



EMPLOYMENT TRIBUNALS

Claimant: Ms D Thomas

Respondent: Bibimoney Global Limited

Heard at: London Central Employment Tribunal
On: 19th, 20th, 21st and 22nd June 2023

Before: Employment Judge Singh
Mr S McLaughlin
Mr T Robinson

Representation
Claimant: In person
Respondent: Mr C McDevitt (of Counsel)

JUDGMENT

Judgment having been sent to the parties on 5th July 2023 and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided;

REASONS

Background

1. The claimant was employed by the respondent as director and CFO of the company, which specialised in providing software for mobile payments. The claimant was appointed as director in September 2016 and CFO in October 2016.
2. The other director of the respondent was a Mr Shiraz Jessa. He was also the founder and, from time to time, the majority shareholder of the respondent. Mr Jessa's family members are also shareholders of the business.
3. On the 4th February 2022, the claimant met with Mr S Jessa at his home. In this meeting, the claimant says that she set out the current issues that the respondent had regarding funding. The claimant also made

a proposal to Mr Jessa that he and his family allow the management team (which comprised the claimant and her partner, Mr Martin Hine) to buy them out so that they could take ownership of the respondent.

4. Following the meeting, on the 7th February 2022, the claimant wrote to Mr S Jessa via email, setting out the proposal and the financial issues that she had explained on the 4th February. On the 8th February 2022, the claimant sent the same email to Mr S Jessa's cousin and father, who were also shareholders in the company. The claimant relies upon this email on the 8th February as a protected disclosure.
5. The claimant alleges that following that email being sent, she suffered a number of detriments.
6. The claimant alleges that on the 9th February 2022, Mr S Jessa told another member of the company that he thought the claimant was acting the way she was because she was menopausal.
7. The claimant claims that there was a 5 week delay in any action being taken in response to the concerns she had raised. A face to face meeting was not held until 22nd March 2022.
8. The claimant complains about a lack of response from the shareholders and that this was detrimental to her as it made her concerned about losing her Chartered Accountant status. She states she was worried that if the company took not action, it could become insolvent and being a director of an insolvent company would impact on her chartered status. She also claimed that her concerns were not take seriously or dismissed by the shareholders which again made her worried about her Chartered status.
9. The claimant claims that Mr S Jessa screamed and shouted at her on occasions and that he accused her of acting fraudulently.
10. The claimant wrote to the respondent shareholders on the 23rd March 2022 to request repayment of a large debt of over £2 million the respondent owed to her. The claimant made proposals on how the debt could be settled but also stated she was not willing to defer her creditor beyond the 21st May 2022. If the respondent was not able to repay the claimant by the deadline she could take steps for them to be wound up.
11. In response to this demand, the claimant was removed as a director of the respondent. Her status as creditor would cause a conflict of interest with her fiduciary duties to the respondent as a director. This took place on the 12th April 2022.
12. The claimant also alleges that after the 8th February 2022 she was ostracized in that work that she would normally be involved in was now being handled solely by Mr S Jessa. She was effectively frozen out of the respondent's business and doing much lower level work than she was used to.

13. Finally, the claimant alleges that she was threatened by Mr S Jessa that if she continued raising concerns “all sorts of other issues are coming out” and threatened with dismissal.
14. On the 14th April 2022, Mr M Hine was made redundant from the respondent. The claimant then submitted her resignation to the respondent. In her resignation letter, the claimant stated that the reason for her resignation was because the respondent had alleged that her contract was fraudulent and because of the menopause comment.
15. The claimant gave 6 weeks’ notice so her effective date of termination was the 29th May 2022.
16. The fraudulent contract comment referred to an ongoing dispute between the parties about the claimant’s contract. This is the subject of a breach of contract claim in the High Court. The parties made it explicitly clear to the tribunal that they did not wish for any decisions to be made in the Employment Tribunal proceedings which could have any effect on that case.
17. The claimant also claimed for some holiday pay she believed she was owed. In February 2022, the claimant went to South Africa on annual leave. Whilst there, she states that she was required to carry out work for the respondent for 6 days. The claimant believes that those 6 days should not have been deducted from her annual leave allowance and therefore the amount of unused accrued holiday pay she received at the end of her employment was short by 6 days.

Claims

18. There was an agreed list of issues which set out the claims. They were as follows;
19. Whistle blowing- the claimant alleged that she had made a protected disclosure and that because of that, she was then subjected to the following and that they were detriments;
 - a. The 5 week delay in having a face to face meeting
 - b. The lack of response from shareholders
 - c. Being accused of being menopausal
 - d. Being screamed and shouted at
 - e. Having her concerns dismissed or not taken seriously
 - f. Being accused of acting fraudulently
 - g. Being removed from the board
 - h. Being ostracised
 - i. Being threatened with “all sorts of other issues coming out”
 - j. Being threatened with dismissal
20. Automatic Unfair Dismissal- the claimant claims that above detriments amounted to a breach of trust and confidence. The claimant claimed that

she was constructively dismissed as she resigned in response to that breach of trust and confidence. As they were because of her protected disclosure, the claimant claims her dismissal was automatically unfair.

21. The claimant made it clear that she was not pursuing an ordinary unfair dismissal claim.
22. The claimant also claimed that the detriments were less favourable treatment and pursued claims for direct age or sex discrimination for each of them.
23. The claimant also alleged that the detriments were race or age related harassment.
24. Finally, the claimant claimed unlawful deduction from wages for her holiday pay.

The Law

25. The law with respect to public interest disclosures is set out in part IVA of Employment Rights Act 1996 (ERA). Section 43A ERA 96 defines a 'protected disclosure' as a *qualifying disclosure (as defined by s43B) which is made by a worker in accordance with any of sections 43C to 43H*".

26. The relevant parts of section 43B of ERA 96 state:

(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) -

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

27. Pursuant to s43C a qualifying disclosure is made if the worker makes the disclosure to his employer.

28. When considering whether there has been a 'disclosure' within the meaning of s43(B)(1) the employee must disclose 'information'. It is not sufficient that the employee has made an 'allegation' (*Cavendish Munro Professional Risks Management Ltd v. Mr. M Geduld* [2010] ICR 325) as clarified by the Court of Appeal in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850. The tribunal must consider whether the disclosures contain sufficient factual content and specificity to amount to a reasonable belief in the breach alleged.

29. The claimant must show that she reasonably believed the disclosure was in the public interest. There is no requirement to show that the breach actually occurred. Our task is to consider, in relation to the alleged disclosures, whether, in the claimant's reasonable belief there was information which was in the public interest and tended to show one of the matters in s43B (1) (b) namely that there had been or was likely to be a breach of a legal obligation. In this case, the legal obligation was purported to be the fiduciary duty the directors of the respondent had to its minority shareholders.

30. Section 103A ERA provides:

“An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure”.

31. If we find that there was a public interest disclosures, we must then consider whether the dismissal was because the claimant made the disclosure. With respect to the burden of proof where the claimant claims automatically unfair dismissal under s103A ERA, the case of Kuzel v Roche Products Ltd [2008] IRLR 530 states that the claimant must challenge the employer's reason and produce some evidence of a different reason for dismissal.

32. Section 47B ERA provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure. Section 48(2) ERA provides that on a complaint under section 47B :- *“it is for the employer to show the ground upon which any act, or deliberate failure to act was done”*. The tribunal must decide what caused the detriments (if any are found) and the dismissal. Helpful guidance in assessing causation is provided in the Court of Appeal's judgment in Fecitt v NHS Manchester [2012] ICR 372 where it was said:

“section 47B 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”.

33. The tribunal is concerned to decide whether there has been a dismissal in accordance with Section 95(1) Employment Rights Act 1996 which states:-

“For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)....only if)-

a) -

b) -

c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of his employer's conduct"

34. This is what has become known as "constructive dismissal". The leading case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 remains good law and makes it clear that the employer's conduct has to amount to a repudiatory breach. The employee must show a fundamental breach of contract that caused them to resign and that they did so without delay.
35. In summary, we are concerned to decide whether there was a disclosure, that is whether there was information which tends to show, in the reasonable belief of the claimant, a breach of a legal obligation. If there was such disclosure, we have to consider whether, in her reasonable belief, it was in the public interest.
36. What we often concentrate on, is whether, if there were disclosures, there was any causal link between them and any detriment or dismissal. The claimant relies on the detriments cumulatively as constituting a fundamental breach. If there is such a breach the tribunal must determine whether the claimant resigned because of it and without delay.
37. The claimant's claims of direct discrimination were brought under s.13 which provides:

"13 Direct discrimination

- (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
- (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."*

38. Section 13 is a definition section. The claimant's claim would be read with section 39(2)(d) which provides:

"39 Employees and applicants

...

(2) *An employer (A) must not discriminate against an employee of A's (B)—*

...

(d) by subjecting B to any other detriment.”

39. In considering what constitutes a detriment, the tribunal should have regard to the guidance in *Shamoon v Royal Ulster Constabulary*, 2003 UKSC 11. There is an objective test: a detriment is to be understood as that which a reasonable worker would understand to place her at a disadvantage in the workplace.

40. The claimant brought claims in the alternative under s.26, which provides:

“26 Harassment

a. A person (A) harasses another (B) if—

i. A engages in unwanted conduct related to a relevant protected characteristic, and

ii. the conduct has the purpose or effect of—

1. violating B's dignity, or

2. creating an intimidating, hostile, degrading, humiliating or offensive environment for B.”

41. Section 26(4) imports into the analysis of harassment a mixture of the subjective perception of the claimant, the objective analysis of the tribunal, and “the other circumstances.”

42. In considering a case of harassment by use of words, it is helpful to have regard to the guidance of Underhill P in *Richmond Pharmaceuticals v Dhaliwal* 2009 ITLR 336, and in particular:

““We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

43. Section 13 ERA confers upon workers the statutory right not to suffer unauthorised deductions from

wages, the definition of which in s27 ERA includes holiday pay.

Findings and conclusions

The protected disclosure

44. The claimant relied upon a letter she had sent on the 8th February 2022 as the protected disclosure in her case. After reviewing the document and hearing evidence from the claimant, the tribunal panel decided that this did not meet the threshold to amount to a qualifying disclosure.

45. As set out in s.43B of the ERA, a qualifying disclosure must be a disclosure of information that tends to show that one of the acts set out in 43B(1)(a)-(f) are being committed, have been committed or are likely to be committed. It was the tribunal's decision that the letter did set out such information.

46. The claimant relied upon a breach of fiduciary duty as a the legal obligation that was not being complied with. In evidence the claimant explained that the directors of the respondent had a duty to act in the best interests of its shareholders, including minority shareholders and the information in the letter explained that they were not doing this.

47. It was the tribunal's view that this was not the case. The letter was no more than a summary of the position of the respondent company and proposals by the claimant as to what steps they should take to grow.

48. The claimant stated in her witness evidence that she sent the letter because "*change was needed*" and that it was "*overdue*". This, the tribunal decided, were the concerns that the claimant had that prompted her to send the letter and not because of any breach of legal obligation or duty.

49. The letter stated that directors have a fiduciary duty to act for all shareholders, including minority ones, but does not go on to say what is being done that could be a breach of such a duty.

50. The claimant suggested in evidence that it was a breach of fiduciary duty if the company were to become insolvent. Whilst this may be the case, the letter did not state this. The letter made some intimation that continuing along on the path it was currently one was not sustainable but it did not set out that there was a real risk of the company becoming insolvent.

51. The claimant set out in the letter that;

"...but without funding we will have to close the business in 4 months and walk away."

52. However, although the claimant is frustrated by the lack of sufficient funding from Mr Jessa's family, she goes on to set out alternative options to secure funding. It was therefore not explicit or implicit, in the tribunal's opinion, that the business was likely to close or that risk of that happening was imminent. The potential breach of fiduciary duty was therefore only a possibility if certain things didn't happen.

53. It was also the tribunal's opinion that the alleged disclosure was not in the public interest. It was clear from reading the letter and from hearing from the claimant that she is concerned about the risk to herself if the company ceases trading and not the risk to any of the minority shareholders

"As directors of this company, trading in a position where we know there is no funding forthcoming, would put you and I in jeopardy and we could potentially become personally liable for the debts of the company should we not act on this and address the situation."

"If you cannot convince the family to reduce the valuation...then we have no business and I have to resign as director and walk away for the sake of my own reputation. There is a risk of me losing all I have invested in my CA qualification, as well as being disqualified as a director..."

54. The tribunal also took into account the claimant's evidence about her meeting with Mr S Jessa on the 2nd February 2022. The claimant confirmed that in that meeting she had made proposals to Mr Jessa that he and his family hand over the company to the claimant and Mr Hines. With this context in mind, the tribunal's view was that the purpose of that letter was to persuade Mr Jessa and his family to sell the business and not to warn them about any breaches of duty that were occurring or likely to occur.

55. For those reasons, the tribunal found that the letter did not amount to a qualifying disclosure and, as such, the claimant's claims for whistleblowing (detriment and automatic unfair dismissal) were not well founded.

Direct discrimination/harassment

56. In respect of the discrimination claims, the tribunal first considered whether any of the acts the claimant complained of actually occurred before determining whether or not they amounted to direct discrimination or harassment as there was strong disagreement about a number of the events.

- *The menopause comment*

57. In relation to the menopause comment, the tribunal decided that this did occur. Although Mr Jessa did not admit to making such a comment and the claimant's evidence about when the comment was relayed to her was confused, the tribunal found Mr A Burke to be a credible witness and his evidence to be clear. The tribunal understood the immense personal conflict that Mr Burke had overcome to attend the hearing, given that he was still an employee of the respondent and therefore decided that his evidence was true and accurate.
58. The tribunal also accepted that this was an act of direct discrimination on the grounds of sex or age. It was clear that a hypothetical male or younger female comparator would not have had such a comment made to them due to the very nature of the comment. For that same reason, it was also determined by the tribunal that act was said because of the protected characteristics of sex or age.
59. In relation to age discrimination, the respondent put forward no argument to attempt to justify the direct discrimination.
60. Further, the tribunal also agreed that this amounted to an act of harassment. The tribunal heard from the claimant how upsetting the comment was to her and so agreed that the comment amounted to unwanted conduct which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant and was related to sex or age.
- Delay in having a face to face meeting
61. The claimant complained that she suffered a detriment in not being given a face to face meeting until 5 weeks after sending the letter on the 8th February 2022. The claimant explained that this was detrimental to her given that she was worried that inaction by the respondent could ultimately lead to the loss of her CA status.
62. Whilst the tribunal accepted that there was a 5 week gap between the letter being sent and the face to face meeting with Mr S Jessa, they did not accept that this amounted to less favourable treatment. There was no basis on which the tribunal could find that a hypothetical male or younger female comparator would have been offered a meeting sooner.
63. Further, the tribunal did not accept that this amounted to unwanted conduct related to race of sex. Whilst the delay may have been unnerving to the claimant, there was nothing to link this to either protected characteristic. The tribunal accepted that evidence of the respondent that the reason for the delay was partly due to the claimant's own holiday and in the interim he had contacted the claimant to explain the steps that were being taken.

64. The claims in relation to this therefore failed.
- *Mr S Jessa screamed and shouted and the claimant.*
65. The claimant clarified in evidence that there were 3 occasions when this was said to have taken place- on the 9th February 2022, on the 22nd March 2022 and on the 12th April 2022.
66. After hearing evidence from witnesses from both sides, the tribunal came to the conclusion that in these instances, there were raised voices on both sides.
67. The tribunal also took into account the nature of the relationship between the claimant and Mr S Jessa. The claimant accepted that although Mr S Jessa often raised his voice and shouted to other employees, he did not do this to the claimant.
68. However, that changed after the meeting at Mr S Jessa's house and the email had been sent on the 8th February 2022. It was clear to the panel that the proposals put forward by the claimant at the meeting and the letter and the very act of going over Mr S Jessa's head as it were and sending the letter to his father and his cousin had upset him and, inevitably the relationship had soured.
69. On that basis, the tribunal found that a hypothetical comparator who was either male or a younger woman, who had also sent such an email and had a meeting in which similar issues had been discussed as the claimant had had on the 4th February 2022, would have been treated the same way. There was therefore no finding of less favourable treatment. The direct discrimination claim in relation to this act therefore failed.
70. Further, the tribunal decided that this was not an act of harassment. The tribunal found that although such treatment was unwanted conduct for the Claimant, it was not related to her age or sex. The reason for the treatment was clearly because of the souring of the relationship. That claim also fails.
- *Telling the claimant at the meeting in the hotel basement that he didn't appreciate her demands ultimatum*
71. Again, the tribunal accepted that this event occurred. However, the tribunal found that there was no less favourable treatment. The tribunal accepted Mr S Jessa's evidence that he was simply expressing his feelings about the nature of the issues the claimant had raised. The tribunal concluded that a hypothetical male or younger female comparator who had also raised similar issues in a similar way to the claimant, would have been treated the same way.

72. Further, the tribunal did not accept that this amounted to harassment on the grounds of sex or age. Although the tribunal agreed that this was likely to amount to unwanted conduct for the claimant, she had failed to establish a prima facie case of discrimination and, in any event, the respondent had given an explanation that is not discriminatory. This claim therefore fails.

- *Threatening the claimant wither losing her job*

73. The claimant initially alleged that this occurred on a number of occasions. After hearing the witness evidence the tribunal accepted that this had occurred during the basement meeting. The tribunal were not satisfied, based on the evidence, that threats had been made at other times.

74. Again, the tribunal did not accept that this was less favourable treatment as the reason for this was the claimant's email of the 8th February and a hypothetical comparator who had sent a similar email would have been treated the same way.

75. Further, the claim for harassment fails as well as a prima facie case was not established and the respondent provided a non-discriminatory explanation for the treatment. The claims in relation to this act therefore fail.

- *Removing the claimant from the board*

76. The tribunal accepted that this occurred. However, the tribunal accepted the respondent's evidence that the reason for this was the statutory demand that the claimant had made.

77. Although the claimant was correct in stating that she did not automatically need to be removed from the board after making the demand, it was clear from the evidence that the demand was what prompted the claimant's removal. Mr S Jessa considered there to be a conflict of interest once the demand had been made.

78. In light of that, the claim for direct discrimination failed as the tribunal were satisfied that Mr S Jessa would have treated a hypothetical comparator who was male or a younger female who had made a similar statutory demand, would have also been removed.

79. Further, the harassment claim also fails as the claimant failed to establish a prima facie case and a non-discriminatory reason was provided by the respondent.

- *Accusing the claimant of acting fraudulently.*

80. The tribunal did not accept that this act had taken place. The claimant could provide no supportive evidence to show such

an accusation had been made and her own recounting of any accusations being made was far from clear. This claim therefore did not succeed.

- *Threatening the claimant that if she continued to raise issues that "all sorts of other issues would come out".*

81. The tribunal accepted that this threat had been made as it was stated in an email which were provided with.

82. However, again, the tribunal accepted the respondent's submission that the reason for this was that tensions were high on both sides following the claimant's actions of raising issues with Mr S Jessa and his father and cousin and that the relationship between Mr S Jessa and the claimant had soured. The tribunal accepted that this was the reason for this act and a hypothetical male or younger female comparator would have been treated the same way.

83. Again, the harassment claim also fails as the claimant failed to establish a prima facie case and a non-discriminatory reason was provided by the respondent.

- *Mr S Jessa telling the claimant that "I am not here to negotiate"*

84. Tribunal found this act did take place. However the tribunal did not find that this was an act of detriment for a harassment claim. Mr Jessa was simply stating his position to the claimant. Therefore the claim for harassment did not succeed.

85. In relation to the claim for direct discrimination the tribunal found that a male or younger female comparator would have also been subjected to such a comment given that Mr S Jessa simply stating his position.

- *Ostracizing the claimant from her work or duties*

86. It was a claim its position that following the e-mail being sent on the 8th of February she was given less work to do and not included an important tasks or deals by the respondent.

87. The tribunal considered the evidence had been provided which was a large number of emails which the claimants suggested showed that she was not being kept in the loop by Mr Jessa and not being called to important meetings that she would have previously been called to.

88. However the claimant had failed to provide any evidence to demonstrate the level of involvement that she had prior to the letter of the 8th of February. In the absence of such evidence the tribunal was not able to find that the claimant was

being ostracised or that there was any change in position after that letter had been sent.

89. Therefore the claims in relation to this did not succeed.

- *Lack of response from Controlling Shareholders to 8th Feb email.*

90. Travel found that this event also did not occur. The tribunal noted that a letter of comfort was provided which showed the claimant that respondents were considering their issues and e-mail of the 8th of February. The tribunal also noted the claimant failed to explain to the respondent what response was actually seeking from them and at no time did she chase up a response to them or state that she felt unhappy that an adequate response had not been given. This claim therefore failed.

- *Being told to hide her liability*

91. The tribunal accepted that the claim was told by Mr Jessa to hide her liability. However Mr Jessa explained that this was a business practise. The tribunal did not judge whether this was a right or wrong practise but accepted but this had nothing to do with the claimant sex or age.

92. It was therefore the tribunal's position that hypothetical male or younger female comparator but have also been subjected to the same treatment and not the claim and it failed to establish a prima facie case of discrimination in relation to this but in any event the respondent had provided a non-discriminatory explanation for this treatment.

93. *This claim therefore failed as well.*

Holiday Pay

94. The claimant's final claim was in relation to holiday pay. The claim alleged that whilst she had been on holiday in South Africa she had been quite required to carry out some business work and felt she should have been reimbursed for the days in which was carried out carrying out work which had originally been booked as annual leave.

95. The tribunal heard evidence from the claimant as to whether or not she'd been instructed to carry out this work by the respondent. The claimant accepted that there be no formal instruction but she taken it on herself to carry out such work.

96. The claimant was questioned as to whether or not she would she would have gone over to those countries if she had not already been in South Africa and it was a tribunal's belief that she would have not done so.

97. The tribunal therefore found that the claimant had carried out such work of her own volition and did not feel there are grounds for it to argue that's her holidays should have been cancelled and their holiday allowance reimbursed back to her for the days in which she was carrying out such work. This claim therefore it did not succeed as the claimant it could not establish that she had not been paid for any outstanding holidays upon her employment ending.

Employment Judge **Singh**

2nd November 2011

JUDGMENT & REASONS SENT TO THE PARTIES ON

02/11/2023

FOR THE TRIBUNAL OFFICE