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EMPLOYMENT TRIBUNALS

Claimant: Sonia Srivastava

Respondents: (1) Brand Advance Ltd
(2) Deca Diversity Media Consultancy Ltd

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 05 May 2021

Before: Employment Judge Housego

Representation:

Claimant: In person
Respondent: Jamie Anderson, of Counsel, instructed by Markel Law LLP

JUDGMENT

The application for interim relief is dismissed.

REASONS

Introduction

1. The Claimant was dismissed by the 2nd Respondent. She claims this was because she made public interest disclosures, and seeks interim relief: that is that her contract of employment will continue until the case is heard.

The legal framework for an interim relief application

2. Section 128 of the Employment Rights Act 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.”

3. The relevant section in this case is S103A, a claim for automatically unfair dismissal for making public interest disclosures.

4. The procedure is set out in S129:

“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.”

5. The effect of an interim order is set out in S130:

“130 Order for continuation of contract of employment.

(1) An order under section 129 for the continuation of a contract of employment is an order that the contract of employment continue in force—

(a) for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and

(b) for the purposes of determining for any purpose the period for which the employee has been continuously employed,

from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint.”

6. There are requirements a Claimant must meet in order to seek an order for interim relief. In this case it is that the Claimant claims to have made protected public interest disclosures (“pid”) and been dismissed as a result. She also claims that sex and race discrimination are part of the reason why she was dismissed. As there needs only to be a taint of unlawful discrimination for claims of discrimination to succeed these are not mutually exclusive claims.

7. In deciding whether an interim order is to be made, no findings of fact are made and no oral evidence is given. The claim and the defence are assessed on the papers, including witness statements, and upon considering submissions made by both parties.

8. An application for interim relief will succeed if it appears to the Tribunal that it is likely¹ that on determining the complaint to which the application relates the Tribunal will find that the reason (or if more than one the principal reason) for the dismissal is (in this case) public interest disclosures made by the Claimant.

9. There has been case law about exactly what “*it is likely*” means. It is not the balance of probabilities. It is not the criminal standard of “*beyond reasonable doubt*”. It is somewhere in between. Whether that is “*a pretty good chance of success*”² or other formulation does not really assist when the statute uses a word of simple English: “*likely*”. Reformulating the test seems to me unhelpful, as it did to Mr Recorder Luba QC when suggesting those words³. Perhaps “*probable*” conveys a similar meaning. What is clear is that this is not a low hurdle – it is a “*comparatively high*”⁴ test⁵.

10. The test applies to all aspects of such a claim, so that it must be likely that the Claimant will show factually that she made disclosures, and that such disclosures are both qualifying, and protected, made genuinely and are in the public interest⁶, and that this was the reason she was dismissed.

11. My task in dealing with an application such as this to do the best I can with such material as the parties are able to deploy by way of documents and argument in respect of their respective cases. I must then make as good an assessment as I am able of whether the Claimant is likely to succeed in a claim for unfair dismissal based on public interest disclosure. The test is not whether the Claimant *is* ultimately likely to succeed in her complaint but whether it “*appears*” to me that it is “*likely to succeed*”. This requires an expeditious summary assessment as to how the matter looks to me on the material that I have. Of necessity this involves far less detailed scrutiny of the respective cases and the evidence then will ultimately

¹ S129(1)

² London City Airport Ltd v Chacko [2013] IRLR 612 at paragraph 10 and Wollenberg v Global Gaming Ventures (Leeds) Ltd and Herd [2018] UKEAT/0053/18/DA, paragraph 25

³ In *Chacko*

⁴ Dandpat v University of Bath [2009] UKEAT/0408/2009, cited in *Chacko* at paragraph 10

⁵ And also MoJ v Sarfraz [2011] IRLR 562

⁶ Hancock v Ter-Berg & O’rs [2020] IRLR 97

be undertaken. I have to do the best I can with the untested evidence advanced by each party.⁷

Claimant's case

12. This is set out in the case summary and list of issues in the case management order of even date, and I do not repeat it here.

Respondent's case

13. The particulars of claim are a “scattergun” and unstructured series of matters.

14. It is by no means clear what disclosures were made, and to whom and when.

15. It was by no means clear whether anything said was information or allegation (Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436) public interest.

16. There is no interim relief possible for sex and race discrimination claims (Steer v Stormsure Ltd (SEX DISCRIMINATION, HUMAN RIGHTS) [2020] UKEAT 0216_20_2112).

17. There was no evidence provided by the Claimant. There was only the Particulars of Claim. There was a substantial volume of documentation provided by the Respondents, from which it was not apparent that the claim of automatically unfair dismissal was likely to succeed.

Consideration

18. Is it likely that qualifying disclosures were made? If so, they are protected disclosures, because they were made to the employer (S43C(1)(a)).

19. The provisions of S47B(1) are clear. A qualifying disclosure is something disclosed which in the reasonable belief of the worker is made in the public interest and tends to show that one of the headings that follow is met.

20. The details of what disclosures were alleged to have been made are not detailed (and in my case management order I have ordered the Claimant to provide further and better particulars of them for this reason). The Respondents do not accept that any disclosures were made. The application for interim relief has to fail at this first hurdle, because on an assessment of the basis of the claim I cannot form the opinion that the claim is likely to succeed, as without it being likely that disclosures were made logically I cannot form the view that it is likely that the claim of automatically unfair dismissal will succeed.

21. If there were public interest disclosures, were they in the public interest, or about her own employment contract and not in the public interest? There is case law about whether something in the private interest of the employee may also be in the public interest⁸, to the effect that it is all a question of scale. The larger the number of people whose interests are engaged by a breach of contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest. There was no one else in the position of the Claimant for the matters she said that she disclosed about the way she was

⁷ From the headnote of *Chacko*

⁸ *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731 paragraph 32-37

treated. It cannot be said that this is likely to succeed, on the evidence before me, for that reason.

22. The matter of asserting a greater reach than was possible to deceive customers and the government to obtain financial advantage is certainly capable of being a public interest disclosure. The difficulty for the Claimant in this application is that her assertion that this was the case is not backed up by any evidence. I cannot form the view that it is likely to succeed solely on the basis that the Claimant says it is so.

23. There is no asserted public interest disclosure related to health and safety. That claim is that the Claimant was automatically unfairly dismissed for refusing to attend work for Covid related reasons.

Causative link between public interest disclosure and dismissal

24. The next stage would be to see whether public interest disclosures were likely to be the reason for the dismissal. This is not fact finding. It is a broad overview of the evidence I have been shown. The statute says it must be "*likely*" that the public interest disclosure is the reason or principal reason for the dismissal. The Claimant must show that she has "*a pretty good chance of success*".

25. The Respondent says that the dismissal was for performance reasons and misconduct. There is a dispute of fact about this. The Claimant had a dispute with the 1st Respondent and so was moved to a sister company, the 2nd Respondent, only a couple of months before. There may have been any number of reasons why the Claimant was dismissed and from the documentary evidence provided by the Respondents I cannot form the view that it is likely that the Claimant will succeed in showing that the reason she was dismissed was because she made public interest disclosures.

26. It is not enough that it was, in the Claimant's assertion, unfair, as she cannot claim unfair dismissal save for a reason not requiring 2 years' service. She must persuade me that it was unfair and (to obtain interim relief) because she made public interest disclosures, and there is no evidence to enable me to form such a view.

27. For these various reasons the application for interim relief fails and is dismissed.

Employment Judge Housego

07 May 2021