



EMPLOYMENT TRIBUNALS

Claimant: Dr Susan Gilby

Respondents: (1) Countess of Chester Hospital NHS Foundation Trust
(2) Ian Haythornthwaite

Heard at: Liverpool (in person)

On: 25, 26, 27, 28, 29
November, 2, 3, 4, 5, 6, 9, 10,
11, 12, 13.
16, 17 18, 19 & 20 December
2024 (in chambers).

Before: Employment Judge Shotter
Ms M Plimley
Mr J Murdie

REPRESENTATION:

Claimant: Mr O Segal, KC

Respondent: Mr S Cheetham, KC

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's resignation was a dismissal under section 95(1) of the Employment Rights Act 1996 as amended and her claim for unfair dismissal brought under section 98 well-founded, (2) the dismissal was unfair under section 103A and (3) the claims are adjourned to an in-person remedy hearing before the full panel on the 6 & 7 May 2025 at the Liverpool Employment Tribunal.
2. The claimant was subjected to detriments by the first and second respondent done on the ground that she had made a protected disclosure, her claims of detriment brought under section 47B of the Employment Rights Act 1996 as amended are well-founded and adjourned to the remedy hearing.
3. The claimant's allegations that were no longer pursued that appear struck though in the list of issues below are dismissed on withdrawal.

33 are particularly relevant, and Regional Employment Judge Franey found “as a fact that there had been deletions of emails from the claimant’s work email account without her knowledge, that these deletions included the Wainwright report and the Bungay email...it appears emails prior to September 2022 have been irretrievably deleted...The respondents have not identified the person or persons responsible for these deletions.” In respect of this finding the position has not changed, and at the liability hearing the respondent’s witnesses denied deleting documents and emails.

5. Regional Employment Judge Franey made findings in relation to WhatsApp and text messages on Ms Price’s mobile phones including the fact that the “second respondent has not disclosed any WhatsApp correspondence from his mobile telephone to any of the other participants in the key events in this case nor has been disclosed any messages with Ms Price taken from his telephone.” The position had not changed by the time the second respondent came to give evidence at this liability hearing.

6. Finally, the Tribunal notes that “it is common ground that a good deal of material one would expect to find” in the claimant’s HR file “is missing” including appraisals from 2019 to 2022. The material from the 2022 appraisal was disclosed by the claimant “and not the respondent” – para 59 and 60. The position had not changed by the liability hearing, and the Tribunal has set out below the adverse inferences raised by the first and second respondent deleting and/or damaging documents irretrievably in light of them having been put on notice that relevant documents should have been safely retained as early as December 2022 when the claimant was suspended on full pay. The findings of fact below refer to the appraisal documents that were never disclosed, and yet reference was made to them by Mr Gill, who failed to disclose messages having “erased messages with Ms Fallon ‘last year’ when they both moved to WhatsApp as the preferred communication method. He said he used WhatsApp messages with the second respondent too...no messages have been disclosed” – para 58 in regional Employment Judge Franey’s Judgment.

7. Regional Employment Judge Franey refused the claimant’s application to strike out, and at para 69 he recorded “Tribunals have other ways of resolving issues with documentation, including drawing inferences from its absence and relying on other sources of evidence to reach a conclusion.” He found that there had been “selective deletions of emails from the claimant’s work email account between 3 December 2022 and 11 May 2023...no explanation has been offered for this” and the emails are no longer retrievable, concluding “the deletion of this material was unreasonable conduct” – para 73. The destruction of Ms Price’s WhatsApp and Text messages sent to and from Ms Price “is wholly unexplained. The deletion of such messages is unreasonable conduct...the Tribunal will be able to draw an adverse inference should it consider that any destruction of documents was anything other than innocent, or if it considers that the searches carried out by Ms Price to identify disclosable material was less than adequate” - para 83.

8. With reference to the second respondent Regional Employment Judge Franey found that “it seems likely that he must have used the WhatsApp more extensively than just with the claimant, and the failure to provide further disclosure, or at least a detailed explanation of why there is nothing more to disclose, is unreasonable conduct on his behalf...The Tribunal can draw an inference from the absence of such material depending on the answers he gives on oath...at the final hearing. It may be unlikely that he only used WhatsApp significantly in communications with the claimant herself, but that is a matter