



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mr Marlan Higgins

AND

Respondent

NHS Blood and Transplant

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY at PLYMOUTH ON
By CVP Video

28 July 2022

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person

For the Respondent: Mr M Smith, Solicitor

JUDGMENT

The judgment of the tribunal is that the claimant's application for interim relief is dismissed.

RESERVED REASONS

1. In this case the claimant Mr Marlan Higgins claims that he has been unfairly dismissed, and that the principal reason for his dismissal was because he had made protected public interest disclosures and/or for trade union activities. This judgment deals with the claimant's application for interim relief. The respondent contends that the reason for the dismissal was gross misconduct, and that the dismissal was fair. It opposes the interim relief application.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents to which I was referred are in an agreed bundle of 309 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant, and I have heard from Mr Smith on behalf of the respondent. I have considered the parties' pleadings and other relevant documentary evidence. I have not made any findings of fact because this is not required by the statutory test.
4. The claimant Mr Marlan Higgins describes himself as being Black British of Jamaican heritage. He is a non-practising solicitor. He was employed by the respondent from 17

- February 2020 as a donor carer and more latterly as an interim project lead. He was dismissed by reason of misconduct on 5 July 2022. He has appealed against that decision and an appeal hearing has been arranged on 28 August 2022.
5. Before the claimant presented these proceedings, he had already brought five separate employment tribunal claims in the Watford Employment Tribunal, together with a separate County Court claim. At a case management hearing on 17 June 2022 the claimant withdrew his claims of disability discrimination, sex discrimination, and arrears of pay. He also withdrew claim number 332192/2022 which was a duplicate of claim number 332195/2022. The claimant confirmed that all remaining claims were for direct race discrimination and harassment related to race. The background to these allegations is as follows.
 6. During the claimant's employment his colleagues Amanda Dee and Rachel May each made complaints under the respondent's dignity at work policy against the claimant. The claimant made his own dignity at work complaints against these two complainants. The complaints raised by Amanda Dee and Rachel May were upheld by the respondent whereas the claimant's complaints against them were not. There were various hearings and appeals in relation to those matters, and eventually the claimant was invited to a disciplinary hearing on 30 June 2022 to face allegations of misconduct against him. In short there were three allegations: that he had bullied Amanda Dee; that he had bullied Rachel May; and that he had made a covert recording of a meeting with Rachel May despite management instructions not to make such a recording.
 7. The claimant was dismissed summarily by letter dated 5 July 2022. The dismissal letter confirmed that the disciplinary panel had concluded that the claimant had deliberately excluded Amanda Dee from team meetings; that he refused to follow a reasonable management instruction to participate in driver training and encouraged others in this behaviour; that he would take frequent smoking breaks and failed to follow instructions to desist; that he had intimidated Amanda Dee and other staff which led Amanda Dee to feel bullied; and that Rachel May felt bullied particularly by the claimant's covert recording of conversations with her and sharing of confidential documents. The disciplinary panel decided that these actions amounted to serious misconduct. In addition, the disciplinary panel found that the claimant had made covert recordings despite express reasonable instructions not to do so and that this was a deliberate breach of the data protection rights of others, and management instructions, and amounted to gross misconduct.
 8. There was an earlier dispute between the parties in about November 2020 when the claimant became a member of an independent trade union, namely Unison. He wished to represent the respondent's Oxford Team, and requested a team meeting to that effect, and discussions took place out of working hours. In addition, he wished to represent a colleague namely Linda Clark in an investigation, but the respondent declined to allow him to do so because of a conflict of interests. The claimant asserts that there was no conflict of interests as confirmed by Ms Chater, a full-time official of Unison.
 9. During the above processes the claimant asserts that he made two protected public interest disclosures. The first disclosure was in May 2021 to the respondent's directors to the effect that there had been fabrication of evidence against him in connection with the allegations that he had bullied Rachel May. The second disclosure was in November 2021 and related to his complaints against Amanda Dee. The claimant says he disclosed to the respondent that members of staff and HR been fabricating statements, particularly those of members whom he represented, for the purposes of this investigation.
 10. The claimant presented these proceedings to the South West Employment Tribunal on 7 July 2022. The claimant's application today is one under which he seeks interim relief and reinstatement on the grounds that he was dismissed for either or both of the impermissible reasons of trade union activities and/or whistleblowing.
 11. Having set out the above, I now apply the law.
 12. A dismissal for conduct is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act"). Section 98 (4) of the Act which provides "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances

- (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case”.
13. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
 14. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
 15. Under section 48(2) of the Act, on a complaint to an employment tribunal it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
 16. Under section 103A of the Act, an employee is to be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.
 17. Under section 128 of the Act: (1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and – (a) that the reason (or, if more than one, the principal reason) for the dismissal is one of those specified in – (i) section 100(1)(a) and (b), 101A(d), 102(1) 103 or 103A, or (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or (b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met, may apply to the tribunal for interim relief.
 18. In addition, section 161(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that an employee who presents a complaint of unfair dismissal alleging that the dismissal is unfair by virtue of section 152 of that Act may apply for interim relief. Section 161(3) provides that: “In a case where the employee relies on section 152(1)(a), (b), or (ba), or on section 152(1)(bb) otherwise than in relation to an offer made in contravention of section 145A(1)(d), the tribunal shall not entertain an application for interim relief unless before the end of that period [the requirement to issue interim relief proceedings within seven days] there is also so presented a certificate in writing signed by an authorised official of the independent trade union of which the employee was or proposed to become a member stating – (a) that on the date of the dismissal the employee was or proposed to become a member of the union, and (b) that there appear to be reasonable grounds for supposing that the reason for his dismissal (or, if more than one, the principal reason) was one alleged in the complaint.”
 19. Section 152(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that: “for the purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee – (a) was, or proposed to become, a member of an independent trade union, (b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, (ba) had made use, or proposed to make use, of trade union services at an appropriate time, (bb) had failed to accept an offer made in contravention of section 145A or 145B, or (c) was not a member

- of any trade union, or of a particular trade union, all of one of a number of particular trade unions, or had refuse, or proposed to refuse, to become or remain a member.”
20. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 (“the ACAS Code”).
 21. I have been referred to and I have considered the cases of Brennan and Ging v Ellward (Lancs) Ltd [1976] WLR 47000; Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] EWCA Civ; London City Airport Ltd v Chacko [2013] IRLR 610 EAT; Ryb v Nomura International plc ET 3202174/09; Taplin v C Shippam Ltd [1978] ICR 1068 EAT; Ministry of Justice v Sarfraz [2017] EAT and Dandpat v University of Bath and anor EAT 0408/09.
 22. The role of the Employment Tribunal in considering an application for interim relief requires the tribunal to carry out an “expeditious summary assessment” as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party. This necessarily involves a far less detailed scrutiny of the parties’ cases than will ultimately be undertaken at the full hearing – see London City Airport Ltd v Chacko. The statutory test does not require the tribunal to make any findings of fact – see Ryb v Nomura International plc. It must make a decision as to the likelihood of the claimant’s success at a full hearing of the unfair dismissal complaint based on the material before it, which will usually consist of the parties’ pleadings, the witness statements and any other relevant documentary evidence. The basic task and function is to make “a broad assessment on the material available to try to give the tribunal a feel and to make a prediction about what is likely to happen at the eventual hearing before a full tribunal.”
 23. When considering the “likelihood” of the claimant succeeding at tribunal, the correct test to be applied is whether he or she has a “pretty good chance of success” at the full hearing – see Taplin v C Shippam Ltd. The EAT confirmed that the burden of proof in an interim relief application was intended to be greater than that at the full hearing (where the tribunal need only be satisfied on the “balance of probabilities” that the claimant has made out his or her case being the “51% or better” test). For interim relief applications the EAT ruled out alternative tests such as a “real possibility” or “reasonable prospect” of success, or “a 51% or better chance of success”.
 24. This approach has been endorsed by the EAT in Dandpat v University of Bath and anor and in Chacko. More recently in Ministry of Justice v Sarfraz the EAT held that “likely” was nearer to certainty than mere probability - Underhill J as he then was stated in paragraph 16: “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.”
 25. It was also held in Dandpat at paragraph 20 that: “Interim relief is a draconian measure. It runs contrary to the general principle that there be no compulsion in personal service. It is not a consequence that should be imposed likely.”
 26. I deal first with that part of the claimant’s application which relates to trade union activities. The claimant has confirmed that for the purposes of this claim he relies upon section 152(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992, namely that the reason for his dismissal was that he had taken part in the activities of an independent trade union at an appropriate time. However, section 161(3) of that Act requires that any such application must be supported by a certificate in writing signed by an authorised official of the independent trade union in question. The claimant accepts that he has not provided that certificate in support. Accordingly, I do not have jurisdiction to entertain that aspect of the claimant’s claim, and it is dismissed for that reason.
 27. The second aspect of the claimant’s application is that the reason or principal reason for his dismissal was because he had made the protected public interest disclosures referred to above in May 2021 and November 2021 in connection with investigations concerning Rachel May and Amanda Dee.
 28. The respondent asserts that it is abundantly clear from (i) the investigation reports prepared (one of which was from an independent organisation); (ii) the management statement of case against the claimant; (iii) the minutes of the disciplinary hearing; and (iv) the detailed

- dismissal letter, that the claimant was dismissed by reason of a combination of serious misconduct and gross misconduct. The claimant is legally qualified as a non-practising solicitor, and despite an order from the Tribunal upon the receipt of this claim for the claimant to provide further and better particulars of his claim for interim relief, he has failed to do so sufficiently. He has still failed to show why his disclosures are said to show one or more of the aspects itemised under section 43B(1)(a) to (f) of the Act; why he believes such a disclosure was in the public interest; why he asserts that any such beliefs were reasonable; and given his admission that he had covertly made recordings despite clear instructions to the contrary, the basis upon which he asserts that any such disclosures could have been the sole or principal reason for his dismissal (rather than that misconduct).
29. I agree with those submissions, and I agree with the respondent's assertion that the claimant cannot satisfy the Tribunal today that there is a high degree of likelihood, or "a pretty good chance", that he will succeed in establishing that he has been dismissed by reason of either of the two disclosures relied upon. It is for the claimant to discharge that burden of proof and he has not done so.
 30. Accordingly, I dismiss his application for interim relief under section 128 of the Act.
 31. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the general background in relation to those issues is at paragraphs 4 to 10; a concise identification of the relevant law is at paragraphs 12 to 25; and how that law has been applied to those findings in order to decide the issues is at paragraphs 26 to 30.

Employment Judge Roper
28 July 2022

Judgment sent to parties on 01 August 2022
Miss K House

For the Tribunal Office