



EMPLOYMENT TRIBUNALS

Claimant: Mr Simwinji Zeko

Respondent: Steve West & 5 others

Heard at: Bristol

On: 14 August 2019

Before: Employment Judge Christensen

Representation

Claimant: represented himself

Respondents: represented by Mr Sendall of Counsel

JUDGMENT having been sent to the parties on 19 August and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant has made an application for interim relief on the grounds that he alleges that he was automatically unfairly dismissed for whistleblowing under S103A Employment Rights Act.
2. The relevant law is to be found at S43B ERA, S128 ERA, S129 ERA. Rule 95 of the Employment Tribunal Rules of Procedure is also relevant. That states that I should not hear oral evidence unless I direct otherwise. I have not heard oral evidence but did consider the contents of a draft statement as set out below.
3. S129 ERA provides that, where on hearing an employee's application for interim relief, it appears to me that it is likely that on determining the complaint the tribunal will find that the reason, or principal reason, is that he has made a protected disclosure.
4. The application is opposed on the basis that there is no basis for concluding that it is likely that at the full merits hearing the Employment Tribunal will find that the reason or the principal reason for the dismissal was that the Claimant made one or more protected disclosures.
5. Both parties brought me a bundle and I confirmed that I would consider any documents that they wished to refer me to in those bundles.
6. I was also given a copy of the respondents' ET3 which had been filed with the tribunal the evening before but had not yet found its way to my file.

7. The claimant worked as a support worker at the University of the West of England to support an academic member of staff who had a disability, namely Young Onset Parkinson's Disease. He had worked on a number of fixed term contracts and there is an issue which will fall to be determined at the final hearing as to whether by virtue of the extension of those fixed term contracts, the claimant had become a permanent employee of the University.
8. He was dismissed by letter of 31 July by letter from the then Acting Head of HR, following a process of consultation with the University in which it was exploring with the claimant how to continue the claimant's role as a support worker.
9. The letter dismissing the claimant states this *"Further to your letter to Sally Moyle, by email, dated 29 July 2019, in which you rejected the offer of a TSU/Zero hours contract. Please be aware that in view of this rejection the offer is now not capable of acceptance and your employment will end today 31 July 2019 at midnight, by reason of expiry, without renewal, of your fixed-term contract. Whilst we do not accept your contention that you are employed on a permanent contract, for the reasons set out in our defense to your ET claim, namely that we consider your fixed-term employment to be objectively justified by reference to the external, fixed-term, funding on which it has been based, without prejudice to that position we are serving you with notice of summary dismissal....we consider, in that event, that the reason for the termination of your employment is 'some other substantial reason' for dismissal i.e. an irretrievable breakdown in working relationships and that in the circumstances we have carried out all reasonable steps to avert your dismissal"*
10. The respondents have presented a skeleton written argument and a draft Witness Statement from Ms Catherine Parker Acting Head of HR Services at the University of Bristol.
11. The claimant objected to my consideration of the draft witness statement. The respondents submitted that I should consider it on the basis that it provided an efficient route through which the respondents were able to present information that would otherwise have to form part of their submissions. They submitted that Ms Parker's statement helps me understand what the evidence is likely to be at a substantive hearing as it explains the chronology of events.
12. I confirmed that I considered it proper to consider the witness statement for the reasons set out by the respondent.
13. The witness statement sets out the chronology of the claimant's letters to UWE in 2017, that he relies upon as disclosures qualifying for protection. It also sets out something of the history of the claimant's fixed term contracts and explains something about the reasons behind the review in 2019 of the review of terms of employment for support workers.
14. The relevant case law is all set out in the respondent's skeleton argument and I do not recite the law in these reasons.
15. I should undertake an expeditious assessment as to how matters appear on the material available doing the best that I can with the untested evidence advanced by each party. My role is not to make findings of fact but to perform a broad assessment so that I may make a prediction about what is likely to have happened at the eventual hearing. When considering the likelihood of the claimant succeeding case law confirms that I should consider whether the claimant has a 'pretty good chance of success'.
16. The correct test is not whether the claimant has a reasonable prospect of success.
17. The claimant has submitted that he will argue that the principal reason for his dismissal on 31 July 2019 is because of a protected disclosure that he made in November 2017. The claimant will argue that he disclosed information at that time about issues around workplace bullying, harassment, intimidation and discrimination of staff and students.
18. This refers to an email of 10 November 2017 which states *"an ongoing situation by poor management practice, discrimination, victimization and other quite negative issues that have no*

place in the UWE workplace have compelled and convinced me to make a claim against the University and 5 other defendants”.

19. It also refers to a letter of 6 November 2017 which is headed “*Letter before Claim: Mismanagement, Abuse of Process, Victimization, Harassment, Bullying, Negligence, Dereliction of Duty, Willful/Reckless/Malicious Intent, Tortious Misconduct, Injury to Feelings, Breach of Statutory Duty and Damages*” The letter runs to 6 pages and sets out incidents which the claimant will say support the descriptions in the heading and amount to disclosures qualifying for protection under S43B ERA. I went through the letter with him and he pointed out the paragraphs which he will say amounted to a protected disclosure and he explained something of the context in which he will wish to argue that.
20. These are
- a. You decided to place my role at risk of redundancy
 - b. Long litany of mismanagement, non-compliance, disregard, arrogance and disdain, recklessness, omissions, deception and Machiavellian tendencies that have subverted, constrained and damaged Dr van den Ankers ability to properly and effectively do her work
 - c. This situation [short term contracts] is normally for up to 6 months as temporary measure. However this continued for 41 months up to December 2016. Inaction, foot dragging and unconscionable omissions
 - d. I have never had a workstation with a separate phone line provided for me as a required reasonable adjustment for Dr van den Anker. Again repeated requests for this were made with no positive outcome. This is an example of the acts of omission line mismanagement and complicity with the relevant parties
 - e. Derogatory and inappropriate comments made by Dr Watson of me in the course of my work.
 - f. Dr Neil....made some highly inappropriate remarks that condoned sexism
 - g. You are ethically compromised, have a conflict of interests and lack real objectivity as far as important processes and decisions affecting Dr van den Ander
 - h. The University....is under a duty and obligation to comply with and meet certain standards.
 - i. The direct and indirect discrimination, mistreatment, hostility, delay, effective sidelining and oppression experienced by Dr van den Anker and me over months and years
 - j. I have little or no confidence in the internal processes for remedial action
21. The claimant has submitted that he has a ‘pretty good chance’ of success in establishing causation and establishing that these protected disclosures are the principal reason for his dismissal on the basis that the ongoing situation arising from his letters in November 2017 fed into the decision to dismiss him. The claimant accepted that he had been offered a new contract but that he had not accepted because it reflected a diminution in terms. The claimant has submitted that his dismissal in July 2019 was sudden and arbitrary and without due process although the claimant has also submitted that he was invited to a meeting to discuss the new terms.
22. The respondent has argued that the passages that the claimant took me to in his letter of 6 November amount to no more than allegations regarding work place disputes and do not identify which particular obligations are being relied upon. By reference to the case of **Kilraine-v-London Borough of**

Wandsworth [2018] IRLR 846 the respondent submits that in order for a statement or disclosure to be a qualifying disclosure according to the language of the section, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in S43B(1). Kilraine also states that whether a disclosure satisfies the test, should be assessed in the light of the particular context in which it is made and that the meaning should be explained in the claim form and in the evidence of the claimant.

23. By reference to causation the respondent submits that even if the claimant can establish that he satisfies the statutory definition relating to disclosures qualifying for protection, that there is no proper basis for me to conclude that it is likely that a tribunal will determine that the reason, or if more than one the principle reason, is that the claimant made a protected disclosure.
24. The respondent has submitted that the dismissal was simply the consequence of the non-renewal of the claimant's contract of employment and the operation of S95(1)(b) ERA. No one at UWE has positively decided that he should be dismissed. In fact, the respondent argues, the opposite was true because he had been offered a new contract. The contract on new terms was, according to the respondent, the result of a review of the contractual arrangements that had taken place for support workers earlier in 2019. The new terms were entirely unconnected to any protected disclosure made some 18 months previously.
25. The respondent has submitted that if the Employment Tribunal concludes that the claimant had become a permanent employee the dismissal occurred because of a breakdown in the relationship between the claimant and UWE because of the claimant's unauthorised absence from work in the period 22 May 2019 and about 5 July 2019. During this period the claimant was in Zambia and was not contactable. On that basis the dismissal would be for some other substantial reason S98(1)(b) and entirely unconnected with his alleged protected disclosure made some 18 months previously.
26. **Does the claimant have a pretty good chance of success in establishing that the principal reason for his dismissal was that he had made a protected disclosure?**
27. I have concluded that he does not and have denied him the relief he seeks.
28. Dealing firstly with the question of the likelihood of establishing that what he wrote in 2017 will satisfy the statutory test. On my assessment, broadly on the basis of what I know, I think there is a chance that he will succeed in this. He makes some specific allegations and refers to some specific legal duties – he has a chance and I am satisfied that because of the specifics in the letter and taking into account the further context that the claimant will wish to give evidence about that is amounts to a pretty good chance.
29. Dealing the second question of the likelihood of the tribunal determining that the principal reason for his dismissal was the making of such protected disclosures. There are a number of factors which satisfy me that he stands a very poor chance of showing such a causative link.
 - a. The letters that I have been shown establish that a process was underway in 2019 to review the terms upon which support workers were employed. This impacted upon the claimant.
 - b. In that process UWE was seeking to continue, not terminate, the claimant's employment
 - c. It was the claimant's decision to reject the terms on offer.
 - d. The dismissal letter confirms that it was the claimant's decision in this regard that caused his dismissal.

e. The claimant has presented no cogent argument to satisfy me that there is any causative link between a dismissal made 18 months after a protected disclosure. He has argued only that the ongoing situation fed into the decision to dismiss him. This is particularly in the context of their being documents that will seek to establish that an entirely unrelated issue relating to the particular terms of employment of support workers was the real cause of the dismissal.

30. These are the reasons for my judgment dismissing the claimant's application for interim relief.

Employment Judge Christensen

Date: 23 August 2019
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