Neutral Citation Number: [2023] EAT 166

Case No: EA-2022-000902-JOJ

IN THE EMPLOYMENT APPEAL TRIBUNAL

7 Rolls Building,
Fetter Lane, London EC4A 1NL

Date: 21 November 2023

Before:

CASPAR GLYN KC, DEPUTY JUDGE OF THE HIGH COURT

- -

Between:

MRS L FRY

Appellant

- and -

KINGSWOOD LEARNING & LEISURE GROUP LTD

Respondent

- -
- -

Mr Sam Way (instructed by **Advocate**) for the **Appellant**
Mr Colin McDevitt (instructed by **Worknest Law**) for the **Respondent**

Hearing date: 21 November 2023

- -

JUDGMENT

- -

SUMMARY

WHISTLEBLOWING, PROTECTED DISCLOSURE

The Tribunal finding that the person who dismissed the claimant did not know of her protected disclosures was not perverse. The Tribunal gave adequate reasons for reaching the conclusion which it did.

CASPAR GLYN KC, DEPUTY JUDGE OF THE HIGH COURT:

Introduction

1. This is the appeal against the decision of the Midlands (East) Employment Tribunal of Employment Judge Ayre, sitting with members, that was sent to the parties on 14th June 2022. The Tribunal concluded that at the time that the decision was made to dismiss the claimant, that Mr Husband, the dismissing manager, was not aware that the claimant had blown the whistle and therefore the dismissal could not be for whistleblowing.

2. The Notice of Appeal is dated 22nd July 2022. Ground 1 challenges the finding of the Employment Tribunal asserting that it was perverse and wrong for the Tribunal to find that Mr Husband did not know of the protected disclosure prior to the decision to dismiss, and Ground 2, asserts that inadequate reasons were given for that conclusion. In short, Ground 2 is that the appellant Mrs Fry, who sits in court, could not tell why she had won or lost.

The Facts

3. On 5th November 2018 the claimant commenced employment with the respondent. As I shall set out, the protected disclosures below were admitted by the respondent, on 20th May 2021.

    i) The first protected disclosure was made orally in a meeting on 13th March 2020 to Sarah Farrell, the Interim Sales and Marketing Director. The claimant disclosed information tending to show that Mr Husband had touched a female colleague at a work event.

ii) The second protected disclosure was made orally to Mr Marsden, Programme Director, on 15th April 2022 when the claimant repeated the disclosure made on 13th March 2020 and also disclosed information tending to show that Mr Husband had made an inappropriate comment to a female colleague about attending a Zoom call in her dressing gown.

4. On 1st June 2020 Mr Husband became the claimant's Line Manager. On 20th July 2020 the claimant was told by Mr Husband that her role was at risk of redundancy. On 22nd July there was the first redundancy consultation, on 24th July the second, and on 27th July 2020 there was a meeting between the claimant and Mr Husband in which the claimant's employment was terminated due to redundancy. The decision to dismiss had been taken by 27th July 2020.

5. On 20th October 2020 the claimant attended a grievance meeting and on 28th October 2020 the respondent provided the outcome of the grievance. On 30th October 2020 the claimant contacted ACAS to commence early conciliation and on 31st October 2020 the claimant's employment terminated. On 30th November 2020 an ACAS early conciliation certification was issued and on 2nd December 2020 the claimant presented grounds of complaint in respect of a protected disclosure, and materially at paragraph 18:

> "*The whistleblowing that I carried out might have been considered in my redundancy dismissal by him and the business*".

6. The grounds of resistance dated 4th January 2021 set out at paragraph 13:

> *"If she did make [protected disclosures], which is disputed, it is denied that this had any relevance to the reasons for her dismissal."*

7. Paragraph 14 set out that

> *"It is submitted that the claimant suffered no detriment, including the dismissal, as a result of any disclosure regarding alleged conduct towards other employees and that the reason for the redundancy decision and the process that was followed will highlight this."*

8. Further particulars were given on 12th January 2021. At paragraph 5 it was said:

> *"The claimant was not subjected to any detriment, including dismissal, because of any whistleblowing disclosure."*

9. On 1st March 2021 there was a preliminary hearing, and Mr Way has drawn my attention particularly to paragraphs 5, 13 and 14. Mr Way has submitted that it was not clear that Mr Husband's knowledge was a matter that would be put as a fact in issue and it was not plain that that would be the case, and certainly not front and centre.

10. There was a final hearing between 6th and 9th June 2022. I should record my gratitude to counsel for agreeing a note of the evidence which makes the task of the Employment Appeal Tribunal easier. I am also grateful to them for their concise and direct submissions. Both their co-operation and submissions were the model of what this Tribunal expects in pursuing such an appeal.

11. In that final hearing the claimant's evidence, in short, which I summarise, at paragraph 5 was that there was a call from Ms Willows on 12th March 2020 where the claimant relayed the facts from the person who had asserted that they had been harassed. At paragraph 6 the claimant sets out that she reported that matter to Ms Farrell who passed it on to Ms Williamson, the CEO. At paragraph 10 she relates that

on 15th April 2020 she told Mr Marsden and at paragraph 15 she says Mr Marsden told the People Director, Mr Watson.

12. Further to that evidence, Mr Husband's witness statement provides at paragraph 10:

> *"Stephen contacted me in March to tell me that someone had called him to make a complaint about a remark I had made a call on although they did not want to make it formal. To this day I have no idea who made the complaint or what alleged remark was. I have very little contact with me apart from the calls I make when I required information as I was still finding my feet within the business and we were still in a Covid 19 lockdown. She was always very forthcoming, and being new to the business I appreciated her sharing her knowledge and her experiences."*

At paragraph 12:

> *"I do not accept the fact that Leigh, who I was aware had raised these concerns, was in any way victimised because of that. I was not influenced by that in my dealings with her during the redundancy process which was relatively amicable, which was purely governed by commercial factors, taking into account questions raised in our consultation meetings."*

13. Mr Husband then gave evidence-in-chief and he said variously during his evidence:

> *"When I received a bundle is the first time I knew of the [whistleblowing] allegations."*

"For the first time I knew of Mrs Fry [making] allegations of sexual harassment was March 2021. To this day [in paragraph 10] refers to the date I received the bundle."

"When I made the statement I did not know [that it was Mrs] Fry [who] had raised whistleblowing."

"I was only made aware that it was Leigh who made the allegations when I made this statement."

"It was either [when I saw] the first bundle of grievance when I first knew that Leigh had made allegations of sexual harassment. I forgot about it to be honest."

"Neither of [the] people who made accusations spoke to me."

"[The] date of knowing that it was Mrs Fry was on the date of the grievance note"

"Stephen would have shared this with me page 156 [of the bundle] 20th October 2020. I confirm my witness statement is true."

In evidence-in-chief:

"I should have been clear in paragraph 12 as to when [I knew] who made the allegations and when."

14. In cross-examination the following questions and answers were put.

"Q. When was the first time you knew of concerns regarding the dressing gown/prodding?

A. When I had sight of the grievance. Until that point I had no idea who had made the complaint and what the complaint was. It was never alluded to.

Q. The first you knew of the dressing gown/poking/prodding was the grievance?

A. I had no idea of the accusations at all, I was quite taken aback when I saw them."

15. Further, Mr Watson, the People Director, also gave evidence-in-chief in which he said:

"I first made Mike [Husband] aware of the identity of the people concerned and their concerns when the grievance [was closed] submitted."

Then further in cross-examination:

"Q. The first time you made Mike [Husband] aware that the claimant was involved was at the stage of the grievance?

A. Yes."

16. The Employment Tribunal had no direct evidence from the claimant as to the date of Mr Husband's knowledge.

17. Turning to the judgment of the Employment Tribunal. At paragraph 22 the Tribunal had some issues with the claimant's recollection in that it was not accurate or consistent with the documents.

18. The Tribunal found as follows at paragraph 23

"The version of events given to us by the claimant during evidence at the Tribunal was also not consistent with the documentary evidence or what she

appears to have said at the time. For example, the claimant was complimentary about Mike Husband at the time she was made redundant, thanking him for the way…he handled the situation, and contacting him on Linkedin to connect with him. She told us in evidence that she had always had suspicions that the real reason for her dismissal was that she had made protected disclosures, but this was not consistent with her behaviour at the time. Not only did she choose not to appeal against her dismissal, but she thanked Mike Husband, made no complaint to Andy Marsden, another director who she trusted and voluntarily contacted Mike Husband on LinkedIn asking him to stay in contact."

19. The judgment also referred to paragraph 63, which reads:

"Thank you Mike and for the way you have dealt with this also. I would have loved to have stayed and worked with you in the new structure however the £20,000 was just too low hence my decision to move on. I do hope our paths cross and that I will hear from you again so we can work together going forward… Take care of you."

20. And further, a reference to paragraph 65 of the written reasons:

"In September 2020 the claimant sent Mike Husband a LinkedIn connection request which he promptly accepted."

21. The judgment goes on and at paragraph 29 sets out on 13th March that the claimant had reported Mr Husband's behaviour to Ms Farrell and on 15th April to Mr Marsden, as I have alluded to above. On 4th May Mr Marsden spoke to Mr Watson, who spoke to Mr Husband's team.

22. At paragraph 40 the Tribunal records:

> *"On 19th May Stephen Watson telephoned Mike Husband and talked to him about behaviour generally and how the respondent operated and dealt with people. He told him to be aware of how he came across and spoke to people, and to make sure that it was in line with the respondent's values. He also told him to ensure that he was respectful of others and that the respondent would not tolerate any behaviour or banter that might upset anyone. Mike Husband asked if Stephen Watson was referring to any particular incident and Stephen Watson said no, he was referring to his conduct generally. Mike Husband apologised if he had done anything wrong."*

23. Paragraph 41.

> *"Stephen Watson did not tell Mike Husband about the incidents on 4 March or the dressing gown comment, nor did he disclose the names of Jen Willows, Susan Evans or the claimant during that conversation. We find, on the balance of probabilities, that Stephen Watson did not tell Mike Husband that the claimant had made allegations of inappropriate behaviour against him until the claimant raised her grievance in October 2020."*

24. At paragraph 44 the Tribunal made findings about the desperate effect of the Pandemic on the respondent's business and the income was zero and the wage bill was about £1,000,000. In order to survive the respondent had to make urgent savings, and this was put into perspective and dealt with by the Tribunal in respect of causation and knowledge of Mr Watson when Mr Husband proposed the redundancy situation at paragraphs 45 to 51 for this underlying reason relating to the Pandemic.

25. The Tribunal went on and made the following findings.

"69. The claimant suggested that Mike Husband was aware that she had made protected disclosures, because Stephen Watson or Andy Marsden had told him. She accepted however that she had no evidence that Andy Marsden had told Mike Husband about the disclosures, and we accept Stephen Watson's evidence that he did not tell Mike Husband about them until October 2020 when the claimant raised her grievance."…….

"85. We have reminded ourselves that in a case such as this where the claimant has less than two years' service, the burden of proving that the reason or principal reason for the dismissal was the protected disclosure lies with the claimant. The claimant has not, in our view, discharged the burden. The claimant's case, at its best, was based on speculation on the part of the claimant that Mr Husband was motivated by her protected disclosure when dismissing her. She had no direct evidence to support her claim and accepted that she did not know whether Mr Husband knew about the protected disclosures.

86. We recognise that an employer is not likely to admit that an employee has been dismissed for whistleblowing, and that in some cases artificial reasons for dismissal are created. We find however that this is not such a case, and that the reason given by the respondent for dismissing the claimant is in fact the true reason for her dismissal.

87. We have no hesitation in finding that the reason for the claimant's dismissal in this case was redundancy. We find that Mike Husband was not aware that the claimant had made protected disclosures until after she had been dismissed."

I should note at this stage the parties agree that this was merely infelicitous language by the Tribunal when it set out that "*until after she had been dismissed."* and the

intended and understood language was, from the context, "after the decision had been made to dismiss her". I continue reading:

> *"He could therefore not have been influenced at all by the protected disclosures when he made the decision to make the claimant redundant, either consciously or subconsciously. What was in his mind at the time he decided to dismiss the claimant was the need to reduce headcount, save costs and ensure that the business could survive in the future. He therefore decided that the claimant's role of Head of Schools was no longer required."*

The Law

26. As to Ground 1, perversity, I direct myself in accordance with the well-known authority of **Yeboah v Crofton** [2002] IRLR 634 at paragraph 93.

> *"Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable Tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has 'grave doubts' about the decision of the Employment Tribunal, it must proceed with 'great care';* ***British Telecommunications PLC v Sheridan*** *[1990] IRLR 27 at para 34."*

27. In respect of Ground 2, the failure to give reasons, the law is essentially that adequate reasons have to be given so that the claimant can understand why she has lost. The duty to give reasons arises under Rule 62(4) and (5) of the Employment Tribunal Rules and Procedure set out in schedule 1 to the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237). They materially provide that:

> *"(4) The reasons given for any decision shall be proportionate to the significance of the issue and for decisions other than judgments may be very short.*
>
> *(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. Where the judgment includes a financial award the reasons shall identify, by means of a table or otherwise, how the amount to be paid has been calculated."*

28. In **Meek v City of Birmingham District Council** [1987] IRLR 250 at paragraph 8 page 251 the test that I apply is set out.

> *"It has on a number of occasions been made plain that the decision of an Industrial Tribunal is not required to be an elaborate formalistic product of refined legal draftsman ship, but it must contain an outline of the story which has given rise to the complaint and a summary of the Tribunal's basic factual conclusions and a statement of the reasons which have led them to reach that conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises."*

29. Further, the duty arises so as to allow the Appellate Tribunal to understand why the judge reached the decision that was reached, as stated by Lord Phillips MR, who held at paragraphs 19 and 21 in **English v Emery Reimbold & Strick** [2002] 1 WLR 2409 that:

"19. It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

"21. When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which he has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise the evidence or submission in question. The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the Judge's decision."

30. Cavanagh J in **Frame v Governing Body of the Llangiwg Primary School** [2020] UKEAT/0320/19 summarised the principles from this case.

"47. The relevant principles can be summarised as follows:

(1) The duty to give reasons is a duty to give sufficient reasons so that the parties can understand why they had won or lost and so that the Appellate

Tribunal/Court can understand why the Judge had reached the decision which he/she had reached.

(2) The scope of the obligation to give reasons depends on the nature of the case.

(3) There is no duty on a Judge, in giving his or her reasons, to deal with every argument presented by counsel in support of his case.

(4) The Judge must identify and record those matters which were critical to his decision. It is not possible to provide a template for this process. It need not involve a lengthy judgment.

(5) The judgment must have a coherent structure. The judgment must explain how the Judge got from his or her findings of fact to his or her conclusions.

(6) When giving reasons a Judge will often need to refer to a piece of evidence or to a submission which he/she has accepted or rejected. Provided that the reference is clear, it may be unnecessary to detail, or even summarise, the evidence or submission in question; and

(7) It is not acceptable to use a fine-tooth comb to comb through a set of reasons for hints of error or fragments of mistake, and try to assemble them into a case for oversetting the decision. Nor is it appropriate to use a similar process to try to save a patently deficient decision."

31. Further, I was referred to the passages of **DPP Law Limited v Greeenberg** [2021] EWCA Civ 672 which set out those principles from paragraphs 57 to 58 of the judgment which I need not set out here as they have been summarised above.

Discussion and Conclusions

Ground 1.

32. The claimant submits, ably through Mr Way, that the Tribunal was simply wrong and that no reasonable Tribunal would have accepted that Mr Husband's knowledge had come about after he had taken the decision to dismiss. Mr Way argues that Mr Husband's evidence was hopeless and says that because paragraph 12 of his statement put the date of knowledge as being prior to the decision to dismiss, the Tribunal should have relied on that date above all others. In the face of conflicting dates, Mr Way argues, the Tribunal should have been compelled to find that the decision to dismiss was taken with knowledge by Mr Husband of the claimant's protected disclosures because of the content of paragraph 12. Mr Way submitted that no reasonable Employment Tribunal when faced with one date over another would have alighted on any other date other than that in paragraph 12. As that date was in the statement, it should have more weight, he submits, as it was prepared prior to the Tribunal and would have been a statement which Mr Husband would have been able to consider.

33. However, a trial is dynamic. The evidence changes. The evidence ebbs and flows. Mr Way is right when he characterises Mr Husband's evidence as deficient. In submissions with me he helpfully identified five different dates on which the evidence of Mr Husband could possibly ascribe knowledge to. The first date was that which is set out in paragraph 12 which Mr McDevitt agreed was likely to be a date before dismissal, namely, when Mr Husband said: "I do not accept the fact that Leigh, who I was aware had raised these concerns, was in any way victimised because of that" is likely to be a reference to Mr Husband knowing about the matters before the decision to dismiss.

34. However, one also has to stand paragraph 12 against the contradictory paragraph 10, which stated: "To this day I have no idea who made the complaint or what the alleged remark was." On one level that may just be about the underlying comment, but it could also have some reference to the claimant's part in making the disclosure.

35. The second possible date from Mr Husband's evidence arises from his statement that "when I received the bundle is the first time I knew of the allegation" and Mr Way broadly said "the bundle" was probably a broad reference to the bundle for the ET proceedings, and I accept that characterisation. The claimant repeated later in his evidence-in-chief that he knew of the protected disclosures, and I am paraphrasing the evidence which I have set out above, either when he saw the first bundle or the grievance when he knew it was Mrs Fry. On that basis, the second date seems to be in preparing for this case after the dismissal. I deal with the alternative interpretation of this evidence at paragraph 38 below.

36. The third date was one which Mr Husband alluded to directly when he said that the first time he knew of Mrs Fry making the allegations of sexual harassment was March 2021.

37. The fourth possible date which Mr Husband offers is that when he made the statement he did not know it was Mrs Fry, but some time, and I accept the characterisation of the date, sometime after the preliminary hearing on 1st March 2021 and before 3rd May 2022 when statements were exchanged he was made aware that it was the claimant who made the allegations when he made his statement, which fixes the date of knowledge again, at a date after the dismissal.

38. Finally, the fifth date which Mr Husband avers was the first time he knew of the claimant's protective disclosures was on or around the grievance on 19th or 20th

October after he had made the decision to dismiss the claimant from the evidence that I considered at paragraph 35 above. In that respect Mr Husband said the date of knowing was the date of the grievance. He said that Mr Watson would have shared it with me and additionally he said either when he first saw the bundle or the grievance when I knew it was Mrs Fry. And indeed in cross-examination it was confirmed with him that the first time he was aware of concerns was when he had sight of the grievance in or around 20th October 2020.

39. So the Tribunal have a number of dates from which to choose as a result of Mr Husband's evidence: firstly, before he made the decision to dismiss, secondly, when he received the bundle in preparing for this case, thirdly, March 2021, fourthly, sometime after the 1st March 2021 but before 3rd May 2022 when he prepared the statement, and finally, when the grievance was submitted in and around October 2020.

40. What Mr Way says is that any other conclusion other than one, that is before the decision to dismiss, was one to which the Employment Tribunal was not entitled to reach. I have already referred to the high bar which he must overcome in showing a perversity challenge. I do find Mr Husband's evidence as to his date of knowledge was inconsistent. His evidence did change, and his evidence changed from that in the initial statement. However, there is no principle of law that the Employment Tribunal was bound to conclude that the date in his statement was the date it had to accept and, given the choice of a number of different dates, it seems to me that it is inarguable that the Tribunal erred in choosing the date that it did. This is all the more so because the only one of the other four dates was corroborated by another witness and that was Mr Watson. Mr Watson had given evidence that he shared the matter with Mr

Husband after the date of the dismissal. This evidence did not come in a vacuum, it came after the Tribunal had made findings of fact that the claimant did not have any evidence to show it was Mr Marsden who told Mr Husband. Accordingly, the Tribunal was entirely justified on the evidence to conclude the date of knowledge was the grievance in October 2020.

Ground 2

41. Mr McDevitt submits that the claimant knows why she lost, because the Employment Tribunal accepted the evidence of Mr Watson, along with the evidence of Mr Husband and in the absence of any sufficient evidence to the contrary to show that Mr Husband knew of the protected disclosures before his decision to dismiss.

42. Mr Way submits it does not follow just because Mr Watson did not tell Mr Husband before 20th October 2020 that Mr Husband was not told of the protected disclosures, and what is conspicuously absent from the Employment Tribunal reasoning is the reason why the date of before the dismissal, that is Mr Husband's statement at paragraph 12, why that was rejected.

43. Mr Way submitted, cogently and strongly, the Employment Tribunal needed to explain why. It should have embarked upon, he submits, on a greater analysis, given that this was the dispute. In support of those arguments he relies on the principles that I have set out above from **Frame**, namely principle (1) that in the face of contradictory evidence the Tribunal failed to let the parties understand why it found that Mr Husband did not know about the disclosures until the claimant raised her grievance. He submitted that principle (2), it was proportionate to the issues, this was a central fact and the Employment Tribunal should have set out its reasoning, and that principle (6), on which he places the heaviest reliance, that it was necessary to set out

the varying accounts at different points in the evidence of Mr Husband, and then, and only then, could it give adequate context in explaining its decision. And further, Mr Way relies upon principle (7) that the error identified was not engineered when coming to the decision but it was an appraisal of the facts given.

44. However, once one understands the context of the judgment and that the Employment Tribunal was trying to focus on why it chose one of those five dates, in my judgment the Employment Tribunal did not have to go through, as I have set out above in the law, each of the five dates, weigh them up and then dismiss them individually before alighting on the one that it did prefer. It did not have to give reasons why Mr Husband's changing evidence did not compel them to one view or the other on the authorities I have set out.

45. Mr Way submits that paragraph 12 in the witness statement had a special status as part of the evidence, it being set before the Tribunal, it having been exchanged, and therefore he submits the Tribunal had to give reasons as to why it did not follow Mr Husband's date of knowledge as apparent from the statement.

46. However, I agree with Mr McDevitt and his reference to the **DPP v Greenberg** essentially that the Employment Tribunal needed to give reasons for the date that it found and not for the dates it did not. In the context of the various dates having been suggested by Mr Husband, the Employment Tribunal needed to take a view and give reasons for it and in my view the Employment Tribunal did so and did so rightly.

47. Firstly, Mr Way rightly conceded that there was no evidence before the Tribunal that anyone else had told Mr Husband of the protected disclosures. Secondly, at paragraph 41, the Tribunal's clear finding that Mr Watson told Mr Husband in October 2020. Thirdly, the Tribunal's clear finding at paragraph 69 that there was no

evidence to suggest that Mr Marsden told Mr Husband and no positive evidence elsewhere that Mr Husband was told of the protected disclosures. So, whilst it was suggested by Mr Way that there were other ways for Mr Husband to find out, there was no evidence to support that suggestion or that supposition in any way. Further, the timing of the redundancy was clearly related to Pandemic reasons and that explained also why the timing was for the redundancy at that time and why matters were concluded in July.

48. I am satisfied that the Tribunal has set out in terms, for the reasons I have set out above, why it chose the date of October as Mr Husband's date of knowledge. I am satisfied on that basis the claimant does know why she lost and therefore adequate reasons have been given.

49. For the reasons I have set out above the appeal is dismissed.
