Case Number: 3305385/2020 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms C Gentry	v	West Hertfordshire Hospitals NHS Trust

Heard at: Watford via CVP **On**: 26 June 2020

Before: Employment Judge Hyams

Appearances:

For the claimant: Mr Matthew Purchase, of Counsel
For the respondent: Mr Simon Cheetham, of Her Majesty's Counsel

JUDGMENT

The claimant's application for interim relief under section 128 of the Employment Rights Act 1996 does not succeed.

REASONS

Introduction

1 The claimant was employed by the respondent as a Consultant Obstetrician from 2011 onwards until her dismissal by means of a letter dated 27 May 2020 which was sent to the claimant's email address and was eventually read by her on (she says) 4 June 2020.

2 The hearing of 26 June 2020 before me was to decide the claimant's application for interim relief, made under section 128 of the Employment Rights Act 1996 ("ERA 1996"). The application was based on the claim that the claimant was dismissed either because, or principally because, she had made a protected disclosure within the meaning of section 43A of the ERA 1996. I refer further below to that disclosure. The claimant is therefore claiming that she was dismissed

contrary to section 103A of the ERA 1996. The claimant is also claiming that she was dismissed unfairly within the meaning of section 98(4) of that Act.

3 Both parties were very ably represented by counsel: Mr Purchase for the claimant and Mr Cheetham for the respondent. Both counsel had filed written skeleton arguments or submissions in advance of the hearing. I am very grateful to both of them for their submissions and other assistance.

4 I was told by Mr Purchase during the hearing that the claimant relies on two protected disclosures, and not just the one on which reliance was expressly stated in the details of the claim. The latter was a disclosure made to the respondent's then relevant Divisional Director, Dr Andy Barlow, about the manner in which a fellow consultant obstetrician, Miss Coker, had acted in 2017. The disclosure, which was made shortly after the circumstances which gave rise to it, led to a disciplinary investigation into the conduct in those circumstances of both Miss Coker and the claimant. The claimant's conduct was in issue because Miss Coker complained about it. The outcome of the investigation was that the claimant had no case to answer but that Miss Coker's actions should be the subject of disciplinary proceedings. The claimant's understanding is that Miss Coker was subsequently put on 18 months' probation and given a final warning in respect of the conduct about which the claimant had "whistleblown".

5 The other disclosure on which the claimant will be relying at trial (further to an intended application to amend the details of the claim by making it clear that it too is relied on as a basis for the claim to have been dismissed unfairly within the meaning of section 103A of the ERA 1996) is an allegation of racism on the part of Dr van der Watt, who at the time of the allegation (early August 2016) was Medical Director of the respondent.

The legal test to be applied by me in deciding the application for interim relief

6 The parties and I agreed the legal test to be applied by me in deciding the application for interim relief. It is in section 129 of the ERA 1996, and has been amplified by case law. The applicable test was whether (applying *Taplin v C Shippam* [1978] IRLR 450, paragraphs 22-23; [1978] ICR 1068, 1074F) the claimant has a "pretty good" chance of succeeding in proving that the sole or principal reason for her dismissal was that she had made one or more protected disclosures.

The parties' cases

7 The respondent did not contend that the claimant had not made one or more protected disclosures: it accepted at least for present purposes that she had done so. The respondent's case was that the evidence showed that it was unlikely that the claimant would be able to satisfy the tribunal that the sole or principal reason for her dismissal was one or more protected disclosures. That was for the following reasons.

7.1 There is (it was said in paragraph 16(i) of the respondent's written submissions) "very strong evidence" that the reason for the claimant's dismissal was capability and by implication there is a very good chance, "given the documentary evidence relating to the allegations, the detailed and lengthy investigation and the very full capability hearings, in all of which the Claimant was, or was given the opportunity to be, fully involved and engaged", that the respondent will be able to satisfy the tribunal that hears the claims that the real reason for the claimant's dismissal was her capability.

7.2 It is implausible that the claimant was dismissed in 2020 for making a protected disclosure in 2017 which was found to be well-founded while at the same time the complaint of the person whose practice was the subject of the disclosure (Miss Coker) about the claimant was found to be ill-founded.

7.3 And, finally:

> "There is also no evidence to suggest that those responsible for the decision to dismiss the Claimant (including an independent expert from another organisation and two of the Claimant's peers) had any substantive involvement with her before their participation in the panel hearings."

8 The claimant accepted that the members of the panel which decided that she should be dismissed had indeed "had [no] substantive involvement with her before their participation in the panel hearings". Her case was that the test in *Taplin v Shippam* was here satisfied, for the following reasons, overall, stated in paragraph 22 of Mr Purchase's skeleton argument:

> "22. It is true that Miss Coker, Dr van der Watt and Dr Barlow were not members of the Panel which made that decision. However:
>
> 22.1 First, they were above the Claimant in the hierarchy of responsibility and/or had some responsibility for the conduct of the disciplinary inquiry and, it is submitted, they procured the disciplinary process or manipulated the situation so as to secure the Claimant's dismissal because she made protected disclosures. Accordingly, that reason should be treated as the true reason for the dismissal.
>
> 22.2 Secondly, the Claimant believes that some or all members of the Panel were aware of her protected disclosures and the Respondent's reaction to them and that this operated on their minds in deciding to dismiss her."

9 Those reasons were the subject of what appeared at first sight to be cogent submissions in support, in paragraphs 24-29 of Mr Purchase's skeleton argument. Mr Purchase relied on the decision of the Supreme Court in *Royal Mail Limited v*

Jhuti [2019] UKSC 55, [2020] ICR 731 in support of the proposition that the claimant's argument that Miss Coker, Dr van der Watt and Dr Barlow "procured the disciplinary process or manipulated the situation so as to secure the Claimant's dismissal because she made protected disclosures" has a pretty good chance of success.

The evidence before me

10 I had before me a bundle of over 270 pages and a number of additional documents, including witness statements made by the claimant and the person in whose name the dismissal letter was sent, Ms Helen Brown, the respondent's Deputy Chief Executive. I read only those documents to which I was referred (and they included those witness statements). I heard no oral evidence.

11 The letter stating the reasons for the claimant's dismissal was of central importance. It was (as I say in paragraph 1 above) dated 27 May 2020. It was at pages 254-266 of the hearing bundle. Mr Purchase rightly submitted (in paragraph 28 of his skeleton argument) that "the critical allegation was clearly case 13". That case concerned a patient referred to as LP, whose baby, JP, died. The case was stated in this way in the dismissal letter (at page 260):

> "Case 13: whether, in September/October 2017 in relation to patient LP, CG took sufficient steps to take care of the patient and her baby, for example by seeking to persuade her to stay on the ward and/or monitoring her and the baby, and failed to have an adequate plan for their ongoing care. Whether CG's communication with the patient and/or the midwives was sub-optimal and whether CG adequately reflected on this case and fully acknowledged the respects in which it could have been handled better."

12 Mr Purchase stated in paragraph 28 of his skeleton argument a sequence of events which, if taken at face value, would have justified the conclusion that the claimant had a pretty good chance of proving that (1) she was singled out to be dismissed for refusing on 26 September 2017 to carry out a Caesarian section on LP when in fact LP had not asked for such a section, and (2) LP's allegation that the claimant had refused to carry out the section was provoked or achieved by manipulation on the part of Miss Coker and Dr Barlow. The events described in that sequence included the making by the respondent of admissions to LP and her partner at a meeting with them (at which Miss Coker was present) in June 2018. The admissions were to the effect that the claimant had erred in discharging LP home on 26 September 2017 "'... without the appropriate full risk assessment of fetal and maternal wellbeing assessment' ... and that if the option to have a Caesarian section had been discussed 'then the baby would have been delivered alive at this time'", and that the respondent did so <u>"without consulting the Claimant or taking evidence from her</u> and without taking evidence from any of the other professionals present at the time" (original emphasis). In oral submissions, Mr Purchase said that by making those admissions, the respondent was throwing the claimant under a bus and making the claimant a scapegoat.

13 Paragraph 28 continues: “The Respondent then maintained that position at the inquest, thereby leaving the coroner little choice in reality but to accept it. In reality, this would have left the Panel little choice either.”

14 The evidence of what occurred at the meeting of June 2018 with LP and her partner, JP’s father, was in paragraphs 54 and 55 of a witness statement made by JP’s father. Those paragraphs were at page 163 of the hearing bundle and were as follows:

> “54. There were five people from the Trust there, almost immediately after introducing themselves one of the members addressed the report stating that they felt the report showed that they were admitting responsibility for [JP]’s death. We were shocked by this suggestion as from our point of view the report said nothing of the sort.
>
> 55. During this meeting, the Trust admitted that mistakes had been made during [JP]’s labour and birth and that if that [LP] had received a Caesarean section as she had requested on 26 September 201[7] [JP] would have been born alive and well. This was not the conclusion that previous versions of the Root Cause Analysis report we had received had come to. It was upsetting to be informed of this in the meeting, when we had been led to believe that the Trust would not come to this conclusion.”

15 I found it hard to see in that passage an admission of the sort that Mr Purchase said had been made at the meeting. It may be that there was a document recording precisely what was accepted by the respondent at the meeting, but I was not referred to it.

16 The decision letter contains this passage immediately below the words set out in the indented part of paragraph 11 above:

> “42. This is a complex case and material additional evidence was made available to the panel from the Coroner’s Inquest after the presentation of the management case in February 2020.
>
> 43. Management side’s case effectively rests on the fact that LP went home following a failed induction of labour (IoL) that was initiated due to reduced fetal movements. Management side is of the view that CG should have made every effort to persuade LP to stay in hospital and fully explored all the alternative options to expedite delivery.
>
> 44. CG has stated that she had an extensive discussion with LP and fully explained all the options and risks. There is no documentation to support this in the clinical record.

45. Management side's view is that the evidence suggests that CG did not effectively communicate the options and risks to LP. If LP effectively self-discharged against medical advice despite a full and clear explanation of the risks this should have been fully documented.

46. Management side accepts that this was not the only factor in the very sad outcome of this case and that there were other, subsequent failings in care.

47. CG's case is effectively that LP was not a case of reduced fetal movements but of a failed induction of labour (IoL). Given it was not a case of reduced fetal movements CG's view is that it was reasonable to 'allow' LP to go home and that this is not unusual in straightforward failed IoL cases. As such, although she counselled LP as to her options and strongly advised her to stay in hospital she was within her rights to decide to go home and it was not for CG to try to persuade her to stay. As such she put in place appropriate follow up care arrangements, fully expecting LP to go into labour and be re-admitted within the next 24 hours.

48. Notwithstanding CG's evidence that this is a straightforward failed IoL not a case of reduced fetal movement she has stated on several occasions throughout the evidence taking process that this was a discharge against medical advice.

49. CG has stated that she fully documented her discussion with LP on a continuation sheet but that this is now missing from the patient records. She explained that she did this because the notes were not available immediately but that shortly after she had recorded her discussion, the notes were brought back into the room and she filed her continuation sheet in the notes at that stage. She has expressed concern that they are now missing (and implied that this may have been done deliberately to undermine her case.)"

17 The following passage of that letter was of central importance in my deliberations. I do not need to quote it in full here. I note here, in particular, the following things:

17.1 JP's death was the subject of a coroner's inquest, and as recorded in paragraph 52 of the dismissal letter:

> "In his summing up the coroner effectively concluded that there was an irreconcilable difference in evidence presented by CG [i.e. the claimant] and LP as to whether she had been offered a C-section or not and whether she had self-discharged against medical advice or not. The Coroner found LP's evidence more compelling and concluded that there was no evidence that LP had been offered and refused a C-Section. In reaching this conclusion the Coroner referred

> to the contemporaneous text messages provided by LP in her submission that supported her version of events."

17.2 Those text messages were in the hearing bundle, and Mr Purchase did not contend that they did not support LP's "version of events".

17.3 At the end of paragraph 55, the dismissal letter stated:

> "The text messages contradict CG's version of events and significantly call into question her claim that this was effectively a 'discharge against medical advice' and her claim that, within reasonable limits, she had tried to persuade LP to remain in hospital."

18 The disciplinary panel's conclusions on case 13 were stated in paragraphs 61 and 62 of the dismissal letter in the following terms (the bold and italicised text being in the original):

> "61. ***The panel finds this allegation upheld***: CG's clinical decision making in this case was suboptimal. CG failed to take sufficient steps to take care of the patient and her baby. She did not take steps to persuade LP to stay on the ward or monitor her/the baby appropriately. She did not discuss appropriate options with the patient and/or the midwives. She did not reflect adequately on the case or acknowledge the respects in which it could have been handled better. In summary, CG failed to appropriately discuss the risks and benefits of the options following failed Induction of labour with LP and effectively discharged her without taking due care and attention to the well-being of the mother and baby.
>
> 62. ***The panel is very concerned that the evidence provided by CG cannot be considered an honest account of the events on that day. Although this is not a specific allegation that the panel was asked to consider, it is a very serious matter of probity and I return to this below.***"

19 The panel's overall conclusions were stated in the "Sanction" section of the dismissal letter, at pages 265-266. On their face, the conclusions on those pages are supported by the evidence before the disciplinary panel and that which was in the hearing bundle before me. The conclusion on the claimant's competence was at page 265 and was in these terms:

> "The panel is very concerned that the cases presented evidence a pattern of fundamentally poor clinical decision making, lack of adherence to established good practice guidelines and poor record keeping over a relatively short period of time. The panel did not consider that you had demonstrated openness to learning and reflective practice in respect of these cases.

> The panel's view is that the clinical practice evidenced by these cases falls substantially short of the standard to be expected from a very senior and experienced clinician and represent a real and substantial risk to the safety of patients under your care. The panel notes that, as a consultant, you are a senior clinical leader and expected to work unsupervised. The panel does not consider that you are competent to work at that level.
>
> The panel also noted that in 2016 you had previously undergone a period of supervised practice following a number of adverse clinical events preceding the cases under consideration in this hearing.
>
> The panel notes your service with the Trust in making its decision.
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> Taking all of the above into account, the panel does not believe that a further period of supervised practice or retraining is a viable or appropriate option. In particular, taking into account the retraining already put in place previously and the concern about your insight/reflection, it is not satisfied that you would improve sufficiently, in order to be able to resume a consultant role. The panel does not consider that redeployment into an alternative role is viable or appropriate."

20 That was the only reason given for the claimant's dismissal. However, on page 266, the disciplinary panel said this:

> "[T]he panel considers that it is important to note that, had the evidence presented to the Coroner's in respect of the death of baby JP been available to management side prior to the submission of the management case, then a further probity allegation was likely to have been added to the management case in relation to your account of your discussion with patient LP. The panel believes that you have presented untruthful and misleading evidence in respect of this case both to the coroner and to the panel. The panel notes that, had this been considered as an allegation in its own right, then an outcome of dismissal for gross misconduct was likely to have been appropriate on the grounds probity."

Overt connection between decision-makers and e.g. Miss Coker

21 The only overt connection between (1) the persons who decided that the claimant should be dismissed and (2) Miss Coker, Dr Barlow or Dr van der Watt, was (as recorded in the letter dated 17 December 2019 from Ms Helen Brown to the claimant at pages 233-236, at page 235) that the independent clinician (Dr Douglas Salvesen) had trained with Miss Coker. However, as it was there recorded, Dr Salvesen had "not socialised with her subsequent to this period of training which concluded in 1998."

22 It was then recorded that: "Since this time Douglas has had occasional cause to liaise with Marcellina Coker on professional matters, but this is not especially

frequent and the most recent occasion that they communicated was to discuss on call arrangements, which was approximately 2 months ago."

My conclusion on the application for interim relief

23 *Jhuti* was a very different case from this one. There, the tribunal concluded that the allegation of incompetence which led to the dismissal of the claimant, Ms Jhuti, was made by the manager about whom Ms Jhuti had made a protected disclosure because she had made that disclosure. That manager then caused the allegations about Ms Jhuti's competence to be considered by another manager on the basis that Ms Jhuti should be dismissed. That other manager then decided, without having met Ms Jhuti because Ms Jhuti was too unwell to see the other manager in person and respond to the allegations about her competence, that Ms Jhuti should be dismissed because of the allegations of incompetence made by the original manager. Here, there was no direct connection between the making of the claimant's disclosure against Miss Coker in 2017 and the decision to dismiss the claimant. I have recorded the only connection drawn to my attention between any decision-maker and Miss Coker in paragraphs 21 and 22 above. That is rather different from the direct connection between the allegations which led to the claimant's dismissal in *Jhuti* and the justification used by the dismissing manager for her (Ms Jhuti's) dismissal. Certainly, there is no ostensible connection between the factual allegations which led to the dismissal of the claimant here, Ms Gentry, and (most obviously) Miss Coker. What is alleged is that (as recorded in paragraph 8 above) Miss Coker and/or Dr van der Watt and/or Dr Barlow "procured the disciplinary process or manipulated the situation so as to secure the Claimant's dismissal because she made protected disclosures."

24 It is <u>possible</u> (and not fanciful to suggest) that they did that. It is also possible that the thing that tipped the balance into a decision that the claimant should be dismissed was the conclusion of the disciplinary panel (recorded in paragraph 20 above) that the claimant had "presented untruthful and misleading evidence". That might mean that the claimant's dismissal was unfair. So might the procedure followed in deciding that the claimant should be dismissed, although the respondent's draft response to the claim contained a possibly sufficient explanation (i.e. such as to show that the procedure followed was within the range of reasonable responses of a reasonable employer) for the unusual procedure that was eventually followed in deciding that the claimant should be dismissed.

25 What was abundantly clear to me, however, by the time that I came to weigh up the arguments and evidence relied on by both parties was that I could not conclude that the claimant's claim that she had been dismissed for whistleblowing had a pretty good chance of success: I was not satisfied that the claimant had shown that there was a "pretty good chance" that the principal reason for her dismissal was that she made one or more protected disclosures.

26 I add that while at first sight Mr Purchase's arguments were cogent, as were the details of the claim (which Ms Gentry herself drafted), on a careful analysis

26.1 Mr Purchase's arguments relied on the proposition (whether stated in this way or not) that the claimant had been thrown under a bus by (among others') Miss Coker's acceptance to LP and her partner (as described in paragraph 12 above) that the claimant had erred in discharging LP home on 26 September 2017 "'... without the appropriate full risk assessment of fetal and maternal wellbeing assessment' ... and that if the option to have a Caesarian section had been discussed 'then the baby would have been delivered alive at this time'", when

26.2 the claimant herself asserted (apparently subsequently, but the precise timing of that assertion does not matter here) that she had discussed the option of a Caesarian section and had advised LP not to go home, so that

26.3 the only basis for the proposition that the claimant had been thrown under a bus was that the respondent had accepted that the claimant had refused the option of a Caesarian section.

27 However, the respondent's subsequent position, i.e. after the meeting of June 2018, did not (as far as I could see on the documentary evidence before me) leave "the coroner little choice in reality but to accept" that the claimant had not discussed with LP the option of a Caesarian section. In any event, there was an apparently careful factual inquiry carried out by the coroner into that question.

28 Similarly, contrary to Mr Purchase's submissions, in my view the panel was not left with little choice but to accept that the claimant had not discussed with LP the option of a Caesarian section. In any event, as shown by what I say in paragraphs 16-20 above, the panel clearly considered the evidence for itself and independently. Further, it is clear that both the coroner and the panel took into account the apparently reliable contemporaneous document in the form of the text messages from LP which "supported her version of events" and therefore by implication contradicted the claimant's "version of events". If LP's "version of events" was accurate, then the claimant was not thrown under a bus by the respondent accepting that version's accuracy.

29 In addition, I did not see the respondent's conclusion that "the cases presented evidence a pattern of fundamentally poor clinical decision making, lack of adherence to established good practice guidelines and poor record keeping over a relatively short period of time" as being (as submitted in paragraph 29 of Mr Purchase's skeleton argument) "unsustainable". Rather, it seemed to me to be capable of being sustained. Nor did I accept that (as Mr Purchase submitted in that paragraph) the decision to dismiss was, in the circumstances, so unreasonable that the tribunal hearing the claim would be likely to conclude that "there was some ulterior motive for it". While the claimant's contentions in her Grounds of Claim and the reasons for her dismissal stated in the decision letter at pages 254-266 were at considerable variance, it was not possible, at least at this stage, to conclude that there was a "pretty good chance" that the tribunal

determining the claim would come to the conclusion that the claimant's dismissal was so unreasonable that there had to be "some ulterior motive for it".

30 For all of those reasons, the application for interim relief had to fail.

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Employment Judge

Date: 30 June 2020

JUDGMENT SENT TO THE PARTIES ON

.....26/07/2020.....

.....S.Kent .....
FOR THE TRIBUNAL OFFICE