RM

THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Warwick-Baker**

Respondents: **(1) The Governing Body of Frederick Bremer School**
(2) London Borough of Waltham Forest

Heard at: **East London Hearing Centre**

On: **Friday 25 January 2019**

Before: **Employment Judge Prichard**

Representation

Claimant:	Mr A Peck, counsel instructed by ELS Solicitors, South Woodford E18
1st Respondent:	Mr M Magee, counsel instructed by Judicium Consulting, Whiteley, Hampshire
2nd Respondent:	Mr S Harding, counsel instructed by LBWF Legal Services, E17

JUDGMENT ON PRELIMINARY HEARING

1 The 4-day hearing starting on 12 March 2019 is vacated and the case is re-listed for a six-day hearing on 26 – 29 November and 3 – 4 December 2019.

2 The claimant's application to amend the claim is partially allowed as detailed below.

3 The second respondent will not be participating in any of the liability hearing save for providing any information or disclosure needed by the other parties.

4 The claimant's application to amend to include Mrs J Smith as an individual respondent to the claim is refused subject the understanding set out in the reasons below relating to the unconditional acceptance of liability by the first two respondents.

REASONS

1 This has been an interesting hearing and, in my personal experience, novel. I did not realise it was possible to join an individual respondent to a claim under s 47B of the Employment Rights Act 1996 for alleged detriments following from a making of a protected disclosure.

2 The argument starts with the court of appeal's decision in *Fecitt v NHS Manchester* [2012] ICR 371 CA. This case confirmed the impossibility of adding an individual respondent to proceedings under 47B of detriments for whistleblowing. The position was reversed by the Regulatory Reform Act 2013 as from 25 June 2013 by inserting the new 47B(1A–1E). Joining such a personal secondary party to tribunal proceedings is achieved by Section 48(5B) of the Employment Rights Act 1996. I need not go further into the reasoning because the respondents both accept that it is correct. These new sections effectively overrule the *Fecitt* case.

3 The next problem that arose was in the case of *Royal Mail Group Ltd v Jhuti* [2018] ICR 982 CA. This affects compensation. The position was considered again in the most recent case of *Timis & Sage v Osipov* [2018] EWCA CIV 2321 - the decision in which effectively Underhill LJ disapproved previous decision in Jhuti. The context of *Osipov* is of some importance relating to secondary party. *Timis* and *Sage* were two company directors, *Osipov* was the claimant. It was important for the claimant have the individual directors as parties because the principal company IPL had entered insolvency. Therefore, the claimant would have had problem enforcing any award if he were not able to make the directors personally liable.

4 Add to that the nebulous status of liability for Section 47B detriments which I previously had to consider at a case management hearing on 10 August 2018. I did so by reference to the, now, extremely out of date Education (Modification of Enactments relating to Employment) (England) Order 2003. I found that liability for the s 47B detriment was with the second respondent but liability for conventional s 103A automatically unfair dismissal was on the governing body, hence the joinder of Waltham Forest today, following the ET3 from them. Their ET3 no longer summarises their actual stance on proceedings in the light of that.

5 I am not directing that they draft another ET3. I am declaring here that their stance today is different now from then. The solicitor involved in the case Mr Springer took issue with the analysis that I had made on 10 August and wrote to the tribunal stating an argument under the Modification of Enactments Order that in his view the council was not liable and asking for the council to be dismissed.

6 By an email dated 23 January 2019 Mr Springer notified the tribunal and the claimant that LBWF no longer made an application to be dismissed from proceedings. Commendably he had changed his mind, so the position is now clear. In the meantime, case preparation work completely ground to a halt, just after the disclosure stage.

7 The structure of the claimant's argument in this case, which I can see is a potentially good argument, in principle, is that she made a protected disclosure.

Following the protected disclosure, she suffered detriments to a degree that made her ill. She was then absent from work through illness and the illness resulted in her dismissal under the school's attendance procedure. The detriment she says was suffered principally from the headteacher, Ms Smith. However, Ms Smith was no part of the decision-making process which led to the termination of her employment for absence. She is back some way in the chain of causation being the alleged cause of the claimant's absence.

8 This addresses the *Fecitt* problem where the decision maker at the end is not the same person as the person who causes the earlier detriment. The *Osipov* case, upon which the claimant now relies, establishes the proposition that under Section 47B a claimant may claim loss of earnings and injury to feelings as if it were an Equality Act discrimination claim. Indeed, Section 47B(1D) even provides for an almost identical provision to a statutory defence under the Equality Act. It seems in all respects the same. That is why she sought to join Ms Smith as a respondent. I have declined this (a) for convenience, and (b) because I considered it unnecessary in the circumstances where in accordance with the judgment above the respondents and particularly the second respondent is unconditionally accepting liability for whatever award may be made in the claimant's favour which could include loss of earnings, similarly to an unfair dismissal, but also injury to feelings (see *Melia v Magna Kansei* IRLR [2006], 117, CA) which could not be awarded under s 103A. It is on that understanding that I do not make the amendment to include Ms Smith as a separate respondent.

9 It is on that understanding that I am allowing the proposed amendment to the ET1 only in part. I allowed it to the extent it includes paragraph 15 as drafted in that amendment under the heading of Section 47B detriment but disallowed it in so far as it makes any reference to a third respondent.

10 As is reflected at paragraph 14 of the claim, the detriment from the headteacher was how she presented management's case to the panel deciding the dismissal under the attendance management. Under those paragraphs there is to be no reference to a third respondent.

11 But the amendment to include the second respondent is allowed - the London Borough of Waltham Forest.

12 The first respondent will not instruct anyone to attend during the liability hearing but it reserves its position on attending if the matter proceeds to a remedy hearing.

13 In any event in this case, because there is a medical dimension to any remedy, I directed that remedy be a separate hearing from liability.

14 As I stated the confusion over the legal position and the identification of the correct respondents caused case preparation to grind to a total halt. I am now informed that the respondent will have 6 witnesses although Mr Magee is unable to tell me their names. I note from my previous hearing it would be Ms Smith, head teacher, Andrew Homer, Cigdem Gecsoyler – HR, and another witness to whom the claimant allegedly made protected disclosures - Laura Pease, a governor. There are 2 others.

15 I stressed to the parties that the hearing before a full panel have to allow the generous time for the panel to deliberate upon and either announce or reserve a fully reasoned judgment on liability. Mr Magee then said that 4 days would be too tight.

16 It is unknown today whether the claimant is working or not if she is fit for work or not and what if any benefits she is receiving.

17 From what little I have been informed, the case management directions therefore must be completely recast as follows.

CASE MANAGEMENT ORDERS

Made under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

1 By agreement between the parties and the tribunal the case is now listed for a liability-only six-day hearing **26 – 29 November and 3 – 4 December 2019** at East London Tribunal Service, Import Building (Formerly Anchorage House), 2 Clove Crescent, LONDON E14 2BE, starting at **10.00 am**.

2 By **28 February 2019** the claimant will please provide the respondent with a schedule of loss.

3 Disclosure having taken place, the first respondent will please provide the claimant with a hard-copy, page-numbered, indexed bundle for use at the final hearing on **13 June 2019**.

4 By **15 October 2019** witness statements of all witnesses to give evidence in the case will please be exchanged between the first respondent and the claimant and the claimant on the same date will provide the first respondent with an updated schedule of loss.

5 The claimant is at liberty to file a formal amended ET1 as the discussion today. Neither respondent is obliged to file an amended ET3. This record is sufficient to evidence the understanding of the parties.

6 Other matters

6.1 Public access to employment tribunal decisions
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

6.2 Any person who without reasonable excuse fails to comply with an Order to which section 7(4) of the Employment Tribunals Act 1996 applies shall be liable on summary conviction to a fine of £1,000.00.

6.3 Under rule 6, if this Order is not complied with, the Tribunal may take such action as it considers just which may include (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.

6.4 You may apply under rule 29 for this Order to be varied, suspended or set aside.

Employment Judge Prichard

8 April 2019