EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs M Fitzmaurice	**v**	**Luton Irish Forum**

Heard at: Watford by CVP **On:** 21 June 2023

Before: Employment Judge Manley
Mr D Bean
Mrs G Bhatt

Appearances:

For the Claimant: Not in attendance
For the Respondent: Mr Crawford, Counsel

RESERVED JUDGMENT

1. The claimant's application to postpone this hearing is refused.

2. The decision to instigate and continue the disciplinary proceedings was not materially influenced by the fact that the claimant had made protected disclosures.

3. The claim is dismissed.

REASONS

Introduction and issues

1 This claim was first determined at the employment tribunal in January 2020 with judgment being sent to the parties in February 2020. The claims arose out the claimant's resignation in May 2018 with the claim for being presented in August 2018. The claims for public order disclosure detriment and constructive and automatic unfair dismissal were unsuccessful.

2 The claimant appealed to the Employment Appeal Tribunal (EAT) with the matter being heard there before His Honour Judge James Tayler on 16 September 2021 (UKEAT/0313/20). The appeal was partly successful with the summary reading "*The employment tribunal erred in its*

approach to causation in the protected disclosure detriment claim and failed to properly analyse whether the making of the protected disclosures was properly severable from ancillary matters". The matter was remitted to this tribunal, except that one of the non-legal members, Mr Bone, has sadly died, so a different non-legal member was allocated to hear the matter.

3 There have been several delays in the case. After the appeal was heard by the EAT, the tribunal was contacted by the respondent in mid-2022, and it then transpired that the tribunal file had been lost. It took some time to list the matter for a short telephone preliminary hearing and then in April 2023, to list by agreement for 21 and 22 June 2023. The hearing was agreed to be by CVP, in part because the claimant made reference to health concerns arising from a brain injury. Orders were made for this hearing to be effective which were complied with. They included sending an electronic bundle of documents from the 2020 hearing, as well as a separate bundle for this hearing, the respondent to send written legal arguments to the claimant with her having leave to respond in writing if she so wished. On 14 June the claimant did send her outline argument. Just after 3pm on the day before the hearing, the claimant sent an email which included a postponement application and we deal with that now.

The postponement application

4 On 20 June 2023 at 15.01 an email was received which read:

"Unfortunately, due to a recent, further deterioration in my health, I will be unable to attend the hearing scheduled for 21st and 22nd June 2023. Over the past three weeks I have been particularly unwell with an infection. This has increased my level of fatigue, resulting in further loss of cognitive ability (exacerbated previous brain injury). I am not capable of attending, or of representing myself at the hearing, so would request that the hearing be postponed and another date arranged.
I will endeavour to source representation/support for a rescheduled hearing, as I am struggling with my health, and this does not appear to be improving.
Under the current circumstances, I would respectfully request that the Tribunal Service take into account my health condition and its disabling impact on me."

5 The respondent's representatives replied at 15.22 on 20 June opposing the application to postpone. In summary, they pointed out there was no medical evidence; that the claimant had mentioned being unwell for three weeks but had not made the application until 3pm the day before the hearing; that she had previously had representation at hearings; that there were significant costs for the respondent in preparing for and attending this hearing and there had already been considerable delays. If the matter was postponed indefinitely, stated the respondent, it would greatly disadvantage it and there was a perceived risk that EJ Manley would not be able to hear the case if she was to retire in August 2023.

6 When EJ Manley read this correspondence at about 5pm on 20 June, she asked the tribunal office to email the parties to say that the

application would be heard at the commencement of this hearing and parties, including the claimant, should make every effort to attend. The claimant did not attend nor reply to that email. We therefore started the hearing by considering that application.

7 EJ Manley was able to inform the respondent that she had heard she had been approved to sit for a further two years in retirement so that was not an issue. Mr Crawford for the respondent provided further information at the request of the tribunal. He said that the costs which would be wasted if the matter was postponed were about £3500. He also provided information on the delays in arranging the preliminary hearing (PH) which was needed to list this hearing. In short, there was a PH listed for December 2022 which the claimant asked to be postponed because there was insufficient time and it was close to Christmas. A further PH was listed for January 2023 but the claimant asked for that to be postponed as she could not attend, making reference to ill health and the lack of representation. The PH did then proceed in April 2023.

8 Mr Crawford added that it would not be in the interests of justice to postpone this hearing as there is no information about when it could be heard, especially as the claimant's ill health seemed to be ongoing. The claimant having had an opportunity to respond to his written argument, had taken that opportunity. The only thing that might cause slight disadvantage to the claimant if there was no postponement was that she would lose the opportunity to respond to any oral argument he might make. The hearing had been listed with the claimant's agreement for these dates and it would cause significant prejudice to the respondent if it were postponed.

9 The tribunal took time to consider its decision on the postponement application. We took into account that fact that the claimant had sought and been granted postponements for the PH, had supplied no medical evidence and left it very late to make the application. We also noted that she had sent her outline arguments on 14 June and had made no mention then of ill health or problems about representation. We had to balance the prejudice to the respondent in granting and to the claimant in refusing the application. We were also very concerned about continuing delays in this case whilst accepting they were not all of the claimant's making. We took into account the cost to the respondent, which is a charity, as well as the impact on tribunal resources. The tribunal noted that the findings of fact were as set out in the merits hearing judgment and this was a remission of a "relatively limited compass". We had carried out some preparatory reading and had all the necessary information. The issue before us was to apply the legal tests applicable to the remission point to those facts. We came to the conclusion it was not in the interests of justice to postpone the hearing as we had everything that we needed to determine the point.

10 We gave that judgment on the postponement application orally. Mr Crawford wanted to make it clear that the legal costs were being paid by insurers but that the respondent might face an increased premium because of this litigation. The tribunal therefore deliberated further by way of reconsideration. We remained of the view that the postponement application should be refused for the reasons set out above.

The remitted issue

11 As well as the summary quoted above at paragraph 2, we also focused on other paragraphs of the EAT judgment. For instance, at paragraph 17, it was said we failed to apply the correct legal test, having regard to paragraphs 93, 94 and 100 of our merits hearing judgment, which suggested that we "*were seeking to ascertain whether the making of the protected disclosure was **the** reason for the treatment and failed to appreciate that if the making of the protected disclosure was **a** material factor in the occurrence of the detriment, that was sufficient for the claim to be made out*".

12 Although there was correct self direction for the causation test, paragraph 18 states, the tribunal had not given itself proper direction as to whether there was separable conduct which might have been the reason for the treatment. The tribunal "*had not carefully analysed where any dividing line fell between the making of the disclosure and the manner of its making, including the claimant's suggestion of possible contact with the Charity Commissioners and the consequences that could have for the trustees, including the possibility of them losing their homes*".

13 Paragraph 23 of the EAT judgment makes reference to the limited compass as quoted above, stating we should determine on remission "*whether the making of the protected disclosure was a material factor in the institution and continuance of the disciplinary proceedings; whether any detriment claim is in time, and/or whether any actions taken in response to the protected disclosure could give rise to a claim of constructive dismissal*".

14 As stated, the respondent had sent written outline arguments, in line with the PH orders, to the claimant and the tribunal. He reminded the tribunal that the merits judgment had already stated that the disciplinary proceedings were not instituted or pursued on the grounds of any of the disclosures. What was missing was self direction or analysis of whether there was conduct by the claimant which was separable from the making of the protected disclosure and whether that was a reason for the disciplinary proceedings. The dividing line is between the protected disclosure itself and the manner in which it is made and/or things done at the same time and/or consequences of the disclosure. We were referred to the case of Panayiotou v Chief Constable Paul Kernaghan and The Police and Crime Commissioner for Hampshire UKEAT/0436/13. The tribunal was reminded that, in the present case, there were three reasons provided by the respondent for the disciplinary proceedings and only one of them had any connection to a protected act.

15 Because the claimant was not present, Mr Crawford agreed to limit his oral submissions to those that related to information that the claimant was well aware of. He reminded us of some of the pertinent facts as found, that the claimant had made the comments attributed to her by the trustees, even though she had denied them. He submitted that we should bear in mind that the comment to the trustees about them losing their homes was made at the same time as the "Hitler's Henchman" comment

and that went to the manner of the making of the disclosure and pointed to separability. This was not simply ordinary unreasonable behaviour but had been perceived, not unreasonably by the trustees, as threatening. That threat was gratuitous and not in the public interest.

16 The claimant sent in her outline arguments which we considered. She accepted that the trustees had stated they felt a threat but said that was unfortunate as she was raising a disclosure. She argued that there was a link between this perceived threat and the disciplinary proceedings. She stated that the trustees had been reluctant to make statements and Ms Hanley had encouraged them to do so. She referred to the statement of Ms Nicholson which we dealt with at paragraph 32 of the merits judgment and has no bearing on the issue we are concerned. The claimant raises other allegations about the conduct of Ms Hanley during the disciplinary process and submitted that "*matters were orchestrated directly in response to the Appellant making protective disclosures, with the sole intention of removing the Appellant from her place of employment*". She concluded with an example where she said the employer took no action when she made a separate serious allegation some years previously (which the tribunal noted was denied by Ms Hanley).

The law

17 Most the relevant law is as set out in the merits judgment, in the EAT judgment and in the submissions as summarised above. It does not need to repeated here. For completeness, as far as this remitted issue is concerned, the relevant legislation is contained in Section 47B Employment Rights Act 1996 (ERA). The guidance in Fecitt v NHS Manchester [2012] ICR 372 is that the section will be infringed if "*the protected disclosure materially influences (in the sense of being more than trivial influence) the employer's treatment of the whistleblower*".

18 As indicated, we were concerned here to consider whether there was conduct which is separable from the making of the disclosure. We looked at the Panayiotou case (above) and saw, at paragraph 50 the EAT considered the case of Bolton School v Evans [2007] ICR 641 where the Court of Appeal had recognised the distinction between disclosing information about the school's computer system being unsafe and the conduct of hacking into the system. Similarly, in the case of Martin v Devonshires Solicitors [2011] ICR 352 the making of untrue allegations of sex discrimination because of mental illness meant that there could be separable reasons for dismissal.

Conclusions

19 Whilst we were deliberating, the tribunal reminded itself of the letter which was sent to the claimant on 20 September 2017 which set out the three reasons for commencing disciplinary action (page 481 of the merits hearing bundle) which was summarised at paragraph 47 of the merits judgment. This stated that there were allegations of gross misconduct which may have been breaches of the Bullying and Harassment Policy and/or Equal Opportunities Policy. The three allegations included matters

at a) and c) which had no connection at all to any protected disclosure. At b) it reads "*Your alleged misconduct towards Marion Curtis and Pauline Sylvester, where it appears you threatened them with losing their homes on 31 July 2017 and 25 August 2017. Marion and Pauline are trustees, roles which are voluntary*".

20 The tribunal is satisfied that the reason for instituting (and later continuing) disciplinary proceedings at allegation b) was the claimant's conduct towards those trustees. Whilst she mentioned going to the Charity Commissioners in that same conversation, which was a protected disclosure, the further comment about them losing their homes, which was the reason for the disciplinary action, is entirely separable. The dividing line is where the claimant made that comment to them. The making of the protected disclosure did not materially influence the commencement of the disciplinary action. There is no evidence that it was a factor in the decision to take disciplinary action. All the evidence pointed towards concern about the claimant's conduct, which was a separate matter from any protected disclosure. The claim under section 47B ERA is dismissed which concludes all the claimant's claims.

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Employment Judge Manley

Date: 22 June 2023

Judgment sent to the parties on

7 July 2023

GDJ
For the Tribunal office