



EMPLOYMENT TRIBUNALS

Claimant: Ms B McInerney

Respondent: Nottinghamshire Healthcare NHS FT

RECORD OF A PRELIMINARY HEARING

Heard : in private, by telephone **On:** 10 December 2019

Before: Employment Judge Ayre (sitting alone)

Appearances

For the claimant: Mr Afridi, Solicitor

For the respondent: Mr Crow, Counsel

JUDGMENT

The claims of age, race and sex discrimination are dismissed upon withdrawal.

CASE MANAGEMENT SUMMARY

Final hearing

- (1) All issues in the case, including remedy, will be determined at a final hearing before an Employment Judge sitting alone at **The Tribunal Hearing Centre, 50 Carrington Street, Nottingham, NG1 7FG** on **Monday 7th September 2020, Tuesday 8th September 2020, Wednesday 9th September 2020, Thursday 10th September 2020 and Friday 11th September 2020**, starting at 10 am or as soon as possible afterwards. The first half day of the hearing will be for reading-in time for the Tribunal and for any preliminary matters to be dealt with. The parties and their representatives, but not necessarily any other witnesses, must attend by **2pm** on that day. The time estimate for the hearing is 5 days, based on the claimant's intention to give evidence and call 1 further witness and the respondent's to call 3 or 4 witnesses, and on the following provisional timetable:

- (i) Half a day for reading in;

- (ii) maximum 2.5 days for oral and other evidence on liability;
 - (iii) a maximum total of 2 hours (half each) for submissions on liability;
 - (iv) approximately 4 hours for the Tribunal to determine the issues which it has to decide, reach its conclusions and prepare its reasons;
 - (v) half a day for the Tribunal to give judgment, with reasons if possible;
 - (vi) Half a day for the Tribunal to deal with remedy, including hearing further evidence if appropriate, reaching conclusions and giving judgment, if the claimant succeeds in whole or part.
- (2) The claimant and the respondent **must** inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.

The issues

- (3) The issues between the parties which potentially fall to be determined by the Tribunal are as follows:

Constructive unfair dismissal

- (i) Was the claimant dismissed, i.e. did the respondent breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant.
- (ii) Between 7 January 2017 and 1 February 2019, did the respondent, by the actions of Dr Silva, Mr Wright, Dr Packham and/or Dr Hankin in relation to the claimant including, but not limited to, the acts below, breach the implied term of trust and confidence, either individually or collectively, or did the respondent act with reasonable and proper cause at all material times.
- (iii) The claimant alleges that the following conduct breaches the trust and confidence term:
 - a. On or around 7 January 2017, the manner in which the Serious Untoward Incident Inquiry (SUI) was investigated, specifically, failing to take into account the claimant's concerns and view point;
 - b. Not one of the claimant's factual corrections being made to the final version of the SUI report which was sent to the Coroner on 21 March 2017 and circulated within the Trust on 15 August 2017;
 - c. On 21 March 2017, Mr Wright providing a statement to the Coroner effectively endorsing the unchanged SUI report;
 - d. The Trust not initially providing the Coroner with documents relevant to the Inquest and only doing so once pressed to do so;

- e. Continuing with the MHPS investigation, and subsequently amending the Terms of Reference, in the light of the Coroner's findings;
 - f. The Investigating Officer not being provided with the claimant's list of factual inaccuracies to the SUI report, not being informed that the contents of the SUI report was disputed and not being provided with any evidence or related documents from the Inquest, or the Coroner's findings;
 - g. Mr Wright circulating the SUI report within the Trust on 15 August 2017 but without including the claimant's corrections and accompanying it with ambiguous wording regarding the claimant's evidence and the Coroner's findings at the inquest;
 - h. Mr Wright circulating his statement from the Inquest to the Trust's Medical Staff Committee on 15 August 2017, containing numerous factual inaccuracies which he was aware of at the time of circulation but did not amend or qualify;
 - i. Following the conclusion of the investigation, and without the claimant knowing the outcome of the investigation, Dr Packham telling the claimant on 5 April 2018 that she had three choices – to resign, retire or face a conduct hearing arranged and overseen by Mr Wright; and
 - j. On 6 July 2018, Mr Wright circulating a document to the claimant's consultant colleagues informing them that the claimant was to be subject to a conduct hearing.
- (iv) Did the claimant waive or affirm any of the alleged breaches of the implied term of trust and confidence before resigning?
- (v) Did the claimant resign in response to the respondent's conduct (to put it another way, was it a reason for the claimant's resignation – it need not be the reason for the resignation)?
- (vi) If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

- (vii) If the claimant was unfairly dismissed and the remedy is compensation:
- a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the

possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];

- b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2); and if so to what extent?
- c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Other matters

- (4) The attention of the parties is drawn to the Presidential Guidance on 'General Case Management', which can be found at:
www.judiciary.gov.uk/publications/employment-rules-and-legislation-practice-directions/
- (5) The parties are reminded of rule 92: "*Where a party sends a communication to the Tribunal (except an application under rule 32) it shall send a copy to all other parties, and state that it has done so (by use of "cc" or otherwise)...*". **If, when writing to the tribunal, the parties don't comply with this rule, the tribunal may decide not to consider what they have written.**
- (6) The parties are also reminded of their obligation under rule 2 to assist the Tribunal to further the overriding objective and in particular to co-operate generally with other parties and with the Tribunal.
- (7) The following case management orders were uncontentious and effectively made by consent.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. Complaints and issues

- 1.1 The parties must inform each other and the Tribunal in writing **within 14 days of the date this is sent to them**, providing full details, if what is set out in the Case Management Summary section above about the case and the issues that arise is inaccurate and/or incomplete in any important way.

2. Statement of remedy / schedule of loss

- 2.1 The claimant must provide to the respondent by **7 January 2020** a document – a “Schedule of Loss” – setting out what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the claimant at the final hearing in relation to each of the claimant’s complaints and how the amount(s) have been calculated.
- 2.2 The Schedule of Loss must include the following information: whether the claimant has obtained alternative employment and if so when and what; how much money the claimant has earned since dismissal and how it was earned; full details of social security benefits received as a result of dismissal.
- 2.3 The parties are referred to: the Presidential Guidance on pension loss at www.judiciary.gov.uk/wp-content/uploads/2013/08/presidential-guidance-pension-loss-20170810.pdf. If the claimant is claiming for loss of pension, the Schedule of Loss must include precisely how much is being claimed and on what factual and arithmetical basis.

3. Documents

- 3.1 On or before **4 February 2020** the claimant and the respondent shall send each other a list of all documents that they wish to refer to at the final hearing or which are relevant to any issue in the case, including the issue of remedy. They shall send each other a copy of any of these documents if requested to do so.

4. Final hearing bundle

- 4.1 By **3 March 2020**, the parties must agree which documents are going to be used at the final hearing. The respondent must paginate and index the documents, put them into one or more files (“bundle”), and provide the claimant with a ‘hard’ and an electronic copy of the bundle by the same date. The bundle should only include documents relevant to any disputed issue in the case and should only include the following documents:
 - the Claim Form, the Response Form, any amendments to the grounds of complaint or response, any additional / further information and/or further particulars of the claim or of the response, this written record of a preliminary hearing and any other case management orders that are relevant. These must be put right at the start of the bundle, in chronological order, with all the other documents after them;
 - documents that will be referred to at the final hearing and/or that the Tribunal will be asked to take into account.

In preparing the bundle the following rules must be observed:

- unless there is good reason to do so (e.g. there are different versions of one document in existence and the difference is relevant to the case or authenticity is disputed) only one copy of each document (including documents in email streams) is to be included in the bundle
- the documents in the bundle must follow a logical sequence which should normally be simple chronological order.

5. Witness statements

- 5.1 The claimant and the respondent shall prepare full written statements containing all of the evidence they and their witnesses intend to give at the final hearing and must provide copies of their written statements to each other on or before **27 March 2020**. No additional witness evidence will be allowed at the final hearing without the Tribunal's permission. The written statements must: have numbered paragraphs; be cross-referenced to the bundle; contain only evidence relevant to issues in the case. The claimant's witness statement must include a statement of the amount of compensation or damages she is claiming, together with an explanation of how it has been calculated.

6. Final hearing preparation

- 6.1 The parties are to liaise and agree a neutral chronology and cast list and send them to the Tribunal no later than 7 days before the first day of the hearing together with, if appropriate, an updated list of issues.
- 6.2 On the working day immediately before the first day of the final hearing (but not before that day), by 12 noon, the following parties must lodge the following with the Tribunal:
- 6.2.1 two copies of the bundle, by the respondent; and
 - 6.2.2 two hard copies of the witness statements (plus a further copy of each witness statement to be made available for inspection, if appropriate, in accordance with rule 44), by whichever party is relying on the witness statement in question.

7. Other matters

- 7.1 The above orders were made and explained to the parties at the preliminary hearing. All orders must be complied with even if this written record of the hearing is received after the date for compliance has passed.
- 7.2 Anyone affected by any of these orders may apply for it to be varied, suspended or set aside. Any further applications should be made on receipt of these orders or as soon as possible.
- 7.3 The parties may by agreement vary the dates specified in any order by up to 14 days without the tribunal's permission except that no variation may be

agreed where that might affect the hearing date. The tribunal must be told about any agreed variation before it comes into effect.

7.4 Public access to employment tribunal decisions

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(s) and respondent(s) in a case.

7.5 Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.

7.6 Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

Employment Judge Ayre

10 December 2019

Sent to the parties on:

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For the Tribunal:

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