Case No. 1405833/2020
1406331/2020

EMPLOYMENT TRIBUNALS

Claimant: Mrs N Aabe

Respondents: Happy Care Limited (1)
Mr A Carab (2)
Mr A Ibrahim (3)

Heard at: Bristol **On:** 19 January 2023

Before: Employment Judge C H O'Rourke
Mrs D England
Dr J Miller

Representation:

Claimant: Ms N Gyane - counsel
Respondents: Ms S Chan - counsel

DECISION ON RECONSIDERATION APPLICATION

The Respondents' application for reconsideration of part of the Tribunal's Judgment of 14 December 2022, in relation to the claim of automatic unfair dismissal, on the grounds of protected disclosure is refused.

REASONS

(Having been requested subject to Rule 62(3) of the Tribunal's Rules of Procedure 2013)

Background and Issues

1. By a reserved judgment dated 14 December 2022, the Tribunal found (as relevant to this application) that:

    a. The First Respondent (R1) automatically unfairly dismissed the Claimant and subjected her to detriment, on the grounds of her having made protected disclosures;

    b. The Second and Third Respondents (R2 & R3) subjected her to detriment (to include dismissal), on the same grounds.

2. By an application dated 11 January 2023, the Respondents applied for reconsideration of that portion of the Judgment in respect of automatic unfair dismissal, on the basis that there was insufficient evidence to conclude that the Respondents were aware, at the time of dismissal, of the Claimant's protected disclosures and that therefore it was an error of law to conclude so. The Application also included a request for an extension of time for doing so, as it had been lodged more than fourteen days after the Judgment was sent to the parties (23 December 2022). This was on the basis that the Judgment was received late into the last working day before Christmas and not perused by the Respondents' solicitors until their office re-opened, on 3 January 2023. We accept that some time would have been needed, thereafter, to seek instructions and perhaps advice from counsel. While the Claimant objected to any such extension of time, the Tribunal considered that in those circumstances, it would be in the interests of justice to extend time, subject to Rule 5, to permit the application to proceed.

The Law

3. Rule 70 of the Tribunal's Rules of Procedure 2013 states:

    70. A Tribunal may … on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

4. Ms Chan referred us to the following authorities:

a. **Croydon Health Services NHS Trust v Beatt [2017] EWCA IRLR 748** requires 'an enquiry of the conventional kind into what facts or beliefs caused the decision-maker to decide to dismiss'. The latter, however, is 'a matter for objective determination by a tribunal' and 'the beliefs of the decision-taker are irrelevant to it'.

b. **Abernethy v Mott and ors [1974] EWCA ICR 323** stated that '*a reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.'*.

Submissions

5. Ms Chan provided both written and oral submissions, which we summarise as follows:

a. The protected disclosures found by the Tribunal were not the principal reason for the Claimant's dismissal, as they were not known to R2&3.

b. A mere suspicion that a protected disclosure may be made, or mere knowledge that the Claimant was in contact with relevant third parties (in this case the Care Quality Commission (CQC) and Bristol City Council (BCC)) is insufficient in law to found the required knowledge that a protected disclosure has been made, for it to be the principal reason for dismissal.

c. Knowledge of disclosures must pre-date the dismissal. There is no equivalent in s.103A ERA to that for victimisation under the Equality Act 2010, as to any belief that a victim '*may do a protected act'*.

d. While it is not necessary for an employer to be fully cognisant of each precise element of a protected disclosure, there must be at least a knowledge of the essential substance of such, which causes the employer to dismiss.

e. While the Claimant had made references in emails from her work email address, on 23 July (which the Tribunal had found were monitored by R2) to having '*informed the police'*, there is no evidence that the Respondents had any awareness that the Claimant had gone to the police and given a statement on 18 July, pre-dating the dismissal (3 August). They were only aware of this act post-dismissal.

f. Merely seeing a request by the Claimant to Companies House (not a 'prescribed person'), on 23 July, to change R1's registered

address does not confer sufficient knowledge of a protected disclosure and nor would it be linked to any disclosures to the CQC or BCC.

g. The Claimant's email to BCC, of 24 July, informing them of the change of office address, at best might have indicated to the Respondents that the Claimant was trying to 'steal the Company', but that would not fall under the requirements of a protected disclosure. Indeed, the Claimant was at pains to hide the fact of her detailed disclosures to CQC and BCC, by sending them from her personal email address. BCC responded to that address and such behaviour is wholly inconsistent with the Respondents having the required knowledge of such past protected disclosures.

h. While the Tribunal has found that the principal reason advanced by the Respondents for dismissal (the Claimant's alleged homophobic discrimination against a client and her partner) was a false, concocted one, there were other potential reasons, such as the Claimant's alleged 'rough-handling' of the client (upon which the Tribunal made no determination and which point was not challenged with the Respondents' witnesses), or the dispute between the Claimant and R2&3 over control of R1.

i. It is, therefore, in the interests of justice to reconsider this finding and revoke it.

6. Ms Gyane made the following oral submissions, having briefly referred to the application in her written submissions on Remedy. Those submissions are summarised as follows:

a. The application is misconceived.

b. The findings made as to the Respondents' knowledge of the protected disclosures (as set out in paragraph 25 of the Reasons) are made on a proper basis. It is open to the Tribunal to make findings of fact and it is common ground that inferences will need to be drawn.

c. There may not be precise or contemporaneous documents, but such disclosures can be made orally.

d. Applying those principles to this scenario, the Tribunal has correctly inferred the Respondents' knowledge of the disclosures.

e. As the Tribunal identified, the timing of the Claimant's suspension is relevant, only four days after her reference to disclosures, in her email of 23 July to Companies House.

f. In the Claimant's detailed email of 14 July to the CQC, setting out all her concerns in detail [307], Mr Hersi, one of R1's directors is copied in, thus putting R1 on notice. (Ms Chan countered to state that there was no evidence that Mr Hersi, who was acting in concert with the Claimant, had informed R2&3 accordingly, or that they were influenced by him in any way).

g. The reference to a 'Quality Assurance (QA) process' in BCC's email of 21 July to the Claimant's work email address [331] will have aroused the Respondents' suspicions, as such process only happens annually and R1 had only become first registered with BCC in April of that year.

h. It is clear in the Claimant's email of 23 July to Companies House, again from her work email address [296] that she has informed the police, who had or were investigating, due to her '*safety'* concerns, for both her and Mr Hersi. It is therefore open to the Tribunal to take into account both the fact of the QA invite and the Claimant's explicit reference to concerns about her safety. (Ms Chan countered that this was only a passing reference to the police, referring to safety reasons and is insufficient in itself. It is a huge leap for the Tribunal to conclude that R2&3 would infer from this reference that it was to sexual assault against the Claimant.)

i. Those concerns are then borne out by the move to the new office address, as communicated to BCC and CQC, on 24 July [336].

j. The Respondents themselves confirm the state of their knowledge about these matters, by stating in Mr Hersi's letter of dismissal, on 3 August (the same date as the Claimant's) [384] that '*during your time at the Company you have provided false information to CQC'* (and referring in the same paragraph to the Claimant being his '*co-associate'*). (Ms Chan countered that both Mr Hersi and the Claimant were informing the various bodies of changes of address, which most of the correspondence relates to, and there is a chance that his dismissal letter is simply referring to that activity. That is not the same as concluding that protected disclosures have been made.)

k. If, as appears likely, the email from BCC of 28 July was sent to the Claimant's work email address (because the writer refers to emailing the Claimant '*separately about the other issues we*

discussed today') [355] and by referring to Mr Hersi, it is open to the Tribunal to conclude that the Respondents were aware that a disclosure/disclosures had been made, hence the subsequent reference in Mr Hersi's dismissal letter. It is recorded that both he and the Claimant spent '*time'* with BCC on both 27th and 28th July, matching the moment of suspension.

l. The findings are clear and should be maintained.

Conclusions

7. We consider that there is conclusive evidence in Mr Hersi's dismissal letter that the Respondents knew of both him and the Claimant ('his *co-associate'*) having '*provided false information to CQC'*. Such information, which, in the Claimant's opinion, required the moving of the office to another address, for '*safety*' concerns, in relation to other '*directors/shareholders'* and an investigation by the police, can only, in our view, be construed as a protected disclosure, related to possible criminal activity, or breach of legal obligations, or the endangering of health and safety of clients by the Respondents. We are confident that they will have construed it as such.

8. As previously found, it is no coincidence that detrimental actions by the Respondents followed closely on protected disclosures by the Claimant.

9. In respect of the claim of automatic unfair dismissal, once the Claimant had alleged an improper and invalid reason for her dismissal (the homophobia allegation) and which we found to be the case, the burden of proof shifted to the Respondents to show an alternative, legitimate reason. They now seek to rely on the 'rough handling' allegation against the Claimant made by the service-user 'J' and her partner, as set out by them in their undated letter of complaint [464]. We don't however consider that this complaint really formed any part of the Respondents' rationale for their decision to dismiss, for the following reasons:

    a. They already had (at least to their mind) the much more serious allegation of homophobia to use against her.

    b. The rough handling allegation was made only following the Respondents' report to the service-user as to the Claimant's alleged homophobia and was not mentioned in the service-user's first complaint of 16 July [314] and indeed was only mentioned, effectively 'in passing' in the later undated complaint, indicating its relative lack of weight, in comparison to the alleged homophobia.

    c. The allegation doesn't match the service-user's earlier email of 21 June [260], complimenting the quality of care provided and is an

indication to us that it is an 'after the event' concern, prompted by the false homophobia allegation and therefore not weighing very heavily on either the service-user, or the Respondents.

d. Finally, the allegation as to rough handling is not mentioned in the Respondents' letter to the Claimant inviting her to the disciplinary hearing, or in her letter of suspension, indicating to us the lack of emphasis they gave to this issue.

10. Generally, we reiterate our previous findings as to R2&3's credibility.

Decision

11. For these reasons, therefore, we refuse the Respondents' application for reconsideration.

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Employment Judge O'Rourke

Dated: 27 January 2023

DECISION SENT TO THE PARTIES ON
10 February 2023 By Mr J McCormick

FOR THE TRIBUNAL OFFICE