Case Number: 1405207/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mrs T Place**

Respondent: **Anaya Corporation Limited t/a Kare Plus Portsmouth**

Heard at: **Southampton** **On: 6 February 2020**

Before: **Employment Judge Dawson**

Representation
Claimant: in person
Respondent: no attendance

REASONS

JUDGMENT having been sent to the parties on 6 January 2020 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:

1. In this case the claimant claims that she was subjected to detriments as a result of making a protected disclosure and, as a consequence, she resigned. She claims constructive dismissal for which, she says, the sole or principal reason was that she had made a protected disclosure.

2. The case was originally defended and a detailed case management order was made by Employment Judge Gray on 25 June 2019 in which he set out the issues. He also gave directions.

3. Pursuant to those directions the claimant served, on the respondent, a schedule of loss which she has relied upon today and sought to also agree a bundle with the respondent. That took some time. Thereafter, the respondent refused to exchange witness statements.

4. The claimant tells me that she spoke to Mr Thakkar, director of the respondent, about exchanging witness statements and he said to her that he was not interested in doing anything else in respect of the case because the respondent had gone into liquidation. A search at Companies House reveals that the respondent is in creditor's voluntary liquidation.

5. As a consequence of the respondent's failure to comply with the tribunal's orders as to exchange of statements, the tribunal wrote to the respondent stating that it was minded to strike the response out and gave the respondent an opportunity to make representations. No representations were made and, therefore, on 30 December 2019 the respondent's response was struck out. Judgment was not entered and the respondent was told that it would be entitled to notice of any hearings and decisions of the tribunal but only entitled to participate in those hearings to the extent permitted by a judge.

6. Although no liability judgment was entered, on 7 January 2020, the tribunal wrote to the parties stating that the hearing listed for the 3rd to 6 February 2020 would be postponed and a remedy hearing listed instead. It is that hearing which has been listed before me today.

7. I was concerned that it was not possible to proceed to a remedy judgment until the claimant had succeeded on liability. No judgment had been entered under rule 21 of the Employment Tribunal Rules. Having had regard to, in particular, the Presidential Guidance on rule 21 judgments and bearing in mind the burden of proof in this case, I did not consider it appropriate to enter judgment under rule 21 before the commencement of the tribunal hearing.

8. Thus, I considered the appropriate way forward to be to convert the hearing before me to be one on liability and remedy. I acknowledged a difficulty with that course of action, in that the respondent had not been given notice of the fact that today's hearing would be a liability hearing as well as a remedy hearing.

9. Having regard to the facts that the respondent has taken no part in the proceedings since last year, that it had served no evidence in respect of liability, that it had not sought to resist its response being struck out and it had not attended today, combined with what Mr Thakkar had told the claimant, I considered this was an appropriate case to exercise my power under rule 6 of the Rules of Procedure to waive the requirement that the respondent have notice that liability would also be decided at today's hearing. I did so having regard to the overriding objective, in particular the need to deal with cases in ways which are proportionate to the complexity and importance of the issues, the desirability of avoiding delay and saving expense and the interests of justice generally. Any prejudice to the respondent by proceeding in this way can be mitigated by acknowledging, as I do, the ability of the respondent to apply for a reconsideration of the decision to dispense with service of notice of the liability hearing.

10. In respect of liability, I heard evidence on oath from the claimant and had also had regard to 2 bundles of documents which she had placed before me. For the purposes of efficiency I will set out my findings by reference to the detailed list of issues.

11. The claimant had been employed as a Field Care Supervisor with the respondent from 3 April 2018.

12. She was off sick from 9 June 2018 due to sepsis. On 22 June 2018 she met with the respondent's manager to discuss her phased return to work. Unfortunately, she was then admitted back into hospital.

13. On 22 August 2018 the claimant received an email from the respondent containing a work timesheet in her name that was meant for another staff member who was advised to work under the claimant's name.

14. On 29 August 2018 the claimant sent an email to the respondent asking why she had received that timesheet. Her email stated "Hi can someone explain why there is a timesheet in my name. This is the 2nd email received with Work on it?? I am confused X". That email is said to be the first protected disclosure (see paragraph 5.1.1 of the Case Management Summary dated 25 June 2019).

15. Subsequently the claimant became aware that the person in question was still using her timesheets. This was an issue for the claimant because she was aware that that persons' employment for domiciliary care had been terminated around May 2018 due to a safeguarding issue. He was under a safeguarding review and so, he believed, should not have been providing care to resident's homes.

16. As a consequence, on the 11 September 2018 the claimant raised a grievance. The grievance was sent to Kare Plus Support, part of Kare Plus Franchising Ltd, and stated "to put you in the picture about [the employee] whom I believe does not know he is working under my timesheet. He was released a few months ago under a safeguarding issue from the Domiciliary side of the business. However, he carried on with the agency side of the business as he would not be alone in homes. It is for this reason I am not happy along with the customers are getting a rota with my name showing and a non-compliant male is turning up to their homes". She also suggested that it was fraudulent for his hours to be shown under her timesheets (page 49 of the bundle).

17. It is apparent from page 2 of Bundle Two, that on 11th of September 2018 at 15:43 hours, the claimant's grievance was forwarded to Mr Thakkar. 2 minutes later he forwarded it to others including the daughter of the manager who was implicated of wrongdoing in the claimant's grievance.

18. Not only was the grievance sent to the manager's daughter but, I find, it was quickly shared with other members of the claimant's team and four members of the team were all related to each other (the manager, her daughter, her niece and her son).

19. I accept the claimant's evidence that thereafter one of her colleagues created an incident report which, wrongly, purported to be raised by another colleague and stated that in May 2018 the claimant had taken her son (a policeman) into a client's home. The claimant had not taken her son into a client's home and the complaint was a fiction.

20. Various statements were taken from members of the claimant's team in respect of her grievance and/ or the alleged incident referred to in the preceding paragraph including one dated 25 October 2018 which suggested that the claimant was unable to fulfil her duties, which the claimant says is

untrue and she found offensive. I accept the claimant's evidence in this respect.

21. Two other statements were made (pages 29 and 30 of Bundle Two) which the claimant tells me and, I accept, are false. A further statement (page 25 of Bundle Two) suggested that there had been a discussion between the writer of the statement, the manager in question and another person, where various things were said. The claimant tells me and I accept that must be false because the manager was not in work and the day referred to.

22. The claimant's grievance was discussed with her on the 25 October 2018 (although an email at page 11 of Bundle Two suggests that the outcome may well have been decided substantially before then) and the allegation against the claimant was discussed in that meeting. Minutes were taken.

23. The claimant asked for the minutes of the meeting and was sent typed minutes. She did not consider that they were accurate and asked to see the handwritten minutes. There were certain omissions in the typed minutes and I was taken to discrepancies between the typed version at page 126 of the bundle and the handwritten versions at pages 131 and 132. The claimant also tells me that particularly important points about looking at the client's care notes, which she mentioned in the meeting, were not recorded in either set of minutes. Those points which were suggestions as to investigations which the respondent could carry out and which would exonerate her. In the absence of challenge I accept the claimant evidence in this respect

24. As a consequence of realising the way in which her colleagues had behaved in making false allegations against her, the circulation of her grievance which should have been kept confidential and the investigation into her conduct which she considered unfair, as well as the issue with the minutes, the claimant resigned on 13 November 2018.

The Law

25. The law is found in different sections according to whether a person is asserting that they have been subjected to a detriment or unfairly dismissed. S.103A Employment Rights Act 1996 provides that

> (1) An employee who is dismissed shall be regarded for the purpose of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) is that the employee made a protected disclosure

26. S.47B Employment Rights Act 1996 deals with detriments on grounds of making protected disclosures and provides that:

> (1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

A Qualifying Disclosure

27. S43B Employment Rights Act 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—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed

28. in *Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436*. The Court of Appeal held "The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of

the matters listed in subsection (1). The statements in the solicitors' letter in *Cavendish Munro* did not meet that standard" (para 35).

Detriment due to Protected Disclosure

29. In respect of a claim of detriment, Harvey on Industrial Relations states "The term 'detriment' is not defined in the ERA 1996 but it is a concept that is familiar throughout discrimination law … and it is submitted that the term should be construed in a consistent fashion. If this is the case then a detriment will be established if a reasonable worker would or might take the view that the treatment accorded to them had in all the circumstances been to their detriment. In order to establish a detriment it is not necessary for the worker to show that there was some physical or economic consequence flowing from the matters complained of"

30. In *Fecitt v NHS Manchester* [2012] ICR 372, the Court of Appeal held that the test of whether an employee has been subjected to a detriment on the ground that he had made a protected disclosure is satisfied if, "the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower"

31. Section 48(2) Employment Rights Act 1996 provides "On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done"

Constructive Dismissal

32. IDS Volume 14, para 6.40 states "A dismissal will only be automatically unfair under S.103A if the sole or principal reason for dismissal was that the employee had made a protected disclosure. However, where an employee claims that he or she was constructively dismissed contrary to S.103A, it is not strictly possible for a tribunal to examine the employer's reason for dismissal, because the decision that triggers the dismissal is the employee's resignation. Instead, the question for consideration is whether the protected disclosure was the principal reason that the employer committed the fundamental breach of the employee's contract of employment that precipitated the resignation. If it was, then the dismissal will be automatically unfair."

Conclusions on liability

33. I give my conclusions by reference to the list of issues contained in the Case Management Summary dated 25 June 2019.

34. The claimant did send an email on 29 August 2018 as set out at issue 5.1.1. However, in my judgment it did not amount to a protected disclosure. It only asked why there is a timesheet in the claimant's name and states that is the 2nd email that she has received with Work on it.

35. The email does not disclose information which tends to show either that a criminal offence was being committed or that the health and safety of residents had been put at risk by the respondent.

36. In respect of issue 5.1.2, the grievance of 11 September 2018 did amount to a protected disclosure. It was a qualifying disclosure in that it did disclose

information (about the other staff member who had been released previously about a safeguarding issue and would be turning up at customers' homes) and that information did, in the reasonable belief of the claimant, tend to show that the health and safety of individuals was being or likely to be endangered. Moreover, the grievance expressly states that the timesheet for that individual amounted to fraud. In my judgment the claimant had a reasonable belief that one person using the timesheet of another and, therefore, misrepresenting who they were for the purposes of work amounted to the criminal offence of fraud.

37. I have, within the issues above, addressed issue 5.2. I answer it in the affirmative.

38. In respect of issue 5.3, having heard from the claimant I find that she was concerned that clients who would be expecting her to be providing a home visit would receive somebody different and that person was under a safeguarding review. She did reasonably consider it in the public interest to complain about that to Kare Plus.

39. Paragraph 5.4 of the issues simply records as a statement that the claimant made her alleged disclosure to her employer. It does not address whether that point is in dispute. I have, however considered the point. Kare Plus is not the claimant's employer. It is the franchisor under which the respondent operates its business. Nevertheless, at page 49 of the bundle is an email dated 11 September 2018 at 12:45 in which Kare Plus asks the claimant whether she wishes it to raise her concerns with the business owner, in which case they would forward the complaint to the business owner. Although I have not seen the response to that email, Kare Plus did forward the email to the respondent. I find, therefore, that Kare Plus acted as the agent of the claimant in forwarding the email and so she did make her disclosure to her employer.

40. In respect of issue 5.6.1, I find that the claimant's confidence was breached in that her grievance was circulated to others, including the daughter of the respondent's manager. That was a detriment, people who make a protected disclosures often find themselves in a vulnerable position. The respondent should have treated her disclosure in a confidential and responsible manner. The claimant was, then, subjected to further detriment by her colleagues, as set out below. It was reasonable for the claimant to take the view that she was being subjected to a detriment by that breach of confidence. The respondent has adduced no evidence to satisfy the requirement under section 48 (2) of the Employment Rights Act 1996 and explain why the disclosure made by the claimant was immediately forwarded to colleagues and whilst this subsection does not amount to a reversal in the burden of proof, having regard to the employer's failure and all the circumstances of the case, I infer that the reason was the claimant's disclosure.

41. In respect of issue 5.6.2, although it is not clear exactly when the investigation into the claimant was instigated, I have found that it was instigated as a result of fictitious complaints made by the claimant's colleagues. In that sense the complaint was unfair as was the investigation. The investigation was caused by the claimant's colleagues who acted

because of the disclosure. At least one of those colleagues, the Manager, was senior to the claimant.

42. In respect of issue 5.6.3 the allegation raised with the claimant at her grievance hearing as to her alleged misconduct was an unfair allegation in the sense that it was a fiction. At risk of repetition, the allegation was made because of the claimant's disclosures.

43. In respect of issue 5.6.4, I have had some concern as to whether the claimant has discharged the burden of proof which shows that the minutes were edited *because* she had made a protected disclosure. In circumstances where the respondent has not chosen to challenge the claimant's evidence, I have concluded that I should accept her evidence and, in particular, that she made various representations and submissions in the hearing as to investigations which the respondent could do and which would exonerate her which were, then, not noted. A failure to accurately record what is said in a meeting can be seen by a reasonable worker as something to their disadvantage. Having regard to section 48 (2) Employment Rights Act 1996, it is for the employer to show the reason for its actions. The employer has not done so. I find the editing of the minutes was because of the claimant's disclosure.

44. In respect of issue 5.6.5, I accept the claimant's evidence that she found herself in an untenable position. She had made a disclosure which had not been kept confidential but disclosed to others. Her colleagues had then invented allegation of misconduct against her. As I have set out above they had also made false statements against her. The respondent had not produced accurate minutes of her meeting with it. In those circumstances I accept that the claimant believed she had no alternative but to resign on 13 November 2018.

45. In respect of issue 5.8, I find that the behaviour of the respondent and, in particular, the claimant's manager and Mr Thakkar amounted to a breach of the implied term of trust and confidence. The claimant accepted that breach in resigning. In those circumstances there was a dismissal.

46. I am satisfied that the reason for the claimant's resignation was the treatment which she had suffered, which was as result of making a protected disclosure. In those circumstances the sole or principal reason for the dismissal was her disclosure.

Remedy

47. In respect of remedy I heard the following evidence from the claimant, all of which I accepted.

48. Prior to her resignation she had been earning £1539.33 net per month.

49. The schedule of loss claims that sum for 14 months (which appears to be slightly in the respondent's favour) amounting to £21,546.42.

50. At the point when she submitted her schedule of loss (in July 2019) she had obtained alternative employment which was paying her £240 per

month. She has given credit for that, in her schedule of loss, to the 1 February 2020 amounting to £1680.

51. In fact, on 1 October 2019 the claimant had obtained different employment paying £712 per month, so £472 per month more than her schedule of loss gives credit for. For the 4 months to February 2020 she must, therefore give an extra £1888 credit.

52. Thus her loss to 1st February 2020 is £17,978.42.

53. I have seen a long list of jobs which the claimant has applied for and not been successful in. She tells me, and I accept, that it is very difficult to get another job when she cannot get a reference from her previous employer. It is more difficult to get a job when one is not in work. She finds particular difficulty when she explains that she resigned from her previous employment as a whistleblower. Job offers which previously seemed likely seemed to evaporate at that point.

54. I find there is no failure to mitigate loss on the part of the claimant.

55. The claimant tells me, and I accept, that the job which she started on 1 October 2019 is in a care home and her new employers are committed to working with her. At the moment she is employed in a lower status than she was but her new employers have agreed to send her on a fast track course which will enable her to get back to a supervisor level which she was in before her resignation. The course will take 11 months and the claimant thinks that she will get back to her previous level of supervisor in about 2 years. She explained that it had taken her nearly 20 years to get to the supervisor role which she started with the respondent. She then had a period of illness. Those matters persuade me that the claimant's assessment is realistic and I should award future loss of earnings for 2 years.

56. The difference between what the claimant was earning and what she is earning now is £796.03, for 24 months the loss is £19,104.72.

57. I have considered whether compensation should be reduced to reflect the fact that the respondent is now in creditors voluntary liquidation and so the claimant may have lost her job in any event. However, Mrs Place told me in evidence that she had driven past the care home recently and it was still operating. In those circumstances it may be that there has been a transfer of undertaking or some other vehicle has been engaged to continue the business outwith the respondent. I am not prepared to assume that the claimant would not still be employed in her role simply because the respondent is now in creditors voluntary liquidation.

58. The claimant was not employed for 2 years and, in those circumstances, I do not think it appropriate to make an award for loss of statutory rights.

59. The claimant does not seek compensation in respect of pension or other losses.

60. The claimant is not entitled to a basic award because she did not have one year's service.

61. I then consider injury to feelings

62. The general principles in relation to the appropriate award for injury to feelings are set down in *Prison Service v Johnson* [1997] IRLR 162 and include that;

    a. awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator.

    b. Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches.

    c. Awards should bear some broader general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but the whole range of such awards.

    d. Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings.

    e. Tribunals should bear in mind the need for public respect for the level of awards made.

63. I have considered the bands of compensation set down by the Court of Appeal in *Vento v Chief Constable West Yorkshire* [2003] IRLR 102 and the updated awards set down in the 2nd addendum to *"Presidential Guidance: Employment Tribunal Awards for injury to Feelings and Psychiatric Injury Following De Souza v Vinci"*.

64. In respect of the lower band, awards of between £900-£8800 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. In respect of the middle band, an award of £8800-£26,300 is appropriate for serious cases but those which do not merit an award in the highest band.

65. I considered the latest edition of the Judicial College Guidelines in respect of personal injury awards. We noted that in respect of post-traumatic stress disorder for a less severe case where a virtually full recovery would be made within one to 2 years and only minor symptoms would persist over any longer period an award of £3710-£7680 was appropriate. We also considered the guidance in respect of whiplash injuries and noted that in respect of injuries where a full recovery takes place within 3 months and a year the appropriate bracket is £2300-£4080 and where a full recovery takes place within a period of about 1 to 2 years an award of £4080 to £7410 is appropriate.

66. The claimant told me in some detail of the level of her upset. She had, as I have indicated, taken 20 years to get to the status which she was in. She had not been there long, she had tried hard to get to work quickly after her sepsis. She told me she had attended work with a drain still in, in order to do so. Having made a protected disclosure she then faced serious bullying by her colleagues. They made up allegations against her in order to retaliate

against the disclosure she had made about their manager who also happened to be their relative. As a consequence, the claimant lost a job which she had cherished and thus had to start again.

67. In those circumstances I consider the injury to the claimant's feelings to be significant and, in my judgment, the appropriate award for injury to feelings in this case is £10,000

68. Thus the total award is £47,083.14.

Employment Judge Dawson

Dated: 28 February 2020

Reasons sent to parties: 2 March 2020

FOR THE TRIBUNAL OFFICE