



EMPLOYMENT TRIBUNALS

Claimant(s): Mr J Fite

Respondent(s): First4Care Limited

Heard at: Leeds (by telephone)
Before: Employment Judge Deeley
On: 25 March 2020

Representation

Claimant: Mr Y Baksh (Consultant)
Respondent: Mr J Gilbert (Consultant)

JUDGMENT

1. The claimant's application for interim relief under the provisions of s128 and s129 of the Employment Rights Act 1996 is rejected.

REASONS

Introduction

2. Neither party objected to holding this hearing as a remote hearing. The form of remote hearing was "A: audio - fully (all remote)". A face to face hearing was not held because it was not practicable and all issues could be determined at a remote hearing. The documents that I was referred to are set out below:
 - 2.1. various documents in the bundle which was originally prepared for the Detriment Claim (as defined below);
 - 2.2. the claimant's ET1 (submitted on 1 March 2020) and the respondent's draft particulars of response;

- 2.3. the respondent's disciplinary hearing documents (letter inviting the claimant to attend an investigation meeting, investigation report, disciplinary report and disciplinary outcome letter);
 - 2.4. a report by Ms Beverley Murphy (Fostering Independent Reviewing Officer on behalf of the Local Authority Designated Officer ("**LADO**"));
 - 2.5. a list of the documents referred to by the claimant's representative during his submissions; and
 - 2.6. copies of the authorities relied on by both parties during their submissions.
3. The claimant previously brought a claim for detriments suffered in relation to a protected disclosure under claim number 1804887/2019 (the "**Detriment Claim**"). This claim was heard from 17-21 February 2020 and both parties were represented at that hearing by their current representatives. Employment Judge JM Wade gave an oral judgment at the conclusion of the hearing and provided a written short form judgment on 21 February 2020 which stated that:

"The claimant's first two complaints of protected disclosure detriment succeed; his third complaint, concerning pay, is dismissed."

4. The parties' representatives disputed during this hearing whether the Tribunal provided its full findings of fact as part of its oral judgment. The parties had applied for written reasons for the Detriment Claim and these had not been sent to the parties at the date of this interim relief hearing. However, the parties' representatives agreed that the Tribunal concluded that:
- 4.1. the claimant had made a protected disclosure to the respondent on 7 May 2019; and
 - 4.2. the claimant was subjected to two detriments because he made a disclosure, i.e. that the respondent:
 - 4.2.1. suspended him from his role on 7 May 2019; and
 - 4.2.2. referred his alleged conduct on 19 April 2019 to the Local Authority Designated Officer.
5. I sought representations from the parties during this hearing as to whether the interim relief hearing should be adjourned, pending the receipt of the written reasons for the Detriment Claim. The claimant's representative stated that he preferred to adjourn matters, pending those written reasons, and the respondent's representative stated that the Tribunal had sufficient evidence to determine the application without waiting for the written reasons. Having considered those representations, I concluded that it was appropriate to hear submissions from both parties on the interim relief application. In reaching this conclusion, I considered factors including:
- 5.1. the requirement on the Tribunal to determine an application for interim relief 'as soon as practicable' after receiving the application (s128(3) ERA). I

noted that over three weeks had elapsed since this claim was submitted on 1 March 2020;

- 5.2. that I could revisit this issue if it became clear from the parties' oral submissions that the written reasons for the Detriment Claim would have a significant impact on my decision regarding the interim relief application; and
- 5.3. the potential for a significant further delay in hearing the interim relief application, given the current difficulties posed to the Tribunal's and the parties' working arrangements by the government guidance regarding the COVID-19 virus.

Application for interim relief

6. The application for interim relief is brought under the provisions of s.128 and s.129 of the Employment Rights Act 1996 (the "ERA") by the claimant. The basis for the claimant's application was that reason or principal reason for his dismissal was that he made a protected disclosure under s103A(a)(i) ERA:

"An employee who is dismissed shall be regarded for the purpose 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."

7. The claimant was employed by the respondent as a Deputy Manager at its Beeches Children's Care Home from 12 February 2018 until his summary dismissal by letter dated 25 February 2020, which the claimant states that he received on 27 February 2020. The claimant applied for interim relief proceedings in a claim form submitted to the Tribunal on 1 March 2020, which is within the 7 day time limit specified in s128(2) of the ERA. He stated that the reason for his dismissal was that he had made a protected disclosure to the respondent on 7 May 2019.
8. The respondent conceded that the claimant had made a protected disclosure (as defined by s43B(1) of the ERA) on 7 May 2019 to Ms Carolann Dodds (respondent's Managing Director) and others for the purposes of this claim. The only question for the Tribunal to determine today is whether it is 'likely' that a future Tribunal, when determining the claim, will find that the reason or principal reason for the claimant's dismissal was the protected disclosure that he made on 7 May 2019. The respondent's position is that the claimant was dismissed after four out of the five allegations of gross misconduct against him were upheld (as detailed out in the disciplinary outcome letter dated 25 February 2020).
9. The task for the Tribunal on an interim relief hearing is to make a broad assessment on the material available to try to get an understanding of the evidence and to make a prediction of what is likely to happen at the eventual substantive hearing of these claims. In doing so, I am not making findings of fact

relating to this claim. I must consider the documentary evidence that was made available to me during this hearing, together with the parties' submissions. I also note that Rule 95 of the Employment Tribunal Rules makes it clear that the Tribunal shall not hear any oral evidence during an interim relief hearing unless it directs otherwise.

10. Both parties provided helpful oral submissions during the hearing today and explained at some length the relevant evidence that I should consider. The parties also referred me to several authorities and the key legal points that I considered included:

- 10.1. the well-known authority of *Taplin v C Shipham Ltd* [1978] IRLR 450, which requires the Tribunal to consider whether it is 'likely' that the claimant will establish that he was dismissed because of a protected disclosure. 'Likely' has been interpreted to mean that the claimant has "a pretty good chance" of establishing that he was dismissed for that reason (see for example: *Ministry of Justice v Safraz* UK EAT/0578/10, *London City Airport Ltd v Chacko* [2013] IRLR 610);

- 10.2. paragraph 60 of the Supreme Court's judgment in *Royal Mail Group v Jhuti* [2019] UKSC 55 which decided that:

"If a person in the hierarchy of responsibility above the employee (here ... Ms Jhuti's line manager) determines that, for reason A (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance), it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination. If limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker."

11. On the basis of the evidence presented to me during the hearing, I have concluded that the claimant has not met the standard required to grant his application for interim relief. The key reasons for my decision are set out below. (References to 'JA' are references to a child under the respondent's care at the Beeches Home.)
12. Ms C Dodds suspended the claimant on 7 May 2019 after he made the protected disclosure. The reason for the claimant's suspension was because he would not confirm who made the allegations against Ms C Dodds (and her daughter) which formed the subject matter of that disclosure. Ms C Dodds then changed the reason for the claimant's suspension on 8 May 2019 to an incident on 19 April 2019 during which JA was injured at the Beeches Home.
13. Ms Dodds had previously sought HR advice in relation to the 19 April 2019 incident but had not discussed the allegations regarding that date with the

claimant. She had prepared a draft undated letter regarding the incident to the claimant.

14. The respondent referred the claimant's conduct on 19 April 2019 to the LADO. I note that this referral was made on 8 May 2019 and was not made within 24 hours, as required by the LADO's guidance. The LADO required the respondent to commission an independent investigation into events on 19 April 2019. However, the LADO was dissatisfied with the report and commissioned Ms Murphy to carry out a further investigation.
15. Ms Murphy's remit was stated in her report as at 22 August 2019 as follows: *"to undertake an investigation into the allegation that [the claimant] failed to take steps to procure medical aid for a child in need of medical assistance"*. She concluded that the claimant had sought advice from his manager, but that the claimant's request for a staff member to take JA to hospital was not corroborated by that staff member. She also pointed to failings in record keeping at the Beeches Home. Ms Murphy stated: *"I am aware at the time of writing this report [the claimant] is suspended from work and subject to other procedures and I would not want this report to prejudice the outcome of such"*.
16. Ms Murphy's report was produced in January 2020. The respondent sought to challenge the outcome of the LADO's internal discussions regarding that report but its challenge was rejected. The respondent then conducted its own investigation into the claimant's conduct on 19 April 2019, which had a wider remit than Ms Murphy's report.
17. The respondent raised four allegations that the respondent states led to the claimant's dismissal, namely:
 - 17.1. **allegation 1** – that the claimant was jumping on a trampoline on 19 April 2019 at the same time as JA, which was contrary to the respondent's risk assessment;
 - 17.2. **allegation 2** – that the claimant failed to seek medical attention for JA, following JA's trampoline injury on 19 April 2019;
 - 17.3. **allegation 3** – that the claimant left his work at the Beeches home on 19 April 2019 without authorisation; and
 - 17.4. **allegation 4** – that the claimant approached Aaron Davies on 11 January 2020 (during the claimant's suspension), in order to discuss the respondent's investigation into matters on 19 April 2019 and to coerce Mr Davies to change his account of events on 19 April 2019.
18. The respondent commissioned an independent consultant (Patrick Kiernon) to investigate the events relating to the allegations. Mr Kiernon interviewed the

claimant and other witnesses and considered various documents. He did not consider Ms Murphy's report. The claimant and Mr Board (trade union representative) referred to various points in Ms Murphy's report for the LADO during their meeting with Mr Kiernon. Mr Kiernon recommended that the respondent should invite the claimant to attend a disciplinary hearing.

19. The respondent then commissioned a further independent consultant (Rachel Laing) to produce a disciplinary report. Ms Laing invited the claimant to attend a meeting with her, but he refused to attend. Ms Laing interviewed other witnesses and considered various documents. Ms Murphy's report is not listed as one of the documents that Ms Laing considered. Also, Ms Laing does not refer to Ms Murphy's report in the disciplinary report.
20. Ms Laing concluded that the four disciplinary allegations against the claimant each amounted to gross misconduct and should be upheld. The respondent accepted Ms Laing's recommendation and Ms C Dodds wrote to the claimant on 25 February 2020, terminating his employment summarily.
21. I note the claimant's representative's contention that Ms Murphy's report effectively held that the claimant was not 'to blame' for the incident on 19 April 2019. The claimant's representative stated that Ms Murphy's report had not been provided to Mr Kiernon or Ms Laing in an attempt to influence their recommendations. However, I also note that:
 - 21.1. Ms Murphy's report focussed on one of the four disciplinary allegations that led to the claimant's dismissal. The claimant and Mr Board referred to this report in detail during the investigation meeting with Mr Kiernon, including quoting passages from Ms Muprhy's report which formed part of Mr Kiernon's notes of his meeting with the claimant and Mr Board;
 - 21.2. the events relating to the fourth allegation regarding Mr Davies took place a few months after Ms Murphy's investigation started;
 - 21.3. the investigation report and disciplinary report were prepared by two different independent consultants and the claimant's representative did not present any evidence at the hearing to suggest that they were influenced by Ms C Dodds;
 - 21.4. the claimant did not attend the disciplinary meeting with Ms Laing or provide written representations to her, on the advice of his trade union representative. Ms Laing therefore based her recommendations on the notes of the claimant's meeting with Mr Kiernon and the other statements and documentary evidence that she had reviewed; and
 - 21.5. Ms Laing recommended that all four allegations were upheld and that each on its own would amount to gross misconduct.

22. I have therefore concluded that the claimant is unable to show that it is 'likely' or that there is a 'pretty good chance' that a future Tribunal will find that the reason or principal reason for his dismissal was due to his protected disclosure on 7 May 2019, based on the evidence presented at this hearing.
23. The claimant's application for interim relief is therefore rejected.

Employment Judge Deeley

Dated: 27 March 2020

Sent to the parties on:

Dated: 27 March 2020

Public access to Employment Tribunal judgments

Judgments and written reasons for judgments, where they are provided, are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties in the case.