EMPLOYMENT TRIBUNALS

Claimant: **Ms M Schumann**

Respondent: **Legend Solicitors**

Heard at: **East London Hearing Centre**

On: **22 May 2019**

Before: **Employment Judge Massarella**

Representation: **Claimant in person**

Ms Shakir (pupil barrister) for the Respondent

JUDGMENT

The judgment of the Tribunal is that:

1 The Claimant's application for interim relief fails and is dismissed.

2 The Claimant's complaint of discrimination because of religion or belief is dismissed upon withdrawal.

REASONS

Introduction

1 The Respondent is a firm of solicitors. At the time of her dismissal the Claimant was employed as a legal marketing and conveyancing manager.

2 The Claimant's employment started on 21 November 2018. She lacks the necessary qualifying period to bring a claim of ordinary unfair dismissal.

3 By a claim form presented on 18 April 2019 the Claimant complained of automatic unfair dismissal. In the narrative section (Box 8.2) the Claimant said that she had raised numerous concerns regarding alleged breaches of legal obligations and the covering up of wrongdoing within the business. Although she does not say in terms that she was dismissed by reason of this, the Tribunal interpreted her claim as being that the reason or principal reason for her dismissal was that she had made a qualifying protected disclosure: s.103A Employment Rights Act 1996 ('ERA').

4 The claim form was treated by the Tribunal as containing an application for interim relief: the Claimant had ticked the box to indicate that the reason why she had not provided an ACAS early conciliation certificate was that her claim consisted only of a complaint of unfair dismissal which contained an application for interim relief.

5 The Claimant also ticked the box indicating that she considered she had been discriminated against on the grounds of religion or belief. The Claimant confirmed to me today that she wished to withdraw that complaint and accordingly I dismissed it.

6 The case came before EJ Warren on 14 May 2019. The hearing was listed to determine the Claimant's interim relief application. She did not attend. The Judge clarified, thanks to information provided by the Respondent's representative, that the Claimant's employment ended on 12 April 2019, as a result of which the claim was in time.

7 EJ Warren accepted the Claimant's explanation, given by telephone, that she had not received notice of the hearing because she had moved home. He arranged for the application to be postponed and relisted for 22 May 2019. He arranged for the Tribunal clerk to telephone the Claimant to inform her of the relisting and urgently prepared a hearing summary so that it could be dispatched to the Claimant with the new notice of hearing to a new address in that same day's post. Both parties confirmed that they received these documents.

The relisted preliminary hearing

8 At the start of the hearing I confirmed with the Claimant that she understood the purpose of today's hearing: that it was not a full hearing of her claims, rather a preliminary hearing to determine her application for interim relief, which she confirmed she wished to pursue. I explained to her the relevant legal test as set out below. She confirmed that she understood that the burden was on her to prove that she was likely to succeed in her claim of automatic unfair dismissal. She also clarified that if the application succeeded she was not seeking reinstatement, rather an order that the Respondent pay her full salary pending a full hearing.

9 Both parties agreed that it would not be appropriate for me to hear oral evidence (neither party had prepared witness statements for today's hearing). The Respondent had submitted a number of documents along with its ET3. The Claimant brought along a bundle of documents running to some 47 pages. The Respondent objected to the admission of that bundle into evidence. However, Ms Shakir confirmed that the bundle had been sent to the Respondent by email late on

Monday 20 May 2019; the Respondent had had a full working day to review it; she had read the bundle herself. She also confirmed that if she needed further instructions on any point within it, she could make calls to instructing solicitor during the adjournment whilst I read the papers myself. Accordingly, I admitted the Claimant's bundle.

10 At the conclusion of today's hearing, the Claimant indicated that she wished to have written reasons for the judgement and decisions which I have made today. These are provided below.

The law

Test for granting relief

11 By s.128(1)(a)(i) ERA an employee may apply for interim relief if she has presented a complaint to the Tribunal that she has been unfairly dismissed and that the reason or principal reason for her dismissal was that she had made a qualifying protected disclosure.

12 Interim relief should be ordered if it appears that it is likely that on determining the complaint the Tribunal will find that the reason or principal reason for the dismissal was the proscribed ground (s.129 ERA).

13 The meaning of 'likely' in this context is 'a pretty good chance of success' (*Taplin v C Shippam Ltd* [1978] IRLR 450) which is 'something nearer to certainty than mere probability' (*Ministry of Justice v Sarfraz* [2011] IRLR 562 at para 19). A 'good arguable case' is not enough (*Parsons v Airbus* UKEAT/0023/16/JOJ 4 March 2016).

14 It is 'an exceptional form of relief' (*Taplin* at para 21).

Procedure on an application for interim relief

15 By Rule 95 of the Employment Tribunal Rules 2013, the Tribunal should not hear evidence on an application for interim relief unless it directs otherwise. The hearing should be conducted as a Preliminary Hearing within Rules 53 to 56. The proper approach is as follows (*Parsons* at para 8):

> 'On hearing an application under section 128 the Employment Judge is required to make a summary assessment on the basis of the material then before her of whether the Claimant has a pretty good chance of succeeding on the relevant claim. The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself. In giving reasons for her decision, it is sufficient for the Judge to indicate the "essential gist of her reasoning": this is because the Judge is not making a final judgment and her decision will inevitably be based to an extent on

impression and therefore not susceptible to detailed reasoning; and because, as far as possible, it is better not say anything which might pre-judge the final determination on the merits'.

16 A Tribunal cannot be criticised for concluding that matters are not sufficiently clear cut at the interim relief stage for it to have sufficient confidence in the eventual outcome to grant interim relief (*Parsons* at para 18).

17 It is the Claimant's application and the burden of proof is on her throughout.

18 Accordingly, in setting out the respective parties' contentions below, and my conclusions, I have given my provisional view, based on such evidence as was available to me today. I am conscious of the fact that disclosure has not yet taken place and other evidence may, of course, emerge. I have sought to avoid making findings of fact which might be taken to bind the Tribunal which hears the full merits hearing.

The Claimant's case

19 The Claimant clarified today that she asserts that the reason, or if more than one the principal reason, for her dismissal was that she had made protected disclosures (s.103A ERA).

20 The definition of a protected disclosure is set out in ss.43A to 43H ERA 1996. Disclosures may be made either to the employer or, in appropriate cases, to prescribed persons.

21 With regard to the protected disclosures the Claimant relies on, she directed me to a number of documents in the bundle which she contended were evidence that she had made protected disclosures.

21.1 [Page 36 in the Claimant's bundle] - Disclosure to the Respondent on 20 March 2019, which the Claimant maintains includes a disclosure concerning the firm holding itself out as practising in areas, such as family law, when it did not.

21.2 The Claimant referred to an oral disclosure at a meeting with the Respondent's principal solicitor, Mr Sreevalsalan, on 25th March at which the Claimant says she stated that there was a lack of conflict checks, which amounted to a breach of GDPR.

21.3 [Page 27 in the Claimant's bundle] - An email of 25 March 2019, regarding conflict checks. The Claimant maintains that this corroborates the oral disclosure referred to above.

21.4 [Page 22 of the Claimant's bundle] - Disclosure to the ICO, both oral and written, on 18th April 2019. The Claimant says that she disclosed to the ICO (1) that the Respondent was not informing clients that their personal data was

being processed outside the EU and (2) that the Respondent had gained control of her mobile phone and accessed her own personal data.

21.5 [Page 23 of the Claimant's bundle] - Disclosure to Law Society, dated 1 April 2019, which the Claimant claims evidences the fact that she had previously made an oral disclosure that the Respondent was breaching its legal obligation by not declaring all its members of staff to the Law Society.

21.6 In the last week of her employment the Claimant asserts that she made an oral disclosure to the Respondent that it was in breach of its legal obligations by taking out a loan of £250,000, with a view to assisting clients (fraudulently) to meet the criteria for the Entrepreneur Visa.

22 It is not in dispute that the Claimant did not attend work between 18 and 22 March 2019. She accepts that she was abroad (in Ukraine and Poland). She also accepts that, when she first informed her employer that she wished to take leave between those dates, Mr Sreevalsalan was resistant. The case she advanced today was that he later gave her oral permission to be absent between those dates. There was no documentary evidence before me to confirm that assertion, other than a bare assertion by the Claimant in an email of 1 April 2019.

23 The Claimant also asserts that the Respondent knew, or ought to have known, that she was abroad between those dates. She pointed to an email of 1 March 2019 at 11:06 which suggests that there was originally a business reason for her being in that country to attend a meeting with the University in Lviv in Ukraine. However, she later volunteered to me that that meeting did not go ahead. She also pointed to an email of 19 March 2019, in which she made reference to her being looked after by her mother. The Claimant argued that the Respondent knew her mother lived in Ukraine. However, she agreed that the email makes no reference to her mother being in Ukraine at the time.

The Respondent's case

24 The Respondent in its ET3 contends that the Claimant was dismissed for taking unauthorised leave in Ukraine and Poland between 18 and 22 March 2019 and for subsequently completing a self-certification form claiming, dishonestly, that she had been ill between 18 and 22 March 2019 and had been unable to travel to the office.

25 The Respondent's case is that permission to take leave between 18 and 22 March 2019 was refused because the Claimant was required in the office during that period to work on an important project. The Respondent maintains that it first knew about the Claimant's trip to Ukraine/Poland as a result of checking her business mobile and discovering images of her abroad on her Instagram account.

26 With regard to the question of Claimant's honesty as to the reason for her absence from work, the Respondent relies on emails from the Claimant on 18 and 19 March 2019 in which she stated that she was too unwell to attend work. It also relies on a self-certification form, in which the Claimant indicates that she was too unwell to

travel. The Claimant gave no indication in any of these documents that she was in Ukraine/Poland at the relevant time.

27 With regard to the alleged protected disclosures, the Respondent simply says that the Claimant never raised these issues prior to leaving its employment.

Conclusion

28 Based on the evidence which has been put before me today I do not consider it likely (within the definition set out in the authorities to which I have referred above) that the Claimant will be able to show that the principal reason for her dismissal was that she made protected disclosures.

29 Dealing first with the alleged disclosures I cannot realistically form a view at this stage as to the Claimant's assertion that she made oral protected disclosures to her employer. As for the alleged written disclosures, I consider that the Claimant will struggle to persuade the Tribunal that the documents she took me to disclose information which tends to show the breach of a legal obligation. The Claimant contends that they corroborate the fact that she made such disclosures orally. Again, I do not consider it likely that she will succeed in persuading the Tribunal of this. Even if she does, I consider that it is unlikely that she will be able to show the necessary causative link between the alleged disclosures and the disciplinary action taken against her, especially as a number of the alleged protected disclosures post-date her suspension within the disciplinary process.

30 Moreover, on the evidence I have seen today, I do not consider it likely that the Claimant will succeed in persuading the Tribunal that her absence in Ukraine was authorised by the Respondent, or indeed known about by them until after the event. I have seen no evidence, other than a bare assertion by the Claimant, that Mr Sreevalsalan gave her oral permission to take leave on those dates. Nor have I seen any evidence, other than the bare assertion by the Claimant, that the Respondent must have known that she was in Ukraine between those dates.

31 I consider that the Claimant will have real difficulties in persuading the Tribunal that the health difficulties she told the Respondent she was experiencing with her foot (which the Claimant agreed consisted of a skin infection, with unpleasant and painful discharge) rendered her unable to attend work, but able nonetheless to travel to Ukraine and Poland. The photographic evidence the Respondent discovered of her attending public spaces during her trip to Ukraine are also likely to cause her significant difficulties.

32 For these reasons I consider that the Claimant has not discharged the burden on her to show that she has a 'pretty good chance' of succeeding in her claim of automatic unfair dismissal and her application for interim relief is dismissed.

Costs

33 The Respondent seeks its costs in respect of the interim relief application. Ms Shakir puts her application as follows. She argues that, when the claim form was issued, it was not complete; the Respondent did not know what case it had to meet. The Claimant failed to particularise what her application was seven days before the last hearing, as Miss Shakir contends she was ordered to do by the Tribunal. The Respondent attended the last hearing which was ineffective. In respect of today's hearing the Claimant filed her documents very late and the Respondent did not have an opportunity to file a response.

34 It is right that the Claimant's ET1 is brief. However, the Claimant is in person and drafted it herself; it is sufficiently clear for the Tribunal to have understood that she was making a claim of automatic unfair dismissal and applying for interim relief. In my view there was sufficient within it for the Respondent to understand the broad outline of the case against it. If it requires further information, notwithstanding the clarification which the claimant has provided today, it can of course make an application in due course.

35 As I have explained above, the Tribunal has already accepted the Claimant's explanation for her non-attendance on the last occasion and that explanation also covers the fact that she did not provide documentation in advance of it. Moreover, on my reading of the file there was no order for her to provide written particularisation of her interim relief application seven days before that hearing.

36 Finally, I have already dealt with the fact that the Claimant provided a small bundle of documents for this hearing late in the day. The Respondent was, in my view, not significantly prejudiced by that late service.

37 I am not persuaded that the Claimant's conduct as outlined above by the Respondent amounts to unreasonable conduct the proceedings and I dismiss its application for costs.

Employment Judge Massarella

10 June 2019