EMPLOYMENT TRIBUNALS

Claimant: Miss Harris

Respondent: Hull University Teaching Hospitals NHS Trust

Heard at: Leeds by Cloud Video Platform **On:** 20 October 2021

Before: Employment Judge Evans (sitting alone)

Representation
Claimant: in person
Respondent: Mr Adjei, Counsel

CORRECTED REASONS

Preamble

1. The claimant was employed by the respondent from 2 March 2020 until 5 January 2021 when she was dismissed. Following her dismissal she presented a claim to the Tribunal on 11 January 2021. She ticked "unfair dismissal" at box 8.1 and referred to whistleblowing in box 8.2.

2. There was a preliminary hearing before Employment Judge T.R. Smith on 12 July 2021. At that hearing EJ Smith considered an application to amend by the claimant so as to include a wide variety of other claims. The application was refused except that the claimant was permitted to amend to include a claim of ordinary unfair dismissal.

3. At the conclusion of that preliminary hearing, EJ Smith ordered this preliminary hearing, the purpose of which was described as being:

   3.1. To consider any application made by the respondent for a deposit or strike out order;

   3.2. To make case management orders and set the matter down for hearing.

4. The parties had agreed a bundle running to 412 pages for this preliminary hearing. All references to page numbers relate to this bundle.

5. The issues to be considered at the preliminary hearing changed as a result of an amendment application made during it, to which I turn below. In the end I reserved my decision on the respondent's application for strike out. I did,

however, discuss with the parties the orders which would be necessary if the whole of the claim was not struck out. Having not struck out the whole of the claimant's claim, those orders including one listing the claim for a final hearing have been issued separately.

The amendment application

6. EJ Smith had set out the claims and issues arising in them in the Case Summary attached to his orders of 12 July 2021 (page 101). The list of issues identified a single disclosure upon which the claimant relied at its paragraph 4.2 which had been made in an email dated 27 November 2020.

7. During the course of the preliminary hearing it became apparent that the claimant's wished to argue that the qualifying disclosure upon which she relied was not contained solely in that single email. Rather that email should be read together with other emails. I noted that the claimant would need to apply for leave to amend if she wished to pursue such an argument. The claimant indicated that she did wish to apply for leave to amend. The amendment that she applied to make was as follows:

> *The claimant seeks leave to amend to contend that the following emails disclose the following information and when read together with the email of 27 November 2020 amount to a qualifying disclosure: (1) that face shields are not an alternative to masks (her emails of 15.10.20 at page 330-332, of 28.10.20 at p340 and of 7.11.20 at p337); (2) that a risk assessment had not been carried out (her emails of 9 November 2020 at p347 and of 23 November 2020 at p355); (3) that no reasonable adjustment had been made (her email of 9 November 2020 at p347).*

8. Mr Adjei for the respondent opposed the application to amend. However, I gave the claimant leave to amend for reasons which I gave orally during the preliminary hearing.

The applications to be considered and the submissions made in relation to them

9. The respondent's application for the strike out and/or for a deposit order were contained in a letter dated 17 August 2021 (page 145). The application was supplemented by Mr Adjei's oral submissions.

10. **Ordinary unfair dismissal**: the respondent contended that the claimant could not pursue this claim because she had not completed two years' service by the time she was dismissed. In summary:

    10.1. The claimant could not rely on section 218(6) of the Employment Rights Act 1996 ("the 1996 Act") because the respondent and previous NHS employers of the claimant were not "associated employers";

    10.2. The claimant could not rely on a staff transfer scheme made pursuant to section 14I of the National Health Service Act 2006 because no such scheme had been made;

    10.3. The claimant could not rely on section 218(8) of the 1996 Act because she had not been employed in "relevant employment".

11. The claimant made very limited submissions in relation to the respondent's application relating to the ordinary unfair dismissal claim. She said she was "happy to take your advice" on that. I explained that it was really for her to say whether or not she opposed the application. She did not make any significant submissions in response. She did, however, accept that her employment with the respondent had resulted from her applying for a specific job, that there had not been a "staff transfer scheme", and that she had not been employed in "relevant employment" as defined for the purpose of section 218(8) of the 1996 Act.

12. **Protected disclosure claims:** the respondent's strike-out submissions in relation to this issue were summarised in three numbered points in its letter at page 147:

    12.1. The email of 27 November 2020 did not disclose information – at the most it made allegations;

    12.2. The email did not show (or tend to show) any of the issues at section 43B (1)(a) to (f) of the 1996 Act;

    12.3. The email could not be evidence of the claimant's reasonable belief that information contained in it tended to show any of those issues.

13. However, Mr Adjei limited his strike-out submissions to points 1 and 2, on the basis that it would not be appropriate to deal with the question of her "reasonable belief" in the context of a strike-out application because the claimant had not given evidence.

14. So far as the email of 27 November 2020 was concerned, Mr Adjei stated that this simply did not contain sufficient information: it simply contained vague assertions about a return to work being unsafe, but did not explain how or why.

15. Following the decision to permit the amendment, Mr Adjei made the following submissions:

    15.1. **Face shields:** the reality was that the claimant was saying in the emails upon which she relied "I won't wear a mask and I also won't wear a shield because it is not effective to protect others and might make me feel claustrophobic". There was little information contained in the emails and the emails did not say that requiring the claimant to wear a face shield would be in breach of some legal obligation.

    15.2. **Risk assessment not carried out:** in the email of 9 November 2020 the claimant reminds the respondent of a need for a risk assessment and on 23 November 2020 she reminds the respondent that there has not been one. However in neither email does she state that there had been a failure to carry out a risk assessment.

    15.3. **No reasonable adjustment:** the email of 9 November 2020 simply expresses a doubt that a reasonable adjustment has been made. There is no assertion of a failure to make a reasonable adjustment.

16. Overall Mr Adjei submitted that the emails relied upon both individually and collectively contained neither sufficient information nor a clear assertion that rules or laws had been broken.

17. The claimant made brief submissions in response. She said it was clear she was raising health and safety concerns: her email of 7 November 2020 stated that shields do not protect others. Further, it was not a question of her not wanting to wear a mask – she had a clinical diagnosis from an OH consultant to the effect that she could not wear a mask. She had raised concerns that wearing a shield might make her feel claustrophobic during an occupational health appointment. So far as risk assessments were concerned, the fact that she was asking for them to be done self-evidently meant that she was raising concerns about the fact that they had not been done. Her email of 9 November 2020 raised concerns and doubts about reasonable adjustments.

18. The claimant said that when all her emails were taken together she was raising concerns for herself and for others. She was raising concerns about a lack of risk assessments and in relation to reasonable adjustments. When the emails were taken together with her later email of 27 November 2020 she had disclosed information tending to show that a criminal offence had been committed or was likely to be committed, that the respondent had failed to comply with a legal obligation, and that the health and safety of an individual had been or was likely to be endangered.

The Law

"Ordinary" unfair dismissal

19. Section 94 of the 1996 Act gives employees the right not to be unfairly dismissed. However section 108 of the 1996 Act provides that only employees who have been continuously employed for a period of not less than two years have such a right.

20. Continuity of employment is calculated primarily by reference to the provisions contained in chapter I of part XIV of the 1996 Act.

Qualifying disclosures

21. Section 43A of the 1996 Act defines a "protected disclosure" as a qualifying disclosure as defined by section 43B made in accordance with any of section 43C to 43H.

22. Section 43B provides, where relevant:

> *(1) In this Part 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 or more of the following—*
>
> > *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
> > *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*
> > *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding para-graphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it…

23. The question of what counts as a "disclosure of information" has been considered extensively by the courts, with much focus on whether there is a "bright line" distinction between, on the one hand, an allegation and, on the other, the disclosure of information. In Kilraine v London Borough of Wandsworth [2018] ICR 1850 the Court of Appeal concluded that there was no bright line distinction, stating at [35]:

> *35 The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in the Cavendish Munro case did not meet that standard.*

Strike out and deposit orders

24. Rule 37 of the Tribunal's Rules of Procedure provides as follows in relation to the striking out of claims:

(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;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.

25. Rule 39 of the Tribunal's Rules of procedure provide as follows in relation to the making of 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, 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.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out. Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),
otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

Conclusions

26. I have reached the following conclusions in relation to the respondent's applications that the claimant's claims be struck out.

The "ordinary" unfair dismissal claim

27. The claimant began working for the NHS in 2007. From April 2017 until when she began employment with the respondent she had been employed as a personal assistant by the NHS East Riding of Yorkshire Clinical Commissioning Group (page 191).

28. The claimant accepted at the hearing before me that she had begun employment with the respondent as a result of applying for an individual post with it. She accepted that there had been no order made pursuant to section 14I of the National Health Service Act 2006 causing her employment to transfer to the respondent from the NHS East Riding of Yorkshire Clinical Commissioning Group. She also accepted that she was not in "relevant employment" for the purposes of section 218(8) of the 1996 Act. ("Relevant employment" is essentially employment of a description in which persons are engaged whilst undergoing professional training involving them being employed by a number of different NHS employers.)

29. The relevant legislative provisions do not provide that continuity of employment is generally preserved between different NHS employers. There are situations in which it may be preserved as identified above, but the claimant has accepted that these are not relevant to her position.

30. There is no dispute about the central fact in relation to the question of continuity: that the claimant whilst employed by NHS East Riding of Yorkshire Clinical Commissioning Group successfully applied for an individual post with the respondent. The claimant has not put forward any coherent legal basis for arguing that continuity was preserved – at the hearing she really fell back on having been "employed by the NHS" for 13 years. Nor, bearing in mind that the claimant is not represented, can I identify any coherent legal basis for arguing that continuity was preserved.

31. In these circumstances the claimant's claim of "ordinary" unfair dismissal quite clearly has no reasonable prospect of success because there is no reasonable prospect of the claimant showing that she had completed two years' continuous employment at the date of her dismissal.

The protected disclosure claims

32. The claimant contends that the email of 27 November 2020 when read together with other emails comprised a qualifying disclosure. She contends the other emails contained the following information:

    32.1. That face shields are not an alternative to masks;
    32.2. That a risk assessment had not been carried out; and
    32.3. That no reasonable adjustment had been made.

33. **Face shields not an alternative to masks:** turning to the emails the claimant relies upon, in her email of 12.42 on 15 October 2020 (page 331) she states

"the occupational health nurse stated she did not think face shields replaced masks". In her email of 15.28 on 28 October 2020 she writes "I'm a bit confused about the face shields, occupation health mentioned they didn't think were are alternative to masks as they protect the wearer and not others. Has clarity been sought on this now?". In her email of 7 November 2020 (page 337) she wrote:

> *Occupational health have confirmed Face shields are not a replacement for a mask, so I am not required to wear one as they do not protect others, which is the purpose of a mask in the COVID safe office. They are also not required as per the Public Health England Guidance that the Trust is following. I did mention wearing a face shield as an alternative at my occupational health appointment as I have concerns that these would also make me feel claustrophobic. Occupational health said that they did not think that face shields were an alternative to a mask and have since confirmed that this is the case.*
>
> *Please could you let me know if you still want me to attend the office as I am unable to wear a mask and can't wear the face shield as this does not protect others.*

34. **Risk assessment not carried out:** in her email of 9 November 2020 (page 347) she wrote:

> *Regarding insisting on me wearing a face shield, given that occupational health have confirmed that a face shield is not a replacement for a mask, I have doubts as to whether this is a reasonable adjustment.*
>
> *I also require an individual and personal risk assessment to be conducted with my full involvement pursuant to Health and Safety laws and duties.*
>
> *As part of these risk assessments I believe it is more than reasonable to require all evidence to be presented from my employer, that the face shield you are providing is safe and effective for the purpose you are intending it to be used for.*
>
> *To avoid any confusion, please could I also have a copy of the policies and procedures , or specify the exact policies the Trust is following, regarding the wearing of face masks/ coverings and shields.*

35. Then in her email of 23 November 2020 (page 355) she wrote:

> *As a courteous reminder , I am still awaiting the risk assessments , as per my email of 9th November, (the individual stress risk assessment as recommended by Occupational Health as per the letter of 15th October), and the Trusts COVID 19 risk assessment*
> *Please could this be resolved during working hours today, so I am aware of what is expected tomorrow. I am available on my personal mo if needed.*

36. No reasonable adjustment made: in her email of 9 November 2020 (page 347) the claimant wrote

Regarding insisting on me wearing a face shield, given that occupational health have confirmed that a face shield is not a replacement for a mask, I have doubts as to whether this is a reasonable adjustment.
I also require an individual and personal risk assessment to be conducted with my full involvement pursuant to Health and Safety laws and duties.

37. More generally, in her email of **27** November 2020 she stated:

> *(2) I fully acknowledge & respect that I am contractually (and morally) required to obey & cooperate with management instructions, the caveat at law (and morally) being that those instructions are required to be lawful, reasonable and based on facts (with legally-reliable proofs of claim). I have yet to be provided with the latter regarding the former in relation to face masks etc, despite my requests and reminders for a risk assessment.*
>
> *(3) In light of all of the afore-mentioned and my reasonably-held beliefs (concerns) regarding both my proposed RTW, and also (and especially) the core unresolved issues regarding face masks etc (concerns both for myself but also and especially my colleagues and the wider public), I believe the RTW offer is neither reasonable nor safe under the circumstances, and thus I am regrettably left with no alternative but to formally invoke and trigger (which I've been trying to avoid in the interests of all parties and resolution): …*

38. The emails goes on to refer to the legal principle of *volenti non fit injuria* and an eclectic mix of legislation before stating:

> *(4) Pursuant to all of the afore-mentioned, it is regrettably unsound legally and in terms of personal health safety to myself and/or others for me to return to the workplace (RTW) as offered unless & until we satisfactorily resolve the core concerns & issues. I believe this to be both lawful and also reasonable (justified) in the circumstances. To that effect: …*

39. When the emails relied upon are all read together it is possible to identify the following *argument* being advanced by the claimant in them

    39.1. She is unable to wear a face-mask;

    39.2. A face-shield is not an adequate replacement for a face-mask because it protects the wearer, not others;

    39.3. Further she has concerns that wearing a face-shield will make her claustrophobic and she does not want to wear one;

    39.4. She believes that in these circumstances a risk assessment should be conducted of her proposed return to the office wearing a face-shield rather than a mask both for the protection of both herself and her colleagues;

    39.5. Because no risk assessment has been conducted, there are unresolved issued concerning the wearing of “face masks etc” which means the basis on which it is suggested she should return to work is not safe.

40. The *argument* that one or more of the matters listed in section 43B(1)(a) to (f) is engaged is clear enough: for example, that the health or safety of any individual is likely to be endangered if she returns to work on the arrangements proposed by the respondent. However, the question, ultimately is whether the emails have "sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)".

41. The emails relied upon do not contain much by way of factual information. However they do contain some (for example, that face shields do not protect others and are not properly to be regarded as replacements for masks).

42. Taking into account that the emails contain some factual information, and the fact that there is no bright-line test, I have concluded that it cannot be said that the claimant has no reasonable prospect of arguing that the emails together comprised a qualifying disclosure. However, given the exceedingly limited factual content, and the lack of specificity of that content, I do conclude that the claimant's argument in this respect has little reasonable prospect of success. I have accordingly made a deposit order which is set out in a separate document.

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Employment Judge Evans

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Date: 6 December 2021