EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103776/20 (P)

Held on 15 November 2020

Employment Judge N M Hosie

Mr M Roberts	**Claimant Represented by Ms N Barrass, Solicitor**
Wood Group UK Limited	**1st Respondent Represented by Mr D Bryden, Solicitor**
Neil McIntyre	**2nd Respondent Represented by Mr D Bryden, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the complaints of detriment against both respondents are struck out as having "no reasonable prospects of success".

E.T. Z4 (WR)

REASONS

Introduction

1. I conducted a preliminary hearing, for case management purposes, on 16 September 2020. I refer to the Note which I issued following that hearing.

2. In my Note I recorded that, *"the claim comprises complaints of 'standard' unfair dismissal, in terms of s.98 of the Employment Rights Act 1996; automatic unfair dismissal for making protected disclosures, in terms of s.103A of the 1996 Act; and that the claimant was subjected to detriments as he had made protected disclosures, in terms of s.47B of the 1996 Act. The claim is denied in its entirety by the respondent. In short, the first respondents' position is that the reason for the dismissal was "some other substantial one": their client Dana Petroleum, requested the removal of the claimant from their contract as they were entitled to do, in terms of the contract between Dana and the first respondent and they were unable to find suitable alternative employment for the claimant".*

"Prospects"

3. I also recorded the following in my Note:-

"*4. Having regard, in particular, to the "overriding objective" in the Tribunal Rules of Procedure and also the interests of justice, I have decided that it is necessary, at this stage, to consider whether the detriment complaints against both respondents should be struck out as having, "no reasonable prospect of success" in terms of Rule 37(1)(a) in Schedule 1 of the Tribunal Rules of Procedure and whether the claimant should be required to pay a deposit as a condition of being allowed to continue with these complaints on the basis that they have "little reasonable prospect of success" in terms of Rule 39*".

4. I directed the parties' solicitors to make written submissions on these issues and advised that I would consider the issues "on the papers" and issue a written Judgment with my Reasons.

5. I had also recorded in my Note the claimant's intention to make an application to amend. However, subsequently the claimant's solicitor advised that the claimant did not wish to pursue such an application.

Respondents' submissions

6. The respondents' solicitor's submissions were attached to an e-mail to the Tribunal on 14 October 2020 at 11:47am. In support of his submissions he referred to the following cases:-

Anyanwu v. Southbank Students' Union [2001] IRLR 305
Eastman v. Tesco Stores Ltd UKEAT/0143/12
Patel v. Lloyds Pharmacy Ltd UKEAT/0418/12;
Ezsias v. North Glamorgan NHS Trust [2007] ICR 1126
ABN Amro Management Services & Anor v. Hogben UKEAT/0266/09
Jansen Van Rensburg v. Royal Borough of Kingston-Upon-Thames and Ors EAT0096/07.

7. The respondents' solicitor set out in his submissions the "alleged disclosures and timeline". I was satisfied that this was an accurate account of the written pleadings, the relevant documents which have been produced and the alleged protected disclosures ("Reports") which the claimant relies upon to support his detriment complaints:-

"*13.1 July 2019 – Report 1 – report of concern about lifeboat safety, made by the claimant to personnel of the client, Dana Petroleum Limited ('Client'), then subsequently reported to first and second respondents.*

13.2 July 2019 – Report 2 – report of further concern about lifeboat safety, made by the claimant to Client's personnel, then subsequently reported to the first and second respondents.

13.3 July 2019 – Report 3 – report of manning concern on ship, following concern about lifeboat safety, made by the claimant to the Client's personnel then subsequently reported to first and second respondents.

13.4 July 2019 – the Client verbally informs the first respondent that it wishes the claimant to be removed from the service contract. The first respondent persuades the client to agree to offer a relocation transfer instead, rather than remove the claimant from the service contract.

13.5 26 July 2019 – the claimant attends a meeting with the client and first and second respondents to discuss his concerns, and is offered the opportunity to transfer to a separate client facility (Western Isles). On the claimant's case, the language used by the representative of the Client (not the respondents) in this meeting was 'offensive'.

13.6 28 July 2019 – the claimant e-mails the first respondent to say that he is unsure whether to accept the transfer.

13.7 30 July – the claimant discusses the situation with the first respondent.

13.8 1 August – the claimant accepts the transfer.

13.9 2 August – the claimant applies for a position on different service contract, working for a different client.

13.10 Early August – Report 4 – report of alleged failure to conduct risk assessment for dangerous maneuver, made by the claimant to Client's personnel and then subsequently reported to first respondent.

13.11 19 August – 9 September – the claimant is signed off sick (and only informs the first respondent of this on the day of his deployment, two days after the sick note was issued). The claimant performed a safety critical role, and this delay risks causing the client significant expense.

13.12 12 September – the Client e-mails the first respondent, requesting the removal of the claimant from the service contract, stating as the reason for this request, the claimant's failure to appropriately inform either party of his sickness absence.

13.13 19 September – the second respondent writes to the Client asking them to reconsider their decision.

13.14 23 September – the Client verbally confirms their request to remove the claimant from the service contract.

13.15 7 November – the Client confirm this request in writing, and states that the reason for the decision is the claimant's decision not to take up his position on the Western Isles site.

14. In relation to all 4 Reports, the claimant accepts that he informed the Client of his concerns first, and then later the first and/or second respondent. There is therefore no suggestion that the respondents were responsible for making the Client aware of the claimant's reports.

15. As set out in the documents in this case, the Client was entitled to make a request for removal of the first respondents' personnel under the terms of the service contract ('the service contract') under which the first respondents' services the Client's installations. It is an agreed fact of this case that the termination of the claimant's employment is a result of the claimant's instruction, under the terms of the service contract to remove the claimant. A copy of the relevant clauses in the service contract has been provided along with these submissions, as ordered."

8. The respondents' solicitor then addressed the alleged detriments, for the purposes of s.47B of the 1996 Act, which he summarised as follows:-

"*16.1 That the first and/or second respondents disclosed private discussions between the claimant and his employer in which the claimant expressed reservations about working for Dana, and this alleged disclosure of the claimant's concerns was a detriment which caused or contributed to the claimant's dismissal; and*

16.2 dismissal."

9. The respondents' solicitor then went on in his submissions to detail the actions alleged by the claimant to support the allegation that the claimant had been subjected to detriments:-

"*17.1 that in July 2019 the claimant expressed reluctance to the second respondent about transferring to an alternative client installation;*

17.2 That on 2 August the claimant asked to be transferred to another client's operation;

17.3 That the second respondent is particularly close to a senior individual at the Client and as a brother in law of said individual;

17.4 That the second respondent passed the claimant's confidential concerns to the Client, as a result of a motivation to remove him from the Client's business because of the claimant's alleged disclosures, with the aim of protecting the Client relationship (and the second respondents' personal close relationship with the Client); and

17.5 that he was dismissed by the first respondent, on the grounds that the second respondents' sharing of confidential discussions led to him being removed from the service contract, and ultimately the termination of his employment;

18. for the avoidance of doubt, it is not an element of the claimant's claim that the confidential discussions which the second respondent has alleged to have passed to the Client should be regarded as protected disclosures. This means that the claimant's case must depend upon the respondents' actions being motivated by the Claimant's Reports.

19. It was accepted by Counsel for the claimant in the preliminary hearing held on 16 September that the above alleged actions of the second respondent constitute the detriment case against both the first and second respondents, the first respondent being held as vicariously liable for the actions of the second respondent. Therefore, if the Tribunal determines that the detriment claim against the second respondent has no reasonable prospect of success, then the same must be said of the detriment claim against the first respondent."

10. The respondents' solicitor went on to submit that while it was not accepted that the claimant's "Reports" amounted to protected disclosures, in terms of the 1996 Act, that his *"timeline",* set out at para. 13 of his submissions, "*represents a series of undisputed facts*". He maintained: "*The only dispute between the parties appears to be whether the second respondent did in fact pass the claimant's concerns about the Client to the Client, and if so whether this feedback was the result of the claimant raising protected disclosures.*"

11. The claimant's solicitor submitted that the basis for the claimant believing that the second respondent had shared the claimant's, *"confidential concerns with the Client"* is based upon a letter which the first respondent received from the Client on 7 November 2019, in particular, the following passage from that letter:-

"*…..we offered Maurice a chance to transfer to our new asset Western Isles in the same function as MSTL…. During the meeting of [26 July] Maurice agreed that this was in fact a very good option, where he indicated a willingness to take up this offer. Subsequently he later informed Wood, several weeks later of his decision not to take the position on Western Isles forcing Dana to find a replacement, thus removing this option for Maurice.*"

12. The respondents' solicitor disputed that this demonstrated that the second respondent had shared the claimant's, *"confidential concerns with the client".*

13. The respondents' solicitor then went on to make the following submissions:-

"*24. As set out in section 13 above, the claimant expressed his doubts about accepting the transfer on 28 July, two days after the meeting with the client and the respondents. By 1 August he had accepted the transfer. The event which took place 'a few weeks' after the 26 July meeting was the claimant's sickness absence, which naturally the first respondent was required to inform the client of. As set out above, the claimant only informed the first respondent that he was unable to work on the day that he was due to take up his new position. This late notice required the client to replace the claimant within 24 hours, or otherwise halt operations at the Western Isles asset, as the claimant's role is safety critical. Given the timeline, it is the respondents' position that it is clear it is this sickness absence which is referred to in the Letter, not the sharing of any confidential discussions.*

25. It was following this sickness absence that the first respondent received the initial formal notice to remove the claimant from the service contract (on 12 September 2019), in an e-mail which states that the reason for the order is that the claimant cannot be allowed to 'hold our operation to ransom'. Again, given the timeline, it is the respondents' position that this refers to the claimant's delay in informing the first respondent of his sickness absence, and the impact which this delay had had upon the Client's operation, including the resultant risk of the Client needing to cease operations if a replacement could not be found for the claimant while he was absent."

14. The respondents' solicitor submitted that not only had the claimant misinterpreted the terms of the letter but also he had no further allegations to

support his contention that the second respondent had shared his *"confidential discussions"* with the Client.

15. It was also submitted that the second respondent "*does not have a particularly close relationship to the client*"; and it was a "*false understanding that the second respondent is related by marriage to a senior executive at the Client. It is a matter of fact (agreed or otherwise) that the second respondent is not the brother in law of any individual employed at the Client.*"

16. The claimant's solicitor also submitted that it was accepted by the claimant that all of his "Reports" were made directly to the Client and that, *"even if the second respondent did pass the Client's concerns to the Client (which is denied) these cannot be responsible for the Client's decision to remove the claimant from the service contract. As the first indication of the Client's intention to do so was a verbal instruction from the Client in July 2019, before the confidential discussions between the claimant and the second respondent took place. As set out above, it is clear from the evidence that the Client's decision to remove the claimant was based on frustration and his handling of his sickness absence, and was not the result of any passing of information by the second respondent".*

17. It was also submitted that the respondents, and the second respondent in particular, had on a number of occasions persuaded the client not to remove the claimant from their service contract. Documentation to that effect was submitted.

18. So far as the detriment of dismissal was concerned, the first respondent was bound contractually by the decision of the Client.

19. Finally, the respondents' solicitor made the following submissions by way of summary:-

"*35. From the above, the respondents' position is that the claimant's detriment claims have no reasonable prospect of success and should be struck out. There is no evidence that the second respondent passed the claimant's concerns to the Client and the timeline demonstrates that the Client's intention to remove the claimant from the service contract predates the discussions which the second respondent is alleged to have shared with the Client. The claimant has presented no evidence in support of his position that the second respondent passed confidential discussions to the Client, and this claim appears to be based on a misinterpretation of the Letter, and a false understanding of the second respondents' relations by marriage. The documentary evidence provided along with these submissions provides a clear reason for the Client's request to remove the claimant from the Service Contract, namely his handling of his sickness absence.*

36. Even if the second respondent did share the confidential discussions (which is denied) (and which allegation is unsupported by the claimant), there is documentary evidence that both respondents argued against the Client's decision to remove the claimant from the Service Contract, in a manner which is inconsistent with the behaviour which is alleged. By the claimant's own account, his relationship with the Client was poor before any such confidential discussions with the second respondent took place, and his sickness absence appears to have acted as a final trigger.

37. The respondents contend that it would be in accordance with the provisions of the overriding objective to make this determination."

Claimant's submissions

20. The claimant's solicitor made her submissions by way of attachment to an e-mail on 13 October 2020 at 16:37. She also attached an unreported case: ***Marriott v. Scarborough Borough Council (Case no. 1800295/16)***.

21. In support of her submissions, she referred to the following cases:-

Ezsias *(see above)*
Anyanwu *(see above)*
Hemdan v. Ishmail & Another [2017] IRLR 228
Sharma v. New College Nottingham UKEAT/0287/11
London Borough of Harrow v. Knight [2003] IRLR 140;
Ministry of Defence v. Jeremiah 1980 ICR 13;

Shamoon v. Chief Constable of the RUC 2003 ICR 337;
Fecitt and Ors v. NHS Manchester 2012 ICR 372.

22. The claimant's solicitor referred to the following averments in the "Particulars of Complaint" at para.28:-

"*After his employment ended the claimant made a data subject access request and as a result he received a number of documents he had not previously seen. One of these was a letter from Dana dated 7 November 2019 explaining Dana's refusal to allow the claimant to work on its facilities. The letter suggests that the respondent(s) had in fact shared with Dana the conversations and correspondence regarding the claimant's concerns about working at Western Isles and his initial request for a transfer outside of the Dana Contract. This was despite the claimant being assured that this would remain private (and in any event the claimant had agreed to go to Western Isles).*"

23. The claimant's solicitor also referred to the following averments at paragraph 32:-

"*The act of disclosing to Dana private discussions between the claimant and his employer in which the claimant expressed reservations about working for Dana was a detriment (under section 47B Employment Rights Act) to which he was subjected to the first and/or second respondent on the ground that the claimant had made protected disclosures.*"

24. The claimant's solicitor then referred to the "legal tests in detriment cases", with reference to ***London Borough of Harrow***:-

"

- The claimant must have made a protected disclosure;
- He or she must have suffered an identifiable detriment;
- The employer, worker or agent must have subjected the claimant to that detriment by some act or deliberate failure to act;
- The act or deliberate failure to act must have been done on the ground that the claimant made a protected disclosure (i.e. causation)."

"Subjected to a detriment"

25. In this regard, the claimant's solicitor made the following submissions:-

"*13. There is no definition in the ERA of 'detriment' but case authorities in other areas which incorporate the concept of 'detriment' (such as discrimination) suggest that what amounts to a detriment is very wide, and it is not subject to any test of seriousness or severity. Brightman LJ in* ***Ministry of Defence v. Jeremiah*** *stated that a detriment exists 'if a reasonable worker would or might take the view that [the actions of the employer] was in all the circumstances to his detriment. This was adopted by the House of Lords in* ***Shamoon****.*

14. The claimant's case is that private communications were disclosed when he had asked for and had been given assurances of confidentiality. It is submitted that any reasonable worker in the same situation would have considered themselves as having been subjected to a detriment.

15. In relation to whether the respondent(s) subjected the claimant to this detriment, it is noted that the respondent(s) appeared to simply deny that this had occurred. However, the claimant considers that their denial to be inconsistent with a letter from Dana dated 7 November 2019 which was disclosed as a result of his subject access request. Therefore, this is a matter of evidence which requires assessment at a full hearing."

"**Burden of proof – causation**"

26. The claimant's solicitor submitted that were the claimant to establish what he had averred, on the balance of probabilities, it would be for the respondent "*to show the ground on which any act or deliberate failure to act, was done*" and that the same burden of proof applies to the second respondent.

27. In support of her submissions in this regard, the claimant's solicitor referred to ***Fecitt*** which, "*formulated the causation test for detriment under s.47B ERA as being 'whether the protected disclosure materially (in the sense of more than trivially) influences the treatment of the whistleblower' it does not have to be the main, let alone only, cause.*"

28. Finally so far as the burden of proof was concerned the claimant's solicitor said this: "*In this case, if it is found that the claimant was subjected to the relevant detriment, there are certainly questions, which are matters for witness evidence, as to why the respondent(s) chose to undermine a duty of confidence to the claimant.*"

"The second respondent"

29. The claimant's solicitor submitted that:-

"21. The respondents' representative has specifically pleaded that the claim against the second respondent should be struck out. The claimant has pursued claims against both respondents on the basis that the most plausible scenario is that it was the second respondent who disclosed the private communications to Dana. The claimant has made the observation that the second respondent has a close relationship with Dana, and that he understood that a senior individual within Dana is the second respondents' brother in law. The respondents state that to be incorrect but have so far not confirmed the absence of any other family relationship. Ultimately though, whilst the claimant has suggested a possible motivation, if the claimant meets the initial tests in the detriment claim, the statutory position is that it is for the respondent(s) to show why the act in question was done. We have addressed this point in detail above.

22. The first respondent has pleaded in his grounds of resistance that it will not be running the statutory defence 'unless any circumstances change to which they are not aware at the present time'. Given that the first respondent does not rule out the possibility of availing itself of the statutory defence at some stage, it is submitted that the claims should not be struck out (or subject to a deposit order) against the second respondent as this may potentially deprive the claimant of a remedy.

23. At paragraph 50 of the Grounds of Resistance it is claimed that taking the claimant's case at its highest, 'any information disclosed by the second respondent to the Client cannot be responsible for the Client's request for the claimant to be removed from its contract, because that decision was taken in September 2019 and the second respondents' actions took place in November 2019.' However, the claimant has not stated that the second respondents' actions (i.e. the alleged detriment) took place in November. The letter is dated November but gives an explanation or context to the Client's decision and appears to indicate that the detriment occurred on an earlier date."

30. Finally, the claimant's solicitor made the following submissions by way of summary:-

"

- *In relation to whether the claimant made a protected disclosure and if he was subjected to a detriment by the respondent(s) the facts are in dispute and it is necessary for all of the evidence to be properly considered.*
- *If the claimant establishes the above points, it is for the respondent(s) to show why the act in question was done. This will in this case involve an assessment of why the respondent(s) chose to disregard the assurances of confidentiality they had given to the claimant.*
- *As stated above, the Tribunal should be mindful of the fact that it cannot determine the causation point without hearing evidence. In particular, it cannot determine that question in favour of the respondent at this point as they have simply denied that the detriment occurred. That denial in itself may become a relevant consideration.*

  In conclusion it cannot be said that the detriment claim has no or little reasonable prospect of success against either respondent.

25. Finally it is accepted that the purpose of Rules 37(1)(a) and 39 is to avoid unnecessary demands on time and resources. However, the Tribunal must strike a balance before making an order that will or could prevent a claimant from proceeding to a full hearing on fact sensitive issues. An additional relevant consideration in this case is that the potential saving of resources by removing the detriment claim is relatively minimal. It is accepted that there would be some additional legal argument, that the issues in the detriment claim are quite narrow and it is unlikely that any additional documents or extra witnesses are required beyond what will be necessary to deal with the unfair dismissal claim in any event.

26. The second respondent currently has the benefit of legal representation and will be required to be a witness in any event due to his involvement in the claimant's dismissal. There is therefore no additional hardship in him remaining as a respondent."

Discussion and decision

"Prospects"

31. The following Rules in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure") were relevant to the issues with which I was concerned:-

"***37. Striking out***

(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –
(a) that it is scandalous or vexatious or has ***no reasonable prospect of success*** (my emphasis);

39. Deposit orders

(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has ***little reasonable prospect of success*** (my emphasis)*, it may make an order requiring a party ("the paying party") to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*"

32. For the purpose of the exercise with which I was concerned, I took the claimant's averments in the claim form at their highest value. In other words, I proceeded on the basis that the claimant would be able to prove all the facts he avers. In doing so, I was mindful of the following passage from the Judgment of The Honourable Mr Justice Langstaff in ***Chandhok v. Tirkey*** UKEAT/0190/14/KN:-

"*16……..*

The claim, as set out in the ET1, is not just to set the ball rolling, as an initial document necessary to comply with time limits but which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but necessary function. It sets out the essential case. It is that to which a Respondent is required to respond. A Respondent is not required to answer a witness statement nor a document, but the claims made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1."

33. I had regard to the case law to which I was referred by the parties' solicitors; to what Maurice Kay LJ said in ***North Glamorgan NHS Trust v. Ezsias*** [2007] IRLR 603:-

"***[29]*** *It seems to me that on any basis there is a crucial core of disputed facts in this case that is not susceptible to determination otherwise than by hearing and evaluating the evidence. It was an error in law for the Employment Tribunal to decide otherwise. In essence that is what Elias J held. I do not consider that he put an unwarranted gloss on the words 'no reasonable prospect of success'. It would only be in an exceptional case that an application to an Employment Tribunal would be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts thought to be established by the applicant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation. The present case does not approach that level.*"

34. Also, in ***Anyanwu*** Lord Steyn said that if a case is *"fact sensitive"* a strike-out should only be ordered: "*in the most obvious and clearest cases*".

Relevant facts in the present case

35. However, so far as the present case was concerned, I was satisfied, having regard to the parties' submissions, the written pleadings and the documentary productions, that, apart from the dispute as to when the claimant intimated that he would not be able to deploy to Western Isles, the timeline and facts in the respondents' submissions at para. 13 were accurate. There was not, in my view, a *"crucial core of disputed facts"* in respect of the detriment complaints.

Dana's letter of 7 November 2019

36. The interpretation of, and any inference to be drawn from, the terms of the letter of 7 November 2019 from Dana to the first respondent, requesting the removal of the claimant from all of its assets, was crucial to my deliberations and decision. The claimant's solicitor submitted that, "*the letter* ***suggests*** (my emphasis) *that the respondent(s) had in fact shared with Dana the*

conversations and correspondence regarding the claimant's concerns about working at Western Isles and his initial request for a transfer outside of the Dana Contract. This was despite the claimant being assured that this would remain private (and in any event the claimant had agreed to go to Western Isles).

37. The claimant's solicitor then went on in her submissions to submit that:- "*The act of disclosing to Dana private discussions between the claimant and his employer in which the claimant expressed reservations about working for Dana was a detriment (under section 47B Employment Rights Act) to which he was subjected by the first and/or second respondent on the grounds that the claimant had made protected disclosures.*"

38. However, the respondents not only deny that these "private discussions" were disclosed to Dana but also maintain that no such inference can be drawn from the terms of the letter of 7 November.

39. I considered not only the terms of the letter but also the undisputed history of the working relationship between the claimant and Dana as set out in the respondents' timeline in the respondents' submissions.

40. It was significant that Dana had expressed dissatisfaction with the claimant's conduct in July 2019, long before the alleged "confidential discussions". At that time, Dana had even gone to the extent of requesting the removal of the claimant from all of their work places, as it was entitled to do in terms of its contract with the first respondent. However, the first respondent was able to persuade Dana to change its mind and agree to the claimant transferring to Western Isles which was a different facility.

41. The claimant was unable to deploy to Western Isles as planned due to ill health. The first respondent maintains that he did not inform them of this until the day of his deployment, two days after his sick note was issued and that

this had caused difficulty for Dana as they had to find a replacement at short notice. However, this is denied by the claimant who maintains that he advised the first respondent earlier. Such a conflict can only be properly resolved by hearing evidence, but in my view that factual dispute was not crucial to the issues with which I was concerned.

42. On 12 September 2019 at 12:54, after the claimant failed to deploy, Martin Lawson, Dana's UK Operations Manager, sent an e-mail to the second respondent, Neil McIntyre, the first respondents' Senior Operations Manager, in the following terms:-

"*Further to our discussions, please accept this e-mail as a formal request to remove the following personnel from the Dana Contract with immediate effect.*

Although this decision is no (sic) *taken lightly, we have concluded that the individuals name* (sic) below *have not operated in a manner conducive with meeting our expectations. I cannot allow a single department to hold our operation to ransom, even when offered an alternative option, a level of trust and support cannot be regained.*

……

Maurice Roberts MSTL.

I trust that Wood will deal with this as per our requirement."

43. On 19 September, Mr McIntyre, sent a letter to Martin Lawson, Dana's Operations Manager with a request that he reconsider his decision. He said this:- "*We acknowledge the recent incidents you refer to and appreciate the operational challenges caused to Dana which has ultimately resulted in a lack of trust in the above named individuals. We are aware that there have been difficult working relations offshore and as you know we have made attempts to mediate between both parties during the recent incidents.*"

44. Mr Lawson's reply was the letter of 7 November. He first made reference to Dana's request that the claimant be removed from the Triton FPSO. He

recorded that it had been agreed that the claimant would transfer to their "new asset" Western Isles. He went on to say that:-

"*This was a brand new asset and would give Maurice a chance to re-affirm his commitment to Dana, allowing a clean slate to be created. During the meeting Maurice agreed that this was in fact a very good option, where he indicated a willingness to take up this offer. Subsequently he later informed Wood, several weeks later, of his decision not to take this position on Western Isles forcing Dana to find a replacement, thus removing this option for Maurice.*"

45. Finally, Mr Lawson referred to the contractual provision which entitled Dana to request the first respondent to remove a person from its work site:

"9.8 The Company (Dana) may instruct the Contractor (the first respondent) to remove from the WORK SITE any person engaged in any part of the WORK who in the reasonable opinion of the COMPANY is either:
(a) incompetent or negligent in the performance of his duties; or
(b) engaged in activities which are contrary or detrimental to the interests of the COMPANY; or
(c) not conforming with relevant safety procedures described in section V-Health, Safety and Environment or persists in any conduct allowed prejudicial to safety, health or the environment.

Any such person shall be removed forthwith from the WORK SITE. Any person removed for any of the above reasons shall not be engaged again in the WORK or on any other work of the COMPANY without the prior approval of COMPANY.

The CONTRACTOR shall provide a suitable replacement for any such person within twenty four (24) hours or such longer time as may be agreed by the COMPANY.

Under section 9.8 I believe that the activities as discussed above would allow our request for Maurice's removal from the contract in either (a), (b) or (c) as all are applicable in our determination."

46. There is no reference, in any of the documentation, to Dana being made aware of the claimant's, *"confidential discussions with the second respondent and a member of the first respondents' HR team";* his "*reluctance to transfer to Western Isles because of his recent treatment by Dana and his concerns about Dana's attitude to safety matters"* (Para 14 of the Particulars of Claim). Indeed, in his e-mail of 19 September to Mr Lawson at Dana, Mr McIntyre,

referred to the *"recent incidents"* and *"operational challenges"* which the claimant had caused which had resulted in Dana having a *"lack of trust"* in the claimant. In my view, those comments are consistent with the respondents' assertion that the claimant's failure to advise Dana timeously that he would not be able to deploy to Western Isles had caused a serious problem for Dana as they had to find a replacement at short notice and that, in a sense, was the final straw so far as Dana was concerned in allowing the claimant to work on their assets. However, I was mindful that the claimant disputed that he had only advised Dana on the day he was due to deploy, some two days after his GP had certified him as unfit for work.

47. In any event, when considered in context and giving the ordinary meaning of the language used by Dana in their letter of 7 November, I was not persuaded, as the claimant's solicitor submitted, that an inference could be drawn that Dana had been made aware (in a manner not specified) of the alleged "confidential discussions". That being so, the "confidential discussions" could not have been the reason for Dana's decision to request the removal of the claimant from all of their assets.

48. Further, I was also mindful, as the respondents' solicitor submitted, that: "*It is not an element of the claimant's claim that the confidential discussions which the second respondent is alleged to have passed to the Client should be regarded as protective disclosures. This means that the claimant's case must depend upon the respondents' actions being motivated by the claimant's 'reports'. These 'reports' were made in the first instance to Dana before they were communicated to the first respondent.*"

49. There was also an allegation by the claimant that the second respondent, Mr McIntyre, had a close personal relationship with Dana and that he also had a family relationship. However, this was denied by the respondents, there were no other averments to support what was no more than an allegation and it appeared to me to be no more than supposition on the part of the claimant.

50. While mindful that the case law cautions against striking out of claims, as I recorded above, in my view there are not any disputed facts, the resolution of which are central to the determination of the detriment complaints. In all the circumstances, therefore, and having regard also to the "overriding objective" in the Rules of Procedure, I decided that, by and large, the submissions by the respondents' solicitor were well-founded.

51. There was some initial attraction in deciding that the detriment complaints have "little reasonable prospect of success", but, on further consideration, I was driven to the view that the detriment complaints against both respondents have "no reasonable prospect of success". Accordingly, they are struck out in terms of Rule 37(1)(a) in Schedule 1 of the Rules of Procedure.

Employment Judge **Nick Hosie**
Date of Judgement **1 December 2020**
Date sent to parties **2 December 2020**