EMPLOYMENT TRIBUNALS

Claimant: Ms F Mansur

Respondent: Feversham Education Trust

Heard at: Leeds **On:** 13 to 16 September 2021

Before: Employment Judge Cox
Members: Mrs S Scott
Mr K Lannaman

Representation:
Claimant: Mr Finley, counsel
Respondent: Mr Jones, counsel

REASONS

1. The Claimant worked as a Teaching Assistant at a school run by the Respondent. On 4 February 2019, she presented a claim to the Tribunal. All aspects of the original claim were dismissed but she was granted leave to amend her claim to add allegations that she had been subjected to four detriments on the ground of a protected disclosure.

The law and the issues

2. It is unlawful for an employer to subject an employee to a detriment by any act, or any deliberate failure to act, done on the ground that the employee has made a protected disclosure (Section 47B of the Employment Rights Act 1996 – the ERA). The Claimant alleged that she made a protected disclosure when she

wrote anonymously to the Department for Education (DfE) on 15 June 2017 raising concerns about the inappropriate conduct of a fellow teacher, X, when taking pupils for a swimming lesson. (The letter was lengthy and raised various other concerns, but it was this aspect of the letter only that she said amounted to a protected disclosure.) She alleged, and the Respondent accepts, that this amounted to a:

- a qualifying disclosure under Section 43B(1)(b) ERA, as tending to show that the Respondent was failing to comply with its legal obligation to take reasonable care to protect pupils from inappropriate conduct by a teacher and

- a protected disclosure under Section 43F ERA, the DfE being a prescribed person under the Prescribed Persons Disclosure Order 2014 as amended.

3. An act or deliberate failure to act amounts to a "detriment" if in all the circumstances of the case a reasonable worker would or might take the view that she had thereby been disadvantaged in the circumstances in which she had thereafter to work (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337).

4. If an employee presents a complaint that the employer has subjected her to a detriment on the ground of a protected disclosure, it is for the employer to show the ground on which the act, or deliberate failure to act, was done (Section 48(2) ERA).

5. A protected disclosure must be viewed as the ground for an act or failure to act if it is a material, in the sense of more than trivial, influence on the decision (NHS Manchester v Fecitt and others [2012] ICR 372).

6. One of the detriments the Claimant alleged occurred after her employment had ended, but a person may bring a claim of detriment on the ground of a protected disclosure against her former employer if the detriment is connected to the former employment (Onyango v Adrian Berkeley t/a Berkeley Solicitors [2013] ICR D17).

7. The Tribunal therefore had to decide the following issues:

    a. Did the alleged acts in fact occur?

    b. If they did, did they amount to detriments?

    c. If they did, were they done on the ground of the Claimant's protected disclosure?

8. A complaint of a detriment on the ground of a protected disclosure must be presented before the end of the period of three months beginning with the date of

the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them (Section 48(3)(a) ERA). If the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented by that time, the claim can still proceed if it has been presented with a further period that the Tribunal considers reasonable (Section 48(3)(b) ERA). The time limit is extended in certain circumstances to allow for early conciliation through ACAS (Section 207B ERA).

9. The Claimant accepted that, if the earlier three detriments she alleged amounted to discrete acts that were not part of a series of similar acts including the fourth detriment, her claim had been presented out of time in relation to them and it had been reasonably practicable for her to have presented those allegations in time. The Tribunal therefore had to decide whether the earlier three detriments amounted to part of a series of similar acts with the fourth detriment.

The evidence

10. At the Hearing, the Tribunal heard oral evidence from the Claimant. A witness statement was submitted by the parent of a child involved in the swimming allegations and the Respondent agreed that evidence. For the Respondent, the Tribunal heard oral evidence from Mrs Anwar-Bleem, the School's Headteacher, who conducted the meetings on 13 and 17 July 2017 that were the subject of the first and second allegations; Mrs Spence, Mrs Anwar-Bleem's Personal Assistant, who took notes of the 17 July meeting; Mr Bashir, the Chair of the School's Governing Body, who was present at the 13 July meeting and wrote the letter that was the subject of the fourth allegation; and Mr Walgrove, Vice-Chair of the Governing Body, who chaired the disciplinary panel who issued the Level 2 warning that was the subject of the third allegation.

11. The Tribunal was also referred to various documents in an 858-page file produced for the Hearing and viewed a short piece of CCTV footage produced by the Respondent of the incident in the playground that led to the Level 2 warning.

12. On the basis of that evidence, the Tribunal made the following findings relevant to the allegations.

Who knew and when that the Claimant had made the protected disclosure?

13. As the Tribunal needed to decide whether any of the detriments had been done on the ground of the protected disclosure, it considered as a preliminary issue who knew and when that it was the Claimant who had made the protected disclosure. The letter was anonymous. The DfE did not tell the Respondent who had written it, because it did not itself know. The DfE did not provide the Respondent with a copy of the letter, it just summarised the concerns raised in it so that these could be addressed by the school.

14. The Tribunal found Mr Bashir a credible witness who was entirely straightforward in his response to the questions put to him in cross-examination. The Tribunal accepted his evidence that it did not occur to him until he saw the Claimant's later letter of 10 December 2018 that she was the author of the anonymous letter. He was a volunteer in his role as Chair of the Governing Body. He saw his task as ensuring that the allegations were investigated, not analysing who the potential authors of the anonymous letter were. He was in any event not in a position to do so, not being sufficiently familiar with the detail of the school's staffing arrangements and organisation. Although Mr Bashir did not identify in his evidence to the Tribunal exactly why he thought the Claimant's later letter of 10 December 2018 established that she was the author of the letter to the DfE, the letter does indicate that she was the author because it makes reference to "the top of page 2" of the anonymous letter.

15. Mrs Anwar-Bleem's evidence was that she did not know until after the Claimant's dismissal on 8 June 2018 that the Claimant was the author of the anonymous letter. She did not see the text of it until it was produced during the course of this claim. Her evidence was that she thought at the time she was interviewing staff about the allegations in the letter that the author of it might have been a parent, but the Tribunal accepts that she must also have suspected it could have been Ms Mansur or Ms Thomas, who were the other staff involved in taking the children swimming. The Tribunal does not accept, on the other hand, that she had formed the belief at the relevant time that it was the Claimant who had written the letter.

16. Mr Walgrove's evidence was that the allegations were not discussed at the Governing Body's meetings but the Tribunal accepts Mr Bashir's evidence that it is more likely than not that they would have been raised in general terms, albeit that they were not recorded in the notes of the meetings. On the other hand, the Tribunal does accept Mr Walgrove's evidence that he never knew that the Claimant was the source of the allegations. Like Mr Bashir, he is a volunteer. He did not have enough detailed knowledge of the allegations or the workings of the school to be able to deduce or even suspect that the Claimant was the source.

Detriment 1

17. The first alleged detriment was that the Claimant was invited to a meeting on 13 July 2017 with Mrs Anwar-Bleem and Mr Bashir at which she was questioned indirectly about the incident with X at the swimming baths and the anonymous letter.

18. The Tribunal accepts that this happened. The Tribunal accepts also, on the basis of the evidence of Mrs Anwar-Bleem and Mr Bashir, that they did not just speak to the Claimant. They spoke to all three members of staff involved in taking pupils swimming and other staff too. Their evidence on who else was questioned did

not exactly match, but the Tribunal does not think that undermines the credibility of the central point they made that they spoke to all the relevant people. It is not credible that the school would talk to only one member of staff when there was a serious safeguarding allegation to investigate.

19. Having said that, the Tribunal does not accept Mrs Anwar-Bleem's evidence that her manuscript notes of the interviews she and Mr Bashir conducted were made on the day of those interviews. The annotation at the top of the document indicates they were made at some point later "from memory", in 2018 or later. The Tribunal does not consider it safe to draw any inference from the fact that Mrs Spence's notes of the meetings on 17 July 2017 make reference to the Claimant having spoken to Mr Bashir "on Thursday" (presumably a reference to 13 July) but make no reference to that in relation to the other two staff members. These were not verbatim notes and Mrs Spence had no training in note taking.

20. The Tribunal does not accept that being interviewed about the allegations could reasonably be viewed by the Claimant as putting her under a disadvantage in her employment, even though the Claimant was not told at the time that this was part of the school's investigation into certain allegations that had been made. She had no reason to believe that she was the only person who was being interviewed and she had not been involved in any conduct that might cause her to feel awkward about being interviewed.

21. Neither Mrs Anwar-Bleem nor Mr Bashir knew at this time that Ms Mansur had made the disclosure. Even if Mrs Anwar-Bleem suspected that Ms Mansur was the source, she was not interviewed on the ground of the protected disclosure, but on the ground that the school needed to investigate an allegation that had been made by talking to all relevant staff.

Detriment 2

22. The second alleged detriment was that the Claimant was invited to a meeting on 17 July 2017 with Mrs Anwar Bleem and Mrs Spence at which she was questioned indirectly about the incident with X at the swimming baths and the anonymous letter.

23. The Claimant says that the tone of this interview was intimidating and threatening. She says that, from the notes of the interviews with staff, it is apparent that only she had it mentioned to her that the allegation was in a letter to the DfE. She was asked why she thought someone had complained to the DfE, what they wanted to achieve and why they had not come to Mrs Anwar-Bleem.

24. The Tribunal finds that in fact the other interviewees were asked similar questions. In Mrs Spence's notes of the interviews, Ms Thomas is recorded as

having given as responses: “”Julie can’t think of any parents who would have complained” and “Julie can’t think of anyone who wouldn’t come to Shahnaz [Mrs Anwar-Bleem]/governors/another staff member”, indicating that she had been asked who she thought might have made the allegations to the DfE. The notes of the questions put to X and the responses indicate something similar was asked of X: “What is your theory on the allegation? Do not know why it’s been put forward.” “Who would you report any concerns to? Shahnaz”.

25. In summary, the Tribunal accepts the evidence of Mrs Anwar-Bleem, which was fully supported by Mrs Spence’s evidence, that while the questions put to the staff may not have been identical, they covered much the same ground.

26. The Claimant’s evidence was that at the meeting Mrs Anwar-Bleem said: “If something happens I’m holding you responsible”. This is not exactly what the Claimant told the Respondent Mrs Anwar-Bleem had said when it was later investigating a disciplinary allegation made against the Claimant. In that context, she said Mrs Anwar-Bleem had said: “If something comes out of this, I’m holding you responsible”. The Tribunal prefers the evidence of Mrs Anwar-Bleem, which was consistent with the answers she gave during the investigation of the disciplinary allegation against the Claimant, that what she in fact said, to all the interviewees, was that if something had happened that was a safeguarding incident and they did not report it, then they would be held responsible.

27. The Tribunal does not accept that a reasonable employee could view being provided with that information as being put at a disadvantage in employment. It was a statement of fact. It was in all the interviewees’ interests to understand that, if they had anything to disclose, they must do so immediately, or they would be held accountable for that omission.

28. In any event, the Tribunal does not accept that either the fact of the Claimant’s interview or the tone of it was on the ground of her protected disclosure. The Claimant’s interview was held, and the statements and questions were made and posed, on the ground of the Respondent’s need to investigate the allegations and to find out who had made them not least because, if they were true, a staff member should have reported them at once to the school’s management.

Detriment 3

29. The third alleged detriment was that on 6 December 2017 the Respondent imposed a Level 2 warning on the Claimant.

30. The imposition of a disciplinary warning clearly amounts to a detriment.

31. The decision to impose the warning was made by a panel chaired by Mr Walgrove. As already recorded, the Tribunal does not accept that Mr Walgrove knew or even suspected at the relevant time that the Claimant had made the

protected disclosure. There was no evidence before the Tribunal to indicate that the other two members of the panel did either.

32. Mr Walgrove's evidence, which was consistent with the documentation, was that the reason the panel imposed the warning was that it had concluded that the Claimant had made unwarranted physical contact with a child in that she grabbed the child by the left arm and used a degree of force to move the child to a different position in the playground, causing the child harm, in breach of the school's safeguarding policy and procedure.

33. The Tribunal accepts that there was conflicting evidence before the panel as to whether the child had sustained a visible injury. Mrs Anwar-Bleem, Miss Gilpin and the child's parent in a written complaint on the day after the incident said that they saw a mark on his arm. But the parent appears to have said something different orally when she came into the school and the first aider did not see a mark on the child's arm even though he examined it closely relatively soon after the incident.

34. The panel also knew, however, that the child himself said to the school and his parents that his arm was sore and the parent said that she had had to give him mild pain relief to get him to sleep. The panel also took into account that the Claimant's account of her contact with the child had changed. She said in the investigation meeting that her hand was flat on his shoulder when she was moving him. In the disciplinary hearing itself she said she cupped her hand on his arm because he was digging his heels in and resisting. The Tribunal accepts that the panel had reasonable grounds from the CCTV footage to consider that the child was not in fact resisting and that the Claimant had in fact gripped the child by his arm. The thrust of the panel's conclusion was that the Claimant was using an unwarranted degree of force in the way she moved the child and had hurt the child in doing so.

35. The Tribunal accepts that the panel had sufficient evidence before it supporting that conclusion to make its decision explicable, even though the Tribunal can also appreciate why, from the Claimant's perspective, the sanction appeared disproportionate and unfair. The Tribunal does not accept that the inconsistencies in the evidence before the panel were such as to indicate that there must in reality have been some other ground for the panel's conclusion. The Tribunal notes that the disciplinary panel's conclusion could have led to a decision to dismiss the Claimant, but it decided to impose a lesser sanction.

36. In summary, and even bearing in mind that it is for the Respondent to show the ground on which the warning was imposed (Section 48(2) ERA), the Tribunal is satisfied that the warning was imposed because the panel believed that the Claimant was guilty of a serious disciplinary offence.

Detriment 4

37. The fourth alleged detriment on the ground of the protected disclosure was made up of various aspects of the content of Mr Bashir's letter dated 17 December 2018, sent in in response to a letter from the Claimant dated 10 December 2018.

38. On 19 July 2018 the School had provided a reference on the Claimant to a potential new employer that contained a reference to the Level 2 warning. The Claimant alleged that in his letter Mr Bashir refused to change the reference to remove the mention of the Level 2 warning in the light of new evidence from the child's father about the allegations she had made about X in her protected disclosure. In her letter, the Claimant said: "The unwarranted contact should be waived as it is more than likely the injury which I allegedly inflicted could have been from the fight in which I had physically intervened, therefore caused by another child". In reply, Mr Bashir said: "If ever a reference request is made in relation to your employment with us, the Academy will provide a factually accurate reference and fully answer all questions asked with the reference. This is our legal duty and responsibility."

39. The Tribunal accepts that this was effectively a refusal by Mr Bashir to remove the reference to the Level 2 warning in the reference. The Tribunal accepts Mr Bashir's evidence, however, which was clear and credible, that he adopted his position not on the ground of Claimant's protected disclosure but on the ground that not to mention the warning when answering a question to which it was relevant would be in breach of the Respondent's legal obligation to give accurate answers to questions posed by potential employers. The Tribunal notes that many aspects of the reference the School provided to the Claimant's prospective new employer were in fact positive. If the senior management of the school really intended to punish the Claimant for making her protected disclosure, as she alleges, it could easily have provided a much less positive reference. Further, Mr Bashir had no authority to remove the Level 2 warning and was satisfied that the warning was properly given, having conducted the Claimant's unsuccessful appeal against the warning himself. At that appeal, the Claimant did not allege that the alleged injury to the child could have been inflicted by another child in the fight before she intervened.

40. The Claimant alleged that Mr Bashir said in his letter that she was being vindictive. He in fact said: "It has come to the point where your actions appear vindictive." The Tribunal finds that he did not say this on the ground of the Claimant's protected disclosure of 15 June 2017 but because of the content and tone of her letter of 10 December 2018 and the fact that in its conclusion she raised the possibility of "escalating the matter" if she was not satisfied with his response.

41. The Claimant alleged that Mr Bashir said in his letter that he would sue her for defamation. He in fact said: “Should you make any defamatory statement or bring the school into disrepute – the school reserves the right to instigate legal proceedings against you.” The Tribunal finds that this was not done on the ground of the Claimant’s protected disclosure on 15 June 2017 but on the ground of the tone and content of her letter of 10 December 2018, in which she was making numerous allegations of bias, unprofessionalism and unlawful conduct which Mr Bashir considered to be untrue and likely to damage the school’s reputation if repeated in the public domain.

42. The Claimant alleged that in the letter Mr Bashir told her she must not contact the School in the future. He in fact said: “we do not intend to correspond any further with you”. He was not saying that she must not contact the school; he was just saying that the school would not be replying to any correspondence she sent. The Tribunal finds that the grounds for that was the tone and content of her letter of 10 December 2018, not the protected disclosure of 15 June 2017. She was no longer an employee of the school and Mr Bashir considered that she was raising unwarranted allegations and matters that had already been investigated.

43. In summary, the Tribunal finds that none of the aspects of Mr Bashir’s letter about which the Claimant complained were included on the ground of the protected disclosure.

Time limits

44. For the purpose of the issue relating to time limits, the Tribunal considered whether the first, second and third detriments were part of a series of similar acts with the fourth detriment.

45. The first two detriments were similar, in that they were meetings held to investigate allegations that had been made. The Level 2 warning was not, however, similar to those meetings or to the fourth detriment: it involved different people, different subject matter and was of an entirely different nature. The fourth detriment was dissimilar from the other three detriments. Although it involved an individual who had been involved in the first detriment, it was of an entirely different nature: it was a letter responding to points made by the Claimant after she had already left employment, not a meeting to discuss allegations made whilst she was still in employment.

46. Although this will be apparent from its earlier findings, for the avoidance of doubt the Tribunal confirms that the evidence it heard did not establish that all or any of the four detriments were part of any overarching plan by, or agreement between, the Headteacher and the Chair and Vice-Chair of Governors to retaliate against the Claimant on the ground of her protected disclosure.

Summary and conclusions

47. In summary, the Tribunal finds that the first two of the alleged detriments did not amount to detriments at all. Further, none of the acts involved in the allegations were done on the ground of the Claimant's protected disclosure: the Respondent has shown that the actions were done on other grounds. In addition, and in any event, the claim in relation to the first three detriments is dismissed as having been presented out of time.

48. For these reasons, the claim fails and is dismissed.

Employment Judge Cox

Date: 25 October 2021