



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4107552/2019

Held in Aberdeen on 17 and 18 February 2020

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Employment Judge J Hendry

15 **Mr M Ives**

**Claimant
In Person**

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Penumbra

**Respondent
Represented by:
Ms H Maclean -
Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:

- 1. The claim for unfair dismissal fails and is dismissed.**
- 2. The claim for detriment fails and is dismissed.**

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REASONS

1. The claimant in his ET1 sought findings that he had been unfairly constructively dismissed because of the actions of his employers arising from a protected interest disclosure (PID) he had made to them and that further he had suffered various detriments as a result of that disclosure.

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2. The respondents accepted that the claimant had made a protected interest disclosure on 6 April 2018 but denied that they had given the claimant cause to resign through any action resulting from the public interest disclosure or that any detriments had been suffered by him.
- 5 3. A preliminary hearing took place by telephone conference call on 28 November before Judge Kemp. It was recorded the claimant could not make a claim for “ordinary” unfair dismissal because he did not have the requisite two years’ service. The respondents accepted that the email was a protected disclosure invoking the protection of the Employment Rights
10 Act.

Evidence

4. The Tribunal first of all heard evidence from the claimant on his own behalf. The respondents led evidence from Jane Cumming, Director of Services and Innovation, Keith Douglas Hall, Head of People, Mrs Dawn Rezin,
15 Service Manager, Emma Wilson, Support Manager and Investigating Officer.

Issues

5. The Tribunal had to examine whether the actions of the respondent related to the disclosure and whether the claimant suffered detriments in
20 connection with his ‘whistleblowing’ complaint of the 6 April. The Tribunal then had to consider if the claimant had been ‘constructively’ dismissed by the respondents by giving him sufficient cause to resign.

Facts

6. The claimant left a career in retailing to work in social care. He initially
25 worked as a support worker for an organisation, SMAH, which provided support to those with mental health difficulties. The claimant had a professional and personal interest in such work having been diagnosed himself with bipolar disorder.
7. He applied for and obtained work with the respondent organisation as a
30 recovery worker. He worked at a facility in Aberdeen at Rosemount Terrace which provides support to five adult residents.

8. The claimant had become concerned about a number of aspects of the service that was being provided and in particular the practice of the manger Mr Fyfe. He discussed his concerns with other staff who he thought echoed some of those concerns themselves. He felt that they supported those concerns. In particular, one member of staff (HB) seemed to have similar concerns to that of the claimant.
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9. As a consequence, the claimant emailed the respondents on 6 April 2018. In the email he raised concerns about the respondent's service. He made reference to various policies and procedures. He copied the mail to a number of people including HB. The claimant also informed the respondents that he had raised his concerns with the Care Inspectorate. This email was treated by the respondent as 'whistleblowing' in terms of their policies.
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10. The respondent's service manager, Kenny Thom, emailed the claimant on 8 April to confirm that he had appointed Ms Emma Wilson to investigate the concerns. Ms Wilson is an experienced practitioner in social care and a manager working in Dundee.
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11. The claimant acknowledged receipt of Mr Thom's email on the 9 April (JBp51).
12. The claimant submitted a second complaint on 13 April. He had received a letter from the Royal Mail enclosing documents one of which was his PVG application. The documents had, in turn been sent by the respondent's staff in Aberdeen to another office but with insufficient postage on the envelope. As there was no return address the envelope was opened by the Royal Mail and the contents examined. The claimant was concerned that his identity and Data Protection rights had been breached as the letter had been opened by Royal Mail although they had done so in a secure facility to protect any confidential information.
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13. Almost immediately after the initial disclosure made by the claimant the respondents became aware that concerns had been raised by two members of staff, HB and LM, about the claimant's behaviour. The claimant's manager Stephen Fyfe alerted the respondent's Head of People, Keith Douglas Hall, on 15 April that two members of staff had raised
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concerns with him on Friday 12 and Saturday 13 April. These concerns in particular in relation to HB included being copied into the email of the 6 April. Stephen Fyfe emailed Mr Keith Douglas Hall following a telephone conversation with him (JBp59).

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"Hi Keith,

Following our telephone conversation this morning, I wish to share the following information with you.

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As you are aware, a Recovery Worker at Rosemount Terrace, M.I. has forwarded an email to Dawn Rezin, Kenny Thom, Jackie Edwards and HB regarding issue and concerns about how these services has been operating.

M.I. began working at the service on Monday 18 March.

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As we are aware, on Saturday 13th April, on the telephone, a Peer Recovery worker, HB, that she had been suffering from mental health issues and this had been caused partly by M.I. HB informed me she felt under pressure by M.I. whilst she had been at work recently and that she was aware that M.I. had copied her into the email mentioned above.

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I advised HB to go home on Saturday as I did not think that she sounded fit and able to be at work. HB met with Dawn and I this morning and repeated her concerns regarding working with M.I. and that she had felt under pressure when she had been working with him and that this had caused her stress levels to increase.

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HB also said that she felt stressed by an email message from Emma Wilson, Support Manager, from Dundee Nova service.

Emma has been appointed to carry out a fact finding investigation on behalf of Penumbra in relation to M.I.'s email and issues that he has raised.

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Dawn Rezin and I offered reassurance to HB that she had done nothing wrong and she does not have to worry about her job or the position that she currently feels she is in.

HB agreed to take the time off work on A Self Certification for seven days from Saturday 13th April and to phone me every day to inform me of her wellbeing and to receive support.

I was made aware on Friday 12th April by Recovery Worker, L.M. that M.I. had raised issues with her regarding the running of the service and that he asked if she had completed the Staff Questionnaire from Care Inspectorate.

5 *M.I. informed L.M. that he had completed his Care Inspectorate Questionnaire and that he had made them aware that the service was not meeting standards.*

L.M. said that this had made her feel uneasy as she does not want to provide negative feedback to Care Inspectorate about the service.

10 *Dawn has spoken with Jane Cumming this morning and fed back to me that Jane has spoken of her concern for M.I.'s mental health.... I am aware that MI is currently protected by the Whistleblowing Policy."*

14. Mr Douglas Hall was concerned about the situation and he took legal advice. He wrote with advice to Ms Cummings on 15 April. The email made
15 reference to the allegations made by HB.

15. On 15 April, the claimant's local manager Dawn Rezin met him to discuss the ongoing situation. She had taken advice from the Mr Douglas Hall and given the serious concerns raised by the claimant and in turn the concerns raised against him, it was proposed that he would be allowed a "breathing
20 space" whereby he would be paid but not required to work until the allegations had been investigated fully. The claimant was content at this course of action and understood the reasons for it. He raised no objections.

16. The claimant met Dawn Rezin on 15 April and emailed her after the meeting (JBp66).

25 *"I am writing to follow up on our discussions with Steve Fyfe present in which you advised that you would be sending me home for "breathing space" on full salary for today and tomorrow (Tuesday) pending a phone call from yourself. You also advised me that I was not being suspended. You advised me that this was an unrelated
30 matter separate to the complaints I have already put in and you are required to consult with other parties to decide what happens next. In response I would like to send my appreciation to you for making the decision to send me home to have some "breathing space".*

However, whilst I appreciate that you have had to make a decision given the circumstances, I am very alarmed again you stated in front of the Support Manager that there was a complaint submitted by myself that was separate to the unrelated matter you raised today.

5 *This is when the Support Manager should have no knowledge that I had put in any complaint which was a Protected Disclosure under a government act in which the Whistleblowing Policy was invoked by Kenny Thom.*

10 *This would appear to suggest that I am potentially compromised ahead of any investigation being carried out in which my position as a Recovery Worker at Rosemount Terrace and as an employee with Penumbra is now untenable.*

17. The employee LM emailed Dawn Rezin 16 April giving details of her concerns (JBp67).

15 *“Since new staff member M.I. joined team*
M.I. stated that not enough Recovery focussed support is being provided with SP and that 47 ? codes of practice is not being achieved by the service ? Lack of risk assessments in place ? H&S for staff re gloves ? also handwashing paper towels? I advised M.I to talk with
20 *manager SF, M.I. stated that he had at SV and also while filing out Care Inspectorate Staff Questionnaire?.... M.I. spends a lot of time observing and taking notes also on computer.... On Saturday 13/4 impact on all staff became clear to me for the first time as fellow staff member HB showed staff on shift that day an email that M.I. had*
25 *copied her into stating some of his complaints the staff member was clearly very upset as had been sent the email on Mon and felt she would be blamed. I did not read the contents of the email but as the 3 team members (The Rosemount Team) were all working that day, we were made aware of what had been happening and were able to*
30 *share. Manager SF was contacted by phone.*

Think it is having an impact on me too as got home an hour later than had planned to be had something to eat and fell asleep sitting on my sofa, so sorry this email is late.”

18. Ms Rezin emailed Ms Cumming on 16 April (JBp69) about the concerns of HB and LM.

19. The claimant emailed Ms Rezin on 16 April with an email following their phone call with him. He stated he was very concerned there had been complaints made against him by two unidentified members of staff and that he hadn't been made aware of the specific concerns.

20. The claimant was unhappy at the situation that had developed. He felt that Mr Fyfe had got to know about the complaint and that this would make it difficult for them to work together in the future. He emailed Mrs Rezin (JBp73-74) on 16 April. He wrote:

"This is an email to follow up our phone call today (Tuesday 16 April 2019 at 17.22). During the call:

- *You thanked me for my patience given the circumstances.*
 - *You advised me that my two complaints are being taken seriously and that they will be investigated.*
 - *You then advised me there have been complaints alleging my conduct towards two members of staff.*
 - *You asked for my consent to continue this "breathing space" arrangement until Friday during which you will call with no timescale involved to which I said yes.*
 - *I requested clarification regarding a scheduled meeting on Thursday to which you advised to continue going ahead with it.*
 - *You then emphasised that this arrangement is not a suspension nor a disciplinary process.*
 - *You then asked me for confirmation I was satisfied with the "breathing space" arrangement to which I said I was*
- I am satisfied that my two complaints are being taken seriously and that they will be investigated.*

However I am very concerned that there have been complaints made against me by two unidentified members of staff with regards to my alleged conduct towards them. I was not made aware of any concerns by anyone otherwise I would have actively listened to any feedback and/or concerns and would have taken them on board then adjust my behaviour accordingly. This may also explain why it

appears to suggest that my first supervision with the support manager at 4 Rosemount Terrace did not follow process and the line of questioning that was used by the Support Manager to elicit answers to specific questions which is also very concerning.

5 *So like Penumbra, I will be taking these complaints very seriously as any complaint made against me regarding my conduct will appear to suggest that what may be presented will be detrimental to my character. Please advise if what I receive is detrimental to my character, I will have no option but to file complaints and grievances*
10 *in response. I will also raise concerns if it appears that the complaints in question could have been handled in a more informal manner. Also, I would like to refer you to the documentation which were enclosed with a covering letter on 27 February 2019 from Heather McCamley, HR assistant, being a 'Formal Statement of Terms and*
15 *Conditions of Employment', 'Recovery Worker Job Description', and 'PenumbraPolicies'."*

21. The claimant then made various points in relation to the documents. He continued:

20 *"Therefore as there appears to suggest that there is contradictory and dishonest language in the 'Formal Statement of Terms and Conditions of Employment', that I signed on 04/03/19, am formally requesting that it is declared null and void otherwise under Termination of Employment, I formally request and wish to terminate my employment one week from the date of this correspondence on Tuesday 23rd April*
25 *2019.*

30 *Lastly, I joined Penumbra in good faith after being recommended this organisation by a current employee and ever since my interview, it has been such a chastening experience I want to put behind in the past as soon as possible so I can focus on the present and future. All I have tried to do is comply with every reasonable request in accordance with the National Health and Social Care Standards, the SSSC Codes of Practice, follow the induction checklist to the letter despite none of the policies, Staff Handbook, not Y: company drive not forming pet (part?) of my contract of employment. I have listened and listened and I*
35 *mean actively listened to every member of staff over the past four*

weeks voice their frustrations and concerns at 4 Rosemount Terrace – including yourself – which eventually led me to making the decision to raise those concerns.

If people don't want to stand up for what is right I respect that as that is their choice as I accept and appreciate everyone is unique, have their own values, codes to live by. However, I don't ever want to be associated with anyone who wants me to listen, wants things to change, wants something done about it then stops and starts complaining instead as this demonstrates a lack of integrity.

This is why in closing it is my wish to terminate my employment with Penumbra with the notice of one week given and my final day will be on Tuesday 23rd April 2019."

22. Mr Thom wrote to the claimant on 18 April (JBp49). He indicated that the investigation into the claimant's concerns would continue. He wrote:

"Thank you for your email dated 16 April 2019 expressing concerns that you have with regards to the service we are provided at 4 Rosemount Terrace.

At Penumbra we take all complaints seriously and therefore we will be following organisational procedure and launching an investigation into the allegation that you made under the auspices of 3.14 Whistleblowing Policy.

We have appointed an investigating officer, Support Manager, Emma Wilson, and she will be in touch with you in due course in a timeous manner.

Our Director of Corporate Services will be writing out to you to inform you of this process later today and explain the process to you.

Jane Cummings, Director of Services and Innovation, is the Penumbra Complaints Officer however Joe will be dealing with this until Jane's return from annual leave."

23. Once Mrs Cummings returned from annual leave she had been appraised of the situation and took over as Complaints Officer.
24. Ms Cumming's email to Emma Wilson on 18 April prior to a meeting with the claimant (JBp79):

“Hi Emma

Please find below feedback from the staff related to the ongoing investigation into the situation that has arose.

5 *I really want to limit the impact of this on Mike and everyone connected to this but at the same time we need to thoroughly investigate so I think as Investigating Officer I would appreciate you clearing this in your investigation – there are clear links to the matter of any investigation, and I think we need to have one full and objective investigation of all matters connected with all parties being offered the*
10 *opportunity to understand any allegations made against them and also having the right of reply.*

25. Mr Keith Douglas Hall wrote to the claimant on 18 April. He used a standard template letter. The claimant received the letter the day after his meeting with Ms Wilson. He was upset by its terms. In particular, he didn't
15 understand how the matter had escalated from a couple of staff having concerns about him to alleged aggressive behaviour and possible gross misconduct. He was also concerned that Mr Douglas Hall had mentioned in the letter that they could notify the SSSC of any findings related to his fitness to practice. The claimant thought this was unnecessary as he was
20 fully aware of the policies.

26. Ms Wilson prepared an investigation report following the submission of the original whistleblowing complaint the claimant had given further detail in relation to the specific events. She considered the evidence and recommended that no action should be taken as there was insufficient
25 evidence of any abuse or malpractice.

27. Ms Cummings considered the report and wrote to the claimant on 1 May (JBp205-206). She could find no evidence to substantiate any abuse or neglect. The complaint in relation to the letter with insufficient postage was upheld. In relation to complaints against Mr Fife, these were not upheld.
30 She also wrote *“as you are aware, Emma Wilson was also investigating concerns that you had put pressure on team members to agree with you where an investigation did not find specific examples of this.”*

Witnesses

28. The claimant is a clever and articulate witness who was generally reliable as a historian but whose evidence I found difficult at time to fully understand. In particular I found it difficult he provided in his disclosure to fully understand or appreciate his concerns although in fairness he gave some examples of what he felt were not best practice and which related to his manager's work. I also had a similar difficulty understanding why he had resigned when he had just as the investigation he wanted was about to commence.
29. The evidence of the respondent's witnesses was factual. It was presented in a clear and firm manner and I had no difficulty in holding that they were credible and reliable. In particular Ms Wilson and Ms Cumming struck me as wholly professional, without any antipathy towards the claimant and whose concern was to fairly investigate the issues that had arisen.

Submissions

30. Ms Maclean addressed the issues of whether the claimant had been dismissed and if he had suffered any detriment arising for his disclosures. The respondent accepted that the email dated 6 April was capable of amounting to a protected disclosure. She then summarised the evidence stressing the claimant's own position at the time as evidenced by Ms Rezin and the contemporaneous emails. In essence her position was that there was no discernible detriment either before or after the claimant resigned. She addressed the letter dated 18 April which had caused offence to the claimant. The reference to the SSSC in that letter to which the claimant objects is no more than a statement of fact and one that the respondent's managers felt should normally be made. It was a routine template.
31. As she saw it the claimant was alleging that the detriments were; that Mr Fyfe was aware he was the author of the first disclosure; that it was critical of him; he was asked to take leave of absence (which he was happy to do at the time) and finally the escalation of staff concerns to possible disciplinary procedures and reporting to the SSSC. She then took the Tribunal through the evidence on these matters and referred to the resignation letter.

32. The claimant has less than two years' service. The Tribunal has no jurisdiction to entertain a claim for 'ordinary' unfair dismissal. The claims for detriment must fail. There was in any event no connection or link between the making of the first disclosure and the actions then taken in relation to staff concerns although those concerns arose from the claimant's actions in relation to pursuing those concerns.
33. Mr Ives kept his submissions brief. He had he said made the disclosures in good faith based on his observations. He thought that he had the support of other staff and had not put pressure on anyone. He felt that to be suddenly asked to have a 'breathing space' and then to be threatened with disciplinary action and the SSSC amounted to detriments. He did not want to object to the enforced 'breathing space' but did not really agree with it. He believed that Mr Fyfe had been told about the disclosures and this would make working with him in the future impossible. He believed that his position was untenable once his manager was aware that he was the 'whistleblower' and this was apparent to him at the meeting with Ms Rezin. That was why he choose to resign. He was unhappy that the employment contract did not properly reflect the job description for his post. The claimant had obtained work with Dundee Voluntary Action but that job only lasted three weeks and he had been suspicious that as Ms Wilson was a manager in Dundee she had contact with staff there that might have led to them being told about the first whistleblowing disclosure he had made but he now accepted that this was not the case.
34. He sought a claim for injury to feelings. He had left care work and returned to work in a supermarket which was not his career choice. There was no continuing financial loss.

Discussion and Decision

35. An employee generally requires to have two years' continuous service before being entitled to make a claim for unfair dismissal. However, an employee who makes a protected disclosure, which it was accepted the claimant had made, has additional protections contained in Section 103A of the Employment Rights Act 1996 ('the Act') namely:

“103 A Protected disclosure.

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

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36. The protection in relation to dismissal is a separate right to that of being protected from suffering a detriment.

37. An employee who makes a protected disclosure is protected from suffering a detriment by Section 47B which provides:

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“47B. Protected disclosures

(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.

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(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, ...

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(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.”

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38. In the case of such a dismissal the onus of proving a ‘fair’ reason for such a dismissal remains with the employer unless, like here, the claimant has insufficient service. In these circumstances the burden is with the employee to establish the reason or real reason for the dismissal and that it relates to the protected disclosure.

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39. Detriment is not defined in the statute. It has a wide meaning. It can cover any action by an employer that puts an employee in some way at a disadvantage compared to other employees. It is not necessary for an employee to demonstrate some actual economic, financial or physical damage.

40. The respondents accepted that the claimant had made two protected disclosures namely the email of the 6 April (JBp45) and the later complaint

over data protection and the opening of mail. The later disclosure does not concern us.

41. The evidence was supportive of the respondent's contention that they had taken the claimant's disclosure of the 6 April relating to his concerns over the running of the service seriously. The investigation carried out by Ms Wilson was thorough and fair and the ultimate decision by Mrs Cummings not to uphold the claimant's position was one that she was entitled to take given the terms of the investigation report. It should be noted that she upheld the claimant's grievance in relation to the second issue that he raised namely his concerns that his private documents had not been treated carefully enough when they were sent out by post without sufficient postage.

42. In many cases of constructive dismissal an employee does not fully know what was going on behind the scenes but can entertain suspicions that there is something untoward happening to their disadvantage. This was certainly the case here and it was apparent that as the claimant heard the evidence of Ms Wilson and Mrs Cummings and was able to question them some of his concerns seemed to have been allayed. I confess that I found it difficult at points to fully understand the claimant's concerns about the investigation. Some of these seem to have revolved around whether Ms Wilson had in some way told his new employers in Dundee about the issues that arose in Aberdeen or was in a position to influence them in some way. After questioning her he was satisfied that this was not the case.

43. The main concern that the claimant had was his belief that Mr Fyfe, his manager, had become aware of the whistleblowing disclosure and the fact that he was the author. We did not hear evidence from that person but the circumstances lend themselves to the high probability that he did become aware that the claimant was the 'whistleblower' from discussion he had with the HB. The respondent's solicitor quite correctly pointed out that the initiating email was sent to a number of parties and that HB had been copied in. This had led to her raising concerns with the respondent's managers and speaking to Mr Fyfe. What was clear was that the claimant resigned in anticipation of future difficulties not because of any detriment at the hands of the respondent's managers or staff at the time of the resignation.

44. In passing I would add that the letter of resignation made mention of issues around the Terms and Conditions. This matter was not pursued in evidence as a concern.

5 45. The claimant had already resigned when he received the contentious letter from Mr Douglas Hall. It was not perhaps the most even handed of letters and possibly not written in the spirit of the whistleblowing policy. However, that is not sufficient to either constitute a detriment in itself in the judgment of the Tribunal nor was it's writing caused by the disclosure rather it was prompted by the complaints made by staff about the claimant. If the matter had gone further the respondents would have had to handle the matter very carefully indeed given the overlapping factual circumstances and the protection the claimant had as an accepted *bona fide* 'whistleblower' but matters did not get that far because of the claimant's resignation.

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15 46. In the circumstances, I cannot detect either any detriment that the claimant suffered at the hands of his employers and as a consequence of either disclosure. He did not have cause to resign on the 16 April. The complaints are accordingly dismissed.

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| 30 | Employment Judge: | James Hendry |
| | Date of Judgment: | 18 March 2020 |
| | Date sent to parties | 19 March 2020 |