Case No: 1800832/2022

EMPLOYMENT TRIBUNALS

Between:
Mr M Bell **and** Sky UK Limited
Claimant **Respondent**

Heard at: Leeds **on:** 8 to 10 August 2023

Before: **Employment Judge Cox**
Members: **Ms J Lee**
Mr L Priestley

Representation:
Claimant: In person
Respondent: Ms Davies, barrister

REASONS

1. The Claimant worked for the Respondent from 31 August to 15 October 2021 as a software developer. His claim to the Tribunal was that he had been subjected to detriments because he had made protected disclosures, contrary to Section 47B(1) of the Employment Rights Act 1996 (the ERA).

2. At a Preliminary Hearing relating to his employment status, the Tribunal made various findings. Those findings, and the reasons for them, have already been provided in writing. In summary, the Tribunal decided that the Claimant was employed by an umbrella company. His services were provided to the Respondent under a series of contractual arrangements between that umbrella company and two other recruitment firms. The Claimant had no contract of any description with the Respondent. Nevertheless, he was a "worker" within the definition of that term in Section 43K(1)(a) ERA and on that basis had a right to bring this claim. His claims of unfair dismissal and breach of contract were dismissed, as those claims can be brought only by employees.

The detriments

3. The Claimant alleged five detriments:

   Detriment 1: On Friday 15 October 2021, in the 'team-lazarus-amigos' Slack channel at 11:45am the Claimant was humiliated by Mr Matt Tennison who abruptly shut down the team discussion, stating "I think we park it for now".

   Detriment 2: On Friday 15 October 2021, in the 'team-lazarus-amigos' Slack channel at 11:55am the Claimant was humiliated by Mr Tennison, who instructed the Claimant to implement the discriminatory requirements that the Claimant had just complained about in his protected disclosures. This required the Claimant to delete all reference to the software code that Mr Matt Tennison had informed the Claimant was "sensible" at 10:17am on Wednesday 13 October 2021 and that could have provided a reasonable technical solution to the complained of discrimination.

   Detriment 3: On Friday 15 October 2021 via Direct Message at 18.39, Mr Tennison demeaned the Claimant by suggesting he had somehow breached "Sky Policy" for merging work that Mr Tennison had previously approved (and that had all required approvals) and that Sabetha (Quality Assurance Tester) had been waiting over a week to review.

   Detriment 4: By an email to Ms Michaela Beal on Friday 15 October 2021 at 18.45, and because of the above three detriments, the Claimant (constructively) terminated the contract. He resigned giving four weeks' notice as required by the contract.

   Detriment 5: By an email to the Claimant on Monday 18 October 2021 at 19.35 Mrs Jennifer Warren dismissed the Claimant while he was sick, without any notice.

Preliminary point on scope of alleged protected disclosure

4. At a Preliminary Hearing on 7 March 2023 the allegations were clarified. By this stage, the Claimant had produced a "third draft list of issues" that he said clarified what his allegations were. Dealing with what it considered to be an application to amend the claim, the Tribunal refused the Claimant leave to rely on any protected disclosure other than the disclosure set out in paragraph 3.10.2 of his grounds of claim. This was a disclosure said to have been made by the Claimant in a team meeting.

5. At the main Hearing, the Tribunal noted that in his claim form the Claimant in fact asserted at paragraph 3.21 that he was dismissed (detriment 5) because of the disclosures he made in the company's Slack channel on 15 October 2021. In his witness statement, under a heading "protected disclosure (the multi-user issue)" the Claimant gave evidence not only about what he said at a team meeting in the week beginning 11 October 2021 but also about what he said in the Slack channel on 15 October 2021. A Tribunal's decision in relation to an amendment application cannot have the effect of narrowing the allegations that are already in the claim form. The Tribunal therefore decided to approach the allegations by analysing whether any part of the Claimant's communications at the team meeting in the week beginning 11 October or on the Slack channel on 15 October amounted to a protected disclosure.

The evidence

6. At the main Hearing, the Tribunal heard oral evidence from the Claimant. For the Respondent, it heard oral evidence from: Mr Tennison, who at the relevant time was Senior Developer in charge of the day-to-day work of the Lazarus team of software engineers in which the Claimant worked; Mrs Warren, Software Engineering Manager, who was responsible for managing teams and for the recruitment of engineers; and Ms Beal, Development Manager, who was responsible for three teams of engineers, including Lazarus. The Tribunal was also referred to various documents in a Hearing file. Based on that evidence, the Tribunal made the following findings.

The multi-user discrimination issue

7. Sometime around Monday 11 October 2021, whilst working on an update to Sky accounts pop-ups/notifications functionality, the Claimant discovered that alerts were being unnecessarily displayed to all users, even those who were logged-out or did not have a Sky account. He believed that that might lead pop-up/notifications intended for the account holder being dismissed by anyone else sharing the same device without the account holder knowing. He knew that some of these alerts might include critical warnings of hazardous weather warnings or potential terrorist attacks. He believed that such a poor user experience would be discriminatory to users sharing the same device and that the majority of those users would most likely have characteristics protected under the Equality Act 2010. In these reasons, this issue is referred to as "the multi-user discrimination issue".

8. The Claimant raised his concerns about this issue with Vinod Viviyan, Business Analyst, at a team meeting in the week beginning 11 October 2021. Mr Viviyan said it was company policy to prioritise the "single user

experience", as single users represent the majority of users. The Claimant asked him to escalate his concerns over the multi-user issues to management as he strongly believed that the policy was most likely discriminatory. On Friday 15 October 2021, at the request of Mr Viviyan, the Claimant raised his concerns with the Lazarus team in a Slack channel discussion. There was an initial exchange from around 9.45 to 12 in the morning, and then a comment from the Claimant at 10.15 that evening.

9. The entries read as follows, "Mike" being the Claimant:

> *Claimant at 09:38: Moving/restarting thread regarding dismissal of alerts on a multi-user system [hyperlink to thread]*
>
> *Claimant at 09:46: @matthew.baker3 could you please confirm if you 'd be happy (or not) with my suggested solution to solve this edge case.*
>
> *Matt Baker at 10:57 Hi Mike - If had a catch up with @vinod.vijayan about this issue and we decided we should not let an edge case influence the experience for the majority of users. Has something changed in the meantime?*
>
> *Vinod Vijayan at 10:59 If I understand it correctly Mike is proposing a solution to that scenario as follows: Mike Bell [11:05 AM] It's possible to implement a satisfactory solution that does not impact the single user experience. The best single user experience would be that alert dismissal for signed out users also dismisses for all-signed in users and alert dismissal for signed-in users likewise dismisses alerts for the signed-out user (but not for all signed-in users)*
>
> *Claimant at 11:17 this solution would provide the best experience for all users (not just the majority)*
>
> *Claimant at 11:17: one concern I do have is users having protected characteristics whom use assistive technology could be more likely to share a computer (with a carer)., so one risk here (that appears to have been overlooked) is not providing an equally good experience for multi-users could be seen as discriminatory. we don't ignore supporting assistive technology because those users are not the majority of users right ?*
>
> *Matt Tennison at 11:32: That's an interesting point, I don't necessarily know if users of assistive technology are more likely to share a computer though - because they're gonna have their machines setup with those technologies making them less useable for other users.*

There's lots of shared state on sky.com that doesn't reflect specific users - for example the cookie dismissal popup is afaik, controlled by a long-lived cookie that doesn't disappear when a user logs out

Claimant at 11:34: for example the cookie dismissal popup is afaik, controlled by a long-lived cookie that doesn't disappear when a user logs out which is why we agreed to hash the skyID for both local and session storage ?

Andrew Stelmach at 11:37: it would be a bit weird for someone to accuse us of being discriminatory because of this

Claimant at 11:38: my point was more about supporting people with protected characteristics, which includes old-age, race and religion (asian households tend to be larger supporting grandparents but not supporting mult-users because they are not the majority is discriminating households sharing the same computer, fact,

Matt Tennison at 11:42: Oh right okay - the original message included "whom use assistive technology" though. I think to make sure we get it right, if we go down this route of per-user dismissing - let's involve a solution architect who'll have more awareness of tech options in Sky than our squad, and might think of more edge cases

Claimant at 11:43: I think this discussion is getting away from the goal of providing the best solution for all users, which I've given. Can we discuss that please ?

Matt Tennison at 11:44: We're operating with the tools at our disposal - client side JS in Masthead. But there might be a wider project to add some sort of persistence layer in Digital for things like this, or planned backend projects that would accommodate these use cases better

Claimant at 11:44: you are right, perhaps i should have rephrased that as "whom might use"

Matt Tennison at 11:45: I think we park it for now, if it becomes a requirement, lets take your solution to [ ] or another Digital solution architect as a starting point Because we could build a better solution - e.g. if it's a backend persistence layer, we get multi-device support

Claimant at 11:54:
so that i understand you correctly, you want to make dismissal of alerts impact all users sharing the same system and strip out the work you wanted me to include to support usefTokens in the utility methods ?

Matt Tennison at 11:55: Yes please, after the earlier discussion around edge cases etc I think we need to tread carefully here, and the more complex the code, the higher the risk of bugs

Claimant at 10:15 pm: I'm very disappointed by Matt Tennison and Team Lazarus in abruptly shutting down my concerns about multi-user discrimination and not allowing a reasonable discussion on the solution to this issue i offered. I'm a contractor with a "can do attitude" and very much a "product focused" developer with a passion for the "user experience". However, It does seem to me that Sky Lazarus believe creating a sub-standard poor experience for a minority (who may or may not have protective characteristics) is acceptable if it makes the gig here at Sky "easier". Sorry but that lazy attitude does not fit with my work and ethical values and therefore I've decided I must end my contract with Sky over this matter.

Did the Claimant make a protected disclosure?

10. The Respondent accepted that, if the Claimant had made a qualifying disclosure, it would amount to a protected disclosure because it was made to his "employer" (Section 43C(1)(a) ERA), who for these purposes was the Respondent (Section 43K(2)(a) ERA).

11. The Claimant originally argued that his contributions to the Slack channel discussion fell within one or both of two aspects of the definition of a qualifying disclosure in Section 43B ERA. His main argument was that they amounted to disclosures of information which, in his reasonable belief, were being made in the public interest and tended to show that Sky had failed, was failing or was likely to fail to comply with the legal obligation not to discriminate against people with protected characteristics, contrary to the Equality Act 2010 (43B(1)(b)).

12. The Claimant also argued that his contributions to the Slack channel were qualifying disclosures because they amounted to disclosures of information which, in his reasonable belief, were being made in the public interest and tended to show that the health or safety of any individual had been, was being or was likely to be endangered (Section 43B(1)(d)ERA). This was on the basis that since some alerts/notification could be considered "urgent" (such as warnings of severe weather or terrorist attack), the health or safety of users sharing a computer would likely be endangered if they did not see them. The Claimant provided no evidence that this belief about the endangerment of health and safety was in his mind at the time he made the disclosures or that he mentioned health and safety as a concern when he raised the multi-user issue. Further, he made no reference at all to this

basis for his claim in his submissions. The Tribunal found that the Claimant had not established that he had made a disclosure falling within Section 43B(1)(d) ERA.

13. The Tribunal was not satisfied that what the Claimant said at the team meeting in the week of 11 October or any of the Claimant's contributions to the Slack channel on 15 October 2021 amounted to a protected disclosure under Section 43B(1)(b). A qualifying disclosure needs to involve the disclosure of "information". A statement of opinion can convey information, but to do so it must "have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in [Section 43B(1)]" if it is to amount to a disclosure (according to Sales LJ in Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436). After careful consideration, the Tribunal concluded that none of the Claimant's contributions met that test. Because it had the opportunity to discuss with the Claimant at the Hearing what he had intended to convey, the Tribunal was able to deduce that he believed he was giving information that indicated that the Respondent might be guilty of some form of indirect race, religious, age or disability discrimination. But his evidence on what he actually said at the team meeting and what the Tribunal could read he said in the exchange itself was imprecise and unclear. Indeed, it is apparent from Mr Tennison's responses to the Claimant's contributions at the time that he did not understand the full import of what the Claimant later explained to the Tribunal that he had meant.

Detriments and grounds for them

14. The Tribunal went on to consider whether, if in fact one or more of the Claimant's contributions did amount to a protected disclosure, Mr Tennison and the Respondent had subjected him to the alleged detriments and had done so on that ground. An action amounts to a detriment if a worker might reasonably consider that it amounts to putting him under a disadvantage in his employment (Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) ICR 337). The burden of proof is on the Respondent to show the ground on which it acted (Section 48(2) ERA).

Detriment 1

15. In relation to alleged detriment 1, the Tribunal decided that Mr Tennison's contribution at 11.45am could not, objectively assessed, be viewed as him "shutting down" the discussion. As the Senior Developer whose responsibility it was to lead the Lazarus team on their day-to-day activities, he was simply indicating to the Claimant and the others in the group that he had decided that the better approach was to leave the Claimant's solution to one side for now. If it was progressed later, he was suggesting that it

could be referred to a digital solution architect who might build a better solution. A worker in the Claimant's position, that is, an external contractor who was hired simply to do the tasks allocated to him, could not reasonably have viewed Mr Tennison as putting him under any form of disadvantage in his employment by communicating this decision, still less as humiliating him, as he alleged. The Tribunal accepted that the Claimant was upset and annoyed that his solution was not being progressed, but the Tribunal did not accept that it was reasonable for him to view Mr Tennison's response in that way.

16. Further, the Tribunal accepted Mr Tennison's evidence, which was clear, credible and unequivocal, that he did not make his comment on the ground that the Claimant had raised a multi-user discrimination issue. He made it because he was wanting to move on. The solution proposed by the Claimant had proved more complicated than initially expected and he felt that the group had spent enough time discussing it already.

Detriment 2

17. In relation to alleged detriment 2, and for the same reasons as in relation to detriment 1, the Tribunal did not accept that Mr Tennison's instruction to the Claimant at 11.55am to undo the work he had done amounted to a detriment. Given his job role, it was well within Mr Tennison's prerogative to take the view that the Claimant's solution should not be progressed and to ask him to reverse it. He was polite and phrased this as a request: "Yes please". A worker in the Claimant's position, that is, an independent contractor brought in to do the tasks required of him, could not reasonably regard that as putting him at any form of disadvantage in his employment, still less as humiliating him, even though he was upset and annoyed that Mr Tennison was asking him to undo work he had previously agreed.

18. Further, the Tribunal accepted Mr Tennison's evidence that the ground on which he gave his instruction was not anything that the Claimant had said about multi-user discrimination. It was because he had decided that the Claimant's solution was too complicated. It had led to bugs already and might lead to more. As Mr Tennison put it in his contribution to the discussion: "the more complex the code, the higher the risk of bugs".

Detriment 3

19. The allegedly demeaning comment by Mr Tennison that the Claimant said amounted to a detriment occurred on the evening of 15 October 2021, during a Direct Message exchange on the Slack channel between the Claimant and Mr Tennison alone. The exchange read as follows:

Matt Tennison at 13.21: Hey Mike, why has 616 been merged without any reviews? On the latest commit

Claimant at 18:07: You, Richard and Edward have consistently dragged your feet in reviewing my work despite numerous requests form myself and Vivian. There are also other members of the team to consider here. Sabeetha has been waiting over a week now to test this bug-fix that was not related to the multi-user issue that Richard wante changing and it should NOT block us from making further progress. Any further updates on how to handle user token updates can be dealt with in LAZ-628 but I will say now that as far as i'm concerned how we handle that logic is best as left as it is for now. If you have a more 'precious' solution than the one you already provided please open your own PR for it, but it has nothing to do with 616.

Matt Tennison at 18.39: Let's speak about this on Monday, but any code changes going to production should be reviewed by at least two other developers, that's Sky's policy. We'll review it as part of the epic, but please don't merge any other unreviewed work

Claimant at 18:49: It's was not going into production because it was not merged to master. I also had 3 approvals including from you and taco-cats. Kindly have some perspective here! If your intention was to make me quit, then congratulation you were successful. What a nasty team you lead.

Claimant at 20.34: Also, do not lecture me on "Sky policy". I've been with Sky for six weeks and I don't recall you informing the team you were on "holiday" at any time. I do recall you failed to respond to my DM until the next day and being absent from standup unexpectedly. Does interviewing for your next job during working hours comply with "Sky policy".

Claimant at 20:56: Does shutting down a discussion about providing a best solution (which you initial seemed to approve of) that might otherwise be considered discriminatory vs multi-user households comply with "Sky's policy" of non-discrimination just because you think it might add a bit more complexity to the code base (that might later get nuked anyway!)? and where in "Sky's policy" does it mention doing the right thing for users now become of secondary importance to an easy life for developers? From my view point you've shown a complete lack of direction and seem quite happy to blindly follow Richards inflated ego and poor work ethic.

20. The Tribunal did not accept that Mr Tennison was "demeaning" the Claimant in this exchange. He was simply asking him, in a polite and civil way, not to merge any more of his work until it had been reviewed. It was his belief that the Claimant had changed his solution since it had been approved and the amended work should not be merged unless and until it had gone through the review process again. He was telling the Claimant that that was Sky policy because the Claimant was an external contractor who had only recently joined the team and might not be clear what that policy was. The Claimant was clearly upset and indignant at what Mr Tennison said and responded in a strikingly rude and disrespectful way. The Tribunal did not accept, however, that a worker could reasonably regard such an instruction and clarification from the person supervising his work as amounting to putting him at a disadvantage in his employment.

21. Further, the Tribunal accepted Mr Tennison's evidence, which was clear and credible, that the ground for his comment at 18.39 was that he wanted to ensure that the Claimant complied with Sky policy on not merging work that had not yet been approved. It was in no way related to the Claimant's contributions about multi-user discrimination.

Detriment 4

22. At 6.45pm on 15 October 2021 the Claimant sent Ms Beal an email saying that he was giving 4 weeks' notice to leave Sky. His email read as follows:

> *Dear Michaela,*
>
> *I wish to advise you that I've decided to end my contract with Sky.*
>
> *I was led to believe I would be working on a React focused projects (no mention of Svelte was given) and the team I was been placed with are not the same as I interviewed with.*
>
> *I'm also disappointed by the work ethic and general attitude of the other developers on my team who have consistently dragged their feet in reviewing my work and generally made my experience at Sky rather unpleasant.*
>
> *I understand I must give 4 weeks notice. Therefore my last day with Sky will be 12th November 2021.*

23. The Claimant alleged that this was a "constructive termination" of the contract by him. The Claimant did not have a contract of any description with the Respondent. His resignation could not, therefore, have amounted to any form of termination of any contract with the Respondent. In any

event, even if the Claimant had had a contract with the Respondent, the Tribunal would not have accepted that it had been breached. The Claimant's allegation was that Mr Tennison's conduct in alleged detriments 1 to 3 above amounted to a breach of trust and confidence. There is an implied term in a contract of employment that an employer will not, without reasonable and proper cause, act in a way that is calculated or likely to destroy or seriously damage the relationship of trust and confidence between itself and its employee. The Tribunal had already decided, however, that the Claimant did not have a contract of employment with the Respondent.

24. For these reasons, this allegation was clearly misconceived, and the Tribunal dismissed it.

Detriment 5

25. Having heard evidence from Mrs Warren and Ms Beal, the Tribunal found that it was Mrs Warren who made the decision that the Claimant's assignment should end. (She made the decision on her return to work on Monday 18 October 2021. The decision had therefore already been made by the time Ms Beal returned from leave, although Mrs Warren consulted with her about it and it was a decision with which she agreed.) The Tribunal accepted Mrs Warren's evidence that at the time she made her decision the only contribution from the Claimant on the multi-user discrimination issue of which she was aware was the contribution he had made in his message to the Lazarus team at 10.15pm.

26. Looked at in isolation, that contribution does not amount to a protected disclosure. The Claimant referred to his "concern about multi-user discrimination" but did not give any detail about what that was, and Mrs Warren had no context from the Claimant's earlier contributions on which to draw to make sense of what he was referring to. Discrimination is a word in common use, to indicate that someone is being treated unfairly. It is not normally used in the legal sense of less favourable treatment on certain specified unlawful grounds. The Claimant referred to the team accepting a sub-standard experience for a minority "who may or may not have protective characteristics", in order to make their work easier. In the Tribunal's view, that fell far short of information tending to show that the Respondent was not complying with a legal obligation.

27. In any event, none of the Claimant's comments about multi-user discrimination was the ground for Mrs Warren's decision. She had read the Claimant's contribution to the group Slack discussion at 10.15pm and his letter of resignation. She considered that he was acting in a disruptive, negative and unprofessional way. He had already resigned. He had not

shown up for work on Monday 18 October nor contacted the Respondent to explain why. She also believed from an email sent to her by Mr Allen, a consultant for Experis (one of the recruitment consultants that arranged for the supply of the Claimant's services) that the Claimant had agreed to an immediate termination of his assignment, although the Tribunal accepts the Claimant's evidence that that was not in fact the case. The grounds for her decision were that, for all these reasons, the relationship between the Respondent and the Claimant was not working for either party and that it would be in the best interests of both for his assignment to end with immediate effect. Her decision was not related in any way to any comment he had made about multi-user discrimination.

Summary

28. For these reasons, all the allegations of detriment on the ground of a protected disclosure failed and were dismissed.

Employment Judge Cox
Date: 14 September 2023