



EMPLOYMENT TRIBUNALS

Claimant: Ms L Duverge

Respondent: EDF Energy Plc

Heard at: Bristol **On:** 29 November 2017

Before: Employment Judge Mulvaney

Representation

Claimant: Mr Small, Counsel (for postponement application only)

Respondent: Mr Graham, Counsel

JUDGMENT

The application to postpone the hearing made on behalf of the claimant was refused. The claimant's representatives' application for release from further participation in the hearing was granted.

The claim of wrongful dismissal was dismissed having been withdrawn earlier in the proceedings

The claim of automatic unfair dismissal by reason of making a protected disclosure was dismissed.

REASONS

1. By a claim form dated the 7 February 2017, the claimant brought claims of automatic unfair dismissal and wrongful dismissal, following the withdrawal of a job offer from the respondent on the 2 November 2016, the day before the claimant was due to commence working for it.
2. The claimant had been recruited as Senior Supply Chain Specialist by the respondent to work at Barnwood, Gloucestershire.
3. A preliminary hearing on this case took place on the 2 June 2017 before me. At that hearing it was confirmed that the claimant had withdrawn her claim of wrongful dismissal.

Issues

4. The issues to be determined in relation to the automatic unfair dismissal claim were identified as:

Protected disclosure

5. Did the claimant make a protected disclosure?
6. If so did the alleged disclosure, in the claimant's reasonable belief, tend to show that one or more of the categories of wrongdoing set out in s43B(1) Employment Rights Act 1996 ("ERA") was taking place or was likely to take place?
7. If so was the disclosure made in good faith?

Unfair dismissal under s103A ERA

8. Was the claimant dismissed by the respondent?
9. If so was the claimant's alleged protected disclosure the principal reason for the dismissal?
10. The burden lies on the claimant to prove both that she made a protected disclosure and, if she does so prove, that the protected disclosure was the reason for her dismissal

Postponement Application

11. The claimant did not attend the court on the day of the hearing. Her solicitor and her counsel were both in attendance as were the respondent's witnesses and representatives. At 10:11a.m. an email was received in the tribunal office from the claimant in which she explained her concerns about the respondent's response to the disclosure process and then stated:

"EDF have also applied increased pressure towards me saying they would apply for up to £25,000 costs if I attend and lose. As I do not have work or funds I would find this impossible to do and feel I have no other choice but to withdraw my claim and to that end accepted EDF offer to accept zero compensation on the basis I would not be pursued for up to £25,000 yesterday (Tuesday 28 November 2017).

EDF are now saying I should agree further terms such as to accept withdraw my complaint with the ICO."

12. Both the claimant's representatives and the respondent's representatives confirmed that whilst there had been settlement discussions between the parties up until past 10:00p.m. on the 28 November 2017, no settlement agreement had been concluded. The claimant's representative said that it had been made clear to the claimant that she was expected to attend court today for the hearing. The claimant's representative had no instructions in relation to a withdrawal of the claim nor agreement of settlement terms and was unable

to contact the claimant on the morning of the hearing despite attempting to do so. The Tribunal office sent an email to the claimant stating that her intentions were not clear from her email and asking her to confirm by 11:15am whether she was withdrawing her claim. She was told that if the Tribunal heard nothing further the Tribunal would hear the case in her absence. An out of office reply was received from the claimant's email and a call was made to her mobile phone and a message left. No response was received from the claimant by the Tribunal and the hearing began at 11:30am.

13. The claimant's representative made an application for a postponement at the start of the hearing in the light of the claimant's non-attendance which he said must be because of her being confused. For the following reasons the Judge refused the postponement application: the absence of any clarity from the claimant as to her intentions in the case, it not being clear whether her email amounted to notification of withdrawal of her claim; the respondent and the claimant's representatives having confirmed that there was no settlement agreement in place; the claimant having been told by her representatives that she would be expected to attend the hearing; the respondent having incurred the costs and suffered the inconvenience of attending court for the hearing; and there being no indication from the claimant's email that she was seeking a postponement. I therefore concluded that the hearing must proceed in the claimant's absence and I refused the postponement application.
14. The claimant's representatives then applied to be released from attendance at the hearing as they had no instructions as to how to proceed and their application was granted.

Evidence

15. A witness statement for the claimant was provided on the day of the hearing. It was unsigned. Evidence for the respondent was heard from Simon Lewis, who worked in a management position in the Supply Team in 2003/2004 and from Graeme Bellingham, Supply Chain Director.

Findings of fact

16. The claimant had worked as a Senior Supply Chain Specialist for British Energy (later acquired by the respondent in 2010) from April 2001 until her dismissal in April 2004. Her work location was Barnwood, Gloucestershire.
17. The claimant in her ET1 asserted that she had been dismissed by the respondent in 2004 because she had made protected disclosures. The reason given by the respondent for the claimant's dismissal in 2004 was performance/capability, following the application of the respondent's capability procedure. The claimant had appealed her dismissal at the time. She had been assisted by Union representatives at the appeal and also with their assistance had submitted an unfair dismissal claim to the Employment Tribunal asserting that the respondent had failed to take account of health issues or to provide support or training to the claimant. The claim was settled by the respondent through a COT3 agreement without admission of liability for £400. The claimant did not refer in her appeal or in her 2004 ET1 to her belief that the reason for her dismissal was that she had made protected disclosures.

18. In 2016 the claimant applied for the role of Senior Supply Chain Specialist with the respondent based at Barnwood in Gloucestershire. The recruitment process was run by Mr Harris, (IT Supply Chain Manager for the respondent). Her appointment was confirmed as unconditional on the 29 September 2016 and she was due to start work on the 3 November 2016. On the 2 November 2016, the claimant was notified that the job offer was withdrawn and the reason given by letter dated 5 November 2016 was “*following a review of your previous employment [2001 -2004] with British Energy (now part of EDF Energy)*”. The claimant contends that the reason for the withdrawal of the offer and her dismissal was the fact that she had made public interest disclosures in 2003.
19. The respondent’s evidence was that at a Leadership Conference on the 1 and 2 November 2016, attended by Mr Lewis and Mr Harris, Mr Harris mentioned the claimant’s name as a new person joining the Barnwood team. Mr Lewis told Mr Harris that the claimant had been dismissed from a previous role at Barnwood for poor performance. Mr Bellingham was informed and it was decided that in the circumstances it was inappropriate to reappoint the claimant. Her offer of employment was then withdrawn.

2003 Disclosures relied on by the claimant

Disclosure 1

20. In a Scott Schedule provided in the course of these proceedings, the claimant said that she had raised concerns to Mr Lewis in May 2003 that the tender proceedings and contract award in relation to the Sizewell Plant Reactor procurement were in contravention of Council Directive 93/38/EEC of 14 June 1993. The claimant’s concern appeared to be primarily that pricing negotiations had taken place after receipt of tender documentation from interested parties.
21. Mr Lewis denied that any such concern had been raised with him. There was no documentary evidence to support the claimant’s claim that she had raised such a concern with Mr Lewis. Although the claimant referred in her witness statement to having made a reference to her concerns in her comments on her appraisal on 9 May 2003 (p58), there is no reference to the concerns described in the Scott Schedule; there was no specific date or meeting or form of words given by the claimant to identify more specifically the disclosure event. Based on the evidence before me, I found that the claimant had not raised the alleged concern with Mr Lewis.
22. Mr Lewis’ evidence was that under the respondent’s procurement procedures which complied with the EC Directive they followed a negotiated procedure which allowed negotiations on price after receipt of tender documentation. It was the respondent’s contention that the claimant would have been aware of this and therefore, even if she had raised such a concern (which Mr Lewis’ evidence was that she had not), she could not have held a reasonable belief that the information she gave tended to show a breach of a legal obligation. In the absence of the claimant, I was unable to make a finding of fact on that point.

Disclosure 2

23. The claimant said that between May 2003 to September 2003, she had reiterated the disclosure 1 concerns about irregularities in the tendering process to Mr Lewis, Mr Walton and Mr Ford. Once again there was no written documentation to support the claimant's evidence that she had made such disclosures, nor any description of the specifics of such disclosures. The respondent denied that such disclosures had been made, and in the absence of any sworn evidence from the claimant at the hearing I found that the claimant had not established that such disclosures were made.

Credibility

24. I had some concerns about the claimant's credibility. There was no evidence that the claimant made any reference during the dismissal process in 2004 that she believed that she was being dismissed because she had raised the concerns described above. In her witness statement, she stated at paragraph 36 that (when she was placed on a capability review in August 2003): *"That's when it dawned on me that I wasn't just going to be punished for my disclosure but management were taking actions to get rid of me"*.
25. The claimant was assisted through the capability process by the Union who helped her with the dismissal hearing and an appeal in 2004, but no mention was made of her belief as to the true reason for her dismissal. The claimant then brought an unfair dismissal claim in 2004, again assisted by the union in which no mention was made of whistleblowing. The claimant said in her statement for these proceedings that she was unaware at the time of the word 'whistleblowing' or that any complaint could be made about it. Even if this were true, her union representatives would or should have been aware of the rights to protection from dismissal afforded to employees who have made public interest disclosures, had she mentioned her concerns to them. Had this been a true concern of the claimant's at the time, I concluded that the claimant or her union representative would have raised it.
26. In the circumstances, I was not satisfied that the evidence supported the claimant's assertion that she believed that her dismissal in 2004 was because she had made a disclosure.
27. In addition, the manner in which the claimant referred to her 2004 capability dismissal in her 2016 particulars of claim appeared disingenuous. She stated in the 2016 particulars of claim *"While I did leave in 2004, I did not feel this was performance related."* She did not refer in the particulars to the fact that she had been taken through all stages of the respondent's capability process prior to her eventual dismissal by the respondent in April 2004 for performance related reasons.
28. I was satisfied based on the evidence of Mr Lewis and Mr Bellingham for the respondent that the claimant's dismissal in 2016 was because she had been dismissed for poor performance in 2004 and that in those circumstances it was considered to be inappropriate and undesirable to reappoint her in the same location where a number of the same employees who had worked there with the claimant were still working. I found no evidence to support the

claimant's assertion that her dismissal in 2016 was because she had made a protected disclosure in 2003.

Conclusion

- 29. In reaching my conclusions I considered the evidence that I heard and the documents to which I was referred. I also had regard to the submissions of the respondent. I had regard to the claimant's ET1, the Scott Schedule and her witness statement but the weight that I attached to the contents of those documents was severely limited as the claimant was not in attendance to swear to the truth of her evidence or be cross examined on it.
- 30. I concluded that the claimant had not discharged the burden on her to prove that she had made protected disclosures. There was no independent evidence to back up her assertions that she had made the disclosures in 2003 that she relied on and, as her assertions as to the making of those disclosures were denied by the respondent, I concluded that no protected disclosures were made.
- 31. Even if the claimant had discharged the burden of proof and established that she had made the 2003 disclosures that she relied on, she would still have had to face the hurdle of establishing that those disclosures were the reason for her dismissal in 2016. I was satisfied on the respondent's evidence that the reason for the claimant's dismissal in 2016 was the fact that she had been dismissed for performance related reasons in 2004 and that it was not appropriate to reappoint her to work at the same location.
- 32. The claimant's claim for automatic unfair dismissal under s103A Employment Rights Act 1996 does not succeed and is dismissed.

Employment Judge

Date 30 November 2017

JUDGMENT & REASONS SENT TO THE PARTIES ON
.....1 December 2017.....

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FOR THE TRIBUNAL OFFICE