EMPLOYMENT TRIBUNALS

Claimant: Mr T Mitchell

Respondent: Taverham High School

Heard at: Bury St Edmunds Employment Tribunal (via CVP)

On: 17 June 2022

Before: **Employment Judge K Welch (sitting alone)**

Representation
Claimant: Mr M Harris, former teacher and lay representative
Respondent: Mr G Baker, Counsel

JUDGMENT

1. The claimant's application for interim relief is refused.

REASONS

Introduction

1. This case was listed to consider the claimant's application for interim relief. The claimant provided me with a 6 page statement, a skeleton argument and a bundle of documents consisting of over 250 pages (referred to as C bundle). The respondent provided me with a skeleton argument, a bundle of documents consisting of over 550 pages referred to as R bundle) and a signed 8 page witness statement from Markella Papageorgiou. None of the witnesses gave oral evidence on oath and none were tested by the other party in relation to their evidence.

2. The claimant provided additional documents during the hearing, which had

not been contained within his original bundle (which I collated and refer to as C supplemental bundle). The respondent did not object to the disclosure of the additional documents and confirmed that it was not seeking an adjournment to the hearing. Both parties had seen the other parties' bundle of documents and witness statements.

3. The hearing was held remotely via the cloud video platform (CVP) under rule 46 of the employment tribunal rules of procedure. It was considered to be just and equitable to hear the claim in this way.

4. I determined at the outset that I would not hear any oral evidence but would be deciding the case on the basis of the written witness statements, submissions from the parties and any documents before me.

5. The Claimant made an application for interim relief initially based on two allegations:

    a. that he was automatically unfairly dismissed in accordance with s.103A of the Employment Rights Act ('ERA') (ie he had been dismissed for making protected disclosures); and

    b. that he was unfairly dismissed for being a "union member" (using the claimant's words from his claim form).

6. Towards the start of the hearing, following a request from the respondent to understand the basis of the claimant's applications for interim relief, the claimant confirmed that he was not pursuing his application for interim relief based upon his claim for automatic unfair dismissal:

    a. on grounds related to trade union membership or activities under section 161 of the Trade Union & Labour Relations (Consolidation) Act 1992 ('TULCRA'); and/or

    b. for a reason set out in paragraph 161(2) of Schedule A1 to TULCRA

under section 128 ERA.

7. Therefore, these applications were dismissed upon withdrawal. The only remaining claim for interim relief was the claimant's claim for automatic unfair dismissal for making a protected disclosure under section 103A ERA.
8. The claimant's dismissal took place on 10 May 2022 and the procedural requirements for making an interim relief application were met as regards his application under section 128 and 129 ERA.
9. It was agreed that the issues I had to consider were whether it appears to me to be likely that on determining this claim a Tribunal will be satisfied that:
    a. there was a public interest disclosure; and
    b. the public interest disclosure was the reason or the principal reason for the claimant's dismissal.

Facts

10. The claimant submitted an ET1 claim form on 16 May 2022 which set out that he had worked as a teacher for the respondent school from 3 January 2013 until his dismissal on 10 May 2022. The ET3 response has yet to be presented.
11. The claimant's case in relation to this application is that he made various public interest disclosures to the school governors, the head teacher, his colleagues, his trade union representatives and/or others contained within the following:
    a. His email dated 9 June 2020 [p42-45 and 48-51 C bundle];
    b. His email of 22 October 2020 [P441-443 R bundle];
    c. His emails of 1 and 2 November 2020 [p60-64 and 71-73 C bundle];

d. His email of 4 January 2021 [C supplemental bundle]; and

e. His grievance dated 15 April 2021 [C supplemental bundle].

12. The claimant contends (from paragraph 47 of his witness statement) that the union representatives gave all of his union business emails to the head teacher, which was then used as the basis for an investigation into the claimant.

13. The documents relied upon raised various health and safety concerns/ issues, which I do not propose to detail here.

14. The claimant attended a disciplinary hearing on 7 December 2021 concerning the following allegation:

"*That you have on multiple occasions over an extended period of time conducted yourself in a way which is considered unreasonable and unacceptable and has resulted in a negative impact on staff. This behaviour falls far short of the reasonable expectations of the school as your employer"*

15. For the purposes of the disciplinary hearing, an interim investigatory report [P21-29 R bundle] and a full investigation report [P 30 – 100 R bundle] had been prepared by an independent investigating officer. These reports reference the conduct the claimant is alleged to have committed giving rise to the disciplinary investigation.

16. The outcome of the disciplinary hearing was to give the claimant a first and final written warning.

17. The claimant appealed against this decision and confirmed on 14 March 2022 [P109 – 110 R bundle] that he required the appeal to be a rehearing of the disciplinary hearing.

18. Following the appeal hearing, which the claimant did not attend, the appeal

committee increased the sanction and dismissed the claimant for gross misconduct. Markella Papageorgiou's statement (not tested by cross examination) stated that the manner of the claimant's behaviour and the tone of his emails towards work colleagues was unacceptable and that this was the reason for his dismissal.

Law

19. This is an application to the tribunal under section 128 of the Employment Rights Act 1996 ("ERA") for interim relief.

20. Section 129 ERA sets out the procedure to be adopted by the tribunal before considering making such an order. Section 129(1) provides:

"*(1) 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—*

(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(1)(d), 102(1), 103 or 103A…"

21. For today's purposes, the claimant is relying upon section 103(A) ERA in relation to his claim for automatic unfair dismissal for having made a protected disclosure under section 43B(d) ERA (that the health or safety of any individual has been, is being or is likely to be endangered).

22. The test for interim relief applications was initially set out in the decision of the Employment Appeal Tribunal in Taplin v C Shippam Ltd [1978] ICR 1068 where it held that the employee must be able to demonstrate a "*pretty good chance*" of success. This has been confirmed in numerous later cases, including Ministry of Justice v Sarfraz [2011] IRLR 562 and Wollenberg Global Gaming Ventures (Leeds) Ltd [2018] 4 WLUK 14.

23. Therefore, in order to succeed in an interim relief application, it is not enough to show that the claimant could possibly win on the balance of probabilities.

24. This is recognised to be a high bar because there is a risk of a respondent being irretrievably prejudiced if required to treat the contract as continuing until the conclusion of the hearing.

25. In the context of an application relying upon a public interest disclosure it is proper to have regard to section 43(B) ERA, which 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 …… "d) The health or safety of any individual has been, is being, or is likely to be endangered."

26. Section 103(A) ERA provides that a dismissal will be automatically unfair if the reason for it, or the principal reason for it, is that the employee has made a protected disclosure. In the case of Eigar Securities LLP v Korshunova [2017] IRLR 115 Simler P make a finding that a disclosure being "on the respondent's mind" was not enough to satisfy the causation test.

27. The claimant must show a pretty good chance of succeeding on each required element of his section 103A ERA claim. In other words, he has to show there is a pretty good chance that the final tribunal will decide that there was a protected disclosure, as well as showing that there is a pretty good chance that the disclosure, if any, was the principal reason for his dismissal.

28. The EAT recognises the task before the Tribunal in dealing with an

application for interim relief is not an easy one as explained in the case of London City Airport v Chacko [2013] IRLR 610 in 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*"

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

30. When making a decision on an interim relief application, I do not make any formal findings of fact which are intended to be binding at any later stage of the proceedings. I am assessing, amongst other things, the likelihood of disputed facts being proved in the claimant's favour at the final hearing. There is only limited material available to a judge making a decision on an interim relief application but my decision has to be based on whatever material is available to me.

Conclusion

31. In coming to my decision, I have to take an impressionistic view of the documentary evidence and written statements before me, (noting that this has not been given on oath or tested by cross examination). I have therefore, carried out a summary assessment of the material before me to form a view as to whether the claimant is likely to succeed in his claim for automatic unfair dismissal.

32. For the purposes of this application, I do not propose to go through each of the documents relied upon by the claimant to say whether I find that it is likely that the claimant will show that he made separate disclosures each

qualifying as protected disclosures at the final hearing. This will ultimately be a matter of fact for the final hearing to determine.

33. Rather than go through each document containing alleged protected disclosure(s), some of which are long documents containing many assertions, I propose to deal with the application by carrying out a summary assessment of these documents taken as a whole. On doing so, I consider that the claimant will be likely to be able to show that the information he provided, in at least one of the various documents relied upon, tended to show in his reasonable belief that the health and safety of pupils and teachers may be adversely affected if the Covid-19 pandemic was not managed appropriately and proper ventilation was in place.

34. It is clear that these were not disclosures which were being made by the claimant in his personal interest. I have regard to the guidance of Underhill LJ in Chesterton Global Limited & Another v Nurmohamed 2017 IRLR 837 as to when a disclosure is in the public interest. I consider it likely that the claimant will persuade a tribunal that he had a genuine and reasonable belief that the information he was giving was in the public interest, given that he was discussing the Covid-19 procedures adopted by a school.

35. My summary view, therefore, is that the claimant does have a pretty good chance of succeeding in showing that he made a public interest disclosure.

36. However, even finding it likely that the claimant will be able to show that he made a protected disclosure, I am not satisfied from the documents I have before me, that the claimant will be able to show the causal link between any such protected disclosures and his dismissal necessary to succeed in his automatic unfair dismissal claim.

37. The claimant contends that the reason given for the claimant's dismissal

was fabricated to cover the real reason for it. That is not clear from the documentary evidence before me for the purposes of this hearing. In coming to my decision, I have had regard to the investigatory reports, the Chair of Trustee's report, the minutes of the disciplinary hearing, the appeal outcome documentation and appendices and the claimant's and respondent's witness statements.

38. There was considerable evidence relating to the reasons for the dismissal of the claimant for his alleged misconduct and/or breakdown in trust and confidence, and whilst this has to be tested at final hearing, I cannot hold from this documentation that the claimant has a pretty good chance of succeeding in showing that the disclosure(s), if any, was the principal reason for his dismissal, as is required by the test for interim relief.
39. Therefore, the claimant's application for interim relief is refused and these matters should be properly tested a full hearing.

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Employment Judge Welch

Date: 24 June 2022

JUDGMENT SENT TO THE PARTIES ON

27 June 2022

FOR THE TRIBUNAL OFFICE