EMPLOYMENT TRIBUNALS

Claimant: Ms P Purcell

Respondent: Royal Surrey County Hospital NHS Foundation Trust

Heard at: Reading **On: 12 and 13 April 2021**

Before: Employment Judge Gumbiti-Zimuto
Members: Mr P Hough and Mr M Pilkington

Appearances
For the Claimant: In person
For the Respondent: Mr A Ross, counsel

JUDGMENT

1. The claimant's complaints about protected disclosure have no reasonable prospect of success. The claim is struck out pursuant to rule 37(1) of the Employment Tribunals Rules of Procedure 2013.

2. The respondent's application for costs is dismissed.

REASONS

1. In a claim form presented on the 18 June 2018 the claimant made a complaint alleging that she had been dismissed and subjected to detriment because she made a protected disclosure. The respondent denied the claimant's allegations contending that she resigned her employment, that there was no protected disclosure and the reference provided (the alleged detriment) was a fair reference unaffected by any alleged protected disclosure.

2. The claim came before the employment tribunal for a preliminary hearing on the 4 April 2019. The case was listed for a final hearing to take place on the 23 to 26 March 2020. The final hearing was postponed because of the covid pandemic and a preliminary hearing took place on the 23 March 2021. At the second preliminary hearing the Employment Judge adopted the list off issues to be determined in the case as drafted by the respondent. The case was subsequently re-listed to take place between the 12-15 April 2021. On 12 April 2021 the final hearing commenced, the claimant gave evidence in support of her case and at the conclusion of her evidence the respondent made an application to strike out the claim pursuant to rule 37(1) of the

Employment Tribunals Rules of Procedure 2013 on the basis that the claim has no reasonable prospect of success because the claimant had failed to show that she made a protected disclosure. The case was adjourned overnight after hearing from the claimant and Mr Ross the Tribunal concluded that the claim should be struck out. We set out below the reasons for our decision.

3. Rule 37(1) provides that 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 grounds that it has no reasonable prospect of success.

4. Under the heading **"Protected Disclosure (s.43A-C ERA)"** the list of issues set out the following:

    1. *Did the claimant make a disclosure of information to her employer? She asserts that she disclosed on a regular basis to Helen Blocke, and in writing once to Professor Christopher Eden (in an email of 31 August 2017) , that Professor Eden was not supplying hospital numbers to verify the identity of the patient in his dictations.*

    2. *Did the claimant reasonably believe that the disclosure tended to show that the health or safety of an individual had been, was being or was likely to be endangered? She asserts that she was concerned that the wrong information would go to the wrong patient, endangering health and safety.*

    3. *Did the claimant reasonably believe that the disclosure was made in the public interest?*

5. The list of issues was drawn up by the respondent after considering the claim form, additional information provided by the claimant on 26 April 2019 (p45), further additional information provided on 8 May 2019 (p61), and yet further additional information provided on 26 June 2019 (p80).

6. The claimant has also provided a witness statement in which she set out the evidence on which she seeks to rely as her evidence in chief in this case. The claimant gave evidence before the Tribunal and was subjected to questioning by Mr Ross on behalf of the respondent.

7. In summary the respondent submitted that the claimant had in her evidence to the Tribunal, in the claim form, and in the additional information documents set out the basis of her contention that there was a protected disclosure. This fell short of showing that the claimant had made a protected disclosure for the purposes of section 43A Employment Rights Act 1996.

8. The claimant's protected disclosure, in her own words is set out first in the claim form in the following terms

> *Since starting the role in July, I complained on several occasions that I am unable to do my job properly because a consultant would not supply hospital numbers for a patient. At times there was no information. I had to cross reference to ensure that it was the correct patient being sent clinical information but was never 100% sure. It so happened that a mistake made. (sic) Management treated me unfairly as I made so many complaints and threatened to make this public. Management lacked a duty of care and was negligent towards me and the patients.*

9. On the 25 January 2019 the respondent's solicitors asked that the claimant provide further information.

10. In response the claimant provided additional information on 26 April 2020 (p45). The claimant stated that "*there were many complaints approximately 4 verbal and one in writing by email*". The claimant also stated that "*Most times it took a long time to tally a patient to the clinical information. On many occasions had to ask other secretary's (sic) to check results which I did not have access to.*"

11. The claimant provided further additional information on 8 May 2019. She provided some new information.

> *Like NHS Numbers- the Hospital Number is unique to the patient. It is used to identify you correctly and is an important step towards your patient safety. It helps to create a complete record of your care – linking every episode of your care across NHS organisations.*
>
> *It enables your healthcare information to be safely transferred and accessible to other NHS organisations, for example – needing hospital treatment when on holiday away from home. Without this number there is a risk of identifying the wrong patient and conveying news that could lead to injury and ill health. I felt I should not have been put in this position and the managers were medically negligent. I was in fear of losing my job and in fear of recrimination.*
> *…*
> *I do not recall the dates when complaints were made usually around the time of the clinic and usually after listening to audio clinical letters when no hospital numbers were provided.*

12. On 26 June 2019 the claimant provided answers to the questions asked. In answer to the request to provide "*the specific terms of your complaints",* the claimant replied, "*Professor Eden was not supplying Hospital Numbers to verify identity of patient."*

13. In her witness statement the claimant stated that "*I voiced my concerns regarding Professor Eden not supplying medical hospital numbers in his clinical dictation…. I had to download the dictation only to listen to a tape without this information to type the clinical letters to his patients…. Trying to*

tally a patient consultation dictation was very time consuming and near impossible."

14. In her oral evidence to the Tribunal the claimant stood by the matters set out above but added for the first time that Professor Eden would also fail to provide the names of the patients and this was a concern that she had also raised. The claimant relied on the contents of an email she sent to Professor Eden on 31 August 2017 in which she stated "*It would be appreciated if would please quote the Hospital Number and Patient's name/date of birth. This will ensure that no errors are made in linking the dictation to the correct patient."* The response from Professor Eden was an agreement to do so followed by the comment "*it's the first time I have been asked to do this in 32 years".*

15. In the course of her oral evidence it was put to the claimant that she could not have had a reasonable belief that the health or safety of any person was likely to be endangered by Professor Eden's practice alleged by the claimant.

16. Section 43A Employment Rights Act (ERA 1996) provides that a "protected disclosure" is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

17. Section 43B ERA 1996 provides that a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one that the health or safety of any individual has been, is being or is likely to be endangered.

18. There must be a disclosure of information with sufficient factual content and specificity such as is capable of tending to show that the health or safety of any individual has been, is being or is likely to be endangered.

19. In the reasonable belief of the worker making the disclosure, the information must tend to show that the health or safety of any individual has been, is being or is likely to be endangered. In <u>Kraus v. Penna Plc & Anor</u> [2003] UKEAT 0360 Mrs Justice Cox stated that " we should interpret the word "likely" in section 43B(1)(b) (and indeed it appears throughout sub paragraphs (a) to (f) in that subsection) … as requiring more than a possibility, or a risk, that an employer (or 'other person') might fail to comply with a relevant legal obligation." Applied to this case it must be shown that there was more than a possibility, or a risk, that an employer (or 'other person') might endanger the health or safety of any individual.

20. In the reasonable belief of the worker making the disclosure, it must be made in the public interest. The worker must believe, at the time of making it, that the disclosure is made in the public interest, and that belief must be reasonable.

21. The tribunal thus has to ask (a) whether the worker believed, at the time that she was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.

22. There may be more than one reasonable view as to whether a particular disclosure was in the public interest.

23. The necessary belief is that the disclosure is in the public interest. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be her predominant motive in making it.

24. The phrase "in the public interest" has not been defined the statute, the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest.

25. A qualifying disclosure becomes a protected disclosure when it is made to the employer of the person who makes the disclosure or some other person who is responsible.

26. Workers are protected against being subject to detriment done on the ground that they made protected disclosures by section 47B ERA 1996.

27. Employees are protected against being dismissed for making protected disclosures by section 103A ERA 1996.

28. Striking out a claim protected disclosure is a Draconian step which is only to be taken in the clearest of cases. (1) only in the clearest case should a protected disclosure claim be struck out; (2) where there are core issues of fact that turn to any extent on oral evidence, they should not be decided without hearing oral evidence; (3) the Claimant's case must ordinarily be taken at its highest; (4) if the Claimant's case is "conclusively disproved by" or is "totally and inexplicably inconsistent" with undisputed contemporaneous documents, it may be struck out; and (5) a Tribunal should not conduct an impromptu mini trial of oral evidence to resolve core disputed facts.

29. "*If a case has indeed no reasonable prospect of success, it ought to be struck out*."[1] It is necessary for us to the parties why the claim was or was not struck out.

30. Guidance for considering claims brought by litigants in person is given in the Equal Treatment Bench Book. *"Litigants in person may be stressed and worried: they are operating in an alien environment in what is for them effectively a foreign language. They are trying to grasp concepts of law and procedure, about which they may have no knowledge. They may be experiencing feelings of fear, ignorance, frustration, anger, bewilderment and disadvantage, especially if appearing against a represented party. The outcome of the case may have a profound effect and long-term consequences upon their life. They may have agonised over whether the case was worth the risk to their health and finances, and therefore feel passionately about their situation. Subject to the law relating to vexatious litigants, everybody of full age and capacity is entitled to be heard in person by any court or tribunal."*

[1] ABN Amro Management Services Ltd & Anor v Hogben UKEAT/0266/09

31. We recognise that litigants in person may have difficulty pleading their cases: "Litigants in person may make basic errors in the preparation of civil cases in courts or tribunals by: Failing to choose the best cause of action or defence; Failing to put the salient points into their statement of case; Describing their case clearly in non-legal terms, but failing to apply the correct legal label or any legal label at all."[2]

32. The claimant has not taken us to any relevant materials; the Tribunal has considered the pleadings and the core documents that explain the case the claimant wishes to advance.

33. We have come to the conclusion that the claim should be struck out because the information that the claimant disclosed on a regular basis to Helen Blocke, and in writing once to Professor Christopher Eden (in an email of 31 August 2017), is that Professor Eden was not supplying hospital numbers to verify the identity of the patient in his dictations. Additionally the claimant says that Professor Eden did not supply patient names however it is not clear whether she ever raised this with Helen Blocke, but she did mention providing names in her email of 31 August 2017. For the purposes of the strike out application we take the claimant's case at its highest.

34. The wrongdoing that the claimant contends she reasonably believed that the information tended to show was that it endangered patient health and safety. The conclusion of the Tribunal is that this could not have been a reasonably held belief. The failure of Professor Eden to insert the correct information in his dictation is only likely to endanger patient health and safety if it is likely results in wrong letters being sent to the patients. The claimant's evidence however showed that the more egregious omission of both name and Hospital Number would not result in any letter being sent to anyone there would be no letter. We understood the claimant to accept that if the wrong details are put in the wrong letter there is a problem, but if the claimant suspects this she would not send the letter. If the claimant is unsure about the correctness of the patient she would not send the letter. Where the claimant was only given a name and no Hospital Number the claimant explained the steps she would have to take either herself alone or with the help of colleagues to ascertain the correct identity of the patient to avoid the risk of a letter going to the wrong patient. The evidence led before us does not lead to the conclusion that Professor Eden' practice, as alleged by the claimant, endangered patient health and safety. It caused the claimant additional work, as the claimant said "*Most times it took a long time to tally a patient to the clinical information. On many occasions had to ask other secretary's (sic) to check results which I did not have access to.*" The claimant could not have had a reasonable belief that Professor Eden's practice endangered health and safety. It caused extra unnecessary work for her.

35. To be a protected disclosure the information, in the reasonable belief of the claimant, must tend to show that the health or safety of any individual has been, is being or is likely to be endangered. In this case the claimant says

[2] Equal Treatment Bench Book at para 26 of Chapter 1

health and safety was likely to be endangered. Likely meaning more than a possibility, or a risk, that Professor Eden's practice might endanger the health or safety of any individual. This has not been shown what has been shown in that it caused extra work and inconvenience for the claimant. The claimant could not have reasonably believed that it was likely to endanger health and safety.

Costs application

36. A Tribunal may make a costs order, and shall consider whether to do so, where it considers that a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or any claim or response had no reasonable prospect of success.

37. The respondent makes an application for costs on the basis that (a) that the claimant acted unreasonably in either the bringing of the proceedings or the way that the proceedings have been conducted, and (b) the claim had no reasonable prospect of success.

38. In correspondence dated 18 November 2019 and 11 February 2021 the respondent wrote to the claimant stating that the claim had no reasonable prospect of success and inviting the claimant to withdraw her claim. The letters were sent without prejudice save as to costs. The points which have been clearly set out in those letters include reference to the essential basis on which this Tribunal has concluded that the claimant's claim must fail.

39. We remind ourselves that in considering an application for costs we should approach the matter in two stages (a) to consider whether the claimant's conduct of the proceedings means that we must consider making an order for cost, and (b) if it does, whether we should make an order for costs.

40. Based on the conclusions we have come to in this case we are satisfied that the gateway has been breached and we must consider an application for costs. This is a case which in our view has no reasonable prospect of success.

41. We have gone on to consider whether in the circumstances of this case we should make an order for costs. We have come to the conclusion that this is not a case where an order for costs should be made for the following reasons.

42. We take into account that the claimant is on universal credit. It is one of the factors which we take into account and consider weighs against making an order for costs.

43. We take into account that when the claimant is working she is employed in modestly paying agency work of an admin nature and recognize that this would enable her to have some capacity to pay an order for costs in the future. We also note that the respondent is a NHS Foundation Trust a public body dependant on limited public funds. We have considered where the balance of injustice lies as between the claimant and the respondent in

respect of an order for costs and we are of the view that the claimant would suffer greater hardship and harm in us making the order for costs against her than the respondent would in our failing to make the order for costs in favour of the respondent.

44. The Tribunal is satisfied that the claimant's pursuit of the proceedings was in her subjective view at all times justified, we however are of the view that had she been able to view the case objectively she would have been able to see that the case has no reasonable prospects of success. That the claimant was unable to do so was not as a result of wilfulness on her part but simply that her genuinely held opinion that she had been the victim of an injustice at the hands of the respondent prevented her from being able to view this matter objectively. The claimant is a litigant in person, also she did not have legal advisers in the background acting off the record as some claimants do, her view of the law and prospects of success appears to have been gained from her own researches including using google.

45. The fact that the claimant was sent "Calderbank" type letters by the respondent does not in our view justify the making of an award in her case. We recognise that the claimant was warned that her case did not have realistic prospects of success however taking into account the claimant's genuine view that she was the victim of injustice such observations coming from the other side are not likely to have had much impact on her, certainly not so as deprive her of the genuine belief that she was the victim of injustice. While the claimant would have been wise to take legal advice as was suggested by the respondent, the fact that she failed to do so and continued to prosecute the case does not does not weigh so heavily against the claimant so as to make it just to make an award of costs against the claimant when other factors such as we have taken into account would suggest that no costs order should be made.

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Employment Judge Gumbiti-Zimuto

Date: 14 April 2021

Sent to the parties on: 4/5/2021

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For the Tribunals Office

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