



EMPLOYMENT TRIBUNALS

Claimant: Mr B Yates

Respondent: Solo Life Opportunities (trading as Social Life Opportunities)

Heard at: Birmingham (in private; by CVP)

On: 26 January 2021

Before: Employment Judge Flood

Appearances

For the claimant: Mr Barnett (Counsel)

For the respondent: Mr Islam-Choudhury (Counsel)

JUDGMENT ON INTERIM RELIEF APPLICATION

The claimant's application for interim relief under section 128 of the Employment Rights Act 1996 is refused.

REASONS

1. The claimant contends that he was subject to a detriment for making a protected disclosure contrary to s 47B of the of the Employment Rights Act 1996 ("ERA 1996") and was unfairly dismissed for making a protected disclosure contrary to s 103A of the ERA 1996. An application for interim relief was presented on 18 December 2020 under s 128 of the ERA 1996 within the prescribed time limit.
2. For the purposes of this hearing, I had before me the following documents:
 - 2.1. A Skeleton argument dated 25 January 2021 prepared by Mr Barnett on behalf of the claimant.
 - 2.2. A Skeleton argument dated 24 January 2021 prepared by Mr Islam-Choudhury on behalf of the respondent
 - 2.3. Claimant's amended Grounds of Complaint dated 24 January 2021.
 - 2.4. A witness statement from the claimant (with attachment) signed and dated 24 January 2021.
 - 2.5. A witness statement from Mrs Beer of the respondent signed and dated 25 January 2021.

- 2.6. A supplementary witness statement from Mrs Beer of the respondent (with attachments) dated 25 January 2021 but shown as signed on 26 January 2021.
 - 2.7. An agreed bundle of documents (references to page numbers below relate to pages in that bundle).
 - 2.8. An agreed bundle of authorities.
3. Neither of the parties made an application to adduce any oral evidence.
 4. I heard oral submissions from both parties, which were completed at just before 3pm. I determined that it was in the interests of justice for the hearing to be adjourned for a reserved decision to be made. The parties agreed to provide further written submissions on the terms of any order for continuation of contract within 8 days. These were provided by the claimant on 26 January and by the respondent on 2 February. For the reasons set out below, I did not need to consider those matters further, although I thank the parties for their submissions in any event.

Outline of relevant facts (summary)

5. Although it is not the function of the Tribunal when considering an interim relief application to make findings of fact, some background information is required to assist me to form a view. I was referred to various documents by the representatives in their submissions, which I have read along with the pleadings and unsworn witness statements. The relevant facts as I saw them in summary are as follows:
 - 5.1. The claimant was employed by the respondent from 6 April 2020 until 14 December 2020 and before that was engaged as a self-employed consultant. At the time of his dismissal he was employed as Head of Regulated Service, having been appointed to that role from his previous role of Supported Living and Standardisation Lead, with effect from 6 April 2020.
 - 5.2. The respondent is a registered charity which aims to empower people with learning disabilities to achieve their full potential and encourage their integration in society. It has around 150 employees and 100 volunteers supporting around 1000 users with learning disabilities. It operates from two premises in Solihull and manages three supported living properties where tenants are supported to live independently. It also operates a personal assistance service which employs care professionals to assist users with support and personal care and to access social, community and leisure activities.
 - 5.3. The respondent operates in a regulated environment and is subject to monitoring and oversight by the Charities Commission, Care Quality Commission (“CQC”), Solihull Metropolitan Borough Council (“Solihull MBC”)(which the respondent states is its lead funder) and other charitable funders.
 - 5.4. At the time of the events leading to this claim, the respondent’s CEO was Karon Swinburn. She is currently suspended, allegations of misconduct having been made by the respondent, and is on sick leave.

- 5.5. The claimant relies on having made nine protected disclosures between April and August 2020. Details of the alleged disclosures are in the claimant's amended Grounds of Complaint and his witness statement. They can be summarised as follows:
- 5.5.1. On 16 April 2020 in writing to Karon Swinburn by way of a written audit report of the respondent's Personal Assistance service – the claimant says this audit report disclosed information that duplicate records were being kept for CQC inspections and “hidden” files existed, and that the respondent was under estimating the number of service users subject to CQC jurisdiction.
 - 5.5.2. On or around 16 April 2020 verbally to Karon Swinburn with reference to the audit report above stating that this was a breach of regulations 17 and 20 of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 (“HSCAR 2014”).
 - 5.5.3. In around April 2020 in writing to Karon Swinburn by a written report entitled “PA Audit Report – Personnel Files” stating that many of the respondent's employees did not have personnel files and those that did were missing information and that the respondent had breached regulation 17 of HSCAR 2014.
 - 5.5.4. In May and September 2020, in writing to the respondent's Board of Trustees in “hot topics” reports prepared for those meetings, which repeated the concerns about lack of employment documentation set out above.
 - 5.5.5. During April and May 2020 (unclear if in writing or verbally) to the respondent's Board of Trustees re understaffing, poor systems and reliance on agency staff impacting medication errors and violent behaviour incidences which claimant says he told Karon Swinburn verbally was a breach of regulation 18 HSCAR 2014.
 - 5.5.6. On or about 22 May 2020 verbally to Karon Swinburn that a commissioning plan indicated a level of support for a particular client (2:1 during daytime; 3:1 at night) which was not provided. The claimant says he told Karon Swinburn:
 - i. that this breached the safeguarding agreement with the Birmingham Clinical Commissioning Group (“CCG”);
 - ii. that it amounted to fraudulently claiming public funds; and
 - iii. that it was in breach of regulation 18 HSCAR.
 - 5.5.7. In June 2020 the claimant says he informed the CQC (unclear whether verbal or in writing) about the respondent carrying out restricted Supporting Living activities without being registered.
 - 5.5.8. In June 2020 the claimant says he disclosed the same information at 5.5.7 above to Karon Swinburn verbally and that he had reported the matter to the CQC. He says he told her that the respondent was breaching the Health and Social Care Act 2008 by failing to register.

- 5.5.9. In August 2020 verbally to Karon Swinburn re the respondent's expense system breaching policy and the Personal Assistance agreements between the respondent and the families it supported
- 5.6. The respondent does not accept that any of the above are protected disclosures.
- 5.7. The claimant alleges that he was subject to 8 detriments as a result of having made these protected disclosures from May to November 2020. These are set out at paragraphs 9.1-9.9 of his amended Grounds of Complaint. These are not directly relevant to the matters I have to consider in this application for interim relief, although reference was made to them by Mr Barnett as background to the decision to dismiss. The respondent sets out its position on the factual allegations said to be detriment at paragraph 9 of its Grounds of Response and denies that any such matters could amount to a detriment and that the claimant was subject to a detriment on the grounds of having made disclosures contrary to section 47B ERA at paragraph 11.6 of that Grounds of Response.
- 5.8. The claimant alleges he was dismissed because of having made these protected disclosures. The respondent says that the claimant was dismissed due to issues with his performance and conduct.
- 5.9. There are a number of key events and documents that the parties pointed out to me:
- 5.9.1. The respondent's Whistleblowing policy is at pages 87-96 and at page 88 provides that:
- "Concerns should be raised with the member of staff or volunteer's line manager in the first instance, or in the case of external stakeholders, the most appropriate member of Senior Management or the Chief Executive Officer. Where the concern is in relation to the Chief Executive Officer, direct representation to the Trustee Board is appropriate."*
- and at page 90 that:
- "When members of staff wish to raise an issue concerning bad practice within SoLO or any organisation SoLO is working with, they have the option to raise this in the first instance with their line manager, or with the line management above that manager, up to and including the Chair of the Trustee Board. Staff need to judge with whom it is most appropriate to raise the concern and SoLO will support them in making that judgement. If they choose initially to raise the concern through line management, and are not satisfied with the outcome, they may also take this further to the Chair of the Trustee Board or other Board member who will decide the most appropriate action to take."*
- 5.9.2. Lesley Beer, the respondent's acting CEO, in her supplemental statement made reference to and attached a document sent to the respondent by Solihull MBC on 19 November 2020. It showed an e mail from M Shiels at Solihull MBC to Amy Kaufmann at the respondent on 19 November 2020 attaching a quality concerns form noting:

“I believe that Becky Bennet has made you aware of the whistle blow that has been passed to Solihull Council by CQC?

I am lead to believe that this has already been investigated by SOLO (Karon Swinburn)”

And asking the respondent to complete the form and provide relevant paperwork within 7 days.

- 5.9.3. The form itself is also attached to Lesley Beer’s statement and sets out information about a “*Whistle blow*” and indicates that the date the concern was alerted to the Care Quality Team was 19/11/20 and went on to set out the details of the allegation that the claimant had been conducting a sexual relationship with a member of his team and had been heard having sex by one of the people who live at one of the respondent’s supported living properties. It went on to state:

“It was at this point that I was made aware that the complaint had been made but not dealt with.

The reason for this being the CEO, Karon Swinburn and Ben Yates are very good friends. Karon did not follow it up and 'brushed the matter under the carpet'.”

- 5.9.4. Later in that same form, there is a section which the respondent says was completed by Lesley Beer (and said to be submitted on 30 November 2020). This includes the following provisions

“As of 27th November 2020, Lesley Beer, Acting CEO, Head of Business Support, reviewed the original investigation by Karon Swinburn which was signed off by Karon Swinburn on 3rd June 2020....

...Both individuals had denied the accusations and due to the lack of any dates/times evidence to support the allegations Karon these found the complaint unsubstantiated. To which she informed Rebecca Bennet and the investigation was closed.

Lesley Beer has re looked into the complaint and re read statements from both individuals as well as conducting a comparison of dates/times that both parties were working around the being of May

And further when asked whether the quality concern was upheld stated:

“Yes, I do uphold the complaint that the investigation was not processed fully and that further facts should have been confirmed at the time In relation to the original complaint I am only able to reach the same conclusion as Karon that the complaint is unsubstantiated due to the lack of evidence provided to support the complaint.”

- 5.9.5. The claimant raised a grievance on 20 November 2020 regarding his access to the Bright HR system (page 210) where he also states:

“it is becoming clearer to me that there is a plan here to proceed against me and potentially dismiss me as a direct result of my having raised concerns that would be considered as protected disclosures since my appointment.”

5.9.6. The respondent replies to this grievance the next day when Jan Prior, the Chair of the respondent’s Board of Trustees, e mails the claimant (page 208) stating:

“The current Senior Leadership team, nor the Board are aware of any protected disclosures from yourself and have no records of this. Therefore, I am of the opinion that Lesley Beer who is acting CEO, is the most appropriate representative of the charity to deal with your concern. I am confident that she will be able to resolve your concern to a satisfactory conclusion for all parties.

If you feel that by raising your concern informally with Lesley does not resolve your issue, then please do raise a formal grievance.

I would like to remind you that we take all matters of concern seriously and would encourage you to seek a resolution in the manner I have set out above.”

5.9.7. The claimant was invited to attend a formal meeting to discuss conduct and performance by a letter sent to him on 24 November 2020 (page 216) which stated:

“The meeting is to discuss concerns regarding your performance and conduct since your employment commenced on 6th April 2020.

The outcome of this meeting could be a decision to dismiss you from your contract of employment.

However, no decision will be made until we have gone through the information available and listened to your explanations.”

5.9.8. The claimant responded on the same day (24 November 2020, shown at page 221) stating:

“I note that you have not set out what these purported performance issues are. That is presumably so you can 'catch me cold' at the meeting. This is a blatant breach of ACAS Code of Practice 1: please let me have the details of my supposed shortcomings and any other allegations, with the relevant evidence, in advance of the meeting. With that in mind, since patently this is a disciplinary meeting you should either read the ACAS Code carefully or take competent legal advice and act as required by the Code.

Either way, your letter is not a surprise since I have already made clear to Jan Prior that I knew that dismissal was inevitable given the change in behaviour towards me. The real reason for my dismissal is that I made a number of protected disclosures over a period either directly to the responsible parties or via Karon Swinburn, who I presume is also about to be dismissed for no other reason than her attempt to transform SoLO into a compliant, professional organisation.

The information that has reached me this week suggests that you will allege, inter alia, that I have pressurised or harassed members of staff. You personally have sought statements to that effect proactively in order to tee-up my dismissal. I mention this now to demonstrate the obvious dishonesty of this exercise and the fact that a decision has been made already. Thus, the hearing is a charade.”

5.9.9.A further letter was sent to the claimant on 26 November 2020 (page 219) inviting him to a rescheduled meeting which included the allegations as follows:

“The meeting is to discuss concerns regarding your performance and conduct since your employment commenced on 6th April 2020. Points of concern are:

Allegations of an inappropriate relationship under the Personal Relationships Policy.

Recruitment of staff without appropriate qualifications.

Misuse of power.

Issue of contracts with incorrect holiday allowance.

Disclosure of confidential information.”

5.9.10.A meeting was held on 3 December 2020 (minutes shown at page 224-225) at which the claimant read a pre-prepared statement (included at pages 226-228) and then informed the respondent that he would not be answering any questions. The statement contained the following:

“As we have made clear, we believe this disciplinary hearing is charade whose only function is to try to legitimise the dismissal of someone whose integrity and refusal to keep quiet, in the form of making protected disclosures, has proved troublesome to the people who really run SoLO.”

And

“Between April 2020 and September 2020 Ben made series of protected disclosures either to Karon Swinburn, the Board of SoLO or the Care Quality Commission directly.”

5.9.11. At page 232 and 233, I was shown a document entitled Concerns raised which the respondent contends is a note prepared by Lesley Beer on 14 December 2020 in preparation for the claimant’s disciplinary hearing setting out 7 numbered points for discussion.

5.9.12.The respondent held a meeting on 14 December 2020 attended by Lesley Beer and Lorna Baker as note taker. The claimant did not attend this meeting and at page 237-239 are the notes prepared by Lorna Baker of that meeting.

5.9.13.The respondent dismissed the claimant and a letter of dismissal was sent to the claimant on 14 December 2020 which is shown at pages 234 and 235. This confirmed that the matters of concern were:

- *Allegations of an inappropriate relationship under the Personal Relationships Policy.*
- *Recruitment of staff without appropriate qualifications.*
- *Misuse of power.*
- *Issue of contracts with incorrect holiday allowance.*
- *Disclosure of confidential information.”*

And went on to conclude that:

“Having considered the information available, and your short amount of service, I have decided that your employment should be terminated.

Your dismissal will take effect immediately from 14 December 2020 and you will be paid 1 month's pay in lieu of notice.”

5.9.14. The claimant presented his claim and application for interim relief to the Tribunal on 18 December 2020 (pages 4-19). There were some errors in the dates of some of the alleged disclosures so a further Grounds of Complaint was submitted on 24 January and those amendments were accepted by the Tribunal on 26 January 2021.

5.9.15. The respondent presented its response on 22 January 2021 (pages 29-49).

The relevant law

6. **S 103A of the ERA 1996** states that if the reason for the employee's dismissal (or if more than one reason, the principal reason) was that the employee “*made a protected disclosure*”, then that employee shall be regarded as unfairly dismissed.
7. **S 128 of the ERA 1996** makes provision for an employee to be able to make an application for interim relief where an unfair dismissal complaint has been presented and that the reason alleged is one of those specified in certain listed provisions (including **s 103A of the ERA 1996**). It stipulates that such an application must be made within 7 days of the effective date of termination of employment and a tribunal shall determine the application as soon as practicable after receiving it.
8. The relevant test under **s 129(1) of the ERA 1996** that the Tribunal must apply on an application for interim relief is that it must be satisfied:
“..that it is likely that on determining the complaint to which the application relates that it will find-
(b) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in-
(i) section.....103A .”
9. If the Tribunal is satisfied that this test is made out, it must then make enquiries as to whether the respondent is willing to re-employ or re-engage the claimant pending the final hearing. **S 129 (8) of the ERA 1996** deals with what is to be done if the employer is unwilling to do so and if so:

“the Tribunal shall make an order for continuation of the employee’s contract of employment”

10. The correct test to apply as to the meaning of *“it is likely”* is that a balance of probabilities approach is insufficient. The decision of the Employment Appeal Tribunal in **Taplin v C Shippam Ltd** [1978] ICR 1068 found that it must be established that the employee can demonstrate a *“pretty good chance”* of success.

11. This was endorsed in the case of **London City Airport v Chacko** [2013] IRLR 610:

“It is not sufficient that the employee is able to establish that “it is likely” they were otherwise unfairly dismissed, i.e. for other reasons. They must be able to show that it is likely that it will be found that they have been dismissed for the sole or the principal reason of [their trade union activities]”.

It was also confirmed that an employment judge:

“must do the best they can with such material as the parties are able to deploy” and requires *“an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material he has”*

12. The meaning of likely has been confirmed in **Wollenburg v (1) Global Gaming Ventures (Leeds) Ltd (2) Herd** (UKEAT/0053/18/DA (4 April 2018, unreported) which provides:

“Put shortly, an application for interim relief is a brief urgent hearing at which the Employment Judge must make a broad assessment. The question is whether the claim under section 103A is likely to succeed. This does not simply mean more likely than not. It connotes a significantly higher degree of likelihood. The Tribunal should ask itself whether the Applicant has established that he has a pretty good chance of succeeding in the final application to the Tribunal.”

13. In the unreported EAT case **His Highness Sheikh Khalid bin Saqr al Qasimi v Robinson** (UKEAT/0283/17/JOJ) HHJ Eady QC gave guidance as to how such cases should be approached in that:

“By its nature, the application had to be determined expeditiously and on a summary basis. The ET had to do the best it could with such material as the parties had been able to deploy at short notice and to make as good an assessment as it felt able....

The Employment Judge also had to be careful to avoid making findings that might tie the hands of the ET ultimately charged with the final determination of the merits of the points raised. His task was thus very much an impressionistic one: to form a view as to how the matter looked, as to whether the Claimant had a pretty good chance and was likely to make out her case, and to explain the conclusion reached on that basis; not in an over-formulistic way but giving the essential gist of his reasoning, sufficient to let the parties know why the application had succeeded or failed given the issues raised and the test that had to be applied.”

14. This also confirmed (and updated) the directions given in the case of **Ministry of Justice v Sarfraz** [2011] IRLR 562 (EAT) that in the context of an interim relief application involving a Section 103A ERA automatic unfair dismissal claim, a Judge has to decide that it is likely that the tribunal at the final hearing would find

five things: (1) that the claimant had made a disclosure to his employer; (2) that he believed that the disclosure tended to show one or more of the things itemised at (a)-(f) under s43B(1); (3) that the belief was reasonable; (4) that the disclosure was made in the public interest; and (5) that the disclosure was the reason or principle reason for dismissal. The **Sarfraz** case also confirmed that “likely” connotes something nearer to certainty than mere probability.

15. In addition, in carrying out the summary assessment required, the burden of proof provisions in relation to Section 103A complaints which were set out in the case of **Kuzel v Roche Products Ltd** [2008] EWCA Civ 380 (CA) are relevant. The Court of Appeal approved the approach to the burden of proof set out by the EAT as being as follows:-

“1. Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent, some other substantial reason, was not the true reason?”

2. If so, has the employer proved his reason for dismissal?”

3. If not, has the employer disproved the Section 103A reason advanced by the Claimant?”

4. If not, dismissal is for the Section 103A reason.”

The same paragraph goes on to note that:

“it is not at any stage for the employee (with qualifying service) to prove the Section 103A reason.”

16. I was also referred to the cases of **Babula v Waltham Forest College [2007] ICR 1026** paragraphs 75-79 as to whether the respondent was actually in breach of a legal obligation and whether the claimant could have been mistaken:

“Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong - nor (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence - is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistleblower of the protection afforded by the statute.”

17. I was also referred to **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436** - paragraphs 31 and 32 on the irrelevance of the distinction between ‘allegation’ and ‘information’ in whistleblowing complaints as this is essentially a question of fact depending on the particular context in which the disclosure is made.

18. The burden of proof is on the claimant in this application.

Submissions

19. I considered the written skeleton argument of both parties. In oral submissions Mr Barnett dealt first with whether it is likely that the claimant will be able to show that protected disclosures were made. He firstly points out the difficulty the respondent will have in adducing evidence to rebut that oral disclosures were

made by the claimant to Karon Swinburn. Given the ongoing dispute he submits, unless there is a reason to doubt the claimant's veracity, it is likely that a Tribunal will find that these disclosures were made. Secondly he submits that the fact that the claimant may not have considered himself as making protected disclosures is not relevant, if they "tick the boxes" in the definition at s 43B ERA 1996, then they are a qualifying disclosure. As there is no dispute that if made they were made to the employer (and in the case of the disclosure set out at para 5.57 above to the CQC) so then also protected disclosures. Thirdly he suggests that the fact that the claimant cannot produce a copy of the audit report (paras 5.51 and 5.53 above) is not surprising, as he did not know he was about to be dismissed, and if he was making up the content of the report, any of the trustees who received it could provide contrary evidence. He says it is likely that a Tribunal will find it was sent.

20. He contends that the point made by the respondent that the claimant has insufficiently identified the legal obligations breached (for section 43B (1) (b) allegations) goes nowhere as he has in many cases identified the particular statutory provisions said to be breached. He suggests that further information can be provided, but the statutory test is met. He notes that as section 43B (1)(d) is also relied upon, there is no need for a specific statutory provision to be identified and disclosures 5.5.1 and 5.5.2 are also pleaded on the grounds of concealment (section 43B(1)(f)). As to whether the claimant genuinely believed disclosures were made in the public interest, Mr Barnett states that this is not denied by the respondent at paragraph 7.2 of its ET3 (Mr Islam-Choudhury contends that this is not correct and the respondent does in fact deny this – the reference relied upon at paragraph 7.2 the ET3 being a typo). Mr Barnett went on to submit that even if the respondent denies it, the very nature of the claimant's job, in compliance working for a charity looking after disabled people, will mean that every issue raised is likely to be in the public interest.
21. He then addressed me on whether the reason for dismissal was likely to be the fact that the protected disclosures were made, rather than conduct or performance as alleged. He first submits that the alleged detriments shed light on the background to the dismissal and the respondent does not vehemently deny that these detriments took place. He submits it is likely that the Tribunal will find that the detriments took place, and this supports an inference of a culture of retribution which will support a decision that the dismissal was also because of the protected disclosures. He suggests that the respondent has been sniping and mudslinging in its responses to the litigation and is trying to create a negative cloud around the claimant's credibility with no grounds or corroborative evidence. If a Tribunal accepts this is true, he says, it will also be likely to accept that the respondent has made up allegations to cloak the true reason for dismissal. He secondly asks me to look at timing and points out that the grievance (para 5.9.5 above) shows that even if the respondent did not realise that protected disclosures had been made before, they did know this was the case after this e mail on 20 November 2020. He points out that the reply (para 5.9.6 above) does not ask for detail of the protected disclosures said to be made (despite Ms Prior being the Chair of the Board of Trustees). Also Ms Prior could not know if the disclosures were about Lesley Beer herself (and so Ms Prior could be asking the claimant to raise his concerns with the very person he is complaining about). He submits that this response is a breach of the respondent's Whistleblowing Policy (set out at paragraph 5.9.1) above as direct representation to the Board of

Trustees was appropriate and it is staff who need to judge who it is appropriate to raise a concern with and that the respondent should support them in this. Instead he says that the claimant was not supported in raising this whistleblowing concern but had his concerns passed on to Lesley Beer to deal with this informally. Mr Barnett suggests a Tribunal is likely to conclude that there is something “fishy” about this. Mr Barnett clarified that the grievance raised by the claimant on 20 November was not being relied upon as another protected disclosure as such, but sheds light on the protected disclosures that are relied upon.

22. Mr Barnett points out that the letter inviting the claimant to a meeting to discuss his concerns was the next communication to the claimant (para 5.9.7 above) which lists as a potential outcome possible dismissal. This does not set out the 5 allegations that are later relied upon (para 5.9.9). Mr Barnett suggests this entirely justified the claimant’s comment (para 5.9.8) that the meeting was a “charade” which was an entirely proper observation for the claimant to make. Mr Barnett casts doubt on the authenticity of the document referred to at para 5.9.11 pointing out that it was undated; not mentioned in any e mails sent to the claimant; not referred to in the notes of the meeting the claimant attended on 3 December; not mentioned in the ET3; and not mentioned in the first statement prepared by Lesley Beer. He says the claimant’s evidence will be that he has never seen this before. Mr Barnett suggests that it is likely that a Tribunal will find that these allegations were never put to the claimant nor even created in this form before dismissal. Even in the dismissal letter he submits, where the 5 allegations are set out, there is no detail. He further refers to the dismissal meeting notes (para 5.9.12) and questions why, if these matters were in the mind of Lesley Beer at the time of the decision to dismiss, they were not put to the claimant at the earlier meeting or mentioned in the letter of dismissal. Mr Barnett submits that this document was created after the event for the purposes of the litigation.
23. On the particular allegation of sexual misconduct, the claimant’s position is that this had already been investigated and was being resurrected by the respondent for the purposes of targeting him for dismissal. He points out that the complaint was received the day before the claimant raised his grievance, but that importantly on the day after the claimant invited to a disciplinary investigation, Lesley Beer concluded that the complaint was unsubstantiated (para 5.9.4) and that she had reached the same conclusion as the previous investigation. He says that at the same time as saying this to Solihull MBC, she was resurrecting the same incident as a justification to dismiss the claimant. He says therefore it is likely that a Tribunal will find that the is an invented allegation to provide a rationalisation for dismissal. He makes similar points on the remaining allegations and in particular on the “abuse of power” allegation which is said to relate to the claimant threatening employees with P45s. He notes that the documents disclosed show an e mail from another employee (not the claimant) and is partial disclosure (the full background being that the claimant was simply trying to find out how many employee on zero hours contracts were available to work). He suggests it is likely that the Tribunal will find this is another “makeweight” to try and justify a whistleblowing dismissal.
24. Mr Islam-Choudhury points out that it is the claimant that bears the burden of proof of showing that he has a “pretty good chance” that dismissal was because of having made protected disclosures. He says the first mention of protected

disclosures comes on 20 November (para 5.9.5) “out of the blue”. He suggests that the claimant had at this stage embarked on a mass deletion of work related e mails (pages 205-206) and that the claimant has given no explanation for this (Mr Barnett says the claimant has explained this at para 12 of his witness statement). He says that this “nefarious” activity took place before the claimant had any indication from the respondent that he would be subject to disciplinary investigation on 24 November. He says that when the claimant raises the issue of protected disclosures for the first time, the respondent’s response is a positive assertion that the claimant has not made any protected disclosures (para 5.9.6). He says that it was then up to the claimant to say what the protected disclosures were, but he was notably silent about this. He suggests that the claimant needed to give an explanation to the Board of Trustees but he failed to do so. Therefore he says a Tribunal will not be likely to find that protected disclosures were made.

25. He refers me to the **Guzel** case and states that the burden is also on the claimant at final hearing to show that not only protected disclosures were made but that these were the reason for dismissal. He submits that there is no burden here on the respondent (as the claimant has less than 2 years’ service and so cannot claim “ordinary” unfair dismissal). He suggests that I could not reasonably find that the claimant will be likely to be able to succeed on both these matters, but that it is more likely that he will not. He suggests that by inviting the claimant to a meeting on 24 November, the respondent was doing more than was required (the claimant having less than 2 years’ service, all it had to legally terminate his contract was to serve him with contractual notice). He points out that in the correspondence leading up to, and during the meeting on 24 November, the claimant again had the chance to set out what the protected disclosures were that he was relying on, but failed to do this. Mr Islam Choudhury states that the claimant makes bare assertions about alleged protected disclosures with no detail. He submits that it is therefore not likely that the claimant will be able to show that the disclosures were made.
26. Mr Islam-Choudhury relies on the note at para 5.9.11. The respondent denies that this is concocted or invented and he submits that the allegation of sexual impropriety does not come out of the ether but arises from a complaint received on 19 November from Solihull MBC (para 5.9.2). He submits that this is clearly not manufactured but is an external organisation reporting to the respondent what has been reported to it about the claimant’s alleged impropriety and was a very serious allegation. He acknowledged that this had been investigated previously, and reviewed by Lesley Beer. However he says when she reached the view that the allegation could not be substantiated, this is not the same as saying it was not proved. Mr Islam-Choudhury suggests that this report alone of a rumour of sexual wrongdoing could have been sufficient for the respondent to dismiss the claimant. He submits that the dismissal does not have to be shown to be fair or reasonable, but this matter was clearly on Lesley Beer’s mind when she decided to dismiss and was the reason for dismissal. He suggests that if this is right, then the claimant’s case is hopeless and he cannot show that he has a pretty good chance of proving his dismissal was because of protected disclosures. This is particularly so, he suggests, when the claimant never set out in writing before dismissal what the protected disclosures were and it was only on submission of his claim form on 18 December 2020 (drafted by experienced counsel) that he is able to do this. He suggests that even at the time of writing his statement, the claimant does not set out factual detail about the disclosures

with sufficient specificity but concentrates on criticising the respondent's pleadings. It is suggested that the claimant has skirted over the detail of the protected disclosures and so it is not likely that a Tribunal will find at a hearing that they were made as alleged. He also points out that for the one disclosure that is said to have been made to the CQC, the claimant has not said when this was made or produced any document to support it. On the contrary, the respondent has been in touch with the CQC he submits and has had it confirmed that no such report had been made.

27. He submits that it is not likely that the claimant will show his dismissal was for a protected disclosure, particularly where there are documents which set out a legitimate (albeit unproved) allegation about serious wrongdoing. This was a live issue at the time of dismissal and Mr Islam Choudhury says that at the hearing Lesley Beer will have success in rebutting what the claimant says about the reasons for dismissal. He invited me to dismiss the application for interim relief and dispose of the matter with the Tribunal going on to make normal directions to take the claim to trial.

Conclusion

28. I have taken account of the guidance set out at the caselaw above and that to succeed in his application for interim relief, I will have decide now that it is likely that the tribunal at the final hearing would find five things: (1) that the claimant had made a disclosure to his employer; (2) that he believed that the disclosure tended to show one or more of the things itemised at (a)-(f) under s43B(1); (3) that the belief was reasonable; (4) that (again in the reasonable belief of the claimant) the disclosure was made in the public interest; and (5) that the disclosure was the reason or principle reason for dismissal. The first four of those items deal with whether protected disclosures had been made by the claimant and the last deals with the issue of causation i.e. whether the claimant was dismissed for making any such protected disclosures.
29. Looking at the first 4 matters and whether the claimant is likely to succeed in his argument that he had made protected disclosures, on balance and on summary assessment I conclude that he is. I take note and am persuaded by Mr Barnett's submissions on this point. The claimant was employed by the respondent in a role which was inherently likely to involve him reporting things to the respondent that amounted to qualifying disclosures. That was part of his function. This is an important background point to all the disclosures that are said to have been made. The claimant relies upon 9 separate disclosures he says were made between April and August 2020. All but one of these disclosures are said to have been made to Karon Swinburn (and indeed this one was allegedly also reported to Karon Swinburn). Two were said to also have been made to the respondent's Board of Trustees and one to the CQC. Clearly both parties will try to adduce evidence to support that such disclosures were or were not made. The evidence of Karon Swinburn (if available) is likely to be of key importance and it is acknowledged that the respondent may have some difficulty with this given the ongoing dispute with her. One would hope that the disclosure exercise would unearth any documentary evidence relating to those disclosures said to have been made to the Board of Trustees and the CQC. I note that the respondent does seem to implicitly accept that the respondent did raise the concern that is said to be the subject of the first disclosure (see Grounds of Response paragraph 6.1, page 40) but contends that these findings were welcome. Therefore I can

conclude that the claimant is likely to be able to show that at least one (and possibly more) of the disclosures he relies upon was made.

30. The next issue is whether he is likely to be able to show that he believed that the disclosure tended to show one or more of the things itemised at (a)-(f) under s43B(1). The claimant's witness statement suggests he will give evidence to say he did believe this to be the case. The respondent will no doubt challenge this evidence and Mr Islam-Choudhury sets out some of the points that it will make. This is a matter of fact for the Tribunal, but on balance and on what I have seen at this stage, I can say that the claimant has a "pretty good chance" of proving this subjective element of the test.
31. The next issue is whether that the belief was reasonable. That is an objective matter and so again evidence from both sides will be relevant on what legal obligations are said to have been breached and whether it was reasonable for the claimant to conclude this had taken place. I accept that there is some lack of particularity on a number of the alleged disclosures. However other disclosures (in particular disclosures 1-4) do have a level of detail disclosed and indeed appear to relate to matters that the respondent was at least in part aware of (para 29 above). Therefore I conclude on what I have seen to date, that the claimant has a pretty good chance of showing this element of the legal test.
32. The final issue is whether the disclosure was, in the reasonable belief of the claimant, made in the public interest. Similar considerations apply as I have set out in paragraphs 30 and 31 above. I also take note that the respondent employed the claimant in a compliance role to assist it to ensure compliance with the law and the requirements of regulatory bodies. Objectively it is clearly in the public interest for a body such as the respondent to be compliant in all such matters. On what I have seen to date, I conclude that the claimant is likely to be able to show that whatever was reported was done (in his reasonable belief) in the public interest. This is the case whether it was done as part of his day to day job or otherwise.
33. I then moved on to look at the question as to whether the claimant is likely to be able to prove that having made protected disclosures, this was the reason he was dismissed. I considered carefully all the submissions made by Mr Barnett for the claimant, but on balance I preferred Mr Islam-Choudhury's submissions on this particular issue. I have reached the conclusion that it is not likely that the claimant can show at trial that the main or principal reason for dismissal was that the claimant had made the protected disclosures. It is not sufficient in an application for interim relief that the employee is able to establish that "*it is likely*" they were otherwise unfairly dismissed, and indeed it is not of direct relevance at all in this claim, given that the claimant is not able to claim "ordinary" unfair dismissal. The employee must be able to show that it is likely that it will be found that they have been dismissed for the sole or the principal reason of having made a protected disclosure.
34. The claimant asks me to look at the detriments before dismissal and suggests that the existence of these lead to an inference that the dismissal was for the same reasons. At this stage, this is a leap too far to make. The claimant not only has to show that the detriments took place but also that such detriments were because of the making of protected disclosures. The claimant has not at this stage been able to point to any cogent evidence that this was indeed the case. Some of the detriments appear to be very closely linked to the dismissal

so the question on these is essentially the same and showing that detriments occurred only takes the claimant so far and not in my view far enough to suggest he is likely to be successful.

35. I am also asked to consider the coincidence of timing of events occurring from 20 November 2020 when the claimant lodged his grievance about his Bright HR access which was followed the next working day by the respondent informing the claimant that his grievance would not be investigated; and the following working day with the claimant being invited to a meeting with the possible consequence that his employment would be terminated. However the respondent also relies on the timing of various actions surrounding the claimant's dismissal and points to the notification it received from Solihull MBC on 19 November 2020 raising a complaint. Clearly events started to come to a head with the relationship between the claimant and the respondent at the same time in November/December 2020. I do not conclude that any of the points made so far around timing (in the absence of detailed evidence) particularly further the likelihood of the claimant showing that protected disclosures were the reason for his dismissal.
36. The inadequacy/implausibility of the stated reason for dismissal and the fact that the claimant says he was not aware of the charges being put to him prior to dismissal does not at this stage of summary assessment shed any light on the reason for the dismissal or what was in the mind of the dismissing officer. This would clearly be a highly relevant factor if the Tribunal were considering an "ordinary" unfair dismissal claim. The claimant may also be able to develop this argument with further evidence to support his contention that the stated reason for dismissal was not valid, and it was in fact because of the protected disclosures. However I cannot say on what I have seen so far that he has a "pretty good chance" of doing this.
37. The mudslinging does not particularly further the claimant's argument that he will be likely to show that his dismissal was on the grounds of having made a protected disclosure. The relationship between the claimant and the respondent is clearly not a good one. It is unfortunate if the parties to litigation are reduced to raising matters that may have limited relevance to the issues whether this is to try and cast aspersions on the other party or for other reasons. I am confident that the Tribunal hearing the claim will stick to the facts that are relevant to the issues and will not be swayed by such matters. I do not feel this sheds any particular light on the reasons for the dismissal in this particular claim such that it would persuade me that the claimant is likely to succeed in his arguments.
38. There were clearly a number of matters going at the respondent at the time of the dismissal of the claimant. The suspension of Karon Swinburn took place on or around 11 November 2020. The respondent says that this taking place was a catalyst for action also being taken against the claimant. They also point to the complaint received by Solihull MBC on 19 November 2020. The respondent would appear to me at this stage of summary assessment to have been motivated largely by factors other than any protected disclosures the claimant may have made. I am not able to say now, in light of this information, that the claimant has a "pretty good chance" of succeeding on this part of his claim.
39. Mr Barnett suggests that the misconduct allegations had been concocted as a pretext for a dismissal for making protected disclosures. I am not persuaded that the documents I have seen and which are referred to above show that this is the

case. A Tribunal of fact may well come to this conclusion but the evidence will have to be examined in full at the merits hearing. On what I have seen at this early stage, I do not believe it is likely that the claimant will be able to establish this.

40. On a broad assessment of the facts as I currently see them, I do not conclude that there is a significantly higher degree of likelihood than just a balance of probabilities chance that the claimant will show that his dismissal was for having made protected disclosures. I am conscious that I must avoid making findings that might tie the hands of the tribunal ultimately charged with the final determination of the merits, but my impression is that dismissal is not likely to be found to be for the reason or principal reason that protected disclosures were made.
41. The application for interim relief is therefore rejected.

Directions for further conduct of the case

42. A case management hearing will now be needed for this claim so that the issues can be further clarified and directions can be made for future conduct of the case. The parties will be notified separately of when this will take place.

Employment Judge Flood

3 February 2021

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