

THE INDUSTRIAL TRIBUNALS AND FAIR EMPLOYMENT TRIBUNAL

CASE REF: 7124/19

CLAIMANT: Linda Margaret Taylor-Sterling

RESPONDENT: Logan Wellbeing and Medical

JUDGMENT ON A PRELIMINARY ISSUE

The judgment of the tribunal is as follows:

- (i) The statement of Emma Riley is inadmissible in these proceedings on grounds of relevance as set out below.
- (ii) The statement of Emma Bustard is inadmissible in part as set out below and an edited version of that statement must be provided by the claimant in accordance with the Order set out in this Judgment.

CONSTITUTION OF TRIBUNAL

Employment Judge (sitting alone): Employment Judge Ó Murray

APPEARANCES:

The claimant represented herself.

The respondent was represented by Mr N Richards, Barrister-at-Law, instructed by Mr McShane of MTB Solicitors.

1. At a Preliminary Hearing, which took place on 14 May 2021 before the Vice President, this hearing was listed in order to deal with the respondent's application for the editing or exclusion of witness statements submitted by the claimant.

The Claims

2. This case has been extensively case managed and it is clear that there are three claims before the tribunal namely as follows:
 - (i) A claim for unfair dismissal;

- (ii) A claim for disability discrimination in relation to the claimant's cancer and cancer treatment in 2018;
 - (iii) A claim for detriment on grounds of having raised a protected disclosure (otherwise known as a whistleblowing claim).
3. The respondent's case is that the claimant was fairly dismissed for gross misconduct having left the keys of the respondent's premises in the lock meaning that she did not secure the premises at the end of a working day and then proceeded to go on holiday. The claimant confirmed during this Preliminary Hearing that she did indeed leave the keys in the lock as alleged but maintains that her dismissal was not for that reason but was because she had raised protected disclosures and she connected her dismissal to her disability.

Case Management

4. The Vice President had ordered that the claimant provide her signed and dated statement to the respondent and to the tribunal by 26 May 2021. On the morning of this hearing the statement from the claimant had not been provided to the Employment Judge and following enquiries it was ascertained that it had actually been emailed to the tribunal two days before the hearing. A copy of the claimant's statement was provided to the Employment Judge after the commencement of the hearing and was read by the Employment Judge in a break.
5. The claimant attended the hearing without any documents whatsoever in her possession stating that she intended to rely on her memory in relation to the application to exclude all or part of her witnesses' statements. It was clear that the claimant understood what the application would deal with so a copy of the claim form, the claimant's statement, her 22-page commentary on the response form and copies of the two statements from Ms Bustard and Ms Riley were printed off and given to the claimant before the hearing proceeded.
6. During the hearing the claimant stated that she has had difficulties as a result of her cancer treatment (which finished in 2018) in concentrating on documents and providing documents to comply with Orders of the tribunal. The claimant also alluded to serious issues involving her son which she stated have now settled to some degree and she is therefore now able to focus on the steps required to ensure this case is ready for hearing. I enquired as to whether the claimant felt able to proceed with this preliminary hearing and she stated she did.
7. The claimant must provide medical evidence to support her assertion that she has difficulties in concentrating and in dealing with documents in relation to this case because this will inform whether or not any adjustments need to be put in place for the claimant in preparing for the case or in the hearing itself. The claimant stated that she would get that from her GP and I therefore Ordered that the claimant provide any medical evidence upon which she intends to rely to support her assertion that she has difficulties dealing with paperwork, to the tribunal, **by 10 June 2021.**
8. I explained that it is vitally important that the claimant comply with the deadlines set out in this record of proceedings. I explained that she can ask for an extension to any deadline and indeed for an adjournment of the hearing if there she has a

reason to do so. I explained that it would not be enough in those circumstances to simply make an application without some supporting evidence from a medical professional. The claimant stated several times that she was anxious to proceed with the claim and with the hearing.

The Claimant's Statement and The Protected Disclosure/Whistleblowing Claim

9. At the outset of the hearing Mr Richards indicated that he intended to make application to have parts of the claimant's witness statement struck out on grounds of relevance ie that a large part of the narrative in that statement did not relate to the claims before the tribunal. Mr Richards also pointed out that the claimant made little or no mention of her disability nor of the dismissal process in her statement.
10. Mr Richards also stated that the focus of his application in relation to the claimant's statement would be on the scope of the protected disclosure claim. A Notice for Additional Information in relation to the protected disclosure claim was served in March 2021 and, whilst the claimant at first could not recollect having received that she did then confirmed that she had received it. Mr McShane undertook to provide a further copy of that Notice for Additional Information (which is one page long and is drafted in uncomplicated language) by 5.00 pm on the day of the hearing.
11. The tribunal Ordered that the claimant must provide written Replies to that Notice of Additional Information **by 17 June 2021**. I went through the information requested on the Notice and explained it and the claimant indicated that she understood what was required of her.
12. Given that the scope of the protected disclosure claim had not been clarified by the claimant I declined to deal with any application to strike out parts of the claimant's statement because it would not be possible to assess the relevance parts of the statement without the clear delineation of the protected disclosure claim.
13. When the respondent receives Replies to the Notice for Additional Information the respondent can decide whether or not it intends to request a Deposit Order Hearing in relation to the whistleblowing claim as Mr Richards indicated that that had previously been considered by the respondent at one point.

The application to exclude evidence in the witness statements

14. I then proceeded to deal with the respondent's application in relation to the statements from Ms Riley and Ms Bustard.

The Legal Framework

15. In the Industrial Tribunals (Constitution and Rules of Procedure) (Northern Ireland) 2020, the overriding objective is set out at Rule 2 and at Rules 24(d)(viii) and 25 are set out the case management powers and the power of the tribunal to strike out all or part of a witness statement on grounds of relevance. Rules 24(d)(viii) and 25 state as follows:

“Early case management

24. As soon as possible after the acceptance of the response or the application of rule 19(1), whichever is the earlier, an employment judge shall review the documents held by the tribunal that are relevant to the claim and shall do one or more of the following:

...

(d) issue any case management order appropriate to furthering the overriding objective including, but not limited to, any order dealing with —

...

(viii) limiting the content, length or format of any document or bundle of documents, including a witness statement;

Case management orders

25.-(1) The tribunal may at any stage of the proceedings, on its own initiative or on application, make a case management order.

(2) A case management order may vary, suspend or set aside an earlier case management order where that is necessary in the interests of justice, and in particular where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made.

(3) The particular powers identified in rule 24 or the following rules do not restrict the general power in this rule.”

16. Mr Richards also referred to the case of **HSBC v Gillespie [2011] IRLR 209 (EAT)** which relates to the Employment Tribunals’ powers to exclude irrelevant evidence on grounds that it is inadmissible. As set out by Underhill LJ when he went through the relevant authorities, the basic rule is that if evidence is relevant it is admissible and if it is irrelevant it is inadmissible. (see: **O’Brien v Chief Constable of South Wales Police [2005] 2 AC 539 (CA)**)

The Riley Statement

17. Mr Richards’ application was that the entirety of that statement was irrelevant. The claimant agreed that the bulk of the statement was irrelevant to the claim for the tribunal as it simply outlines Ms Riley’s own experience with the respondent in general. Whilst the claimant at first stated that she thought that one sentence might be relevant on reflection she decided that it was in fact irrelevant to her claim.

18. As a result the entirety of the statement from Ms Riley is irrelevant to the claims before this tribunal and the claimant stated she therefore no longer intends to call her as a witness to the hearing. In accordance with my powers under the Rules and by consent I therefore exclude the entirety of Ms Riley’s evidence on the

grounds that its content is irrelevant to the claims before the tribunal and it is therefore inadmissible.

The Bustard Statement

19. Mr Richards' application was that the bulk of that statement was irrelevant and he went through the parts in issue in this regard.
20. The claimant agreed that the paragraph on page one which starts: "*I have three ...*" and ends: "*...train their therapists*", is irrelevant to her case and that she would therefore take it out of the statement. On page two of the statement the claimant agreed that the sentence in the third paragraph which starts: "*I can therefore summarise...*" and ends: "*...schedule at that time*" is irrelevant to her case and can be removed from the statement.
21. The claimant further agreed that the remainder of the statement from page two to page five is irrelevant to the claim and should therefore not form part of the statement.
22. There is reference on the final page of the statement to Ms Riley alleging that she witnessed someone making a derogatory comment to the claimant regarding her eyesight. The claimant confirmed that the disability relied upon in this case relates to her cancer and cancer treatment in 2018 and she therefore agreed this reference to her eyesight was irrelevant to the claims before the tribunal.
23. By consent and in accordance with my powers under the Rules I therefore Order that the said paragraphs and parts of the statement set out above be struck out of the statement as they are inadmissible on grounds of relevance.
24. In summary the evidence therefore to be given by Ms Bustard is very limited indeed. It will be for the claimant to provide a copy of the edited statement signed by Ms Bustard to the respondent **by 18 June 2021**.
25. The claimant then referred to a "falling out" between Ms Bustard and herself and the claimant therefore had a concern about calling her as a witness at all. I explained that it is for the claimant to decide whether she wants to call Ms Bustard to give evidence and if she is to give evidence her evidence must be contained in a signed revised statement as set out above. If Ms Bustard is reluctant to come to the tribunal it is open to the claimant to ask for a Witness Order to compel her to attend. I explained the procedure in that regard and that the claimant would have to write to the tribunal to ask for a Witness Order to be issued against Ms Bustard. In those circumstances the claimant would have to be in a position to give a full address for Ms Bustard so that can be issued and served on her. The claimant stated that she would consider whether or not she wanted to call Ms Bustard as a witness at all.

The Claimant's Statement

26. Whilst the content of the claimant's statement was not before the tribunal in this hearing I indicated to the claimant that she should look very carefully at the statement she has provided. First of all she must provide a statement with numbered paragraphs as it will be impossible for any tribunal to navigate the

statement without the paragraphs being numbered. I also explained that the claims before the tribunal are the claims contained within the claim form which include a claim for protected disclosure detriment as confirmed by the Vice President at a previous hearing. I therefore urged the claimant to look carefully through her statement to check that the evidence within it relates to the claims which she has made. I explained that the tribunal process is not an opportunity to look at a wide ranging review of this respondent and its working practices in general but rather that the tribunal will focus on the allegations which the claimant has made regarding alleged adverse treatment which she says she suffered because of her disability having raised protected disclosures and her claim for unfair dismissal.

27. It is open to the claimant to revise her statement to exclude irrelevant paragraphs and to include further details of her claim about disability discrimination and the dismissal process and if she wishes to do so she must provide a draft statement to the respondent's representative **by 18 June 2021** for their consideration. The respondent must then either, agree to the revised statement being substituted for the original statement as the claimant's statement of evidence for this tribunal, or the matter can be the subject of a Preliminary Hearing if appropriate.

Hearing Dates

28. Both sides agreed this case is likely to be a three-day case rather than a five-day case given the narrowing of the evidence. It is currently listed for **10-14 January 2022**. I offered earlier listing dates to the parties and by consent the case has now been listed **for three days beginning 7 September 2021** with reading time until **11.00 am on the first day**. The parties can revert to the tribunal **by 3 June 2021** if there are difficulties with the attendance of witnesses for those dates and at that point the hearing can either revert to the original dates **in January 2022** or alternative dates can be offered to the parties in the Autumn or indeed in August 2021. The case is a reserve case on the list **in Adelaide House** during the listing period and is an **in-person hearing**. I explained that there is a chance of the hearing not been reached as it is the reserve case but in those circumstances alternative listing dates would be given and indeed it is hoped that more listing rooms will become available in Autumn 2021.

Employment Judge:

Date and place of hearing: 27 May 2021, Belfast.

This judgment was entered in the register and issued to the parties on:

Notice

1. **If any party fails and/or is unable to comply with any of the above Orders, any application arising out of such failure or inability to comply must be made**

promptly to the tribunal and in accordance with the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020.

- 2. Failure to comply with any of these Orders may result in a Costs Order or a Preparation Time Order or a Wasted Costs Order or an Order that the whole or part of the claim, or as the case may be, the response may be struck out and, where appropriate, the respondent may be debarred from responding to the claim altogether.**
- 3. Under Article 9(4) of the Industrial Tribunals (Northern Ireland) Order 1996, any person who, without reasonable excuse, fails to comply with a requirement to grant discovery and inspection of documents under Rule 27 of the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020 shall be liable on summary conviction to a fine not exceeding Level 3 on the standard scale - £1,000 at 27 January 2020, but subject to alteration from time to time.**
- 4. Under Article 84(9) and (10) of the Fair Employment and Treatment (Northern Ireland) Order 1998 (as amended) any person who, without reasonable excuse, fails to comply with a requirement to grant Discovery and Inspection of documents under Rule 27 of the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020 shall be liable on summary conviction to a fine not exceeding Level 5 on the standard scale - £5,000 at 27 January 2020, but subject to alteration from time to time; and if without reasonable excuse the failure continues after conviction shall be liable on a second or subsequent summary conviction to a fine not exceeding one tenth of level 5 of the standard scale for each day on which the failure continues.**
- 5. A party may apply to the tribunal to vary or revoke any of the above Orders in accordance with the Industrial Tribunals and Fair Employment Tribunal Rules of Procedure 2020.**