



EMPLOYMENT TRIBUNALS

Claimant: Mrs L J Welsh

Respondent: Heart of England NHS Foundation Trust

Heard at: Birmingham **On:** 7 December, 10 to 14
December and 17 to 19 December
2018

Before: Employment Judge Butler

MEMBERS: Mr S G Woodall
Mr P M Davis

Representation
Claimant: In person
Respondent: Ms H Barney (Counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that: the claimant suffered detriments as a result of making protected disclosures is not well founded and is dismissed.

REASONS

The Claim

1 By a Claim Form submitted on 17 May 2017, the claimant made claims of unfair dismissal, automatic unfair dismissal, breach of contract and detriment and/or dismissal as a result of making protected disclosures. The respondent resisted all claims.

2 At a Preliminary Hearing on 22 February 2018, Employment Judge Jones found that the Tribunal had no jurisdiction to hear the claims of unfair dismissal, automatic unfair dismissal and breach of contract as they were out of time. The claimant had not shown that it was not reasonably practicable to present her claims before the end of the 3 months' period prescribed by section 111(2), Employment Rights Act 1996 (ERA).

The Issues

3 The agreed issues were appended to the Case Management Order made by E J Self on 20 November 2018. The issues comprised a list of the 5 protected disclosures allegedly made by the claimant followed by a list of the 24 detriments she claims to have suffered.

4 There is also the issue of whether the claim was made within the prescribed time limit of 3 months from the act complained of.

5 The alleged disclosures and detriments required the Tribunal to make findings of fact and it considered in detail below.

The Law

6 Section 47B (1) ERA provides that

“a worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his or her employer on the ground that the worker has made a protected disclosure.”

7 Section 43B ERA defines a qualifying disclosure as -

“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 which are relevant to this case:

- (i) that a criminal offence has been committed, is being committed or is likely to be committed;
- (ii) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject;
- (iii) that the health or safety of any individual has been endangered, is being or is likely to be endangered; or
- (iv) that information tending to show any matter falling within any one of these has been, is being or is likely to be deliberately concealed.”

8 A complaint that a worker has been subjected to a detriment for making a protected disclosure must be presented before the end of 3 months beginning with the date of the act or failure to act to which the complaint relates by virtue of section 48(3) (a) ERA. This is subject to section 48(3) [(b)] ERA which gives the Tribunal power to extend the time limit if it is satisfied that it was not reasonably practicable for the complaint to have been presented in time.

9 We have considered the judgment of the ETA in Blackbay Ventures Ltd v Ms K Gahir UK EAT 0449/12/JOJ which gives guidance on the approach to be taken in whistle blowing cases in, inter alia, identifying each disclosure and detriment.

10 We also considered the judgment of the court of appeal in NHS Manchester v Fecitt & Others [2011] EWCA CIV 1190 where it was held whether the alleged disclosure was the sole or principal reason for the subsequent detriment must be addressed by the tribunal.

The Evidence

11 There was an agreed bundle of documents of 1,227 pages and references in this judgment to page numbers are to page numbers in that bundle.

12 We heard evidence from the claimant and for the respondent from:

Ms Paula Stewart, Delibery Suite Coordinator
Miss Sylvia Owusu-Nepaul, Acting Matron
Ms Claire Westwood, Midwife
Ms Margaret Flatley, Midwife Support Worker (referred to as a circulator)
Mr Paul Edwards, Senior Operating Department Practitioner
Ms Rachel Chitima, Matron and the Investigating Officer
Ms Wendy Taylor, Midwife
Miss Tracey Nash, Associate Head of Nursing and Midwifery for Women's Services, Mr Steve Waller, General Manager, Radiology and Laboratory Medicine and Chair of the Disciplinary Panel, Miss Paulette Gent, Senior HR Manager, Ms Janet Pollard, Lead Midwife Governance and Quality, Ms Joselle Wright, Consultant Midwife.

13 The witnesses produced Witness Statements and gave oral evidence including under cross examination.

14 As for the claimant's evidence, we regret we found it at times to fall into the realms of fantasy and fiction and at other times to lack plausibility or credibility. We found her to be evasive under cross examination, prone to embellishment and reluctant to allow a question to be finished before giving the answer she wanted the Tribunal to hear, rather than answering the question.

15 Examples of the serious short comings in the claimant's evidence include the following:

(i) Generally referring to surgeons as regularly stealing instruments and selling them on E bay (259). In particular, she suggested that Dr Garber, who performed the surgery on 28 March 2015, had the missing instrument secreted in his hand at the end of the surgery as she notice his hand was bent like a hook so as to conceal what was in it. In contrast, the claimant suggested in response to a direct question from the Employment Judge that it was possible that a complete stranger had ____? during the caesarean section and taken the instrument returning 2 days or so later to put it back and send it for sterilization.

(ii) Complete strangers regularly walked into the theatre in the delivery suite and did so whilst surgery was being carried out. Given the security arrangements to actually get into the delivery suite this allegation did not seem at all credible. We noted that during the surgery on 28 March 2015, the claimant alleged, trying to prove her point, that there was a tall black man in theatre whom she did not know and did not challenge but who was actually the patient's partner.

(iii) Before they had regularly worked on the same shift and before any disagreement between them, Miss Flatley shouted along the corridor to the claimant that she would get her struck off. The claimant gave absolutely no explanation or assumption as to why Miss Flatley might behave in this way.

(iv) She was laughed at by members of the Panel in her disciplinary hearing and by Mr Waller in particular and Miss Gent called her a "whore". The claimant was accompanied by an experienced union representative who said nothing in

response to this and it was not raised by an even more senior union official at her appeal.

(v) She implied that Miss Gent was drunk in the disciplinary hearing and that Miss Flatley collapsed when she entered the room to give evidence. There was no corroboration in relation to Miss Gent and the evidence was that Miss Flatley did not collapse but tripped over a cable on the floor on entering the room.

(vi) The claimant said that in a meeting in around March 2016, Ms Nash pulled a "silver object, from her pocket and threw it at the claimant narrowly missing her face. She then said she was threatened by Ms Nash who told her in an aggressive manner that she should "button it". The claimant then changed her evidence to say that the object was not thrown at her but did not elaborate further as to how it came to be close to her face.

(vii) Miss Pollard roughly grabbed her arm in a corridor on a date unknown causing pain and shock. Both this allegation and the previous one could result in serious consequences for Ms Nash and Ms Pollard; yet no further action was taken by the claimant, even though they would have constituted a criminal offence.

(viii) Despite being dismissed by the respondent the claimant said on her application for employment with the Spire Hospital that she had left her employment by reason of organizational and management changes (1069). This was untrue.

(ix) The claimant alleged that documents in the bundle had been amended by the respondent before being sent to her. This was a serious allegation raised on 2 occasions when she was faced with a difficult, but relevant, question from Miss Barney. She was unable to point to a single specific example of where this had happened.

16 The claimant also showed herself to be incapable of accepting any responsibility for anything that went wrong and in which she was involved, preferring to seek to apportion blame to others. For example, she criticized Miss Flatley for her conduct in saying she had not completed the instrument check with the claimant on 28 March 2015 when the claimant initially said that this check had been done. Her criticism of Miss Flatley extended to reporting her alleged misconduct and suggesting she was unfit for theatre duty. Further, when it was suggested that she dropped an instrument in theatre, she sought to blame the person who had assembled it, saying it fell apart in her hand (506) notwithstanding evidence to the contrary from witnesses who were there.

17 We also noted the claimant's reluctance to accept the obvious when her performance was in issue. For example, when challenged by Miss Barney to concede that 2 witnesses interviewed in connection with the investigation into the events of 28 March 2015, had given a remarkably consistent account of her checking process, the claimant denied that this was the case even though the interview notes clearly showed otherwise.

18 By contrast, the respondent's witnesses gave their evidence in a straight forward, concise manner without any visible or audible attempt to discredit the claimant other than to convincingly deny her allegations. There was not one of these witnesses who gave the slightest impression that they were not being truthful even in the face of some of the more outrageous allegations made by the claimant.

19 It follows that we found the claimant's evidence in its entirety to be completely unreliable. Accordingly, where there was a conflict in the evidence between the Parties, we preferred the evidence of the respondent's witnesses.

20 The Facts

In relation to the issues before us, we find the following facts:

(1) The claimant was employed as a registered operating department practitioner in the respondent's maternity and obstetrics department at Good Hope Hospital. The respondent is an NHS Trust. Her employment commenced on 26 August 2008 and continued until her dismissal on 21 July 2016.

(2) On 28 March 2015, the claimant was in theatre on the nightshift when the patient was brought in for a category 1 emergency caesarean section. The claimant's duties included carrying out the checking of the number of instruments in theatre. This was done with Miss Flatley, a maternity support worker. Before the check had been finished, which involved calling out each instrument and ticking it off on the check list, Miss Flatley was asked to leave the theatre to fetch a pair of gloves the doctor gave her who was performing the surgery. The instrument check was not completed in accordance with the respondent's policy and we do not accept the claimant's evidence that it was. Rather, if it was done at all, she did it herself.

(3) At the end of the surgery, the claimant said that of the 5 curved artery forceps (clips) present at the beginning, only 4 were present at the end. A portable x ray machine was requested to x ray the patient to check whether the clip was inside her and when that was not conclusive a second x ray had to be carried out. This resulted in the clip being confirmed as not inside the patient who had been left with an open wound for several hours.

(4) On 30 March 2015, the claimant submitted a Datix incident form (221) stating the instrument count had been properly carried out. This was not the case.

(5) Miss Pollard commissioned an investigation and a root cause analysis. The investigation was carried out by Ms Chitima (847) and upon reviewing it Miss Pollard suspended the claimant who remained on suspension for some 6 months. (285).

(6) The suspension was lifted by a letter of 2 February 2016 (474c) when the claimant went to Heartlands Hospital for refresher training as a supernumerary to bring her competencies up to date. Her professional practice and destructive conduct were quickly criticized by staff at Heartlands.

(7) Upon reviewing the investigation report Miss Pollard decided that the claimant should attend a disciplinary hearing (927) to answer allegations, inter alia, that she failed to undertake an instrument count with Miss Flatley on 28 March 2015, had breached the Trust's policy on accounting for swabs, packs, sharps and instruments during sterile procedures and, on 7 July 2015 had entered patient details on to the wrong patient's record. (8). The disciplinary hearing was held on 20 July 2016 (1005) and the claimant was accompanied by Ms Brewer, a trade union official. She had presented her statement of case (985) which we find was not amended or changed in any way by the respondent. The outcome was that the claimant was summarily dismissed (1021).

(8) The claimant's appeal (1031) and that the Hearing on 9 November 2016 (1139) she was accompanied by Mr L Williams, a trade union official. Her appeal was dismissed (1151).

(9) The claimant subsequently applied for a position at Spire Hospital and was appointed subject to references. Ms Wright was contacted for a reference even

though she had not been the claimant's line manager at the time of her dismissal. Ms Wright took advice from HR and confirmed the claimant had been dismissed which was at odds with the claimant's stated reason for leaving on her application for, namely, that there had been organizational and management changes of the respondent.

(10) For the avoidance of doubt, we do not find that the claimant's letter of resignation (217) was ever sent to the respondent.

21 The Claimant's alleged protected disclosures

In relation to the claimant's alleged disclosures, we find as follows:

(1) We accept she completed the Datix incident report relating to the missing clip which wrongly stated the instrument count had been correctly carried out.

(2) We do not find the claimant reported issues with door access to the theatre area or that third parties ever entered restricted areas in the maternity unit.

(3) We do not find the claimant ever disclosed to Mr Edwards or Ms Owusu-Nepaul information showing Ms Pollard concealed the disappearance of the clip thereby endangering a patient's health and safety.

(4) We do not accept that the claimant reported serious I.T. disruptions to Ms Owusu-Nepaul.

(5) We do not accept that she reported dangerously low levels of staffing and serious I.T. disruptions to Ms Owusu-Nepaul and one other.

22 The Claimant's alleged detriments

In relation to these alleged detriments:

(1) We do not find that Miss Flatley ever threatened the claimant or said she would get her struck off in March 2015 or at any other time.

(2) We do not find the claimant's request to rotate back on to day shifts was repeatedly refused in March 2015.

(3) We do not find that in April 2015, Miss Flatley made any further threats to the claimant which made her fearful for patients' safety or that the claimant reported them to anyone.

(4) We do not find that Miss Flatley threatened and intimidated the claimant in March/April 2015.

(5) We do not find that in May 2015, the claimant was called a prostitute or otherwise abused by other night staff or that she reported this alleged abuse to anyone.

(6) We do not find that on 13 May 2015 or on any other dates Miss Stewart tried on several occasions to send her to work a shift at Heartlands Hospital or that such action would have left the theatre at Good Hope Hospital unsafe,

- (7) We do not find that the claimant found an email from Mr Edwards in a corridor.
- (8) We do not accept that in May 2015, Miss Taylor screamed at and intimidated the claimant over theatre keys.
- (9) We do not find that in May 2015, Miss Westwood threatened the claimant claiming the claimant's job was hers and she needed the money and the claimant had to go or that this was recorded to Miss Owusu-Nepaul.
- (10) We do not find that on 7 July 2015, Miss Pollard made malicious allegations against the claimant, that she was singled out for investigation or that she was marched off the premises.
- (11) On 4 February 2016, we do not find the claimant's job had been allocated elsewhere.
- (12) We do not find that on 23 February 2016 the claimant was repeatedly called into the office.
- (13) We do not find that Ms J Paintain produced a report claiming the claimant suffered from learning difficulties.
- (14) We do not find the claimant was referred to Occupational Health on 14 March 2016 and was alleged to have learning difficulties.
- (15) We do not find that on 14 March 2016, Miss Nash threatened the claimant with a silver object which almost hit her in the face.
- (16) We do not find that Miss Pollard announced to staff that the claimant was under investigation and there were concerns about her practice.
- (17) We do not find Miss Pollard ever grabbed the claimant in the corridor.
- (18) We accept the claimant completed her competencies up date at Heartlands but was not threatened by staff at Good Hope Hospital. We accept that maternity staff may well not have wanted to work with the claimant due to her own disruptive behavior.
- (19) We do not accept the claimant resigned on 21 May 2016 or that Miss Pollard made malicious allegations in 2015.
- (20) We do not find that on 21 June 2016, Ms Chitima had gathered partial information and orchestrated an unfair and detrimental finding.
- (21) On 20 July 2016, none of the disciplinary Panel made comments such as calling the claimant a whore or laughing at her.
- (22) On 21 July 2016, Miss Pollard did not instruct the disciplinary Panel to dismiss the claimant.
- (23) In November 2016, the claimant did not see Miss Pollard in the car park at Spire Hospital.
- (24) Neither on 10 February 2017, nor at any other time did Ms Wright or others of the respondent staff tell Spire Hospital the claimant was on a performance improvement plan or needed support and constant supervision.

23 For the respondent, Miss Barney relied heavily on her written submissions and additionally submitted the claimant's claims were out of time.

24 The claimant relied on her own skeleton argument.

Conclusions

25 It can be seen from our findings of fact that we accept that the claimant submitted a Datix incident report 2 days after the incident involving the missing clip. This is certainly capable of being a qualifying disclosure. However, to be so it must have been made in the public interest. We have already noted the claimant's propensity for avoiding criticism of her own work and it is our considered view that, in this respect, the claimant submitted the Datix form to protect herself, especially since she carefully noted (223) "See section set 1st count correct, or instruments present in tray". We found as fact that she did not complete the check in accordance with recognized policy. Accordingly, submission of the form was not a qualifying protected disclosure.

26 In relation to the remaining 4 alleged disclosures, we have found that they simply were not made. The claimant's evidence was that she made them to various staff members orally. There is no corroboration to support her and in each case the respondent's witnesses stated convincingly that no such disclosures were made.

27 It follows that, if there are no disclosures, there can be no detriments arising from them and on this basis the claims must fail.

28 For the avoidance of doubt, however, we have considered each of the claimant's alleged detriments and, due to the unreliability of her evidence, concluded that they simply did not happen. Put bluntly, they were a fiction.

29 We also bear in mind that the claimant confirmed in evidence she was fully aware of the respondent's whistle blowing policy and, despite the serious nature of her alleged disclosures and the detriments she said she suffered, she chose not to report any of them under the policy. This in itself would be very surprising if the allegations were true. We also note that the claimant made no mention of the alleged disclosures in either her disciplinary or appeal hearing.

30 The claimant has made some serious allegations against a number of staff including Miss Flatley, Miss Pollard, Miss Nash and Dr Garber and has heavily criticized others including calling some liars. For the record, we find these allegations to be a fiction and without any substance whatsoever.

31 There were time limit points to be considered in this Hearing. Clearly, all of the alleged detriments, bar the final one, were out of time. As the claimant was advised by her union throughout and had advanced no further argument, there was no claim that it was not reasonably practicable to submit her Claim in time. In relation to the 24th alleged detriment which might have been in time, since we have found it did not occur, the point is academic.

32 For the above reasons the Claim fail and is dismissed.

Employment Judge Butler
04 January 2019