



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Charmaine Smith

**Respondents:** (1) Wellspring Care Services Ltd  
(2) Caerus Life Care Ltd

## RECORD OF AN OPEN PRELIMINARY HEARING

**Heard at:** Watford

**On:** 17 July 2020

**Before:** Employment Judge Alliott (sitting alone)

**Appearances:**

For the claimant: In person

For the respondent: Mr Alan Williams (Solicitor)

## JUDGMENT

The judgment of the tribunal is that:

1. The claimant has withdrawn her whistleblowing claim and it cannot be reinstated. As such it is ended. For the avoidance of doubt no judgment dismissing the claim is made.
2. Permission is granted to the claimant to amend her claim to include a claim of sex discrimination. The details of the alleged treatment will be set out in the list of issues.
3. The claimant's claim for notice pay is well founded and the first respondent is ordered to pay her the sum of £425.00.
4. The claimant's claims for discrimination on the grounds of marriage/civil partnership are dismissed upon withdrawal.

## REASONS

1. The claimant's whistleblowing claims:

- 1.1 In her claim form the claimant presented claims for automatically unfair dismissal and/or detriment for making protected disclosures (whistle blowing).
- 1.2 On 19 July 2019 the employment tribunal sent out a notice of preliminary hearing to be heard on 21 February 2020. A blank agenda for case management was sent out to the parties.
- 1.3 In due course the claimant returned a handwritten agenda for the case management but on 19 February 2020 the claimant submitted a typewritten document headed "Agenda for Case Management at Preliminary Hearing". In that document the following is set out:-

"Whistleblowing: See ET1 form. Claimant wishes to withdraw claim of whistle blowing; as claimant fears for her safety and that of her family following past and present news reports of this nature. However respectfully submits this led to the respondents restricting use of claimant's Wellspring work email, untoward behaviour toward claimant."

- 1.4 That document was followed up in the early hours of 20 February 2020 with an email that stated:-

"Please note: whistleblowing claim withdrawal of claim and statement made on the attached agenda is strictly private and confidential.

Taking into account the nature of this claim. At the tribunal I would respectfully ask that it is stated that "the claimant has been advised to withdraw the claim of whistleblowing" in relation to her claim solely."

- 1.5 Later on 20 February 2020 at 14:01 hours the claimant sent an email stating:

"Upon careful consideration and making and (sic) informed decision myself the claim of whistleblowing will be pursued. Sorry for any inconvenience with the agenda: however this is a prominent part of my claim made in good faith and I do not wish to retract it.

Please place this item back on the agenda for full consideration. As discussed with Watford Tribunal today I will have a discussion with Employment Tribunal Judge for this claim to be reinstated."

- 1.6 On 21 February 2020 Employment Judge Smail held the closed preliminary hearing. In his case summary he states:-

"The claimant claims a series of detriments and ultimate dismissal resulting from this and kindred disclosures. The problem is that the claimant purported to withdraw the whistleblowing claim by email and then in a list of issues for a case management agenda, but then shortly thereafter purported to withdraw the withdrawal.

6. Mr Aireton, on behalf of the respondent says it is not possible to withdraw the withdrawal and that is the end of the whistleblowing claim. The claimant is shortly to take advice from an employment lawyer at the Citizens Advice

Bureau and it seemed to me appropriate for her to take advice as to whether there is a way around her withdrawal.”

- 1.7 Rule 51 of the ET’s (Constitution and Rules of Procedure) Regulations 2013 provides as follows:-

“51. End of claim

Where a claimant informs the tribunal, either in writing or in the course of a hearing, that a claim, or part of it, is withdrawn, the claim, or part, comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order.”

- 1.8 The IDS Employment Law Handbook on Practice and Procedure provides at paragraph 4.92 as follows:

“Where a claimant informs the tribunal that a claim (or part of it) is withdrawn, the claim (or part) comes to an end, subject to any application that the respondent may make for a costs, preparation time or wasted costs order... Once withdrawn, the tribunal has no power to set aside the withdrawal so as to “reactivate” the claim – Khan v Heywood and Middleton Primary Care Trust 2006 ICR 543, CA.”

- 1.9 In my judgment the statement by the claimant in both her typed agenda and in her email constituted unequivocal withdrawal of her whistleblowing claims. Although the claimant refers to fears for her safety it would appear that that statement arises out of news reports and there is no suggestion of any duress or other improper pressure being applied on her to withdraw her claims.

- 1.10 Consequently, and based on the authority of Khan, I have concluded that the claim has been withdrawn, that it therefore has come to an end and I have no discretion whether or not to reactivate it.

- 1.11 The claimant has invited me to allow her whistleblowing claims to proceed under the discretion provided in Rule 52. However, I have explained to the claimant that Rule 52 is merely concerned with whether or not a judgment should be made dismissing the claim after it has come to an end following a withdrawal. I have decided that it would be in the interests of justice not to make a judgment dismissing the claims for whistleblowing. My reasons are that the claimant clearly feels that she has a claim to be advanced under this head and I would not want to preclude it by virtue of res judicata alone.

## 2. Amendment

- 2.1 The claimant told me that she had ticked the discrimination on the grounds of marriage and/or civil partnership box in the claim form in error and what should have been ticked was the sex discrimination claim.

- 2.2 I have been through the original claim form with the claimant in order to identify those allegations of treatment she wishes to rely upon in support of her sex discrimination claim. The first nineteen that appear in the list of issues do arise from the facts pleaded in her original claim form.

Allegations 20-24 are new. However, Mr Williams has indicated that his clients are prepared to deal with these extra allegations and consequently I will allow them. In my judgment the amendment to present a sex discrimination claim is merely a relabelling exercise and consequently I will allow the amendments.

3. Notice pay

3.1 The claimant has shown me a letter dated 2 April 2019 wherein the respondents have asserted that due to her absence without permission on 2 April they have concluded that the claimant has terminated her employment by her own volition. In essence, I understand that the claimant had requested to work from home on Monday 1 April 2019 due to her dependent children being ill. Whilst it is possible for the absence of an employee to become an unambiguous resignation, in my judgment absence for one or possibly two days cannot conceivably begin to be sufficient for an employer to conclude that the employee has resigned. By reference to the IDS Unfair Dismissal Handbook at 1.22 in citing the case of Harrison v George Wimpey & Co Ltd [1972] ITR 188 Sir John Donaldson said:

“Where an employee so conducts himself as to lead a reasonable employer to believe that the employee has terminated the contract of employment, the contract is then terminated.”

3.2 The NIRC upheld a tribunal’s finding of implied resignation by H, but also pointed out that the employer was under a duty to make enquiries and to warn the employee of its intentions

3.3 In practice, however, it is only in exceptional circumstances that resignation will be the proper inference to draw from an employee’s conduct.

3.4 In my judgment there are no such exceptional circumstances in this case and it is inevitable that the claimant will be found to have been dismissed by the respondent.

3.5 No notice pay was paid. The claimant was entitled to one week’s notice. Accordingly, I will give judgment for the claimant for the sum of £425 representing one week’s notice not paid.

4. The claimant has also presented claims for holiday pay, overtime pay, pay for 21 and 22 March 2019 and a claim for expenses. Unfortunately, it has not been possible for me to reach a concluded decision on these issues.

5. Holiday pay

5.1 As will become apparent from the list of issues relating to sex discrimination, one of the allegations of unfavourable treatment relates to the claimant asserting that she was prevented from taking holiday. The claimant’s contract of employment expressly provided that holiday pay could not be rolled over. The holiday year was from 1 April to 31 March and of course the claimant was dismissed on 2 April, two days into the

holiday year. Further, Regulation 13(9)(a) of the Working Time Regulations provides that the statutory basic annual leave entitlement of four weeks may only be taken in the leave year to which it relates. Nevertheless, the March 2019 edition of the IDS Employment Law Handbook on Working Time suggests that recent European Court of Justice decisions may allow a private sector employer to argue that unused holiday entitlement should be rolled over into the next leave year. One of the situations cited relates to where the employer does not give the worker an effective opportunity to take annual leave. At 4.16 the following is suggested:-

“This raises the possibility that, even if it were not possible to disapply Regulation 13(9)(a) by means of a purposive interpretation, a worker who had been effectively prevented from taking his or her Regulation 13 leave could rely directly on the EU charter to enforce the right to carry over paid annual leave in line with the jurisprudence of the ECJ.”

5.2 Accordingly, in my judgment, this matter should be left over to the full merits hearing.

6. Expenses

6.1 According to the claimant, following the preliminary hearing in February the claimant was told to submit an expenses form for March 2019 and this would be considered by the respondents. In the circumstances I have deemed it expedient to give the claimant an opportunity to submit a claim for her expenses and, if it is not paid, then she can pursue this at the full merits hearing.

7. Overtime and pay for 21/22 March

7.1 As regards the overtime and pay for 21 and 22 March claims, in her schedule of loss the claimant has set out details of her claims as to when she says she worked in excess of her contractual hours and asserts that she was not paid for working those hours. In addition, the claimant has set out in her witness statement a large amount of evidence which she says indicates that she was working on 21 and 22 March. I shall order the respondents to provide a detailed response to both her overtime claim and her claim for pay for two days on 21 and 22 March and accordingly those issues will be determined at the full merits hearing.

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**Employment Judge Allott**

Date: ...4 September 2020

Sent to the parties on:

7 September 2020

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For the Tribunal:

J Moossavi

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