EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms L Walldock	**v**	MacCabi London Brady Recreational Trust

Heard at: Watford **On**: 28 February 2020

Before: Employment Judge George

Appearances

For the Claimant: Mr A Sendall, Counsel
For the Respondent: Mr D Kyte, Trustee

INTERIM RELIEF HEARING

1. In this interim relief application, the claimant was represented by Mr A Sendall of Counsel and the respondent was represented by David Kyte who is one of the trustees.

2. The application for interim relief is granted.

ORDERS

The following orders were made:

1. The respondent shall reinstatement the claimant, that is shall treat her in all respects as if she had not been dismissed having stated that he is willing to reinstate her.

2. The respondent shall pay to the claimant any sums due by way of pay or other benefits for the period 29 January 2020 to 29 February 2020.

3. The time for the respondent to file a response to the claimant is extended until **27 March 2020**.

4. Any application by the claimant to amend her claim should be filed and served by **17 April 2020**.

5. The claim is listed for a preliminary hearing with a time estimate of **two hours**, on **20 May 2020**, to take place at Triton House, St Andrews Street North, Bury St Edmunds IP33 1TR, starting at **2pm**.

6. The claim is listed for a full merit's hearing with a time estimate of **four days** on **12** to **15 April 2021**, in Watford Employment Tribunal, 2nd Floor, Radius House, 51 Clarendon Road, Watford WD17 1HP, to start at **10am**.

7. The claimant is to provide a draft list of issues to the respondent by **6 May 2020**.

8. The respondent is to provide comments on the draft list of issues by **13 May 2020.**

REASONS

1. In hearing this application, I have had the benefit of a bundle of documents running to 66 pages but was compiled on behalf of the claimant. I have also had a skeleton argument provided by Mr Sendall and he referred to a number of authorities.

2. The claimant started work and was employed by the respondent which is a charity. Her employment started on 13 September 2016 and ended on 28 January 2020. She has brought proceedings in reliance on a number of communications which she relies on as being protected disclosures. Notably, for the purposes of this application, she relies on an e-mail sent on 25 June 2017 which is referred to at paragraph 4 of her particulars of claim and is at page 37 in the bundle. She describes in the particulars of claim that she made a number of other communications that she says were protected disclosures over the course of the intervening period and in particular, as one sees from paragraph 13 of the particulars of claim, that she made a number of oral communications between January 2018 and June 2019 to another of the trustees. Then, she wrote an e-mail on 20 January 2020 that is at page 55 of the bundle. As I say, her effective date of termination was 28 January and therefore the claim form having been presented on 3 February, it was within the seven days stipulated under section 128 of the Employment Rights Act. She did not take part or attempt to take part in early conciliation because that is not necessary when the claim form includes as listed, an application for interim relief by reason of regulation 31d of the Early Conciliation Exemption Regulations which are statutory ….. 2014 to 254 of 2014??

3. The claim form and the notice of the interim relief application was sent to the respondent on 12 February, together with a notice of hearing for today's hearing and it is accepted by Mr Kyte on behalf of the respondent, that that was received more than seven days prior to today's date. The time within which the respondent has to reply to the claim has not yet passed and therefore, this application is being considered before I have the benefit of seeing the ET3 or the grounds of response.

4. An application for interim relief is made under sections 128 to 132 of the Employment Rights Act where the claimant was an employee who has been dismissed, both of which are accepted and has presented a complaint of unfair dismissal that includes a complaint that the reason for that dismissal or the principal reason, falls within section 103A of the Employment Rights Act. In other words, where she complains that the reason or principal reason for the dismissal was that she made a protected disclosure. There are strict time limits for making the application by the claimant and I am satisfied that he has complied with those.

5. The question for me when deciding the interim relief application is whether it appears to me that it is likely that the tribunal hearing the claim will find that the reason or principal reason was one falling within section 103(A). That has likely been interpreted to mean that there is a pretty good chance of success. After being taken to the case of Taplin v Shippam Limited, where the EAT in relation to an earlier iteration of this right said that the correct approach is for the Employment Tribunal to ask itself whether the applicant has established that she has a pretty good chance of succeeding in the final application to the tribunal. In order to obtain an order, the claimant must achieve a higher degree of certainty in the mind of the tribunal than that of showing that she just had a reasonable prospect of success. It was accepted in the more recent decision of Raja v Secretary of State for Justice, which is an Employment Appeal Tribunal decision of Judge Byrtles, but although Taplin v Shippam is under predecessor legislation and dates from the 1970s, the principals are still the right principals to apply. That means that I need to be satisfied that the claimant has got a pretty good chance of succeeding on each of the building blocks that amount to a successful claim of whistleblowing dismissal. In other words, did she make a protected disclosure? In this case, certainly for the purposes of todays' application, the claimant has focussed on section 43(b1) and (d). It is made clear that at trial, she would argue that her disclosures were also covered by section 43(b1)(a) but it was accepted by Mr Sendall that for today's purposes that section does not add anything to the weight of his argument.

6. Then, I would need to go onto consider whether she has a pretty good chance of succeeding and showing that the reason or principal reason for the dismissal was that she made that disclosure. There are a number of elements to a communication amounting to a protected disclosure, for the purposes of this claim, or certainly for today's purposes, it is a question of whether it was a disclosure of information, that in the reasonable belief of the claimant was made in the public interest, and in the reasonable belief of the claimant, tended show that the respondent was in breach of legal obligations to other people, or that the health and safety of another individual has been, is or is likely to be endangered. There needs to be sufficient particularity in the contents of the communication that it can be said to be a communication of information and I have also been taken to the relevant authority on the question of what amounts to the public interest, namely Chesterton Global v Nurmohamed and I read out during the course of argument, the section of the head note that is between

sections b and d in the industrial cases report that is relied on by the claimant's counsel.

7. I have given careful scrutiny to the claimant's case. This is because the respondent is acting effectively in person. The consequences for any respondent can be serious in the present climate where the Employment Tribunal is listing full merits hearings well into the future. Taking into account the overriding objective, it seemed to me that the obligation to keep the parties on a level playing field meant that I should give careful scrutiny to the claimant's case. As I have said, we are at a relatively early stage in the proceedings and I do not yet have a response in writing setting out the reason for dismissal relied on by the respondent, they have not taken the opportunity to add documents into the bundle. They refer to there being a redundancy situation, but there are no documents that may in the fullness of time be relied on in relation to any investigation that there may have been in response to the allegations and information communicated by the claimant on 20 January. There is no documentary evidence concerning any redundancy procedure followed by the respondent on this occasion or in any previous occasion.

8. I take into account that when looking at the e-mail of 20 January it could be said that there are some references to concerns by the claimant about her personal situation and this may have been anticipated by the claimant's representatives, hence their preparation of the case of Chesterton Gloval v Nurmohamed. The e-mail chain dating from July 2017 suggests that some of the claimant's earlier concerns that may, on their face, have appeared to be about wider matters were resolved with her personal situation and it appears that she had taken legal advice on her situation prior to drafting the letter of 20 January. However, it was argued in response to those matters on behalf of the claimant, that she was not specifically saying that because she had made a disclosure in 2017, she was dismissed in 2020, it was part of a picture of protected disclosures that she says she has made over time culminating in the e-mail of 20 January. Essentially, it is suggested that she had become a 'thorn in the side' of the respondent and that it had reached a stage where they were not going to tolerate her any more. As to the reason why she had felt it necessary to formalise her concerns, I was taken to a section in the e-mail of 20 January headed 'my health' on page 56, where she says that the stress occasions to her as office manager in trying to get these problems addressed by senior management has made me unwell and I have been obliged to consult my doctor. It was argued on behalf of the claimant that she was setting out concerns about her responsibilities. She was also worried that her personal situation was under threat to some extent, the words used was that she was being 'squeezed out', but she attributed that to her constantly drawing attention to the problems that she regarded as being potentially grave for the health and safety of individuals working at and visiting the site and also for the charity.

9. That is how the claimant's case is put on the reason why she wrote the e-mail of 20 January and in it she sets out particulars of health and safety concerns and failure to comply with a legal obligation as follows:

> "1. **Health and Safety Concerns**
> - the fire alarm system at the premises is not a current legal specification / regulations;
> - There is no current certified fire marshal for the premises;
> - There is a rat infestation in the building;
> - The car park is dangerous to use when the premises are operating on busy football weekends;
> - The health and safety risk assessments are not up-to-date;
> - The roof the club house building is in a state of disrepair and is unsafe;
> - In particular, I am aware that asbestos tiles in the physio room were removed and disposed of during the physio room renovations, without the buildings taking safety precautions."

10. I pause there to say that when I was making enquiries about when some of these matters might date from, the respondent accepted that the roof the building as a nursery, had been fixed since damaged carried out by storm Ciara and therefore it was clearly a current matter as at 20 January.

11. The points that she refers to:

> "2. **Failure to comply with legal obligations**
> - Breaches by Maccabi London Football Club of IT licenses granted to MLBRT;
> - Inappropriate provisional or claim for Gift Aid funds on behalf of Maccabi London Lions.
> - Use of separate building on site as a Children's Nursery that is not fit for purpose;
> - Failure to seek a change of use for the nursery building for nursery use for over 3 years;
> - Failure to deal with asbestos safety. I believe that this is also a breach of legal obligations as well as putting the health of others at risk;
> - Failure to comply with employment legislation and provide appropriate legal documents to staff such as:
>   a) Incorrect employment status of Elaine Taylor. Employed as an independent contractor without NI/PAYE/Contract etc.
>   b) Failure to issue staff with written statement of particulars of employment;
>   c) Inappropriate treatment of staff, such as bullying as staff members and unlawful discrimination towards staff on grounds of six or marital status."

12. I am not at this stage making a final determination. The claimant may or may not succeed at the full merits hearing. The respondent argues that some of the matters that she is referring to were within the scope of her responsibility. However, I have reached the conclusion that she has a pretty good chance of showing that this e-mail was a protected disclosure, she gives details about why she considers the respondent in breach of health and safety regulations or good practice, that is necessary to avoid health and safety risk. Some of the matters may be old, but others are not.

As far as Elaine Taylor is concerned, I have seen some invoices dating from the summer of 2019. I have not been told, it is possible that a defence will be put forward as to why she should be an independent contractor. But, at this stage, nothing has been put forward from which might lead me to think that a tribunal at final hearing would conclude that the claimant was not genuine in the concerns that employment practices were such at the respondent that the respondent was in breach of individual employee's rights.

13. Some of the matters complained of concerned only of herself, but many do not. She gives information and she has pretty good prospects of showing that this tended to show a breach of employment law as to section 1 statements, tax law as to payments of tax and National Insurance to employees, planning law regarding the use of building. Health and Safety risks to users of the nursery that was alleged to not be fit for purpose and users of the site with regard to a rat infestation and the lack of a fire marshal. I am also satisfied that she has a pretty good chance of showing the reason, or principal reason for the dismissal was this disclosure. I make an aside to note that it is the principal reason, it is not the question merely of being an effective reason and that is the higher test for whistleblowing dismissal cases.

14. The e-mail was sent on 20 January and it states in terms that the claimant regards herself as making a protected disclosure. The chronology from thereon is that the claimant is certified sick by her GP, see page 58, and that is due to last until 2 February. There is a quick response from Mr Kyte saying that he will look into the points that the claimant raises in her 20 January e-mail. Mr Kyte says he forwarded it to Alison Lipman who was then the Centre Manager for her to look into. Then on 27 January, which as far as I have been told is the next matter in the chronology, the claimant discovers that her e-mail and laptop passwords have been changed and her access removed. Mr Kyte said that was to prevent her from working while she was certified unfit to attend work. However, on 27 January, in an e-mailed response to the claimant's query about this situation Mr Kyte says "I can explain and will call you tomorrow". He does not immediately proffer the explanation that the respondent wants to protect the claimant from herself and this seems to me to be potentially be an inconsistency that would need to be looked at, at the final hearing.

15. The on 28 January, there are a number of attempted telephone calls during the course of the morning. No doubt it will be a matter of dispute about exactly what was and was not said, and therefore it seems right that focus has been at this stage of proceedings on the dismissal e-mail that is at page 63, in which, amongst other things, Mr Kyte says for the sake of clarity – "your employment will cease with immediate effect". The respondent denies in the strongest terms that the reason for the dismissal was the e-mail of 20 January 2020. Mr Kyte says that he had been thinking, that the respondent in fact, had been thinking of it being necessary to make the claimant redundant for purely financial reasons since before Christmas but he had not wanted to act prior to the festive

period out of consideration for the claimant at that time. The respondent may well then need to explain if they were able to postpone the dismissal from before Christmas, why it was taken on 28 January 2020, rather than a procedure being started at that point. It is said on behalf of the claimant, that the e-mail does not expressly say that her employment has been terminated because of redundancy, although the reference is to the final payment including redundancy. It certainly does not say in terms we cannot afford you, and that that is the reason for them having to let her go. It apparently followed a situation which had been some sort of procedure in relation to earlier redundancies that had taken place a year or two previously. The respondent had access to HR advice that they pay a subscription for. Mr Kyte says it is possible that the trustees may have consulted them. Taking into account the short period of time between 20 and 28 January, the removal of access to e-mail and laptop passwords on 27 January and not immediately giving the reason that is now advanced, the lack of clear statements in the e-mail of 28 January for the reason for dismissal, the apparent difference in procedure followed on previous redundancy occasions, the lack of explanation for it apparently being fiscally appropriate to delay making the claimant redundant from before Christmas, but not for long enough to have an appropriate process in January 2020. All of those matters lead me to conclude that the claimant has a pretty good chance of succeeding and showing that the principal reason was the letter of 20 January and therefore I allow this application.

____

Employment Judge George

Date: ………20 March 2020

Sent to the parties on: .....1 April 2020..

....

For the Tribunal Office