



EMPLOYMENT TRIBUNALS

PUBLIC PRELIMINARY HEARING BY VIDEO

Claimant: Mr R A Stafford

Respondents: York Teaching Hospital Facilities Management LLP

Heard: Remotely by video

On: 8 March 2022

Before: Employment Judge S A Shore

REPRESENTATION:

Claimant: In Person

Respondent: Ms I Baylis, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. Of the claimant's list of alleged protected disclosures contained in the document titled "Protected disclosures" that was submitted with his email to the Tribunal dated 5 December 2021 in response to the Order of EJ Bright dated 23 November 2021, **all** are struck out as having no reasonable prospect of success of being found to be protected disclosures **save for** the following:

1.1. In his document "DB Statement" dated 26 April 2021:

1.1.1. The comments concerning "Female A" that:

1.1.1.1. DB sent a WhatsApp message to Female A in which he stated "I can see you.";

- 1.1.1.2. DB sent Female A a WhatsApp message in which he stated “Have you had your hair done?”;
- 1.1.1.3. In March 2020, DB gave Female A a silk scarf costing £60; and
- 1.1.1.4. After a meeting at which DB was challenged by Female A, he sent her a WhatsApp message in which he stated “Be careful whose toes you step on.”

1.1.2. The comments concerning “Female B” that:

- 1.1.2.1. DB requested that Female B did not work from home during the pandemic. He says that this was an act of controlling behaviour;
- 1.1.2.2. DB banning Female B from having any interaction with executives of the NHS Trust unless he was present or had pre-approved the meetings; and
- 1.1.2.3. DB treated Female B with a significant lack of respect and spoke to her in a disrespectful and abusive manner.

1.2. In his document titled “Andy Stafford – Statement (June 2021)”:

- 1.2.1. An allegation that on 25 December 2020, DB drove around the NHS Trust’s sites when not wearing PPE or practising social distancing.

1.3. In an email dated 7 July 2021 from the claimant to Stephanie Greenwood:

- 1.3.1. An allegation that on 18 June 2021 at around 11:00am, DB had locked Penny Gilyard in her own office during a meeting between them.

2. All the remaining allegations in paragraph 1 above have little reasonable prospect of success. The claimant shall pay a deposit of £100 to continue each of the allegations concerning:

- 2.1. Female A (paragraph 1.1.1 above);
- 2.2. Female B (paragraph 1.1.2 above)
- 2.3. The allegation concerning the actions of DB on 25 December 2020; and;
- 2.4. The allegation concerning the actions of DB on 18 June 2021.

3. The total payable as a deposit is £400. A Deposit Order will be sent to the claimant with this case management Order.
4. The “amended” ET1 submitted by the claimant on 12 January 2022 is not accepted as an amendment to his case.

REASONS

Background and History of this Hearing

1. The claimant was employed by the respondent from 29 September 2020 to 27 September 2021 on a fixed term contract as Head of Security and Car Parking. The respondent is a wholly owned subsidiary of York and Scarborough Teaching Hospitals NHS Foundation Trust (“the NHS Trust”) that provides estate and facilities services for the NHS Trust.
2. The claimant’s effective date of termination was agreed to be 27 September 2021. The claimant began early conciliation with ACAS on 10 September 2021 and received an early conciliation certificate dated 14 September 2021. His ET1 was presented on 16 September 2021. The claimant’s ET1 indicated claims of detriments because he had made protected disclosures.
3. There was a private preliminary hearing (TPH) by telephone in this case conducted by Employment Judge (EJ) Bright on 23 November 2021. In her case management order (CMO) dated 23 November 2021, EJ Bright found the claimant’s explanation of his claim to be opaque and ordered him to provide further particulars [49-53].
4. Mr Stafford produced his further particulars in a document titled “Protected disclosures” that was submitted with his email to the Tribunal dated 5 December 2021. In a table within it, he identified 8 instances of protected disclosures. For the sake of completeness, I have cut and pasted that part of his in Annex 1 below together with the claimant’s table of detriments.
5. Mr Stafford also produced what he said was an “amended claim form” dated 10 January 2022 [58-72]. That document had not been accepted as an amendment by the Tribunal before this hearing.
6. The respondent’s response was to write to the Tribunal on 20 January 2022 [97-100] and claim that the information provided was insufficient and that it could not, therefore, comply with the Order of EJ Bright to produce an amended response to the claimant’s claim by the deadline of 21 January.
7. My task today, therefore, was to deal with the three matters listed by EJ Bright [49]:
 - 7.1. Whether all or any part of the claim has no reasonable prospect of success and should be struck out, under Rule 37 of the Employment Tribunal Rules of Procedure 2013 (“the Rules”); and/or
 - 7.2. Whether any specific allegation or argument in the claim has little reasonable prospect of success and an order should be made requiring the claimant to

pay a deposit not exceeding £1000 as a condition of continuing to advance that allegation or argument (Rule 39);

- 7.3. If the claim or any part of the claim is proceeding, listing the final hearing, identifying the issues to be decided and making such case management orders as will be required for the preparation of the final hearing.

Housekeeping Matters

8. EJ Bright's Order did not include a requirement for the parties to produce a bundle. The respondent sent a bundle of 100 pages to the Tribunal at 17:50pm on the day before the hearing. It did not reach me until just before 10:00am on the morning of the hearing. If I refer to any documents from the bundle, I will indicate the appropriate page numbers in square brackets (e.g. [27]).
9. The claimant is unrepresented. The Tribunal operates on a set of Rules (I have set out the link to those Rules below). Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

10. I applied the overriding objective in interpreting and exercising any power given to me by the Rules. The hearing was conducted remotely by video with the agreement of the parties. There were a few technical glitches, but I am grateful to Mr Stafford and Ms Baylis for their understanding and good humour throughout.
11. As I had only seen the bundle for a few minutes before the scheduled start of the hearing, I advised the parties that I had not finished reading it. I could not deal with the question of whether the claimant's claim stood little or no reasonable prospects of success unless I had read the documents that were embedded in his "Protected disclosures" document that had been submitted on 5 December 2021. I had a brief discussion with Mr Stafford about protected disclosures and, particularly, the requirement for a protected disclosure to contain information. I gave the example from the case of **Cavendish Munro Professional Risks Management Ltd v Gudlud** [2010] IRLR 38 that the ordinary meaning of information is conveying facts.

Information would be “The wards have not been cleaned for the last two weeks. Yesterday, sharps were left lying around.” Contrast with that the statement “You are not complying with Health and Safety requirements”, which would be an allegation, not information.

12. Mr Stafford admitted to struggling with the concepts of protected disclosure cases, which is entirely understandable. The task I had in making decisions about the protected disclosures that Mr Stafford says he made is that he seemed unable to disconnect what he said or wrote at the time he made the alleged disclosures with his view of the alleged misconduct of the Managing Director of the respondent, Delroy Beverley (“DB”), about whom most of the disclosures are made.
13. I took a break of about 30 minutes to read the parts of the bundle that were new to me. All but one (number 7) of the 8 sets of alleged protected disclosures were said to show that the health and safety of any individual had been, was being or was likely to be endangered. Number 7 was alleged to be a disclosure that a criminal offence had been committed. I could not see in any of the claimant’s ET1 or his “Protected disclosures” document or any of the documents that were embedded in it any words that expressly set out, or implied the endangerment of health and safety of an individual. Mr Stafford accepted this and said that the health and safety danger was an implicit result of the bullying and controlling behaviours of DB.
14. Ms Baylis objected to me seemingly allowing the claimant to add to the further particulars he had provided, but I was mindful of the fact that Mr Stafford is a lay person representing himself and gave him some latitude.
15. We then went through the entire “Protected disclosures” document and attachments.
16. I then heard closing submissions from Ms Baylis, followed by closing submissions from Mr Stafford. I then retired to make my decision and delivered it before undertaking some case management.
17. I indicated in the hearing that I would leave it to the parties to agree a case management timetable, but on reflection, I feel that may be a solution that lacks precision and certainty. At Annex 2 of this Order, I have set out a template of draft Orders that will take the case from where it will be once Mr Stafford has paid his deposit to a final hearing. I have included in these Orders a mechanism to list a “backstop” preliminary hearing in case the parties cannot agree how the case should be managed. Both parties are reminded of their obligation to help the Tribunal to achieve a just and fair hearing.

Relevant Law

18. I was mindful of the overriding objective to deal with cases justly and fairly in Rule 2 and the Tribunal’s wide case management powers under Rule 29.
19. A ‘protected disclosure’ is defined by section 43B of the Employment Rights Act 1996:

Disclosures qualifying for protection.

“(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 paragraphs has been, is being 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.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).”

20. I was mindful of the guidance from the Court of Appeal in the case of **Kilraine v London Borough of Wandsworth** [2018] EWCA Civ 1436, in which the words of Langstaff J in the EAT were approved:

“I would caution some care in the application of the principle arising out of Cavendish Munro. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between “information” and “allegation” is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point’.”

21. I therefore looked at the alleged disclosures made by the claimant through the prism of whether they contained sufficient information.
22. A Tribunal may make a Deposit Order under the powers given to it by Rule 39. I have included a link to the Rules in the section headed "Useful Information" below. Essentially, a Tribunal can make an order requiring the "paying party" to pay a deposit of up to £1,000 as a condition of continuing to advance an allegation or argument that the Tribunal considers to have little reasonable prospect of success.
23. Under Rule 37, a Tribunal may strike out all or any part of a claim or a response on the grounds:
 - 23.1. that it is scandalous or vexatious or has no reasonable prospect of success;
 - 23.2. 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;
 - 23.3. for non-compliance with any of the Rules or with an order of the Tribunal;
 - 23.4. that it has not been actively pursued; or
 - 23.5. 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).

Findings

24. I heard no evidence as such, so have made no findings of fact. A chronology of significant events was agreed.
25. As a general overview of the claimant's list of alleged protected disclosures, I would comment that it is obvious that the documents that form most of the alleged protected disclosures were compiled by the claimant, who had little or no working knowledge of the law regarding whistleblowing at the time that they were written. I have no doubt that he believed what he wrote at the time he wrote the documents.
26. I find that all the alleged protected disclosures that were made in conversations in person, or by video meeting (numbers 1 (15 April 2021), 2 (22 April 2021), and 4 (6 May 2021)) contained no more than very general allegations and contained no information. They certainly did not contain sufficient information to meet the test of "protected disclosure" in section 43B of the Employment Rights Act 1996. I find that none of these three instances of alleged protected disclosures had any reasonable prospect of success at a final hearing. They are all struck out.
27. Number 3 - In his document "DB Statement.pdf" dated 26 April 2021, which is embedded in paragraph 3 of the claimant's list of 8 instances of disclosures, he divides his disclosures into sections relating to colleagues who he identifies as Female A, Female B, Female C, Female D and Female E. He disclosed the names of the individuals at the hearing, but I do not find it necessary or proportionate to repeat their names in this document.

28. Mr Stafford accepted that the single sentence regarding Female D did not contain sufficient information to be considered as a protected disclosure, so I strike that allegation out as having no reasonable prospect of success.
29. I find that the alleged disclosures relating to Female C and E did not contain sufficient information to be considered as a protected disclosure, so I strike those allegations out as having no reasonable prospect of success.
30. I find that the following comments regarding Female A could be regarded as information tending to show that the health and safety of Female A had been, was being or was likely to be endangered:
 - 30.1. DB sent a WhatsApp message to Female A in which he stated "I can see you.";
 - 30.2. DB sent Female A a WhatsApp message in which he stated "Have you had your hair done?";
 - 30.3. In March 2020, DB gave Female A a silk scarf costing £60; and
 - 30.4. After a meeting at which DB was challenged by Female A, he sent her a WhatsApp message in which he stated "Be careful whose toes you step on."

I find that the endangerment was the risk to her mental health because of DB's conduct, but I find that the chance of a Tribunal finding that the claimant had made one or more protected disclosures relating to Female A and that any of those disclosures were the reason that the claimant's contract was allowed to expire without renewal to be unlikely and that the claim has little reasonable prospect of success.

31. I find that the following comments regarding Female B could be regarded as information tending to show that the health and safety of Female B had been, was being or was likely to be endangered:
 - 31.1. DB requested that Female B did not work from home during the pandemic. He says that this was an act of controlling behaviour;
 - 31.2. DB banning Female B from having any interaction with executives of the NHS Trust unless he was present or had pre-approved the meetings; and
 - 31.3. DB treated Female B with a significant lack of respect and spoke to her in a disrespectful and abusive manner.

I find that the endangerment was the risk to her mental health because of DB's conduct, but I find that the chance of a Tribunal finding that the claimant had made one or more protected disclosures relating to Female B and that any of those disclosures were the reason that the claimant's contract was allowed to expire without renewal to be unlikely and that the claim has little reasonable prospect of success.

32. Number 5 - In his document “Andy Stafford – Statement (June 2021)” the claimant set out 4 pages of allegations about DB. I find that all but one of them were allegations about DB’s conduct, that did not contain sufficient information to be regarded to constitute protected disclosures. The exception was the statement that:

32.1. An allegation that on 25 December 2020, DB drove around the NHS Trust’s sites when not wearing PPE or practising social distancing.

I find that there is little reasonable prospect of a Tribunal finding that this was a protected disclosure and that it was the reason or part of the reason along with any other protected disclosures, that the respondent did not extend the claimant’s contract.

33. Number 6 - I find that the document “witness statement interview questions.dc” is a list of questions that the claimant was to be asked and cannot be a disclosure. It is struck out as having no reasonable prospect of being found to be a protected disclosure.

34. Number 7 - In an email dated 17 July 2021, the claimant made comments about:

34.1. An allegation that on 18 June 2021 at around 11:00am, DB had locked Penny Gilyard in her own office during a meeting between them.

It is alleged that this was a disclosure that a criminal offence had been committed. I find that this could be a protected disclosure, but there is little reasonable prospect of a Tribunal finding that this was a protected disclosure and that it was the reason or part of the reason along with any other protected disclosures, that the respondent did not extend the claimant’s contract.

35. Number 8 - I find that that the document “aystafford_23-07-2021_09-15-43.pdf” does not contain any sufficient information to constitute a protected disclosure. It appears to be a list of complaints about the behaviour of DB, which the claimant himself characterised as “unprofessional”. It is struck out as having no reasonable prospect of being found to be a protected disclosure by a Tribunal.

36. I would respectfully suggest that Mr Stafford undertakes a careful assessment of his case and, particularly, considers the effect of Rule 39(5)(a) and (b), which mean that if a Tribunal finds against him on the matters in respect of which I have made a deposit order, he shall be treated as having acted unreasonably in pursuing that specific allegation or argument, unless the contrary is shown. He would be at risk of a cost order. He would also forfeit the deposit monies.

Case Management

37. All the following case management orders are made on the expectation that the claimant pays the deposit on one or more of the arguments or allegations that I have made deposit orders in respect of.

38. By **4:00pm on Tuesday 5 April 2022**, the respondent shall send the claimant and the Tribunal an amended response. This date is 7 days later than the date I ordered in the hearing, as I find that it would be a waste of time and expense to require the

respondent to file an amended response on or about the same day that the deposit is due.

39. By **4:00pm on Tuesday 19 April 2022**, the parties will agree a draft list of case management orders and submit the same to the Tribunal with a request that the draft is converted to an Order and that the matter is listed for a hearing. The parties shall send in their availabilities for a hearing for the period 1 June 2022 to 31 December 2022. A template case management order is produced at Annex 2.
40. In the event that the parties cannot agree case management orders by the given date, the Tribunal shall list the case for a video preliminary hearing for case management with a time estimate of 90 minutes on the first available date after 19 April 2022.

Variation of dates

41. The parties may agree to vary a date in any order by up to 14 days without the Tribunal's permission, but not if this would affect the hearing date.

About these orders

42. These orders were made and explained to the parties at this preliminary hearing. They must be complied with even if this written record of the hearing arrives after the date given in an order for doing something.
43. If any of these orders is not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the claim or the response; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunal Rules.
44. Anyone affected by any of these orders may apply for it to be varied, suspended or set aside.

Writing to the Tribunal

45. Whenever they write to the Tribunal, the claimant and the respondent must copy their correspondence to each other.

Useful information

46. All judgments and any written reasons for the judgments are published, in full, online shortly after a copy has been sent to the claimants and respondents at:

<https://www.gov.uk/employment-tribunal-decisions>

47. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here:

<https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/>

48. The Employment Tribunals Rules of Procedure are here:

<https://www.gov.uk/government/publications/employment-tribunal-procedure-rules>

49. The President of the Employment Tribunals has issued guidance on hearings. The hyper-link to the guidance is here:

<https://www.judiciary.uk/wp-content/uploads/2013/08/14-Sept-2020-SPT-ET-EW-PG-Remote-and-In-Person-Hearings-1.pdf>

50. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here:

<https://www.gov.uk/appeal-employment-appeal-tribunal>

Employment Judge S A Shore

Date 9 March 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10 March 2022

CM Haines

FOR THE TRIBUNAL OFFICE

Annex 1