EMPLOYMENT TRIBUNALS

Claimant: **Mrs E Ratcliffe**

Respondent: **Donna Woodruff**

Heard at: **Mold** **On: 16 May 2019**

Before: **Employment Judge**

Representation
Claimant: **Ms Thirsfield, Solicitor**
Respondent: **Ms S Roberts of the respondent.**

JUDGMENT

1. The application for interim relief is refused because it is not likely that, on determining the complaint, that the tribunal will find that the principal reason for claimant's dismissal was her asserted protected public interest disclosures.

REASONS

1. I state at the outset that it is common ground between the parties that the claimant was never employed by Ms Woodruff, the named respondent, and the correct identity of the employer is Fairways Care Limited. At all relevant times the claimant was working at the Ty Cariad Dementia Care Centre owned and operated by the limited company but I have clarified today that Mrs Roberts and Mrs Woodruff speak with the consent and authority of the limited company.

   Background

2. The agreed facts of this case are as follows. The claimant commenced employment with Fairways Care Ltd on a date in February of 2019. She was employed as an Activities Coordinator within the foresaid dementia care home. Her employment was terminated by the respondent on 25 April

2019 following a meeting with Ms Donna Woodruff, the Manager of Ty Cariad Care Centre.

3. The claimant presented a Claim form wherein she asserts that she made number of protected public interest disclosures and that she was dismissed by reason of those protected disclosures. The details of her claim states that on two occasions she informed a care practitioner of poor care and the two specific matters which are addressed below. She goes on to state:

   "I explained I am not happy about a lot of things and that I'm going to contract the owner {of the respondent company] Mr Bailey as I was informed that was my chain of command. I was told that I was mistaken. Thursday I was called into a meeting and instantly sacked for trying to inform Mr Bailey".

4. Thus, she asserts that her dismissal was contrary to Section 103A of the Employment Rights Act of the Employment Rights Act.

5. The respondent denies that the claimant made disclosures, that they were "qualifying disclosures, that Ms Woodruff had knowledge of the alleged disclosures or that any such asserted disclosures had any influence on the decision to dismiss the claimant,

6. The claimant has made a timely application for interim relief in accordance with Sections 128 – 132 of the Act and that some precision this application is brought under 128(1)(a)(i).

   The Legal Matrix

7. The relevant statutory matrix is found within the Employment Rights Act 1996, it states as follows:

128 Interim relief pending determination of complaint.

(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—

(a)that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

(i)section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or

(ii)…, or

(b)….,

may apply to the tribunal for interim relief.

(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).

(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

129 Procedure on hearing of application and making of order.

(1) 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—

(a)that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

(i)section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or

(ii)paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b)that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

(2) The tribunal shall announce its findings and explain to both parties (if present)—

(a)what powers the tribunal may exercise on the application, and

(b)in what circumstances it will exercise them.

(3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

(a)to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or

(b)if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(4)For the purposes of subsection (3)(b) “terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed” means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6) If the employer—

(a)states that he is willing to re-engage the employee in another job, and

(b)specifies the terms and conditions on which he is willing to do so,

the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.

(8) If the employee is not willing to accept the job on those terms and conditions—

(a)where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and

(b)otherwise, the tribunal shall make no order.

(9) If on the hearing of an application for interim relief the employer—

(a)fails to attend before the tribunal, or

(b)states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3),

the tribunal shall make an order for the continuation of the employee's contract of employment.

The Issues

8. The issues that I have to determine are those which relate to the elements that constitute a protected public interest disclosure and then the consideration of the principal reason for the dismissal.

9. The constituent element of such a disclosure are set out in section 43B-K, 44 and 103A of the employment Rights Act 1996:

Section 103A, so far as material, provides:

"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

A "protected disclosure" is defined by s.44A of the 1996 Act as a "qualifying disclosure" that was made in accordance with ss.43C–H. In that regard, s.43B(1), so far as material, provides:

"(1) ... a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

Section 43C(1), so far as material, provides:

"(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith – (a) to his employer ..."

10. The burden of proving each element of the statutory definition lies upon the claimant.

11. In this case, the burden of proving the reason or principal reason remains on the employer unless the claimant lacks the qualifying period of employment in which case the burden of proof lies on the employee: *Maund v Penwith District Council* [1984] IRLR 24, *CA*, as applied in *Kuzel v Roche Products Ltd* [2008] IRLR 530. In this case the claimant had less than two years continuous service.

12. The burden of proof which rests upon the claimant is expressed in section 129 of the ERA 1996 thus (my emphasis):

129 Procedure on hearing of application and making of order.

(1) 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—

(a)that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

….. 103A.

The term "likely that on determining the complaint…" has been examined in two cases; *Taplin v Shipman Ltd* 1978 IRLR and the more recent authority of *Ministry of Justice* ***v*** *Shafraz* [2011] IRLR 562 at 562. Firstly in *Taplin:*

"' 21. Having considered all these matters which have been urged before us we are unanimously of the view that the test proposed by Mr Hands of a "reasonable prospect of success" is not one which should be adopted. The phrase can have different shades of emphasis, the lowest of which we do not think is sufficient. We do not consider that Parliament intended that an employee should be able to obtain an order under this section unless he achieved a higher degree of certainty in the mind of the tribunal than that of showing that he just had a "reasonable" prospect of success. The employee begins with a certificate from the trade union official certifying that there appear to be reasonable grounds for supposing that the reason for his dismissal was the one alleged. We consider that the tribunal is required to be satisfied of more than that before it can appear "that it is likely" that a tribunal will find that a complainant was unfairly dismissed for one of the stated reasons.

22. On the other hand we are not persuaded that there is a dichotomy between "probable" and "likely" as expressed by the chairman of the industrial tribunal. We find it difficult to envisage something which is likely but improbable or probable but unlikely and we observe that the Oxford Dictionary definition does define "likely" as "probable". Nor do we think that it is right in a case of this kind to ask whether the applicant has proved his case on a balance of probabilities in the sense that he has established a 51% probability of succeeding in his application, as has at one stage been contended before us. Nor do we find Mr Hands' alternative suggestion of a real possibility of success to be a satisfactory approach. This again can have different shades of emphasis. It seems to us that the section requires that the employee shall establish more clearly that he is likely to succeed than that phrase is capable of suggesting on one meaning. On the other hand it

is clear that the tribunal does not have to be satisfied that the applicant will succeed at the trial. It may be undesirable to find a single synonym for the word "likely" but equally, we think it is wrong to assess the degree of proof which has to be established in terms of a percentage as we have been invited to do.

23. We think that the right approach is expressed in a colloquial phrase suggested by Mr White. The tribunal should ask itself whether the applicant has established that he has a "pretty good" chance of succeeding in the final application to the tribunal."

And in Shafraz:

"The burden of proof rests upon the claimant is that it must appear to me to be likely that the claimant will succeed at a full hearing. Likely has been as best as the Court of Appeal can do described as "a pretty good chance" What this essentially means is that lawyers are used to speaking of "arguable" or "probable" or "greater than fifty-one Percent" as being the tipping point when a case had a greater prospect of succeeding than failing but the standard required at this hearing is higher than that"

The Evidence relevant to the material issues

13. To determine the merits of the application I had the benefit of considering witness statements from Ms Ratcliffe. I have also considered a signed statement from Mrs Woodruff and an unsigned note of the meeting of the claimant with Ms Woodruff on the 25th April 2019, a statement from Ms Tina Round a work colleague who was senior to the claimant and a statement from Tracey Dimery who was member of the respondent's reception staff member and the person who took notes during the meeting of 25 April and a second statement from Ms Dimery also dealing with the same matter dated 9 May. I have also had unsigned statement of Ms Sarah Roberts who was charged with conducting the appeal raised by the claimant against the dismissal. That appeal process is on-going at the date of this hearing.

The Protected Public Interest Disclosures

14. The particular disclosures upon which the claimant places most emphasis at this hearing are set out in her statement at paragraph 6(1):

(a) The first was a disclosure which she states was made to a care practitioner, called Catherine Duffy, regarding staff to patient ratios which the claimant asserted were so inadequate as to put the residents' health and safety at risk.

(b) The second was a disclosure to Tina Round; that a resident who was suffering from dementia had been kissed by a member of staff in circumstances where the resident was not capable of giving informed consent to such conduct; that might amount to the criminal offence of assault or a sexual assault.

15. On the evidence before me the respondent is not in any position to contradict the claimant's assertion that these two disclosures were made. That is in part at least because the ET1 does not clearly identify the recipients of the disclosures.

16. Before progressing then I must consider whether those disclosures fall within the qualification and protected status set out in Sections 43B to 44.

17. I should note that I have taken into account, that the respondent does not accept the claimant's case and that Ms Roberts or Ms Woodruff have been able to assist me through any written submission or argument on these points. I make no criticism of them; they have no legal background nor experience of advocacy or knowledge of the legal issues which are pertinent to this application.

18. On the evidence before me, I consider that the claimant has proven that she has "a pretty good chance" of establishing that:

    (1) she made the two statements recorded above to the two persons named because her witness statement is direct and clear in her account and the respondent has not adduced any evidence to suggest it will be able to rebut the claimant's assertions.

    (2) That these disclosures clearly contained information which expressed the conduct, or facts, upon which the claimant asserted that patients were at risk or subject to potentially criminal behaviour.

    (3) The first disclosure could clearly amount to an allegation that the respondent had acted in a manner which put, or would put, the health and safety of vulnerable adults at risk. The second was an assertion that a criminal offence had occurred.

    (4) The next question is whether the belief of the claimant was reasonable? Again, the claimant's account is she directly witnessed these matters and therefore there is nothing before me which would cause me to have any concern that she would be able to establish that point at a final hearing.

    (5) The disclosures were, on the claimant's evidence communicated to employees of the respondent. Again, on the evidence before me the claimant has "a pretty good chance" of proving this at a liability hearing.

    (6) In respect of the amended section 43(1) and the reasonable belief in the public interest of the disclosure, if have followed the guidance in *Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979*.

    (7) Based on the claimant's evidence, I accept for the purposes of today's hearing, that the claimant has a pretty good chance of proving that she reasonably believed that the care and treatment of vulnerable people was a matter of public interest and so to was her assertion that there had been criminal offence committed against such a person. These are the sort of matters which the relevant statutory authorities, such as the

Care Quality Commission, would expect to be notified and in which they would take an interest.

19. I am thus satisfied that the claimant has a "pretty good" of establishing that her conduct places her within the protection of ERA 1996.

The Dismissal

20. There is no doubt the claimant can establish that she has been dismissed because the dismissal has been admitted and is documented.

The reason for the dismissal

21. With regard to a claim under Section 103A, the principal reason for the decision to dismiss has been the foremost point of dispute between the parties today.

22. To establish the principal reason the claimant, who had less than three months continuous service, will have to establish some cogent evidence to effectively rebut the respondent's assertions that:

(a) that that the decision maker had no knowledge of the disclosures, and

(b) the dismissal was solely by reason of the claimant's conduct.

23. To deal with those points today Ms Thirsfield took me through a number of submissions; raising for instance the apparent contradictions in the two accounts of Ms Woodruff as to the manner and content of the hearing on 25th April; the content of the counselling interview form, which on first reading, suggests that the decision to dismiss had occurred before the dismissal meeting commenced (but on Ms Woodruff's evidence was only party completed before the meeting and partly completed after its conclusion). The fact that the meeting was called on a day when the claimant was not at work and there was no urgency to conduct the meeting before the claimant was due to return to work. and the fact that meeting was described as being called to address "niggles" or "minor matters" but it resulted, after a fairly short time, in the dismissal of the claimant.

24. All of those matters the claimant will doubtlessly present at a final hearing to try to undermine the credibility and reliability of Ms Woodruff.

25. The Respondent's evidence before me shows that it has evidence which could persuade an employment tribunal that prior to the 25th April the claimant, who had no prior relevant experience in her new role was: rude to her colleagues, disruptive and negative in her attitude to her manager (Tina Round) and opinionated without the competence or experience.

26. Further more in the meeting of the 25th Ms Woodruff and Ms Dimery will both give evidence that, when in formed of the criticisms from her colleagues, the claimant became loud and talked over Ms Woodruff and dismissive of her line manager's abilities When Ms Dimery stated the purpose of the meeting was to discuss the claimant's conduct, not Ms Round's performance, the claimant told Ms Dimery to "fuck off".

27. All of the above, on the respondent's evidence, confirmed the concerns which had been made by other staff and persuaded Ms Woodruff that the claimant was not a suitable person for continued employment.

28. It is therefore evident to me that the explanation of the respondent can be challenged by the claimant but, in the absence of a direct admission from the respondent, it seems less than likely the claimant would be able persuade a tribunal that the principal reason for her dismissal was her protected disclosures.

29. There is another matter which is the claimant will have to establish prima facie; that Ms Woodruff had knowledge of the disclosures. The knowledge is denied by the respondent.

30. The way in which the claimant put her case acknowledged that whilst she had not made disclosures to Ms Woodruff and that she did not communicate formally her disclosures to anyone senior employee of the respondent until a few days after the dismissal she did ask a receptionist Tina Dimery for the details of the appropriate person to whom she should raise a complaint and in doing so had communicated her intent to complain about health and safety matters. From this it seems that the claimant will seek to establish that Ms Dimery informed Ms Woodruff of the disclosures prior to the decision to dismiss the claimant.

31. Ms Woodruff denies that she had knowledge of the claimant's asserted discussion with Ms Dimery and denies knowledge of the disclosures. The claimant has no evidence to contradict Ms Woodruff's denial.

32. How then is the claimant likely to be able to establish her factual allegation (the communication of the claimant's asserted disclosures or the intent to do so) when she was not party to any alleged exchange between Ms Dimery and Ms Woodruff?

33. Ms Thirsfield took a number of points of which I will use several as illustrations:

    (1) Why would a meeting that was only "a chat" be called at such short notice; the day after the claimant has sought the identity of the appropriate person to receive her public interest disclosures?

    (2) Why would that meeting be held on one of the claimant's rest days?

    (3) How can that be credible that a meeting which was styled as a" Counselling Interview" could become a dismissal meeting.

34. From the above, despite Ms Woodruff's denial, the claimant will invite a tribunal to infer that the respondent's conduct is evidence of prior knowledge of the protected disclosures and thereby it is likely that the tribunal is likely to reject Ms Woodruff's evidence; inferring that Ms Woodruff did have knowledge of the disclosures and acted quickly to dismiss the claimant before she could express them formally.

35. These are all tenable arguments, but in the context of evidence of the claimant's poor behaviour prior to the meeting there is a more obvious explanation for why the meeting was called. The respondent's case is that the claimant was invited to attend the meeting on her day off, not instructed to do so. Further the respondent's evidence is that claimant's conduct in the meeting of the 25th demonstrated that staff concerns were well found and that telling a colleague to "fuck off" in front of a manager and in a counselling, meeting is a more obvious and credible explanation for the respondent's conduct.

36. In the end I have to step back and assess all of the above against the guidance in *Taplin v Shipman* and Shafraz; does the claimant's case in have a "pretty good chance" of succeeding in a final tribunal hearing?

37. In this case, on the evidence before me, the claimant's prospects of success will ultimately depend on cross examination to achieve concessions or sufficiently undermine the respondent's witnesses. This is clearly possible but, on the evidence before me, I am very wary about the prospects of claimant being able to demonstrate a connection between the alleged disclosures to junior staff and the alleged knowledge of the decision maker when there is no direct evidence to establish that link and the requisite knowledge is denied.

38. Thus, by reason of my conclusions at paragraphs at 35 and 38 above I am not satisfied that the claimant's case is likely to succeed before a tribunal; it does not have a pretty good chance.

39. For these reasons I do not make an interim relief order in favour of the claimant.

Employment Judge R F Powell

Date 20th September 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON
23 September 2019

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FOR THE TRIBUNAL OFFICE