EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Ms V Wilton-Oluwole		**Lewisham & Greenwich NHS Trust**

Heard at: London South Employment Tribunal **On:** 1 April 2021

Before: Employment Judge Hyams-Parish

Representation:
For the Claimant: Mr D Ebekwe (Trade Union Representative)
For the Respondent: Mr L Harris (Counsel)

JUDGMENT

The application for interim relief pursuant to sections 128 and 129 of the Employment Rights Act 1996 is refused.

REASONS

Introduction

1. This application for interim relief is made in respect of a claim which was presented to the Employment Tribunal on 15 January 2021. The Claimant brings various claims against the Respondent, including a claim of automatic unfair dismissal pursuant to s.103A Employment Rights Act 1996 ("ERA"), together with claims of race discrimination contrary to the Equality Act 2010, and breach of contract.

2. There are three protected disclosures relied on by the Claimant in support of her s.103A ERA claim. These are: (i) an email sent to Shobah Steel on 5 December 2019; (ii) a grievance complaint dated 13 August 2020; and (iii) a further grievance complaint on 19 November 2020. These shall be referred to below as the first, second and third disclosures respectively.

3. The Claimant was dismissed for gross misconduct in January 2021. The reason alleged by the Respondent for the dismissal was the "serious bullying and harassment" in breach of the Respondent's Dignity at Work policy. The Claimant alleges that the reason for her dismissal was because she made the above protected disclosures, albeit it was not clear to me, given that the Claimant also alleged that the dismissal was an act of race discrimination, whether she was alleging that the making of the protected disclosures was "the reason or principal reason" for dismissal.

Practical matters

4. For this hearing I was provided with a bundle of documents extending to 328 pages. As the Respondent had not yet provided a formal response to the claim, the time limit for doing so having not yet expired, they supplied a witness statement from the dismissing officer, together with some documentary exhibits.

5. It was impracticable for me to read everything that I had been given and neither was it necessary for me to do so for today's purposes. I did read those documents referred to during submissions before reaching my decision.

6. My decision, with reasons, was provided at the conclusion of the hearing. These written reasons are provided at the request of the Claimant's representative.

Law

7. The powers to make an order for interim relief are set out in sections 128 and 129 ERA which provide as follows:

> ***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.***
>
> ***…….***
>
> ***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.***

8. My task is to make a broad assessment on the material available to me to try to get an understanding of the evidence and make a prediction of what is likely to happen at the eventual substantive hearing of these claims. I have considered the well-known authority of ***Taplin v C Shipham Ltd [1978] IRLR 450***. What is clear from this authority is that I must be satisfied that there is '*a pretty good chance'* that the Claimant will establish that she was dismissed for the particular reason on which she relies, in this case that of a protected disclosure. In the case of ***Ministry of Justice v Sarfraz [2011] IRLR 562*** Underhill J said that the term "likely" in s.129(1) ERA "*does not mean simply more likely than not but connotes a significantly higher degree of likelihood i.e. something nearer to certainty than mere probability*".

9. Thus, to make an order for interim relief I must be satisfied that it is *likely* that the Tribunal at the final hearing in this case will find: (1) that the Claimant made a disclosure of information to her employer; (2) that she believed that the disclosure of information tended to show one or more of the matters listed at 43B(1)(a)–(f) ERA; (3) that such belief was reasonable;

(4) that the disclosure was in the public interest; and (5) that the disclosure was the reason or principal reason for the Claimant's dismissal.

10. It is a difficult task but not one that a Tribunal should shy away from simply because the case appears complicated. But it is important to bear in mind that it is an 'expeditious summary assessment' as to how the matter appears to me on the material available, doing the best I can with the untested evidence advanced by each party. This necessarily involves a far less detailed scrutiny of the parties' cases than will ultimately be undertaken at the full hearing. For this reason, I make no findings of fact at this hearing as that will be the task of the Tribunal at the final hearing.

11. It goes without saying that a decision to refuse to make an order for interim relief does not mean that the Claimant will lose her claim at the hearing or that the Respondent will win. My decision does not prejudice the Claimant or the final hearing at all. At the final hearing, the Tribunal will have the benefit of hearing the evidence, including hearing witnesses tested under cross examination. Nothing I say today should be taken by the parties as meaning that they will win or lose or that they have a strong or weak case. It simply isn't that kind of exercise.

Analysis and conclusions

12. During his submissions to me, Mr Ebekwe placed a greater emphasis and importance on the first disclosure made by the Claimant. Mr Ebekwe sought to persuade me that it was necessary, when considering whether the first disclosure was a qualified disclosure within the meaning of s.43B ERA, to look at this together with another email sent from a consultant nine months later on 13 September 2020, to the Claimant's representative, Mr Neckles.

13. I have to say it is far from clear, and certainly not as obvious as Mr Ebekwe would suggest, that the email said to be the first disclosure conveys any information tending to show one of those matters at s.43B(1) ERA. It certainly does not pass the threshold that I am to consider today, namely that it is likely to be considered by a Tribunal to be a protected disclosure. I do not believe that a Tribunal would be bound to read the first disclosure alongside the additional email sent to Mr Neckles (referred to above) when determining whether the first disclosure was a protected disclosure. There is no obvious link or connection between the two. They are months apart in terms of when they were sent, and the additional email was not sent by the Claimant in any event. Whether the Tribunal decides to read these together will be a matter to be explored at the hearing.

14. Regarding the second and third disclosures, Mr Ebekwe chose not to place as much emphasis on these during his oral submissions. Having looked at them, I believe there are similar problems with the second and third disclosures as there are with the first disclosure. I do not look at those two later disclosures and conclude that it is *likely* that a Tribunal will consider

they are protected disclosures. Indeed, it is not entirely clear what they are disclosing. Clearly, the Claimant's belief will need to be examined by the Tribunal with care, and that can only be done at a hearing.

15. Turning to whether it is likely that a Tribunal would find that the reason or principal reason for dismissal was because the Claimant made protected disclosures, even putting aside the apparent difficulties I have with the disclosures themselves, it is impossible for me to see the causal link on the basis of what I have heard today. Far from being likely that a Tribunal will find in the Claimant's favour, I can see obstacles bearing in mind the dismissing officer's apparent lack of knowledge about the disclosures. That is not to say there is no causal link; but it is impossible to say at this stage and can only be determined at the hearing. There is a clear dispute between the parties as to what the dismissing officer actually knew about the disclosures at the time of the dismissal. As far as the second and third disclosures are concerned, it appears the disciplinary process was well underway when they were made. Therefore, one questions whether such action can be because of the protected disclosures.

16. I listened carefully to Mr Ebekwe's submissions during which he explained why it was likely that a Tribunal would find as fact that the Claimant was dismissed because she made protected disclosures, including, according to Mr Ebekwe, the fact that the Claimant was not given a right of appeal under the dignity at work policy. However, I was not at all persuaded that the link between the dismissal and the protected disclosures was nearly as obvious as he suggested.

17. I do of course emphasize that my above comments should not be taken as suggesting that the Claimant's case is weak or that the Respondent's case is strong. All I am saying is at this preliminary stage, I cannot conclude that it is likely that the Claimant will succeed with her s.103A ERA claim.

18. For all the above reasons, it is my judgment that the Claimant's application should be refused.

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Employment Judge Hyams-Parish
1 April 2021