



EMPLOYMENT TRIBUNALS

Claimant: Mary Smith

Respondent: (1) NHLEX Limited
(2) Sally Calverley
(3) Joanna Kangurs
(4) Keystone HR Consultancy Limited

Heard at: Bristol Employment Tribunal (Via VHS) **On:** Monday, 22nd May 2023

Before: Employment Judge Mr. M. Salter

Representation:

Claimant: Mr. Gilroy, King's Counsel.
Respondent: Ms. Hirsch, Counsel

JUDGMENT

The Claimant's application for interim relief fails and is dismissed.

REASONS

INTRODUCTION

1. This is a claim which involves dismissal on the grounds of making a public interest disclosure under Employment Rights Act 1996 (ERA) s103A. The effective date of termination is 6th April 2023 and the claim was issued on 13th April 2023. The application for interim relief is made under s128 ERA against the First Respondent.
2. The various Respondent's ET3's are yet to be entered.
3. The hearing was a remote public hearing, conducted using the Video Hearing System under Rule 46. The parties agreed to the hearing being conducted in this way.

4. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. No members of the public attended.
5. The parties were able to hear what the tribunal heard. From a technical perspective, there were no difficulties of any substance.

PAPERS AND PROCEDURE

Papers

6. In advance of the hearing I received:
 - (a) a witness statement from the Claimant (30 pages, 135 paragraphs);
 - (b) a bundle of documents from the claimant totaling 699 pages;
 - (c) a skeleton argument on behalf of the Claimant;
 - (d) witness statements on behalf of the First Respondent from:
 - (i) Sally Calverley (25 pages, 111 paragraphs);
 - (ii) Andrew Stinchcombe (14 pages 47 paragraphs);
 - (e) a bundle of documents from the First Respondent totaling 527 pages;
 - (f) a skeleton argument on behalf of the First Respondent

Representation

7. The Claimant was represented by Mr. Gilroy K.C, and the First Respondent was represented by Ms. Hirsch of counsel. This being a hearing or interim relief no other Respondents were present.

Procedure

8. At the outset of the hearing, I established that the parties had access to all of the documents I had. I explained, as this was a summary application, that under Rule 95 Employment Tribunal (Constitution and Rules of Procedure Regulations) 2013, schedule 1, it was not usual to hear witness evidence but that I had read the witness statements.
9. I had written skeleton arguments. Both parties supplemented their arguments orally. Since the skeletons are in writing it is unnecessary to repeat them here and they are referred to as appropriate in the conclusions.

ISSUES

10. The issue for me was whether under s129 ERA it appeared that it was likely that on determining the complaint to which the application related, the Tribunal at final hearing, will find that the reason (or if more than one the principal reason) for dismissal was specified under s47B of the same Act.

11. My role was to consider the paperwork before me and the submissions of both parties and to make a broad assessment as to whether the Claimant's application for interim relief should succeed. My role was not to attempt to decide the issues as if it were the final substantive hearing. This is the approach endorsed in Raja v Secretary of State for Justice UAEAT/0364/09/CEA.
12. Richardson J in Wollenburg v Global Gaming Ventures (Leeds) Ltd EAT/0052/18 (penultimate paragraph) said that such hearings are intended to be short, with broad assessments by the Employment Judge who cannot be expected to grapple with vast quantities of material.
13. The principles were reviewed and summarised by the Employment Appeal Tribunal in London City Airport Ltd v Chacko 2013 IRLR 610:

The application falls to be considered on a summary basis. The employment judge must do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The employment judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the Employment Tribunal but whether "it appears to the tribunal" in this case the employment judge "that it is likely". To put it in my own words, what this requires is an expeditious summary assessment by the first-instance employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim.

THE LAW

Interim Relief: Statute

14. Section 128 Employment Rights Act 1996 ("ERA") provides:

128. Interim relief pending determination of complaint

- (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(1)(d), 102(1), 103 or 103A,
- (ii) Section 103 A

may apply to the tribunal for interim relief.

- (2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).
- (3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.
- (4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.
- (5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so'.

15. The question to be considered upon an application for interim relief is set out in s129 ERA 1996:

129. Procedure on hearing of application and making of order

- (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,

16. Interim relief can therefore be ordered where the Tribunal finds that it is likely that a final hearing will decide that the reason (or principal reason) for dismissal was the employee having made protected disclosures contrary to s 103A ERA.

Interim Relief Case Law

17. The meaning of the word 'likely' for these purposes has been considered in several cases. In Taplin v C Shippam Ltd [1978] ICR 1068 EAT, decided under similar provisions relating to interim relief applications in dismissal for trade union reasons, the EAT (Mr. Justice Slynn) held that it must be shown

that the claimant has a 'pretty good chance' of succeeding and that that meant something more than merely on the balance of probabilities.

18. In Dandpat v University of Bath EAT/0408/09 the EAT reaffirmed the test that the claimant must demonstrate a 'pretty good chance' of success at trial.

19. A 'pretty good chance' of success was interpreted in the whistleblowing case of Ministry of Justice v Sarfraz [2011] IRLR 562, EAT, Underhill P stated that,

“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.”

(para 16).

20. That approach to the word 'likely' has been followed in subsequent decisions, His Highness Sheikh Khalid Bin Saqr Al Qasimi v Robinson UKEAT/0283/17/JOJ, at paras 8–11.

21. There are policy reasons why the threshold should be thus. Underhill P said, in Dandpat:

“If relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing and pay the claimant, until the conclusion of proceedings: that is not a consequence that should be imposed lightly.”

paragraph 20

22. If the claimant succeeds the tribunal shall ask the employer whether it is willing pending the determination or settlement of the complaint to reinstate or re-engage the employee in another job on terms and conditions not less favourable than those which would have applied had he not been dismissed. If the employer is willing to reinstate the tribunal makes in order to that effect. If the employer is willing to re-engage and specifies the terms and conditions, the tribunal shall ask the employee whether he is willing to accept the job.

23. If the employee is not willing to accept re-engagement on those terms and conditions where the tribunal is of the opinion that the refusal is reasonable

it shall make an order for the continuation of his contract and otherwise the tribunal shall make no order.

Interim Relief: Protected Interest Disclosure

24. Mr. Justice Underhill, then President of the EAT, laid out guidance for cases such as these. He confirmed that Claimants must persuade a tribunal in relation to all the elements that fall to be considered at the substantive hearing. In *Sarfraz* he stated:

“In order to make an order under Ss 128 and 129 the Judge had to have decided that it was likely that the Tribunal at the final hearing would find five things;

- (1) the Claimant had made a disclosure to his employer;
- (2) the disclosure tended to show one or more things itemised at section 47B;
- (3) that the belief was reasonable;
- (4) that the disclosures were made in good faith (now whether the Claimant believed the disclosure to be in the public interest) and
- (5) that the disclosure was the principal reason for his dismissal.

§16

25. In the context of a whistleblowing claim, the law was reviewed by the EAT (Eady J) in *Robinson*. The claimant must show that level of chance in relation to the elements of the claim that:

- (a) she made the disclosure(s) to the employer;
- (b) she believed that it or they tended to show one or more of the matters itemised in section 43B(1);
- (c) her belief in that was reasonable;
- (d) the disclosure was made in the public interest; and
- (e) the disclosure was the principal cause of the dismissal.

26. These are matters of fact for the tribunal and at the interim relief stage the task of the tribunal is only to make a summary assessment of the strength of the case. Eady J said of the tribunal’s task (judgment paragraph 59) that it was:

54“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 has succeeded or failed giving the issues raised and the test to be applied.”

Protected Interest Disclosures

27. "Protected disclosure" is defined in s43A Employment Rights Act 1996: "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

28. "Qualifying disclosures" are defined by s43B ERA 1996,

43B Disclosures qualifying for protection

(1) In this Part 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) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.'

...

29. The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations), Cavendish Munro Professional Risk Management v Geldud [2010] ICR [24] – [25]; It is possible an allegation may contain information, whether expressly or impliedly. In Kilraine v London Borough of Wandsworth [2018] ICR 185 the CA said that in order for a statement or disclosure to be a qualifying disclosure, it had to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) - (of section 43B). There is no rigid distinction between allegations and disclosures of information.

30. In terms of the reasonableness of the belief, the Court of Appeal in Babula v Waltham Forest College [2007] ICR 1026 said that whilst an employee claiming the protection of section 43B(1) must have a reasonable belief that the information she is disclosing, tends to show one or more of the matters in that section, there is no requirement to demonstrate that the belief is factually correct. The belief may be reasonable even if it turns out to be wrong. Whether the belief was reasonably held is a matter for the tribunal to determine.

31. The test for “reasonable belief” is a two-stage test, Chesterton Global Ltd v Nurmohamed [2017] IRLR 837, at para 29. The two stages are:
- (a) Did the claimant have a subjective genuine belief that the disclosure (i) tended to show one of the matters set out in s.43B(1) ERA, and (ii) was in the public interest? If so,
 - (b) Did the claimant have objectively reasonable grounds for so believing in both such cases?
32. This is a two-stage test, which the ET must follow, and the two stages ought not to be elided, Ibrahim v. HCA International [2020] IRLR 224, CA, para 17, per Bean LJ.
33. Underhill LJ said, in Chesterton Global Ltd v Nurmohamed [2017] IRLR 837, para [31], that the meaning of ‘in the public interest’ was not defined by Parliament. Instead,
- “.. the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression”. However, “the essential distinction” to be drawn was “between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest”.
34. At [35] and [37] Underhill LJ set out the factors which are useful in deciding whether a disclosure relating to a breach of a worker’s own contract (or where the interest in question is personal in nature) was made in the public interest:
- (a) the numbers in the group whose interests the disclosure served;
 - (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;
 - (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
 - (d) the identity of the alleged wrongdoer ..., “the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities ...”.
35. Underhill LJ explained at paras [36] and [37]:

[36] the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers...

[37] "...where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker.... The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but [counsel for the employee's] fourfold classification of relevant factors which I have reproduced ... may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

36. It is for the tribunal to rule as a question of fact on whether there was a sufficient public interest to qualify under the legislation. The term "public interest" has not been defined in the legislation. In Parsons v Airplus International Ltd EAT/0111/17 the EAT pointed out that in law a disclosure does not have to be either wholly in the public interest or wholly from self-interest. It could be both and this does not prevent a tribunal from finding on the facts that it was actually only one of those.

Causation

37. In determining whether the reason for the Claimant's dismissal was her alleged disclosure, it is not sufficient for the disclosure to be "in the employer's mind" or for it to have influenced the employer. The Tribunal must consider whether that disclosure was the "sole or principal reason" for her dismissal, Eiger Securities LLP v Korshunova [2017] IRLR 115).
38. The approach under section 103A ERA to determining the principal reason for dismissal is not a 'but for' test, but a 'reason why' test: Salisbury NHS Foundation Trust v Wyeth EAT/0061/15.

SUBMISSIONS AND DISCUSSIONS

39. All submissions and authorities referred to were fully considered, even if not expressly referred to below. Both parties had initially indicated an hour would be sufficient for their submissions: ultimately the Claimant took 1 hour and 10 minutes, and the First Respondent 1 hour and 2 minutes.

40. The Claimant's submissions focused on 4 main areas:
- (a) The dismissal letter;
 - (b) Key documents on causation;
 - (c) Other documents;
 - (d) The Respondent's submissions.
41. Mr. Gilroy:
- (a) highlighted the harsh nature of the sanction, describing it as "truly extraordinary" being as it was totally un-foreshadowed by any disciplinary action as well as the vague nature of the "regulatory requirements" the Respondent relied upon.
 - (b) Brought my attention. to the fact that others were held out by the Respondent as solicitors when they were not
 - (c) Highlighted documents from the outset of the claimant's employment that showed the First Respondent was aware of the claimant's professional status;
 - (d) Argued his clients conduct and behaviour in the meeting with the Second Respondent was nowhere near enough to place it in the Kong type situation where her behavior goes beyond ordinary unreasonableness, indeed, contends Mr. Gilroy, her behaviour is not unreasonable at all;
42. In the Respondent's submissions the Claimant could not meet the threshold for any application for interim relief. Ms. Hirsh:
- (a) Highlighted contemporaneous documentation relevant to the issues of the Claimants status including letter from the SRA and responses to those letters [192-193, 196 and 197];
 - (b) Took me through the Claimant's record of the meeting she had had with Ms. Calverley highlighting instances where, the First Respondent contends the Claimant was "obstructive and uncooperative" and pushed back on instructions concerning her title and email;
 - (c) Argued the contemporaneous documents do not support the claimant's "completely distorted perception" of what was going on, and this led to the breakdown in trust and, ultimately the finding of Gross Misconduct;
 - (d) Identified a series of clear instructions from Ms. Calverley to the Claimant concerning her email signature, all of which Ms. Hirsh said were not completed by the Claimant;
 - (e) Addressed the point regarding whether the Claimant's behaviour was blameless or not, Ms. Hirsch argued it was "objectively unreasonable and uncooperative" and was clearly demonstrated by a failure to follow a lawful instruction given on numerous occasions and relevant to an important regulatory matter,

MY CONCLUSIONS

43. The task for the tribunal on an interim relief application is to make a summary assessment of the strength of the case as to whether the claim is

“likely” to succeed. The Taplin test remains good law: “does the claimant have a pretty good chance of success”. Subsequent case law has shown that the test is comparatively high, following Dandpat. Following Sarfraz the test connotes a significantly higher degree of likelihood than “more likely than not” and connotes something nearer to certainty than mere probability. It is a high test.

44. The Respondent accepted that the application had been presented within time and that the claimant was entitled to seek interim relief. My first consideration, therefore, is whether it is likely the tribunal at the substantive hearing would find the Claimant had made qualifying disclosures and protected disclosures.
45. Understandably, most of the submissions focused on the element of causation, but I must proceed through the initial questions of whether the alleged disclosures are protected ones.

Qualifying Disclosure

46. The Claimant contends that she disclosed information which she reasonably believed was in the public interest.
47. Having looked all the evidence before me I consider the Claimant is likely to meet the higher standard of proof required here. I consider she has “a pretty good chance” of proving the disclosures were qualifying ones. There is a disclosure of information which is likely to amount to breach of a legal obligation.

Public Interest

48. Further, I considered that the Claimant could argue persuasively that the disclosures were in the public interest, concerning as they do the impact on clients of a solicitors firm. I felt I could say that there was a “pretty good chance” that a Final Hearing would decide that the information was disclosed in the public interest.

Protected disclosure

49. The disclosures being made to her employers, I consider it more than likely, inevitable, the claimant will show the qualifying disclosures are protected.

Reason for Dismissal

50. In order for the Claimant to be entitled to interim relief, I would also need to assess that it was “likely” that the Tribunal would find that the protected disclosure was the principal reason for the dismissal.
51. It would not be enough that it was one of a number of reasons for dismissal.
52. On the material available to me, I did not consider that it was “likely” (in the sense of a significantly higher degree of likelihood than more likely than not) that a Tribunal would conclude that the protected disclosure was the principal reason for dismissal.
53. There appear to me to be the following substantial matters of fact that require determination in this matter
- (a) Dispute over behaviour in the meetings: the Claimant has produced a detailed record of her disciplinary meeting. I would presume from an audio recording. There is a dispute as to her behaviour in that meeting that can only be resolved from considered findings of fact, made after hearing any audio recording or drawing conclusions from other facts.. The Respondent contends the claimant’s behaviour in that meeting was belligerent; the Claimant denies this. If the Claimant is right then the question of why the Respondent’s acted on this false allegation arises;
 - (b) The issue of the claimant’s professional status did not arise for the first time after the disclosures. Whether it is, therefore, a smokescreen for the real reason for dismissal needs consideration, and the First Respondent may have some questions to answer in this regard;
 - (c) Whether any proven actions amount to gross misconduct in the circumstances of this case. I acknowledge the Claimant’s submissions as to whether the matter relied upon by the First Respondent for the dismissal of the claimant could safely be claimed to amount to gross-misconduct, may well have some force at Final Hearing;
 - (d) Further the alleged disparity of treatment, on her case between herself and two other employees’ whos’ professional status had been mischaracterized. Was it, as Ms. Hirsch put it “conspiracy or cockup”?
54. These all appear to either directly or indirectly (i.e. where they a façade behind which another reason for dismissal lurked, and if so, what was it and why was the façade constructed) have relevance to the question I need to determine: whether the reason for the Claimant’s dismissal was likely to be because of her protected disclosures.
55. However, I considered that the oral evidence of the witnesses was likely to be very important in determining the reason for dismissal. Ultimately, with

such fundamental questions of fact, I considered that the reason for dismissal in this case could only be properly assessed having heard oral evidence. While the Claimant might have good evidential arguments, they were not enough, at this stage, to satisfy me that it was “likely” that a Tribunal would find that her alleged protected disclosures were the (principal) reason for dismissal.

CONCLUSION

56. I therefore do not find the Claimant has proven before me at this juncture that she has met the higher burden of proof required. Even though the Claimant has satisfied me that she has a “pretty good chance” that any disclosures she made were protected, I do not find there to be “a pretty good chance” of showing the disclosures were the sole or principal reason for her dismissal.

57. I was unable to find on what was before me, that the claimant had a sufficient prospect of success such as to merit interim relief. The claimant has a prospect of success, as does the respondent. The claimant does not meet the test, described in Dandpat as comparatively high or in Sarfraz as nearer to certainty than probability.

58. In these circumstances, the application for interim relief fails.

MATTERS ARISING FROM MY DECISION

59. The Hearing listed for 22nd June 2023 is vacated.

Employment Judge Salter

Date: 29 May 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
31 May 2023 By Mr J McCormick

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be

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provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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