EMPLOYMENT TRIBUNALS

Claimant: **Ms J Rankine**

Respondent: **Elite Fostering Limited (1)**
Mr Benni Joseph (2)

Heard by: **CVP** **On: 8th July 2021**

Before: **Employment Judge Britton**

Representation :

Claimant: Mr M Jolly (Claimant's son)

Respondent: Ms P Cunningham (Consultant)

JUDGMENT

It does not appear to the Tribunal that it is likely that on determining the complaint to which the application relates that it will find that the claimant has been unfairly dismissed by virtue of Section 103A of the Employment Rights Act 1996. The claimant's Interim Relief application is refused.

REASONS

Background

1. By her Claim Form presented on 14 June 2021 the claimant asserted that she had been dismissed for "whistleblowing". The claimant alleges that this was the reason or principal reason for her dismissal and that her dismissal was therefore automatically unfair. Pending resolution of his unfair dismissal claim, the claimant has applied for interim relief pursuant to Section 128 of the Employment Rights Act 1996 ("ERA 1996"). Although there are two named respondents, this application can only be made against the First Respondent as they were the claimant's employer (hereinafter "the respondent").

2. On the face of the Claim Form, the relevant disclosures on which the claimant appears to rely were made on various dates between 17th January

2020 to around the end of August 2020.The Claimant relies on fourteen disclosures in all. The disclosures were made primarily to the employer but the Claimant also contends that disclosures were made to Ofsted in early August 2020.

3. The issue to be determined is whether I am satisfied that "it is likely that on determining the complaint" the Tribunal will find that the reason or the principal reason for dismissal is the prohibited reason under Section 103A ERA 1996 which the claimant has asserted.

4. The application for interim relief was heard by CVP and it was set down for a full one day hearing. Although both parties made l oral submissions and, as indicated, I was furnished with a large bundle of documentation, no oral evidence was called.

Relevant Law

5. Sections 128-132 ERA 1996 set out the procedure for an application for interim relief. Section 128(1) provides that:-

"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(d), 102(1), 103 or **103A**, or
(ii) –
(b) –

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).

6. As to the ground on which interim relief may be granted, Section 129(1) ERA states as follows:-

(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(d), 102(1), 103 or **103A**, or
(ii) –
(b) –

7. Section 129 ERA also deals with the position that arises if the Tribunal is satisfied that it appears likely that on determining the complaint the Tribunal will find that the reason (or if more than one the principal reason) for the dismissal is one of those specified, as set out above, and for the purpose of this claim, the primary remedy is either reinstatement or re-engagement. If the employer is unwilling to reinstate or reengage the employee pending the hearing of the unfair dismissal claim, the Tribunal shall make an Order for the continuation of the employee's Contract of Employment.

Application of the Relevant Law

8. The burden of proof is on the claimant to satisfy the Tribunal that it is "likely" he was dismissed for an automatically unfair reason: Bombardier Aerospace v McConnell [2008] IRLR 51.

9. The test that a Tribunal is required to apply when determining an application for interim relief is whether "it is likely that on determining the complaint" the Tribunal will find that the reason or the principal reason for dismissal was the reason which the employee has asserted. It is not sufficient that the employee is able to establish that "it is likely" that they were otherwise unfairly dismissed,ie.for other reasons. In this case, the respondent contends that the reason or principal reason for dismissal was conduct, which is not a prohibited reason, and if that appears to be the real reason the application for interim relief will fail.

10. The correct approach to be applied to the meaning of "it is likely" has been resolved by case law. It is not sufficient for the employee to show that, on the balance of probabilities, he or she is going to win at the subsequent unfair dismissal hearing. It was held in Taplin v C Shippam Limited [1978] ICR 1068 that the appropriate test is higher than simply establishing that the balance is somewhat more in favour of the employee's prospect of success. It must, on the authority of Taplin, be established that the employee can demonstrate a pretty good chance of success.

11. The EAT endorsed the Taplin approach in Raja v The Secretary of State for Justice UKEAT/0364/009 and Dandpat v University of Bath [2009] UKEAT/0408/009.

12. For the interim application to succeed, the claim that the claimant was dismissed for an automatically unfair reason under Section 103A ERA must therefore stand "a pretty good chance of success" or, alternatively, as referred to by the EAT in Derby Daily Telegraph v Foss [1991] UKEAT/631/921 it is necessary for the claimant to establish that his case looks like "a potential winner".

13. Pursuant to Section 103A ERA 1996 an employee who is dismissed shall be regarded for this part as unfairly dismissed if the reason for the dismissal is that the employee may have protected disclosure.

14. As stated by the EAT in Ministry of Justice v Sarfraz [2011] IRLR 562 for an application for interim relief to be granted, it must appear to be likely that a Tribunal will find that: -

- The claimant has made a disclosure to their employer;
- They believed that the disclosure tended to show one or more of the matters set out at (a)-(f), Section 43B ERA 1996;
- The belief was reasonable;
- The claimant believed the disclosure to be in the public interest;
- The disclosure was the principal reason for the dismissal.

15. The respondent does not concede that the reason or principal reason for the claimant's dismissal was an alleged protected disclosure. In order to determine the true reason for the claimant's dismissal, it is going to be necessary to make determinations in relation to disputed facts. It is not the role of an Employment Judge to make findings of fact when considering an application for interim relief. However, it is necessary for me to weigh the evidence available to me in order to make an assessment as to whether it appears that the claimant would be likely to succeed in her unfair dismissal claim on the basis that her dismissal was for a prohibited reason.

16. In London City Airport Limited v Chacko [2013] IRLR 610 the EAT stated as follows:-

"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".

17. In London City Transport Limited the EAT went on to hold that what is required is an expeditious summary assessment as to how the matter looks to the Employment Judge on the material available and stated that this "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".

Factual Background as it appears from the material available

18. The claimant assisted Mr Joseph to set up a fostering agency (i.e., the respondent) as an Independent Consultant. The Claimant contends that she did so on the understanding that she would have a stake in the business and be entitled to a profit share. The claimant was the Responsible Individual and assisted the respondent to become approved by Ofsted. The claimant first became employed by the respondent in June 2020 as Service Manager and she performed various roles which included Agency Decision Maker (ADM) and Quality Assurance (QA).

19. On or about 6th August 2020 Ofsted carried out a virtual monitoring visit, following an anonymous complaint, during which the roles of ADM and the QA role performed by the claimant were identified as potentially conflicting. The lack of safeguarding notifications also appears to have been an issue.

The proposal made by Mr Joseph was for the Claimant to relinquish the ADM role and focus upon QA.

20. At the Respondent's action plan review meeting around the end of September 2020 the Claimant and Mr Joseph failed to reach agreement regarding the separation of her roles. The Claimant strongly resisted the proposal that she should give up the ADM role. It looks as though the Respondent wanted the ADM role to be carried out by an external person and that they felt that the QA role needed a hands-on full-time employee. The Claimant's proposed amendments to the action plan appear to have been rejected. This impasse was not resolved notwithstanding further meetings and the claimant started working from home on 5th October 2020. The respondent wanted the claimant to relinquish her ADM role, but she was unwilling to do so.

21. On 7th October 2020 the Respondent invited the Claimant to a meeting to discuss the potential irretrievable breakdown in the working relationship between the Claimant and Mr Joseph. The letter informed the Claimant that a possible outcome of this meeting could be her dismissal. The meeting was re-scheduled and then overtaken by events.

22. On or about 13th October 2020 the claimant was signed off work due to stress. The claimant raised a formal grievance on or about 9th November 2020, which was heard by Kate Davies (Independent Fostering Panel Chair) on 25th November 2020. The substance of the grievance was broadly the dispute regarding the proposal to remove the ADM role and numerous allegations relating to the manner in which the Claimant had allegedly been treated by the Claimant. A fundamental issue for the Claimant at this time appears to have been her belief that Mr Joseph had breached their "pre-agency set up and registration agreements" regarding her stake in the business, profit share and other benefits.

23. In December 2020 the claimant was informed that her grievance had not been upheld. The reason for the decision was set out in a detailed report prepared by Ms Davies. A mediation meeting was then held on 11th December 2020, following which the parties decided to embark on pre-termination negotiations. Although progress appears to have been made, a Settlement Agreement was not in fact signed and or about 2nd February 2021 the respondent appears to have issued the claimant with an ultimatum that the terms offered would be withdrawn if the Settlement Agreement had not been signed by 5pm on 5th February 2021.

24. On 5th February 2021 the claimant sent a detailed letter to the Respondent addressed to the "Whistle-blowing Officer" and headed "formal complaint – public interest disclosures and detrimental treatment". The respondent does not in fact have a Whistle-blowing Officer so this correspondence was dealt with by Mr Joseph and he referred it to outside independent consultants.

25. On 24th February 2021 the claimant attended a meeting with Rebecca MacLeod, an external consultant, in order to discuss her letter dated 5th February 2021. It was dealt with as a grievance on the basis that any matters that were potentially protected disclosures would be addressed by

Ofsted. Some of the safeguarding concerns raised by the claimant pre-dated the Ofsted inspection on 6th August 2020.The claimant contends that they were raised by her directly with Ofsted on 6th August 2020 and that she previously raised them with the respondent, which I understand is denied by the respondent. The matters that were investigated by Ms McLeod were not upheld and her rationale for this decision was set out in a very detailed report which is dated 3rd March 2021.

26. On 9th March 2021 the claimant was invited to participate in an investigatory meeting that would be Chaired by Victoria Hart, who is an external Consultant, and the focus of this investigation was to be the conduct of the claimant. This investigation appears to have been detailed, notwithstanding the fact that all interviews were conducted remotely.

27. The matters that were addressed by Ms Hart included an allegation that the claimant had persistently raised claims of serious safeguarding issues, unfair treatment, discrimination and harassment, which due to the nature of the complaints, were considered to be potentially vexatious. The investigation carried out by Ms Hart resulted in the preparation of a detailed case report which is dated 7th May 2021. The upshot of this report was a recommendation that the claimant should be invited to a disciplinary hearing to consider 3 allegations. They were, broadly, the unsatisfactory reporting of concerns that were believed to have been made at a time when there was a "lack of evidence" and a "lack of concern raised at the time"(which I interpret as meaning that the respondent did not accept that the claimant had a reasonable belief that the matters that she raised were true and that the matters raised were either not in good faith or not believed to be in the public interest by the claimant at the time that she raised them); the unsatisfactory reporting of concerns was re-phrased within the second allegation which referred to as the persistent raising of claims, which were believed to be vexatious; and the gist of the final allegation was that the activities of the claimant had irrevocably broken the trust and confidence in the employment relationship.

28. The claimant's appeal against the grievance outcome was heard by Anthony Leather, an external consultant, on 25th March 2021 and he prepared a detailed report on 7th April 2021. The upshot of this report is that the claimant's grievance appeal was dismissed in its entirety.

29. On 20th May 2021, Paul Baker, an external consultant, conducted a disciplinary hearing with the claimant. Following the hearing, Mr Baker prepared a comprehensive case report, which was dated 7th June 2021. The conclusion of Mr Baker was that there had been an irretrievable breakdown of trust and confidence and that the claimant and Mr Joseph were unable to work together "cohesively". The specific recommendation was that the claimant should be dismissed with notice due to this breakdown in trust and confidence. There was no finding as to whether the claimant's actions were any form of misconduct. The respondent acted on this report and the claimant was duly dismissed.

Submissions

Claimant's submission

30. It is contended on behalf of the claimant that she made fourteen protected disclosures to the Respondent, including some made orally to Mr Joseph prior to the Ofsted monitoring visit on 6th August 2020, also to Ofsted at or around the time of the Ofsted visit, and in particular, within her letter dated 5th February 2021. It is submitted by the claimant that the matters raised by her were significant safeguarding concerns, that she was entitled to make as part of her role and that as a consequence she was subjected to various detriments and ultimately dismissed. The claimant relies upon a Scott Schedule of Disclosures and detriments.

31. It was also submitted by the claimant that she felt that her relationship with Mr Joseph was a "partnership" and not just employment. It was the Claimant's expectation that she would play a major role in the business as the technical professional and have a shareholding.

32. It was submitted that the investigation into the claimant's conduct was a consequence of the whistle-blowing complaint made on 5th February 2021. Those complaints, according to the claimant were raised because previous complaints had not been dealt with. It was also submitted that the respondent did not properly investigate the whistle-blowing complaints at any time and that to treat them as vexatious, without proper investigation, was an unlawful detriment. Whilst the Claimant acknowledges that the alleged vexatious complaint was, according to the correspondence received from the Respondent, not relied upon by them as the reason for dismissal, the claimant submits that it is the whistle-blowing complaint of 5th February 2021 which in reality brought about her dismissal.

33. It was submitted by the Claimant that the circumstances which led to her dismissal were a "complex situation" and, specifically, that the amalgamation of all of her disclosures of 5th February 2021, referred to as PD10 within the claimant's Scott Schedule, was the reason for her dismissal.

34. However, when asked to identify which disclosures were made to Ofsted, it was accepted during her submission that none of the Ofsted disclosures were in fact identified in the Scott Schedule, although it was submitted that Ofsted were made aware of earlier concerns by the Claimant during the visit on 6th August 2020. The matters raised in August 2020 appear to have been investigated by Ofsted and dealt with at the time.

35. The claimant's submission did not deal with the evidence that she relied upon to support her belief that the information that the she allegedly disclosed tended to show either a relevant failure or concealment. The submission did not attempt to set out the basis upon which I should be

persuaded that the claimant did make protected disclosures, other than PD10, that were mostly denied by the respondent and, in particular, did not address the issue of the claimant's reasonable belief, or the basis upon which disclosures were said to have been made in the public interest.

36. The Claimant's submission did not refer me in any detail to matters relied upon and the findings within the various reports produced by external consultants on behalf of the Respondent. I do not know therefore how the Respondent intends to argue key components of her claim, including, for example, causation, where the Respondent purports to have a potentially fair reason for dismissal.

Respondent's Submission

37. The respondent points to the Chronology of events which is within the Hearing Bundle at pages 65-70, which demonstrates that there is a lengthy and complicated background to this complaint. According to the respondent, the Chronology shows that the alleged whistle-blowing complaints were raised after Ofsted raised their concerns that the claimant's various roles were conflicting and the respondent proposed to take steps to separate the roles.

38. The respondent set out within its submission the various factual disputes regarding whether disclosures were in fact made and highlighted factual disputes in relation to how the respondent did in fact address alleged disclosures set out at PD5 of the Scott Schedule. The respondent also referred me to the evidence that might suggest that the reason for dismissal was a fair reason, namely the bringing of malicious allegations which brought about a breakdown of trust and confidence. I have been referred to the letter of dismissal at page 337 and the various reports at pages 125-336. I was also referred to the report of Kate Davies which is at pages 76-82 in the Bundle. It is contended by the respondent that these reports, in particular the report of Ms Davies, illustrate that the claimant is unable to provide sufficient information to sustain a reasonable belief in her whistle-blowing allegations.

39. The respondent's submission highlighted the fact that there is a dispute as to the extent to which the alleged disclosures may have been in the public interest and/ or were genuinely intended to address a safe-guarding risk. It was submitted by the respondent that the claimant's alleged disclosures were in response to the proposal to remove parts of her role, the claimant's unhappiness with Mr Joseph because of the dispute regarding her "shareholding" and that PD10 was only made because settlement negotiations had broken down.

Conclusions

40. For the purpose of this ancillary relief application I have to rely upon the details of claim, since the application can only be considered in light of the pleaded allegations. The pleaded claim is not well particularised. Although the claimant has produced a Scott Schedule, this Schedule does not include the detail required in order to substantiate that protected disclosures were made in each instance. As an ulterior reason for dismissal is argued by the claimant, the onus is upon her to clearly point to facts upon which she relies to demonstrate that a Tribunal is likely to find that the reason for dismissal was an automatically unfair reason. The burden of proof is on the claimant but, unfortunately from her perspective, the claimant's pleaded claim is lacking in some fundamental detail needed to satisfy me at this interim stage that the Claimant is likely to establish that protected disclosures have been made and also the causative link between her alleged disclosures and her dismissal.

41. Section 103A ERA requires the making of a protected disclosure to be the reason or, if more than one, the principal reason for dismissal. It is necessary for the Tribunal to determine the reason in the normal way (i.e, the set of beliefs causing the employer to dismiss); it is not enough simply to pose the causative question "but for the proscribed factor" would she have been dismissed?

42. At the final hearing, it is the fundamental task of the claimant to demonstrate that the reason for dismissal can properly and fairly be described as the making of a protected disclosure, as opposed to something else. Further, establishing the principal reason for dismissal is an exercise in identifying the reasons within the mind of the decision maker based on the facts known or relied upon by that individual. I have not been taken to the evidence to any great extent by either party and the claimant's submission did not address the possibility that the Tribunal might be satisfied that the decision maker acted in good faith and without an improper motive when he accepted the recommendations of the external consultant.

43. Moreover, the documentation presented to me and referred to within the submissions has been inadequate to specifically address the issue of whether the claimant made disclosures which qualified for protection within the meaning of Section 43B ERA. It appears on the face of it to be arguable that some of the claimant's alleged disclosures may have been no more than bare allegations and did not disclose information. An assessment of the claimant's alleged disclosures would also require a detailed examination of their context. Although I was provided with an extensive bundle of documentation, it was not explained to me how the the evidence within the documentation upon which the Claimant relies demonstrates that it is likely that she will be able to establish that she had a reasonable belief that the information that she allegedly disclosed tended to show a relevant failure. On balance, it seemed to me that whilst an extensive amount of time could have been spent trying to get to the bottom of this fundamental issue, it would have been a fruitless exercise given the summary nature of an interim relief hearing and the fact that there are clearly numerous factual disputes about whether disclosures were made, either at all in some instances, or were in the public interest in the case of the disclosure on 5th February 2020.

44. As identified during the submission on behalf of the claimant, the factual background to this case is complex and the context in which the alleged protected disclosures were made is far from straightforward. It is plain that the respondent does not accept that the claimant has made protected disclosures and that they strongly assert that the decision to dismiss was a fair reason, namely the claimant's conduct in bringing malicious of vexatious allegations that has resulted in a complete breakdown of trust and confidence. I have been referred to number of reports which illustrate the basis for the Respondent's decision, which cannot be properly tested in the absence of oral evidence.

45. I have found that from the information available, there is no clear evidence which suggests that the test on the Section 128, in terms of likelihood of the claim for unfair dismissal succeeding, can be met.

46. At this preliminary stage, based upon the information I have available, I cannot reach a conclusion that the evidence upon which the claimant relies, is such that the claimant has a pretty good chance of succeeding.

47. For the reasons set out above, the claimant's application for Interim Relief fails.

Employment Judge Britton

Signed on: 20/07/2021