



EMPLOYMENT TRIBUNALS

Claimant: Ms Nichole Gaskin

Respondent: The Arreton & Oakfield Federation/Oakfield Primary School

Heard at: Southampton **On:** 6 February 2020

Before: Employment Judge Richardson

Representation

Claimant: Mr K Bryant, Counsel

Respondent: Mr A Johnston, Counsel

JUDGMENT

The application for interim relief is dismissed.

REASONS

The proceedings

1. This is an application for interim relief under section 128 of the Employment Rights Act 1996. It stems from a claim under section 103A of the ERA namely that the claimant was automatically unfairly dismissed because she had made a protected disclosure under the provisions of section 43 of the ERA.
2. The claimant was employed as a Primary School Teacher at the respondent in Ryde on the Isle of Wight and the effective date of termination was 16 January 2020.

3. The claimant will bring other claims relating to the protected disclosure, also under the Equality Act 2010 and for unfair dismissal. The early conciliation process is yet to be commenced and I anticipate the current proceedings will need to be consolidated with the later proceedings.

The Law

The key statutory provisions for present purposes are sections 43A-43C, 103A and 128-129 of the ERA which, in so far as material, provide as follows:

'43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection

- (1) *In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and 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,*
 - ...
 - (d) *that the health or safety of any individual has been, is being or is likely to be endangered,*
 - ...
 - (f) *that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

43C Disclosure to employer or other responsible person

- (1) *A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –*
 - (a) *to his employer,*
 - ...

103A Protected disclosure

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.

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 ... 103A,...
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.*
- (5) *The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.*

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 ... 103A, ...*
- (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.*

Section 130 of the **ERA** provides:

- (1) *An order under section 129 for the continuation of a contract of employment is an order that the contract of employment continue in force -*
 - (a) *for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and*
 - (b) *for the purposes of determining for any purpose the period for which the employee has been continuously employed,**from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint.*
- (2) *Where the tribunal makes such an order it shall specify in the order the amount which is to be paid by the employer to the employee by way of pay in respect of each normal pay period, or part of any such period, falling between the date of dismissal and the determination or settlement of the complaint.*
- (3) *Subject to the following provisions, the amount so specified shall be that which the employee could reasonably have been expected to earn during that period, or part, and shall be paid -*

- (a) *in the case of a payment for any such period falling wholly or partly after the making of the order, on the normal pay day for that period, and*
- (b) *in the case of a payment for any past period, within such time as may be specified in the order.*
- (4) *If an amount is payable in respect only of part of a normal pay period, the amount shall be calculated by reference to the whole period and reduced proportionately.*
- (5) *Any payment made to an employee by an employer under his contract of employment, or by way of damages for breach of that contract, in respect of a normal pay period, or part of any such period, goes toward discharging the employer's liability in respect of that period under subsection (2); and, conversely, any payment under that subsection in respect of a period goes towards discharging any liability of the employer under, or in respect of breach of, the contract of employment in respect of that period.*
- (6) *If an employee, on or after being dismissed by his employer, receives a lump sum which, or part of which, is in lieu of wages but is not referable to any normal pay period, the tribunal shall take the payment into account in determining the amount of pay to be payable in pursuance of any such order.*
- (7) *For the purposes of this section, the amount which an employee could reasonably have been expected to earn, his normal pay period and the normal pay day for each such period shall be determined as if he had not been dismissed.*

Rule 95 of the **Employment Tribunal Rules of Procedure** provides:

When a Tribunal hears an application for interim relief (or for its variation or revocation) under... section 128 or 131 of the Employment Rights Act 1996, rules 53 to 56 [the rules relating to the scope and conduct of preliminary hearings] apply to the hearing and the Tribunal shall not hear oral evidence unless it directs otherwise.

4. The core issue for today is whether it appears to me that it is likely that the claimant would succeed in this claim. In this context case law has established that this means the claimant has a pretty good chance of success. I have had helpful skeleton arguments from both Counsel who have taken me to the relevant case law and statutory provisions . In addition, I have been taken to various passages in the cases of
- *Hancock v Ter-Berg & Anor* [2019] UKEAT
 - *London City Airport Ltd v Chacko* [2013] IRLR 610

- Chesterton Global Ltd v Nurmohamed [2017] IRLR 837
 - Dandpat University of Bath & Another [2010] EWCA Civ 305
 - Taplin v C Shippam Ltd [1978] IRLR 450
5. I need to apply the test that I have set out to both whether there was a qualifying protected disclosure and to set out if the reason or the principal reason is that the claimant made a protected disclosure.

Evidence produced

6. I heard no evidence but I did have witness statements from the claimant, her partner Robbie Hamilton, Colin Hayley the Executive Head Teacher of the respondent and Mary Hillary who was employed as an HR Advisor to the Isle of Wight Council as she provides HR Support to the respondent.
7. As was inevitable in an application of this nature and short notice both sides produced documents they wanted to rely upon. I had produced to me the following documentation, marked as follows:

Claimant

CI - Email exchanges between 13 and 15 July 2019 claimant/union rep

C2 - Opus report

C3 - Heales Occupational Health report

Respondent

R1 - Bundle of documents containing three letters, two investigation reports and minutes of a disciplinary hearing.

The Facts

8. The claimant appears to have been well regarded. There had been no disciplinary action taken and only an informal warning in January 2019 about her ill health record. Without going into too much detail on 18 March 2019, there was a disagreement between the claimant and Ms Gains a member of the Senior Leadership team and specifically the Head of Safeguarding. The claimant was upset and Ms Gains went to speak to her again to apologise for any upset caused. The pair went into a small breakout room, voices were raised and heard by others outside the room. The claimant alleges she was grabbed by the arm by Ms Gains and prevented from leaving the room. Ms Gains concedes there was physical contact but all she did was place her hand on the claimant's arm to calm her down.

9. The claimant raised a complaint with Mr Hayley shortly afterwards and, when her partner (Mr Hamilton) was present, she alleged she had been assaulted and essentially unlawfully imprisoned. Both were important matters not just because potentially a criminal offence had been committed but also there was the matter of public interest given Ms Gains' role as Head of Safeguarding. Mr Hayley conducted an informal investigation and interviewed both parties and another nine people. His report is dated 28 March 2019. There is a dispute as to when he reported his conclusions to the claimant. Given that there were no witnesses in the room as to what actually happened, he concluded there should be no disciplinary action. The claimant says that from this point her relationship with the respondent became more difficult and strained and she listed a number of matters that will go to the detriment claim but for today are to be seen as part of the factual matrix.
10. One of the most significant issues was the taking a leave of absence by the claimant. The respondent had a policy in relation to leave of absence dated December 2016. The claimant's daughter is at boarding school on the mainland and there were occasions when she wanted to support her daughter, accompany or collect her at sporting events. There is a dispute as to what broad principles about the claimant's working arrangements she may have agreed with Vicky Reader, the Head Teacher at the primary school. My impression was the application of the rules was being tightened up by Mr Hayley after his appointment. The claimant having had two days already granted in the school, and because of insufficient staff coverage, was refused two days' leave on 24 and 25 June 2019.
11. She pursued the issue of refused leave with the head of the Governors Mr Eric Hemmings. They met on 20 June and he followed up that meeting in writing on 21 June. He made it clear the claimant had to abide by Mr Hayley's decision and any unauthorised leave could result in disciplinary action. On 22 June the claimant again asked for confirmation about leave and Mr Hayley repeated she could not take leave. Nevertheless, she did so on 24 and 25 June.
12. There was a subsequent investigation conducted by another Head Teacher Maria Herbert from a different school. It appears neither then nor at the meeting with Mr Hemmings did the claimant allege, because she had made a protected disclosure, that she was being treated unfairly. The outcome of the investigation was to recommend disciplinary action.
13. Notification of disciplinary action was handed to the claimant on 23 July, the last day of term, by a Trudy Taylor during it is said a classroom break. The claimant became upset and again there are some factual disputes about who said what, where and to whom, but there was a complaint about the claimant's behaviour/reaction on receipt of those papers on 23 July. The upshot was that the disciplinary hearing eventually dealt not only with the unauthorised leave but also the alleged aggressive and rude behaviour of the claimant on 23 July.
14. In September 2016, the claimant was signed off with anxiety and stress and she did not return to work. She was seen by an Occupational Health Nurse and separately a consultant psychiatrist on 15 January 2020. Come the disciplinary hearing, she was signed off until 26 January.

15. The panel decided not to adjourn the proceedings and the outcome of the disciplinary hearing was to dismiss her with effect from 16 January 2020.
16. It is important that I do not find facts which bind the Tribunal in the final hearing. As said in *Chacko* "I am required to make as good as an assessment as I can of whether the claimant is likely to succeed in her claim for unfair dismissal. This requires an expeditious summary assessment as to how the matters looked to me on the material provided to me".
17. The first issue is whether I think it is likely that the claimant has a pretty good chance of establishing she had made a qualifying protected disclosure. Mr Johnston, for the respondent, essentially says it does matter what happens and goes to the question of reasonable belief. Mr Bryant says it is what the claimant can establish she believed at the time. In my view while the claimant may turn out to be wrong, I believe the claimant does have a pretty good chance of establishing she made a qualifying disclosure. Something happened between her and Ms Gains who was the Head of Safeguarding. I think this meets the test of a pretty good chance of succeeding in relation to the requirements of section 43A, 43B ((a), (b) and(d), I am not sure if it meets the test for (f).
18. As for causation, I am satisfied that the claimant does not have a good chance of success of establishing her disclosure was the principal reason for her dismissal.
19. Mr Bryant particularly relies on *Chacko* and draws parallels to the matters there with his client's position, on this point I disagree with him.
20. The issue over the unauthorised leave arose some three months later and the alleged misbehaviour did not take place until July. In neither case was there any obvious haste to move to disciplinary action and dismissal. From what I have seen, and I absolutely accept there may well be other evidence yet to emerge, I cannot go so far as to say the claimant has a pretty good chance of succeeding.
21. As to the submission over consistency of treatment, that I consider is capable of an explanation and the claimant does not get over the higher threshold required in this application.
22. It appears that the respondent may have some questions to answer over the disciplinary procedure and the decision not to adjourn the hearing. There may be other issues too but, in my view, at this stage they appear to be more likely to arise in the context of the section 98(4) claim.

Employment Judge Richardson

Date 10 March 2020