EMPLOYMENT TRIBUNALS

Claimant: **Ms D Gibbons**

Respondents: **1) Nationwide Building Society**
2) Kayawu Chinambu

Heard at: **London South** **On: Thursday, 15 November 2018**

Before: **Regional Employment Judge Hildebrand**

Representation
Claimant: **Mr M Green, Counsel**
Respondent: **Mr J French-Williams, Solicitor**

RESERVED JUDGMENT
on Application for Interim Relief

The judgment of the Employment Tribunal is that Claimant's application for Interim Relief failed.

REASONS

The Claim

1. By a claim presented to the Employment Tribunal on 25 September 2018 the Claimant made claims of unfair dismissal and disability discrimination and for other payments and also in relation to whistleblowing. This related to her dismissal on 20 September 2018. She made an Interim Relief application pursuant to section 128 of the Employment Rights Act 1996. The application was set out in the grounds of complaint and made reference to a protected disclosure on 4 June 2018 when the Claimant telephoned the Respondent's HR department at the head office in Swindon and raised a complaint that her bonus of £400 had been calculated incorrectly. An individual responded the

following day to concede that the Claimant's pay had been incorrectly reduced and admitted that her annual bonus had been reduced due to her absence. On 5 June 2018 the Claimant replied to the HR department and the Chief Executive Officer. She set out that the policies of the Respondent were discriminatory and that they applied to disabled staff stating that disabled employees should not have their annual bonus reduced when their disability prevents them from working for a period of time. She contended that the annual bonus should not be reduced and the Respondent's action was discriminatory. The Claimant contended that this was a protected act in that it was a communication sent to the Claimant's employer tending to show that in her reasonable belief a person has failed, is failing or is likely to fail to comply with any legal obligation to which he or she is subject as provided in section 43B(1)(b). The legal obligation is said to be the Respondent's obligations under the Equality Act 2010.

2. The Claimant contended that the detriment to which she had been subjected was that on 7 June after the matter had been passed to an individual in the Respondent's HR department the same individual e-mailed the Claimant to advise her that the Respondent had decided that it would be appropriate to arrange a formal meeting to discuss her ongoing employment and explore possible alternatives. Eventually on 20 September 2018 the Claimant received an e-mail advising that at a meeting which she had not attended on 10 September 2018 a decision had been taken that she should be dismissed. The Claimant contended that there was no valid reason to terminate her employment with immediate effect and pay in lieu of notice nor to seek to backdate the dismissal which it was said had been done and thereby prevented her from acquiring a bonus to which she was entitled on acquiring 30 years of service. The Claimant accordingly contended that the dismissal was as a result of the protected disclosure, being her e-mail on the 5 June 2018.

3. On the hearing of the Claimant's application for Interim Relief there were three witness statements. The Claimant produced a statement and on the Respondent's side the case consultant, Deborah White and the dismissing officer, Mr Daniel Crouch, produced statements. The Claimant's statement contains material directed to the fairness of the dismissal, the relevant portions include paragraph 4 where the Claimant recounts her telephone call to the Respondent's HR department about her bonus and her e-mail of the following day, 5 June 2018 copied to the Chief Executive Officer alleging this was a discriminatory practice by the employer and something which she considered should be raised on behalf of all disabled employees. In an e-mail of 7 June which the Claimant believes was in response to her e-mail of 5 June but which appears to be a newly created thread Ms White indicated that the business had decided it would now be appropriate to arrange a formal meeting to discuss the Claimant's ongoing employment and explore possible alternatives. Without setting out excessive detail the position was that the Claimant have indicated she was fit to return to work after a lengthy absence. In light of difficulties in the relationships in the branch were the Claimant worked the Claimant mediation had been attempted to resolve those issues

and create new relationships. The mediator spoke to the Claimant and four of the five individuals in the branch. One of the individuals in the branch would not speak to the mediator and the other four indicated that they considered that relationships could not be restored with the Claimant because of past history and their fear that any actions they might take would be the subject of further complaint.

4. As a consequence, the Respondent considered locating the Claimant to another branch. The branch in which she currently worked was approximately 2 minutes' walk from her home. The Claimant has a condition of sickle cell anaemia and it was said by the Claimant that relocation to another branch was not a possibility as exposure to pollution would potentially aggravate her condition. The Respondent verified the medical basis for this statement and accepted it. Consequently, the Respondent was faced with a situation where returning the Claimant to the branch where she had previously worked would cause insuperable difficulties with almost all the other members of the team and relocating her to another branch was not a practical possibility.

5. That is the background to the Respondent's communication to the Claimant in the summer of 2018 including the provision of an occupational health report. Brief details of the dates thereafter are as follows. The Respondent wrote to the Claimant on 27 June and arranged a meeting for 2 July to consider continuation of the employment. The Claimant was again signed of sick at this point. An occupational health report advised that although unfit to work the Claimant would be well enough to engage with a meeting. On 13 August the Respondent indicated that the occupational health report indicated that the Claimant was required to attend a rescheduled meeting on 17 August. The Claimant responded on 16 August to say that this was insufficient notice.

6. Following the Claimant's e-mail of 16 August, the Respondent wrote again on 20 August setting up a meeting for the 10 September. It was said this letter was sent by recorded delivery. The record of the trace is that of the document delivered on 14 August. There is speculation as to whether a card was provided to the Claimant if she was unavailable to sign for the document when delivery was attempted. In the absence of the Claimant at the meeting on 10 September Mr Crouch elected to proceed and considered the material provided to him and decided that the Claimant would be dismissed.

7. There is a recording of the meeting which took place and an outcome letter dated 14 September 2018. Mr Crouch concluded that the Claimant was unable to work from any location other than her branch at Wandsworth because of the negative impact this would have on her health. Reference was made to the report by the external mediation service and the subsequent case summary document which said that working relationships between the Claimant and others in the branch were at the point of an irretrievable breakdown. Mr Crouch concluded it was untenable for the Claimant's

employment to continue as there were no reasonable adjustments that could be made to allow her to work from another location. To ask her to return to Wandsworth would have a significant negative impact on the other individuals working there as confirmed by the report from the third-party mediator.

Submissions

8. There was an oral submission from the Claimant's representative. It was submitted that the Claimant stood a pretty good chance of succeeding at the final hearing. There was a disclosure by the claimant and in accordance with section 43B she made a disclosure of information in her e-mail of 5 June which in a reasonable belief of the Claimant was made in the public interest and tended to show that the Respondent had failed, was failing, or was likely to fail to comply with her legal obligation under the Equality Act.

9. In relation to the Interim Relief application in accordance with the case Taplin v C Shippam Ltd [1978] I.C.R. 1068 the Claimant needed to have a pretty good prospect of success at the final hearing. As Mr White observed it is rare in a discrimination case to find a smoking gun and there is no smoking gun in the present case. The argument on behalf of the Claimant is based on a belief that the decision to dismiss the Claimant was made shortly after the Claimant's disclosure e-mail of 5 June. It was also suggested that the factual situation was misrepresented to Mr Crouch by the HR advice he received, both on a factual level in relation to emendations made to the reports provided to him and in relation to the procedural advice he received which did not encourage him to make e-mail or telephone contact with the Claimant before proceeding to dismiss her in her absence.

10. The Respondent's submissions are set out in a comprehensive document supported by oral remarks and referring to the relevant statutory provisions and leading authorities. It is not necessary or proportionate to repeat them here.

Conclusion

11. In accordance with section 128 of the Employment Rights Act 1996 and the leading authority of Taplin v Shippam Ltd I am asked to identify whether I consider the Claimant has a pretty good prospect of success at the final hearing.

12. Stripped to the essential elements the Claimant's argument is that there is proximity in time and a demonstrable causative link based on inference.

13. The Respondent points to absence of knowledge of the protected act on the part of the decision maker and a compelling case for dismissal on other grounds.

14. In those circumstances I am not in the position to say that the Claimant

stands a pretty good chance of success in her claim.

15. It is not for me to decide the issue at this point, but she may encounter difficulties in relation to establishing that her e-mail of 5 June 2018 meets all the necessary components required for a protected disclosure. If she fails to surmount that hurdle the case falls at that point. It is then necessary for her to, contrary to express statement, demonstrate that the decision taken by Mr Crouch was influenced by that protected disclosure.

16. If she cannot establish that Mr Crouch, contrary to his testimony, did know of the disclosure then she will need to rely on an argument that others in the Respondent's HR department had predetermined the outcome and manipulated the information supplied to him to allow him to reach the conclusion he did.

17. Against that proposition Mr Crouch states that he had ample material on which he based his decision. There had been a long running difficulty in relationships in the branch. The Claimant had been absent for a lengthy period of time and the investigations in May were on the topic of whether she could return to work under appropriate management arrangements. The conclusion that she could not return had already been a potential outcome before the Claimant's e-mail of 5 June 2018. The Claimant's disclosure does not stand in isolation in an otherwise satisfactory working relationship. It stands as one more part of a difficult and bitter dispute pursued with vigour by the Claimant.

18. Accordingly, I cannot conclude that the Claimant stands a pretty good chance of demonstrating that her dismissal was caused by the one element being the e-mail of 5 June and her Interim Relief claim therefore fails.

Regional Employment Judge Hildebrand

Date 23 November 2018