



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss S Najjuma

v

B & R Residential Lettings Ltd

Heard at: Watford

On: 12 September 2019

Before: Employment Judge Hyams,
sitting alone

Appearances:

For the Claimant: In person

For the Respondent: Mr Mark Humphreys, of counsel

RESERVED JUDGMENT ON A PRELIMINARY ISSUE

- (1) The claim of a breach or breaches of contract is dismissed on its withdrawal by the claimant.
- (2) The claim of unfair dismissal for making a protected disclosure within the meaning of section 43B of the Employment Rights Act 1996 has no reasonable prospect of success and is accordingly struck out.

REASONS

Introduction

- 1 In these proceedings, the claimant claims that she made a protected disclosure within the meaning of section 43A of the Employment Rights Act 1996 (“ERA 1996”) and that she was dismissed principally because she made that

disclosure. Thus, she claims that her dismissal was automatically unfair within the meaning of section 103A of the ERA 1996.

- 2 The claimant also claims damages for breach of contract. However, by the time of the hearing before me on 12 September 2019, the claimant accepted that she had been paid all her contractual entitlements and during the hearing she withdrew her claim of breach of contract.
- 3 The hearing of 12 September 2019 was listed for the determination of the respondent's application for the striking out of the claim on the basis that it had no reasonable prospect of success. In the circumstances, the application turned on the question whether or not the claimant had made a protected disclosure.
- 4 I heard oral evidence from the claimant and Mr Mark von Grundherr, a director of the respondent, and I was referred to documents in the bundle put before me. I was therefore able to determine as a matter of fact what the claimant communicated to the respondent before her dismissal.

The claimant's responsibilities, her written communications to the respondent on which she relied as showing that she had made a protected disclosure within the meaning of section 43A of the ERA 1996, and her oral evidence about what else she said to the respondent, on which she also so relied

- 5 The claimant was employed by the respondent as a "Lettings Coordinator" at the respondent's Highgate office from 14 August 2017 to 6 October 2017, when she was dismissed by being told that her services were no longer needed. It was her case that that dismissal occurred because she had refused to complete fire risk assessment ("FRA") forms and that her communication of her initial unwillingness and then her refusal to complete those forms amounted to one or more protected public interest disclosures. The respondent had several offices, and the claimant was asked to do work on (but not, it was the respondent's case, complete) FRA forms for those other offices as well as the Highgate office. The claimant's line manager was the Highgate office Manager, Mr Ivan Hrissimov.
- 6 There was in the bundle before me a short series of emails which contained at least some of the claimed public interest disclosures of the claimant. They were at pages 233, 236, 242 and 266 of the hearing bundle. (Any reference below to a page is to a page of that bundle.) The first of those emails had to be read against the background of paragraphs 4-6 of the claimant's witness statement, which were as follows:

- '4. On Friday 29th September I received a call by Kristy Warren [i.e. Mr von Grundherr's Personal Assistant] informing me that she'll be sending me an email for me to complete a simple task & that it needs to be completed as soon as possible as Marc the director [i.e. Mr von Grundherr] needs it.

5. She said “it’s just copying and pasting”, but she failed to explain or address what type of document it was to me.
 6. She shortly sent me an email with fire risk assessment documents for “Beaufort Park Office”.’
- 7 The communications in the emails at pages 233, 236, 242 and 266 were in the following terms:

7.1 On 29 September 2017 at 15:53, the claimant wrote to Ms Warren, with the subject “RE: Document for Typing - Fire Risk Assessment”:

“Hi Kristy,

Just wanted to double check that this was for me as I’m in the Highgate office?

Thank you”

7.2 Six minutes later, Ms Warren replied:

“Hi Sarah,

Thank you for checking. It is fine as most of the information will be in the report that was attached. Any missing items will be checked.

Kind regards”

7.3 On the same day, at 16:48, the claimant wrote to Ms Warren:

“Hi Kristy,

Tried to fill out as much as I could with what I could understand, this is all quite new to me.

But please do let me know if it’s okay, and maybe what it will look like when it’s complete so I can have a better understanding for future references.

Thank you”

7.4 At 17:23 on that day, Ms Warren replied:

“Hi Sarah,

Thank you for updating the report.

We still need to add from 3.4 and Steps 4 and 5 to it so I can copied it

[sic] across to new document without all of the tricky formatting if you can add the information for these parts for me.

Kind regards”

7.5 On 4 October 2017, the claimant wrote to Ms Warren:

“Hello Kristy,

Hope you are well.

I am unable to complete the last 2 steps of the FRA, as mentioned in my prior emails I have completed the FRA to my greatest efforts (The attached I tried to do more, however whether it's correct I am not certain).

As mentioned to yourself and Marc, I don't entirely know what I am doing, especially as FRA are not something I have ever done in the past, as well as been taught/trained to a basic standard on the topic to fill out the form accurately.

To your request, I have highlighted the parts I cannot complete.

Maybe this needs to be completed by a manager or someone more qualified, as the booklet is not much help to me.

Kind regards”

7.6 On the next day, 5 October 2017, Ms Warren replied:

“Hi Sarah,

Thank you for sending these through. We really appreciate you helping us with them.

I have attached the FRA for our Hampstead and Fulham Reach offices. They were completed by different company and may have some of the information that you are missing for the BP and Highgate ones.

Could you please also update the unformatted FRA for these offices?

Kind regards”

7.7 On 6 October 2017, at 12:56, the claimant wrote:

“Dear Marc and Kristy,

As per our previous phone conversation, as I stated, I am more than happy to help and support where I can. Contrarily, I would appreciate my wishes be respected when I say that I am unable to take a task further, and if you could pass it on to someone more knowledgeable in the given area.

Kind regards”

- 8 The claimant had made a witness statement, of which she had not sent a copy to the respondent in advance of the hearing. However, the respondent was able to deal with her evidence in it, and she was cross-examined on what she said in it. One of the reasons why the claimant was unhappy about being asked to work on, or complete, the FRA form that she was first sent was that it related to the respondent’s Beaufort Park Office, and she had not been to that office. However, she acknowledged that she was not told that she need not, or should not, go to that office before doing what she could by way of completion of the form for that office.
- 9 The claimant also accepted that she at no time said to any member of the respondent’s staff (including Mr von Grundherr) that:
 - 9.1 she thought that it was wrong that she was being asked to complete the FRA forms;
 - 9.2 she had wrongly been asked to complete the form for, for example, the Beaufort Park Office; or
 - 9.3 requiring her to complete the forms was putting anyone’s safety at risk.
- 10 The claimant said that she said to Mr von Grundherr on the telephone on 6 October 2017, before she was dismissed (she was dismissed by Mr Hrisimovats 17:20 on that day) that she was not comfortable about being required to complete the FRA forms in case “something happened”, i.e. there was a fire at the location to which the form related, and the form was later scrutinised in the light of that fire. The claimant said that this was said by her against the background of the notorious fire at the Grenfell Tower, which had only recently occurred.
- 11 The claimant’s witness statement contained this passage about what she had said to Mr von Grundherr on 3 and 6 October 2017:
 - “9. On Tuesday 3rd October Marc the director came to my office to have a meeting with the Lettings manager Ivan and the negotiator Soolmaz.
 10. He asked me how the fire risk assessments are going and in response I told him I don’t understand what I’m doing. He then asked whether Kristy

had sent me the fire risk assessment forms for the other offices, and in response I told him no she has not and I think the task should be completed by someone more knowledgeable, which he then told me there isn't, can't I just use the Internet to help me complete it. By this point I could see the conversation was going around in circles.

11. I stated multiple times within my emails, phone calls to Kristy Warren and Marc Von Grundherr as well as one face to face encounter with Marc, from Friday 29th September 2017 to Friday 6th October 2017, that I feel someone more knowledgeable in the area concerning Fire Risk Assessments should complete the task.
 12. Especially after Kristy had sent me the fire risk assessment for Highgate office which had a tick box format, and was not able to be copy and pasted to the new fire risk template provided which required more detail.
 13. She then told me on the phone that I should change the address from the Beaufort Park Office to the Highgate Office as our offices are similar. I did this hesitantly and sent her the email. After this I was adamant to not do anymore.
 14. On Friday 6th October I had a phone conversation with Marc, and Kristy, his personal assistant, after they had sent me more fire risk assessment forms from other offices, expressing my whistleblowing concerns & reasons for not wanting to carry out the task, which was met with a threat by Marc to either do the task or leave, which I did not submit to either.
 15. I followed this with an email reiterating what I had said over the phone about my concerns in completing the task at hand."
- 12 Mr von Grundherr's evidence was that he had spoken to the claimant about the FRA forms twice: once on 3 October 2017 (in person, and briefly) and once on 6 October 2017, on the telephone. He said that the claimant had said to him on 3 October 2017 that she had not made progress with the FRA forms as she did not understand the task, having never done it before, and that he had said to her that she should search the internet for guidance on how to complete the forms, which was what Ms Warren had done. It was his evidence that there was very little other work for the claimant to do and that he had said that she could spend as much time on the task as she needed to.
- 13 Mr von Grundherr did not accept that the claimant had said anything about not wanting her name to be on the forms in case there was subsequently a fire and the form was scrutinised. His evidence about the telephone conversation on 6 October 2017 was in paragraph 11 of his witness statement, which was in these terms:

“On 6th October 2017 Ms Warren transferred a call to me from the Claimant who told me that she still had done nothing and that she was unwilling to do the task because she did not understand it. I responded that as previously stated she should look up what was required to complete the task on the Internet. I informed the Claimant at the end of the call that there was little other work for her to do. She did not tell me any information that suggested she felt there was a health and safety risk or mention a health and safety risk at all.”

- 14 There was in the bundle a copy of Her Majesty's Government's guidance on completing fire risk assessments for offices and shops. It was lengthy (it was pages 44-188 of the bundle), and it was the “booklet” to which the claimant referred in the email set out in paragraph 7.5 above. There was a copy of the FRA for the respondent's Beaufort Park office in the bundle at pages 189-232. At pages 239-241, there was a copy of a document entitled “Risk Assessment – Record of significant findings” for that office. That was, apparently, the “unformatted FRA” to which Ms Warren referred in the email set out in paragraph 7.6 above.

The relevant law

- 15 Section 43B of the ERA 1996 provides:

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

...

(d) that the health or safety of any individual has been, is being or is likely to be endangered’.

- 16 I could find no case law that assisted my consideration of whether or not the claimant had made a protected disclosure within the meaning of section 43B, and Mr Humphreys referred me to no case law that might have done so. I did, however, refer the parties to and read with care paragraphs CIII[17]-[21.01] of *Harvey on Industrial Relations and Employment Law*, concerning what is a “whistleblowing” disclosure.

The parties' contentions

- 17 The claimant's case (as she confirmed to me during submissions) was that she had been told to complete a series of FRAs, she was not competent to do so, she had said so, and that in doing so she had said something which tended to show that the health and safety of persons present at any of the respondent's offices

for which she completed a FRA was likely to be endangered.

18 It was the respondent's case that what the claimant had said did not amount to a protected disclosure within the meaning of section 43B of the ERA 1996 since all that the claimant had in fact said was that the FRA forms should be completed by someone other than her, but that in any event it could not be said in the circumstances that the claimant could have reasonably believed that anyone's health and safety was likely to be endangered because

18.1 Ms Warren had written in the email set out in paragraph 7.2 above that "any missing items" would be checked; and

18.2 the claimant was never told that she would have to sign the forms, and all she was asked to do was work on their content.

A discussion

19 If the claimant had said that she would complete the FRAs, or contribute to their content by herself assessing at least some of the risks in question with the result of such assessment(s) being included in the formal FRAs, and that as a result the health and safety of one or more persons at the respondent's offices was likely to be endangered, then in my judgment that could have been a protected disclosure within the meaning of section 43B of the ERA 1996. Whether it would have been would have depended on whether or not the claimant could reasonably have believed that the health and safety of one or more persons was as a result of her contributing to the FRAs likely to be endangered. That in turn would have depended on the extent to which what she contributed would have been reviewed and if thought necessary revised by someone else.

20 However, if all that the claimant did was to say that she was not going to do the work as she did not feel competent to do it, and that someone else (who was competent) should do it, then in my judgment she could not reasonably have believed that what she was saying tended to show that the health and safety of any individual was likely to be endangered.

My conclusions on the facts and the result of the application of the law to those facts

21 Having heard and seen both the claimant and Mr von Grundherr give evidence, but also taking into account the facts that

21.1 the claimant did not include in her witness statement the evidence to which I refer in paragraph 10 above, namely that she said to Mr von Grundherr on 6 October 2017, during her telephone conversation with him of that day, that she was not comfortable about being required to complete the FRA forms in case "something happened", i.e. there was a

fire at the location to which the form related and the form was later scrutinised in the light of that fire,

21.2 there was nothing to that effect in the claimant's email of 6 October 2017 set out in paragraph 7.7 above,

21.3 as recorded in paragraph 9 above, the claimant at no time said to anyone acting for the respondent that

21.3.1 she thought that it was wrong that she was being asked to complete the FRA forms;

21.3.2 she had wrongly been asked to complete the form for, for example, the Beaufort Park Office; or

21.3.3 requiring her to complete the forms was putting anyone's safety at risk,

I concluded that what the claimant said to Mr von Grundherr and Ms Warren about the FRA forms and the work that she was being asked to do on them was fully and accurately conveyed in the email sequence set out in paragraph 7 above.

22 In that sequence there was nothing said by the claimant that fell within the definition of a qualifying disclosure stated in section 43B of the ERA 1996. That was because the claimant was saying in that sequence only that she did not feel competent to assess fire risks and that as a result someone else should do the work of compiling information to be put in the FRAs.

23 That was sufficient to determine the case: the claim in my view could not succeed given that conclusion. However, for the sake of completeness, I considered what the position would have been if what the claimant had said to Mr von Grundherr on 6 October 2017 was as she now claimed. It was clear to me that what she was being asked to do was to put into a document (which was described as "unformatted": see paragraphs 7.6 and 14 above) a set of "significant findings". Those findings were intended by Mr von Grundherr to be made by reference to the central government guidance to which I refer in paragraph 14 above, which, as noted there, was extensive. What I record in paragraph 10 above the claimant said she said to Mr von Grundherr on 6 October 2017 was in my view to the same effect as her email of that day set out in paragraph 7.7 above: she was saying that she did not feel able (i.e. sufficiently competent to do the job reliably) to contribute anything to the content of the FRAs, and as a result she was not going to do so.

Outcome

24 For those reasons, I concluded that the claim of unfair dismissal contrary to section 103A of the ERA 1996, namely that the claimant was dismissed principally because she had made a protected disclosure within the meaning of section 43B of that Act, could not succeed. In my judgment it therefore had no reasonable prospect of success, which meant that it had to be struck out under rule 37(1)(a) of the Employment Tribunals Rules of Procedure 2013.

Employment Judge Hyams

Date: 1 October 2019

Sent to the parties on:

1 November 2019

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For the Tribunal Office