Case Numbers: 1802008/2019
1803544/2019
1806366/2019

EMPLOYMENT TRIBUNALS

Claimant: **Ms. Z Windle**

Respondents: **(1) The Chief Constable of West Yorkshire Police**
(2) The Chief Constable of South Yorkshire Police
(3) Claire Cuttell
(4) PS Greenwood

Heard at: Leeds On: 3,4,5,6 and 7 February 2020

Deliberations – in chambers 5 March 2020

Before: Employment Judge Shepherd

Members: Mr Dorman-Smith
Mr Fields

Appearances:

For the claimant: In person
For the respondent: Mr Jones

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

The claim that the claimant was subjected to detriments on the ground that she had made public interest disclosures is not well founded and is dismissed.

REASONS

1. The claimant represented herself and the respondent was represented by Mr. Jones.

2. The Tribunal heard evidence from:

Zuzana Windle, the claimant;
Claire Cuttell, the third respondent;

Julie Greenwood, the fourth respondent.

3. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, consisted of 555 pages. The Tribunal considered those documents to which it was referred by the parties.

4. The claim and issues were set out following a Preliminary Hearing before Employment Judge Eeley on 21 August 2019.

These were as follows:

The claim

(1) The claimant is a professional interpreter who was engaged by Capita (amongst others) to provide interpreting services for the first and second respondents. She asserts that she made a series of protected disclosures and as a result was subjected to unlawful detriments. The respondents defend the claim. Whilst it is accepted that some protected disclosures were made by the claimant, it is denied that she was subjected to detriments on the ground that she had made protected disclosures.

The issues

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

Worker status

(i) For the purposes of these proceedings was the claimant a worker within the meaning of sections 43K or 230(3)(b) of the Employment Rights Act 1996?

Public interest disclosure (PID)

(ii) Did the claimant make one or more protected disclosures (ERA sections 43B *& 43C*) as set out below? The claimant relies on subsection(s) (a), (b) and (c) of section 43B (1).

(iii) Did the respondent subject the claimant to any detriments, as set out below? Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.

(iv) If so was this done on the ground that she made one or more protected disclosures?

(v) The alleged disclosures the claimant relies on are as follows:

1. The claimant wrote to the first respondent on 29 March 2019 raising concerns about an unqualified interpreter, supplied by Language Empire, compromising two modern slavery trials.

2. The claimant wrote to the first respondent on 3 April 2019 with a complaint against the third respondent's department's failure to carry out its legal obligations in respect of due diligence and monitoring contracts.

3. The claimant raised concerns with the first respondent on 9 April 2019 regarding the contractor sending an unqualified interpreter who spoke no Slovak to take a written statement from a Slovak speaking witness at Trafalgar House police station in Bradford.

4. On 9 May 2019 the claimant wrote to the first respondent's Head of the Criminal Justice Department informing him about the response from the National Audit Office in respect of her concerns pertaining to the third respondent's department awarding a police contract to a company convicted of fraud which also caused trials to be compromised.

5. On 18 May 2019 the claimant wrote to the second respondent's Freedom of Information Officer alleging a potential breach of the Freedom of Information Act 2000 by the third respondent's department.

(vi) The alleged detriments the claimant relies on are as follows:

1. The third respondent made a complaint of professional misconduct against the claimant to her professional body the NRPSI. The complaint asserted that the claimant was defrauding the taxpayer to get more money by not being booked via Capita. Secondly, it asserted that the claimant had breached confidentiality/the GDPR.

2. The third respondent unlawfully disseminated a copy of the claimant's confidential email to the first respondent's office.

3. The respondents cancelled the claimant's work bookings for 30 April 2019 and 4 May 2019 or asked for cancellation of the same by Capita.

4. The respondents suspended the claimant from receiving further bookings via Capita or requested that Capita suspend her from further bookings after 4 May 2019.

5. The fourth respondent wrongly disseminated the email from PC Sanders which was marked "protected".

5. It was noted at the Preliminary Hearing that no 'reasonable steps defence' was pleaded pursuant to section 47B(1D) and, in those circumstances, where appropriate, references to the respondents includes all the respondents.

6. The issues set out above were determined prior to the claimant presenting the third claim to the Tribunal – 1806366/2019 which was submitted once she had sight of further documents and the claimant provided a list of detriments she wished to be considered following the issue of the third claim She confirmed that there were no detriments alleged to have taken place after 18 May 2019. These further detriments where identified as follows:

> 6. The third and fourth respondents deliberately refused to co-operate and properly follow up with the NRPSI's complaints investigation. Whilst indicating that they had further information to provide, they failed to provide it.
>
> 7. Excessive email correspondence without justification between the third respondent, the fourth respondent, Warwickshire Police, Greater Manchester Police, Capita and others.
>
> 8. The fourth respondent's excessive and bizarre enquiries damaged my relationship with Capita and made Capita think there was something wrong with me.

7. The claimant referred to having been turned down for an assignment on 7 September 2019 by Capita and that she had since de-registered from Capita. The claimant indicated that she did not know why Capita had not offered her the assignment and that this had been exceptional. She confirmed that she did not bring any claim in this regard but she was suspicious and it was provided by way of evidence of background information.

8. Remedy

If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

9. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings that the Tribunal made from which it drew its conclusions:

> 9.1. The claimant is a professional interpreter and translator registered on the National Register of Public Service Interpreters (NRPSI)
>
> 9.2. The third respondent is a Senior Category Manager within the regional procurement team employed by the second respondent as the lead force for a collaboration agreement for the provision of procurement services for the first respondent, the second respondent, North Yorkshire Police and Humberside Police.
>
> 9.3. The fourth respondent is a Police Sergeant and is the regional Specific Point of Contact (SPOC) for language services and operational lead for the first respondent.

9.4. In 2016 the regional police forces agreed to collaborate to procure a language service. The contract was awarded to Language Empire. It was decided not to extend the contract which was allowed to end on 31 March 2019.

9.5. From 1 April 2019 an agreement was entered into with Capita Translation and Interpreting for the provision of interpreting services to the police forces within the collaboration agreement.

9.6. The claimant registered with Capita and provided interpretation services to the first and second respondent.

9.7. A Language Services Framework had been developed by Eastern Shires Purchasing Organisation (ESPO). This framework was utilised by the Regional Procurement Team on behalf of the four Police Forces in the collaboration.

9.8. The ESPO framework provides that, to carry out police work, interpreters are required to hold the appropriate vetting clearance. The vetting requirement for interpreters is the Non-Police Vetting Level 3 (NPPV3) clearance.

9.9. On 29 March 2019 the claimant sent an email to the Office of the Chief Constable of West Yorkshire Police in which she referred to Capita taking over the interpretation contract from Language Empire and raising concerns that the police should ensure that unqualified individuals used by Language Empire were not supplied by Capita to the police forces. She referred to a named "unqualified bilingual" whose "lack of qualifications and inability to interpret had compromised Crown Court trials in the Yorkshire area". The claimant referred to a number of cases and indicated that "the use of unqualified bilinguals can have a catastrophic impact on the administration of justice and cause the taxpayer to incur significant and unjustifiable costs." She said that she was raising these concerns as a taxpayer and a citizen living in the area and she said that she considered them to be of significant public interest.

9.10. On 3 April 2019 the Staff Officer to the Chief Constable of West Yorkshire wrote to the claimant acknowledging her email of 29 March 2019 and indicating that it had been forwarded to the Head of Criminal Justice.

9.11. On 3 April 2019 the claimant sent a further email to the first respondent with the subject of "complaint against the procurement department". Within that email the claimant stated:

> "Regrettably, given the procurement department's conduct, which falls far below of what members of the public and taxpayers should expect from a department of such importance, I have no alternative but to submit a formal complaint to the Chief Constable against the

> procurement department and its staff responsible for the interpreter contract.
> …
> I ask for an urgent investigation into the procurement team's actions and once I have had a response, I shall consider whether this matter needs to be referred to the National Audit Office and the Home Office…"

This email was copied to the third respondent on 4 April 2019.

9.12. On 9 April 2019 the claimant sent a further email to the Office of the Chief Constable of West Yorkshire in which she referred to:

> "…shocking malpractice perpetrated by your new supplier Capita TI Ltd."

The claimant referred to the new supplier providing:

> "…an even worse service than Language Empire at the expense of justice and the taxpayer by supplying unqualified bilinguals who do not even speak the correct language."

The claimant went on to refer to a specific incident and that she was appalled that an interpreter had been used who spoke no Slovak and had no interpreting qualifications who had been sent to take a written statement from a victim of alleged domestic assault.

9.13. On 9 April 2019 Superintendent Humpage, Criminal Justice and Custody Services sent an email to the third respondent indicating that she had allocated the complaint raised by the claimant to the fourth respondent to investigate.

9.14. Claire Cuttell, the third respondent, stated that the claimant had been submitting complaints regarding the actions of the procurement department for a number of years and that, since this matter had arisen, she had become aware of at least six formal complaints the claimant had raised against the third respondent. This meant that the fact that the claimant had raised further complaints regarding the department in March and April 2019 did not come as a surprise to the third respondent. The third respondent also said that she welcomed such issues being raised in order that they could be addressed with the provider as the ramifications of using an interpreter within a policing environment who is not appropriately qualified could be very serious.

9.15. The third respondent was concerned that the claimant, within her email of 9 April 2019, had disclosed the name of the individual who had been in custody and the details of the particularly serious and sensitive offence for which the individual had been arrested. She was also concerned that the email had been sent to a generic group email address which could have been seen by a number of different people and it had been sent from

a non-secure personal email address. There were data protection issues, a danger that the investigation could be jeopardised, and the safety of individuals put at risk. She therefore took advice from the first respondent's in-house legal team and it was suggested that she should contact NRPSI.

9.16. On 10 April 2019 the third respondent spoke to a member of the NRPSI's Professional Standards Department and was advised that the disclosure of information did represent a breach of the code of conduct as a linguist was not permitted to share such details with anyone other than those directly involved in making the appointment.

9.17. On 17 April 2019 the third respondent completed an NRPSI online complaint form, in this she stated:

> "Following Dr Windle's attendance to the booking on 7th April, Dr Windle proceeded to contact the staff officer to complain about another linguist that attended the booking on behalf of a contracted service provider. Within the email to the staff officer, Dr Windle disclosed details of the detained suspect and the offences for which the suspect is detained. Whilst these details have been disclosed to police personnel, the personnel contacted are not involved in the associated investigation nor involved in the custody process; this therefore poses risk to the investigation. No details of arrests made should leave the custody setting without authorisation for the circulation of details. Sharing of such details could jeopardise investigations and put people within the organisation in positions whereby there is a conflict of interest. There is also concern that there is a breach of GDPR, which is also being investigated internally."

9.18. On 23 April 2019 the fourth respondent sent an email to the third respondent and others. This was in reply to redacted emails on the subject of "Concerns" regarding Language Line". In that email the fourth respondent stated:

> "Sorry all – just getting up to date with emails following leave.
> If we consider suspending Dr Windle from any Police duties, I think we should take this up with Legal first, bearing in mind that she has previously taken WYP to court for loss of earnings. I believe both Mick Preston and Rachel London both had to give evidence at that court case."

9.19. Also on 23 April 2019 the fourth respondent sent an email to the third respondent. This referred to an incident at Stainbeck Police Station and an email which had been sent by a Police Officer which referred to the claimant having been booked by Capita after a lot of trying and that the claimant said that Capita had been pestering her all day and that she didn't want to do it

> "as Capita pay peanuts and this is why they can't get interpreters"

The officer said that the claimant wanted her to feed this back. The fourth respondent stated:

> "What is very interesting are the comments Dr Windle made to the Officer as below. We thought that she was purposely ignoring calls from Language Empire before they refused to use her (we didn't have any direct evidence to report the matter to NRSPI) but below clearly states that she has been trying to avoid Capita in order to charge more money for her services by being approached by the Police direct.
> As part of the complaint made to NRSPI, could this be included?
> Let me know your thoughts please."

9.20. On 24 April 2019 an email was sent to the third respondent from NRPSI Professional Standards Manager acknowledging the complaint about the claimant and stating that:

> "Breach of confidentiality sounds serious and we are very keen to put it through our full disciplinary process.
> In order to build up the case for the Professional Conduct Committee (PCC) we need to provide them with as much evidence as possible. You mentioned on the form that you would be able to provide the redacted emails that were sent by Dr Windle. It would really help if you could do that."

9.21. On 25 April 2019 the fourth respondent checked the Warwickshire Police portal as that was where the national vetting contract was held. The portal did not show any results for the claimant. The fourth respondent checked with Warwickshire police and was told that there was no record of the claimant. The fourth respondent also contacted Greater Manchester Police as they had held the vetting contract before Warwickshire Police and the fourth respondent indicated that the vetting lasts for five years.

9.22. On 25 April 2019 the fourth respondent sent an email to Sergeant Humpage stating:

> "Just to keep you in the loop regarding Dr Windle.
> Warwickshire have confirmed that she is not vetted with them. I have been advised to contact Manchester who may have done some Northern vetting before the National vetting began.
> NSPRI shows that she only has a DBS clearance and there is no mention of police clearance which would be NPPV2 or NPPV3 (we require 3 – level 2 is a lower scale of vetting).
> I have updated Claire and will update everyone once GMP reply to me."

9.23. On 26 April 2019 the third respondent provided NRPSI with a redacted copy of the claimant's email of 9 April 2019.

9.24. The fourth respondent was sent an email by Capita indicating that the claimant needed the NPPV3 in addition to her Home Office clearance

9.25. On 29 April 2019 Greater Manchester Police indicated to the fourth respondent that they held no vetting record for the claimant.

9.26. On 2 May 2019 the third respondent emailed Capita indicating that, until the claimant had NPPV3 clearance, she would not be booked for any jobs. Capita confirmed that the claimant had been removed from future bookings.

9.27. On 6 May 2019 the claimant presented a claim to the Employment Tribunal claiming detriment for making a protected disclosure contrary to section 47B of the Employment Rights Act 1996. This claim was made against the first second and third respondent.

9.28. On 9 May 2019 Superintendent Humpage, Head of the first respondent's Criminal Justice Department, wrote to the claimant. In that letter she provided a response to the issues raised by the claimant on 29 March 2019, 3 April 2019 and 9 April 2019.

9.29. On 9 May 2019 the claimant sent an email to Superintendent Humpage informing her of a response she had received from the National Audit Office. Within that email the claimant referred to the judgment that had been issued against Language Empire and referred to the fraudulent nature of Language Empire and her belief that the procurement department failed to discharge its duty of due diligence when awarding and maintaining the Language Empire contract. She raised further concerns with regard to the management of the contract with Capita.

9.30. On 14 May 2019 the NRPSI Professional Standards Manager wrote to the third respondent requesting further details with regard to the complaint made by the fourth respondent in respect of the claimant's conduct on 23 April 2019.

9.31. On 18 May 2019 the claimant wrote to the second respondent's Freedom of Information Officer indicating a potential breach of the Freedom of Information Act 2000. In that letter it was indicated:

> "I have identified three unqualified bilinguals being used in two languages alone. There can be no doubt that unqualified individuals were being supplied regularly to police interviews at the time procurement provided the response to the FOI request and provided incorrect and misleading information to the request. Given the extent of this problem, it is my contention that the procurement department acted in bad faith and intentionally misled the public when providing the response to the bona fide FOI request.
> The FOI response therefore either indicates failure to manage the contract and its performance adequately, or deliberate deception intending to mislead the public in contravention of the Freedom of Information Act 2000…."

9.32. On 6 June 2019 the third respondent informed the fourth respondent that the NRPSI had asked that the fourth respondent to provide a statement in relation to the feedback provided in respect of the claimant's comments about ignoring calls and the rates of pay.

9.33. On 12 June 2019 the NRPSI Registrar reviewed the complaint and decided to dismiss it. It was indicated that the file had been kept open beyond normal procedural deadlines to facilitate further evidence to be supplied by the complainant which, in the event, did not arrive. In the report it was stated:

> "In this case we find no shortcomings given the Information Commissioner helpline has confirmed that the GDPR did not apply, particularly as the code of conduct advises Registrants to disclose all potential issues and organisations as well as individuals who are subject to the GDPR ought to disclose information in the interest of justice; see section 6 of the GDPR.
> With regard to the second complaint there has been no evidence supplied and it is based on hearsay.
> Therefore the Registrar has decided that the complaint does not warrant referral to the Professional Conduct Committee."

9.34. On 24 June 2016 the claimant presented a further claim to the Employment Tribunal bringing a claim pursuant to section 47B. This included a claim against the fourth respondent. An order was made on 3 July 2019 that the claims be heard together and case management orders were made at a Preliminary Hearing on 21 August 2019. The issues were identified including the alleged protected disclosures and detriments.

9.35. On 23 August 2019 Capita informed the third respondent that the claimant had received NPPV3 clearance along with other interpreters and it was indicated that all interpreters would now receive job offers for bookings in the West Yorkshire region.

9.36. On 28 August 2019 Capita acknowledged the claimant's interest in an assignment. It was stated that, if the claimant was successful in being assigned to the job, she would receive a separate job confirmation email from Capita.

9.37. On 7 September 2019 Capita indicated that the claimant had not been assigned to the job in which she had expressed interest. The claimant said that she did not know why Capita had not offered her the assignment and that this was exceptional. She had not previously received acknowledgement of interest and then not been awarded the job.The claimant confirmed that she did not bring any claim in this regard but she was suspicious and it was evidence providing background information. She also said that she had removed herself from the Capita registration.

9.38. On 22 October 2019 the claimant presented a further claim to the Employment Tribunal. This was a claim of detriment on the ground that she

had made a protected disclosure within the meaning of section 47B. All three claims were listed to be heard together at this hearing. The claimant confirmed that the protected disclosures upon which she relies are those identified at the Preliminary Hearing on 21 August 2019. She also confirmed that she did not allege any detriment to have taken place after 18 May 2019.

9.39. On 8 November 2019 the claimant wrote to Capita indicating that she was informing them that she did not wish to work for Capita and requesting that all her data be deleted from Capita's portal and database.

The law

10. **Protected Disclosure Claim**

Section 43B (1) of the Employment Rights Act 1996

"(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) 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 an 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 the preceding paragraphs has been or is likely to be deliberately concealed".

The claimant in this case seeks to rely upon disclosures to the respondent and section 43C of the 1996 Act provides: -

> "A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith –
>
> (a) to his employer…..".

Section 47B (1)

"A worker has the right not to be subjected to any detriment by an act, or any deliberate failure to act, by his employer done on the ground that the workers made a protected disclosure."

Section 48(2) provides that on a complaint to an Employment Tribunal

> "… it is for the employer to show the ground on which any act, or deliberate failure to act, was done."

Section 43K provides:

(1) For the purposes of this Part "worker" includes an individual who is not a worker as defined by section 230(3) but who –

> (a) works or worked for a person in circumstances in which –
>
> > (i) he is or was introduced supplied to do that work by a third person, and
> >
> > (ii) the terms on which he is or was engaged to do the work are or were in practice substantially determined not by him but by the person for whom he works or worked, by the third person or by both of them.
>
> (b) contracts or contracted with a person, for the purposes of that person's business, for the execution of work to be done in a place not under the control or management of that person and would fall under section 230 (3) (b) if for "personally" in that provision there were substituted "(whether personally or otherwise)"…

(2) For the purposes of this Part "employer" includes –

> (a) in relation to a worker falling within paragraph (a) of subsection (1), the person who substantially determines or determined the terms on which he is or was engaged…

11. Section 43K provides an extended definition of the meaning of "worker" in order to bring a claim of detriment on the ground that the worker has made a protected disclosure pursuant to section 47B.

12. Section 43K was considered by the Employment Appeal Tribunal in **Croke v Hydro Aluminium Worcester Ltd [2007] ICR1303.** The EAT reached the conclusion that, in construing the definition of "worker" in section 43K, it was appropriate to adopt a purposive approach. Accordingly, where an individual supplied his services to an employment agency through his own company and the employment agency, in turn, provided the services of that company to an end-user, it may be that in appropriate circumstances the individual is a "worker" of the end user for the purposes of section 43K.

13. Section 230(3) Employment Rights Act 1996 provides that an individual is a worker if he or she works under a contract of employment, or any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

14. In the case of **The Secretary of State for Justice v Windle and Arada [2016] EWCA Civ 459** the Court of Appeal held that interpreters working for HMCTS were not obliged to accept assignments from HMCTS, nor were they guaranteed to be offered work. They were paid only for work done. They received no sickness or

holiday pay. They accepted each individual contract on a case-by-case basis. There was no umbrella contract or mutuality of obligation between the parties between assignments. The claimants were found not to be workers pursuant to section 230(3).

15. In **Day v Lewisham and Greenwich NHS Trust [2017] EWCA Civ 329** the Court of Appeal held that words should be read into section 43K so as to exclude a claim by an employee or worker falling within section 203(3) of the Employment Rights Act 1996. In that case a doctor had brought a claim against the Trust and Health Education England (a training body). The EAT had upheld the Employment Tribunal's decision that the claimant was precluded from bringing a claim against the HEE as the NHS Trust was his employer pursuant to section 230(3). The Court of Appeal held that the doctor fell within section 43K notwithstanding his working relationship with the Trust.

16. In **McTigue v University Hospital Bristol NHS Foundation Trust (EAT/0354/15)** Simler J, the then president of the EAT, stated:

> "In conclusion in the hope that it will assist tribunals dealing with these issues, it seems to me that in determining whether an individual is a worker within s.43K(1)(a) the following questions should be addressed:
>
> (a) For whom does or did the individual work?
>
> (b) Is the individual a worker as defined by s.230(3) in relation to a person or persons for whom the individual worked? If so, there is no need to rely on s.43K in relation to that person. However, the fact that the individual is a s.230(3) worker in relation to one person does not prevent the individual from relying on s.43K in relation to another person, the respondent, for whom the individual also works.
>
> (c) If the individual is not a s.230(3) worker in relation to the respondent for whom the individual works or worked, was the individual introduced/supplied to do the work by a third person, and if so, by whom?
>
> (d) If so, were the terms on which the individual was engaged to do the work determined by the individual? If the answer is yes, the individual is not a worker within s.43K(1)(a).
>
> (e) If not, were the terms substantially determined (i) by the person for whom the individual works or (ii) by a third person or (iii) by both of them? If any of these is satisfied, the individual does fall within the subsection.
>
> (f) In answering question (e) the starting point is the contract (or contracts) whose terms are being considered.
>
> (g) There may be a contract between the individual and the agency, the individual and the end user and/or the agency and the end user that will have to be considered.

(h) In relation to all relevant contracts, terms may be in writing, oral and may be implied. It may be necessary to consider whether written terms reflect the reality of the relationship in practice.

(i) If the respondent alone (or with another person) substantially determined the terms on which the individual worked in practice (whether alone or with another person who is not the individual), then the respondent is the employer within s.43K(2)(a) for the purposes of the protected disclosure provisions. There may be two employers for these purposes under s. 43K(2)(a) ERA 1996."

17. The definition of a qualifying disclosure breaks down into several elements which the Tribunal must consider in turn in order to determine whether there was a qualifying disclosure. There are several appellate authorities which would normally be considered. However, in this case it is accepted by the respondents that the claimant had made a qualifying disclosure. The Tribunal is satisfied that the disclosures made by the claimant were disclosures of information which, in the reasonable belief of the claimant, tended to show that the respondent had failed to comply with their legal obligations.

18. The claimant had very serious concerns about the use of unqualified interpreters and the effect on the investigation of crimes and the administration of justice.

19. The Tribunal had the benefit of detailed written and oral submissions provided by the claimant and Mr. Jones. These were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

20. The first issue the Tribunal had to consider was whether the claimant comes within the extended meaning of "worker" within section 43K of the Employment Rights Act 1996.

21. Mr Jones, on behalf of the respondent, submitted that, for the purposes of the first disclosure, in the email sent on 29 March 2019 to the office of the Chief Constable of West Yorkshire, the claimant was not a worker within the meaning of section 43K. This was because, she failed to satisfy the requirements of section 43K(1)(a)(i). The claimant had not been introduced by Capita to the first respondent until 2 April 2019 when she undertook her first assignment under the terms of the framework agreement in place between Capita and the first respondent for the provision of language services.

22. Mr Jones went on to indicate that the express terms of the claimant's contract with Capita provide that the claimant was self-employed and at all relevant times she was an independent contractor. She was not an agency worker and nothing in the agreement should constitute a relationship of employer and employee or "worker" and the claimant should not hold herself out as such. The remaining terms of the contract also supported these provisions.

23. If there was more than one interpreter of the languages offered by the claimant then it would be a matter for Capita to determine which individual from its bank was put forward for the assignment. The respondents contend that the terms of the claimant's engagement were substantially determined by her or, in the alternative, Capita. The claimant had the ability to accept or reject assignments as she saw fit. She was engaged by a number of linguistic service providers and in business on her own account. The claimant had the choice of refusing assignments and there was no requirement for the respondents to offer the claimant any assignments. Thus, there could be no mutuality of obligation or position of subservience giving the respondents, or Capita the ability to "substantially determine the terms of engagement". The claimant had no obligation to Capita.

24. Mr Jones referred to the case of **Day v Lewisham and Greenwich NHS Trust** in which the EAT held that "substantially" in section 43K(1)(a)(ii) means "in large part" and rejected the argument that it means "more than trivially". The respondent avers that the claimant retained ultimate control and therefore it must be said that the claimant "substantially" possessed the ability to determine an engagement.

25. If the claimant chose to accept an assignment with the respondent, that engagement was subject to the terms agreed between the respondent and Capita. The claimant's conduct was subject to the Code of Professional Conduct of the National Register of Public Service Interpreters (NRPSI), the claimant's regulatory body,

26. It was submitted that, if the Tribunal was satisfied that the claimant was a worker within the meaning of section 43K then the respondent contends that she was not a worker at the time the disclosures were made.

27. If the Tribunal determined that the claimant was a worker within the meaning of section 43K the respondent accepts that the claimant made five protected disclosures.

28. The respondent denies that the claimant was subject to any detriment on the grounds that she made protected disclosures. The protected disclosures did not materially influence the treatment of the claimant. There were other substantive reasons for the actions of the third and fourth respondent.

29. The claimant submitted that at the time she made the disclosures she was a section 43K worker. She referred to the case of **McTigue v University Hospital Bristol NHS Foundation Trust** indicating that section 43K was enacted primarily to protect agency workers provided to an end-user in circumstances where the worker could not fulfil the strict limb (b) requirements of section 230(3).

30. In the EAT case of **Croke v Hydro Aluminium Worcester Ltd** it was said that the legislation should be construed for the purpose of providing protection from discrimination or victimisation. It is appropriate to construe those provisions, so far as one properly can, to provide protection rather than deny it.

31. The claimant submitted that the respondent's interpretation of section 47B was such that they were trying to find any way possible to exclude a putative whistle-blower from the protection and that it is a narrow interpretation against the purpose of the legislation that the putative whistle-blower cannot fall under its protection unless he or she is physically on an assignment.

32. The claimant was supplied by Capita to the respondents. The respondents are capita's clients. They're not the claimant's clients. She does not invoice them and they do not pay her. She did not determine any of the terms of her engagements which were offered to her on a take it or leave it basis and were non-negotiable. The claimant said that respondents determined every aspect of the terms on which Capita can engage a linguist including interpreters' qualifications, the nature of the skills required for each assignment and the level and nature of security vetting.

33. The claimant submitted that it is sufficient to show that the fact that the whistle-blower made protected disclosures played a significant role in the alleged acts of victimisation. She referred to Mummery LJ in in the well-known Court of Appeal case of **NHS Manchester v Fecitt & Others [2011] EWCA Civ1190** in which he made it clear that liability arises if the protected disclosure is a material factor in the employer's decision to subject the claimant to a detriment.

> "In my judgment, the better view is that Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower. If Parliament had wanted the test for the standard of proof in section 47B to be the same as for unfair dismissal, it could have used precisely the same language, but it did not do so…
>
> Where the whistle-blower is subject to a detriment without being at fault in any way, tribunals will need to look with a critical – indeed sceptical eye – to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation."

34. The claimant submitted that the third and fourth respondents carried out a number of acts of victimisation against the claimant for which there could be no bona fide or innocent explanation. They could only be explained by their intention to victimise the claimant because of the disclosures.

35. In the Court of Appeal case of **The Secretary of State for Justice v Windle and Arada** it was held that interpreters were not workers within section 230(3)(b). However, the Tribunal is satisfied that the claimant comes within the extended meaning of 'worker' within section 43K. She was introduced or supplied by Capita to the respondent and the terms on which she was engaged to do work were substantially determined by the respondents or Capita. The claimant was supplied by Capita to do work for the respondents. The claimant was subject to fixed terms with non-negotiable rates of pay. She was required to attend premises at the date and time set by the respondents and was not allowed to leave until released by the respondents.

36. The claimant could refuse an assignment and there was no 'umbrella contract'. However, she was subject to the control of the respondents. Once she accepted the assignment she could not choose her own time to attend and was managed by the Officer in Charge whose instructions she had to obey. She could only leave when the Officer in Charge signed her time sheet and authorised her to leave.

37. At the time of the first disclosure, on 29 March 2019, the claimant had not been introduced by Capita to the respondents. The claimant said that she had signed up with Capita in February 2019. She submitted that she was a worker from that time pursuant to section 43K even though she had not been offered or undertaken any

assignments for the respondents. It was submitted by Mr Jones that the claimant was not a worker within the meaning of section 43K(1)(a)(i) as it was not until 2 April 2019 that she was introduced to the first respondent and undertook her first assignment under the terms of the framework agreement.

38. Section 43K provides the extended meaning of 'worker' and the definition is with regard to the introduction of supply to do 'that work by a third person' and in paragraph (ii) it refers to the terms on which the worker was engaged to do the work being substantially determined not by him, but by the person for whom he worked or by the third person. The Tribunal finds that if the claimant was not engaged to work for the respondents at the time of the first disclosure then she was not a worker within the meaning of section 43K. This is not of significance in this case as, there is no claim that there was a particular detriment in respect of the first protected disclosure. It is accepted that the claimant made protected disclosures and the Tribunal is satisfied that the four subsequent disclosures were made at a time when the claimant was a worker.

39. The respondent accepts that claimant's disclosures were protected disclosures pursuant to section 43B. The Tribunal is satisfied that the disclosures were qualifying disclosures of information in the reasonable belief of the claimant that the disclosure was made in the public interest and tended to show that the respondents had failed, were failing, or were likely to fail to comply with a legal obligation. That is to provide the efficient administration of justice which would include ensuring that reasonable interpretation facilities were provided in the interests of justice.

40. The alleged detriments were as follows:

> 1. The third respondent made a complaint of professional misconduct against the claimant to her professional body the NRPSI. The complaint asserted that the claimant was defrauding the taxpayer to get more money by not being booked via Capita. Secondly, it was asserted that the claimant had breached confidentiality/the GDPR.

41. The complaint was submitted to NRPSI on 17 April 2019. The complaint was about the claimant posing a risk to an investigation and breach of confidentiality. On 23 April 2019 the third respondent added a further complaint in respect of the incident at Stainbeck Police Station on that date and the email which had been sent from a Police Officer.

42. This was a serious allegation and the Tribunal accepts that it was a detriment.

> 2. The third respondent unlawfully disseminated a copy of the claimant's confidential email to the first respondent's office.

43. On 25 April 2019 the third respondent sent a redacted copy of the claimant's email to the NRPSI Professional Standards department. During the hearing, the claimant agreed that this was not unlawful but she said that it was unnecessary and inappropriate. This was in the context of the third respondent submitting a complaint about the claimant in respect of the respondents' concerns about the claimant disclosing confidential details in relation to criminal offences and investigations.

44. It was submitted by Mr. Jones, on behalf of the respondents, that the claimant had not proven that there had been detrimental treatment on the balance of probabilities.

45. The Tribunal is satisfied that the making of the complaint to the claimant's professional body was a detriment. However, it is not satisfied that the dissemination of the claimant's email was a detriment.

> 3. The respondents cancelled the claimant's work bookings for 30 April 2019 and 4 May 2019 or asked for cancellation of the same by Capita.

46. The third respondent wrote to Capita on 2 May 2019 indicating that the claimant should not be booked for any jobs until her NPPV3 vetting was cleared. This was a detriment.

> 4. The respondents suspended the claimant from receiving further bookings via Capita or requested that Capita suspend her from further bookings after 4 May 2019.

47. This appears to be a, in effect, duplication of detriment 3 and the claimant deals with it on this basis in her submissions.

> 5. The fourth respondent wrongly disseminated the email from PC Sanders which was marked "protected".

48. The respondent submitted that this is unclear and confusing – the claimant made it clear that she objected to the email being sent to Sergeant Humpage and the third respondent but the Tribunal is satisfied there is no detriment established here.

> 6. The third and fourth respondents deliberately refused to co-operate and properly follow up the NRPSI's complaints investigation. Whilst indicating that they had further information to provide, they failed to provide it.

49. The alleged detriment is that the third and fourth respondents failed to cooperate with the investigation by NRSPI. There was a delay with regard to providing statements but this was not unfavourable to the claimant. No further action was taken against her and there was no detriment to the claimant.

> 7. Excessive email correspondence without justification between the third respondent, the fourth respondent, Warwickshire Police, Greater Manchester Police, Capita and others.

50. The Tribunal has considered the email exchanges between the third and fourth respondent, colleagues, other police forces and Capita. These appear to be reasonable and appropriate once the issue in respect of the claimant's vetting had arisen. The claimant referred to the fourth respondent's email exchange with Capita with regard to CTC clearance in which the fourth respondent indicated that there was a difference tween "Home Office clearance" and CTC which is a counterterrorism check. The claimant submitted that this was unnecessary and unjustified. She also submitted that if the fourth respondent genuinely wanted to establish the claimant's NPPV3 status one email to Capita would have been sufficient.

51. The Tribunal is not satisfied that there was any detriment to the claimant established in the content of these emails

8. The fourth respondent's excessive and bizarre enquiries damaged my relationship with Capita and made Capita think there was something wrong with me.

52. The claimant said that this detriment concerned her allegation that the fourth respondent watched her and reported on her various activities to Superintendent Humpage.

53. The claimant said that Superintendent Humpage is one of the senior officers within the force and does not deal with the day-to-day issues, such as the booking of interpreters.

54. Superintendent Humpage had appointed the fourth respondent to investigate the concerns raised by the claimant in her emails of 29 March 2019 and 9 April 2019 to the Office of the Chief Constable. It was not a detriment to the claimant that the fourth respondent continued to keep Superintendent Humpage informed of the issues with regard to the claimant, and the reference to keeping her in the loop regarding the claimant was not a detriment to the claimant.

55. Superintendent Humpage provided a response to the issues raised by the claimant on behalf of the Chief Constables and Police and Crime Commissioners and it was entirely appropriate for her to be kept informed of issues with regard to the claimant and issues with regard to her vetting status at that time.

56. There is no dispute that the first and second respondents are vicariously liable for the acts of third and fourth respondents.

57. It is accepted by the respondent that there had been five protected disclosures made by the claimant. It was also accepted that, if the Tribunal is satisfied that the claimant was a worker within the meaning of section 43K, then four of those disclosures were made whilst the claimant was a worker. It is also accepted by the respondent that there were detriments, specifically, detriments 1, 3 and 4.

58. In those circumstances, the determinative fact for the Tribunal to consider is whether the reason for the detriments to which the claimant was subjected was on the ground that she had made the protected disclosures. The Tribunal must determine whether the protected disclosures materially influenced the respondents in making the detriments.

59. The Tribunal has taken into account the burden of proof in respect of a detriment. There were detriments and pursuant to section 48(2) and the other necessary elements of the claim have been proved on the balance of probabilities by the claimant. That is that there were protected disclosures, there were detriments and the respondents had subjected the claimant to the detriments. The burden then shifts to the respondents to prove that the claimant was not subjected to the detriments on the ground that she had made the protected disclosures.

60. The claimant exhorted the Tribunal to consider the guidance of Mummery LJ in the case of **Fecitt** and to look, with a 'critical - indeed sceptical – eye, to see whether the innocent explanation' is genuine. The Tribunal gave careful

consideration to this matter and finds that the evidence of the third and fourth respondents was clear, consistent and credible.

61. There was clear evidence that there was concern that the claimant had potentially endangered an investigation and breached security by disclosing the name of a detainee and the offence for which he was investigated. The information had been sent by the claimant to a generic email address from what could be an insecure email address. The third respondent considered that this may be a breach of the NRPSI guidelines and she sought guidance from the respondents' legal department and the Professional Services Department of NRPSI before submitting a complaint. The Tribunal has considered this carefully and is satisfied that this concern was the genuine reason for the complaint to NRPSI and was not materially influenced by the protected disclosures.

62. The email on 23 April 2019 from PC Sanders was forwarded to the fourth respondent. It was information provided by the claimant to the Police Constable. The fourth respondent was concerned about the information that had been provided and said that her sole concern was to try and end the practice of interpreters going "off contract" which was costing the force a considerable amount of public funds. The Tribunal is satisfied that the respondent has established that this was the reason the fourth respondent raised the issue and the third respondent added it to the complaint to NRPSI and that the protected disclosures did not materially influence this.

63. The request or requirement that Capita ensure that the claimant was not used on police assignments until she had the NPPV3 clearance as required by the framework agreement was because the claimant did not have the requisite vetting clearance. It was a temporary measure and, once the claimant obtained the NPPV3 she was provided with information in respect of a further police assignment. The Tribunal is satisfied that the respondents have shown that the genuine reason for this detriment was that the claimant did not have the requisite vetting and it was not materially influenced by the protected disclosures.

64. The claimant referred to the email of 29 April 2019 from the fourth respondent to the third respondent and others as a "smoking gun". The Tribunal is satisfied that this email serves to confirm that the fourth respondent had legitimate concerns that Capita had been sending interpreters who did not have the requisite vetting. It was submitted by Mr Jones that it was an "absurd proposition" on the part of the claimant to suggest that this is evidence that establishes the detriments were done on the ground of the claimant having made protected disclosures. The Tribunal has considered the contents of this email carefully. It refers to the claimant having made complaints about inadequately vetted interpreters and that it had then been found that the claimant did not have the appropriate clearance.

65. The reporting of the claimant to her professional body was established to be because of the respondent's concerns about the potential breach of confidentiality and jeopardising investigations followed by the further concern with regard to the claimant not having the required level of vetting.

66. The claimant submitted that the evidence given by the fourth respondent in cross examination raised a question of credibility in that it contradicted the wording

of the grounds of response when there was reference to the fourth respondent becoming aware of "five" (referred to as "several" in the third grounds of response) linguists who did not have the requisite vetting.

67. The claimant referred to "false information and intention to mislead" in the 3 grounds of response and the evidence from the fourth respondent with regard to the discovery of four or five interpreters without the requisite vetting. The Tribunal is satisfied that this came as a complete surprise to the fourth respondent. It was an error on the part of the legal representatives. The Tribunal is satisfied that it would have been appropriate for the fourth respondent to have sight of each of the ET3s and the grounds of response but it was apparent that she had not, even when she had been named as a respondent. This was a repeated pleadings error. The claimant referred to it as false information that could only have been put in all the responses to mislead the claimant and the Tribunal. The fourth respondent gave an honest response. She did not know how that information had come to be included in the grounds of response. There had been some confusion with regard to a reference to four interpreters. The Tribunal is satisfied that this was an error and it did not damage the credibility of the fourth respondent

~~76~~68. The requirement for Capita to take the claimant off the list and that she be provided with no more police assignments until she had the NPPV level 3 clearance was not materially influenced by the disclosures. It was purely because it had come to the respondents' attention that the claimant did not have the required level of vetting. The claimant obtained the requisite vetting and was then provided with an indication that she would be considered for a further assignment through Capita for the respondents. She was provided with an indication in respect of some potential work but was then not provided with the assignment and removed herself from Capita's list.

69. The Tribunal has been careful to use a "sceptical eye" when considering the innocent explanation given by the respondents. The Tribunal entirely satisfied that the identified detriments were not as a result of or, materially influenced by, the protected disclosures that have been identified.

~~78~~70. In the circumstances, the claim that the claimant was subjected to detriments on the ground that she had made public interest disclosures is not well founded and is dismissed. .

Employment Judge Shepherd
6 March 2020

JUDGMENT SENT TO THE PARTIES

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FOR THE TRIBUNAL OFFICE