EMPLOYMENT TRIBUNALS

Claimant: Miss D Powell

Respondent: Mobili Office Limited

HELD AT: Sheffield (by video) **ON: 10 August 2020**

BEFORE: Employment Judge Brain

REPRESENTATION:

Claimant: **In person**
Respondent: **Miss M Ashworth, HR and Accounts Manager**

JUDGMENT having been sent to the parties on 28 August 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These reasons are provided at the request of the claimant.
2. In a claim form presented to the Tribunal on 16 January 2020 the claimant brings a complaint of unfair dismissal. The claimant gave her dates of employment as between 22 November 2017 and 31 December 2019. The claimant was employed by the respondent as a *'seating operative (sewing machinist)'*. She worked at the respondent's premises in Skipton.
3. The respondent's notice of appearance was presented on 2 March 2020. The respondent said that the claimant was employed between 26 February 2018 and 31 December 2019.
4. Generally, in order to pursue a complaint of unfair dismissal under the Employment Rights Act 1996 an employee must have two years of continuous employment ending with the effective date of termination. The respondent's case therefore is that the Tribunal has no jurisdiction to entertain the claimant's unfair dismissal complaint because she does not have sufficient continuity of service.

5. There are a number of exceptions to the requirement for employees pursuing unfair dismissal complaints to have two years' continuity of service. Amongst these are: firstly, that the reason or principal reason for the dismissal of the employee was because the employee had made a protected disclosure (being a disclosure that qualifies for protection, as one which in the reasonable belief of the employee making the disclosure was made in the public interest and tends to show one or more of six relevant failures); and secondly, that the reason or principal reason for the dismissal of the employee was for a health and safety reason. (The Tribunal shall refer to the latter as a *'health and safety case').*

6. The claimant's case is one of constructive unfair dismissal. It is her case that the respondent was in fundamental breach of the contract of employment and that she resigned her position (wholly or partly) because of that breach and accordingly she was constructively dismissed.

7. The matter benefited from a case management hearing which came before Employment Judge Shepherd on 11 May 2020. He listed the case for a public preliminary hearing in order to determine the claimant's length of service and whether the Tribunal has jurisdiction to consider her constructive unfair dismissal complaint.

8. The Tribunal was presented with an indexed and agreed bundle of documents. This contained a witness statement from the claimant and a witness statement from Joanne Ashworth on behalf of the respondent. Miss Ashworth holds the position of HR advisor.

9. Having heard the evidence of the claimant and Miss Ashworth and having considered the documents within the bundle, the Tribunal now makes its finding of fact.

10. The Tribunal finds, in summary, that the claimant worked at the respondent's Skipton premises from 22 November 2017. The period between 22 November 2017 and 25 February 2018 was undertaken by the claimant in her capacity as an agency worker. She commenced work as an employee of the respondent with effect only from 26 February 2018.

11. On 13 November 2017 the claimant filled out an application form with the Advantage Group. This is at pages E1 to E4 of the bundle. The Advantage Group is an agency which provides agency workers for the respondent.

12. The claimant then signed the principal statement of terms and conditions of employment which are in the bundle commencing at page C3. This shows an employment commencement date of 26 February 2018. The parties to the statement were the claimant and the respondent.

13. The claimant's evidence at paragraph 1 of her witness statement is that she was *"poached from another company as a full-time sewing machinist".* A role was created for her by the respondent *"utilising my sewing machine skills only".* The Tribunal accepts the claimant's account that the respondent found her to be a good worker when she worked for them as an agency worker, encouraged her to join them as their employee and was prepared to tailor the role to suit her skills. The claimant's account about this was not challenged by Miss Ashworth.

14. The claimant prayed in aid a letter dated 27 March 2018 from Corrie Burton, the respondent's HR manager. She provided a letter (at page C23) addressed *'to whom it may concern'* confirming that the claimant had commenced work at the

respondent on 22 November 2017. The letter says that *"..since 26 February 2018 [she] has a permanent, full-time (39 hours) position with the company".* This was provided at the request of the claimant to assist the claimant with an application which she was making for a property which she was hoping to rent from Yorkshire Housing.

15. It is clear upon the face of the documentation in the bundle that the claimant was working as an agency worker between November 2017 and February 2018 and that she was then offered and accepted a role as an employee with effect from 26 February 2018. The letter for housing purposes at page C23 of the bundle is consistent with that. The letter draws a clear distinction for the post-26 February 2018 period, the respondent making it clear that as of that date she became a permanent full-time member of staff. Adopting a more liberal interpretation of the letter in favour of the claimant cannot detract from the fact that the claimant signed an agency agreement with Advantage in November 2017 and an employment contract with the respondent giving a commencement date of 26 February 2018. The position is plain. The claimant does not have two years continuity of employment.

16. Accordingly, she is unable to pursue a complaint of unfair dismissal unless she can bring herself within one of the exceptional categories of unfair dismissal cases which do not require two years' continuity of service (such as those at paragraph 5 above). The exceptional category of cases for which the two years' qualifying service requirement does not apply are commonly known as *"automatic unfair dismissal cases".* The general right to complain of unfair dismissal for which a two years' qualification period is required are generally known as *"ordinary unfair dismissal cases."*

17. In order to determine whether the claimant can complain of automatically unfair dismissal it is necessary to make some further factual findings.

18. In doing so, the Tribunal's task is to determine whether there is any jurisdictional basis upon which for the claimant to pursue a complaint of constructive unfair dismissal. In other words, has the claimant shown a *prima facie* case of automatic constructive unfair dismissal given that she is unable to pursue a complaint of ordinary constructive unfair dismissal?

19. For the purposes of this exercise, the Tribunal makes findings of fact, taking the claimant's complaint at its height. It follows that these are preliminary findings of fact only and which have been unchallenged by the respondent. Should the Tribunal determine that the claimant's complaint of constructive automatic unfair dismissal may proceed then the respondent may of course challenge the claimant's account.

20. The following factual findings in paragraphs 20 to 24 are largely taken from a letter addressed to Corrie Burton by the claimant on 10 October 2019. This letter was presented to the Employment Tribunal by the claimant as part of her claim form and is at pages A13 to A15 of the bundle. (This was in fact her resignation letter).

21. The claimant says in this letter that she was happy to be working for the respondent *"in a place where nobody knew me, I was going to get divorced and Skipton was my own new little bubble, I felt safe, and was making new friends. This was my fresh start in Skipton, where nobody knew me."* The letter goes on to say that, "*Your job application, via the agency, did not indicate any disclosures were required. However, Zoe, whilst doing her reference checking, and rightly so,*

discovered my conviction. This was disclosed to management as it could be, and initially it was kept as management only information. Although I did not know this at the time, as far as I was aware, nobody knew."

22. The claimant then complains that the fact of her criminal conviction became common knowledge upon the shop floor. In particular, on 31 October 2018 a member of staff obtained some information about the conviction and disseminated this to another member of staff. The claimant discovered that this exchange had taken place on 3 November 2018.

23. The claimant went to see Bob Taylor who is her manager. She saw him about the matter on three occasions, the last of which was on 26 November 2018.

24. The letter of 10 October 2019 goes on to say that, "*The tipping point for me was 28.11.18 – I had had enough, I tried to commit suicide: I am embarrassed to say. It was in A&E when I was diagnosed with complex PTSD. The events at work had triggered it."*

25. The claimant then complains that when she returned to work after 28 November 2018, "*the intimidation continued."* She says that she had divulged the *"trigger words for my PTSD"* to the member of staff who had obtained information about the conviction. She says that the member of staff then indulged in repeating the trigger words. This led to the claimant going off sick again on 11 March 2019. The claimant never returned to work. She tendered her resignation on 10 October 2019 in the letter addressed to Miss Burton at pages A13 to A15.

26. Section E of the bundle contains correspondence passing between the parties between 8 March 2019 and 25 May 2020. There now follows a summary of this correspondence:

    26.1. 8 March 2019 – the claimant provides a doctor's note *"in regards to complex PTSD and treatment"* together with details of medical appointments.

    26.2. 3 April 2019 – the respondent writes to the claimant to inform her of a pay rise.

    26.3. 2 May 2019 – the claimant confirms that she is currently signed off work until 11 June 2019 and seeks clarification of her job role. She offers to return to work sooner than anticipated.

    26.4. 3 May 2019 – Miss Burton acknowledges the claimant's offer to return to work sooner than anticipated.

    26.5. 5 May 2019 – the claimant raises an enquiry about arrangements for her to return to work.

    26.6. 15 May 2019 – the claimant confirms that it would be sensible for her to *"continue in recovery until her fit note is up for review with my GP in June."*

    26.7. 10 June 2019 – the claimant provides an update to Miss Burton about her treatment.

    26.8. 5 August 2019 – the claimant provides Miss Burton with a new fit note up to 1 October 2019.

    26.9. 7 August 2019 – Miss Burton asks the claimant about her intentions regarding returning to work.

26.10. 30 September 2019 – Miss Burton writes to the claimant to say that she has been absent from work due to sickness since 11 March 2019 because of PTSD. The claimant is invited to a meeting on 16 October 2019. The purpose of the meeting is to discuss whether the claimant is able to return to work and any adjustments which the respondent may make to facilitate her return.

26.11. 1 October 2019 – the claimant replies to say that she is *"unable to commit to anything with you regarding your suggestion of October 16th."*

26.12. 3 October 2019 – the claimant's email of 1 October is acknowledged by Miss Burton who asks her to confirm her attendance in due course.

26.13. 3 October 2019 – the claimant confirms she has a meeting with her trade union advisor on 10 October after which she will revert to Miss Burton.

26.14. 10 October 2019 – the claimant writes the letter to Miss Burton at pages A 13-15 to which the Tribunal has already made extensive reference. This is her letter of resignation.

26.15. 11 November 2019 – the letter of resignation is acknowledged by Miss Burton.

27. Against this factual background, the Tribunal will now explore whether the claimant has shown a *prima facie case* that she was constructively unfairly dismissed for having made a protected disclosure and/or for a health and safety case. The Tribunal shall deal with these in turn.

28. The first issue is whether the claimant made a protected disclosure. A disclosure qualifies for protection if it is a disclosure of information which in the reasonable belief of the worker or employee making the disclosure is made in the public interest and tends to show one or more of six relevant failures. The relevant failures include that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject. The Tribunal was not told the nature of the claimant's conviction or whether the conviction is spent under the Rehabilitation Offenders Act 1974. It is not necessary at this stage for the Tribunal to make those enquiries.

29. Again, taking the claimant's case at its height, the Tribunal will work upon the premise that the respondent's management breached a legal obligation not to disclose the fact of the claimant's criminal conviction to others. The Tribunal will also work upon the premise that the claimant made a public interest disclosure when she informed Mr Taylor that the fact of the criminal conviction had been divulged by the respondent's management and that she reasonably believed it was in the public interest for her to provide Mr Taylor with that information. The claimant said in evidence (which the Tribunal accepts) that she had been to see Mr Taylor about this on three occasions, the last of which was on 26 November 2018.

30. The mischief against which the provisions in the Employment Rights Act 1996 (that a dismissal of an employee for having made a protected disclosure is automatically unfair) is aimed is to stop whistle blowers from being deterred from making protected disclosures. In essence, the protection is a form of prohibition against victimisation for having blown the whistle about a matter.

31. Therefore, where an employer dismisses an employee for having done so, that will be automatically unfair. In a constructive automatic unfair dismissal complaint such

as this case the matter is analysed in the following way. It is for the employee to show that the employer was in fundamental breach of contract and that the reason or the principal reason for the fundamental breach was the fact that the employee had blown the whistle about a matter. Accordingly, the question here is whether the claimant is able to demonstrate that the respondent was in fundamental breach of contract in some way after 26 November 2018 (or indeed after the earlier two occasions that month upon which she discussed matters with Mr Taylor) and whether that fundamental breach of contract was wholly or principally attributable to the fact that she had made a protected disclosure.

32. The difficulty faced by the claimant is that she was unable to point to any fundamental breaches upon the part of the employer after her disclosures of November 2018. The correspondence analysed in paragraph 26 above does not evidence any breach (let alone fundamental breach) by the respondent. It is solely concerned with issues around the claimant's absence and return to work.

33. Her long-term sickness absence after 11 March 2019 was caused on her case by the actions of her co-workers. It was not the claimant's case that the co-workers were aware of her having made a public interest disclosure to the respondent's management. Therefore, the co-worker's actions were not materially caused by the public interest disclosure made by her but rather were caused by the failure of the respondent's management to preserve confidentiality.

34. The claimant's case, in essence, was that Mr Taylor failed to put a stop to the co-worker's actions. The claimant was unable to satisfactorily explain any basis upon which she said that such management failure as she was able to establish was <u>because</u> she had made a protected disclosure. The claimant had some difficulty articulating how it was that the respondent's management had failed her during and after November 2018, much less how any such failure was causally linked to the protected disclosure. There was no evidence that the respondent decided to take no action against the co-workers because the claimant had blown the whistle on her co-workers' actions.

35. Turning to the health and safety case, an employee who is dismissed (which of course includes an employee who is constructively dismissal) shall be regarded as unfairly dismissed if the reason or the principal reason for the dismissal is that:

- *The employee brought to the employer's attention by reasonable means circumstances connected with his or her work which he or she reasonably believed were harmful or potentially harmful to health or safety.*
- *In circumstances of danger which the employee reasonably believed to be serious and imminent and which he or she could not reasonably have been expected to avert, he or she left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his or her place of work.*
- *In circumstances of danger which the employee reasonably believed to be serious and imminent, he or she took (or proposed to take) appropriate steps to protect himself or herself or other persons from the danger.*

36. In a similar way to the law as it relates to public interest disclosure, the mischief against which these provisions are aimed is to prevent employers from victimising employees who bring to the employer's attention by reasonable means circumstances reasonably believed by the employee to be harmful to health and

safety, or taking steps to safeguard themselves or others from circumstances of danger.

37. As this is a constructive automatic unfair dismissal, it is for the claimant to show that the employer acted in fundamental breach of contract in some way because of any of these health and safety cases. The Tribunal accepts that the claimant did bring to the employer's attention circumstances connected with work which she reasonably believed were harmful or potentially harmful to health and safety and/or which presented a serious and imminent danger to her. On her case, it is clear that the workers' actions were potentially injurious to the claimant's health and safety. However, as with the public interest disclosure case, there is simply nothing to show that the employer acted in fundamental breach of contract in response to the claimant's complaints or actions upon the health and safety cases.

38. By Rule 37 of schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 the Tribunal may, at any stage of the proceedings, on its own initiative or on the application of a party strike out a case upon the basis that it has no reasonable prospect of success. Before doing so, the party in question must be given a reasonable opportunity to make representations either in writing or at a hearing.

39. Therefore, having determined that the claimant is unable to pursue a complaint of ordinary unfair dismissal, the Tribunal goes on to consider whether there was any scope within the claimant's complaint for her to pursue a complaint of automatic constructive unfair dismissal. The claimant was given the opportunity at today's hearing to make representations in order to show cause why the Tribunal should conclude that there was a reasonable prospect of a complaint of automatic constructive unfair dismissal succeeding, taking the complainant's case at its height. The claimant was unable to show cause. It follows therefore that there is no prospect of the claimant succeeding with a complaint of constructive unfair dismissal (whether of ordinary or automatic unfair dismissal).

40. For the sake of completeness, the Tribunal ought to mention that the dismissal (including a constructive dismissal) of an employee for having a spent conviction is automatically unfair. Two years of qualifying service is required to enable an employee to pursue a complaint against an employer of a breach of the Rehabilitation Offenders Act 1974. Therefore, given the Tribunal's finding in this matter about continuity of service that route is not available for the claimant in this case.

41. It is possible that the claimant may have a cause of action to pursue a complaint of personal injury against the respondent. A civil complaint may be brought under the Protection from Harassment Act 1997 and/or for breach of the common law duty to provide a safe system of work and safe and competent workmates. However, these are matters that lie outside the jurisdiction of the Employment Tribunal. The claimant will be well advised to seek independent legal advice about these matters before pursuing them.

Employment Judge Brain

Date 13 October 2020