



Reserved judgment

## THE EMPLOYMENT TRIBUNALS

**Between:**

**Claimant:** Mr A Levitt

**Respondent:** Peabody Trust

**Hearing at London South on 5 June 2018 before Employment Judge Baron**

**Appearances**

**For Claimant:** Anna Beale - Counsel

**For Respondent:** Zain Malik - Consultant

### JUDGMENT AT A PRELIMINARY HEARING

It is the judgment of the Tribunal that the application for interim relief fails.

#### REASONS

- 1 Apologies are due to both parties for the substantial delay in issuing this judgment. As the representatives for the parties are no doubt only too well aware there is a very significant of judicial resources at present.
- 2 The Claimant presented a claim to the Tribunal on 4 April 2018, which was served on the Respondent by post on 21 May 2018. The Claimant claims that he was unfairly dismissed and he applied for interim relief under section 128 of the Employment Rights Act 1996 on the basis that the principal reason for his dismissal was that he had made a protected disclosure.
- 3 The Claimant is also making other claims. He is claiming that he suffered detriments short of dismissal on the ground of having made protected disclosures. He is also claiming that he was discriminated against because of his age. The less favourable treatment alleged consists of the same alleged detriments, and also his dismissal. There are also claims of indirect age discrimination and 'ordinary' unfair dismissal. The indirect discrimination claim also relates to the Claimant's dismissal.
- 4 The Respondent had not presented a response before this hearing. The Claimant provided a witness statement. There was no such evidence on behalf of the Respondent, but Mr Malik stated the basis upon which the

claim would be resisted. In summary, it was simply that the Claimant was redundant, and had failed to be appointed to an alternative post for which he had applied.

- 5 I am grateful to the representatives for the cooperation which had obviously taken place in the preparation of a properly indexed and paginated bundle for this hearing held at short notice.
- 6 It is the usual practice to announce the decision on the application at the conclusion of the oral hearing, and indeed that is required by section 129(2) of the 1996 Act. Two hours had been allocated to this hearing, and I was able to provide three hours. However it was not possible in that time for me to consider the detailed analysis made by Miss Beale of the two job descriptions mentioned below, nor the cross-references to the Claimant's Performance Reviews.
- 7 I do not intend to set out the law in any detail, although specific points about protected disclosures are mentioned below. Miss Beale set out in her written submissions the statutory provisions and relevant authorities. Mr Malik did not dispute them. The decision I have to make has to be made on a summary or broad basis, and the statutory test is whether it is likely that at the final hearing the Claimant will succeed in showing that the reason for his dismissal was that he had made a protected disclosure. That does not simply mean that a decision in favour of the Claimant is more likely than not. A higher degree of likelihood is required so that the Claimant shows that he has a pretty good chance of success.
- 8 The points to be decided in this matter on the basis set out above are as follows. The first is whether there was a protected disclosure, and that itself involves various different elements. The second is whether a disclosure, or disclosures, was or were the principal reason(s) for the dismissal of the Claimant. The reason put forward by the Respondent, as mentioned above, was redundancy.
- 9 The facts as stated below are predominantly from documents, and there was no suggestion that the veracity of the documents is disputed. It is not intended that any other 'facts' are findings based on evidence so as to bind any future Tribunal. I have also taken information from the witness statement of the Claimant which, unsurprisingly, largely reproduces the particulars of claim which had been drafted by Miss Beale.
- 10 The Respondent is a major housing charity based in London. It is publicly funded. On 1 July 2017 there was a merger with, or takeover of, another similar charity – Family Mosaic. That is material to the redundancy / reorganisation mentioned below. The function relevant to these proceedings is that of Procurement. That function is subject to regulatory regimes under EU Public Contracts Directive 2014 and the Public Contracts Regulations 2015 implementing the Directive.
- 11 Historically the Respondent had a Director of Procurement, with three teams of two reporting to him. The Claimant was a Procurement Manager in one of those teams, working with Ms Karabanova, a Senior Procurement

Officer. Various members of staff left (including the Director of Procurement) and from May 2016 there were only four members of staff left, with the Claimant as the most senior person acting in the role of Director of Procurement.

- 12 Mr Jody Adams was appointed as the new Director of Procurement from January 2017. Shortly after his appointment he mentioned to at least the Claimant and Ms Karabanova that his partner, Ms Sharpe, worked in procurement also for an organisation called YPO. My understanding is that it is one of several organisations providing 'framework services, effectively acting as 'purchasing clubs' seeking to obtain lower prices through purchasing power.
- 13 Miss Beale referred to five different incidents which she said amounted to Mr Adams seeking to promote YPO. These were firstly on 12 January 2017 when YPO was included on a list of framework service providers. Secondly on 1 March 2017 Mr Adams sent to the Claimant and his colleagues YPO marketing information. Thirdly on 8 March 2017 Mr Adams specifically encouraged the Claimant to add YPO to shortlist for the provision of energy. Fourthly on 15 March 2017 Mr Adams introduced Ms Sharpe to a procurement officer in Family Mosaic by email.
- 14 The fifth incident was on 15 March 2017 when Ms Sharpe emailed Ms Karabanova to say that Mr Adams had asked Ms Sharpe to contact her. Following that approach Ms Karabanova spoke to the Claimant and told him of the email followed up by a conversation in which Mr Adams asked Ms Karabanova to provide some of the Respondent's confidential spend information to Ms Sharpe.
- 15 Having taken advice from HR, and made an informal approach to Mr Adams, the Claimant made a formal report to Mr Harrison of HR on 20 March 2017. A copy of that document was in the bundle. It specifically refers to the Claimant seeking to follow the Respondent's Whistleblower's Policy. It clearly supplied information which was summarised by Miss Beale as follows:
  - That Mr Adams was setting up meetings, in which he was to be involved, with his partner to discuss using YPO to provide a service to procure energy for the Group;
  - That Mr Adams had given a verbal instruction to the Senior Procurement Officer [of Family Mosaic] to meet with his partner and discuss other options for placing work with YPO;
  - That Mr Adams had verbally instructed Ms Karabanova to provide confidential spend data, not usually disclosed by procurement, to Ms Sharpe.
- 16 The other two elements as to reasonable belief that there was a breach of a legal obligation, and that the disclosure was in the public interest are linked together. The legal obligation was to comply with the regulatory provisions concerning public procurement, and thus the disclosure of any breach was necessarily in the public interest. I am satisfied that the Tribunal is likely to find that this amounted to a protected disclosure.
- 17 I move on to the next element which is the reason for the dismissal. Although full details were not before me (which would not be expected at this stage) it is apparent that the merger with Family Mosaic would involve

some reorganisation and possibly redundancies. The Respondent had a Redundancy and Restructuring Policy, and clause 11.1 is as follows:

Peabody may identify situations where the role previously performed is changing slightly to reflect the new way of working required. Where the change between the existing and new job is such that the new role remains substantially the same as the previous role the post holder will be offered the new post without the need to undergo a formal selection process. However if there are more suitable individuals at risk in the situation than there are new roles, a competitive selection process will take place.

- 18 It is in this connection the Miss Beale referred to the job descriptions of Procurement Manager, being the Claimant's pre-existing role, and that of Procurement Business Partner, being the new role which was created. A table had been prepared which Miss Beale said summarised the similarities between the roles. She submitted that the roles were 'virtually identical' but properly accepted that there were minor differences.
- 19 Miss Beale referred me to what is said to be a transcript of part of a telephone conversation on 7 August 2017 between Jody Adams and an unnamed person in which Mr Adams said that the Claimant would 'hate it when I do not give him a job'. Miss Beale pointed out that that was before the first consultation meeting concerning redundancy had taken place, and the inference to be drawn was that the attitude of Mr Adams towards the Claimant was caused by the making of the protected disclosures. To my mind that document requires oral evidence to be given about it, and it is not appropriate to take it at face value, particularly when it is so incomplete.
- 20 Miss Beale also referred me to an email of 14 September 2017 written after the decision to dismiss the Claimant had been made from Mr Adams in which he expressed the desire to require the Claimant to leave the office immediately after he had been told of the decision.
- 21 Miss Beale also referred to other matters in her written submissions which I have noted. In summary she said that the redundancy process was a sham designed to get rid of the Claimant. Further he should have been assimilated into the new role. The Claimant had provided evidence-based examples to show his competency for the role. Finally, the Claimant had always had good or excellent performance appraisals.
- 22 I have concluded that an interim relief order should not be made for the following reasons. I respect the work undertaken by Miss Beale particularly in comparing the job descriptions and also in annotating the table by reference to the Claimant's appraisals where appropriate. However, I do not consider it appropriate at the stage of considering an interim relief application to seek to enter into a relatively detailed forensic examination of job descriptions and appraisals without being able to hear witness evidence on behalf of the Respondent. It is my experience that full written and oral evidence is required in order properly to understand job roles, and there may also be nuances in appraisals which are not obvious. Properly understanding the documents is not something that can be undertaken with any confidence as part of the broad assessment exercise inherent in an interim relief decision.

- 23 Secondly, the Claimant is also claiming that his dismissal was because of his age on the basis of either direct or indirect discrimination. That of necessity causes me to conclude that the Claimant himself has doubts about the claim relating to protected disclosures.

**Employment Judge Baron**

**Dated 31 October 2018**

JUDGMENT SENT TO THE PARTIES ON

01<sup>st</sup> November 2018

FOR EMPLOYMENT TRIBUNALS