially fair reason, was the dismissal fair or unfair in accordance with ERA section 98(4)? Namely, did the respondent hold that belief in the claimant's misconduct on reasonable grounds and after sufficient investigation, and was the decision to dismiss a fair sanction? The claimant maintains that her dismissal was unfair for the reasons as set out at paragraphs 35.1 to 35.7 of the grounds of her claim.

2.11.4. If the claimant was unfairly dismissed, was there a chance that the claimant would have been fairly dismissed at some point in any event?

2.11.5. Did the claimant contribute to her dismissal?

Other claims

2.12. If the claimant was unfairly dismissed, did the respondent fail to provide written reasons for her dismissal?

3. **Preliminary Matters**

- 3.1. The respondent accepted at paragraph 5 of the amended grounds of resistance that the claimant was an employee
- 3.2. The claimant in the amended grounds relies on Rebecca Russett under section 43C(1)(b) and section 43(g) and (h)
- 3.3. The claimant also relies on Kerry Jacques in respect of section 43(g) and (h)

4. **Evidence**

The Tribunal have before it

- (a) a bundle of documents paginated and indexed
- (b) The claimant provided a written statement which was taken as read and gave oral testimony
- (c) No witnesses appeared for the respondent who did not appear, were not represented and produced no witnesses having gone into creditors voluntary arrangement (yet to be approved). The creditors meeting is apparently set for 27 September 2019.

5. **Findings of fact**

- 5.1. Having considered all of the evidence both oral and documentary the Tribunal makes the following findings of fact on the balance of probabilities which are relevant to the issues to be determined. Where we heard or read evidence on matters on which we make no finding or do not make a finding to the same level of detail as the evidence presented to us that reflects the extent to which we consider the particular matter assisted us in determining the issues. Some of our findings are also set out in our conclusions below in an attempt to avoid unnecessary repetition. Conversely, some of our conclusions are set out in the findings of fact adjacent to those findings.
- 5.2. The Tribunal found the claimant to be a straightforward and credible witness. We noted in particular that she did not seek to embellish evidence or exaggerate. She was, for example, modest in her evidence relating to detriment and injury to feelings. She volunteered that she had not requested written reasons for the dismissal.

In the circumstances where there is a conflict between the evidence of the claimant and the arguments put by the respondent in the ET3 we prefer the claimant.

6. **Respondent's status**

- 6.1. The claimant was employed by the respondent as a recruitment consultant. The respondent is a small limited company which operates a recruitment agency, it is run by two principal Directors Mr & Mrs Guy. The company has now gone into creditors voluntary arrangement.
- 6.2. The claimant says she was employed from 6 October 2016 to 21 November 2018. This is disputed by the respondent who contends that

there was a short gap in the service which broke the continuity between 26 May 2017 and 28 June 2017.

- 6.3. The claims are set out above and the importance of continuity is two-fold. In respect of unfair dismissal under section 98 ERA the claimant must show two years' continuous service to qualify. In respect of unfair dismissal under section 103A (PID) the burden is on the claimant to prove the reason for the dismissal or the principle reason was protected disclosure if she has less than two years' service. Otherwise, it is the respondent who must show the reason.
 - 6.4. The Tribunal accepts the evidence of the claimant that in May and June 2017 she suffered a double bereavement, losing both her Grandmothers in close succession. This triggered an episode of depression during which the claimant was granted a period of bereavement leave followed by a period of sick leave. The Directors of the respondent were very sympathetic at the time and when the claimant indicated that she was contemplating resignation they persuaded her to reconsider her position and if necessary have more time off work. In the event she had a period of a couple of weeks working from home part time until she was able to return full time. The text messages between the parties support the claimant's account and we find that there was no break in service.
 - 6.5. In the circumstances we find that the claimant was continuously employed from 6 October 2016 to 21 November 2018 and had two years' continuous service.
 - 6.6. The Tribunal finds that the effective date of termination of 21 November 2018 which was the date of the meeting at which the respondent Director Paul Guy informed the claimant that she would be dismissal for gross misconduct.
7. Events leading to dismissal
- 7.1. The claimant contends that the reason for her dismissal was because she made a Public Interest Disclosure.
 - 7.2. The respondent arranged placement of temporary workers with various employers including the Royal Mail. In February 2018 the Royal Mail awarded the staff a retrospective pay rise. That pay rise also applied to staff placed by the respondent with Royal Mail.
 - 7.3. The figures relating to back pay were not agreed until August 2018. The claimant was instructed by the Directors that payroll information of only the staff currently on the books of the respondent would be processed to the effect that only those currently on the books would receive the back pay. However, Royal Mail was intending to send to the respondent sufficient sums to cover the back pay of all those who had been on the books in the relevant period.
 - 7.4. The claimant genuinely believed as a result of an email in July from GRI (the intermediary company) that all relevant staff were legally entitled to receive the back pay (including those who were no longer on the respondent's books).
 - 7.5. The claimant contends that when the time sheets were received on or about 6 August 2018 it was clear that the back pay was also due to the

staff no longer on the books and she raised that matter with the Directors Mr & Mrs Guy. Mr Guy said that they did not intend to make those payments and Mrs Guy said, "*we aren't paying them, we are robbing that money*". By that comment the claimant understood that the Directors intended to divert money, due to the employees no longer on the books, for the benefit of the company.

- 7.6. In the ET3 the conversations are disputed by the respondent whose Directors were not present to give evidence. We found the claimant to be a straightforward witness and did not appear prone to exaggeration and we believe her account of these conversations.
- 7.7. We further believe her account of the conversation of 2 November 2018 which she covertly recorded to the effect that Mr Guy admitted regarding the money to be paid over to the company by Royal Mail to cover the costs of back pay was in his words a windfall which "*has plugged up the fucking hole for the time being*". The Tribunal understood from the context that this meant the hole in the company's finances.
- 7.8. The claimant became increasingly anxious about what she perceived to be the respondent's plan to divert into the respondent's funds monies which the Royal Mail was about to pay to them to cover back pay and thus deprive members of staff formerly employed of the sums properly payable to them. Whilst Mr & Mrs Guy, the Directors were away on holiday the claimant decided to contact the company's accountant Rebecca Russett.
- 7.9. She did so because the claimant believed as the accountant Miss Russett had a responsibility for ensuring that the books were kept in good order and conformed to legal requirements and the claimant was afraid that some criminal responsibility might fall on her, the claimant.
- 7.10. The claimant contacted Miss Russett by text dated 20 October 2018, the Tribunal has read the text and although it is written in colloquial language it alerts the accountant of the wrongdoing that the claimant suspected.
- 7.11. The accountant (who is an independent accountant and not an 'in house' accountant) contacted the claimant by telephone on 22 October 2018 during which the claimant repeated her concerns. The accountant reassured her to the extent that if there was any wrongdoing responsibility would fall on the Directors and not on the claimant. The accountant gave no reassurances to the effect that there was no wrongdoing taking place at all.
- 7.12. Mr Guy visited the claimant in her office on 2 November 2018 on his return from holiday. He was furious with her about the backpay issue and made a number of remarks including those set out in paragraph 13 above. On the following day (3 November 2018) he sent the claimant home early and on 5 November 2018 he suspended her. The pleadings reveal that he had been informed by another member of staff (Melanie) that the claimant had raised concerns about the backpay with other members of staff.
- 7.13. A disciplinary meeting was set for 14 November and a letter was sent dated 13 December 2018 (which was a typo we assume for 13

November 2018) setting out the charges as loss of trust, accessing data, deleting data and breach of confidentiality.

- 7.14. It is clear from the meetings which followed on 14 November and 21 November 2018 which were taped by consent of the party's that all these matters were inextricably linked to the claimant's protected disclosures.
- 7.15. On 8 November 2018 during her suspension the claimant also informed her HR contact at Royal Mail Kerry Jacques about her concerns. It seemed to the claimant that it was an HR issue involving backpay and a misuse of the money that the Royal Mail had sent or intended to send to the respondents to cover the backpay and Miss Jacques was the most senior person at Royal Mail known to the claimant.
- 7.16. There was an initial meeting between the respondent Directors and the claimant on 14 November 2018 when the company failed to disclose the details of the allegations or the documents retrieved from the system by Cloud Ten. The meeting was adjourned for further investigation but the results of that investigation were not shared with the claimant.
- 7.17. The meeting was resumed on 21 November 2018. By agreement it was taped, the claimant's solicitor has transcribed the tape.
- 7.18. The Tribunal note in particular the following extracts from the transcript:

"Elaine I have looked into what we have discussed and listened to the transcript two or three times and looked over further evidence in detail. Looking at everything I have looked at and everything I have seen and things that we discussed the major things we discussed, the deleting of vetting forms, DBS stage one and two altered, DBS letters sent cannot be traced. The fact that I asked you on text message when we first suspended you not to tell anybody and you went and told Royal Mail puts you then in repute (sic) and so then Elaine you are dismissed under gross misconduct".

"What I have in front of me is data protected so it can't be given to you but if you go to ACAS or an outside source by all means do that and I am happy to show them all the evidence provided"

"Well look I will end this now and then I want to know your reasoning why you thought you had to do this Elaine but obviously we're not going to get into it we are going to stop the call now so that's it Elaine you are sacked under gross misconduct okay if you want to take it further by all means do I've got evidence I can't give you the evidence that's where we are today"

"Elaine admits to sending Royal Mail emails to the LD Mail address to cover herself to say that staff were not being paid that is gross misconduct Elaine so I have got you banged to rights"
8. The Tribunal are in no doubt and conclude that the real reason for the dismissal was the fact that the claimant had made the disclosures. We make that finding because
 - (a) the timing of the suspension and disciplinary proceedings,
 - (b) the so-called grounds of dismissal and the charges put in the letter calling her to the disciplinary meeting are all inextricably linked to the disclosures

(c) the background of the comments made by Mr & Mrs Guy on 6 August 2018 and by Mr Guy on 2 November 2018,

(d) the record of the dismissal meeting which we have extracted above,

(e) as part of the dismissal process the respondent secured a statement from the accountant Rebecca Russett.

9. The claimant sought to appeal the dismissal and we accept that she was told a reason of dismissal was because she had contacted Royal Mail during her suspension as set out in her appeal letter of 22 November 2018. The respondent ignored her request for an appeal.
10. The claimant was never issued with a letter of dismissal although she was promised one. However, she frankly admits that she never made a formal request for written reasons for her dismissal.

11. **Conclusions**

11.1. The Tribunal finds that the claimant made protected disclosures

- (a) On 20 October 2018 by text message to Rebecca Russett (the accountant).
- (b) On 22 October 2018 in a telephone conversation with the accountant
- (c) On 8 November 2018 to Kerry Jacques the HR Manager with Royal Mail.

11.2. The information provided in each case was to the effect that

- (a) This was a possible fraud on Royal Mail and the former employees entitled to the backpay
 - (b) This was a potential failure to pay the backpay properly payable under the employees' contracts of employment and as such was a breach of a legal obligation.
 - (c) That there was a possible risk of concealment given the remarks of Mrs Guy to the effect that it would be better to pay off one driver in order to keep him quiet and not to open a can of worms and her preparation of an alibi based on the data protection act should a challenge be made.
12. The Tribunal are in no doubt that the claimant was genuine in her belief that this was in the public interest involving the diversion of funds and possible fraud of a considerable amount of money paid by Royal Mail to the respondent for a specific purpose namely the backpay of a significant number of employees.
 13. Rebecca Russett was not an employee of the company, she was an accountant with Down to Earth Accountancy Limited who undertook the accounts for the respondent company. However, it was her job to prepare the company accounts and she had a professional duty to raise the alarm in the event of misfeasance in the finances. However, we are not satisfied that in this context that Rebecca Russett has any legal responsibility such as to be a person falling under section 43C(1)(b).

14. Nevertheless, we feel that she was a person to whom it was reasonable for the claimant to make the disclosure under 43G and in that context we specifically find that
 - (a) the claimant was not acting for personal gain,
 - (b) the claimant reasonably believed that her allegations and the information she was imparting were true. She had seen the documents relating to the backpay calculations, she had heard the conversations of Mr & Mrs Guy indicating their intentions in respect of diverting the money and depriving the drivers of it. There was a risk for the reasons set out above that the evidence might be destroyed or concealed.
15. It was reasonable for the claimant to have made the disclosure to the accountant who she knew and trusted and who she understood had a professional public duty in respect of financial misconduct in a company whose books she prepared.
16. This was a serious matter and there was a risk of the money being lost if it was being put to use 'plugging the hole' in the company finances.
17. There was no internal company whistleblowing procedure to follow and the claimant's previous efforts to raise it with the Directors had been rebuffed on 6 October and on 2 November 2018 had been met with an angry tirade of wholly inappropriate language by Mr Guy. As such we find that the requirements of section 43G are met.
18. Likewise, we find on the same or similar reasons that the disclosure made to Kerry Jacques of Royal Mail meets the requirements of section 43G and that Kerry Jacques was the appropriate person to report to given that she was the most senior HR person at Royal Mail known to the claimant. This was a matter of backpay which fell in her remit as HR Manager and the funds which the claimant believed would be diverted emanated from Royal Mail.
19. The Tribunal finds that the matter was serious such as the requirements of section 43G. We do not find that it meets the criteria of exceptionally serious which is contemplated for rare and exceptional case of extreme severity under section 43H.
20. The Tribunal is satisfied that the claimant suffered a detriment in that she was suspended and this caused the claimant considerable stress such that she had to consult her Doctor who signed her off work, it isolated her from her colleagues. It cast doubt on her reputation, the respondent having in breach of the duty of confidentiality, made critical remarks about the claimant to her colleagues and customers. The claimant was fearful throughout the suspension of being dismissed.
21. However, the claimant was soon able to secure a new position in a similar organisation and the period of her suspension was relatively short as was the two weeks sign off by reason of sickness by the G.P who did not prescribe medication. In the circumstances although the Tribunal agrees that an award for injury to feelings should be made we put it at the middle of the lower band of *Vento* and set it at £3,000 before any uplift.
22. The Tribunal finds that the real reason for dismissal is the protected disclosures to Rebecca Russett and Kerry Jacques. The claimant has provided sufficient evidence to raise the question particularly given the transcript of the dismissal

hearing. The respondents have not proved that the real reason was a potentially fair reason relating to her conduct. The matter about which they say they relied included the acknowledgment that the claimant had raised matters with Royal Mail.

23. The dismissal is automatically unfair under section 103.
24. The Tribunal make no finding that the claimant would have been dismissed fairly at some point or that she had contributed to her dismissal. However, her claim for continuing loss is limited to two and a half weeks and we note that the company has gone into a voluntary arrangement.
25. The Tribunal find that the dismissal was procedurally unfair and inconsistent with the ACAS Code in that
 - (a) the real reason was the protected disclosure and her dismissal was predetermined by the respondent.
 - (b) the investigation was flawed in that the results and the documents were not shared with the claimant.
 - (c) the claimant was denied the opportunity of an appeal hearing.
 - (d) it was evident from the note of the dismissal meeting that the respondent's mind was made up and we note that they did not even adjourn before announcing their decision.
26. In the circumstances the Tribunal apply and uplift of 25% for failure to apply the ACAS Code.

Summary

27. The claimant was an employee with 2 years' continuous service such as to qualify to bring an unfair dismissal claim under section 98
28. In those circumstances the claimant is required under section 103 to show only that she has produced sufficient evidence to raise a question as to whether the reason for the dismissal was a protected disclosure and we find that she has.
29. In that event the burden passes to the respondent to show that the real reason was a reason (in this case) related to conduct. We find that the respondent has not done so. We find that the real reason for dismissal was because the claimant had made protected disclosures.
30. We find that the protected disclosures were made under section 43G to Kerry Jacques and to Rebecca Russett and that the claimant meets the requirements of that section in that this was a serious matter, she made the disclosure not for personal gain, it was reasonable that she made the disclosure to the accountant and to the HR Manager Royal Mail, there was a risk that evidence would be destroyed or concealed, the claimant genuinely and reasonably believed that her allegations and information were true and amounted to a criminal offence and/or a failure to meet a legal liability.
31. We find that the suspension was a detriment for the reasons we have given above but in respect of injury to feelings the award should be set at £3,000 before the uplift.

32. We find that the awards should be uplifted by 25% for failure to follow the ACAS Code.
33. We calculate the award of compensation as set out below.

Calculation

Key information

Basic Pay £299.02
 Pension Contributions annually £374.40
 Contractual notice period one month
 Date of birth of claimant 4 February 1970
 Age at EDT 48
 Period of Service 6 October 2016 to 21 November 2018
 Total continuous service two years
 Date started new employment 11 December 2018
 Net weekly pay in new employment £340.13

Basic Award

1.5 x 2 x £360	£1,080.00
Uplift at 25%	£270.00
Total Basic Award	<u>£1,350.00</u>

Compensatory Award

Loss of wages to date of hearing 2.6 weeks	£790.19
Loss of statutory rights	£300.00
ACAS uplift 25%	£272.00
Total	<u>£1362.00</u>

Injury to feelings – Detriment

Protected disclosure	£3,000.00
ACAS uplift 25%	£750.00
Total Compensation for detriment	<u>£3,700.00</u>

Total compensation unfair dismissal

Basic	£1,350.00
Compensatory	£1,362.00
Detriment	£3,750.00
Total	<u>£6,462.00</u>

Employment Judge O'Neill

27 September 2019

Sent to the parties on:

30/09/2019