



EMPLOYMENT TRIBUNALS

Claimant: Miss C Drayson

Respondent: ABM Catering Ltd

Heard at: Manchester (by CVP) **On:** 9 February 2024

Before: Employment Judge Eeley (sitting alone)

Representatives

For the claimant: In person

For the respondent: Mr Lawrence of Counsel

JUDGMENT having been sent to the parties on 23 February 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This was listed as a public preliminary hearing. The Case Management Order of Employment Judge Tobin indicated that the issue for me today was effectively whether to strike out the claim of automatic unfair dismissal on the basis that it had no reasonable prospects of success, or alternatively to issue a deposit order on the basis it had little reasonable prospects of success.
2. On starting the hearing it became apparent that the Case Management Order did not reflect the entirety of the conversation or the intentions in regard to the hearing. Counsel informed me (and sent me his note from the last hearing) that Employment Judge Tobin had in fact intended to list this to determine a preliminary issue, namely whether there was a protected disclosure by the claimant in this case so as to enable her to bring a claim for automatic unfair dismissal – the point being that if there was no protected disclosure then the claim for unfair dismissal must fall away and be dismissed. Alternatively, if there was a protected disclosure the matter would go forward for a final hearing and be determined on the facts. This also explained why the claimant and the

respondent's witnesses were present to give oral evidence and why witness statements had been exchanged on that part of the case.

3. When I checked with the claimant, she thought it was a final hearing where all matters and all the evidence would be considered.
4. Effectively I arrived at a position where both parties consented to me determining the preliminary issue of whether there was a protected disclosure in this case. I felt, therefore, that I was able to go beyond what the Case Management Order indicated and to determine the preliminary issue of whether there was a protected disclosure.

Evidence

5. I heard witness evidence from the claimant, who was cross examined, and also from Ms Natalie Bailey who had prepared a witness statement and was cross examined by the claimant.

Protected Disclosure

6. The protected disclosure in this case is said to relate to the contents of a telephone conversation between the claimant and Ms Bailey on 27 February 2023. Before I consider whether anything which was said amounts to a protected disclosure, I have to consider what was said, what information was conveyed and what the substance of it was, and whether it would then meet the test set out within the Employment Rights Act 1996 so as to constitute a protected disclosure.

Findings of Fact

7. The first matter for me is to make a finding of fact based on the evidence.
8. The claimant says that there was a conversation which was partly concerned with a manager and a colleague having had an affair. That would not constitute a protected disclosure as indicated by my colleague, Employment Judge Tobin, at the last hearing.
9. The substance of the allegations is within the claimant's witness statement, and in particular at paragraphs 44 and 45 [A60]. The claimant asserts that during a conversation with Ms Buckley (one of the parties to the extramarital affair and a colleague of the claimant) the claimant was informed that Ms Buckley had arranged for her mother to come into the residential care setting in order to 'set up' her mother with one of the homeowners within the development who was known to have money. The claimant took this to be an indication that there was a safeguarding issue. She thought that a vulnerable adult (who had just lost his wife) was being targeted for a personal relationship as a means of obtaining a financial benefit. The claimant felt that this contravened the safeguarding rules.
10. What the claimant then says is that she had a conversation with Natalie Bailey about a number of matters. She says that this safeguarding issue was one of the matters disclosed, and that when she disclosed it, she was effectively making a protected disclosure on health and safety grounds. I refer to paragraph 46 of her witness statement for her account of the exchange.

11. On the respondent's side, I have the witness evidence of Ms Bailey [A64]. Attached to her evidence is a handwritten one page note which is said to have been written at the time of the relevant conversation, if not shortly thereafter [A66]. That forms the best contemporaneous evidence that I have to go off as to what was said during the conversation in question.
12. Essentially, the respondent's evidence is that it was a one-hour conversation between the claimant and Ms Bailey where the claimant 'went around the houses' talking about various things. Indeed in the handwritten note there is reference to the claimant "rambling" and coming back to the issues of Ms Buckley having had time off over Christmas, the extra marital affair and matters of that nature. There are references to other things (the employment situation of the chef (Mal) and there is also reference to Ms Bailey saying that she was not at liberty to discuss other staff members' private lives or private affairs). At the conclusion of the note it says that the claimant has been rambling, that it has ended up back on the subject of Jill at Christmas (i.e. Jill Buckley). There are three question marks to query "drunk?" It continues "Asked question, "have you been drinking?" The note then records "hung up" which is a reference to the claimant hanging up on the phone call.
13. The evidence that I have heard from the respondent is that the safeguarding issue was not discussed at this meeting, hence it does not appear in the note. Ms Bailey says that she would have noted it down if it had been said. She indicated that although the conversation took place over an hour, very little of substance was said because the claimant was going round the houses, going over the same ground. Hence the note discloses the salient points that were raised and does not keep referring to them or repeating them just because they were mentioned a number of times by the claimant. Ms Bailey maintains that if something had been said about safeguarding then it would have been in the handwritten note. She confirmed that the claimant was rambling and that is why she asked if the claimant had been drinking, and then the claimant hung up and stopped the conversation.

Conclusion

14. Where does this leave me? I have to make a finding of fact as to what was said during the relevant conversation before I can consider whether it amounted to a protected disclosure. I am afraid that I am unable (based on the evidence that I have seen and heard) to make a finding of fact that the safeguarding issue was raised at all with Ms Bailey on this occasion. Certainly if it came up at all it was so much 'in passing' that it did not make it into the note. Given the way that evidence has been given today (and the difficulty the Tribunal has experienced in establishing clarity with the claimant as to precisely what issues she raised with Ms Bailey during this conversation) it is credible to suggest that the claimant *did* 'ramble' during the course of this conversation. Ms Bailey's suggestion that no disclosure about the safeguarding was made (or that anything that was said was so minimal as to become lost in the wider complaints about the Jill Buckley and Christmas situation) is credible. I find Ms Bailey's evidence to be clearer, more cogent and more reliable than that of the claimant.

15. I am afraid I cannot make a finding (on the balance of probabilities) that a safeguarding issue was raised or that the claimant told Ms Bailey of her concerns that a vulnerable adult was being targeted for his money by Ms Buckley or her mother. Certainly, nothing said by the claimant in that conversation had enough substance to constitute a disclosure of information as required by the Employment Rights Act 1996. The relevant section requires a disclosure of information which, in the reasonable belief of the claimant, tends to show that the health and safety of any individual has been, is being or is likely to be endangered. I am not satisfied that the claimant has proven on the facts that she made a disclosure on this subject matter. I cannot, therefore, go on to analyse whether the disclosure qualifies for protection under section 43B. The case falls at the first hurdle.
16. I looked to see if there was anything else that would assist me in concluding that there were disclosures on other relevant matters in this case. The only other matters that were raised in Judge Tobin's Case Management Order as being potentially relevant were issues of bullying and harassment. However, that does not appear to be what was discussed during the relevant conversation either. The closest we get to that is a reference to the chef being set up to fail, with a question "what do you mean?" but there is nothing there to show a health and safety risk (which is said to be the type of protected disclosure relied upon by the claimant in her case.) Furthermore, if I were to consider section 43B(1)(b) we would then struggle to identify or find the relevant public interest element in this part of the conversation as it appears to relate specifically to a particular individual within the organisation with no wider implications.
17. All of the above leads me to conclude, as a finding of fact, that there was no relevant disclosure during this conversation. Given the claimant's failure to prove the necessary facts, it is not possible for me to apply the relevant legal principles to a putative disclosure in order to decide whether it qualifies for protection under section 43B. Rather, the claimant's claim fails at the first stage. This means that the claim of automatic unfair dismissal which is based on a protected disclosure must be dismissed on the basis that it has no reasonable prospects of success. There can be no automatic unfair dismissal claim relating to protected disclosures if there is no identified protected disclosure on which to base the claim.
18. That concludes my decision on this issue.

Employment Judge Eeley

Date: 8 March 2024

REASONS SENT TO THE PARTIES ON

20 March 2024

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