



EMPLOYMENT TRIBUNALS

Claimant: Mr T Reuser

Respondent: University Hospitals Birmingham NHS Foundation Trust

Heard at: Birmingham

On: 1 October and
4 November 2020 (in chambers)

Before: Employment Judge Broughton

REMISSION JUDGMENT

The claimant's dismissal was not automatically unfair.

REASONS

1. The claimant, a Consultant Ophthalmic Surgeon, brought claims of unfair dismissal, automatic unfair dismissal for having made a protected disclosure and wrongful dismissal.
2. I heard the case in August 2018 and held that the claimant had been both unfairly and wrongfully dismissed. However, I did not find that the sole or principal reason for his dismissal was the fact he had made a protected disclosure under s103A Employment Rights Act 2010.
3. The facts and the law were fully recorded in my judgment of 8 October 2018 and I will not repeat them here.

4. The respondent submitted lengthy grounds of appeal in relation to my findings on the unfair and wrongful dismissal but was unsuccessful.
5. The claimant submitted one ground of cross appeal in relation to his claim of automatic unfair dismissal and that has been remitted to me.
6. The EAT observed that, in parts, I had failed to specifically address some of the claimant's submissions on relevant matters or had taken into account irrelevant matters. I have, however, considered the whole case again rather than simply addressing those criticisms individually.
7. The claimant contends that the reason for dismissal can not have been misconduct. Effectively, the argument is that, but for the protected disclosure, the claimant would have received a lesser sanction.
8. Equally, it appeared that, but for the conduct incidents, the claimant would probably not have received any sanction at all, in line with other whistleblowing colleagues.
9. That is not to rule out the potential for some predisposition against the claimant to have, nonetheless, resulted in some disparity.
10. That gives rise to a potentially interesting argument about which then becomes the principal reason for the dismissal.
11. Let us say that the conduct would ordinarily have resulted in a final written warning. On the one hand, the disclosure could be the sole reason that the sanction was upgraded to dismissal. However, viewed as a whole, it could be said that the conduct was the larger, and hence principal, part of the situation.
12. For what it is worth, I prefer the former construction. If the disclosure is what ultimately triggers the dismissal it must be the principal reason. However, having reconsidered all of the evidence I remain of the view that this is not what happened in this case.
13. I found that the respondent did not genuinely view the 2 incidents, individually or collectively, as potentially amounting to gross misconduct.
14. That was principally an observation on the procedure followed up to the disciplinary hearing.
15. I remain of the view that the respondent, generally, and HR in particular, did not treat the incidents as gross misconduct, other than during the exclusion on untenable grounds, until the disciplinary hearing itself.
16. That said, there was significant evidence to suggest certain members of the senior management may have been keen to escalate matters should the opportunity arise.

17. This was most clearly demonstrated by all of the issues around the claimant's exclusion but also a number of the procedural failings which also pre-dated the disclosure.
18. As I found in my original decision, it was these which led to some inaccurate findings and restricted the claimant's ability to fully defend and explain himself.
19. Whilst far from conclusive, there was no evidence that the disclosure itself caused any immediate change of direction on the part of the respondent. The claimant continued to work. The charges against him were not revised to potentially amount to gross misconduct.
20. Indeed, the disclosure appeared to be largely ignored. It related to an ongoing issue, nursing support in Solihull. The concern had been raised several times before. The respondent was well aware of the issue and claimed to be addressing it.
21. In any event, a dismissal will be automatically unfair if the principal reason for it was the employee making a protected disclosure, whatever the contents and response. The failure to respond to the protected disclosure was because the issue was already known about and being dealt with, rather than forming part of any alleged "smoking gun".
22. I acknowledge that the fact that no action was taken against other whistleblowers is also far from conclusive. There appeared to be both a predisposition against the claimant and an opportunity to discipline him. These significantly differentiate his circumstances.
23. However, the fact that I did not accept that the respondent genuinely viewed the charges as gross misconduct initially does not mean that I found that the potentially fair reason for dismissal was not conduct. In my judgment it clearly was.
24. What caused the elevation of the charges to ones that were claimed to warrant dismissal was, as claimed, the claimant's perceived lack of insight. His comments on this were misunderstood due to the predisposition against him, the procedural failings and a lack of due care and attention.
25. I wish to make it clear that, despite significant evidential issues, I stopped short of finding that Dr Rosser had deliberately misled the GMC, this tribunal or anyone else. I remain of that view.
26. I acknowledge that he was a very busy man, doing a very difficult job, in challenging circumstances. There were failings, and serious ones, but that is not the same thing.

27. The inaccurate and unfair referral was more likely to have been caused by the predisposition against the claimant and a lack of due care and attention.
28. If there was any subsequent "cover up" it was, in my judgment, in relation to those failings. However, again, I consider it more likely that the subsequent disclosure failings and evidential anomalies were similarly caused.
29. The fact is that most of the failings pre-dated the protected disclosure.
 - a. The exclusion on false pretences
 - b. Most of the MHPS failings
 - c. The NCAS failings
 - d. Most of the documents that were the subject of subsequent disclosure failings
 - e. Even Dr Rosser's lack of sufficient independence
30. Some of these failures directly resulted in the perceived lack of insight and the escalation of the charges to ones which were believed to warrant summary dismissal. Specifically, the predisposition against the claimant, the failure to obtain specialist medical advice and the failure to properly forewarn the claimant so that he would have received legal advice.
31. The respondent's disclosure failings related to documents pointing towards the unfairness of the dismissal and, in particular, an apparent bias against the claimant. That said, those documents, as a result, were more likely to support the respondent's case on automatic unfair dismissal.
32. The protected disclosure was largely ignored when received and during the disciplinary hearing. It was completely ignored or overlooked in the GMC referral. It should not have been but, contrary to the claimant's submissions, I did not find that this was deliberate and I remain of that view.
33. There was significant material which could, on the face of it, have led to adverse inferences being drawn but the majority of it actually pointed away from the protected disclosure being causative of the dismissal.
34. The protected disclosure played little or no part in the decision making of the respondent and was not the principal reason for his dismissal.
35. In my judgment, the claimant would still have been dismissed if he had not made a protected disclosure.
36. All of the failings of the respondent, other than those related to the disclosure itself, would still have occurred.
37. If the parties are unable to resolve remedy within 14 days a short telephone hearing will be arranged before me as soon as possible to ensure that the necessary directions are in place for the remedy hearing already listed.

Employment Judge Broughton

6 November 2020