EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4122154/2018

Held in Glasgow on 30 November 2018

Employment Judge: Ms R. Sorrell

Ms M F O'Neill	**Claimant** **Represented by:** **Ms E Mannion** **Solicitor**
Strathclyde Partnership for Transport	**Respondent** **Represented by:** **Mr D Hay** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant's application for interim relief under Sections 128 and 129 of the Employment Rights Act 1996 is refused.

REASONS

The Application

1. On 29 October 2018 the claimant lodged an application for interim relief in relation to her claim (lodged on the same date) that she was automatically and constructively unfairly dismissed and that the reason or principal reason for her dismissal was that she had made qualifying protected disclosures. The effective date of termination was 24 October 2018 and the claim was therefore presented within the prescribed time for pursuing an application under Section 128 (2) of the Employment Rights Act 1996 ("ERA 1996")

Evidence and Submissions

2. The representatives provided written submissions which they read and made some additional comments.

3. A joint bundle of productions and a joint bundle of authorities were produced.

4. The respondent lodged a supplementary bundle which incorporated four letters of correspondence between parties' representatives.

5. The claimant sought to admit a supplementary bundle which incorporated "without prejudice" correspondence; namely the claimant's resignation letter dated 1 August 2018 and correspondence from the respondent's representative to the claimant's representative dated 10 July 2018. The respondent objected to the admission of these documents.

6. While submissions were made by the representatives in respect to this issue, a summary of which I have recorded below, it was agreed that the issue of whether not these documents were admissible need not be decided until a later date.

7. In summary, the claimant submitted that the claimant's resignation letter is both important and relevant in order to consider the merits of this application. The respondent's correspondence of 10 July 2018 was a response to the claimant's correspondence of 4 July 2018 which sought a protected conversation under Section 111A of the "ERA 1996" in order to enter into pre-termination negotiations. Reference was made to the authority of ***Turck Banner Limited v Cassidy (2004) ALL ER 215*** which held that the test for admission of "without prejudice" correspondence is one of discretion for the Tribunal. It was submitted this correspondence is relevant given the substance, tone and tenure of it which repeatedly states at page 2 (paras 4,7 & 10), page 3 (paras 7 & 8) and page 4 (paras 2 & 3) that the claimant is lying and distorting facts to advance her position. It is also indicative of the treatment the claimant was subject to from the respondent after the disclosure

she made on 18 June 2018 and is viewed as a further act of detriment against her by the respondent. Furthermore, in accordance with ***Daks Simpson Group plc v Kuiper 1994 S.L.T. 689***, the claimant submits that these statements amount to statements of fact and are therefore admissible.

8. In response to these objections, the respondent submitted that Section 111A of the "ERA 1996" and the question of the admissibility of "without prejudice" correspondence are not mutually exclusive. "Without prejudice" communication concerns matters of dispute between parties and it is dispute that engages privilege. This is particularly so in unfair dismissal claims where there may be an overlap with Section 111A (2) as there is in this case because the dismissal is subject to the contract of employment being terminated. The word "liar" does not feature in the statements referred to by the claimant in the correspondence of 10 July 2018 and these are not statements of fact but suggestions, which is far apart from the situation in ***Daks (supra)*** where there was a clear admission of something that had already happened.

The Law

9. The applicable law and relevant authorities are set out in the parties' submissions and joint bundle of authorities. In terms of the approach to be taken in assessing this application, the claimant submitted that it should be considered in respect of the reason(s) for dismissal. However, the respondent did not agree and made reference to Section 129 of the "ERA 1996" which states: *"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 that the reason for the dismissal is one of those specified"* and submitted that in this case a determination of the complaint comprises of two issues; firstly whether or not there had been a dismissal (as this is a constructive dismissal claim) and if so, the reason(s) for the dismissal.

10. While there is a lack of case law in respect to this issue, Section 95 (1) (c) of the "ERA 1996" sets out what a claimant is required to prove in order to show that a he or she has been constructively dismissed in that*: "An employee is*

dismissed by his employer if the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

11. In view of these representations and the two statutory provisions, I am persuaded by the respondent because unlike ordinary unfair dismissal claims where the fact of a dismissal is not usually in dispute, I considered that the determination of a constructive unfair dismissal claim would first require the claimant to prove that there has been a repudiatory breach of his/her contract of employment and therefore a dismissal, before determining the reason(s) for that dismissal. As such, I am of the view that the same approach should be applied in deciding this application in that I must first assess the likelihood of whether a repudiatory breach of contract has occurred and therefore a dismissal and only if I am satisfied of that, am I able to proceed to assess the likelihood of the reason(s) for that dismissal.

There was no dispute between the parties about the legal principles that applied in respect to an interim relief application. The test is that the claimant has a "pretty good chance of success" in establishing that she was dismissed and that the reason(s) for her dismissal was that she had made protected disclosures. (***Taplin v Shippam Limited 1978 ICR 1068)*** In that case the EAT held that the burden of proof in an interim relief application was intended to be greater than at a full hearing, where the Tribunal need only be satisfied on the "balance of probabilities" that the claimant has made out her case.

12. I noted that at an interim relief hearing, I am required to make a summary assessment based on the material before me of whether the claimant had a pretty good chance of succeeding on the relevant claim. I should not make a summary determination of the claim. In giving reasons, it is sufficient to indicate the "essential gist" of my reasoning; this is because I am not making a final judgment and my decision is inevitably based on impression and is therefore not susceptible to detailed reasoning; and because so far as possible it is better not to say anything that might pre-judge the determination

on the merits. (***Parson v Airbus International Limited UKEAT/0023/16/JOJ***)

Summary Assessment

13. In my summary assessment, I am not making any findings of fact but setting out my observations based on the material before me, of the likelihood of the claimant succeeding at a Final Hearing in her complaint.

14. The respondent employed the claimant from 1 August 2016 to 24 October 2018 as a Senior Legal Adviser. She was the most senior legal figure who led and managed her own staff team and reported directly to the Assistant Chief Executive, Valerie Davidson.

15. My understanding is that the respondent is a public body created by the Scottish Government and is the Regional Transport Partnership for the West of Scotland.

16. The claimant's case is that she made qualifying disclosures on 1, 8, 18 and 19 June 2018 in relation to a potential conflict of interest between external firms that handled various matters on behalf of the respondent and that because she did so, this triggered a shift in behaviour towards her by the respondent which amounted to a repudiatory breach of contract that led her to resign.

17. The respondent's case is that the cumulative effect of the circumstances that occurred between the claimant and respondent after these disclosures were made is slight and were in no way evincing an intention that the respondent was no longer bound by the contract of employment and therefore entitling the claimant to treat herself as discharged from any further performance. It is further denied that these disclosures amounted to qualifying disclosures in terms of the "ERA 1996."

18. Prior to making these disclosures, it appeared that the claimant's performance in her role and relationship with Valerie Davidson and the senior management team were generally good.

19. I first proceeded to consider whether the claimant has a pretty good chance of establishing that she was dismissed.

20. The claimant has identified the nature of the asserted breach of contract as a last straw construction. The circumstances in which the claimant relies upon as amounting to a material breach of contract are contained in paragraphs 25-51 of the ET1 and are set out below together with parties' submissions in relation to each instance:-

(i) 1 June 2018 – the claimant had a meeting with Ms Davidson where she made her first disclosure. In response to that Ms Davidson said "I think you are putting yourself in the firing line here."
The claimant understood from this comment that her job was under threat for raising this matter and that she was viewed by the respondent as a trouble maker. It is accepted by the respondent that this was said to the claimant, but the context and meaning are disputed.

(ii) **On 6 June 2018 Ms Davidson asked the claimant in an agitated and aggressive manner what precisely procurement and projects had asked of her that led her to seek external legal advice.**
The claimant was visibly shaking and upset at Ms Davidson's tone and manner during this conversation which she had not experienced before. It is accepted by the respondent that these questions were asked by Ms Davidson but the manner in which they were asked is disputed.

(iii) **On 8 June 2018, following receipt of the document in relation to the conversation of 6 June 2018, Ms Davidson emailed the claimant asking specifically who approached her with this information and what questions she was asked.**

The claimant considers the tone and content of the email was tense and a departure from previous professional interactions. The respondent disputes the tone of the email as described by the claimant.

(iv) **On 12 June 2018 Ms Davidson emailed the claimant advising that she had reviewed the document of 8 June 2018 and stated that she didn't think that some of the points in the note were either accurate or balanced and gave an example of that.**

The claimant felt that this was an attempt to undermine the information as put forward by her so as to diminish the seriousness of the matters that she raised. The respondent accepts that the facts were challenged, but disputes this was done in an attempt to undermine the information given by the claimant.

(v) **On 14 June 2018 the claimant emailed Ms Davidson advising that proposed variations to a specific contract were significant which could require an additional agreement to be drawn and she therefore intended to obtain external legal support from a firm who had previously been involved as this expertise could not be provided by her team. In her response of 15 June 2018, Ms Davidson questioned why the claimant felt the variations were significant, that external legal advice was not required at that time and that the matter of whom advice is taken from needed to be discussed in more detail.**

The claimant considers that this email was a departure from previous practice and a curtailment of the responsibility and independence of decision making responsibility held by her. The respondent does not accept the claimant's interpretation of this email.

(vi) **On 21 June 2018 Ms Davidson emailed the claimant advising that she intended to review the material which the claimant considered could be a conflict of interest with Iain McNicol, Head of Audit and Assurance and that she would require to meet with the claimant**

to establish exactly the scope of concern and the matters connected to it. On 22 June 2018 the claimant's representative sought clarification from the respondent as to the remit of the investigation, the policy relating to it and the claimant's role within it and whether she had the right to be accompanied.

The claimant considers that she was given vague and limited information about the meeting she was invited to. The respondent's position is that this was an internal meeting without the need for a formalised agenda.

(vii) **On 25 June 2018 Ms Davidson emailed the claimant stating that she was very disappointed that a reasonable management request had been responded to through legal channels when she could have spoken to her directly about it and that the purpose of the meeting was to allow facts to be gathered.**

The claimant was greatly upset by this email and was anxious about the reference to "reasonable management" request and its association with disciplinary procedures. She believed that Ms Davidson viewed her as trouble maker and was angry with her because she had instructed her lawyer to write to Ms Davidson detailing the disclosures made by the claimant. The respondent's view is that Ms Davidson corresponded directly with the claimant about the internal meeting, the context of which was a reasonable management instruction.

(viii) **The respondent was in breach of their Counter Fraud Strategy which incorporates their Whistleblowing policy in that the claimant did not receive a letter acknowledging her concern and advising her of the procedure in relation to it and that under this policy she had a right to be accompanied at any meeting about it.**

The respondent disputes whether the meeting scheduled was in accordance with the whistleblowing policy or an internal meeting prior to it being treated as whistleblowing.

(ix) **The claimant was fearful that her conduct was under scrutiny and that disciplinary action would follow.**

The respondent disputes that it had disciplinary proceedings in mind at this stage or any stage prior to the claimant's resignation.

(x) **On 25 June 2018 the claimant emailed Ms Davidson and other members of the project team in relation to an ongoing project at Collegelands setting out the next steps. Ms Davidson replied that she will pick up matters directly with the project team and essentially cut the claimant out of the equation.**

The claimant felt marginalised as she expected that she would also give a view and be involved in the next steps. The respondent disputes that the claimant was cut out of the project because the project pre-dated the claimant's employment and Ms Davidson had been leading on the project for some time.

(xi) **On 25 June 2018 the claimant was advised that a member of her team had been chosen to act as a mystery shopper for the respondent and that Ms Davidson had approved this and the staff member already informed. Ms Davidson had not spoken to the claimant about this or sought her view as to whether there was sufficient capacity within her team for the staff member to undertake this additional responsibility.**

The claimant felt that this further undermined her role as head of her team and marginalised her. The respondent's position is that the staff member was selected in March 2018 prior to any suggested disclosure. This was for a specific purpose which was not envisaged to last more than one day and the claimant had not previously been advised of this as it related to a confidential matter.

(xii) **On 27 June 2018 the claimant and Ms Davidson had their four weekly meeting during which they discussed variations on a contract. The claimant advised that she had identified an external**

law firm who could provide the necessary expertise but that instructing them would depend upon whether the respondent intended to follow the legal advice given on 8 June 2018. Ms Davidson responded that the views of the project lead should be sought as to whom the respondent should contact for external legal support on this matter.

The claimant's position is that this had never been required previously and was a further departure from the level of independence she previously enjoyed and a curtailment of her duties and responsibilities. The respondent's view is that this did not have the effect of curtailing the claimant's responsibilities.

(xiii) **On 3 July 2018 an investigation meeting under the Whistleblowing Policy was held by Ms Davidson and Mr McNicol with the claimant who was accompanied by her father. The claimant was questioned about her conduct in relation to the disclosures. Ms Davidson also stated that she would have to look again at the process of giving work to external law firms.**

The claimant felt that this was further curtailing her duties and responsibilities. She left the meeting feeling very concerned about the security of her role given the focus on why she acted as she did. The respondent disputes that these amounted to breaches of the claimant's contract as Ms Davidson considered the full factual picture had not been fed into the advice which was relevant as to whether the claimant's concerns were well founded and that the issue of looking again at the process was not undermining in terms of the scheme of delegation.

(xiv) **On 6 July 2018 the claimant telephoned Ms Davidson advising that she had attended her GP who had diagnosed her with acute work related stress and that she would therefore be absent from work for two weeks. The call lasted approximately twenty minutes. Ms Davidson spent the majority of the call asking the**

claimant what was in her diary and her key priorities for the coming two weeks. The claimant had difficulty providing the level of detail required without her diary and became flustered at the level of discussion she was expected to engage in.

The claimant came off the phone feeling exhausted, anxious and panicked and had to go and lie down. The respondent disputes that the conversation was fraught. It was the claimant who raised work issues and Ms Davidson needed to gauge whether certain meetings could still go ahead as planned.

(xv) **The respondent's correspondence of 10 July 2018 in response to the claimant's letter of 4 July 2018 seeking pre-termination negotiations was highly aggressive in terms of its content and amounts to improper behaviour under Section 111A of the "ERA 1996" and not an attempt to resolve a dispute. The claimant was accused of seeking to or skewing facts and of making defamatory remarks about Ms Davidson.**

The claimant found the letter threatening and intimidating and was most upset by it. The respondent (who as discussed above objects to the admission of this correspondence), considers that it was a response to the claimant's representative letter which relies upon the tone of the negotiating stance as opposed to any form of factual admission and sets out a strong position in explanation of an offer.

(xvi) **On 12 July 2018 the respondent's representative wrote to the claimant's representative confirming that the disclosures made by the claimant under the Whistleblowing Policy and the allegations of detriment would be dealt with under their Grievance Policy. In response, the claimant's representative advised that the claimant had concerns about the independence of the grievance hearer as the majority of the senior staff reported directly to Ms Davidson whose behaviour and treatment was the subject of the complaints raised and it would therefore not be appropriate for a**

subordinate of Ms Davidson or for anyone who had a vested interest in the disclosures to consider her complaint against Ms Davidson. Further correspondence ensued between the representatives in relation to this matter.

The claimant felt that the respondent did not appear to be taking her concerns of impartiality seriously. The respondent's position is that this does not amount to a breach of the claimant's contract of employment as it was a dialogue as to the potential grievance hearer and no suggestions were proposed by the claimant.

(xvii) **The respondent provided the claimant with a copy of the statement taken from her on 3 July 2018. The statement lacked detail and the purpose of the meeting set out at the start of it confirmed to the claimant that the investigation meeting was in fact concerned with her actions in engaging external lawyers rather than the substance of the disclosure itself.**

This coupled with the lack of independence or impartiality in the grievance process was the last straw for the claimant. The respondent disputes this interpretation and the claimant made amendments to the statement which were forwarded to the respondent's representative.

21. Having considered these circumstances relied upon by the claimant to show that a material breach of her contract of employment occurred and the respondent's position in relation to them, my summary assessment of the evidence before me is that the claimant does not have a pretty good chance of showing that she was constructively dismissed. This is because while my impression of the evidence is that there appeared to be a decline in the professional relationship between the claimant and Ms Davidson after 1 June 2018, it is clear that a significant amount of the evidence is disputed and I could not say that the evidence of either party was implausible.

22. In view of my summary assessment of the evidence in respect of the likelihood of dismissal, I have not proceeded to assess the likelihood of whether the disclosures made by the claimant were the reasons for it.

23. I therefore refuse the application for interim relief.

Employment Judge: R Sorrell
Date of Judgment: 14 December 2018
Entered in register : 17 December 2018
and copied to parties