



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4116425/2018 & 4112742/2018

Held in Fort William on 16 & 17 May 2019 (and members' meeting on 23 May 2019)

Employment Judge: M Sutherland
Members: A Ross
G Doherty

Mr C Adams

Claimant

In Person

Buzz Project

Respondent

Represented by:

R Young - Volunteer

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Employment Tribunal is that –

- The dismissal of the Claimant by the Respondent was not automatically unfair (by reason of protected disclosures) and the claim is dismissed
- The dismissal of the Claimant by the Respondent was not unfair and the claim is dismissed
- The Claimant's claims for holiday pay, wages, notice and redundancy payment are dismissed following withdrawal

REASONS

E.T. Z4 (WR)

Introduction

1. The Claimant represented himself. The Respondent was represented by Rona Yard who is a volunteer with the Respondent.
2. The Claimant made claims for holiday pay, wages, notice and redundancy payment. However following provision of additional information by the Respondent, the Claimant was satisfied that he had been paid in satisfaction of these claims and any outstanding issue regarding taxation was being progressed with HMRC. Accordingly these claims were withdrawn and fall to be dismissed.
3. The Claimant alleges that his dismissal was automatically unfair under sections 103A and 105(6A) of the Employment Rights Act 1996 ("ERA") (i.e. that the reason or principal reason he was dismissed / selected for redundancy was that he had made a protected disclosure). The Claimant also alleged that he had been unfairly dismissed under Section 98 of the ERA because there was another employee who should have been selected for redundancy. The Respondent's position was that the principal reason for redundancy was that they were unable to secure funding and not because of the alleged protected disclosure. The Respondent's position is that he was their only employee and they had no other employees.
4. In his claim, the Claimant had raised issues regarding his treatment by Simon and Anita Nicholls. At the preliminary hearing the Claimant did not advise that this treatment was intended to be a separate detriment claim. At the final hearing Claimant confirmed that he was not seeking to make a separate claim for detriment. In any event any such claim appeared to be time barred.
5. The Respondent led evidence from Norma Callison, Trustee and Rona Yard, Volunteer. The Claimant gave evidence on his own behalf. Janette Cowie, ex Chair initially attended to give evidence but went home unwell. She had

prepared a statement the terms of which were agreed by the parties. Parties lodged their own bundles of documents. Parties made brief oral submissions.

6. The parties were advised that the following issues required to be determined:
- (i) Had the Claimant made a disclosure of information to his employer or a prescribed person? Did the Claimant reasonably believe the disclosure was in the public interest? Did the Claimant reasonably believe the disclosure tended to show a relevant failure (e.g. a criminal offence, a breach of a legal obligation, etc)?
 - (ii) Was the reason or principal reason for dismissal of the Claimant that he had made a protected disclosure? If so, was the protected disclosure made in good faith?
 - (iii) Was the reason for his dismissal wholly or mainly attributable to the Respondent ceasing to carry on the business for which the Claimant was employed, or had the requirements of the business for employees to carry out work of a particular kind ceased or diminished? In the circumstances (including their size and administrative resources) did the Respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant, determined in accordance with equity and the substantial merits of the case?

7. The following initials are used as abbreviations in the findings of fact–

| Initials | Name | Position |
|-----------------|-----------------|-----------------------|
| AN | Anita Nicholls | Trustee |
| JC | Janette Cowie | Chair of the Board |
| NC | Normal Callison | Trustee |
| PK | Paul Kelly | Manager |
| RY | Rona Yard | Volunteer |
| SN | Simon Nicholls | Youth Worker/ Manager |

Findings in fact

8. The Tribunal makes the following findings in fact: -
9. The Claimant was employed by the Respondent as a musician from 1 November 2013 until 1 June 2018. The Respondent is a charity, the Buzz Project, which worked with young people on musical related activities. They had a studio based in Fort William and a bus which toured outlying villages. The Claimant initially reported to SN as his line manager and latterly to PK as manager. AN, wife of SN, was a trustee and primary fundraiser.
10. The Respondent is dependent upon external funding and wages represent its largest cost. During 2017 the Respondent had three principal funders: Roberston Trust, Gannochy Trust and Tudor Trust. The Claimant was aware from the start of his employment that his role was contingent upon the Respondent having sufficient funding. In November 2016 the Claimant agreed to permanently reduce his hours of work from 36 to 16 hours because of funding issues. Payment of his wages was also delayed on a number of occasions, again because of funding issues, including from 19 February 2018 onwards.
11. Before the Claimant commenced employment with the Respondent, he was diagnosed with PTSD but had developed coping techniques. The Claimant did not have any sicknesses absence from work on account of any mental health issues until May 2017. The Claimant then had extended periods of absence with work related stress in the period between May 2017 until 19 February 2018.
12. The Claimant's relationship with SN, his line manager, was good at the start and together with AN they were initially the driving force of the Buzz Project. However problems started to arise in their relationship in 2013 and continued to escalate thereafter. By November 2016 the Claimant and SN had become estranged and the Claimant was no longer invited to attend Board Meetings. In November 2016 and again in February 2017 the Claimant attempted to raise verbal grievances with AN (SN's wife) but matters deteriorated further. In early 2017 the Claimant was accused by SN and AN of using a guitar

belonging to the Respondent for non-work related reasons. The Claimant was dismissed for misconduct on 31 March 2017 but was re-instated on appeal on 15 May 2017.

13. On 6 April 2017 the Claimant advised Police Scotland and OSCR that SN had been breaching client confidentiality and mentally abusing young people in breach of child protection responsibilities. The incidents had happened in 2016 but the Claimant only found out about them in 2017. On 7 April 2017 the Claimant also made the same disclosure to the Respondent. The Claimant believed this disclosure of information was made in the public interest. The Claimant believed this information tended to show that a criminal offence had been committed and that there had been a failure to comply with legal obligations. OSCR investigated these allegations and made a list of recommendations which were implemented by the Respondent in September and October 2017. One of those recommendations pertained to a conflict of interest because AN, a trustee was married to SN, an employee. In order to manage this conflict and in fulfilment of OSCR recommendations, the Board concluded that AN should cease to be a trustee and become a paid employee. AN did not become an employee but ultimately resigned as a trustee.
14. In the summer of 2017 the Respondent was concerned that there had been a reduction in music related activity and devised a strategic plan to introduce alternative programmes of work. In August 2017 the Claimant was advised he was at risk of redundancy. The Respondent withheld implementation of the strategic because of the Claimant's extended sickness absence.
15. The Claimant raised written grievances regarding his treatment by SN in March, September and December of 2017. JC investigated the Claimant's grievances. She concluded that the issues raised in his grievances pertained to a breakdown in the relationship between the Claimant and SN. She concluded that the Claimant was being bullied and obstructed in his duties by SN. SN was suspended and formally reprimanded.
16. On 4 December 2017 the Claimant advised Police Scotland and OSCR that the end of year report published on the OSCR website misrepresented the number of clients and had been deliberately falsified by AN. The Claimant did

not advise the Respondent. The Claimant believed this disclosure of information was made in the public interest. The Claimant believed this information tended to show that a criminal offence had been committed and that there had been a failure to comply with legal obligations. These allegations were investigated by the Police and OSCR.

17. In about December 2017 and on account of the OSCR and police investigations the three principal funders withdrew or withheld their funding expressly because of governance issues. The Respondent tried to resolve the withdrawal/ withholding of existing funding without success. Thereafter PK and RY tried to additionally secure funding but were unsuccessful. Funding was eventually secured for a different project sometime after the termination of the Claimant's employment.
18. During January and February 2018, and following the outcome of the grievance investigation, PK and RY sought to resolve the Claimant's grievances and secure his return to work. In view of the outcome of the grievance investigation, the strategic plan was put on hold to enable the current staff, funding and management situation to stabilise. On 7 February 2018 the Claimant was advised accordingly.
19. In January 2017, SN and AN had previously intimated their intention to leave the Respondent and move to England contingent upon the sale of their house. The initial sale of their house fell through but a final sale around end 2017 was successful. SN ceased to be an employee of the Respondent around February 2018. AN ceased to be a trustee from 20 February 2018, but continued to have limited involvement remotely.
20. The position of Manager was advertised in December 2017 and PK applied. PK had previously been involved with the Respondent on a voluntary basis but had use of an office space in kind. PK acted as manager on a voluntary basis in February 2018 following the departure of SN. In March 2018 PK was successfully appointed to the position of Manager on a formal basis. His appointment was contingent upon funding being secured. That funding was

not secured and PK continued in that role on a voluntary basis until September 2018.

21. In March 2018 staff were advised that the funding crisis remained unresolved and the Trustees were now having to consider ceasing operations. The Respondent was without funds and staff wages were unpaid.
22. The composition of the Respondent's Board of Trustees changed frequently and comprehensively in the period between April 2017 and May 2018. Various board chairs and board members resigned at various times such that NC was the only consistent member. There was no impression of any animosity towards the Claimant by the trustees or volunteers of the Respondent who were in position at the time of the redundancy situation and indeed it was apparent that they regarded him favourably. They were clearly sorry for the deterioration in his relationship with SN and AN and would welcome his involvement as a session musician should the opportunity arise.
23. On 9 May 2018 the Respondent held a formal redundancy consultation meeting with the Claimant to advise him of their ongoing attempts to secure funding and to warn him of a potential risk of redundancy. This was confirmed in writing.
24. On 1 June 2018 the Claimant was advised that the Respondent had been unable to secure funding and his role was therefore redundant. His employment was terminated with a payment in lieu of notice and redundancy pay. The Respondent had to take out a loan to pay the Claimant's wages, notice pay and redundancy pay which loan remains unpaid.
25. The Claimant was unemployed from his dismissal until February 2019.

Observations on the evidence

26. The Claimant and the Respondent witnesses gave their evidence in a measured and consistent manner and there was no reasonable basis upon which to doubt the credibility and reliability of their testimony. They answered the questions in full, without material hesitation and in a manner consistent with the other evidence. Their recollections were sometimes hampered by the passage of

time and the significant changes in board composition, but this did not undermine the credibility and reliability of the evidence they were able to recall.

Relevant Law

27. Under Section 43A Employment Rights Act 1996 ('ERA') a protected disclosure is a qualifying disclosure made by a worker ordinarily to his employer (Section 43C) or to a prescribed person (Section 43F). The Scottish Charity Regulator (OSCR) is a prescribed person where the worker undertakes paid work for a charity. The burden of proving a protected disclosure rests upon the Claimant.
28. Under Section 43B ERA 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 – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health and safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
29. Section 94 ERA provides the Claimant with the right not be unfairly dismissed by the Respondent.
30. Section 98 ERA provides that it is for the Respondent to show the reason, or principal reason, for dismissal. Redundancy is a potentially fair reason. If the reason for his dismissal is potentially fair, the tribunal must determine in accordance with equity and the substantial merits of the case whether the dismissal is fair or unfair. This depends whether in the circumstances (including the size and administrative resources of the Respondent's undertaking) the Respondent acted reasonably or unreasonably in treating it

as a sufficient reason for dismissing the Claimant. At this stage of enquiry the onus of proof is neutral.

31. Under section 103A ERA an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
32. Under Section 105 ERA an employee who is dismissed shall be regarded as unfairly dismissed if – (a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant, (b) it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and (c) the reason (or, if more than one, the principal reason) for selection was that the employee made a protected disclosure.
33. Section 139 ERA provides that “an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
 - (a) the fact that his employer has ceased or intends to cease—
 - (i) to carry on the business for the purposes of which the employee was employed by him, or
 - (ii) to carry on that business in the place where the employee was so employed, or
 - (b) the fact that the requirements of that business—
 - (i) for employees to carry out work of a particular kind, or
 - (ii) for employees to carry out work of a particular kind in the place where the employee was so employed by the employer, have ceased or diminished or are expected to cease or diminish.”

Decision

34. On 6 April 2017 the Claimant made a disclosure to OSCR as a prescribed person, and later to the Respondent as employer, that SN had been breaking client confidentiality and mentally abusing young people. The Claimant did not provide significant detail regarding the disclosure but the detail provided was not challenged by the Respondent and it was regarded by the Tribunal as sufficient to constitute a disclosure of information.
35. The Claimant believed this disclosure was made in the public interest. The Claimant believed this tended to show that a criminal offence had been committed and that there had been a failure to comply with legal obligations. The tribunal must determine whether those beliefs were reasonable. The Respondent did not seek to challenge his beliefs as unreasonable. Given the nature of the information, which concerned risk to members of the public rather than the Claimant, we conclude on balance that his belief in the public interest was reasonable. Given the nature of the information disclosed, which prompted police and OSCR investigations, we conclude on balance that his belief in a criminal offence / breach of a legal obligation of confidentiality was reasonable. The tribunal therefore concludes that this disclosure constituted a protected disclosure.
36. On 4 December 2017 the Claimant made a disclosure of information to OSCR that the end of year report published on the OSCR website was deliberately falsified by AN. The Claimant did not provide significant detail regarding the disclosure but the detail provided was not challenged by the Respondent and it was regarded by the Tribunal as sufficient to constitute a disclosure of information.
37. In the belief of the Claimant this disclosure was made in the public interest. In the belief of the Claimant this tended to show that a criminal offence had been committed and that there had been a failure to comply with legal obligations. Given the nature of the information, which concerned misappropriation of public donations, we conclude on balance that his belief in the public interest was reasonable. Given the nature of the information disclosed, which prompted police and OSCR investigations, we conclude on balance that his

belief in a criminal offence/ breach of a legal obligation of honest accounting was reasonable. The tribunal therefore concludes that this disclosure constituted a protected disclosure.

38. The Claimant's position was that the reason for his dismissal could be inferred from the campaign of bullying and harassment by SN and AN which culminated in his redundancy. That 'campaign' extended from 2016 until their departure in March 2018 and included being falsely accused by them of inappropriate use of company property which led to his dismissal in March 2017. After his re-instatement in May 2017 the Claimant had extended periods of absence with work related stress in the period until 19 February 2018. Accordingly that 'campaign of bullying and harassment' started before his first protected disclosure in April 2017 and was limited thereafter given his extended periods of absence, albeit with scope to influence the Board of Trustees until March 2018.
39. The Respondent's position is that the police and OSCR investigations caused the principal funders to withdraw or withhold funds; that the Respondent had tried to secure funding but was unsuccessful; that staff wages were their major expense and they were unable to pay staff wages; that without funding they would have to cease operations; that the Claimant was their only employee; and that they had no reasonable alternative but to dismiss the Claimant by reason of redundancy; that his line manager had changed; that the composition of the Board of Trustees changed frequently and comprehensively in the period between April 2017 and May 2018 such that a radically different board made the decision to dismiss; and there was no animosity towards the Claimant – indeed they regarded him favourably.
40. In circumstances we have no hesitation in concluding that the reason for the Claimant's dismissal was because of the redundancy situation and not because the Claimant had made a protected disclosure.
41. Whilst there is a chain of causation which links the protected disclosure to the redundancy situation (via the investigation which led to the withdrawal of funding), that chain of causation relates to the information provided rather than

because it was the Claimant who provided it. Further the Respondent had no part in that chain and was merely reacting to its final consequences.

It is not in any event appropriate to apply a “but for” test. The protected disclosure, and fundamentally the making of it by the Claimant, was neither operative nor proximate by the time of the redundancy situation. The making of the protected disclosure by the Claimant did not motivate or influence, materially or otherwise, the Respondent’s decision to dismiss. Responding to the funding crisis, rather than the making of the protected disclosure, was the reasoning which led to the decision to dismiss.

42. There was a genuine redundancy situation. A redundancy situation had arisen because the Respondent had not secured funding and were therefore closing the Buzz Project. They no longer had a requirement for permanent musicians.
43. The reason for the Claimant’s dismissal was redundancy which is a potentially fair reason. The Claimant was not challenging the fairness of the procedure adopted as regards individual and collective consultation, efforts to find alternative employment or any appeal process. The Claimant asserted that his dismissal was unfair because there were two employees, the Claimant and PK, both of whom ought to have been included within a selection pool.
44. At the time of the redundancy process which culminated in the Claimant’s dismissal PK was working as an unpaid volunteer (his employment was contingent upon funding which never materialized). At the relevant time PK was not an employee of the Respondent. Accordingly at the relevant time the Respondent had only one employee, the Claimant. There was therefore no requirement for a selection pool. (In any event, the Respondent was without funds and if PK had been employed at the relevant time he too would have been dismissed by reason of redundancy.) The Claimant was not unfairly selected for redundancy. The Respondent acted reasonably in treating the Claimant’s redundancy as a sufficient reason for dismissing him.
45. The tribunal therefore determined in accordance with equity and the substantial merits of the case that the Respondent acted reasonably (including the procedure adopted) in treating the reason given as a sufficient

reason for dismissing the Claimant in the circumstances (including the size and administrative resources of the Respondent's undertaking).

46. The claims of automatically unfair dismissal and unfair dismissal are accordingly dismissed.

Employment Judge

M Sutherland

Date of Judgment

31 May 2019

**Entered in register
to parties**

04 June 2019 and copied

I confirm that this is my judgment or order in the case of Mr C Adams v Buzz Project 4116425/2018 & 4112741/2018 and that I have signed the order by electronic signature.