



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Smith  
**Respondent:** Mid Essex Hospital Services NHS Trust  
**Heard at:** East London Hearing Centre  
**On:** 16 July 2018  
**Before:** Employment Judge M Warren  
**Members:** Mr P Quinn  
Mrs B K Saund

## Representation

**Claimant:** Mr S Perhar (Counsel)  
**Respondent:** Mr J Arnold (Counsel)

## JUDGMENT ON REMISSION FROM THE EMPLOYMENT APPEAL TRIBUNAL

The Tribunal confirms that the reason or principle reason the Claimant was dismissed was that he had made Protected Disclosures.

## REASONS

### Background

1. By a Judgment sent to the parties on 9 February 2017, the Claimant succeeded in his claim that he was unfairly dismissed and subjected to detriment by reason of his having made Protected Disclosures.
2. The Respondent appealed.
3. By a Judgment dated 5 March 2018, Her Honour Judge Eady QC remitted the matter to this tribunal saying this:

*[Paragraph 47] "... the ET's conclusion on the claim of automatic unfair dismissal under section 103A cannot stand and that case must be remitted"*

*[Paragraph 44] "The ET had itself drawn a distinction between the background – the nuisance factor – and the whistleblowing (see paragraphs 283 to 284). It found that the relevant decision takers were aware of both (paragraph 288). It needed then to demonstrate that it had considered which had been the or principal, reason for the dismissal..."*

*[Paragraph 49] "Here, the question is whether the ET overlooked the third stage in Kuzel, failing to ask itself whether the 'nuisance' factor was the real or principal reason for the dismissal rather than the Claimant's protected disclosures."*

4. The parties agreed in correspondence that the Tribunal should deal with the remission by way of written submissions and that there was no need for a further hearing.
5. In our deliberations we have had regard to our Reserved Judgment, the Judgment of the EAT, the submissions of Respondent's representatives submitted on 14 June 2018, the submissions of the Claimant's representatives submitted on 15 June 2018 and the reply on behalf of the Respondent, submitted on 29 June 2018.

### **Submissions**

6. Mr Arnold reminded us of the key passages in the case of Kuzel v Roche Products Limited [2008] IRLR 530 at paragraphs 56, 57, 58 and 59. In particular:

*"But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, that it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."*

7. The respondent's contention, having seen our findings of fact, is that the principal reason for Mr Smith's dismissal was that he was seen as a nuisance and a source of irritation by the Respondent. Mr Arnold goes on to list 30 findings of fact from our Judgment in support, which we will deal with in detail below. He argues the protected disclosures were at best, just a facet of the nuisance factor, but that they cannot amount to the principal reason, in light of the context of the nuisance factor.
8. Unfortunately, the submissions from Mr Perhar on behalf of Mr Smith, are not particularly helpful. He seems to focus on criticising the Respondent for appealing our decision and suggesting that it has adopted a vexatious approach to the litigation. Given that the Respondent has succeeded in its appeal, even if only in part, such criticism would appear to be misguided.

The legal principles which he has set out are unhelpful; they seem to be legal argument more appropriate for the EAT, as argument suggesting that our original decision should be allowed to stand. He suggests that, (paragraph 18) it is an unassailable conclusion of the Tribunal that the reason for dismissal was because of the whistleblowing; clearly it is not, "unassailable" as the matter has been remitted to us by the EAT. He suggests that the Respondent is seeking to substitute the word, "nuisance" for word the Respondent had originally relied upon, which was that Mr Smith was, "unmanageable". He suggests the Respondent is trying to circumvent our findings on whistleblowing by raising a specious point, that the reason for dismissal was that Mr Smith was a nuisance. If it was a specious point, the EAT would not have remitted it. He does however, make the point that in our Judgment, we had described that Mr Smith was a nuisance as, "background".

9. The Respondent replied, defending itself in respect of the criticisms levied at it on behalf of Mr Smith, but the reply takes us no further forward in assisting us with the point remitted.
10. It is a shame that Mr Smith's representatives did not choose to reply to Mr Arnold's submissions as to why on our findings of fact, we should conclude that the reason or principal reason for dismissal was that the Respondents managers regarded Mr Smith as a nuisance.

### **Discussion**

11. As we mentioned above, Mr Arnold has set out 30 separate references to our findings of fact in support of his contention that we should conclude that the Respondent's view of Mr Smith as a nuisance was the reason or principal reason for his dismissal. Some of those points are repetitive. Some of them need to be put in context. Some of them are apt. We have considered each point and we have considered them together, globally, (the sub numbering coincides with Mr Arnold sub numbering):
  - 11.1. That Mr Smith was a Royal College of Nursing local steward from 1994 is not a reason the Respondent would regard him as a nuisance.
  - 11.2. It is apparent from the quoted email of January 2015, that Ms Foster did find Mr Smith's round robin emails irritating and therefore probably, a nuisance.
  - 11.3. The quoted passage is that Mr Smith saw himself as becoming unpopular, it is not a finding by us that he did become unpopular. However, it is correct to say that the Respondent would have regarded Mr Smith's campaign in respect of Recruitment and Retention Payments as a nuisance.
  - 11.4. Some may have regarded Mr Smith's assistance of Mr Saunston with his grievance and the disciplinary action against him as a nuisance, but he was doing no more than his job as a trade union

representative. It is unlikely to have been a significant factor. It is noteworthy that the disciplinary action was dropped.

- 11.5. Whilst Mr Smith was called into a meeting in April 2013 in which he was accused of bringing the trust into disrepute by spreading rumours that Mr Watson was bullying staff, the context is that he provided an explanation that eight people had complained to him that they were being bullied. That in due course becomes one of the Protected Disclosures.
- 11.6. It is correct to say that whilst he was away ill, Ms Foster sent him a letter alleging that he had harassed a potential witness in Mr Saunston's case. In the following paragraph of our reasons, (paragraph 51) we described it as an extraordinary letter to send and were critical that he had been written to in this way.
- 11.7. There are a number of criticisms of Mr Smith's emails by us in Mr Arnold's list. This is the first of them, in respect of his emails to Mr Jackson on 6,7 and 23 November 2013. It need only be said once that Mr Smith sent lengthy and difficult to understand email correspondence.
- 11.8. We did note that Mr Smith was warned in February 2014 not to email Mr Jackson anymore, but he continued to do so, on three further occasions.
- 11.9. We found that Mr Smith had refused to attend a meeting in February 2014, which resulted in a letter threatening him with disciplinary action. However, the context is that this was very shortly after his first disclosure, his colleagues had told him that there was a witch hunt against him and there had been an agreement that in light of his returning to work from illness, there would be no meetings with him unless he was accompanied by a union representative.
- 11.10. It is true to say that the Respondent's Chief Finance Officer Mr Gerrard, replied to an email from Mr Smith to say that he had already answered Mr Smith's points in an earlier email and that nonetheless, Mr Smith wrote to him again. The context is he had not been specifically told not to write again. He was trying to get his point across, which had earlier been dismissed by Mr Gerrard.
- 11.11. There is a second criticism of Mr Smith's emails, in respect of that of 15 March 2014.
- 11.12. There is third criticism of his emails, in respect of that of 18 March 2014.
- 11.13. We do not understand how our finding that Mr Smith's emails were more lucid in 2013 amounts to his being regarded as a nuisance, other than as fourth criticism of his email style.

- 11.14. It is correct to say that Ms Stevenson wrote to Mr Smith a strongly worded email asking him not to write to Mr Jackson, suggesting that it was inappropriate for him to continue to do so. The context is, that Mr Smith had sent what was in fact, an appropriate email, as Mr Arnold acknowledges.
- 11.15. It is correct to say that Mr Smith was sending back-up emails to his home email account and he had to be written to twice, to explain that he ought not to be doing so. This is because on the first occasion, he did not understand that this was not acceptable, given that his home email account was password protected and secure.
- 11.16. It is correct to say that Mr Smith sent a further email to his home account. The context is, he did not understand what the problem was.
- 11.17. In April 2014, Mr Smith did report a concern that statements about him were being obtained, the context is that he was right to be concerned.
- 11.18. It is also correct to say that on 16 April 2014, Mr Smith was spoken to about the disruption he was perceived to be causing and the person who spoke to him, Ms Hine, accused him of not listening. As we observe in our paragraph 91, it was more a case of Ms Hine not listening to him and the irony was, that he was complaining about statements being gathered against him and she was involved in that.
- 11.19. Mr Smith did feel that he had to try and contact a Ms Angel-Everett, who he had been told not to contact. The context is that this was a person he said had complained about being bullied and it had been suggested to him that he should have the permission of such people before he put their names forward. He did not simply contact this person direct, but asked for advice on how he might be permitted to do so.
- 11.20. Mr Smith did ask questions during a theatre unit meeting on 7 July 2014, despite being told that his questions were not appropriate. This resulted in his being suspended. The context is that in our conclusions we noted that some of the witnesses in the disciplinary hearings thought that the questions were appropriate and did not think that Mr Smith had behaved inappropriately.
- 11.21. Mr Arnold's 21<sup>st</sup> point is that the Respondent considered Mr Smith's behaviour at the meeting on 7 July 2014 to be unreasonable and disruptive. This is really a repeat of the previous point.
- 11.22. Mr Arnold's 22<sup>nd</sup> point is a reference to a fifth criticism of Mr Smith's email correspondence.

- 11.23. Mr Arnold says that the Care Quality Commission received numerous correspondence from Mr Smith, to which the Respondent was obliged to respond. Actually, whilst the CQC received, “numerous” correspondence, so far as we are aware and so far as appears in our findings of fact, the Respondent was obliged to reply once.
- 11.24. Mr Arnold goes on to quote as we did, Ms Geddes’ reply to the CQC as evidence that Mr Smith was regarded as a nuisance, which he clearly was. The context is, his disclosures.
- 11.25. Mr Arnold quotes Ms Lloyds criticism of Mr Smith’s emails. This is the sixth such criticism.
- 11.26. That external investigator, Ms Lloyd, complained that she herself received one hundred emails from Mr Smith, which is a seventh criticism and further, Ms Lloyd is not part of the respondent organisation and so this is not evidence of the Respondent finding him a nuisance.
- 11.27. There is an eighth criticism of Mr Smith’s emails, in relation to that of 10 November 2014.
- 11.28. It is true to say Mr Smith did complain that Ms Lloyd was not provided with his emails going back to 2002.
- 11.29. Mr Arnold refers to the five charges brought against Mr Smith by the Respondent and suggests that their nature points toward Mr Smith being viewed as a nuisance rather than a desire to punish a whistleblower. We do not agree. To paraphrase our view of the charges, they were weak and have little or no merit. That could be because the Respondent was looking for a reason to dismiss Mr Smith because of the protected disclosures. All five charges might be described as matters regarded by the Respondent as a nuisance, that does not mean that was the reason why they were put forward.
- 11.30. Mr Arnold’s final point is that the findings of the disciplinary investigation report would have, (incorrectly) informed the Respondents view of the claimant as a nuisance, as would the conduct of the disciplinary hearing. Our view of the investigation report and the conduct of the disciplinary hearing was that they read as a poor attempt at finding a reason to dismiss Mr Smith, which does not help with the question as to why the Respondent might want to do that.

### **Conclusions**

12. At paragraphs 283 and 283 in the conclusions to our Reserved Judgment, we said:

**283. Furthermore, in our assessment, Mr Smith was a nuisance to the Respondent and to the three managers in question. He was an effective trade union representative and his involvement both in the Saunston and Dando cases, were an additional source of irritation to the Respondent as well as stress to Mr Smith.**

**284. Against that background, he made the protected disclosures to Mr Jackson and then suddenly, everything went wrong.**

13. What we meant by that, is that Mr Smith being a nuisance to the Respondent and the 3 managers, was the background against which he made the disclosures. The, “then suddenly, everything went wrong” are the more significant words. When we went on to say at paragraph 293:

**293. The reason for dismissal was, we conclude, on the balance of probability, that Mr Smith had made the protected disclosures relied upon. This is what was in the mind of Ms Geddes and Ms Hinton in their decision making. It was not the content of any one disclosure in particular, it was the collective of the disclosures, the fact that he had made them at all, that was in the mind of Ms Hinton and Ms Geddes.**

We meant that what was in the minds of Ms Geddes and Ms Hinton in their decision making, were the disclosures. The fact that Mr Smith had over the years been a nuisance, had merely been background.

14. I say to the parties, the members and to the EAT, that I am sorry I did not make that clear.
15. We have revisited the question of whether that Mr Smith was a nuisance, might have been the reason or principle reason for his dismissal. We have re-read our decision and we have reflected on and discussed Mr Arnold’s submissions. Within his list are the reasons why Mr Smith was regarded as a nuisance by the Respondent and why we said as such in our original Judgment. It omits the another reason why Mr Smith was regarded as a nuisance; because of the protected disclosures, because he was a whistleblower.
16. We review why we considered whistleblowing was the reason for the dismissal:
- 16.1. The coincidence of timing;
  - 16.2. Everyone pointedly ignoring the possible link between the disciplinary action and the protected disclosures;
  - 16.3. The witch hunt against him;
  - 16.4. The flawed, cursory investigation report;
  - 16.5. The failure to disclose the CQC email by the appeal officer;
  - 16.6. The weakness and lack of merit in the disciplinary charges;
  - 16.7. It was not at all clear that there was a breakdown in the

employment relationship;

- 16.8. Mr Smith was not unmanageable as claimed, and
- 16.9. The dismissal and appeal officers were very much aware of the protected disclosures and what a nuisance those disclosures had been, which is not to say the reason was the nuisance factor, it means as a whistleblower, he was a nuisance, and so they dismissed him because he was a whistleblower, because of the protected disclosures.
17. We remain of the view that Mr Smith was dismissed because he made the Protected Disclosures.

**Remedy**

18. This matter has been listed for a remedy hearing over the course of two days on **2 & 3 October 2018**. Formal notice will follow in due course. If any case management orders are required, the parties should write in seeking directions. The tribunal would hope to see witness statements dealing with remedy, an up to date schedule of loss, a counter schedule, the issues clearly identified and an agreed bundle.

Employment Judge M Warren

18 July 2018