



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4102584/2019

Held in Edinburgh on 18 – 20th November 2019 and 15-17 June 2021

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**Employment Judge Jones
Tribunal Member J Auld
Tribunal Member J Grier**

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Mr G Ocytko

**Claimant
In Person**

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Four Square (Scotland) Limited

**Respondent
Represented by:
Mr I Maclean
Consultant**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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It is the unanimous judgment of the Tribunal that the respondent did not breach the claimant's contract of employment, that the claimant was not subject to discrimination either on the ground of his race or a disability and that the claimant was not dismissed for having made a protected disclosure and therefore the claimant's claims are dismissed in their entirety.

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REASONS

Introduction

1. The claimant brought the following claims:

5 (a) Breach of contract in that the claimant said that he had a contractual right to a pay rise and the respondent's failure to award him a pay rise was a breach of contract

(b) Disability discrimination

(c) Race discrimination

(d) Automatically unfair dismissal for having made protected disclosures.

10 2. A hearing took place between 18th and 20th November 2019. However the claimant did not attend the Tribunal on 20th November and as the Tribunal administration could not contact him to determine why he had not attended, the hearing was adjourned and the remaining days of the hearing were vacated. The claimant subsequently advised the Tribunal administration that
15 he had been unwell and had been unable to contact the Tribunal to advise of his non-attendance as his mobile phone had not had any credit on it. Therefore, further dates were then arranged for the hearing. Unfortunately, due to the COVID pandemic, those dates (in April 2020) had to be adjourned and a preliminary hearing for the purposes of case management took place
20 on the first scheduled date of the continued hearing. Further dates were then set but these too had to be adjourned with the agreement of both parties due to the non-availability of a witness who both sides had wished to call. Therefore, there was a considerable gap between the commencement of the hearing and the reconvened dates.

25 3. The Tribunal had heard evidence from the claimant and a Trade Union representative who appeared with him at the appeal hearing which took place in relation to his dismissal, Mr Turnbull. On the reconvened dates, the Tribunal heard evidence from the respondent's witnesses, Mr Sturrock, the then HR Manager, Ms Devine, the Chief Executive of the respondent and
30 Mr Lopata who had been a manager with the respondent and had chaired the disciplinary hearing after which the claimant was dismissed. A witness order

had also been issued in relation to a further witness at the request of the claimant, although this witness did not, despite a reminder from the Tribunal, attend to give evidence. Although initially the claimant had indicated that if the witness did not attend he would seek a further postponement of the hearing, on the morning of the last day of the hearing the claimant indicated that he would not seek a postponement of the hearing and was content to proceed to submissions.

4. Both parties also lodged productions.

Findings in fact

5. Having considered the evidence heard and documents to which reference was made, the Tribunal made the following findings in fact:
6. The claimant is originally from Poland and was engaged by the respondent from 11 December 2017 as a driver. He was responsible for driving and picking up items of furniture which were then brought back to the respondent's premises. The respondent is a charity.
7. The claimant signed a contract of employment on 11 December 2017. Clause 5 of that contract which set out the claimant's salary also provided that "Four Square will review salaries annually."
8. The claimant reported to Mr Lopata who is also of Polish origin.
9. On 17 October 2018, the claimant contacted the charity regulator OSCR by email and asked whether the respondent was still a charity.
10. A routine team meeting which had been rearranged some time before took place between the staff and management of the respondent on 18 October 2018. At this meeting, the claimant asked for a pay rise for himself and his colleagues. At this meeting the claimant also referred to the Edinburgh Furniture Initiative, which was the part of the respondent's organisation where he worked, as a 'cash cow' for the respondent more generally. The meeting itself became heated and Ms Devine had to intervene at one point.

11. Around October 2018 a pay review was being undertaken by the respondent and Mr Sturrock was conducting a benchmark exercise with the pay of what he believed to be similar organisations.
12. On 20th November 2018, the claimant attended the offices of the Edinburgh and Lothians Racial Equality Council to uplift some furniture. He was accompanied by a colleague Mr Gift Makunganya. In the event, the furniture was unsuitable for uplift.
13. During the claimant's attendance at these offices, the claimant spoke to the receptionist in a manner which caused her upset. The claimant then spoke to the Chair of the Edinburgh and Lothians Racial Equality Council ('ELREC') in a manner which caused him upset.
14. Later that day, the office manager of ELREC contacted Mr Lopata by telephone to complain of the conduct of the claimant. The office manager subsequently sent an email on 20 November setting out the details of the complaint. The email ended by saying "I want assurance that this gregor guy will be dealt with properly and I will report this to the police too."
15. On 21st November, Mr Lopata spoke to Mr Makunganya and obtained a statement from him. He also spoke to the claimant and subsequently typed up the notes of what the claimant said, although this was never signed by the claimant. A decision was then taken by Ms Devine to suspend the claimant.
16. Later that day, Mr Lopata and Mr Sturrock met with the claimant and advised him that he was being suspended on full pay. This was confirmed in a letter to the claimant.
17. Messrs Lopata and Sturrock and Ms Devine attended the premises of ELREC in the days following 21st November 2018. At that time, they all viewed CCTV footage of the period during which the claimant was in the premises. They all concluded that the footage did not provide any relevant evidence, both due to the quality of the footage and its content.
18. A complaint was subsequently made to the police by the manager of ELREC in relation to the claimant's conduct on 20 November 2018. Although the

claimant was initially issued with a police warning, the claimant appealed this decision and no further action was taken against him.

19. A letter was given to the claimant on 30th November inviting him to a disciplinary hearing on 7th December.
- 5 20. A disciplinary hearing took place on 7th December 2018 at which the claimant was accompanied by a colleague Mr McGreevy. The hearing was chaired by Mr Lopata and he was assisted by Mr Sturrock, who also took notes of the hearing.
- 10 21. At the conclusion of the hearing, the claimant was advised that Mr Lopata would speak to Mr Makunganya again and that the claimant remained suspended on full pay pending the outcome of the hearing.
22. On 10th December 2018 Mr Lopata and Mr Sturrock had a further meeting with Mr Makunganya. A handwritten amendment to Mr Makunganya's statement was made by Mr Sturrock and this was signed by Mr Makunganya.
- 15 23. Notes of the disciplinary hearing, which were not verbatim, were sent to the claimant for approval. The claimant subsequently provided comments on the notes of the hearing, having been prompted to do so by the respondent on 16 December.
- 20 24. A further version of the notes of the disciplinary hearing incorporating the claimant's comments was produced by Mr Sturrock and sent to the claimant for approval. The claimant did not ever approve the notes or provide any further comment on the amended version of the notes. The notes were approved by Mr McGreevy.
- 25 25. A letter was sent to the claimant dated 21st December, advising him that he was dismissed with immediate effect. The decision to dismiss the claimant was taken by Mr Lopata with input from Mr Sturrock.
- 30 26. At the time of the decision to dismiss the claimant, Mr Lopata was not aware that the claimant had raised a complaint with OSCR about the respondent. Mr Sturrock was aware that the claimant had contacted OSCR but had no knowledge of the matters raised by the claimant.

27. The claimant appealed against the decision to dismiss him in a letter dated 24th December 2018.
28. An appeal hearing took place on 11 January 2019. The claimant was accompanied at that hearing by a Mr Turnbull, a regional officer of Unison. The hearing was chaired by Ms Devine, and a note taker was present during the hearing. Mr Sturrock was in a room nearby in case he was called upon to provide any advice.
29. A very brief note of the hearing was produced by the respondent.
30. The claimant was advised by letter dated 14th January 2019 that his appeal had been dismissed.

Observations on the evidence

31. The claimant explained on a number of occasions that he appreciated that he may come across as shouting when it was not his intention to shout. He said that he had previously been a teacher and therefore may sound louder than he intended. He also said that he did not intend to be sarcastic. The claimant did at points during the proceedings, both when giving evidence and when cross examining witnesses, come across as aggressive. He often spoke over witnesses and interrupted. It was appreciated that the claimant suffered from mental health difficulties and took medication and the Tribunal gave him some degree of latitude in these circumstances. Nonetheless, the claimant's evidence was not wholly satisfactory and in the opinion of the Tribunal he was prone to exaggerating his evidence and being unnecessarily personal in his criticism of the respondent's conduct. He sought to introduce evidence, such as alleged drug use at the respondent's premises and witnesses' alcohol consumption which was wholly irrelevant to the proceedings and appeared simply to be an attempt by the claimant to damage the reputation of the respondent's witnesses. He consistently referred to each individual with whom he came into contact as 'unprofessional', often without specification.

32. Mr Turnbull's evidence was of limited relevance to the Tribunal although it became clear that the claimant began to treat him as a hostile witness during his evidence in chief.

33. The respondent's witnesses gave their evidence in a straightforward manner. Messrs Sturrock and Lopata were no longer employed by the respondent and Ms Devine was on the whole measured in her evidence and did her best to remember events which had occurred well over two years ago.

Submissions

34. The claimant approached submissions by analysing the evidence of each of the witnesses. He did not address the legal issues other than indirectly and no criticism is made of him in that respect. However, he did not make any submissions on race or disability discrimination at all. He did make submissions on the question of breach of contract and appeared to suggest that the contractual right to a pay rise arose from a duty of care the respondent had towards him.

35. The claimant was critical of the respondent's failure to give him access to the CCTV footage which they had viewed. He highlighted inconsistencies of evidence on the visit to the offices of ELREC by the respondent's witnesses. He was also critical of the failure to provide him with the full email which set out the details of complaint against him, in that the top part of the email had been redacted.

36. The claimant raised the issue of a possible statement which was said to have been taken from ELREC's chairman, although the respondent's witnesses did not indicate that any formal statement had been taken.

37. The claimant also submitted that the respondent changed the narrative of the complaint against him by first indicating that they relied on the CCTV footage and then suggesting that they relied on the statement of his colleague and the email from ELREC. The claimant invited the Tribunal to find that the statement of his colleague was wholly unreliable and had only been changed at the prompting of Mr Sturrock and Mr Lopata.

38. The claimant also reminded the Tribunal of the evidence of Ms Devine, that she had been briefed on the evidence of the first days of the Tribunal.
39. The respondent's witnesses were criticised for remembering matters which the claimant said were in their favour but not remembering things which were not in their favour. They were also criticised for being aware of the ACAS Code of practice, but in the view of the claimant, failing to follow any of it.
40. The claimant was particularly critical of the evidence of Mr Lopata. The Tribunal was invited to find that he was a lying and unreliable witness and that he had rehearsed his evidence.
41. The claimant said that Mr Sturrock didn't know what to do about the claimant as he had complained to OSCR and therefore he just decided to sack him. It was said that Mr Sturrock had failed to give any good reason as to why the claimant had been suspended.
42. The claimant also invited the Tribunal to find that his witness, Mr Turnbull had lied and that his evidence should be ignored.
43. The claimant's submissions on the evidence of Ms Devine were that she was a victim of the respondent's Board and had been caught up "in a perfect storm" of the dispute over pay rises with the staff. It was said that Ms Devine had just done what the Board had told her (although it should be noted that this was not put to Ms Devine in cross examination).
44. For the respondent it was said that it was recognised that the claimant was stressed by his presentation of his case and that his emotions had rather run away from him.
45. It was pointed out that there had been no evidence led and no submissions made in relation to the claimant's claims of race or disability discrimination.
46. It was also submitted that there was little evidence on the issue of the claimant's allegations of breach of contract and that there was no basis in fact for this allegation.
47. In terms of the claimant's automatically unfair dismissal claim, the respondent's position was that it was not at all clear what alleged protected

disclosure the claimant relied upon. There was no evidence that the respondent knew what the claimant had said to OSCR and whether that could qualify as a protected disclosure.

5 48. The respondent however submitted that even taken at its highest, if it was accepted that the claimant had made a protected disclosure related to health and safety and/or his contact with OSCR, there was no evidence that either of these matters were in any way related to his dismissal.

49. Rather it was said that it was clear that the reason for the claimant's dismissal had solely been the incident at ELREC.

10 50. It was recognised by the respondent that the process leading up to the claimant's dismissal could have been more robust, but taking into account the claimant's length of service, it was said that the process was adequate.

15 51. It was said that there was the original complaint against the claimant, which was from two individuals and was supported by the statement of the claimant's colleague. Therefore, even if it could be said that the process was flawed, the respondent had a reasonable belief that the claimant had committed the misconduct alleged and dismissal was appropriate.

Issues to determine

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- Was the claimant discriminated against because of his race?
 - Was the claimant discriminated against because of a disability?
 - Was the claimant contractually entitled to a pay rise each year?
 - Did the claimant make a protected disclosure?
 - Was the making of that protected disclosure the principal reason for the
- 25 claimant's dismissal?

Relevant law

52. Section 13 of the Equality Act 2010 provides that a person discriminates against another person if because of a protected characteristic, the employer treats the claimant less favourably than he would treat someone without that protected characteristic.
53. Race and disability are both protected characteristics for the purposes of the Equality Act.
54. Section 103A of the Employment Rights Act 1996 ('ERA') provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
55. For a disclosure to amount to a protected disclosure in terms of ERA, it must satisfy the conditions set out in Part IVA of ERA. In particular,
- (1) It must be a disclosure of information
 - (2) It must be a qualifying disclosure in that it must be in the reasonable belief of the person making it, be made in the public interest and tend to show that one of more of the six relevant failures set out in the legislation has occurred or is likely to occur, and
 - (3) It must be made in accordance with one of six specified methods of disclosure

Discussion and decision**Race and disability discrimination claims**

56. The claimant led no evidence whatsoever that he had been dismissed or otherwise subject to a detriment on the basis of his race or that he had been discriminated against because of a disability. He did not put to any of the respondent's witnesses that they knew he was disabled. At best he cross examined them on his allegation that he was dismissed while he was off sick.

There was no evidence whatsoever that the respondent was or could reasonably be aware that the claimant was a disabled person during his employment with them.

57. In relation to the claimant's claim of race discrimination, again there was simply no evidence led by the claimant. He did not put to any of the witnesses that his race was anything to do with his dismissal. There were no facts from which the Tribunal could draw an inference of discrimination on this basis.
58. In terms of the claimant's claim for breach of contract, the Tribunal had no hesitation in concluding that it was bound to fail. The provision in the claimant's contract was that his salary would be reviewed, not that it would be increased. There was no dubiety or ambiguity about the provision whatsoever. In addition, the claimant's own evidence was that there had been no salary increases for staff for a number of years.
59. The Tribunal then turned to deal with the claimant's claim that he had made a protected disclosure and that this had been the principal reason for his dismissal.
60. So far as the Tribunal could determine, the claimant was relying in this regard on an email sent to OSCR late on 17th October 2019 and issues raised at the meeting between staff and management on 18th October. However, the claimant was not at all clear what exactly he was relying on this regard.
61. The first issue to determine therefore was whether the claimant had made a protected disclosure. As is set out in section 43B ERA, a qualifying disclosure must be a disclosure of information and must relate to one of the categories of information set out in section 43B(1)(a) – (e).
62. In relation to the contact with OSCR, the claimant's evidence was that he had completed an online form to OSCR on 17th October, asking whether the respondent was still a charity. This was not a disclosure of information, but a question. The claimant did produce a further document at p31 of the document bundle he provided the tribunal. This was a typed document headed up 'Charity Concern Form'. There was also typed document entitled 'OSCR update 22 November 2018'. The provenance of these documents was

not at all clear. The claimant did not speak to them. It was not clear for instance if the content of these documents replicated information provided to OSCR.

- 5 63. On the face of it, if the information was provided to OSCR, then it could be said that these were protected disclosures.
64. However, there was no evidence that the information in the documents had been provided to the respondent or the respondent was otherwise aware of it. At its highest, the respondent was made aware on 18 October 2019 that the claimant had made contact with OSCR. There was no evidence that the claimant gave the respondent information about any issues raised with OSCR and there was no evidence that there was any further discussion with the respondent about this matter.
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65. While it could be said that indicating an intention to raise a complaint with a charity regulator about the status of a charity could amount to a protected disclosure (or intention to make a protected disclosure), the Tribunal had no hesitation in concluding that this had nothing to do with the claimant's subsequent dismissal two months later. The Tribunal concluded that the principal and only reason for the claimant's dismissal was the incident at ELREC for which he was subject to disciplinary proceedings.
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- 20 66. The Tribunal did also consider whether the claimant's raising of health and safety issues at the meeting on 18th October amounted to a protected disclosure. The evidence on this was again vague and it was not clear what specifically the claimant raised at this meeting, although there was some evidence about trolleys. However, even if it could be said that this amounted to a protected disclosure, and the Tribunal had significant reservations as to whether this was the case, the Tribunal remained of the view that the principal and only reason for the claimant's dismissal was the incident at ELREC.
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- 30 67. The Tribunal did take into account that the procedure followed by the respondent in dismissing the claimant was not robust. In particular, there was no investigatory meeting with the claimant before the disciplinary hearing took place and the claimant's manager Mr Lopata appears to have played a key

role at the investigation stage as well as being a decision maker at the disciplinary hearing. However, the Tribunal was also mindful that the respondent was advised by its HR Manager that its procedure (which was not shown to the Tribunal) allowed for disciplinary proceedings to move straight to a hearing where the employee concerned had less than two years qualifying service. In addition, the Tribunal was mindful that the management team in the respondent was a small one.

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68. The Tribunal was also concerned at the brevity of the notes of the appeal hearing which took place in relation to the claimant's dismissal. However, the Tribunal reminded itself that this was not a case where a fair procedure required to be followed for the purposes of section 98(4) of ERA. The Tribunal did consider whether any defects in the procedure could provide the basis of an inference that the respondent's position that the claimant was dismissed for the events of 20 November was a sham. However, it had no hesitation in concluding that the respondent had a genuine belief that the claimant had behaved inappropriately towards a receptionist and the chairman of a client of theirs and that this was the sole reason for the claimant's dismissal.

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69. In all these circumstances, the claimant's claims fail and fall to be dismissed.

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Employment Judge: Amanda Jones
Date of Judgment: 25 June 2021
Entered in register: 29 June 2021
and copied to parties