



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs Anita Vaghji

Edge Grove School

Heard at: Watford

On: 25 April 2019

Before: Employment Judge Henry

Appearances

For the Claimant: Ms F Babalola, Solicitor

For the Respondent: Mr J Wynne, Counsel

JUDGMENT

The claimant's application for interim relief is refused.

REASONS

1. The claimant, by a claim form presented to the tribunal on 31 March 2019, presents complaint for automatic unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 and discrimination on the protected characteristic of race.
2. The claimant commenced employment on 31 August 2017. The effective date of termination was 25 March 2019; the claimant having then been employed 19 months.
3. Pursuant to section 128 of the Employment Rights Act 1996, the claimant makes application for interim relief, pending determination of her complaint. It is the claimant's complaint that, having made protected disclosures by correspondence presented in defence of disciplinary allegations against her on 7 March 2019, her employment was terminated as a consequence thereof for gross misconduct on 26 March 2019.

Evidence

4. The tribunal had before it a bundle of documents, exhibit R1 and written statements from the claimant and from Mr Singh, - Bursar, on behalf of the respondent. The tribunal was further presented with written submissions on behalf of the claimant which were supplemented by oral submission, the respondent submitted oral submissions in reply.

The facts

5. The claimant was employed as an early years teacher with the respondent's school, Edge Grove School Trust Limited, commencing employment on 1 September 2017. The claimant was subject to a 12 month probationary period.
6. On 25 January 2019, a parent of a pupil raised concern with the schools Headmaster, Mr Evans, as to the claimant's attitude and approach to her son and interactions with them, the parent, and for which the parent raised concerns as to her child being anxious on attending the claimant's class.
7. Following the Headmaster's meeting with the parent, he then met with the claimant advising as to the allegations made against her, as to her attitude and treatment towards parents, pupils and colleagues, noting that he considered the allegations to be serious issues relating to the wellbeing of the pupil, further advising that he would need to carry out a full investigation.
8. The Headmaster, later that day, wrote to the claimant advising of the investigation to be carried out and that in view of the allegation the claimant would be suspended pending the conclusion of the investigation, the letter advising:

“I am writing to confirm our meeting today during which I informed you that we had received serious allegations regarding your attitude towards and treatment of pupils, their parents and colleagues alike. I advised you that, faced with these allegations and complying with our disciplinary policy, a copy of which has been given to you today, we would need to conduct an investigation into the allegations. Depending upon the outcome of the investigation, it may be necessary to hold a formal disciplinary hearing and you are advised that should the matter proceed to a formal hearing, one possible outcome of the hearing is for your actions to be construed as gross misconduct, in which case your employment might be terminated without notice.

As mentioned, this matter is being dealt with under the schools' disciplinary policy and this provides a clear framework for resolving the matter and details responsibilities of both the school and the employee. Under clause 4.3 of this policy, I advise you that you are, on a non-judgmental basis, being suspended from your post ending the conclusion of the investigation. As stated in the policy, suspension itself is not regarded as a disciplinary action; so your salary will continue to be paid during this period and I offer the support of the schools employer assistance programme...”

9. An investigation was then carried out with interviews being conducted with a number of the claimant's colleagues, for which on 6 February 2019, the claimant was advised of the product of the investigation by which the claimant was advised:

“...I now have concluded my investigation into allegations of your behaviour as outlined in my letter to you dated 25 January 2019 and am enclosing copies of the report provided by four members of the pre-pep staff.

Given the evidence of these reports, along with the content of our meeting I can only conclude that there is indeed a case to answer over these allegations and I am therefore asking you to attend a formal disciplinary meeting which is on Thursday 14 February 2019. The meeting is being held under the school's disciplinary policy of which you have already been given a copy. As I have led the investigation process, Martin Sims will be appointed as the hearing manager and I will present the findings from the investigations...”

10. The claimant was then advised of her rights to representation.
11. The disciplinary hearing was subsequently postponed until 7 March 2019, on the claimant requesting a postponement in order that her union representative could attend with her. It was Mr Sims' evidence that “in view of the seriousness of the allegations and the fact that they could amount to serious misconduct if she was found to have acted in breach of the school's policy, I thought it important for her to have a suitable representative and agreed to the meeting being postponed”.
12. On 7 March 2019, on convening the disciplinary hearing, the format of the hearing being outlined and the claimant being advised that Mr Sims would consider anything that she wanted to say about the issues and other documents furnished, the claimant then handed in a statement dated 22 February 2019, as further amended on 2 March 2019, and by which document the claimant states she had made protected disclosures, which are here set out in full, as the content is germane to the issues for the tribunal's determination.

“MY STATEMENT

22 February 2019

My name is Anita Vaghji I have worked with children for over 28 years and I have never had such strong allegations made against me. These allegations have left me feeling completely heartbroken. In all my years of working with children I have shown love, care and attention enabling every child to reach their full potential carrying out my duties passionately.

I have worked in a variety of settings and have proven to be a strong and valuable asset to every team. I have never witnessed such that I am experiencing here today. I thought that I was being a listening ear to those that needed me and I managed to clear up and re-organise not only my current setting but any that I have been in with high regard.

I have always treated staff, parents and children with respect, importance and value as I am fully aware that the children are my primary concern and without them I would not have a job.

I have always tried to create an even balance in terms of learning, fun and classroom management with an organised, purposeful and independent atmosphere which enables the children to thrive and flourish.

I have always carried out my role and fulfilled my duty as the teacher in the best way possible showing receptiveness.

It saddens me that other staff members can:

- vape in classrooms and within the school premises
- have long breaks that are extended
- have mobile phones in class
- have shared indecent images of themselves with a parent on a mobile device
- talk about me with no regard towards my feelings amongst themselves
- leave me out
- isolate me – making me feel isolated
- make me feel vulnerable
- make me feel inadequate
- not supporting me
- say I'm doing a great job one minute and subsequently be presented with such serious allegations – these allegation that can completely ruin my career with children and demoralise me in an instance.”

13. The document was then amended by the additional paragraph that:

“I feel that the investigations are a discredit to my character and I feel victimised”

The document was then signed and dated 2 March 2019.

14. On receipt of the document Mr Sims adjourned the meeting for him to read the document which, having done so, determined that before he could proceed with the disciplinary meeting, there would need to be further investigations of the issues raised by the claimant's statement for which it was agreed that the hearing be adjourned to allow for the further investigations to take place.
15. Following the adjournment of the disciplinary hearing, on 8 March, Mr Sims wrote to the claimant advising her:

“I am writing further to your disciplinary meeting held yesterday which has now been adjourned until such time as we can reschedule following the submission at the meeting of your statement which is variously dated 22/02/2019 and 02/04/2019 and supporting evidence. As John (*“the claimant's representative – the tribunal's emphasis”*) is now away for two weeks on holiday, this will need to be after his return and I will liaise with you, John and Ben's diary for the earliest possible date to reconvene. It would help if you were to agree with John before he leaves some convenient dates and times in the week commencing 25 March.

In the meantime, I advised you that you remain suspended from the School but I had said that I felt it would now be appropriate for this to be on an unpaid basis as I believed to be permitted to under our policy. Having checked the policy I have noted that this belief is incorrect so please accept my apologies for that error. You therefore remain suspended on full pay until the conclusion of the disciplinary process.

The statement that you submitted contains some serious allegations against unnamed colleagues and I refer to your statement....

....

You will understand that, although these allegations may be considered of varying degrees of seriousness, at least two of these relate to knowledge that you possess of staff being in breach of our safeguarding procedures and are therefore extremely serious and all are contrary to school policies. Please confirm whether you are saying that the school knew about these instances to which you refer and if so, let me have confirmation of who it was that you believe to have been aware of the allegations that you make.

I have no alternative but to take your allegations most seriously and I have passed these on to Andrea Caldwell in her capacity as the DSL, and asked her to investigate these matters on an urgent basis. I have asked her to include your position within the investigation as there would appear to be grounds to suspect that you are aware of these breaches being committed but have, until now, chosen not to draw them to the school's attention. This is, an action where further investigation is warranted. Andrea will therefore be reviewing this aspect of the matter along with your specific allegation."

16. The tribunal pauses here as the claimant advances that on Mr Sims advising that she would, following the adjournment, no longer receive pay pending the reconvening of the disciplinary hearing, this was evidence of the respondent, on the claimant having made her disclosures, determining that her employment would terminate and therefore no further needed to pay her a wage and evidence that the ensuing dismissal was because of her having made the protected disclosures.
17. It was Mr Sims' evidence that he had, on the reconvened hearing following the adjournment being delayed because of the claimant's circumstance and not because of the respondent's, believed that the claimant was then not entitled to pay during the delay, but of which he was quickly corrected and advised the claimant accordingly, which was then recorded in his correspondence to the claimant, as above referred
18. Equally following the adjournment, Mr Sims made arrangements for the school's designated safeguarding lead, Andrea Caldwell, to carry out the investigation into the concerns raised by the claimant. For completeness, it is here noted that following Ms Caldwell's investigation, disciplinary proceedings were brought against staff involved.
19. It is here recorded that, of the concerns raised by the claimant, the parties agree that they raised safeguarding issues.
20. On 11 March 2019, the respondent requested further details of the claimant's disclosures, for which the claimant furnished a statement on 13 March 2019. A copy of which is at R1 page 102.
21. On 20 March 2019, the claimant was written to by the Headmaster, advising that:

“I am writing as the investigation manager into allegations against you to say that, following receipt of your statement handed to Martin at the last meeting, the scope of the disciplinary meeting being held on 25 March has been extended to include consideration of the much delayed whistleblowing of the potentially serious allegations contained in your statement. The reason for this is that it is considered to amount to a breach of trust between you and the school.”

22. The reconvened disciplinary hearing took place on 25 March 2019, notes of which are at R1 tab 2, pages 1-8 and page 91.
23. It is Mr Sims' evidence that, he reached his decision on the balance of probabilities, that the allegations relating to the claimant's treatment of children, bullying of staff and her poor relationship with parents were well founded. Which, on referring to the school's disciplinary procedure and policy, under the heading "gross misconduct – examples of gross misconduct", bullying or harassment of employees, pupils or parents was set out and considered to be acts of gross misconduct, for which he concluded that the claimant's treatment of the children, in particular the pupil whose parents' complaint had led to the investigation, amounted to bullying, as did the treatment of staff which had come out in the statements, and for which he determined that dismissal was the appropriate sanction.
24. With regards the issues raised by the claimant's disclosure, and the delay in her raising two particular issues, being; that in respect of the staff member herself admitting having intimate conversations with parents, and a staff member showing indecent images of herself with a parent on a mobile device, both of which issues Mr Sims states he considered to be extremely serious by a staff member at the school, which were in breach of the school's policy relating to safeguarding.
25. Mr Sims determined that the claimant had received regular training on safeguarding issues during her employment at the school, including a course entitled "safeguarding children" which the claimant completed on 1 October 2018, and another course on keeping children safe in education, which the claimant completed on 15 October 2018 and that the claimant was aware of the school's whistle blowing policy, which makes it clear that employees are encouraged to raise concerns with the school and that where there are concerns of child protection or safeguarding involving a member of staff then these issues must be raised directly with the head teacher unless he is absent, in which case the concern should be taken to the chair of governors. The claimant had failed to do this at the appropriate time, only choosing to do so during her own disciplinary proceedings some months later, Mr Sims determining that the claimant had acted in clear breach of the school's policy, including the safeguarding policies which is given as an example of gross misconduct within the school's disciplinary policy and procedures. Mr Sims felt that this would also have warranted dismissal for gross misconduct had it not been the case that he had already made a decision to dismiss the claimant based

on his findings in respect of the claimant's treatment of pupils, parents and other members of staff.

26. The claimant's employment was summarily terminated for gross misconduct, at the reconvened hearing and confirmed by correspondence of 25 March 2019.

The law

27. The law relevant to the issues for interim relief, pending the determination of the complaint, is provided for by section 129 of the Employment Rights Act 1996, which provides "this section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates, the tribunal will find;

that the reason (or if more than one, the principal reason) for the dismissal is one of those specified in;

10.1.1 section103A....

10.1.2

28. The section then provides direction for the terms in which an order for interim relief is to be made.
29. The issue therefore for the tribunal to determine, is whether "it appears to the tribunal that it is likely that on the final hearing the tribunal will find that the claimant in this instance has been dismissed for the reason (or if more than one, the principal reason) that he had made protected interest disclosures.
30. The term "is likely" has been clarified by Underhill P, in Ministry of Justice v Sarfarz [2011] IRLR 562 at paragraph 16 that;

"the meaning of "likely" in the context of the sections has been the subject of a certain amount of authority. The leading case is Taplin v C Shippam Ltd [1978] ICR 1068..... In the judgement of the tribunal in that case, Slynn J recited the self-direction by the industrial tribunal chairman as follows.....

"13. In his decision the chairman of the tribunal directed himself as to the meaning of "likely" in section 78(5). He referred to a previous decision of the industrial tribunal at which he had been chairman in the case of Johnson v Great Clowes Discount Warehouse Ltd (unrecorded). In that case the tribunal had drawn a distinction between "possible" (where the tribunal considered that there would be a less than 50% chance of success), "probable", which was regarded as being more likely than not, when the chance of success would be more than 50%, and "likely", where the tribunal said that

this meant “that the chances have to move a degree nearer certainty than would be the case if the word “probable” had been used.” They referred to the shorter oxford dictionary definition of “likely” as “seeming as if it would prove to be as stated.” They concluded that the word “likely” is a degree nearer certainty, than would be the case if only the word “probable” had been used.”

On the basis of that direction, the industrial tribunal had refused the application for interim relief. The applicant argued on appeal that the approach taken by the tribunal involved imposing too high a standard and that “likely” should be treated as equivalent to “having a reasonable prospect of success.” After setting out that submission Slynn J proceeds;

“21. Having considered all these matters which have been urged before us, we are unanimously of the view that the test proposed by Mr Hands of “reasonable prospect of success” is not one which should be adopted. The phrase can have different shades of emphasis, the lowest of which we do not think is sufficient. We do not consider that Parliament intended that an employee should be able to obtain an order under this section, unless he achieved a higher degree of certainty in the mind of the tribunal than that of showing that he just had a “reasonable” prospect of success.... We consider that the tribunal is required to be satisfied of more than that before it can appear “that it is likely” that a tribunal will find that a complainant was unfairly dismissed for one of the stated reasons.

22. On the other hand we are not persuaded that there is a dichotomy between “probable” and “likely” as expressed by the chairman in the industrial tribunal. We find it difficult to envisage something which is likely but improbable or probable but unlikely and we observe that the oxford dictionary definition does define “likely” as “probable.” Nor do we think that it is right in a case of this kind to ask whether the applicant has proved his case on a balance of probabilities, in the sense that he has established a 51% probability of succeeding in his application, as has at one stage been contended before us. Nor do we find Mr Hands alternative suggestion of a real possibility of success to be a satisfactory approach. This again can have differing shades of emphasis. It seems to us that the section requires that the employee shall establish more clearly that he is likely to succeed than that phrase is capable of suggesting on one meaning. On the other hand, it is clear that the tribunal does not have to be satisfied that the applicant will succeed at the trial. It may be undesirable to find a single synonym for the word “likely” but equally, we think it is wrong to assess the degree of proof which has to be established in terms of a percentage as we have been invited to do.

23. We think that the right approach is expressed in a colloquial phrase suggested by Mr White. 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.

...In this context “likely” does not mean simply “more likely than not” – that is at least 51% - but connotes a significantly higher degree of likelihood. Slynn J understandably declined to express that higher degree in percentage terms, since numbers can convey a spurious impression of precision in what is inevitably an exercise depending on the tribunal’s impression.

Submissions

31. The claimant submitted written submissions which were augmented by oral submissions. The respondent presented oral submissions.
32. The submissions have been fully considered.

Conclusion

33. On the tribunal being tasked to answer the question whether it appears to the tribunal that it is likely that on the final hearing the tribunal will find that the claimant has been dismissed for the reason (or if more than one the principal reason) that she had made protected interest disclosures, where the meaning of “likely” is to be answered on the tribunal asking itself whether the claimant has established that she has a “pretty good” chance of succeeding in the final application to the tribunal.
34. On the claimant’s claim that her employment was terminated for having made protected disclosures, where the disclosures were made by the claimant at a disciplinary hearing into allegations of gross misconduct, for which her employment was then in jeopardy, wherein she then made the qualifying disclosures in defence of the allegations against her so as to evidence differential treatment between her and her colleagues, which disclosures were then proffered for what appears to have been for no other reason otherwise than in defence of the claim against her, it is highly unlikely that the claimant will be able to establish that the disclosures were then made in the public interest, so as to amount to a qualifying disclosure; the submissions of the respondent being that save for the claimant being subject to disciplinary action for gross misconduct, she would not then have made the disclosures.
35. Were I wrong in this assessment, on the respondent’s case being that the claimant was disciplined, not for the fact of her making the disclosures, but for the fact that trust and confidence had been lost in the claimant by her failure to make the disclosures, in circumstances where it was incumbent on the claimant by the respondent’s safeguarding policy to have positively acted where safeguarding issues arose. On the claimant being in possession of such information but then failed to disclose such, and was the act for which dismissal would have been imposed, (albeit that the respondent’s case is that the claimant’s employment was terminated on misconduct being proved against her for bullying and harassment, which

was not predicated on any disclosures), the respondent having lost trust and confidence in the claimant, I find this to be a proposition for which there is arguable merit, and against which the claimant's claim that her dismissal was for the reason, or principal reason, of her having made a protected disclosure, does not have a "pretty good" change of success.

- 36. In these circumstances, it does not appear to me that it is "likely" that the tribunal at the final hearing will find that the reason, or if more than one, the principal reason for the claimant's dismissal, was because she had made protected disclosures.
- 37. I accordingly, do not find this an appropriate case in which to award interim relief. The claimant's application is refused.

Employment Judge Henry

Date: ...6/6/19.....

Sent to the parties on:

.....
For the Tribunal Office