Case No: 3300150/2017

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms E Fiddian	**v**	**Elysium Healthcare**

Heard at: Watford **On:** 16 February 2017

Before: Employment Judge Bloch QC

Appearances:
For the Claimant: In person (assisted by Mr Peter Cumberland – Lay Representative)
For the Respondent: Mr W Young, Counsel

JUDGMENT having been sent to the parties on 22 February 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This is an application under s.128 of the Employment Rights Act 1996 ("ERA") for interim relief pending determination of the claimant's complaint of unfair dismissal contrary to s.103(A) of the ERA.

2. At the outset of the hearing today the respondent applied for an adjournment. For the reasons which I gave, I refused that application. In particular, I was not satisfied that there were any special circumstances which existed within the meaning of s.128(5) for exercising the tribunal's power of postponing the hearing. In particular, (as Mr Young on behalf of the respondent accepted) there had been delay by the respondent in its response to the notice of hearing and the application for interim relief. While it was true that the claimant had delayed in submitting her documents to the tribunal, so that they were received only yesterday by the respondent's representatives, it seemed to me that those documents were unsurprising. They were documents which were largely within the possession of the respondent and the issues had been fully rehearsed in the appeal hearing held internally by the respondent and set out at some length in the claim form. In those circumstances, it seemed to me that the respondent should not benefit from its own delay and (it would seem to me) its own decision not to call evidence today – so as to result in a postponement, when the important purpose of the section, as shown by s. 128(5), is that there should be a speedy summary hearing.

3. Turning to the facts of the case, these I largely cull from the claim form. It is important for me to say at the outset that my findings are not factual findings as such, they are merely background in order to assist me arrive at a decision under s.128 ERA.

4. With that caveat, the facts as they appear to be at this stage, are that the

claimant began employment with the Priory Group in Potters Bar on 23 May 2016 in the position of a Ward Clerk. The Priory Hospital, Potters Bar, now known as the Potters Bar Clinic, treats adult patients suffering from acute mental health episodes and provides a period of intensive assessment and stabilization. Many of the patients are detained under the provision of The Mental Health Act 1983, as amended ("MHA").

5. In August 2016 the claimant applied for the new internal part-time post of MHA Administrator, which had been created to support the full-time MHA Administrator, Rosa Stacey, due to the workload being excessive for one full-time member of staff. She was offered this position on 8 August 2016 and commenced work in the new role on 5 September 2016.

6. On 1 December 2016 the ownership and management of the hospital passed to Elysium Healthcare.

7. On Thursday 29 December 2016 a patient ("X") was discharged "from section" by his responsible clinician, Dr Anderson, during the ward round. At that point the patient became "informal". However, the claimant was not aware of that. By the term "informal", I understand that the patient was no longer detained under the MHA but was voluntarily present at the clinic.

8. According to the claimant, contrary to proper practice the MHA office was not informed of the patient's discharge from section and the correct procedure for submitting the discharge paper to the MHA Office was not followed. What appears to be the case, although the matter has not yet been explored, is that the clinician may have handed the relevant discharge document to a nurse and the nurse may have put that document together with other documentation on the claimant's desk or elsewhere in her office. It was apparently not placed in a safe or otherwise made secure.

9. The most simple explanation as it appeared to me at this stage (and as put forward by the claimant) was that the relevant document was filed together with a number of other papers on the claimant's desk, that she did not have time, because of excessive workload and other matters, to look at these documents but when she did so on 9 January she found that the relevant document was amongst the pile on her desk.

10. It appears fairly clear at this stage (although matters might appear differently at a full hearing) that the claimant had nothing at all to do with the discharge of patient X. She only discovered that he had been discharged because she was told so by members of staff (who would know that the patient had been discharged) and it was at that stage that she became aware that the relevant document had apparently not been handed to her as she believed it should have been.

11. When the full-time MHA Administrator returned to work on 9 January 2017, the claimant informed her that there had been an issue with the particular patient X regarding his discharge from section in that the MHA Office had not been properly informed.

12. The claimant states that for the MHA office to be kept informed of the legal status of patients being detained under the MHA is vital to protect both their

rights and potentially the safety of the general public. For the purposes of this application that appears to be right.

13. For this reason she believed that her reporting of the issue to the full-time MHA administrator, who trained her and usually directed her work was a protected disclosure.

14. However, two hours later she was summoned to a meeting by the Director of Clinical Services, Vincent Loh. He agreed it was a serious incident but rather than investigate why the paperwork had not been properly submitted to the MHA office, he blamed the claimant personally for the failing and dismissed her. Putting a little more flesh on that bone, the reason which the respondents put forward for the dismissal is the claimant's delay between her discovering that the relevant document was not immediately available to her and her reporting that matter to Ms Stacey on her return to the office on 9 January 2017.

15. The claimant states that she believed that she had been automatically unfairly dismissed because her employment was terminated as a direct result of making the above protected disclosure and she therefore applied for interim relief under s.128 of the ERA.

16. In support of her application (in the claim form) she said that the dismissal had taken place without any proper investigation or advance warning. Her contract was terminated during the meeting on 9 January 2017 in circumstances in which she had not been advised either verbally or in writing, before the meeting took place, that it would be a disciplinary meeting. Further, she was not advised what disciplinary action might be taken and although she was given an opportunity to speak in the meeting, this was sprung on her on short notice so that she was not given time to prepare a considered response. There was nothing prior to this in terms of written warnings.

17. The dismissal letter states: "At the meeting our concerns and issues were thoroughly reviewed and discussed" but that was not true according to the claimant. The meeting lasted no more than 12 minutes before an adjournment of two minutes after which the claimant was informed of her dismissal. That indicated to the claimant that the decision to dismiss her had already been made prior to the meeting. Further, the dismissal letter incorrectly stated that she had filed the missing paper with other paperwork. That allegation was not put to her in the meeting and the claimant emphasized that she had not had sight of the discharge paper regarding patient X until Monday 9 January 2017.

18. Certain other issues emerged in the course of the hearing before me, in particular that there had been considerable tension between the claimant and Vincent Loh regarding the issue of overtime. The claimant appeared to be put in to a cleft stick of having to work overtime because of the amount of work, especially during the absence on holiday of Ms Stacey and yet she was criticised for taking such overtime.

19. There was another issue in relation to probation upon which I can not make any findings at this time. Suffice it to say that the respondent maintained

that the claimant began a second period of probation once she was moved to her new post and claimed to have sent a letter to her in this regard. The claimant denied having received such a letter and the document relied on by the respondent which appeared in the bundle was in any event, unsigned. I say no more about this beyond a brief reference below.

20. Turning to the law. Under s.128 ERA:

> "An employee who presents a complaint to the employment tribunal that he has been unfairly dismissed and - that the reason (or if more than one the principal reason) for the dismissal is one of those specified in - s.103(A) ERA…. may apply to the tribunal for interim relief."

21. There are various procedural requirements for this rather unusual form of application but suffice it to say that the respondent conceded that those procedural requirements had been met.

22. S.103(A) ERA provides:

> "An employee who is dismissed shall be regarded for the purposes of this Part 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."

23. Section 43A defines "protected disclosure" as a qualifying disclosure as defined by s.43B which is made by a worker in accordance with any of sections 43C to 43H.

24. The relevant parts of s.43B are:

> "….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…
>
> (b) that a person has failed, is failing or likely to fail to comply with any legal obligation to which he is subject…"

25. Returning to s.128 the leading authority on the applicable test is the decision of the Employment Appeal Tribunal in *Taplin v C. Shippam Limited* [1978] I.C.R. 1068. That authority directs me to the correct test to be applied today. This is that when establishing that his complaint was "likely" to succeed within the meaning of (now s.128) the claimant should show a greater likelihood of success in his main complaint than a reasonable prospect or a 51% probability of success. The employment tribunal should ask itself whether the employee had established that he had a "pretty good" chance of succeeding in his complaint of unfair dismissal.

26. The real issue in the current case from a protected disclosure perspective relates to the reason for the dismissal. Applying the *Taplin* test the key point for me to decide is whether the claimant has a pretty good chance of succeeding in her complaint of automatically unfair dismissal and, in particular, of showing that the reason for her dismissal was that she had raised with the respondent the procedural defects or failure to apply a procedure which she did on 9 January 2017.

27. One of the difficulties which became apparent in the course of the claimant's evidence was that there were on the face of it a number of possible reasons for her dismissal:

24.1 There were the difficulties which she experienced with Mr Loh relating to the question of overtime working;

24.2 There was the incident itself between 30 December and 9 January of non-reporting of the apparent absence of the release documentation; and

24.3 There was (of course) the complaint about the failure to apply a proper procedure which the claimant had made.

25 Turning to the submissions of the parties, Mr Young, on behalf of the respondent, submitted the following five points in support of his contention that I could not have the necessary confidence that the claimant would succeed at the hearing:

25.1 The respondent set out the reason for the dismissal in the dismissal letter which was upheld on appeal and this was a different reason than the reason put forward by the claimant. While the claimant says that the respondent got the facts wrong, there is no real dispute about the delay between 30 December and 9 January. There was nothing to suggest that that was not the real reason for the dismissal.

25.2 The claimant herself acknowledged that her delay in reporting created a serious issue and was in fact a "huge error". Indeed, in the appeal hearing note she is recorded as saying (bearing in mind that this was a first incident) that she should had been given a "final warning". Accordingly, her complaint was really one of the severity of sanction, ie that her mitigation plea had not been accepted. However, says Mr Young, it is not credible in those circumstances that the given reason for dismissal by the employer was not the real reason.

25.3 The claimant never raised the issue at the time that her dismissal was because of a public interest disclosure. It was only in the claim form that that allegation was made for the first time. That said, one has to accept the reality that it would not have been in the claimant's interest, in trying to keep her job, to have raised such a matter at the earlier time.

25.4 The claimant, at the full hearing, would have to prove that not only Mr Loh but also Mr Atchia, the most senior manager at the premises who heard the appeal, was putting forward a false reason for the dismissal. This was inherently unlikely.

25.5 As to the probation issue, it was not enough that there were potential procedural failings. The respondent's case was that the claimant was indeed still on probation but even if that were not the case, that would fall far short of amounting to sufficient evidence that the respondents were putting forward a false reason for dismissal.

26 The claimant made succinct submissions in response, which I can summarise as follows:

26.1 There was, surprisingly, no attempt by the respondents to understand or investigate what had happened in relation to the missing document (which was found on 9 January – see below).

26.2 The failure by Mr Loh and Mr Atchia to understand the relatively simple facts of what had occurred amounted to a deliberate misunderstanding of the true position.

26.3 The respondents wanted to get rid of the claimant. In particular, they did not want the claimant to pursue the raising of such complaints as she raised on this occasion, ie the procedural failings in relation to the discharge papers.

26.4 The "probation issue" shows that the respondents were looking for a reason not to apply normal disciplinary procedures, ie notice of a disciplinary hearing and proper investigation - in order to cover up their real reason for dismissal.

27 It is right to say that (as a matter of impression) the respondents seem to have put forward mistaken grounds for the dismissal of the claimant and then to have persisted in that mistaken view. For example, in the dismissal letter of 9 January 2017 there is reference made to "Your failure to report a serious incident on 30 December 2016 whereby a patient was discharged despite you believing you did not have the relevant section papers". It appears tolerably clear, even at this stage, that that was a mistaken view, as is the point put forward in the same paragraph: "Fortunately the relevant papers were on file but you were not aware as you have filed this with other paperwork." There seems to be no basis for suggesting that the claimant had anything to do with the discharge of the patient or was aware of it at the stage of discharge or that she had filed the discharge paperwork.

28 Against this must be put the point, which the claimant accepted, namely, that it was a serious matter that she did not disclose to her seniors the absence of that document (as she believed it to be) until 9 January.

29 It is also right to say that at the appeal hearing the claimant kept on drawing to the attention of Mr Atchia, the (allegedly) serious failing of the clinical staff in not giving the discharge paper directly to the claimant and informing her directly that the patient had been discharged off section.

30 In the appeal outcome letter dated 25 January 2017, Mr Atchia said that the concerns which he had were that the claimant felt that it was not urgent to escalate this to a senior member of the management team, despite believing that the patient should not have been discharged or failing even to go back to her office to check whether she had the relevant section papers on file. That seems much closer to the mark.

31 Has the claimant persuaded me that she has a pretty good chance of succeeding in showing at the hearing that the respondent dismissed her for her "whistle-blowing disclosures"? Or, is it more likely that the tribunal will

conclude that the respondent wished to be rid of the claimant because of a perception that she was a difficult person, particularly in relation to the overtime issue, or, more simply, because there was a real perceived breach by her in failing to report her concerns about the relevant missing documentation between 30 December 2016 and 9 January 2017.

32 Has the claimant persuaded me that she has a pretty good chance of succeeding in showing at the hearing that the misunderstanding by the respondents as to the events of 30 December (apparent from the dismissal letter and the appeal hearing transcript) are really tied in with that rather than evidencing some deeper agenda related to "whistle-blowing"?. (I should make it clear that the respondents say that the transcript of the appeal hearing was made without their knowledge and that they have not checked it as against the tape).

33 Doing the best I can on the information before me and without hearing evidence from the respondents' witnesses, it does not seem impossible to me that the claimant will be able to establish at the hearing the deeper agenda and that this is tied in with the wrong reasons put forward for her dismissal. The dismissal letter and the transcript do read very oddly in this regard, when the position seems relatively simple, namely that, the complaint in reality was not that the claimant had anything to do with the discharge of the patient from the clinic but that she took too long before reporting her concerns about the apparent absence of the relevant document. That was not difficult to understand.

34 However, the true question for me is whether the claimant has a pretty good chance of succeeding in this regard - and she has not done so. While she has legitimate concerns, as I have indicated, it seems to me that for the reasons submitted by Mr Young, on behalf of the respondent, the greater likelihood is that the tribunal will conclude that the reason for the dismissal was the delay in reporting the apparently absent document and not the fact that she had raised qualifying disclosures. The difficulty, in particular, for the claimant at this stage was to point to any evidence showing that these two senior managers were deliberately putting forward a false reason for dismissal. There is a large gap between muddled thinking as to the true nature the claimant's behaviour between 30 December and 9 January and my concluding that this was a mask for another reason. On the face of it, there is no evidence (and insufficient basis for drawing the necessary inference) that the respondent was so concerned about the public interest disclosure, that it decided to dismiss her for that reason (and cover it up as alleged). Indeed, this seems inherently unlikely.

35 For those reasons the application is refused.

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Employment Judge Bloch QC

Date: ……3 April 2017

Case No: 3300150/2017

Judgment sent to the parties on

.....8 April 2017.....

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For the Tribunal office