



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000332/2023

5

Held in Glasgow on 17, 18 and 19 January 2024

Employment Judge L Wiseman
Members D McDougall and A Matheson

10

Mr Stephen Leighton

**Claimant
In Person**

Renfrewshire Council

**Respondent
Represented by:
Ms C Gregory -
Solicitor**

15

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The unanimous decision of the tribunal was to dismiss the claim.

REASONS

1. The claimant presented a claim to the Employment Tribunal making complaints of disability discrimination and also referring to “whistleblowing”.
25 The claimant clarified, at a subsequent case management preliminary hearing, that his complaint was one of victimisation in terms of section 27 Equality Act, and that he was bringing no other complaint.
2. The respondent entered a response denying the claimant’s allegations.
3. The issues for the tribunal to determine are:
30 (i) did the claimant do a protected act when he provided support to a disabled tenant with autism (referred to throughout this Judgment as Mr A) whom the respondent had informed had to be moved from his

property, to temporary accommodation, in order for building work to be done to the property?

(ii) If so, was the claimant subjected to the following detriments when:

(a) he was moved to alternative duties;

5 (b) he had his whistleblowing complaint dismissed;

(c) he suffered a loss of earnings caused by not being able to move to alternative employment with Capability Scotland or Turning Point Scotland and

10 (d) there was an attempt to blackmail him when the respondent said a positive reference would be provided if he gave written confirmation of the withdrawal of his grievance.

(iii) If so, was the claimant subjected to the above detriment/s because of having done the protected act?

4. The tribunal heard evidence from the claimant; and from Ms Laura Howat, Head of Mental Health and Learning Disabilities and Alcohol and Drug Recovery, who took the decision to invite the claimant to a disciplinary hearing; Mr David McCaig, Operational Manager, who was the claimant's line manager; Ms Pauline Wilson, Senior HR Adviser; Ms Marlene Boyd, Head of People, Organisation and Development; Ms Christine Laverty, Chief Officer of the Health and Social Care Partnership and Mr John Trainer, Head of Child Care and Criminal Justice, and Chief Social Work Officer, who dealt with the "whistleblowing" complaint.

15

20

5. The tribunal was also referred to a jointly produced folder of productions.

6. The tribunal, on the basis of the evidence before it, made the following material findings of fact.

25

Findings of fact

7. The claimant commenced employment with the respondent on the 21 March 2016. He was employed as a Team Leader in the Autism Connections

Service. His duties were primarily to deal with referrals from social work and mental health services, carry out autism assessments to identify what supports were required and to deliver training to employees regarding autism.

8. The claimant was contacted by the Housing Department in January 2021 regarding the circumstances of an adult tenant (Mr A) who had mobility issues and autism (page 85). The tenant was required to move out of his accommodation temporarily to allow for necessary repairs to be carried out to the building where he lived. The tenant was unable to achieve packing up and moving out to alternative accommodation by himself, and a request was made for support to be provided.
9. The claimant was also contacted by Mr A's Psychologist in January 2021 to help the tenant (page 88). The claimant agreed to put forward a request to his manager, Mr David McCaig, to provide support to Mr A, and this was granted.
10. The claimant provided significant support to Mr A to help him pack up, move into alternative accommodation and then move back into his accommodation and refurbish.
11. The claimant raised a "whistleblowing" complaint with the respondent on the 14 July 2021 regarding the issue of the service not being SSSC registered, yet having to work with complex cases. Mr John Trainer, Chief Social Work Officer, was asked to investigate the whistleblowing concerns.
12. There was some delay in dealing with the claimant's complaint due to sickness absence and holidays. Mr Trainer considered the information provided by the claimant and looked at the social work records to see how people could access services. He did not consider it necessary to interview anyone. Mr Trainer concluded there was no evidence to support the concerns raised by the claimant and he confirmed this to the claimant in a letter dated 23 November 2023.
13. On 6 August 2021 Mr A's Psychologist submitted a complaint on behalf of Mr A and also raising her concerns regarding the support which had been provided and allegations of a breach of confidentiality (page 151).

14. The complaint was forwarded to Ms Laura Howat, who decided to initiate a fact-finding process.
15. Mr David McCaig, the claimant's line manager, met with the claimant on 9 August to advise him a complaint had been made, but he would not be provided with a copy of it unless it proceeded to a disciplinary hearing. Mr McCaig also advised the claimant that he was to be moved to alternative duties. Mr McCaig and Ms Howat considered moving the claimant to alternative duties was necessary to ensure he and Mr A did not come into contact.
16. Mr McCaig decided to refer the claimant to occupational health because he was concerned about the claimant's mental health. The claimant refused to attend for some months.
17. The fact finding report took over 7 months to complete. Ms Howat received a copy of the report on 7 April 2021 (page 242). Ms Howat, having considered the report, accepted there were mitigating circumstances for two of the issues in the report and therefore they would go no further. Ms Howat decided the allegations relating to a breach of confidentiality required further information and consideration and so she decided that matter should proceed to a disciplinary hearing.
18. The claimant was, by letter of the 9 June 2022 (page 249) invited to attend a disciplinary hearing. The letter enclosed a copy of the fact finding report. The letter should also have enclosed a copy of the complaint, but this was omitted.
19. The claimant raised a grievance. The disciplinary hearing was put on hold pending the outcome of the grievance. One of the points of the claimant's grievance was that he had not been provided with a copy of the complaint.
20. The claimant made a Subject Access Request in June 2022. He was provided with a heavily redacted copy of the complaint in January 2023. He was provided with a clean copy of the complaint in February 2023 and an apology for it not having been provided earlier (along with the invite to the disciplinary hearing).

21. The claimant, having seen the complaint, put in a fresh grievance (page 257). The respondent offered to appoint an external/independent investigator to investigate the grievance, but the claimant and his trade union representative did not agree to this.
- 5 22. The claimant applied for a post with another local authority. The claimant's trade union representative approached Ms Marlene Boyd, Head of People, Organisation and Development to advise the claimant had secured another role but needed a positive reference. He further advised that if this could be done then he would speak to the claimant about dropping the grievance.
- 10 23. The claimant's trade union representative subsequently confirmed the claimant was not prepared to withdraw the grievance.
24. The respondent provided a positive reference for the claimant. He gave four weeks' notice and left the employment of the respondent.
- 15 25. The disciplinary hearing could not proceed once the claimant left the employment of the respondent.
26. The claimant's grievance was dealt with under a modified procedure and he was advised in August/September 2023 that his grievance had not been upheld.
- 20 27. The claimant had, in October 2021, applied for alternative employment with Capability Scotland. The claimant disclosed to them that there was an outstanding issue to be resolved before he could take up employment. The claimant was invited for a second interview but did not attend.
- 25 28. The claimant, who is SSSC registered, understood that he could not leave the respondent's employment during the investigation and if he did leave, the respondent would be obligated to inform the SSSC and the prospective employer about the investigation.
29. The claimant also identified alternative employment with Turning Point Scotland. He was invited for interview but did not attend.

30. The above posts both offered a salary significantly in excess of what the claimant was earning with the respondent.

Credibility and notes on the evidence

- 5 31. There were no issues of credibility in this case. The claimant was very well prepared for the hearing and readily accepted guidance from the tribunal to focus on the issues and not dwell on the unfairness of the allegations made in the complaint and why they should have been dismissed. There were two disputes in evidence. The first one related to the issue of the claimant being SSSC registered. The claimant's evidence that he was SSSC registered and
10 required to be so for the purposes of his role, was supported by the written statement of employment particulars (document 1). The acceptance slip included a clause stating *"I note the requirement to register and remain registered with the Scottish Social Services Council while employed by Renfrewshire Health and Social Care Partnership in my capacity as a Senior Social Care Worker"*.
15
32. The respondent's evidence (Ms Laura Howat) was that she was unaware the claimant was SSSC registered, and that there was no requirement for the postholder to be SSSC registered.
- 20 33. There was clearly some confusion regarding this matter, and this was not helped by the fact the acceptance slip attached to the claimant's contract referred to the post of Senior Social Care Worker, which was not the post the claimant held. It was not material for the tribunal to resolve this dispute but it is dealt with because the claimant stated it influenced his actions in relation to the jobs for which he applied. We accepted the claimant was SSSC
25 registered. We also accepted there was no requirement for the holder of the claimant's post to be SSSC registered. We considered those two positions were supported by the fact the claimant wanted the service to be SSSC registered and this was the thrust of his whistleblowing concerns.
- 30 34. There was also a dispute in the evidence of the claimant and that of Ms Boyd and Ms Laverty regarding who had put forward the proposal that in return for a positive reference the claimant would withdraw the grievance. We preferred

the evidence of Ms Boyd and found as a matter of fact the proposal was one that came from the claimant's trade union representative. We acknowledged, given what the claimant told us, that he had been unaware of the approach made by his trade union representative.

- 5 35. The respondent's witnesses were all credible and gave their evidence in a straightforward manner, explaining what had happened and the reasons for the decisions they had made.

Respondent's submissions

- 10 36. Ms Gregory noted the respondent's position was that the claimant did not do a protected act in terms of section 27(c) Equality Act. The respondent accepted the claimant provided support to Mr A, but Mr A was not being discriminated against because he was provided with support to avoid that.

- 15 37. Ms Gregory submitted that even if a protected act was done, there was no causal link between the protected act and the detriments detailed by the claimant. The steps taken by the respondent were because of the complaint made against the claimant. The claimant was moved to alternative duties, but this was because of the complaint. The claimant's whistleblowing concerns were investigated by Mr Trainer and an outcome letter was issued. Mr Trainer did not reject the claimant's concerns because of the protected act.

- 20 38. Ms Gregory acknowledged the claimant had applied for a job with Capability Scotland but the invite to the second interview had been withdrawn without explanation. Further, it had been the claimant's choice not to attend the interview with Turning Point Scotland.

- 25 39. There was no attempt to "blackmail" the claimant regarding a positive reference. The claimant's trade union advised Ms Boyd the claimant would withdraw the grievance if a positive reference was given. In any event the claimant chose not to withdraw the grievance, but the respondent provided a positive reference.

- 30 40. Ms Gregory submitted the key issue for the tribunal to decide was why the respondent acted as it did, and the answer to that question was that the

respondent acted as it did because of the complaint made against the claimant and their duty to investigate it. There was no protected act and therefore the claim should be dismissed.

Claimant's submissions

- 5 41. The claimant submitted he did a protected act when he supported Mr A, a disabled man, to move out of his tenancy on a temporary basis. The respondent was forcing Mr A to move out without support, and if the claimant had not supported him, Mr A would not have been able to move out.
- 10 42. The claimant accepted he had been moved to alternative duties because the complaint had been made, but argued that the complaint was linked to the protected act.
- 15 43. The claimant submitted, with regard to the second detriment, that Mr Trainer had been motivated to reject the whistleblowing concerns because the claimant had done a protected act. Mr Trainer had been made aware of the complaint. He conflated the complaint and the whistleblowing and it influenced his decision not to investigate.
- 20 44. The claimant was SSSC registered and if he left during an investigation the respondent would have been obliged to inform the SSSC and the prospective employer. The claimant suffered a loss of earnings in not being able to take up the alternative employment with Capability Scotland and Turning Point Scotland.
45. The claimant believed the respondent tried to blackmail him to drop the grievance in return for a positive reference. The trade union representative told him the respondent had made the offer.
- 25 46. The claimant, if successful with his claim, sought compensation for loss of earnings which he would have received if he had taken up the employment with Capability Scotland. He calculated this sum to be £18,900. He also sought an award for injury to feelings of £4000.

Discussion and Decision

Did the claimant do a protected act

47. The tribunal firstly had regard to the relevant statutory provisions in this case. Section 27 of the Equality Act provides that a person victimises another person if s/he subjects the other person to a detriment because that other person has done a protected act. The section goes on to define what a protected act is and at subsection 2(c) it provides “*doing any other thing for the purposes of or in connection with this Act*”.
48. The claimant argued that he had done a protected act within the terms of section 27(2)(c) when he provided support to a disabled tenant to move house. The claimant believed the reason why it was a protected act was because the disabled tenant was told he had to move tenancy and that he would not be provided with any support in relation to his disability because Housing staff could not enter his property due to covid restrictions. The disabled tenant would not have been able to move if support had not been provided.
49. The tribunal, considering the claimant’s argument, had regard to the case of ***Bayfield and another v Wunderman Thompson (UK) Ltd ET 2200540/2019*** where it was found that emails sent by the claimants raising concerns that the company was going to rid itself of “white, middle-aged men” were a protected act. This was because the claimants feared they were going to be made redundant because they were white, middle-aged men. We also had regard to the case of ***Aziz v Trinity Street Taxis Ltd*** where it was said that “*doing something*” was to be given a wide interpretation.
50. The tribunal asked itself what was it the claimant was doing for the purposes of, or in connection with, the Equality Act. The claimant referred to two points: (i) that he provided support to the disabled tenant and (ii) that the tenant would be discriminated against if support was not provided because he would be forced to move.
51. We did not consider, in respect of point (i) that providing support to Mr A amounted to a protected act. We say that because simply because Mr A was disabled does not mean each and every interaction with him is a protected

act. Further, in respect of point (ii) the whole purpose of the request to provide support to Mr A was to enable him to move accommodation on a temporary basis to allow damp in his property to be addressed. The purpose of the request for support was (to use the claimant's language) to prevent Mr A being "discriminated" against.

52. The tribunal concluded, for these reasons, that the claimant had not done a protected act within the meaning of section 27(c) of the Equality Act.

Was the claimant subjected to detriment for having done a protected act

53. We did go on to consider whether, if the claimant did do a protected act, he had been subjected to detriment because he had done the protected act. The claimant alleged there had been four instances of detriment: (a) being moved to alternative duties; (b) the failure by Mr Trainer to investigate his whistleblowing concerns; (c) loss of earnings in relation to the posts with Capability Scotland and Turning Point Scotland and (d) the respondent's attempt to blackmail him regarding a positive reference in return for withdrawing the grievance. The tribunal considered firstly whether these matters occurred and if so, whether they constituted a detriment; and secondly, if there was a detriment whether the claimant was subjected to that detriment because of having done the protected act. The issue for the tribunal to determine is what motivated the person to act as they did, having regard to conscious and subconscious motivation.

The first detriment

54. There was no dispute regarding the fact the claimant was moved to alternative duties. The tribunal accepted this was a detriment. The issue to be determined is whether the respondent took this decision because the claimant had done a protected act. The essential question in determining the reason for the claimant's treatment is what consciously or subconsciously motivated the employer to subject the employee to the detriment. We concluded it was clear the respondent moved the claimant to alternative duties because of the complaint which had been against him and in respect of which there was to be a fact finding investigation.

55. The claimant argued that the complaint arose because of the support which he had provided to Mr A, and therefore the complaint was linked to the protected act. The tribunal accepted that on the face of it the complaint arose from the support provided to Mr A but it was very clear that it was the complaint, and not the protected act, which caused the respondent to move the claimant to alternative duties. If the claimant had provided the support and there had been no complaint, he would not have been moved. The only reason the claimant was moved was because of the complaint. The complaint can be separated from the support provided to Mr A.

56. The tribunal decided that what motivated the respondent to move the claimant to alternative duties was the fact the complaint was received and was to be investigated. The complaint was separate to the support provided to Mr A (the protected act). In the circumstances, the tribunal decided the detriment of being moved to alternative duties was not because he had done a protected act.

The second detriment

57. The second detriment alleged by the claimant was that because of the complaint against him, he was not believed in his whistleblowing concerns. There was no dispute regarding the fact the claimant's "whistleblowing" concerns were rejected by Mr Trainer. The tribunal did not consider the rejection of his concerns amounted to a detriment. We say that because Mr Trainer considered all of the information provided by the claimant and looked at the social work records to see how people could access services, before reaching his decision to reject the claimant's concerns. We accepted Mr Trainer did not undertake the extensive investigation the claimant wished, but we were satisfied the concerns were investigated before Mr Trainer reached his decision. We did not consider the mere fact of concerns being rejected amounted to a detriment in the circumstances.

58. We should state that if we are wrong in this, and the rejection of the concerns did amount to a detriment, the tribunal would have gone on to ask what motivated Mr Trainer to make that decision: was it because the claimant had

done the protected act? The tribunal noted Mr Trainer was not asked about the protected act and there was no evidence Mr Trainer had been aware of it. The focus of the claimant's cross examination of Mr Trainer was on the complaint and in fact the claimant asserted his concerns had not been believed "because of the complaint".

5

59. We explained above that the complaint can be separated from the protected act. We concluded that even if Mr Trainer had been motivated to act by the fact of the complaint (of which he was aware), that is separate to the protected act. The claimant was not subjected to detriment for having done the protected act.

10

The third detriment

60. The third detriment concerned loss of earnings from Capability Scotland in circumstances where the claimant felt unable to leave the respondent's employment. The tribunal concluded there were two reasons why this aspect of the complaint could not succeed. Firstly, the claimant, in his evidence to the tribunal, stated that he had decided not to proceed to the second interview because it was during the pandemic/lockdown and he could not leave vulnerable people. This had nothing whatsoever to do with the protected act. Secondly, the claimant's opinion that he could not leave the employment of the respondent in the middle of the fact finding investigation was based on his understanding that the respondent would be required to report the matter to the SSSC and to the prospective employer. This, again, had nothing to do with the protected act. We acknowledge the claimant would argue the fact finding investigation was into the complaint which arose from the protected act, but this argument is dealt with above where we have explained the protected act and the complaint can be separated.

15

20

25

61. The claimant, whilst identifying a post at Turning Point Scotland for which he could have applied, decided not to do so because he would have encountered the same issue regarding leaving in the middle of the investigation. This is dealt with above.

30

62. We decided the claimant has not been able to show the alleged detriment happened because he had done a protected act.

The fourth detriment

5 63. The fourth detriment was an attempt to blackmail the claimant when it was proposed he withdraw his grievance in return for a positive reference. The tribunal preferred the evidence of the respondent's witnesses regarding this matter and found as a matter of fact that the claimant's trade union representative (with or without the claimant's knowledge) approached Ms Boyd with the proposal. There was no attempt by the respondent to
10 "blackmail" the claimant. The detriment alleged by the claimant did not happen and this aspect of the complaint is dismissed for this reason.

15 64. The tribunal, in conclusion, decided the claimant did not do a protected act in terms of section 27(c) of the Equality Act; further, even if the claimant had done a protected act, the detriments alleged by the claimant did not happen because he had done the protected act. The tribunal decided to dismiss the claim for these reasons.

20

25

30

LWiseman

Employment Judge

01 February 2024
Date

Date sent to parties

02 February 2024