



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr S Payne

Respondents

Pilgrims Corner Limited

Mrs Sarah Norman

and

PRELIMINARY HEARING

Preliminary Hearing (Case Management)
held by telephone at Croydon on 22 November 2018

Representation

Claimant:

Mr J Gidney, Counsel

Respondents:

Ms A Okill, Solicitor

Employment Judge Harrington

JUDGMENT

1. The Claimant's application to amend his claim to bring a claim of public interest disclosure detriment, as agreed by the Respondent, is allowed.
2. The Claimant's application to join Mrs Sarah Norman as a Respondent to his claim for public interest disclosure detriment is allowed.

Note: Reasons for the decision having been given orally at the hearing, written reasons will not be provided unless a written request is received from either party within 14 days of the sending of this record of the decision.

CASE MANAGEMENT SUMMARY

- 1 By an ET1 received on 10 January 2018 the Claimant brings claims of unfair dismissal, automatic unfair dismissal, public interest disclosure detriment and a failure to provide a written statement of terms and conditions of employment. The Respondents deny the entirety of the claims.
- 2 At today's hearing, the Tribunal proceeded to consider the Claimant's application to join Mrs Sarah Norman as a respondent to the claim of public interest disclosure detriment. Both parties consented to this application being determined at this telephone hearing and after due consideration, I allowed the application. An earlier application to amend the claim dated 23 May 2018 had been agreed to by the Respondents in correspondence and this too, was allowed. The details of the entirety of the Claimant's claims were then considered. The Tribunal was assisted in this exercise by the draft lists of issues prepared by the parties.
- 3 I now proceed to record the issues which will fall to be determined by the Tribunal at the full merits hearing. I note that these issues are agreed by both Mr Gidney and Ms Okill and that no other claims or issues will be considered without the permission of the Tribunal.

The Issues

Unfair Dismissal

- 4 What was the reason for the dismissal? The Respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) ERA 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.
- 5 Did the Respondent hold that belief in the Claimant's misconduct on reasonable grounds? The burden of proof is neutral here but it helps to know the Claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:
 - (1) Did the dismissing officer genuinely believe that:
 - (a) the Claimant had, without the Respondent's knowledge or permission, engaged in another business, Prime Caring Services Ltd (PCS) whilst working for the Respondent?
 - (b) The Claimant had, without the Respondent's knowledge or permission, encouraged the Respondent's staff to breach their contracts of employment and work for PCS, whilst working for the Respondent?

- (c) The Claimant had encouraged one of the Respondent's staff, Hannah Taylor, to believe that the Respondent was dissatisfied with her and were considering terminating her employment?
 - (d) The Claimant had acted to the Respondent's detriment when it was struggling to find staff by (i) having Helen Taylor work for PCS and (ii) having the Respondent's staff arrive late because they were also working for PCS?
 - (e) That the Claimant (i) moved the service user ER to PCS from the Respondent and (ii) did so without telling the Respondent, allowing a proper transition or having a written transition plan in place?
- (2) That Sarah Norman had agreed with the Claimant that he could set up a 16+ care facility for service users, engaging some of the Respondent's bank staff, as evidenced in an email dated 11 May 2016. Further, that there was agreement between the Claimant and Respondent that the service could be provided to JG and ER, two vulnerable service users.
 - (3) That the Respondent did not conduct a fair investigation in that it failed to properly investigate whether there was such an agreement for the 16+ care facility as identified above.
 - (4) That the Respondent refused to allow the Claimant to bring a companion to the disciplinary hearing other than a fellow employee or union representative.
 - (5) That the Respondent refused to allow the Claimant to bring a companion to the appeal hearing other than a fellow employee or union representative.
 - (6) That the decision to dismiss was made by Sarah Norman at first instance and then Linda Norman on appeal, when they were adjudicating upon matters directly involving their own conduct and interest.
- 6 Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?
 - 7 Does the Respondent prove that if it had adopted a fair procedure, the Claimant would have been fairly dismissed in any event? And/or to what extent and when?

Public Interest Disclosure claim

- 8 What did the Claimant say or write?

- 8.1 On 24 August 2017 the Claimant told Sarah Norman that the development of AE sending his sister texts repeating a complaint made earlier was a very serious development, that Sarah Norman had not followed the Respondent's Child Protection Referral policy when dealing with the initial complaint and that he would have to contact the local authority designated officer ('LADO') which she should have done at the time of the original complaint as Safeguarding Officer and Safeguarding Champion. The Claimant told Sarah Norman that he would need a copy of the minutes from her in respect of her initial meeting with AE so he could prepare a report for the LADO.
- 8.2 On 30 August 2017 the Claimant told Sarah Norman that he was in contact with the LADO and reiterated that she had not followed the mandatory prescribed procedures for dealing with complaints by children in their care, that she should have sent the original complaint to the social worker at the time when it was first made and the Claimant should have been appointed to carry out a formal investigation and make full details known to the LADO. The Claimant also told Sarah Norman that he needed her to complete a professional contact sheet recording her previous conversation with the social worker.
- 8.3 On 25 August 2017 the Claimant telephoned the LADO for a consultation to report the complaint. He raised his concerns that AE's complaint had not been dealt with in accordance with the safeguarding policy.
- 8.4 On 29 August and 30 August 2017, the Claimant wrote to the LADO and AE's social worker repeating the complaint that proper process had not been following with regards to AE's complaints.
- 8.5 On 29 September 2017 the Claimant telephoned Ofsted and reported the Respondent's failure to comply with safeguarding procedures.
- 9 In any or all of these, was information disclosed which in the Claimant's reasonable belief tended to show:
 - 9.1 that the Respondent had failed to comply with a legal obligation to which it was subject namely complying with its safeguarding procedures and Ofsted's Child Protection Referral Policy (Section 43(1)(b))
 - 9.2 the health and safety of the service user, AE, (his physical or mental wellbeing) was likely to be endangered (Section 43(1)(d))
- 10 If so, did the Claimant reasonably believe that the disclosure was made in the public interest?

Public Interest Unfair Dismissal complaint

- 11 Was the making of any proven protected disclosure the principal reason for the dismissal?

Public Interest Detriment complaint

- 12 If protected disclosures are proved, was the Claimant on the ground of any protected disclosure found, subject to detriment by the employer or another worker in that:
- 12.1 On 5 September 2017 Sarah Norman confronted the Claimant and asked him (i) whether the Respondent's staff worked for PCS and (ii) whether the service user ER was in PCS's care;
- 12.2 In a meeting between the Claimant and the headteacher, the headteacher reacted adversely to the Claimant's news that the original complaint had not been dealt with in accordance with the child protection policy, that he had contacted the LADO and that was the reason for his investigation;
- 12.3 The Claimant was suspended on 6 September 2017;
- 12.4 The institution of the disciplinary process was on a false premise because the Normans were aware of an earlier agreement permitting the Claimant to start a 16+ service. It is the Claimant's case that the Normans gave a false account of this matter to Paul Bishop and Theresa Addison;
- 12.5 The Claimant was given a letter dated 18 September 2017 inviting him to a disciplinary hearing;
- 12.6 The respondent refused to allow the Claimant to raise a grievance regarding his treatment;
- 12.7 The Claimant was denied permission to bring a companion to the disciplinary hearing other than a work colleague or trade union representative;
- 12.8 Whilst on suspension, the Claimant received an abusive telephone call from Gideon Dann, the Respondent's support worker;
- 12.9 The Claimant was denied permission to bring a companion to the appeal hearing other than a work colleague or trade union representative;
- 12.10 Linda Norman deciding to dismiss the Claimant's appeal;

- 12.11 Sarah Norman providing an oral reference for the Claimant on or around 6 or 7 March 2018 in which she referred to the Claimant's tribunal claim and referred to him as a 'nasty piece of work'.

Failure to provide a written statement of terms and conditions

- 13 Was the Claimant provided with a statement of terms and conditions for his role of registered manager and / or operations manager as required by section 1 of the ERA 1996?

Remedies

- 14 If the Claimant was unfairly dismissed: What compensation is he entitled to? Has the Claimant adequately mitigated his loss and what, if any, increases / reductions should be made for the Respondent's alleged failure to comply with the ACAS Code?
- 15 Is the Claimant entitled to an injury to feelings award? What award (if any) should be made for injury to feelings?
- 16 If the Respondent failed to provide the Claimant with a written statement of terms and conditions, what is the appropriate compensation?

CASE MANAGEMENT ORDER

Judicial Mediation

- 1 No later than **21 December 2018** the parties are to notify the Tribunal whether they are interested in pursuing judicial mediation. I explained that if both parties are interested, the Regional Employment Judge will then consider the case further and its suitability for an offer of judicial mediation.

Further Information

- 2 No later than **21 December 2018** the Claimant shall send to the Respondents and the Tribunal further and better particulars of the issue set out in paragraph 12.8 of the List of Issues above including the date, time and what was said.

Specific Disclosure

- 3 No later than **21 December 2018** the Respondent is ordered to disclose to the Claimant by list and copy documents, the emails from the Claimant to the LADO sent on 29 and 30 August 2017.

- 4 No later than **21 December 2018** the Claimant is ordered to disclose to the Respondent by list and copy documents, any documents relating to his contact with the LADO in September 2017.

Amended Response

- 5 The Respondents have leave to present an amended response to the Claimant and the Tribunal no later than **11 January 2019**. The amended response will set out the Second Respondent's defence to the public interest disclosure detriment claim and the Respondents factual assertions in connection with the claim as now understood.

Disclosure of documents

- 7 The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive no later than **4 March 2019**.
- 8 This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.
- 9 The parties shall comply with the date for disclosure given above but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

Document Guidance

- 10 "Documents" includes letters, notes, emails, memos, diary entries, audio or visual recordings, text messages and any other legible records.
- 11 If hand written documents are being relied on a typescript must be provided by the party relying on them and inserted in the bundle of documents immediately after the hand written document.
- 12 If a recording is being relied on a transcript must be prepared by the party relying on it. That typescript must be included in the bundle of documents and sent to any other party, together with a copy of the recording.
- 13 **No documents or copy correspondence should be sent to the Tribunal unless a party is required to do so.**

Trial Bundles of Documents

- 14 The Respondents have primary responsibility for the creation of the single joint bundle of documents required for the Hearing.

- 15 To this end, the Respondents shall prepare a consolidated bundle of copy documents.
 - 15.1 The bundle shall not, without the consent of an Employment Judge, exceed 200 pages (400 sides). Two-sided copying is encouraged.
 - 15.2 The bundle shall only contain copies of relevant pages of documents a party intends to use at the Tribunal hearing.
 - 15.3 All the documents, except any pleadings and Orders, must be in date order, with the oldest at the front.
 - 15.4 Each page must be numbered.
 - 15.5 The bundle must have an index showing the date, description and page number of each document.
 - 15.6 The bundle must be held together so it opens flat.
 - 15.7 Witness statements must not be included in the bundle.
- 16 No later than **14 December 2020** the Respondents shall supply one copy of the bundle to the Claimant.
- 17 The Respondents shall bring five identical bundles of the copy documents to the Tribunal hearing.

Witness Statements

- 18 The parties shall prepare a written statement for each witness (including the Claimant who will give evidence personally) that it is intended will be called to give evidence at the Tribunal hearing. Each witness statement must:
 - 18.1 have page numbers, be typed single-sided with double line spacing with at least 2.5cm page margins;
 - 18.2 use a "standard" (e.g. Arial, Times New Roman or similar) size 12 font;
 - 18.3 contain all the evidence of the witness;
 - 18.4 be laid out in short consecutively numbered paragraphs;
 - 18.5 set out in chronological order, with dates, the facts which the witness can state;
 - 18.6 not contain matters irrelevant to the issues;
 - 18.7 refer by page number in the bundle of documents to any document mentioned in the statement;
 - 18.8 be signed and dated;
 - 18.9 not be contained in a bundle.

- 19 Each party shall ensure that there are four copies of each statement of their own witnesses available at the Tribunal hearing for the use of witnesses and the tribunal.

Evidence without a Witness Statement

- 20 No evidence-in-chief may be given by a witness, in addition to that contained in the written statement of that witness, without the permission of the Tribunal.
- 21 No witness may be called by a party to give evidence at the Tribunal hearing, without the permission of the Tribunal, unless their written witness statement has been prepared and exchanged.

Simultaneous Exchange of Witness Statements

- 22 On **1 February 2021** there shall be a simultaneous exchange of witness statements by each party providing to the others one copy of each witness statement for each of the witnesses that party intends to call to give evidence at the Tribunal hearing.

Hearing Date

- 23 The case is listed with the agreement of the parties for hearing of liability and remedy, if appropriate, before a full Tribunal for eight consecutive days from **1 – 10 March 2021** commencing at 10.00am on the first day at the Employment Tribunals, **Montague Court, 101 London Road, West Croydon, Surrey, CR0 2RF.**
- 24 This listing was on the basis of the Claimant having 4 witnesses including himself and the Respondent a further 4 witnesses. No postponement of the hearing date will be granted unless there are exceptional and unforeseen circumstances.

Non-compliance

- 25 Each party is required to inform the Tribunal forthwith following any of the above directions not being complied with, in full, on the due date and provide its explanation in respect of any non-compliance.

NOTE:

1. *Failure to comply with an Order may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under section 7(4) of the Employment Tribunals Act 1996.*
2. *If a person does not comply with Orders made under the Employment Tribunals Rules of Procedure, rule 8 of the Employment Tribunals (Levy Appeals) Rules of Procedure or rule 7 of the Employment Tribunals (Health and Safety - Appeals against Improvement and Prohibition Notices) Rules of Procedure an Employment Judge or Tribunal may:*
 - (a) *make an order in respect of costs or preparation time (if applicable); or*
 - (b) *make an order to strike out the whole or part of the claim or, as the case may be, the response and, where appropriate, order that a respondent be debarred from responding to the claim altogether.*
3. *The Tribunal may also make a further Order (an “Unless Order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice under rule 19 or hold a pre-hearing review or a Hearing.*
4. *An Order may be varied or revoked upon application by a person affected by the Order or by an Employment Judge on his own initiative.*
5. *This Order confirms orders made/directions given at a hearing on 22 November 2018.*

Employment Judge Harrington
22 November 2018