EMPLOYMENT TRIBUNALS

Claimant: **Mrs T Kostakopoulou**

Respondent: **University of Warwick & others**

Heard at: **Birmingham** **CVP** **On: 3 November 2020**

Before: **Employment Judge Dean**

Representation

Claimant: not in attendance

Respondent: Ms Akua Reindorf, of counsel

This hearing took place against the background of the background of the coronavirus pandemic and was conducted remotely by CVP in accordance with safe practice and guidance.

JUDGMENT

The Claimant's application for interim relief in respect of a claim presented to the Tribunal on 5 August 2020 for interim relief does not succeed.

REASONS

Background

1. By way of background in this case, a claim form was presented to the Employment Tribunal on 5 August 2020. The Claimant brought complaints of automatically unfair dismissal pursuant to Section 103A of the Employment Rights Act 1996 (“ERA”) for having made protected disclosures, detriment pursuant to Section 47B of the Employment Rights Act (protected disclosures) and for unlawful discrimination because of the protected characteristics of her sex and race and breach of contract and for holiday pay. Subsequently the claimant has raised a complaint that the respondent failed to provide written reasons for her dismissal.

2. The application contained an application for interim relief and this Hearing has been listed to consider that application for interim relief.

3. The Claimant’s application is that having made what she asserts to be protected disclosures, the Respondent treated her detrimentally because of having made protected disclosures qualifying for protection under Section 43B of the Employment Rights Act 1996 (“ERA 1996”). As a consequence of subsequent actions upon the part of the Respondent, the Claimant asserts that she has been dismissed by the Respondent on the 29 July 2020 and that her dismissal was an automatically unfair dismissal in breach of the provisions of Section 103A of ERA. The claimant claims for Interim Relief having been unfairly dismissed “*for the reason (or, if more than one, the principle reason) for the dismissal is that the employee having made a protected disclosure*”. The respondent asserts that the claimant was dismissed for the sole reason of her misconduct and deny that the claimant has been subjected to detriments as a consequence of making protected disclosures.

4. The Claimant was employed as an academic member of staff within the First Respondent’s School of Law from 2012 until her dismissal on the grounds of gross misconduct on 29 July 2020. The background to the disciplinary allegations being made against the Claimant is outlined in the

First Claim. In summary, the following allegations were made against the Claimant:

a) failure to comply with reasonable management requests; non-attendance at five separate meetings to discuss issues raised by students;

b) not fulfilling her duties in good faith;

c) attempting to influence potential witnesses, specifically by questioning students in relation to complaints they may have made against her, in an effort to undermine the on-going investigation into the fulfilment of her duties; and

d) harassing and displaying threatening and intimidating behavior towards students when questioning them in relation to complaints they may have made against the Claimant.

The Issues

5. The complaint in respect of which an interim application is brought, is under the procedure of Section 129 of the Employment Rights Act 1996 which provides: -

> "*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 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or*
>
> *(ii)paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or*
>
> *(b)that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.*

6. The Claimant asserts that she has brought a claim pursuant to Section 103A ERA 1996 and the Claimant makes an application for interim relief pursuant to Section 128(1)(A)(i) ERA 1996:

   "***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 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or

   (ii)paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or

   (b)that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met,

   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."

7. In essence, the issues to be considered are whether it appears that it is likely that on determination of the complaint to which the application relates the Tribunal will find: -

   i. that the Claimant been dismissed?

   ii. the reason for the dismissal, (or if more than one, the principal reason for the dismissal) was that the employer made a protected disclosure as

described at Section 43B of ERA 1996? In particular that it is likely the Tribunal at the final hearing would find:

a) That the Claimant had made a disclosure to her employer;

b) That she believes that the disclosure tended to show one or more of the things itemised at (a)-(f) under Section 43B (1);

c) That that belief was reasonable;

i) That the disclosure was made in the public interest;

ii) That the disclosure was the principle reason for her dismissal.

The Legal Principles

8. In considering an application or interim relief, I am required to undertake a predictive exercise as to the likely outcome of the full-Hearing. In undertaking that exercise, I seek to avoid making determinations of factual issues as if mine is a final determination of the matter. In the circumstances, the application stands on the pleadings, documentary evidence and the submissions and arguments of the parties. Having regard to the provisions of Rule 95 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 in considering an Interim Relief application *"the Tribunal shall not hear oral evidence unless it directs otherwise".* This is not a case in which I consider it appropriate to hear oral evidence for either party.

9. I have had the opportunity to take into account the claimant's application in her Grounds for Complaint [16-28] and, somewhat unusually in this case, also the Grounds of resistance [87- 93] submitted by the respondent on 30 October 2020. I observe that in very many hearings considering an application for Interim Relief the respondent will have had only the barest of notice of the complaint and not had the opportunity to file a response to the complaint.

10. The leading cases on the test to be applied by an Employment Tribunal hearing an application for interim relief are those of Taplin -v- C. Shippam Limited [1978] ICR1068 and the Ministry of Justice -v- Sarfraz [2011] IRLR 562. An application for interim relief is for a brief urgent

Hearing which is to make a broad assessment of the application and in particular the question whether the Claimant under Section 103A is likely to succeed. In the case of Sarfraz, Mr Justice Underhill – President at the Employment Tribunal gave the following guidance at paragraph 14:-

> *"Thus, in order to make an Order under Sections 128-129 the Judge had to have decided that it was likely that the Tribunal at the final hearing would find five things:*
> *(i) That the Claimant had made a disclosure to his employer;*
> *(ii) That he believes that the disclosure tended to show one or more of the things itemised at (a)-(f) under Section 43B (1);*
> *(iii) That that belief was reasonable;*
> *(iv) That the disclosure was made in good faith;*
> *(v) That the disclosure was the principle reason for his dismissal."*

11. Further guidance is given by the EAT in London City Airport Limited -v- Chacko [2013] IRLR610 in which Mr Recorder Luba QC provided further guidance upon the approach to be taken and in particular the correct approach to be applied to the meaning of "*it is likely*". The conclusions reached by Mr Recorder Luba QC reaffirms the exercise of judgment that an Employment Judge at the interim application hearing is required to undertake, at paragraph 23 he explains:

> "23. *In my judgment the correct starting point for this appeal is to fully appreciate the task which faces an employment judge on an application for interim relief. The application falls to be considered on a summary basis. The employment judge must do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The Employment Judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the Employment Tribunal but whether "it appears to the tribunal" in this case the employment judge "that it is likely". To put it in my own words, what this requires is an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim."*

12. The Claimant who is a litigant in person, though not unfamiliar with the process of Employment Tribunal Hearings. The claimant is employed by the respondent as an academic member of staff within the First Respondent's School of Law. Notwithstanding her academic appreciation of employment law the claimant is not, so far as I am aware, an employment law practitioner and may be forgiven for not appreciating that the nature of applications for interim relief are of their nature to be dealt with, with sufficient expedition so that, if successful, the relief may be granted in a timely fashion to preserve the employment relationship. EJ Findlay, in responding the claimants application to postpone the hearing until she had had sight of and opportunity to consider the respondent's grounds of resistance, provided an explanation that it was not necessary for the respondent to have submitted a response to the complaint before the interim application was considered, and that it was not necessary for the judge considering the application to hear evidence nor for the parties to be represented before the tribunal. I hope that on reflection the Claimant will better understand more clearly the nature and constraints of an interim relief application and hearing.

13. In considering whether or not it is likely that at a Final Hearing a Tribunal will find that the principal reason for the dismissal was on the grounds of whistle-blowing, without making binding Findings of Fact, an initial assessment must be made of whether, if a breach of a legal obligation is asserted by the Claimant, to have found the Section 103A application. The source of the obligation which the Claimant believes applies, should be identified and capable of verification by reference to statute or regulation. In <u>Blackvey Ventures Limited (t/a Chemistree) -v- Gahir</u> [2014] IRLR416 HHJ Serota QC commended the approach to be taken by Employment Tribunals in considering claims by employees for victimisation for having made protected disclosures: -

> *"1. Each disclosure should be identified by reference to-date and content.*
>
> *2. The alleged failure or likely failure to comply with illegal obligation, or matter giving rise to the Health & Safety of an individual having been or likely to by endangered or as the case may be should be identified.*

3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.

4. Each failure or likely failure should be separately identified.

5. Save in obvious cases if a breach or illegal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to Statute or Regulation."

Mrs Justice Slade DBE in Eiger Securities LLP -v- Korshunova [2017] IRLR 115 @ paragraph 46 confirmed that the identification of the source of the legal obligation "*does not have to be detailed or precise but it must be more than a belief that certain actions are wrong."* Actions may be considered to be wrong because are immoral, undesirable or in breach of guidance without being in breach of a legal obligation.

14. Mrs Justice Slade DBE later drew the distinction between a legal obligation as opposed to a moral or lesser obligation which a Claimant may consider to have been broken which does not amount to a qualifying disclosure.

15. In addition Ms Reindorf has drawn my attention to a number of authorities within her skeleton t which I have hade regard in reminding me of the proper approach to be taken and the meaning of "likely" which in this context is a "pretty good chance of success" which is "something nearer to a certainty than mere probability" and that a "good arguable case" is not enough. The respondent has provided copies within the authorities bundle of the following:
Chesterton Global Ltd (trading as Chestertons) and another v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731
Ms L Parsons v Airplus International Limited UKEAT/0023/16/JOJ
Ms L Parsons v Airplus International Limited UKEAT/0111/17/JOJ
Sheik Khalid Bin Saqr Al Qasimi v Robinson UKEAT/0283/17/JOJ
NASUWT v Harris 2019 UKEAT/0061/19/BA
Ibrahim v HCA [2020] IRLR 224

The Materials & arguments

16. The respondent has prepared a Interim Relief Hearing bundle which extends over 131 pages and it is indexed.

17. The claimant asserts that she has been unfairly dismissed by the respondent and that the real reason for her dismissal was that she had made protected disclosures under s 103A of ERA 1996 and thus that her dismissal was an automatically unfair one. In the particulars of her complaint at para 16 the claimant states:

> *"16. I shall rely on the following protected disclosures made in good faith and in the public interest:*
> *a) Internal Disclosures contained in my letters to the Sir David Normington, Chair of the Governing Council of the University of Warwick, Mrs Cooke, Deputy Chair of the Council of the University of Warwick, the Members of the Council and Ms Sandby-Thomas, Registrar of the University, of 6 June 2020, 13 June 2020, 24 June 2020 and 28 June 2020. These relate to failure to comply with legal obligations, disclosure that the health and safety of any individual has been, is being or is likely to be endangered and information tending to show any of the above is being or is likely to be deliberately concealed.*
>
> *b) Internal Disclosures containing in the five grievance files I have submitted to the University of Warwick since January 2020 falling within the ambit of above stated grounds of wrongdoing (s. 43B(1)(b),(d) and (f) of the ERA) .*
>
> *c) External Disclosures made to the Information Commissioner (submitted complaint RFA 0897317 on 9 December 2019 and ongoing since ICO was not satisfied with the University of Warwick's response), the Department of Education, the Health and Safety Executive and my Member of Parliament, Mr A. Bell. I had previously made the disclosures internally and they had not been dealt with appropriately.* "

18. On 27 October 2020 [73-76] Notice of this interim Relief hearing was sent to the parties giving the requisite 7 days notice. Although the respondent has sought to agree a bundle of documents with the claimant in readiness for this Interim Relief application and I have been referred to their correspondence with the claimant [95-97] which drew the claimant's attention to disclosure any documents that she wished to include in the interim relief bundle:

> *"Please can you send me the documents Professor Kostakopoulou will be referencing for the purposes of her interim relief application. I will include the Tribunal papers but you will need to send me the early conciliation certificates and any documents which relate to Professor Kostakopoulou's argument that her dismissal was because she made protected disclosures."*

19. Ms Reindorf has confirmed that notwithstanding repeated requests sent to the claimant for such documentation to be disclosed none was forthcoming from the claimant.

20. In considering what, if any, documentation there may be within the bundle that is relevant to the claimant's alleged disclosures I have noted that within the bundle I have had sight of the claimants application to add a complaint that the respondent had failed to provide her with written reasons for her dismissal [43]. Within that document the claimant refers to *"A: Outstanding Pre-Disciplinary Matters"* in respect of which the claimant referred that she had :

> *"been awaiting your response, careful examination in light of the duties of care and due diligence in ensuring the protection of human rights, including my health and safety, and actions in respect to:"*

The claimant referred then to correspondence including that being identified as Internal Disclosures to Sir David Normington and Ms Sandby-Thomas. The content of the document does not reveal any reference to matters in the public interest and on its face refers only the claimant's personal circumstances and the respondent's unfavorable treatment of her and her human rights and health and safety. I have been able to identify no other documentation refers to matters which I might identify as relating to her argument that she had been dismissed for having made protected disclosures.

21. It is evident from reading the claimant's Claim form and the particulars of her complaint as well as the letter to which I have referred to above that the claimant has expressed at length her dissatisfaction with the respondent's treatment of her and the effect she asserts that treatment has had on her health and safety in the context of her private workplace disputes. I have not however ad sight of the protected disclosures that she asserts she made in her claim form that formed part at least of her complaints to the Employment Tribunal case number 1304457/2020.

22. The claimant asserts that she was unfairly dismissed. I have been referred to the respondent's ET3 and their Grounds of Resistance [87-93] in which the respondent describes the reason for the respondent subjecting the claimant to a disciplinary process was that in summary, the following allegations were made against the Claimant:

    "a) failure to comply with reasonable management requests; non-attendance at five separate meetings to discuss issues raised by students;
    b) not fulfilling her duties in good faith;
    c) attempting to influence potential witnesses, specifically by questioning students in relation to complaints they may have made against her, in an effort to undermine the on-going investigation in to the fulfilment of her duties; and
    d) harassing and displaying threatening and intimidating behaviour towards students when questioning them in relation to complaints they may have made against the Claimant."

23. The respondent gives an account that they proposed Professor Andy Lavender was to conduct a disciplinary investigation into the allegations against the claimant and the claimant was suspended on 16 January 2020. The claimant raised a grievance against her suspension which was investigated and not upheld. The claimant raised an appeal in respect of the grievance and that was not upheld on appeal. The respondent completed the disciplinary investigation which led to a disciplinary hearing being held on 20 July 2020. The decision at the hearing held in the claimant's absence was that she was found guilty of the misconduct alleged at a) and b) and of gross misconduct in respect of the allegations c) and d). Despite her long service that was not considered sufficient mitigation to excuse her conduct or an alternate sanction to dismissal. The claimant appealed her dismissal and participated at the appeal hearing held on 27 August 2020 [116]. The respondent states they effectively reheard the disciplinary complaints and upheld the original decision. I have been referred to the documentary evidence in relation to the disciplinary and appeal process [110-131].
24. The claimant is clear in her grounds of application that she has made disclosures to her employer that she believes tend to show one or more of the things itemised at section 43B(1) (a)-(f) of ERA 1996. However absent

sight of any evidence to support the content of those disclosures, not even the documents within which such disclosures were alleged to have been made, it is not possible for me to identify the precise nature of the alleged protected disclosures. It is not possible for me to conclude in my summary assessment that such disclosures have been made in good faith.

25. To the extent that I have been referred to other documents sent by the claimant that refers to any of her alleged disclosures that would appear to be to allegations of a breach of legal obligations in respect of her personal employment and contract terms and her own health and safety. There is nothing before me that leads me to conclude that the claimant at the time she made such disclosures that she did subjectively believed that she was making disclosures that were in the public interest, as opposed to being disclosures about her personal interests that may or may not have been of public interest and that such believe was objectively reasonable.

26. It is not possible on the limited information presented to me by the claimant to determine if it is likely on determining the complaint that the Tribunal will find that the reason or principal reason for the dismissal was the proscribed ground as required by s129 ERA 1996. That is not to say that at a final hearing a Tribunal panel hearing all relevant evidence may not determine that protected disclosures were made and that the reason or principle reason for the claimant's dismissal was that she had made protected disclosures.

27. In contrast the respondent has provided documentation that suggests the respondent had cause to conduct a disciplinary investigation into the claimant's conduct and to convene a disciplinary hearing the outcome of which was the claimant dismissal for gross misconduct. I note that the claimant makes a number of assertions in her grounds of complaint that as well as being substantively unfair the disciplinary process was flawed para 20 [21-23]. The respondent on my assessment of the documents submitted to me has identified a substantive reason why the claimant's employment was terminated and I am unable to reach the conclusion that it is likely or that the claimant has a pretty good chance of success in the final determination of the merits of her complaint to the Employment Tribunal.

Assessment

28. It is unfortunate in this case that the claimant, having been informed that the hearing was to proceed and her application to postpone was not granted has not engaged with the respondent to produce to them and thus to the tribunal documentary evidence to support her application for interim relief. This application for interim relief is one that has not been brought before the tribunal in as expeditious a time as it usually would and that is to be regretted. However, I make my summary assessment on the information and materials before me. I have taken the claimant's pleaded case and correspondence and considered the papers in the bundle prepared by the respondent.

29. I have considered the written submissions made on behalf of the respondent and also the oral submissions made to me on the day. Given the nature of the hearing I have sought not to make findings of fact that would otherwise bind the Tribunal panel hearing all of the evidence at the final hearing of the case.

Conclusions

30. The factual matrix in this case is far from clear on a summary consideration of whether the Respondent's act of dismissing the claimant was one which was done because the Claimant had made a protected disclosure contrary to Section 103A of the Employment Rights Act or for unrelated reasons as asserted by the Respondent as being because of the claimant's gross misconduct. On a summary assessment I am not able to conclude that the claimant has been able to demonstrate that it is likely that the Tribunal at a final hearing will conclude that the claimant was dismissed by the respondent because of her having made a protected disclosure and that the disclosure was the principle reason for her dismissal.

31. On the necessary summary consideration of the documentary evidence that has been brought to my attention, the Claimant has not particularised any breach of any actual legal obligation as opposed to good practice standards and moral standards to which the Respondent

might adhere, nor does the Claimant particularise any alleged breach of Health & Safety.

32. Having considered the authorities to which my attention has been drawn, and having considered the documentation and representations that have been made, I am unable to conclude that the Claimant has a *"pretty good chance"* of establishing that she was dismissed contrary to Section 103A ERA 1996. To succeed in the application the Claimant must have a pretty good chance of satisfying the burden of proof at the Final Hearing, such that on my consideration of the interim relief application, I am not able to conclude that the Claimant has demonstrated that it is likely that on determining the complaint to which the application relates, the Tribunal will find that the reason (or if more than one, the principle reason for the dismissal) was one of those specified in Section 103A. From the summary assessment that I have made based upon the documents to which I have been referred and the argument before me the claimant has not satisfied the standard of consideration to succeed in her application for Interim Relief. The Interim relief application does not succeed.

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Employment Judge Dean
17 December 2020