EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105502/2020

Held at Glasgow on 16 November 2020

Employment Judge R Gall

Ms S Coyle	**Claimant** **Represented by:** **Mr J Lee -** **Solicitor**
Ferguson Marine (Port Glasgow) Ltd	**First Respondent** **Represented by:** **Mr A Crammond -** **Counsel**
Mr T Hair	**Second Respondent** **Represented by:** **Mr A Crammond –** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the application for Interim Relief made in terms of Sections 128 – 130 of the Employment Rights Act 1996 pursuant to a claim made in terms of Section 103A of that Act is refused.

As stated at the Hearing, in terms of Rule 62 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, written reasons will not be provided unless they are asked for by any party at the Hearing itself or by written request presented by any party within 14 days of the sending of the written record of the decision. No request for written reasons was made at the Hearing. The following sets out what was said, after adjournment, at the conclusion of the hearing. It is provided for the convenience of parties.

REASONS

1. This hearing took place in person at Glasgow on 16 November 2020. The claimant was represented by Mr Lee, solicitor. The respondents were represented by Mr Crammond, Counsel.

2. The claim made is one of discrimination, the protected characteristics being sex and disability, and of automatically unfair dismissal. The dismissal of the claimant is said to have been automatically unfair as the reason or principal reason for dismissal was that the claimant made protected disclosures. The claimant has less than 2 years' service and so is unable to make what might be referred to as a "standard" unfair dismissal claim.

Applicable Law.

3. The provisions in relation to arrangements for a hearing on an interim relief ("IR") application, the test to be applied by the Tribunal and principles confirmed by case law as being appropriately involved in that test were not in dispute.

4. Without specifically rehearsing that law and those tests, the Tribunal is to exercise its powers and is to grant an application for IR if "it appears to the Tribunal that it is likely that on determining the complaint to which the application relates the Tribunal will find that (in this case) the reason or principal reason for dismissal is as specified in Section 103A of the Employment Rights Act 1996" ("ERA").

5. Cases to which I was referred were *Taplin v C Shippam Ltd* 1978 IRLR 450, *Raja v Secretary of State for Justice* UKEAT/0364/09, *Dandpat v The University of Bath* UKEAT/0408/09, *Ministry of Justice v Sarfraz* 2011 IRLR 562, *His Highness Sheikh Bin Sadr al Qasimi v Robinson* UKEAT/0283/17, *Cavendish Munro Professional Risk Management Ltd v Geduld* 2010 ICR 325, *Kilraine v Wandsworth London Borough Council* 2018 ICR 1850,*The Learning Trust & Others v Marshall* UKEAT/0107/11 and *London City Airport Ltd v Chacko* UKEAT/0013/13.

6. An application for IR is made and heard by the Tribunal well in advance of the hearing itself. There had been a case management Preliminary Hearing ("PH") held in this case on 11 November. At that PH I determined, having heard parties' representatives, that no witness evidence would be heard at the IR hearing. I also refused an application, spoken to at that PH, for a documents Order. A Note was issued following that PH confirming those case management rulings.

7. No evidence was therefore heard at this IR hearing. That is the position envisaged in terms of Rule 95 of the Employment Tribunals (Rules of Constitution & Procedure) Regulations 2013. As I did not hear evidence there are no findings in fact made.

8. Both parties submitted documents. I was taken to many of them during submissions.

9. As mentioned, if the application for IR is to be successful it must appear to the Tribunal that the Tribunal hearing the case is likely to determine that the claim will succeed. This has been interpreted as requiring the Tribunal to be of the view that when the case proceeds to a hearing there is "a pretty good chance of success*"* for the claim.

10. The Tribunal hearing an application for IR has a difficult task as it involves an assessment of the papers available and submissions made. The Tribunal requires to undertake a broad assessment on the material available. The application is to be determined expeditiously and on a summary basis. The Tribunal has to make as good an assessment as it feels able to do. That is confirmed in the *Al Qasimi* case referred to above. There is to be a broad assessment by the Tribunal.

11. The test I have to apply does not involve application of the balance of probabilities as the touchstone. The burden on a claimant in an application of this type is therefore greater than is the case at a full hearing.

The claim

12. The claimant says that she made protected disclosures, the disclosures qualifying for protection in terms of Section 43B of ERA. Specifically, she has referred to Section 43B (1) (b) and (d). The claim for IR proceeds solely against the first respondent, the claimant's former employer.

13. A qualifying disclosure requires to be disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and shows or tends to show one of the elements mentioned in that Section. It also requires to be made, except in specific circumstances, to the employer.

14. There is guidance in case law as to what constitutes a disclosure of information as opposed to an allegation being made.

15. The likelihood of establishing each of the necessary elements essential to the claim has to be considered on a preliminary basis at an IR hearing.

16. In course of submission, it was highlighted by Mr Crammond that some of the alleged disclosures were said to have been to officials of the Scottish Government rather than to the respondents. Mr Lee stated in reply that it might be that the claimant wished to rely on other provisions in terms of which a disclosure could qualify as a protected disclosure. He referred, as I understood him, to Sections 43G and 43H of ERA. The difficulty in that regard, as I mentioned to Mr Lee, is that no case is currently advanced in terms of those or any other Sections beyond the claims referring to Section 43 B (1), sub paragraphs (b) and (d). I can only consider the claims as currently set out by the claimant in her case. I cannot therefore consider the IR application looking to Sections not pled.

17. In my assessment I do not make findings in fact as mentioned. I also do not make any decisions on the key areas of dispute which might bind an Employment Judge or Tribunal hearing the case in the future. I require to look beyond the case purely as the claimant sets it out and to consider the terms of the response. I do not of course have the ability to assess which version of events is correct or is to be preferred, not having heard evidence.

Assessment

18. I looked at various areas in my assessment of whether it was likely that the claim that the reason or principal reason for dismissal was the making of protected disclosures by the claimant would be successful.

19. I considered what was said to have constituted the disclosures said to have been made. I considered to whom it was said that the information had been disclosed. I considered the information before me relevant to the matter of reasonable belief on the part of the claimant that the disclosures were made in the public interest. I considered the respective positions of parties on those matters and also in relation to the dismissal itself. The question of the connection said to exist between disclosures and dismissal was assessed by me. I had regard to the factors the claimant said pointed to the reason or principal reason for dismissal being the making of protected disclosures.

20. It was relevant in my deliberations, as I saw it, to keep in mind that the claimant was a senior HR person with many years of experience. That would indicate the likelihood of her having an awareness of what was involved in a protected disclosure and how that type of information might be passed on to qualify as such. Evidence might of course weaken this as being a factor in the ultimate assessment of the case.

21. It was also relevant in my view to have regard to the fact that the claimant did not specifically allege that she had made protected disclosures or had suffered detriments as a result until her grievance was presented post dismissal. There may be more information in this area or clarification obtained when evidence is heard.

22. As pled, the claimant's dismissal is alleged by her to have been an act of direct discrimination and also an act of harassment and victimisation under the Equality Act 2010, the protected characteristics being said to be disability, perceived disability and/or sex. That is also a factor to which I properly have some regard as I see it.

Disclosures

23. I had the benefit of being taken to what were said to have been the protected disclosures, where made in writing, and to being informed of the verbal disclosures said to have been made.

24. I believe there to be a very real area of dispute as to there having been disclosures of information as required in terms of Section 43B of ERA. The claimant was certainly unhappy and had issues she raised. There are questions as to whether what the claimant was doing was providing professional advice, with a cautionary note being sounded, rather than making a protected disclosure. Potentially what was said might lie in both categories. There is a clearly arguable point which can be made, however, that what was involved does not lie in the "protected disclosure camp". The claimant's role and experience may be of some relevance in the weighing of matters eventually to be undertaken by the Tribunal.

25. This element of the claimant's case cannot be said on assessment to have a pretty good chance of success, I concluded. It may or may not be successful when all the evidence is heard and when documents are spoken to. That is a different matter. Hearing of evidence is necessary in my view to be able to determine the context and to come to a decision on the matter which I have to in this IR hearing. Whilst I am not making a final determination, and could not as part of the IR hearing, what is clear to me is that given these points, I cannot conclude that the claimant meets the test under the relevant Sections of ERA.

26. Without evidence it is also impossible to be clear enough in terms of the test as to what was in the mind of the claimant when what was said or written happened. Did she have a reasonable belief that the information disclosed showed or tended to show one of the matters in terms of Section 43B as she contends? I do not of course require to be certain of that. I do however require to be satisfied that there is a significantly higher degree of likelihood of success than 51 %, that being the position explained in the *Sarfraz* case above. There are points made by the respondents as to her self-interest in the matters she raised, supported, they say by surrounding circumstances

(disputed by the claimant) and the matters which she did raise. Once more, all of this might be very clear, one way or the other, when evidence has been heard. Whilst I bear in mind the claimant's comments as to the identity and circumstances of her employer, at present it is not in my view sufficiently clear for it to appear to me that on hearing the case the Tribunal is likely to find that the claimant had a reasonable belief she acted in the public interest in saying what she said or writing what she wrote.

27. There is also the question of the person to whom any disclosures accepted as having been in that category and as having been made in the public interest were made. 3 people mentioned as recipients of alleged protected disclosures were not fellow employees of the claimant.

28. In addition, some of the matters she raises relate to obligations of the second respondent as a director rather than those of the first respondents.

29. On this leg of the claim, the prospects for success are not such that I am persuaded that there is a pretty good chance of success. I appreciate that not all of the aspects mentioned relate to all of the alleged protected disclosures. They do however extend to the alleged disclosure said to have been made some 2 weeks before dismissal.

<u>Reason or principal reason for dismissal</u>

30. I was taken to several productions by Mr Lee. I understand why he did that. He looked to build up a picture which showed that the respondents had, out of the blue, called the claimant to a meeting at which she was dismissed. He sought to highlight a lack of investigation and procedure, a lack of performance management, the appointment of a replacement for the claimant said to have been on the day of her dismissal and the way in which it was said the claimant's post confirmation of dismissal grievance, and appeal, supported her view that the making of protected disclosures was the reason or principal reason for dismissal. The letter of dismissal was, he said, opaque and gave no clear reasons for dismissal. He also referred to post termination correspondence between the respondents' legal advisors and the claimant, which was said to be of relevance. All of this supported the making of

protected disclosures as being the reason or principal reason for dismissal, it was argued.

31. These are all elements disputed by the respondents either as having occurred or as being anything from which the conclusion contended for by the claimant can be drawn. The respondents, for example say, and took me to documentation in line with this, that recruitment of the claimant's replacement was in hand some time before her appearance at her place of work. They point out that this is not a standard unfair dismissal claim and so non-contractual procedures are not of particular significance. They say that there had been conversations with the claimant as to her performance in certain key areas.

32. I mention at this point that the claimant herself refers to criticism being made of her a few months before her dismissal, so it does not seem that she was unaware of dissatisfaction, however unfounded she may have viewed that dissatisfaction as being and however unhappy she may have been as to the manner in which it was communicated.

33. In due course all of those areas will no doubt be tested by evidence being led. I have set them out to illustrate the many central areas which are in dispute and in relation to which the position of both parties is very stateable and is supported to an extent by documentation. There is clearly a lot of material to be examined by the Tribunal hearing the evidence in the case. That Tribunal will have the benefit of hearing evidence in chief and cross examination, and of looking at the documents in that light.

Conclusion

34. My broad assessment of the claim as advanced, having regard to the submissions and the documents to which I was taken, is that the claimant certainly has a stateable case looked at as things lie. There are clear legal and factual disputes, however, for which I can see a basis from the point of view of both parties.

35. The documents I was taken to certainly do not however reveal a "smoking gun" which might assist the claimant achieve the weight in her case which

would take her to the point of having a pretty good chance of success. It is of relevance that what is said to have been the protected disclosure made closest to the claimant's dismissal is disputed as being in that category on various grounds. All of those grounds seem to me to be very arguable and to be of some substance, although no concluded view can be expressed. This matter is touched upon above. What is pled as having been said is certainly an expression of concern. There is competing evidence anticipated from the documentation as to what the discussion comprised. The exchange, is however, not something which, looking at respective positions of parties, meets the "pretty good chance of success" test in my view when the label of protected disclosure is sought to be attached to it. Whatever was said was also said to someone other than the claimant's employer. That means there is a degree of difficulty in categorising it as a protected disclosure as the case is pled. Any connection between this being said and dismissal would therefore also be a matter in which there is a degree of difficulty. This means that I could not conclude that the test in terms of Section 129 of ERA was met by the claimant.

36. There is also an issue, as I see it, in regarding the test as being met by inferences being drawn from certain matters as to the reason or principal reason for dismissal. The claimant sought to draw such inferences from the way in which her dismissal was handled with no formal warnings or formal performance management, the terms of the dismissal letter, the appeal and grievance proceedings and correspondence regarding what was accepted by the claimant at this hearing as being breach by her of her undertaking. These were all areas where alternative explanations were advanced. It is not in my view possible to say at this stage in assessing those competing versions that the claimant has a pretty good chance of success in persuading the Tribunal to draw such an inference from one or more of those elements. To be clear, I am equally not saying that there is little reasonable prospect of success or that there is no reasonable prospect of success in such an argument. I have concluded that context will be vital and likewise assessment of the witnesses and their explanations of events and communications, or lack of them, will be of much significance.

37. It is also of relevance that the claimant herself, as mentioned above, pleads that her dismissal is an act of direct discrimination. She does not plead that ground of claim on an esto basis. Her position is that she was dismissed because of grounds which were discriminatory. Mr Crammond submitted that dismissal cannot be because of discrimination in circumstances where the reason or principal reason was the making of a protected disclosure. It could however be argued that discrimination was an effective cause of dismissal, even where the making of a protected disclosure was the principal reason for dismissal. Conduct can be directly discriminatory even although discrimination is not the only or even main reason. The claimant's case however founding upon discrimination alongside the making of protected disclosures as the reason for her dismissal is of relevance in my assessment at IR stage.

38. All of the above considerations mean that I do not regard the test I have to apply at this stage as having been met by the claimant.

39. For those reasons therefore I have refused the application.

40. At conclusion of the delivery of this Oral Judgment Mr Lee renewed the claimant's application for a documents Order. That was initially made on 5 November 2020 and had been refused at the PH on 11 November as mentioned above. The application was restricted to paragraph 1 of the application initially made.

41. Mr Crammond had not anticipated this application. He sought time to take instructions. I regarded that as being appropriate. Taking of instructions during a CVP hearing is not straightforward. It was also by this time almost 5pm. I therefore decided that it was appropriate to allow the respondents time to take instructions and to intimate their position. A Case management PH could then take place by telephone to deal with this application and opposition.

42. Discussion led to that case management PH being set down for 10 am on 1 December to last for one hour. The Clerk to the tribunals is requested to issue hearing notices for that case management PH. The case management PH currently in place for approximately a week later should remain in place. The

hope is that with the disputed application for the documents order having been dealt with, progress can be made in relation to fixing the hearing in the case.

Employment Judge: Robert Gall

Date of Judgment: 17 November 2020

Entered in register: 25 November 2020

and copied to parties