EMPLOYMENT TRIBUNALS

Claimant	Mrs L Oyebisi
Represented by	Mr H Ogbonmwan, Adviser
Respondent	Hyde Housing Association Ltd
Represented by	Mr N Caiden, Counsel
Before:	**Employment Judge K Andrews**

WRITTEN REASONS FOR THE REFUSAL OF INTERIM RELIEF (provided at the request of the claimant)

1. This was the claimant's application for interim relief. Her employment terminated on 8 October 2020 and the application was made on 15 October 2020.

2. The claimant was represented by Mr Ogbonmwan. There were a number of technical difficulties encountered at the commencement of the hearing (which was delayed due to Mr Ogbonmwan's understandable initial absence due to a very recent bereavement). Ultimately however we were able to overcome those difficulties and I was satisfied that Mr Ogbonmwan was fully able to present the claimant's case. He had also sent written submissions to the Tribunal on the morning of the hearing which I had before me and took into account. I also had a written skeleton argument from Mr Caiden for the respondent together with a bundle of documents.

The Relevant Law

3. 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. Section 103A 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.

4. 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). The burden of proof is on the claimant.

5. 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 reaffirmed in the case of Dandpat v The University of Bath and ors UKEAT/0408/09.

6. 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 is 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.

Factual Context

7. The following chronology of events is agreed between the parties:
    a. The claimant commenced employment on 14 October 2019.
    b. The respondent's concerns about the claimant's performance were – at least to some extent – raised with her at formal one to one meetings on various dates between 26 November 2019 and 16 January 2020.
    c. On 27 January 2020 the claimant commenced a period of long-term sick leave.
    d. On 29 January 2020 the claimant made an allegation to her employer of sexual harassment by a colleague – an alleged protected disclosure. Thereafter the claimant says that she made further protected disclosures to the respondent's occupational health service as well as the police and in the course of subsequent grievances.
    e. A subsequent investigation and disciplinary process by the respondent did not uphold the allegation against the colleague.
    f. The claimant was due to return to work in July 2020 and she was invited to a probationary review to be held by Ms Hill. This was put on hold however as the claimant again went on sick leave and raised a grievance against Ms Hill. That grievance (and appeal) was not upheld but it was decided that Ms Edwards would chair the probationary review.
    g. All internal processes having been concluded, Ms Edwards held the probationary review in the absence of the claimant on 5 October 2020. On 8 October 2020 the claimant was informed that her employment was terminated owing to poor performance and not passing the probationary period.

8. For the purposes of this hearing I assume that the disclosures relied upon by the claimants were protected disclosures. That assumption is only for the purposes of today however and whether or not they were in fact protected remains a live issue for a future tribunal.

Decision

9. Even from that starting point however I am not persuaded that the claimant has satisfied the necessary test for interim relief to be granted namely that

she has a high degree of likelihood of succeeding with her argument that the reason or principal reason for the dismissal was one or all of those disclosures.

10. There is very clearly a very triable issue as to the reason for the dismissal not least because of the apparent documentation by the respondent of performance concerns with the claimant in December 2019 and January 2020 before the incident took place in January 2020 and before any protected disclosures were made. Also the dismissal letter itself expressly stated that the review was of the claimant's performance before her period of absence started in January and that absence followed the alleged incident.

11. The issue as to what the reason(s) for dismissal was can only be resolved by hearing and testing evidence together with a full and proper consideration of the documentation. It may well be that the concerns raised by the claimant about the respondent's approach to her treatment generally and to her dismissal are valid but on the basis of the information before me, I cannot say that those concerns amount to a "pretty good chance of success" of her automatically unfair dismissal claim. Accordingly the application for interim relief fails.

Employment Judge K Andrews
Dated 9 February 2021