



EMPLOYMENT TRIBUNALS

Between:

Claimant: Ms H Rochester

Respondent: Care Quality Commission

JUDGMENT

It is the judgment of the Tribunal that the claim be dismissed.

REASONS

- 1 On 27 July 2017 the Claimant presented a claim to the Tribunal. In section 8 of the claim form ET1 the Claimant said the following:

Whistleblowing detriment on the part of the prescribed authority in care homes.

I went to them as the concerns I raised re the health and safety of residents in the home I was employed at with were not being addressed and given the employers reaction to me I knew they would not be. The response from the CQC was to advise the employee to make a referral to the disclosure and barring service against me without even speaking to me to ascertain facts. I had already raised whistleblowing concerns with the CQC in writing the previous day.

- 2 The Respondent presented a response to the Tribunal on 30 August 2017 in which it was said that the Tribunal did not have the jurisdiction to consider the claim.
- 3 The case file was referred to me in accordance with rule 26 of the Employment Tribunals Rules of Procedure 2013. Rule 27 provides as follows:

Dismissal of claim (or part)

27.—(1) If the Employment Judge considers either that the Tribunal has no jurisdiction to consider the claim, or part of it, or that the claim, or part of it, has no reasonable prospect of success, the

Tribunal shall send a notice to the parties—

- (a) setting out the Judge's view and the reasons for it; and
- (b) ordering that the claim, or the part in question, shall be dismissed on such date as is specified in the notice unless before that date the claimant has presented written representations to the Tribunal explaining why the claim (or part) should not be dismissed.

(2) If no such representations are received, the claim shall be dismissed from the date specified without further order (although the Tribunal shall write to the parties to confirm what has occurred).

(3) If representations are received within the specified time they shall be considered by an Employment Judge, who shall either permit the claim (or part) to proceed or fix a hearing for the purpose of deciding whether it should be permitted to do so. The respondent may, but need not, attend and participate in the hearing.

(4) If any part of the claim is permitted to proceed the Judge shall make a case management order.

- 4 On 15 September 2017 I signed a Notice and Order addressed to the Claimant a copy of which was sent to the parties on 28 September 2017. It stated that I considered that the claim had no reasonable prospect of success for the following reasons:

A worker is entitled under section 47B of the Employment Rights Act 1996 not to be subjected to a detriment on the ground of having made a protected disclosure. That protection relates to detriments done by the employer, another worker of the employer, or an agent of the employer with the employer's authority. It appears to me that the Respondent does not fall into any of those categories.

- 5 The Claimant wrote to the Tribunal on 4 October and again on 5 October 2017 setting out her contentions. She referred to an email from the Respondent to her ex-employer in which it was suggested that the ex-employer may wish to contact DBS to report its concerns about the Claimant if they were considered to be of a serious nature. The Claimant also referred to *Day v. Health Education England* [2017] IRLR 623 CA.

- 6 The Claimant said as follows:

This is discrimination against a whistle blower by the prescribed person as well as the employer, this is my interpretation as someone with practically no legal knowledge but who does common sense really well. To discriminate against a whistle blower is against the law and it seems to me they are jointly liable here.

- 7 The parties agreed that this matter be dealt with on the papers rather than by a hearing in person.

- 8 I am entirely satisfied that the Tribunal does not have any jurisdiction to consider this claim. Section 47B of the Employment Rights Act 1996 grants rights to 'a worker' not to be subjected to a detriment on the ground of having made a protected disclosure. That right protects the worker against any detrimental act of the employer, another worker of the employer, or by an agent of the employer. It does not protect a worker against any detrimental act of a prescribed person. The only relevance of the category of 'defined person' in section 43F of the 1996 Act is this. Section 43B of the 1996 Act sets out the definition of a 'qualifying disclosure'. Information must be disclosed by the worker in accordance with that section, and in order for there to be a 'protected disclosure' that information must be disclosed in accordance with any of sections 43C to 43H. Such disclosures are usually to the employer under section 434C. There are other categories in other sections, and one of those categories is that of prescribed persons in section 43F.

- 9 It is not in dispute that the Respondent is a prescribed person to which a qualifying disclosure can be made so as to create a protected disclosure. It appears that there is no doubt that the Claimant had been a 'worker' as defined in the 1996 Act in relation to the care home where she worked. However, there is no evidence that the Claimant was a worker in relation
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to the Respondent, being a prescribed person. Further I fail to see how the Respondent can be said to be an agent of the care home at which the Claimant was employed.

- 10 The authority of *Day* is on a different point. That case involved a doctor in training who was placed by Health Education England ('HEE') with a NHS Trust, and entered into a contract of employment with the Trust. The issue was whether Dr Day was a 'worker' in relation to HEE as well as the Trust. The Court of Appeal held that he was such a worker for the purposes of the protected disclosure legislation. That case has nothing to do with the facts prevailing here.

**Employment Judge Baron
18 October 2017**