



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000053/2022

Preliminary Hearing
Held in Edinburgh
on 21 March 2023

Employment Judge Jones

Ms T Nelson

Claimant
In person

City of Edinburgh Council

Respondent
Represented by:
Ms Thomson,
solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The respondent's application to strike out the claimant's claim in terms of section 43B Employment Rights Act 1996 succeeds and the claimant's claim in terms of section 47B of the Employment Rights Act 1996 is struck out.
2. The case will now be listed for a final hearing to determine whether the refusal to grant the claimant annual leave on 16 March amounted to an act of direct sex discrimination and whether the Tribunal has jurisdiction to determine that matter.

Background

1. The claimant presented a claim on 5 September 2022 alleging that she had been subjected to discrimination on the ground of sex and that she had been subjected to detriments because she made a protected disclosure.

The claim form was brief in its terms and did not specify the protected disclosure said to have been made or what detriments the claimant had been subjected to as a result. Neither did it provide any specifics of the alleged discrimination on the ground of sex. The claimant was called upon
5 by the respondent in its response form to provide further specification of her claim. The respondent also highlighted that the claimant had raised an internal complaint in terms of the respondent's Avoidance of Bullying and Harassment Policy.

- 10 2. The claimant has continued to represent herself throughout these proceedings.
3. The claimant was further called upon by the respondent on 30 November to provide specification of her claim in a detailed request for further specification. The claimant responded on 1 December.
- 15 4. A preliminary hearing for the purposes of case management took place by telephone conference call on 7 December. During that hearing efforts were made to clarify the nature of the claimant's claims as they remained unspecified.
- 20 5. During that hearing the claimant indicated that the protected disclosure she relied upon related to inappropriate recruitment practices by the respondent. She said that the respondent had policies and procedures in place which created a legal obligation and that these had been breached.
- 25 6. The claimant was unable to specify the nature of the detriments she alleged she had been subjected to for having made the protected disclosure. She was ordered to provide specification of these detriments.
7. In terms of the claimant's claim of sex discrimination, she indicated that this related to an instance where male colleagues had been given annual leave to attend a football match and her request was turned down. This was on 16 March 2022.
- 30 8. The claimant was ordered to specify any allegations which were intended to be included in her claim and had not been referred to in the Note of the Preliminary Hearing by 13 January.
9. On 9 January 2023, the claimant sent a 6 page densely typed email purporting to provide further particulars of her claim. She referred to the protected disclosure she made as 'nepotism and cronyism'. She also made

reference to allegations of deliberate concealment and 'danger to health and safety of any individual'. She went on to claim she had been subject to direct and indirect discrimination, bullying, harassment and victimisation. The claimant outlined 37 instances in which she said she had been subjected to detrimental treatment for having raised a protected disclosure. Although she had been ordered to specify why she said that any alleged detriments had been related to her making a protected disclosure, there was nothing in the claimant's particulars which dealt with this issue. In addition, some of the incidents referred to occurred after the date on which she had lodged her claim.

10. The Tribunal then wrote to the claimant indicating that the further particulars which had been provided did not make clear whether the claimant was simply providing background information or whether she was suggesting all the matters outlined were allegations the Tribunal could determine. In addition there was nothing in the particulars to suggest that she was making an application to amend her claim. The claimant's failure to provide any information to suggest why any detriment had occurred because she had made a protected disclosure was also highlighted.

11. The claimant then sent a further email which appeared to be a chain of emails which had been forwarded which was not comprehensible. She was informed that any further particulars should be provided in PDF format. The claimant confirmed that no application was being made to amend her claim.

12. The claimant was ordered again on 20 January to comply with the Order to properly specify her claim.

13. The claimant sent a further email on 21 January said to be in compliance with the Order which had been made. It referred again to the protected disclosure as being 'over nepotism and cronyism'. It did not specify any dates or to whom the disclosure was said to have been made. It did not provide further information as to why the claimant said that she had been subjected to detriments for having made a protected disclosure.

14. The respondent then made an application to strike out the claimant's claims on 30 January. The application was made on the basis of non-compliance with an Order and also on the basis that the claim had no reasonable prospects of success. The claimant objected to the Order being granted and

a hearing was listed to consider the application. The respondent sent the claimant a skeleton submission in support of its application in advance of the hearing.

15. Both parties produced a bundle of documents for use at the hearing. The Tribunal expressed disappointment that the claimant did not co-operate with the respondent to ensure that a joint bundle was produced.

16. In the first instance, I sought to understand the claimant's claims.

Sex discrimination claim

17. The claimant confirmed that her only claim of sex discrimination related to the incident of 16 March 2022, where the claimant was not granted annual leave to attend a football match when male colleagues were given leave. While during the hearing the claimant appeared to suggest that she was making further claims of sex discrimination, she did subsequently confirm that this was the only claim of sex discrimination before the Tribunal. The Tribunal therefore proceeded on the basis that this was the only allegation of sex discrimination being advanced.

18. The respondent indicated that it accepted that evidence would be required to be heard in relation to this matter and therefore the application to strike out the claimant's claim did not extend to this allegation of sex discrimination. That said, the respondent confirmed that it was reserving its position on the question of time bar in relation to that matter.

Protected disclosure

19. The claimant confirmed that the protected disclosure she relied upon was in relation to alleged breaches of the respondent's policies and procedures which were said to confer a legal obligation on the respondent. I sought to clarify with the claimant what policies or procedures she was relying upon and in what way she said that these conferred a legal obligation on the respondent. The claimant referred to 'management policies'. She said she had read some of the policies but could not say what policy she was relying upon or in what way that conferred a legal obligation.

20. The claimant subsequently referred to an email received by her from the respondent which confirmed that following an investigation 'there had been a breach of the Recruitment and Selection procedure'. The claimant was not able to say what that breach had been or whether that was the procedure being relied upon. The claimant indicated that her concern related to a family member of another member of staff being appointed to role with the respondent. The claimant said that she was aware that the individual had applied for the position, but remained concerned that there was 'nepotism'. However the claimant was not able to say in what way there had been any breach of the policy.
21. A complaint regarding this matter had been raised by the claimant in an email of 2 January 2022. It would appear that this may have been what the claimant was relying on as a protected disclosure although the claimant did not herself make this clear. The email itself did not refer to any policies, but members of staff who had been appointed and were related to other members of staff.

Detriments

22. In the most recent document provided by the claimant (produced at pp131 – 135 of the respondent's bundle) which appears to set out the detriments to which the claimant alleges she was subject, the claimant refers to 17 matters. These matters also appear to refer to allegations of discrimination although such matters are not part of the claimant's claim before the Tribunal.
23. The events complained of refer to a number of individuals with whom the claimant worked, a Mr Taylor, Mr Greenan, Mr Herbert and Mr Calder.
24. The claimant says in that document "I feel that Robert Taylor had exposed my disclosure to my senior management and also managers Joe greenan, gavin Calder keith young andy hunter and this is why I was being subjected to this characteristic discrimination from all unwanted male managers attention to be single out as only female driver with less favourable treatment towards myself as a rightened female who had raised public interest disclosure."

25. The incidents set out in that document lack specification of the detriment to which the claimant allege she was subject and focus more on how she was feeling or how she reacted to certain events. They make continued reference to 'no duty of care' without any specification of what is meant in that regard or what specifically was not done which the claimant believes ought to have been done.

5

10

26. The allegations are wholly lacking in specification and give no indication as to how they are related in any manner to the claimant's disclosure of 2 January 2022 (if indeed that is the disclosure being relied upon).

Causation

15

20

25

27. I then sought to explore on what basis it could be said that if any of the matters she alleged amounted to detriments were established, these matters could be said to be related to her having made a protected disclosure. Initially, the claimant indicated that management had told her colleagues that she had made a protected disclosure but when asked to outline on what basis she made this allegation she indicated that she could not prove that management had told her colleagues that she had made a protected disclosure. There was nothing in the particulars which might suggest that even if the various allegations outlined could amount to detriments, these were in any way related to the claimant making a protected disclosure. There was nothing to indicate on what basis the individuals mentioned above were aware of the claimant having made a protected disclosure.

Discussion and decision

30

28. Rule 37 of the Tribunal Rules (Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013) allows a claim to be struck out on a number of bases. In the present case, the respondent's application is made in relation to Rule 37(1) (a) and/or (b).

29. Rule 37 (1)(a) provides that a claim may be struck out where it is scandalous or vexatious or has no reasonable prospect of success and Rule 37(1)(b) relates to failure of a party to comply with an Order of the Tribunal.

5 30. Dealing with Rule 37(1)(b) in the first instance, compliance with an order is a matter of form not substance. In the present case, although it is true to say that the claimant did not set out in any coherent manner a number of aspects of the requirements of the Order which was made, she did provide a response in compliance with the Order. Taking into account that the
10 claimant is unrepresented and that while significant criticisms of the claimant's purported compliance with the Tribunal's Order can be made, I am not satisfied that it can be said that she failed to comply with the Order. Therefore the application made on that basis is refused.

15 31. Turning then to the application in terms of Rule 37(1)(a), it is said that the claimant's claim of detriment for having made a protected disclosure has no reasonable prospects of success.

Approach to application

20 32. In the first instance, the Tribunal had at the front of its mind the fact that the claimant is unrepresented. What can be expected of party litigants in terms of the quality of the pleadings made by them is not what is expected of those who are professionally represented. That said, any party bringing a claim to the Tribunal should be able to set out the claim they are advancing
25 with some degree of cogency. A respondent is entitled to know what the case against them is. That is a fundamental principle of fairness. Further, while a Tribunal should ensure that a claimant is given a reasonable opportunity to put forward their claim, there must be a limit to the number of opportunities given to a claimant in that regard.

30 33. The Tribunal is also cognisant of the fact that the striking out of a claim is a draconian step. If there are factual matters in dispute then generally evidence will be required to determine a claim. Authorities such as **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126** demonstrate that much

caution should be taken in such circumstances, more recently highlighted by the EAT in **Kaul v Ministry of Justice and others EAT/21/713.**

Does the claim have no reasonable prospects of success?

5

34. I then turned to consider whether it could be said that there were no reasonable prospects of success of the claimant succeeding in her claim. In order to do so I considered the constituent aspects of her claim. In approaching this question, I sought to consider the claimant's case at its highest, that is that she could prove all the matters set out by her in what pleadings had been put forward.

10

Did the claimant make a protected disclosure?

15

35. Part IVA of Employment Rights Act 1996 sets out the definition of a protected disclosure for the purposes of the legislation. Section 43B provides that a qualifying disclosure means "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". The provision then goes on to set out various topics of information which will come within the ambit of section 43B and includes information in relation to where "a person has failed or is failing or is likely to fail to comply with any legal obligation to which he is subject". This is the basis on which the claimant alleges she made a protected disclosure.

20

25

36. The claimant appears to rely on an email of 2 January 2022 to Mr Kramer, which states "a new employee David Welsh has started within my working department at waste street cleansing Seafield but got an 18 month contract with Edinburgh city council with a transfer over from Pertemps my concern is that David Welsh new member of staff is related to a senior boss from Bankhead Chris orroc who is David Welsh Uncle and this is why David Welsh got contract with city Edinburgh council with transfer from Pertemps agency I have never met chris orroc but I feel with what is ongoing could have an impact on more wrong doing going on with the city of Edinburgh council with nepotism and cronyism that I feel knowing this information and

30

not sharing it as an employee with someone in a higher position within the council who I feel I can put my trust in and who can deal with this situation and if there is wrongdoing to put right and this is why I have nominated yourself Mr Kramer to send this email as what is happening within my workplace...”

Was there a disclosure of information?

37. The first aspect of the test as to whether something amounts to a qualifying disclosure is whether there is a disclosure of information. It would appear that what the claimant is alleging is that an employee may have been appointed to a position with the respondent or given a particular type of contract because he was related to another more senior employee and that this could have an impact on ‘nepotism and cronyism’ within the Council.

38. When asked by me if the claimant knew whether this individual had applied for the role in question, she indicated that she understood that he had. She could not say what aspect of the respondent’s policies or procedures were not followed.

39. While the distinction between what amounts to information which would come within the ambit of section 43B and what amounts to an allegation which would not is not always clear (see for instance **Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325, EAT** and **Kilraine v London Borough of Wandsworth 2016 IRLR 422, EAT**), it would appear that what the claimant was doing in her email was making an allegation that an appointment had been made without proper process. The claimant does not in her email provide any information as to the basis of this belief or point to particular procedures which were not followed. The Tribunal formed the view that the claimant was simply making an allegation of inappropriate practices and not providing any information to substantiate that allegation. The Tribunal formed the view that the claimant’s email was an allegation and that it was not an example of a person providing information in relation to matters which could amount to a protected disclosure.

Did the information relate to a legal obligation?

40. If the claimant's email did amount to information, then the next question to consider is whether it related to a failure to comply with a legal obligation.

5 The claimant's position was that there were policies and procedures which created legal obligations on the part of the respondent in relation to the appointment of staff. The breach of a legal obligation can cover a wide variety of matters. It is possible that the failure to follow a recruitment policy could amount to a breach of a legal obligation if for instance it also amount

10 to a breach of equality legislation. The difficulty for the Tribunal in this regard is that the claimant has not pointed to any policy in particular or any provision within such policy. Indeed it appeared to the Tribunal from what was said by the claimant that she did not have any particular policy or procedure in mind, but simply was of the view that there must be some breach.

15 Her allegations appear to be entirely speculative. While in some cases it may be immediately obvious that the relevant information related to a legal obligation, it did not appear to obvious to the Tribunal in the present case given the lack of information from the claimant about what it was about the recruitment which was said to be inappropriate.

20

Did the claimant make the disclosure to an appropriate person?

41. The next issue is the method of disclosure. On the basis that the claimant is relying on an email to senior manager within the respondent's organisation,

25 it is clear that the disclosure was made within the terms of the legislation.

Was the claimant subject to a detriment?

42. As set out above the claimant has made various attempts to set out the

30 detriments to which she alleges she was subjected. While these appear to have been narrowed down in number, they are still entirely lacking in specification. It would appear that the circumstances narrated by the claimant on the whole narrate how she felt about interactions with colleagues rather than in what way she was subjected to a detriment. She

complaints of colleagues responding with an emoji in texts regarding her notifying them of her absence, of being dissatisfied as to people attending meetings, of being asked to drive a van in which she'd had an accident but then when she objected someone else was asked to drive it. It appeared
5 that the claimant was aggrieved that her grievance was not handled in exactly the way in which she thought it should be handled.

43. While it is well accepted that there is a low threshold in establishing a detriment, that detriment must be clearly expressed and must be something which was done or not done to a claimant. It is not enough that a claimant
10 feels stress and anxiety through their interactions with colleagues. Although the claimant complained about how her grievance was handled, on enquiry, it was clear that the grievance had been dealt with and indeed to some extent was upheld.

44. The details of the detriments the claimant alleges are vague and simply
15 lacking in substance. As detailed above, while it is appreciated that the claimant is unrepresented, she should be able to say with some degree of conciseness what it is she says was or was not done which amounted to a detriment. She has been given a number of opportunities to do so.

20 Causation

45. Section 48(2) Employment Rights Act 1996 provides that once a claimant
25 has established that they made a protected disclosure and that they have been subjected to a detriment by a respondent, it will be for the respondent to demonstrate that the reason for the detriment was not that the claimant had made a protected disclosure. It will often be necessary in the absence of direct evidence for a Tribunal to draw inferences as to the reason for a detriment.

46. In the present case, even if the claimant establishes that she made a
30 protected disclosure and that she was subjected to any detriments, there is simply nothing in the pleadings as they stand to suggest that any detriments were related in any way whatsoever to the claimant having made a protected disclosure. It is recognised that the person responsible for the detriment may not always be required to know the details of a protected

disclosure. However, given the nature of the circumstances outlined by the claimant, whereby she is not alleging that there was a collective failure of management, but is directing her criticism at specific individuals in albeit vague allegations, it follows that there must be some degree of knowledge on the part of the individuals. However the claimant candidly admitted that she did not know if her colleagues knew she had made a protected disclosure. Moreover the allegations she makes are so vague that it is difficult to discern on what basis, even if they amounted to detriments, they could in any way be related to the making of a protected disclosure.

10

Conclusion

15

47. While the Tribunal is aware that it is not its role to determine the claimant's claim at present, it has formed the view that the allegations made by the claimant are so vague, lacking in specification, and bereft of any linkage to any protected disclosure which could have been made as to present the claimant with almost insurmountable difficulties in establishing her claim. Moreover, it is very difficult to determine on what basis the claimant can establish that she made a protected disclosure in the first place given that if the Tribunal is correct that she is relying on her email of 2 January 2022, then that appears to be no more than an allegation that something inappropriate may have happened without providing any information to substantiate the allegation.

20

25

48. In all these circumstances, the Tribunal is of the view that the claimant's claim in terms of section 47B of the Employment Rights Act 1996 has no reasonable prospects of success and is struck out.

30

49. The case will now be listed for a hearing to determine the remaining aspect of the claim namely that the refusal to grant her annual leave on 16 March 2022 was an act of direct sex discrimination.

5

Employment Judge: Amanda Jones
Date of Judgment: 29 March 2023
Entered in register: 30 March 2023
and copied to parties

10