



EMPLOYMENT TRIBUNALS

Claimant

Ms V White

v

Respondents

**J.J Heinz Foods UK Ltd(1)
Rafael Oliveira(2)
Georgiana de Noronha(3)
Ms Melissa Weneck (4)
Ms Jennifer Hogan (5)**

Heard at: London South Employment Tribunal

On: 27 June 2019

Before: Employment Judge Webster

Appearances

For the Claimant:

Mr T Croxford QC (Counsel)

For the Respondents:

Ms J Mulcahy QC (Counsel)

INTERIM RELIEF APPLICATION

JUDGMENT

1. The claimant's application for interim relief is refused.

REASONS

2. By a claim form presented on 17 May 2019 the claimant made an application for interim relief under s. 128 Employment Rights Act 1996 (ERA). The claimant's employment terminated on 14 May 2019 and therefore, the claim for interim relief has been brought within the time frame specified in s. 128 (4) ERA. The notice of hearing was dated 24 May 2019, so the parties have had seven days' notice.
3. The claimant has made claims of unfair dismissal, discrimination based upon the protected characteristics of race and sex, and detriments and dismissal due to having made a protected disclosure in the public interest and victimisation contrary to s39(4) Equality Act 2010.

4. The claimant already has another claim in the tribunal under claim number 3303748/2019 which was submitted prior to the claimant's employment terminating (she had a 6 month notice period during which she was on garden leave). Whilst the two claims are to be joined, for the purposes of today's hearing I was just considering the claims presented on 17 May 2019.
5. Both parties provided me with detailed written submissions. I was also provided with 2 separate bundles, a bundle of agreed authorities and a witness statement by the claimant. The respondent also provided its ET3 in respect of the claimant's second claim. The claimant did not give oral evidence and the respondents did not have an opportunity to test the witness statement which had been served on them the day before the hearing. It was accordingly given appropriate weight.
6. I do not make any findings of fact, however, it is useful to summarise the claimant's claim under s 103A ERA and the parties' submissions.

The claimant's submissions

7. The claimant is a practising solicitor and was General Counsel Europe for the respondent. She asserts that she had received positive appraisals throughout her employment and this continued into the first part of 2018. Against this background she was told that she would be dismissed (with 6 months' notice served on garden leave) on 14 November having made a series of protected disclosures. The claimant relies upon 30 separate disclosures, made to the respondents, about the behaviour of various members of the senior leadership team and in particular around concerns about regulatory and compliance issues and financial irregularities at a high level. The disclosures she relies upon are detailed in her ET1s and witness statement. She states that part of her role was to raise these concerns, she raised them directly with the respondents and reasonably believed that they were in the public interest. As a very broad summary, she believes that because she was raising concerns about people close to her line manager, he was not willing to listen to her and would not take the appropriate action against these individuals, and that he therefore wanted to dismiss her and ultimately did so.
8. In his submissions Mr Croxley drew a connecting line between the most recent disclosures including, in particular, the concerns the claimant raised verbally at her appraisal meeting in October 2018 and subsequent emails on 27 October and 31 October 2018.
9. Mr Croxley stated that the claimant's assertions at the appraisal meeting and her follow up email resulted in the email dated 28 October from the second respondent in which he says as follows:

"Unfortunately it seems my relationship with Victoria got to a level that It becomes unsustainable for us to continue working together. You will see on the email below that she makes serious accusations, which I don't take lightly. Im [sic] quite said to read this and strongly refute the picture she draws. There are so many wrong or out of context points that it makes it impossible to respond. I gave her plenty of real examples which she refuses to acknowledge or accept. She is clearly building a case against me and KHC. I cant [sic] have a person in

my team that doesn't trust me. As absurd as it can be, I will now need a lawyer to talk to my lawyer!

Two immediate questions:

1/ do I have to respond to this email? If yes, what can/should I say?

2/ What is best way to help her exit? (BLANK if you want her in another zone, im [sic] ok, but cant [sic] be in emea anymore). It might be easier for us to speak on phone."

10. The claimant's submissions today were that the email was evidence that the claimant had been dismissed because she was raising allegations and accusations and that the second respondent could not work with her because she did not trust him. She said that this was reinforced by the summary manner of her dismissal as it shows that there were no attempts to properly manage any under performance which or other substantial reason which the respondent now relies upon as the reason for dismissal.
11. On 14 November the claimant was called to a meeting with the second respondent. She asked if the meeting was formal to which she was told it was. She therefore refused to attend without a representative and left the meeting. The claimant then shortly afterwards received a text from the second respondent saying that an envelope had been left on her desk. The envelope contained a dismissal letter.

The respondent's submissions

12. The respondents' submissions in response to the claimant's application today were various. They state that the claimant relies upon 30 separate alleged disclosures as being the reason for her dismissal not just the most recent ones.. Therefore it is not possible for the tribunal to assess today, whether the claimant has 'pretty good' chances of success of establishing that the dismissal took place because of the multiple protected disclosures..
13. They also dispute that some or all of them were protected disclosures under s43B ERA and assert that some or all of the disclosures could be covered by legal advice privilege because it was the claimant's job to advise the respondents about compliance and regulation and that this therefore precluded the claimant from relying upon those disclosures.
14. The respondents also rely upon the fact that the claimant has brought claims for sex and race discrimination and that this further clouds the possibility of her showing that her claim for unfair dismissal under s 103A and s129 ERA has pretty good chances of success because she is ascribing her dismissal to so many different causes of action.

Conclusions

15. For the purposes of this hearing, the issue is whether under s.129 ERA it appears that it is likely that the reason for the dismissal is was making a protected disclosure as per s. 43B ERA.
16. In order to determine 'whether it is likely' the claimant will succeed at a full hearing. The EAT said in London City Airport v Chacko 2013 ILR 610, that this

requires the Tribunal to carry out an 'expeditious summary assessment' as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party. Clearly this involves less detailed scrutiny than will be undertaken at the full final hearing.

17. 'Likelihood' has been interpreted to mean 'a pretty good chance of success' at the full hearing - Taplin v C Shippam 1978 ICR 1068. The burden of proof was intended to be greater than that at a full hearing, where the Tribunal only needs to be satisfied on the balance of probabilities that the claimant has made out her case - or 51% or better. A pretty good chance is something nearer to certainty than mere probability.
18. I conclude that the claimant has not satisfied that burden (which is a very difficult one to surmount). She has not convinced me that her claim for being dismissed for making a protected disclosure is nearer to certain, rather than a possibility. She has not demonstrated at this very early stage in the proceedings, that it is likely her claim will succeed at a full hearing, nor that it has a pretty good chance of success.
19. I am mindful of the fact that the complexity of a claim is not sufficient reason to conclude it does not have pretty good chances of success, In Raja v Secretary of State for Justice UKEAT/0364/09, the EAT criticised an employment judge's decision that interim relief orders should only be made in connection with simple factual disputes.
20. In this case the claimant ascribes her dismissal to multiple different reasons (race and sex discrimination as well as due to protected disclosures) and multiple different disclosures. I cannot assess those claims today based on the limited evidence before me. Mr Croxley's submissions served to draw a beguilingly simple straight line between the most recent disclosures and the claimant's dismissal. Although Mr Croxley did not expressly invite me to take this approach and at no point did he renege from relying on all 30 alleged disclosures, his submissions relied heavily on linking the recent alleged disclosures to the dismissal.
21. This 'simplified' approach to this application, of only looking at the recent alleged disclosures and the subsequent dismissal, requires me to assume that I can ignore having to summarily assess whether the claimant can demonstrate a pretty good chance of success based on the majority of the other disclosures as well as the most recent ones. If summarily considering all the disclosures and the possibility that they individually or cumulatively caused the claimant's dismissal is what is required then it is clear that I do not have enough evidence to make that assessment at this stage.
22. However it is possible that this approach is wrong. I accept that it is possible for a claimant to be able to show that she has pretty good chances of success of showing that just one or two of many disclosures led to her dismissal even if she is relying on many. I have therefore considered whether the simplified claim which Mr Croxley described, i.e. that the appraisal meeting and subsequent emails led to the claimant's dismissal has a pretty good chance of success.

23. I do not accept that the limited evidence relied upon by the claimant is as unequivocal as the claimant asserts and I cannot, based on this limited evidence, find that she has a pretty good chance of success at this early stage based on what I have seen.
24. Even if I am wrong in my approach to the above assessment, the claimant's application also requires me to be able to assess arguments around whether any or all of the 30 disclosures are qualifying disclosures that satisfy the definition and whether, even if they do, some or all of them are covered by legal advice privilege and therefore cannot be relied upon at all under (S43B(4) ERA.
25. These are not matters that I can, based on the evidence currently available, assess in such a way as to enable me to conclude that the claimant has a pretty good chance of success. Both counsel addressed me at relative length regarding the law around legal advice privilege. They agreed that there was no guiding case law on certain aspects. This included whether in house legal counsel can rely on disclosures which includes information that comes to them in order for them to advise their employer about it or alternatively rely on disclosures which are the advice/information she has given her employer in those circumstances. These submissions demonstrate that this situation requires careful and detailed analysis of the factual basis and circumstances for the disclosures and whether they can be relied upon at all. Therefore I cannot, at this early stage, based on the evidence before me, determine that the claimant's claim has pretty good chances of success.
26. For those reasons, the claimant's application fails.

Employment Judge Webster
20 July 2019

ORDERS

1. The matter to be listed for a PH case management on 2 October.
2. Ensure that the ET3 is served on the claimant. Officially.
3. The cases are joined together.