



EMPLOYMENT TRIBUNALS

Claimant: Miss U Prasad

Respondent: Epsom & St Helier University Hospitals NHS Trust

REASONS

(requested by the claimant on 24.8.20)

1. This was a request for written reasons for the tribunal's Judgment, sent to the parties on 4 August 2020, refusing the claimant's application for Interim Relief.
2. By a claim form presented on 16.6.20, the claimant claims, automatic unfair dismissal, sex discrimination and race discrimination. She contends that she was automatically unfairly dismissed by the respondent for making protected disclosures pursuant to section 103A of the Employment Rights Act (the "ERA"). Included within the claim was an application for interim relief pursuant to section 128 ERA.
3. The issue I had to determine in relation to this application was whether the claimant's automatic unfair dismissal claim was likely to succeed at the substantive hearing.

The Law

4. By section 128(1) ERA, an employee who presents a complaint of automatic unfair dismissal pursuant to section 103A may apply to the Tribunal for interim relief.
5. An application for interim relief will be granted where, on hearing the application, it appears to the tribunal that it is likely that on determining the complaint to which the application relates, a tribunal will find that the reason for dismissal is the one specified. (s.129(1) ERA)
6. The case of Taplin v Shippam Ltd (1978) ICR 1068 EAT defined "likely" in section 129(1) as a "pretty good chance of success". That test was re-affirmed in the case of Dandpat v The University of Bath and Ors UKEAT/0408/09

7. The standard of proof required is greater than the balance of probability test to be applied at the main hearing. The EAT recognised in the *Dandpat* case that such a high burden of proof was necessary as the granting of such relief will prejudice a respondent who will be obliged to treat the contract as continuing until the conclusion of the proceedings. Such a consequence should therefore not be imposed lightly.
8. Section 103A ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason is that the employee made a protected disclosure.
9. Section 43B ERA defines a qualifying disclosure as any disclosure of information which in the reasonable belief of the work making the disclosure, is made in the public interest and tends to show one or more of the matters set out in sub-paragraphs a-f.
10. The claimant relies on the disclosures that are set out at paragraph 1.8 of the claimant's written submission document and refer to disclosures made from January 2019 onwards.
11. The respondent accepts that some disclosures were made but its focus is on the dismissal itself and whether there is a causal link with the disclosures. For the purposes of this hearing, I have assumed that the disclosures referred to were qualifying disclosure but without prejudice to the respondent's case that certain matters were not.
12. The reasons relied on by the respondent for the claimant's dismissal are set out in the dismissal outcome letter dated 9 June 2020. These are concerns about relationships with colleagues, concerns about the claimant's diagnostic and clinical work and clinical governance and clinical management. These are reasons related to capability. It is the claimant's case that these reasons were a sham to cover up the real reason. It is the respondent's case that the claimant was restricted from practice and that the hearing was convened as a result of its genuine concerns about her clinical practice and conduct, and relationships with colleagues.
13. The overall conclusion of the disciplinary hearing was that 6 of the concerns raised in the terms of reference were upheld and 9 were not. It also concluded that serious capability and conduct concerns had led to a breakdown in relations with colleagues which damaged staff cohesion and potentially jeopardised patient care and safety, making the claimant's position at Trust untenable.
14. In order to win her automatic unfair dismissal claim, the final tribunal will need to be satisfied that the principal reason for her dismissal was the disclosures. It was submitted by the respondent that this was not likely to be the case because the claimant in her ET1 and other internal documentation alleges that her dismissal was race and sex discrimination and these are equal, if not preferential reasons for her dismissal. Whilst that may have been the claimant's subjective view of the position, the reason for dismissal is an objective test based on a set of facts known to the employer or beliefs held by it that caused it to dismiss. It is the respondent's burden to prove not the claimant's. I therefore don't consider the order in which she places her allegations to be particularly material.

15. It was submitted on behalf of the claimant that the capability, conduct and relationship breakdown issues were invented to mask the real reason, which was the disclosures.
16. An obvious difficulty is that the investigation which is said to have culminated in the claimant's dismissal commenced in or before June 2017 and therefore pre-dated the first of the claimant's disclosures, which is said to have occurred around January 2018. The claimant seeks to address this by arguing that following the disclosures, the investigation was ramped up by the claimant's suspension in February 2018.
17. Coincidence of timing is often the basis for drawing adverse inferences, particularly where the timing of an action cannot be otherwise satisfactorily explained. I am not in a position to know what inferences if any, the final tribunal is likely to draw because there is no evidence before me of the respondent's explanation for why the suspension happened when it did. Even if the Tribunal goes on to find that the suspension amounted to a detriment because of the disclosure, it has to go on to find that that motive of the suspending officer infected the minds of those who made the decision to dismiss.
18. The dismissal letter is comprehensive. It deals with each allegation in turn and, more importantly, does not uphold a substantial number of the allegations set out in the disciplinary terms of reference. That suggests to me a certain level of independence from the MHPS investigation and report that militates against the decision makers being infected by any ulterior motives of individuals involved in the earlier stages of the process. Of course, that can only really be tested by cross examination of the decision makers, a process which is apt to be done at the final hearing.
19. I have not heard any evidence at this hearing so I have to make my decision based on the documents before me. What they show is that concerns were raised about the claimant in June 2017 (before the disclosures) with Dr Bogle, through reports from others and he instructed that an investigation take place to establish their accuracy. They were investigated by Dr Beeton, a person independent from the Trust and following his investigation, he produced a report dated 12.7.17, in which found a number of professional capability issues in relation to the claimant's practice. A formal investigation then followed, culminating in dismissal.
20. Where concerns have been raised about a doctor's clinical practice and capabilities, one would expect in the natural course of events for these to be investigated. That such an investigation was carried out is therefore not remarkable. The claimant's representative contends that there were serious procedural flaws in how that investigation was carried out. Whether that is the case is a matter that can only be properly assessed following a full consideration of the evidence. I cannot say on the papers what view the final tribunal is likely to take on that. Even if I could, procedural flaws indicate unfair dismissal, they don't necessarily point to an automatic unfair dismissal.
21. This case is a very fact sensitive one and much will turn on the final tribunal's view of the credibility of the witnesses.
22. Based on the paperwork that I have been taken to, I cannot say that the final tribunal is likely to find that the principal reason for dismissal was the claimant's protected disclosures. The application for Interim relief is therefore refused.

Case No: 2302397/2020 & 2302411/2020

Employment Judge Balogun
Date: 1 September 2020