# EMPLOYMENT TRIBUNALS

**Claimant:** Dr Ambreen Malik

**Respondent:** Cygnet Behavioural Health Limited

**Heard at:** Manchester (by CVP) **On:** 16 December 2021

**Before:** Employment Judge Warren
Mr B McCaughey
Mr G Barker

**REPRESENTATION:**

**Claimant:** Ms M Murphy, Counsel
**Respondent:** Mr S Forshaw, Counsel

# JUDGMENT ON RECONSIDERATION

The unanimous judgment of the Tribunal on reconsideration is that:

1. The name of the first respondent is Cygnet Behavioural Health Limited.

2. The case against the second respondent is dismissed.

3. Part 1 of detriment 14 was presented out of time and the Tribunal has no jurisdiction to hear it.

4. Part 2 of detriment 14 was presented in time.

5. The claims of detriment numbered 14, Parts 1 and 2 in the agreed List of Issues are not part of a series either within themselves or with any other detriment in the List of Issues.

6. It is possible to have a fair trial on the issue of whether or not detriment 14 Part 2 was made out, in that the evidence had been heard and sufficient findings of fact already made.

7. On reconsideration of the issue of allegation 14 Part 2, the allegation is dismissed after due consideration of the findings of fact made in the original judgment.

8. Further, the appeal procedure amounts to part of the dismissal procedure and as such is specifically exempted from the provisions of section 47(B) (1) Employment Rights Act 1996 by section 47 (B) (2) Employment Rights Act 1996.

# REASONS

1. The reserved judgment was sent to the parties on 2 February 2021.

2. Each party has provided a list of case law and skeleton arguments to which they spoke in the Hearing. Reference was made to the Judgment in this case and paragraph numbers cited herein relate to that Judgment.

3. There were two issues before the Tribunal today for reconsideration. The initial application had included a request that the second respondent be dismissed and the name of the first respondent be amended. The name of the respondent had changed between the presentation of the original claim and the hearing. The Tribunal was mistaken and has, with the consent of the parties, agreed to change of name of the First respondent to Cygnet Behavioural Health Limited and to dismiss the second respondent from proceedings

4. The remaining issues are related to the fact that there is no specific reference to detriment 14 (on the original List of Issues paragraph 23), in the judgment. This application was made by the claimant under Rule 70 to 72 of the Employment Tribunals Rules of Procedure 2013. The reconsideration is to the Tribunal's finding that all of the whistleblowing detriment claims except the referral to the GMC (detriment 13) were out of time.

5. The claimant avers that detriment 14 was in time and the claimant was subjected to detriment 14 on the ground that she made protected disclosures. There are 2 allegations within detriment 14 :- the claimant's suspension – referred to herein as Part 1, and the 'inadequate' appeal against dismissal – referred to herein as Part 2.

6. A brief summary of the original case is as follows. The claimant is a Consultant Psychiatrist who was employed by the respondent to care for young adult males who suffered from psychiatric conditions linked to a history of addiction. Following the death of patient AG, the claimant asserts that she had made a series of protected disclosures to the respondent regarding the discovery of what she believed to be an illegal substance in the deceased patient's room. Having made those disclosures, the claimant alleged that she was subject to a number of detriments, which she believed to be on the ground of her protected disclosures. Two of those detriments related to the respondent accusing the claimant of gross misconduct for covertly administering medication to patient MP.

7. The detriments are:-

   (i) Following the covert administration, the respondent suspended the claimant on 27 July 2017 (Part 1 of detriment 14). The claimant appealed the subsequent investigation and disciplinary process on 16 October 2017. The outcome of that appeal on 17 November 2017 was that the claimant's dismissal for gross misconduct was upheld.(Part 2 of detriment 14). Detriment 13 related to the respondent referring the claimant to the GMC on 18 October or thereabouts 2017, for gross misconduct.

   (ii) The claimant had brought claims of whistleblowing detriments under Section 47B (1) of the Employment Rights Act 1996, automatically unfair dismissal under Section 103A of the ERA 1996, wrongful dismissal under Section 94 ERA 1996 and wrongful dismissal.

8. The Tribunal found that several of the detriment claims were made out but all of them except detriment 13 were out of time. The claimant was not automatically unfairly dismissed, the claimant was unfairly dismissed, and the claimant was wrongfully dismissed.

9. At paragraph 9 of the Tribunal's reasons in the judgment the Tribunal listed the detriments alleged by the claimant numbered 1 to 12. Two further detriments had been added namely the referral to the GMC and the terms used to describe the claimant to a GMC Liaison Officer (detriment 13) and detriment14 – the suspension and appeal procedure.

10. There were only two issues being considered under detriment 14, they were the suspension and the appeal (two specific parts of the procedure), and paragraph 9 was opaque in this regard.

11. The Tribunal went on to reach conclusions in relation to the detriments but made no specific reference to detriment 14 other than to indicate it would be considered under the unfair procedure findings.

**The Claimants submissions**

12. The claimant asserted that detriment 14 was in time. The ET1 was presented on the 12 January 2018. The claimant's reference to ACAS was on 18 October 2017. The early conciliation certificate was issued on 23 October 2017. It was agreed between the parties that any act taking place after 8 October 2017 was in time. Part 2 of detriment 14 was thus in time. The invitation to the hearing was on 20 October 2017 or thereabouts, the outcome was communicated to her on 17 November 2017. Both parties agree therefore that the second part of detriment 14 is in time.

13. In the reconsideration application the claimant asserted that the first part of detriment 14 was also in time. The suspension in July 2017 formed part of a series of similar acts or failures which culminated in the appeal process. The judgment and reasons do not expressly deal with detriment 14, which the respondent agrees. Part of the reason for not finding any of detriments 1 to 12 to be part of a series was that the detriments were spread amongst a number

of protagonists and were each unique in its own nature (Paragraph 415). The claimant argues that this analysis fails to engage with detriment 14 where the Part 1 and Part 2 are not unique but are connected and form a series.

14. The basic argument is that both the suspension and the appeal letter were part of a decision made by "a committee" consisting of the same people, who had a common aim to dismiss the claimant from the outset.

15. Counsel referred to the Court of Appeal's guidance on Section 48(3)(a) of the Employment Rights Act 1996 in **Arthur -v- London Eastern Railway (2007)** IRLR page 58. The series test is broad and permissive, and Tribunals should look at all the circumstances surrounding the acts. Were they committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? Per Mummery LJ at 35 "depending on the facts I would not rule out the possibility of a series of apparently disparate acts being shown to be part of a series or to be similar to one another in relevant ways by reason of them all being on the ground of a protected disclosure". Counsel for the claimant argued that both parts of the detriment were committed by the same fellow employees and that the actions of Dr Romero and Ms Gibson were found to be collaborative and concerted. Thus, the suspension and the appeal were part of a series, the last part of which, the appeal, was well within three months of the presentation of the claim.

16. Counsel for the respondent noted that there was a gap of more than three months between the detriments and relied upon that to assert that there had been a break in the series. The claimant asserted that that is a misapplication of the authority of **Bear Scotland -v- Fulton (2015) IRLR 15** which has had a mixed judicial response as it relates only to unlawful deduction from wages and specifically distinguishes itself from other detriments.

17. In the alternative Counsel for the claimant asserts that the first part of detriment 14 i.e. the suspension forms part of a series with detriment 13 (which was in time) as they are within three months of each other, and the suspension letter was signed on behalf of Dr Burton and it was Dr Burton who made the referral to the GMC.

18. Detriment 14 was 'on the ground' that the claimant had made protected disclosures.

19. If the Tribunal finds that detriment 14 is in time then they must also find that the detriment claim is made out in full because they were on the grounds that the claimant had made protected disclosures.

20. Detriment 14 appears to have been overlooked by the Tribunal. The Tribunal found that the claimant was subject to 9 detriments on the grounds that she made protected disclosures. Those responsible included Dr Burton, Mr Ruffley, Dr Romero and Ms Gibson. These were the same individuals who formed "the committee" involved with the claimant's suspension and appeal (reasons paragraph 395). The logical inference is that just as with the other

detriments, these were the same individuals influenced by the Public Interest Disclosures ("PIDs") which materially influenced detriment 14.

21. The Tribunal found that the respondent's investigation was fatally flawed, and the decision-making process was disreputable. The respondent did not have a genuine belief in the claimant's misconduct but developed a case from which she could be dismissed. With the claimant's disclosures acting as background, the respondent seized on an opportunity to dismiss her (paragraph 433). The claimant asserts that the respondent has not proved that detriment 14 was not materially influenced by the claimant's disclosures. According to the claimant, the burden of proof lies with the respondent.

22. It is noted that the claimant's claim for automatic unfair dismissal under Section 103A of the ERA 1996 failed. The respondent is not correct that because that failed, the claimant's detriment 14 claim under Section 47B (1) of the ERA 1996 must also fail. Causation under Section 47B(1) is a much lower hurdle than Section 103A ERA and it is met on the Tribunal's findings.

23. Under Section 47B (1) the detriment must be on the ground that the worker made a protected disclosure which is accepted by the parties as meaning that the disclosure was a material i.e. more than trivial influence. This is a less strict test than "the reason or principal reason for dismissal" as in Section 103 ERA .

24. The claimant argues that the Tribunal found in the Section 103A ERA claim that the claimant's protected disclosures coloured the way in which the dismissal was handled and acted as a backdrop. That would be sufficient to meet the material influence threshold for Section 47B (1). The Tribunal was thus invited to find that detriment 14 in whole or alternatively in part was 'on the ground' that the claimant made protected disclosures, and that the claim should therefore succeed.

**The Respondent's Submissions**

25. The application is opposed by the Respondent on the grounds that the Employment Tribunal implicitly dismissed the detriment 14 claims in the judgment.

26. Further a fair Article 6 ECHR compliant determination of those detriment 14 claims is not now possible. In any event the claims in relation to detriment 14 fall to be dismissed on their merits. The respondent therefore invites the Employment Tribunal to dismiss the reconsideration application.

27. Detriment 14 is comprised of two allegations, a suspension on 27 July 2017 because of the making of earlier protected disclosures, and an appeal against dismissal which was dismissed on 17 November 2017, because the claimant made protected disclosures. It is accepted between the parties that the Employment Tribunal did not expressly deal with the detriment 14 claims in the reasons, but the respondent contends that it is obvious when the judgment is read as a whole, that the Employment Tribunal intended to dismiss these complaints and did so implicitly.

28. The Employment Tribunal implicitly dismissed Part 1 of detriment 14 by finding that the claim had been presented to the Employment Tribunal outwith the time limits set out in Section 48(3) ERA 1996. The claimant was suspended on 27 July 2017, engaged with ACAS on 18 October 2017 and was issued with a certificate on 23 October 2017.The time therefore expired for her to bring her complaint on 23 November 2017, and it was not presented to the Employment Tribunal until 12 January 2018. The claim was thus substantially out of time and the Employment Tribunal found (at paragraph 417) that no extension of time would be granted to the claimant on the reasonable practicability test because she was legally represented early in her dispute and was a member of the Medical Defence Union at the outset. She could have sought assistance sooner to establish if she needed to bring her claim by a particular time.

29. The claimant's only possible way of bringing her claim in time therefore was to rely on Section 48(3)(a) ERA 1996. In a case where the act or failure is part of a series of similar acts or failures that time would run from the last of them.

30. In this case the Employment Tribunal did find one act of detriment to be in time, namely Dr Burton's reference to the GMC which took place on 12 October 2017. The Employment Tribunal rejected that these were part of a series of similar acts or failures along with the suspension and appeal.

31. The Employment Tribunal found that there were disparate and different acts undertaken by different persons and therefore these could not be said to be similar acts in a series. The suspension and Dr Burton's referral to the GMC were entirely separate and distinct acts undertaken by different persons. The suspension undertaken by Ms Gibson and the referral to the GMC undertaken by Dr Burton were different in character, and factually different. one of which related to the exercise and express of an implied contractual power and the other being regulatory – a referral to a professional body. One is an employer's precautionary step pending internal investigation, the other a regulatory duty.

32. The Employment Tribunal made no findings of fact linking the act of suspension with the act of the GMC referral and therefore implicitly dismissed the detriment 14 Part 1 , even though it did not expressly refer to detriment 14 at paragraphs 409 to 419.

33. The Employment Tribunal did not in paragraph 1 of its judgment refer to detriment 14. It did say that the claims of detriment following public interest disclosures are all out of time and the Tribunal has no jurisdiction to hear them. They do not form part of a series of similar acts. It was reasonably practicable for the claims to be brought in time. That finding should be applied just as much to part 1 of detriment 14 as it did to the other claims.

34. Turning to Part 2 of detriment 14 - the appeal against dismissal. This was dismissed by Dr Romero on 17 November. The respondent does not take any time point in relation to this. However, the respondent argues that the Employment Tribunal implicitly dismissed detriment 14 in relation to the appeal on the merits because the refusal of the appeal was inextricably

intertwined with the claimant's dismissal. There were a number of strands to counsel's argument:

(i) It is well established at law that an appeal is inextricably part of the dismissal process. The defects on appeal can render a dismissal process unfair **(Taylor -v- OCS Group (2006) IRLR at page 613**). The Employment Tribunal dismissed the claim under Section 103A ERA finding that the claimant was not dismissed by reason of any protected disclosure. Paragraph 43 the Employment Tribunal stated "we do not find the claimant was dismissed because she made public interest disclosures i.e. automatically" and at paragraph 421 "the claimant was not dismissed for making protected disclosures".

(ii) The test for causation is slightly different in a whistleblowing detriment claim (**Fecitt -v- NHS Manchester (2012) IRLR page 64,** the Court of Appeal said that the test of causation in a detriment claim focusses on whether the protected disclosure materially influenced the employer's treatment of the whistle-blower, when compared with a Section 103 ERA claim where the protected disclosure must be the principal reason. Both tests require an enquiry into the motivation of the employer. Why did they act as they did? What was the reason why the employer acted as they did? Such an enquiry was confirmed in **International Petroleum -v- Osipov EAT WO5817/DA** and **London Borough Of Harrow -v- Knight (2003) IRLR 140**. The Employment Tribunal therefore implicitly dismissed Part 2 of detriment 14 by saying that it was not because the claimant had made protected disclosures which remained as a backdrop rather than a material influence.

The Employment Tribunal in this case found that the Appeals Officer, Dr Romero, was involved in the decision to dismiss the claimant (paragraph 428 to 433). The Employment Tribunal having found that one of the parties instrumental in the decision was not motivated by the claimant's protected disclosures influencing the decision to dismiss, it would be very strange to find that such a person was motivated by those same disclosures in making the decision to dismiss the appeal against dismissal.

In the case of **Timis and another -v- Osipov (2019) IRLR 52** the Court of Appeal found that Section 47B(2) ERA prevented the application of Section 47B(1) ERA where the relevant detriment in substance amounts to a dismissal. The appeal was in substance part and parcel of the dismissal. No claim could be advanced under Section 47B(1) ERA in any event. The Employment Tribunal implicitly dismissed the claim when it dismissed the Section 103A ERA 1996 claim. The Employment Tribunal should dismiss the claimant's reconsideration application which is based on the Employment Tribunal not having dealt with the detriment 14 claims. The Employment Tribunal had dealt with them and therefore the reconsideration application should fail.

(iii) Fair determination is not now possible. If the Employment Tribunal considers that it has not implicitly dealt with the detriment 14 claim it must decide how to proceed. The respondent contended that such a lot of time had passed since the evidence was heard that a fair and Article 6 ECHR compliant determination of the claims on the merits was not now possible. The only proper approach was to either order that the claims are dismissed altogether or that the claims should be the subject of a fresh hearing before a new Employment Tribunal. There was a substantial delay in the promulgation of the original judgment such that a serious breach of Article 6 ECHR would be committed, supported by the contention that the Employment Tribunal, at the time of decision making did not have a clear recollection of the evidence, based upon errors in the judgment.

(iv) The claims fail on their merits. If the Employment Tribunal is against the respondent on the first two points then the Employment Tribunal will have to determine the detriment 14 claims on their merits now.

35. Section 47B (1) ERA - a worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure. The burden of proof rests with the claimant although the employer under Section 48(2) has to be prepared to explain why they acted as they did. Why did the employer act as they did, was their motivation materially influenced by the making of the protected disclosures in occasioning the detriment. The Employment Tribunal has to consider the motivation of the decision maker,

a. Suspension. Even if the claimant's detriment claim in relation to suspension was not implicitly dismissed by the Employment Tribunal it is subject to the time point. If it has to be decided on the merits then the claimant bore the burden of proving that her suspension was materially influenced by the making of a protected disclosure. She was unable to surmount that evidential hurdle in circumstances where her own evidence was that her suspension was not because of any protected disclosures.

b. The simple answer is the obvious one, that the claimant was suspended because of her email sent the day before in which she revealed to the respondent's senior clinicians the covert medication of MP. The claim should therefore be dismissed.

c. The appeal. The allegation of detriment advanced as it is under Section 47B(1), hits the hurdle erected by Section 47B(2), but even if that hurdle can be surmounted, there are a number of other fatal problems with the claim.

(i) The detriment alleged is not just that the claimant's appeal was dismissed, but that it was inadequate. The claimant may disagree with the reasoning in the appeal and the Employment Tribunal may do as well, but that does not make it inadequate. The reasoning is detailed and cogent. Accordingly, the claim does not get off the ground.

(ii) Even when the question of motivation is considered, the claimant's case remains extremely difficult, because her grounds of appeal were sparse. She declined to expand on them. She did not attend the appeal hearing and it was always highly unlikely that the claimant's appeal would be allowed. The Employment Tribunal of course found that Dr Romero was involved in the decision to dismiss.

36. It is clear from the Employment Tribunal's findings that Dr Romero profoundly disagreed with the claimant's actions in covertly medicating MP. Given Dr Romero's view as to the covert medication of MP, in the absence of any debate or discussion with the claimant who had not attended the appeal hearing, the claimant's appeal was highly likely to fail. It is obvious that this was motivating Dr Romero to dismiss the appeal, not any historic protected disclosures.

**Our conclusions**

37. We agree with both parties that the Tribunal failed to explicitly deal with detriment 14. On reflection we have concluded that this is because in the list of issues it followed detriment 13, when chronologically it should have been the other way around. That said, the Tribunal considers that it made findings of fact in connection with all of the detriments including detriment 14, from which we are in a position to reconsider if appropriate.

38. We firstly considered the issue of the suspension on 27 July 2017. It was always our intention that should have been dismissed on the grounds that it was out of time. It was no different to any of the other allegations of detriment that occurred in the period between the claimant's first public interest disclosure and her eventual dismissal.

39. Whilst suspension is not always a neutral act, in this case it occurred immediately after the claimant advised her manager that she had been involved in the covert administration of drugs to a patient. The circumstances were starkly unusual. It is clear that her manager, even at the suspension stage, was very worried about her actions.

40. However, we do not find there to be sufficient nexus between her suspension in July ( which in cross examination she admitted was not a detriment in any event) and the dismissal on 17 November of her appeal to suggest that this was part of a series. With the claimant's own admission that her suspension was not a detriment, there could not possibly be a series linking the appeal process with her suspension. There would need to be two detriments to create a series.

41. Any suspension may or may not end in a dismissal and there may or may not be an appeal. It was reasonably practicable, if the claimant wished to argue that her suspension was a detriment, for her to bring a claim at that stage or within the appropriate time thereafter.

42. In reaching this conclusion we have relied upon our findings in paragraph 416 and 417 in relation to the 'reasonable practicability' test.

43. We reflect on the fact further, that the suspension followed in swift response i.e. 24 hours to the claimant advising her manager of her actions with regard to the covert application of medication, which leads us to find that the suspension was a reaction to her actions rather than being motivated in any way by the public interest disclosures she had made more than 18 months earlier. We note that the suspension was undertaken by Ms Gibson and the referral to the GMC by Dr Burton. Whilst throughout the disciplinary process decisions appear to have been made by "the committee" as referred to in the judgment, the act of suspension was a one-off reaction to the claimant's own conduct, as admitted by her in cross examination. We do not see how that could be linked in any way to the separate act of the GMC referral by Dr Burton Detriment 13.

44. We therefore conclude that without a series of acts the suspension was out of time and the tribunal has no jurisdiction to hear it further.

45. Turning now to the issue of the appeal. The appeal was dismissed by Dr Romero by letter of 17 November 2017 and there is no time point taken in relation to the appeal by the respondent. The issue the claimant alleges to be a detriment is that the handling of the appeal and the outcome was "inadequate". The respondent however argues that the appeal was inextricably intertwined with the dismissal. The case of **West Midlands Co-Operative Society Limited -v- Tipton** (cited above by the respondent) points out that defects on appeal can render a dismissal process unfair, and extrapolates from that that the appeal is therefore part of the dismissal process. The claim under Section 103A ERA in this case was dismissed, (paragraph 433). We did not find that the claimant was dismissed because she made public interest disclosures i.e. automatically (paragraph 421)

46. The appeal process was part of the dismissal process and we consider ourselves bound by s47(B)2 ERA but if we are wrong about that then we have looked more closely at causation.

47. The test of causation is different in a whistleblowing detriment claim (**Fecitt** see above).The issue in a detriment claim is focussed on whether the protected disclosure *materially influenced* (our emphasis) the employer's treatment of the whistle-blower in contrast with Section 103A ERA where the protected disclosure must be the *principal reason* for the dismissal. In both cases we do have to enquire into the motivation of the employer i.e. why did the employer act as they did. We consider the initial burden of proof to lie with the claimant, with the respondent having a secondary responsibility to explain their motivation.

48. We had found that the claimant's dismissal was not because she made public interest disclosures. We were satisfied that the public interest disclosures had coloured the relationship between the claimant and the respondent. We found that the entire disciplinary process beyond suspension followed the claimant's admission of the covert medication of a patient. Her manager was shocked by what she admitted. We do not find that the appeal process was motivated or materially influenced by the earlier public interest disclosures.

49. We do not feel it necessary to outline again our criticisms of the process that was followed before the claimant's dismissal, and whilst dealing with her appeal. We are satisfied that the focus of that procedure was based on the claimant's immediate actions, and in her manager's belief that she should not have covertly administered medication to MP. We found no evidence of motivation based on the consequences of the public interest disclosures made 18 months earlier.

50. The second allegation made by the respondent is that there has been disproportionate delay and that a fair finding cannot now be made under Article 6 ECHR.

51. The claimant was somewhat taken aback by this argument which they received a very short period of time before the hearing. Whilst the Tribunal did not reach conclusions in relation to detriment 14 explicitly in the original judgement, the respondent does argue that we made them implicitly within the judgment.

52. We had made sufficient findings of fact within the original judgement to reach the conclusions necessary to complete the judgment (the respondent could not otherwise argue the outcome was implicit within the judgement). We did not therefore find ourselves hampered by Article 6 ECHR.

53. Bearing in mind the facts that had been decided, we found no difficulty in reaching the conclusions that we came to today. We note that the claimant whose application for reconsideration this was, does not endorse the respondent's assertions about Article 6 ECHR.

54. We consider that the respondent is correct in their argument. The appeal argued as a detriment under Section 47B(1) ERA 1996 does hit the hurdle erected by Section 47(B) (2) in that the appeal is part of the dismissal and the dismissal is specifically excluded as a detriment by Section 47B(2).

55. If we are wrong about that, in any event, we do not find that the' inadequate appeal' was motivated by her public interest disclosure some eighteen months before. The motivation was entirely because Dr Romero considered her actions inappropriate and this is why the appeal was dismissed. We do not consider our description of 'coloured the background' to meet the standard required to prove motivation based on the PID when the motivation in this case was so obviously based on the claimant's own and more immediate actions.

56. In conclusion we dismiss the claims brought under detriment 14 Parts 1 and 2.

Employment Judge Warren
6 January 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
7 January 2022

FOR THE TRIBUNAL OFFICE