EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Dr K Aries **v** **Royal Holloway University of London**

Heard at: Watford **On**: 29 August 2018

Before: Employment Judge R Lewis

Appearances
For the Claimant: In person, assisted by Mr S Aries
For the Respondent: Mr B Gill, Counsel

JUDGMENT

The claimant's application for interim relief is refused.

CORRECTED REASONS

Procedural summary

1. The claimant asked for written reasons.

2. This was the hearing of an application for interim relief under the provisions of ss.128, 129 and 103A Employment Rights Act 1996 ("ERA").

3. The claimant was dismissed with effect from 8 August 2018 and presented her claim form and application on 13 August 2018. She applied in proper form for interim relief and was therefore exempt from the provisions of early conciliation.

4. At this hearing the tribunal had a claimant's bundle of about 175 pages, accompanied by the claimant's statement for the hearing. The claimant also sent to the tribunal a statement signed by her Unison Representative, Mr Ferman.

5. The respondent produced no documents, save for Counsel's skeleton argument.

6. After a short opening discussion, I adjourned to read the documents (which I had been able to begin reading the previous afternoon). During that adjournment the claimant was able to read the respondent's skeleton and Mr Gill was able to read the claimant's bundle.

7. I asked Mr Gill for his submissions first, so that the claimant, acting in person, would make her application in light of hearing the professional response to it. Mr Gill addressed the tribunal for about 35 minutes. The claimant was not ready to reply immediately, and I adjourned to enable her to complete her submissions. The claimant then addressed the tribunal for just under an hour. Mr Gill replied briefly. I gave judgment the same afternoon.

8. As this case was heard under the s.128 procedure, it was heard before the respondent was required to present its response, and indeed when Mr Gill's instructions appeared to be incomplete.

9. The task of the tribunal is to decide whether it appears likely that when the matter proceeds to full hearing, the tribunal will find that the reason for dismissal, or principal reason if more than one, was that the claimant had made a protected disclosure. If it does, the claim for automatically unfair dismissal under s.103A ERA will succeed.

10. Although I was not referred to authorities, I understand that the correct approach is to test whether the claim has a "pretty good chance" of success, which implies a greater degree of likelihood than the balance of probabilities.

11. This hearing proceeded in accordance with rule 95 and therefore without oral evidence. My task is not to make findings of fact, all of which may be disputed at full hearing, but to set out, on the basis of the material before me, an informed prediction as to the outcome of a hearing in the future. In this case, that involves setting out an evidential interpretation, which I repeat and stress contains no findings of fact. In so doing, I comment that in my experience it is unusual for a respondent to attend at an interim relief hearing without any documentation; and unusual for a respondent to answer the application with a focus on whether there was protected disclosure, rather than on the reason for dismissal. Mr Gill clearly did not have full instructions, but did advise the tribunal that the respondent in defending the claim would put forward a positive case as to reason for dismissal.

<u>The evidential basis</u>

12. The evidential base on which I proceed is that the claimant **[…]** was appointed by the respondent on 19 February 2018 to a senior position in IT. Her field of experience and expertise was virtual online learning, delivered through the Moodle platform in universities.

13. She was involved in a project which I understood to be a form of upgrade of online learning systems. The project was managed at RHUL by a Project Board, and delivered in collaboration with a group called CoSector, which was based at the University of London. Her line manager was Dr Nigel Rata, Head of Information Security. The bundle contained evidence from the claimant, showing that they had had a good working relationship and that he had commended her work. The language of his commendation did not seem to me as enthusiastic as the claimant's interpretation of it.

14. The claimant was on holiday from 26 June to 6 July 2018. The Project Board was due to meet on Tuesday 12 July. Shortly before the board meeting Mr David Kenworthy of CoSector wrote a one-page report (85). I must bear in mind that this was no more than a one side of summary, written by and for those with close involvement in the detail of a long project. I understand it as showing that the project was running behind timetable, and had met a number of 'Challenges.' I read the report as Mr Kenworthy flagging that should the update not be achieved to timetable, and / or to satisfactory standard, any shortcoming would be the responsibility of RHUL, not CoSector.

15. The respondent's Project Manager, Ms Nawaz, was sent a copy of the report at 5pm on 11 July (84). It seems that due to error on her part, the report was not forwarded to the Project Board. After the Project Board meeting on 12 July, Ms Nawaz forwarded it to a number of members of the Project Board, including the claimant and Dr Rata (84).

16. At 8.37 the following morning the claimant made what she regarded as her first protected disclosure. She wrote an email in which she forwarded the report to senior IT colleagues who had not previously received it, Mr Westcott and Mr Withey. In her email, the claimant wrote, 'I am even more concern *(sic)* about the risks for the project delivery. In my opinion, the things do not look good and it seems that CoSector are preparing RHUL for accept *(sic)* the responsibility for the project delay (and for not achieving key milestones).'

17. Ms Choudhury, Head of Projects, replied just over an hour later, saying that she had spoken to Mr Kenworthy and that "he said he is confident that we can deliver to time" (83).

18. The claimant had a meeting with Dr Rata the same day, 13 July, at which he appeared displeased that the claimant had sent on the CoSector report to senior managers within IT who were not members of the Project Board.

19. The following Tuesday, 17 July, the claimant had another meeting with Dr Rata. After dealing with the technical business of the meeting, Dr Rata gave her a formal letter (39) advising her to attend a formal probationary review meeting which would consider "Your continued employment".

20. Shortly before midnight that day, the claimant made what she regarded as her second protected disclosure by writing to Ms Deem, the Moodle project sponsor. The claimant attached Mr Kenworthy's report, and set out personal grievances against Ms Choudhury and Ms Nawaz. In her email she said almost nothing about the project, except that it had not progressed during her absence on holiday.

21. Dr Rata went on holiday after 17 July. Before leaving, he wrote a document entitled "Probation Review Statement" (86-90) which I found highly significant. It presents as a summary of working with the claimant as a colleague who was technically very able, but whose interpersonal skills were, at least, lacking, and who was almost impossible to manage. Dr Rata expressed the report both in general terms (eg '[she] had a manner that was very direct and blunt. This was noted by a number of staff within IT

..') and in specific instances of complaints from a number of named colleagues, as well as citing his own experience ('Katya has threatened to resign in 1:1 meetings with me at least 7 times ..').

22. The claimant made what she considered two further protected disclosures, using the language of the respondent's formal procedures, on 25 and 26 July (77 and 30 respectively). Their content did not seem to me to add anything new, and on the contrary in both the claimant seemed more concerned to repeat her earlier reports through cut and paste templates from the RHUL procedures.

23. The claimant attended a probation review meeting on 1st August with Mr Michael Johnson, Strategic IT Project Director. She was accompanied by a representative of Unison. By letter dated 6 August, Mr Johnson on behalf of RHUL terminated the claimant's employment with effect from 8 August (113). The stated reason was 'your overall performance has not reached a satisfactory standard during the probationary period.'

Discussion

24. It seems to me that the claimant must overcome a raft of difficulties in making good her case. My view is that taking them cumulatively, she will be unable to do so. I find her unlikely to meet the test of proving that public interest disclosure was the sole or principal reason for her dismissal.

25. I set out below my reasons for reaching this conclusion. There is no single determinative point. I therefore stress that the following should be read cumulatively.

Information

25.1 Mr Gill denied that the claimant had disclosed 'information' as required by ERA s.43B. I accept that the claimant's own wording was sketchy, but she seems to me likely to prove that she included Mr Kenworthy's report in her disclosure. If that is found, that seems to me likely to include information, broadly that the project is under pressure, including time pressures.

Legal obligation(s)

25.2 The claimant put the case under s 43B(1)(b). She submitted that the information tended to show breach of a legal obligation upon RHUL to provide online learning (of which the Moodle Project was part). She need not show that her understanding of the law is correct, but that she had a reasonable belief in it.

25.3 Was the claimant's belief reasonable? The claimant is something of an authority in the field of on line learning. That being so, the standard of reasonable belief which the tribunal may expect is a high one. It was surprising that she could not identify the source of a legal obligation to provide online education.

25.4 There are two further problem points about the existence of such an obligation. The first is that as Mr Gill pointed out, at the time in question there was an online system at RHUL, but it needed to be upgraded. There could not reasonably be a disclosure of a failure to provide on line learning, if all agreed that online learning was being provided.

25.5 The second problem is that the claimant's argument is counter-intuitive. It would be surprising if a university were under a statutory duty to deliver a particular form of service, just as it would be if a university were under a statutory duty to teach a particular subject area or language.

25.6 Alternatively, the claimant argued that the disclosures were information tending to show breach of legal obligations contained in RHUL's contract(s) with CoSector. That argument had the ring of opportunism. I did not have the contracts. The claimant asserted that she had experience of such contracts. I noted the use at the time by both the claimant and Mr Kenworthy of the word 'milestone.' That word, unlike for 'deadline', suggests that the timetable for delivery was not necessarily contractual.

25.7 In the further alternative, the claimant told me that it was known that the old online learning system was not compliant with GDPR, and that the new system was required in part because it would be compliant. As Mr Gill rightly pointed out, there was no evidence that this point had been made by anyone at any of the material times.

The stated reason

25.8 It was undoubtedly true, and perhaps the claimant's best point, that shortly after receipt of the first protected disclosure email, the issue of probationary review was triggered. I flag the obvious general caution that while chronology is essential to causation, it does not of itself prove causation.

25.9 I accept Mr Gill's point that Dr Rata's objection to the alleged disclosures may have been to their manner rather than their content. Mr Westcott is the University's most senior IT professional, and a number of layers of management above the claimant: in the context of wider difficulties in managing the claimant, Dr Rata may well have taken exception to the claimant going outside line management.

25.10 I attached a great deal of weight to pages 86 to 90, because the claimant seemed to me unlikely to be able to prove that Dr Rata had committed himself to what she submitted in effect was a detailed fabrication. I accept the possibility that even if Dr Rata had not documented events fully at the time, the history between the claimant and Dr Rata, and between the claimant and colleagues, was accurately set out in Dr Rata's report, and that the report contained material which he reasonably believed to be true. The language used by the claimant about colleagues (paragraph 20 above) suggested, at least, strained relationships.

The dismissing officer

25.11 The claimant was dismissed by Mr Michal Johnson not by Dr Rata. When asked, the claimant denied that Mr Johnson was an independent decision maker, and referred to a number of senior staff who she said wished to see her dismissed. That approach gave rise to other avenues of difficulty in proof for the claimant, and seemed to me to reduce the likelihood of her making good the reason for her dismissal relied upon.

The logic of the case

25.12 The logic of whistle blowing claims is that the employer has an interest in dismissing the troublesome whistle blower. I understand that this is not a requirement of statute (or case law), but it is a matter of the logic of evidence. Whistleblowing claimants are often asked the questions, why would the employer cover up what you disclosed; and why would the employer dismiss someone for doing what you did.

25.13 The logic of the factual matrix seemed to me to run against the claimant. On cover up, as Mr Gill pointed out, CoSector's report was not private or confidential. It had been circulated to a large group of people so there could be no question of the respondent covering it up. If the project were indeed running behind time, the claimant's expertise was all the more necessary. If the project were not delivered, or were not delivered to standard, that would be a visible failure which could likewise not be concealed.

25.14 The claimant's answers were that Ms Choudhury wanted the claimant to be dismissed to cover up her own failings in appointing Ms Nawaz; and that if the Moodle project failed, it would be easier to blame the claimant if she were no longer there. The former answer seemed to me run counter to the claimant's case, and the latter not necessarily to follow.

25.15 The claimant put forward further reasons why others, notably Dr Rata, might have wanted to dismiss her, without seemingly being aware that these were not reasons related to whistleblowing, and therefore were contrary to her own case. She in particular theorised that Dr Rata hoped at the time to gain a promotion, that if the Moodle project went wrong, he would not gain the promotion, and he therefore engineered the claimant's dismissal as her knowledge of shortcomings in the project might damage his chances of promotion. That on paper is contradictory: if the Moodle project went wrong, its failure would be a visible, public event, and questions about it would go beyond the claimant. Her dismissal would not prevent her from emailing her opinions to former colleagues. I add that if the tribunal found that the claimant was dismissed for 'political' reasons, that would point away from protected disclosure being the reason for dismissal.

25.16 I raised one possibility with the parties. What if, contrary to the binary approach of both, the tribunal found that Dr Rata's probationary report was well founded, and that its timing was in response to the claimant's emails? Another way of putting the same question would be to ask, what if the claimant's emails were the last straw for Dr Rata? The claimant emphasised the timing of the report and the rapidity of the response (which might, on examination of all evidence, turn out to be driven by nothing more than summer holiday plans); Mr Gill suggested that the tribunal might find that what had moved Dr Rata to write his report was the manner of the claimant's emails in going outside line management, rather than their content.

25.17 On reflection, I found that this line of speculation could not assist me. First, it was my speculation, unsupported by evidence, or by the submission of either side. Secondly, it would, at the full hearing, require a close analysis of the relationship between a number of entangled factors: the content of the emails; the manner of sending them over Dr Rata's head, and out of the line of management; the content of Dr Rata's report; the timing of the report and the speed with which it was actioned; the various holiday arrangements; and Mr Johnson's decision to dismiss. A tribunal which found that both limbs of my proposed possibility were met would then have to decide if the content of the emails (if found to be a protected disclosure) was the sole or main reason for dismissal. In doing so, the tribunal would in logic have to make adverse findings about the integrity of Dr Rata's report writing and / or of Mr Johnson's decision making. Taking all of these points cumulatively, I could not say at this interim stage that the claimant was likely to succeed in her claim.

25.18 Drawing all the above together, it seems to me that even allowing for the claimant's best case, which was, in her phrase to me, 'It all happened so rapidly after my disclosure,' she is unlikely to show that the reason for her dismissal falls under s.103A ERA. The application for interim relief therefore fails.

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Employment Judge R Lewis

Date: ……12/3/19.

Sent to the parties on: ...12/3/19.....

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For the Tribunal Office