THE EMPLOYMENT TRIBUNALS

Claimant: **Mr J Malcolm**

Respondent: **Delta Academies Trust**

AT A PRELIMINARY HEARING

Held at: **Leeds** **On: 6 September 2018**

Before: **Employment Judge Lancaster**

Representation:

Claimant: **Mr M Keenan**
Respondent: **Mr G Vials, Solicitor**

JUDGMENT having been sent to the parties on 7 September 2018 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. I have decided this claim has no reasonable prospect of success and should therefore be struck out and not proceed to a final hearing.
2. The allegations are of being subjected to a detriment because of having made protected qualifying disclosures. There are two potential such qualifying disclosures identified in the papers. The first of those is in a grievance letter of 5 December 2017 and the second in a supplementary grievance of January.
3. The allegation in January I consider does not, on any reasonable construction, disclose any information that could amount to a separate protected disclosure. It is largely a repetition of the earlier complaints. Then Mr Malcolm also refers to an incident that happened whilst he was not himself present at school but where he was aware that another colleague had raised concerns about alleged failure properly to risk assess a pupil: but there was no information actually within the knowledge of Mr Malcolm himself which he could or did disclose.

4. So, I have been concerned therefore only with the earlier alleged disclosure of 5 December.

5. The background to this matter very briefly is that the claimant was a teaching assistant. He had regularly supported staff in taking children on outdoor activities, he had attended Herd Farm at Harewood on numerous occasions. On 13 July he and another member of staff took two students on a trip which involved a walk in the area of the farm but not actually attending the premises. The claimant's principal complaint is that he was not a "designated team lead" and therefore should not have been required to be the trip leader on that excursion.

6. It was a walk which he had done many times but on this occasion however he chose to try an alternative route. It was not successful. It resulted in the four of them having to walk back along the A61 which is a major road out of Leeds. Ultimately realising they were lost and not likely to return to their pick-up point in good time a lift was accepted from a neighbouring farmer. That involved that man driving the claimant, who sat alongside him in the passenger seat, his colleague and the two students in the back, over a relatively short distance of a few minutes to the pick-up point near Herd Farm.

7. Clearly, there was potentially a safeguarding issue that needed to be addressed as a result of that incident. The claimant himself did not report any concerns. His colleague, Mr Olphert did, putting in a formal "cause for concern form" where he sought to attribute the blame squarely to Mr Malcolm. Mr Malcolm was unaware of the complaint having been put in that format but it did then result in an investigation into the safeguarding concerns.

8. The first meeting was due to be held before the end of term in July 2017 but did not take place. It was therefore adjourned to the start of the new term in September. There was then a second investigatory meeting that took place on 22 November. There were various reasons for the delay which I do not need to go into at this stage.

9. Following that final investigatory meeting on 22 November all the enquiries had been concluded. By that stage the investigative officer had had access to all relevant material: that included a statement taken from the two pupils shortly after the event; it included access to those pupils' timetables which showed a scheduled outdoor activity on the day in question, and; it included all the investigation notes of both the claimant and of other people who were interviewed.

10. Up to that point the concerns that had been identified to be addressed were solely related to the potential safeguarding issues in respect of the claimant' actions but the letters of invitation to any meeting had always indicated that that list was not final. Clearly the investigative officer in concluding her report, which was eventually dated 31 July 2018, had identified three complaints. The first two, which were parallel to those originally raised, were not to go forward to any further disciplinary hearing. But she identified a third complaint which arose from the information gathered in the course of that investigation which was an allegation of misconduct. That was in respect to the claimant having instructed the two pupils not to tell anyone about the mishaps on the excursion on 13 July saying that there was a risk of him and his colleague losing their jobs.

11. Ultimately that allegation did go forward to a disciplinary hearing and the decision of the panel was that there should be a final written warning issued.

12. The alleged protected disclosures were made on 5 December, that is a relatively short time after the final investigatory meeting but before the outcome had been announced. So, within the timeline, that disclosure is in anticipation of a decision being made very shortly as to whether the claimant would face any disciplinary action.

13. He had not previously throughout the course of that investigation raised the specific concern that he then included in his grievance letter. Mr Olphert in his "cause for concern" report of 13 July had indicated that he considered there was a potential safety risk in having to accept a lift with someone that they did not know, as well also in the course of his report identifying the alleged risk of walking on a major road. It also appears that when those matters were initially brought to the attention of the Head she too expressed some concern that there may be a safeguarding issue in having taken a lift from the farmer. The claimant himself had not however identified that that was any cause for concern.

14. When a safeguarding complaint in writing is also then made by the Claimant it is this: "I would like to make a formal safeguarding complaint against the Elland Academy SLT (senior leadership team) led by Alice Ngodi, the Head, as on 13/7/2017 during an OFSTED inspection I was instructed at short notice to undertake an unplanned and therefore unscheduled outdoor activity to Herd Farm without a delegated outdoor activities lead contrary to both OFSTED inspection policy and Elland Academy's outdoor activity policy so that the Elland Academy could remove two of their most troublesome students in order to obtain a higher OFSTED rating. As a consequence, the Elland Academy led by Alice Ngodi put both students and staffs lives at serious risk as we got lost at Herd Farm and had to accept a lift in a stranger's car due to the aforementioned negligent and incompetent safeguarding breaches and actions of the Elland Academy led by Alice Ngodi".

15. The alleged protected qualifying disclosure is therefore the disclosure of information that the health or safety of any individual had been endangered (section 43 B (1) (d) Employment Rights At 1996). This concern was only raised by the claimant some five months after the incident itself and what he was informing the respondent of was in relation essentially to his own actions. He had taken, or had at least been involved in, the decision as to what route was taken which resulted in getting lost. Also he had been intrinsically involved, whether it is right that it was his sole decision or whether it was a joint decision with the other member of staff, to accept the lift from the farmer. So clearly at the time any immediate risk assessment that he had carried out in his own head had indicated that it was not a danger to the children. What he is seeking to do in his complaint is to bypass those intervening actions on his own part and blame the fact that he, notwithstanding his previous experience on trips to this location, was not formally identified as a leader on the system. Accordingly he argues that he should not have been placed in that position and therefore that failure of putting somebody in charge, namely himself, whom he was effectively saying was incompetent to lead and therefore made wrong decisions, is the alleged endangerment to health.

16. The respondent takes the point, which I on reflection accept, that there is no reasonable prospect in due course of the Tribunal considering in these circumstances that that was a reasonable belief that the health of the claimant himself or of the three people with him was in fact endangered. This was a trip of very short duration. The driver was somebody who could be readily identified, because the location where he had offered the lift could clearly be ascertained. The risk allegedly that the driver, the farmer, may have assaulted any of the people who outnumbered him 4 to 1 is in my view so minimal that it cannot have been a reasonable belief at that stage that there was any such danger. The claimant as I say had five months to reflect upon the matter and he chose to raise it only at this particular juncture in the investigative process when he was anticipating decisions as to whether he would go forward to a disciplinary hearing.

17. And that therefore I consider is the short answer to this question, there is no reasonable prospect of a Tribunal concluding that this was a disclosure of information that fell properly within the ambit of section 43B of the Employment Rights Act.

18. At the outcome of the grievance appeal, at page 350 in the bundle, is a conclusion which the claimant - and particularly his representative Mr Keenan - base great reliance upon as indicating that in fact is an admission that this document of December was indeed a protected qualifying disclosure. I simply cannot read it in that way. There is no reasonable prospect of the tribunal at any final hearing reading it in that way either. All it shows is that on examination of the computerised records, which are clearly not complete (and that may be a failing that in deed ought to be addressed by the Academy) the claimant had ordinarily led as a support to others, others who were identified within the system as “designated leads”. Whether that means as the respondent contends that they were those who were trained and authorised to carry out the preparatory work in anticipation of any individual trip or series of trips by risk assessing it and carrying out the other necessary preliminary enquiries, or whether it simply means that they were the person who had responsibility on the day, I do not have to decide. The fact that that search of the records also found that the only two occasions where somebody designated on the system as a lead had not actually been present on a trip were two occasions when the claimant had been present does not in my view in any way, as Mr Keenan contends, constitute an admission that this complaint as of 5 December was indeed a protected and qualifying disclosure. It simply indicates a possible flaw in the way information about trips is recorded on the system in as much as that the status of the claimant as the trip leader on those two occasions is not fully explained . It does not in any way constitute an admission that such an administrative error also encompassed the purported endangerment to health which the claimant relies upon in his alleged disclosure.

19. The alleged disclosure made is not, and cannot be simply the information that the claimant was not shown as a “designated lead” (which it is correct to say he was not as recorded on the system) but that one of the prescribed matters in section 43B was in fact identified as having happened. Of course, there was in the same document the outcome of the appeal where it is clear that the conclusion of the panel was that the claimant did have appropriate trip leader training, even though not a “designated lead”, and that there was no actual risk to

anybody on this occasion. Therefore in context those few paragraphs relied upon cannot in my view bear the interpretation that is sought to be placed upon them.

20. In any event, looking at the claim form it is also not at all apparent to me that the claimant would be able to establish that he had in fact been subjected to a detriment. Many of his complaints are allegations in very general terms that the respondent Academy Trust has failed properly to investigate matters. They are not instances which could ordinarily and properly be said to be a detriment to him in the course of his work. There are things he would have liked to have been done and things he thinks his employer ought to have done. There are however no indications as to how that disadvantaged him in performing his role.

21. Furthermore, given the chronology the claimant faces a serious difficulty in seeking to establish any link of causation between the letter of 5 December and any of those alleged detriments.

22. Obviously, anything that happened prior to 5 December cannot be a detriment because of how he made the disclosures. The investigative process was in train before that and indeed to all intents and purposes had concluded before that date.

23. The subsequent actions that took place were that the claimant was not, in fact, brought to any disciplinary hearing because of any failings on his own part in relation to safeguarding. Had the party been seriously endangered as the claimant alleged in his grievance then, because of his own intrinsic involvement , he would no doubt have been subjected to disciplinary action: that was not the finding of the investigation. Not being disciplined is not detrimental treatment.

24. He was because of his ill health absence liable to reduced sickness pay but there is no obvious indication that that had anything to do with the making of his alleged safeguarding complaint in December.

25. The allegation that there was collusion between the respondent Academy and the claimant's trade union representative I consider to be wholly groundless. When the claimant put in his grievance of 5 December he was taking advice at that stage from Mr Keenan, a former colleague who is still now assisting him. When that came to the attention of his trade union who were up to that point advising him, certainly in the disciplinary investigative process, they pointed out in an e-mail - which was entirely private between the union representatives and the claimant - that he was in breach of the union code and they would not support him unless he withdrew that grievance which he had submitted without due authorisation from the trade union representatives. There is no suggestion that there was any contact between the union and the respondent prior to that. When the deadline for the claimant responding to that letter from his union had passed some few days later it is clear from the e-mail chain that the union reps, or one of them at least, then contacted the HR representative of the respondent and left a message for her to indicate that the union were no longer supporting the claimant. The documents show that the response of the Academy Trust at that stage was to get back to the union and urge them to reconsider that decision, as they would have liked the claimant to continue to be represented.

26. So on the face of the contemporaneous documents there is no basis whatsoever for alleging the collusion between the respondent and the union to withdraw representation at this point.

27. So not only does the claimant appear to be unable, reasonably, to establish a protected qualifying disclosure there are severe problems on the pleaded case in identifying any actual detriment to the claimant and to which h may have in fact been subjected because of that disclosure. Although I am well aware that the provisions of section 48 of the 1996 Act place a burden on the respondent to show the reason for any detrimental treatment that depends upon a prima facie case at least to be made out that there is a causal link and thee claimant faces substantial difficulties there.

28. So, looking at this matter in the round, I consider as I have said that it has no reasonable prospect. In the alternative I would certainly have held that it has little reasonable prospect and for the same reasons I would order a deposit.

29. I can see no justifiable reason to have pursued a claim that in my view, even without having made any findings of fact (and I accept there are a number of evidential issues in dispute in this case, but which I consider to be peripheral to the actual claim) which discloses no realistic prospect of success, notwithstanding those disputes of fact. In those circumstances I will not allow this case to proceed; it will therefore be struck out.

30. If the claimant wishes to pursue a further claim of constructive unfair dismissal arising from what certainly appears to have been an unequivocal resignation tendered with immediate effect from today that would have to be the subject of a fresh claim and will be considered and dealt with separately, but this present claim will now be dismissed.

Employment Judge Lancaster

Date 8th October 2018