



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs S Jones

**Respondent:** Eco Montessori CIC

**Heard at:** Bristol (by video-CVP)      **On:** 1 September 2021

**Before:** Employment Judge Livesey

**Representation:**

Claimant:

Respondent:

## JUDGMENT

1. The Claimant's application for interim relief is dismissed.
2. The following directions are made by consent;
  - 2.1 The Respondent's name is amended to Hartley House Montessori Ltd;
  - 2.2 The time by which the Respondent is to file a response to the claim is extended to 1 October 2021.

## REASONS

Relevant procedural background

1. By a Claim Form dated 11 August 2021, the Claimant brought complaints of constructive unfair dismissal on the grounds of having made public interest disclosures, and of unpaid holiday pay. Her claim included an application for interim relief.
2. The Claim was listed for hearing by a Notice dated 20 August. On 27 August, the Respondent's solicitors indicated that they had been instructed and requested a postponement. The Tribunal did not have chance to address that application before, three days later, the Respondent withdrew it.
3. At the hearing of the application, both parties produced unnecessarily lengthy bundles of documents considering the nature of the investigation under s. 128. The Respondent's was paginated and references to it have been cited in

square brackets below. Other documents referred to by the Claimant have been specifically identified.

Relevant factual background

4. The Claimant worked as a Nursery Manager at the Respondent's Montessori Pre-School Nursery near Salisbury known as Norman Court. Ms Hartley-Raven is the Director of the Nursery. She is involved in other pre-school establishments in the same geographical area.
5. The Claimant did not have two years' service and could only pursue a complaint of unfair dismissal under s. 103A of the Act. It was important, therefore, to understand the nature of the alleged disclosures, to whom and how they were made, when they were made and the basis upon which she asserted that her constructive unfair dismissal had been on the grounds of her disclosures.
6. Although not clear in her Claim Form, at the hearing, she stated that she relied upon the following disclosures;
  - a. Written disclosures to her employer (Ms Hartley-Raven, copied to Mr Goodfellow) by emails on 6 and 8 April 2021 ([30] & [37-8]). The emails concerned the wellbeing of children and the Respondent's non-adherence to good practice and/or Ofsted's framework guidance in general terms and, more specifically, the conduct of another employee, 'LH', who allegedly lifted a child inappropriately and forced his/her coat on in an '*unnecessary way*'.

The Claimant alleged that her disclosures fell under s. 43B (1)(b) and/or (d) in that they concerned the health and safety of the children in the Respondent's care and its legal obligation in respect of their wellbeing.

The Respondent accepted that the first email of 6 April had been a protected qualifying disclosure under s. 43B, but not the second of 8 April which, Mr Jackson maintained, had been too vague;

- b. A phone call and then an email disclosure to Ofsted in the latter part of April 2021. Her disclosures were said to have covered the same broad subject matter.

The Respondent did not concede that disclosures have been made. Mr Jackson stated that they had not been seen and, further, that the Claimant had distanced herself from having been the whistleblower to Ofsted (see paragraph 7 of the grievance investigation report [96]).

The Claimant stated that she had advised the Respondent that she *would* have gone to Ofsted if the matters that she raised had not been addressed. She stated that she did not, however, tell the Respondent that she *had* gone to Ofsted until August;

- c. A disclosure to Mr Blackwell, the LADO for Hampshire County Council, initially by phone but then in an email on 8 April 2021 which enclosed a completed form setting out the Claimant's concerns as described above.

Although the Respondent could accept that there had been contact between the Claimant and the LADO, it did not know what had been said and/or when and no disclosure was admitted.

7. The Claimant issued a grievance in April 2021 [38]. It covered broadly the same ground as that referred to above but it also raised concerns that she had been excluded and undermined following matters that she had raised and the Ofsted visit which took place following what she described as an anonymous report. The Ofsted report revealed a decline in the effectiveness of the nursery from 'good' to 'inadequate'. Other nurseries run by the Respondent also received similarly unfavourable reviews at or around the same time.
8. A grievance hearing took place on 6 May and the Claimant was provided with an outcome on 29 June. Save in one technical respect relating to the provision of an employee handbook, her grievance was dismissed. An appeal against that decision was also dismissed on 16 August 2021.
9. The Claimant resigned on 1 August with effect from 27 August 2021 [123-5]. The cover email stated as follows;  
*"It is with regret and plenty of consideration that I send you my letter of resignation. Sadly with the continued reluctance to address my grievance appropriately the trust and mutual respect. [sic]"*
10. When asked why she resigned, the Claimant stated that it was because the lengthy grievance proceedings '*had not focused on the safety of the children*'. She believed that that had occurred because of her disclosures. That of course was resonant of the contents of her resignation letter (above). She did, however, provide other examples of ways in which she alleges that she was poorly treated;
  - a. She was given extra work for the after-school club around Easter;
  - b. She was excluded from decision meetings;
  - c. She was excluded from a meeting to discuss the outcomes of the Ofsted inspection around 15 April;
  - d. Her emails 'vanished';
  - e. She no longer received out of hours phone calls.She considered that all of those issues had their root in her email of 6 April.

#### Relevant legal test

11. The Claimant's application for interim relief was founded upon s. 128 (1)(a) of the Employment Rights Act 1996. She bore the burden of proof in respect of the application.
12. Section 129 (1)(a)(i) was relevant;  
*"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.... 103A"*
13. '*Likely*', according to the court in *Taplin-v-C Shippam Ltd* [1978] ICR 1068, meant '*a pretty good chance*' (that test having been more recently confirmed

in *Dandpat-v-University of Bath* UKEAT/0408/09 and *London City Airport-v-Chacko* [2013] IRLR 610). The test required a “*significantly higher degree of likelihood*” than the balance of probabilities (Underhill J in *Ministry of Justice-v-Sarfraz* [2011] IRLR 562).

14. The claim was brought under s.103A and the Claimant therefore needed to show that there was a pretty good chance of her ultimately successfully demonstrating that her dismissal had been solely or principally because of her disclosures.

#### Discussion and conclusions

15. The Claimant made compelling submissions about the nature of the ill treatment that she allegedly suffered following the concerns that she had raised on 6 April (see paragraph 10 above), concerns which had been escalating for some time in her mind. She said that what she had wanted to see was an end to the Respondent failing to comply with its obligations under the statutory framework and to children getting hurt and upset.

16. The focus of her resignation was the manner in which her grievance was treated, however. She claimed that the investigation had failed to focus upon the safety of the children, but the specific concern raised in relation to LH’s conduct did appear to have been addressed by a suspension, investigation and sanction. When asked to address that point in submissions, the Claimant asserted that the notes of her interview to the investigation were not accurate, which was a rather different point entirely.

17. Accordingly, whilst much of the Claimant’s case concerning her treatment after her disclosures was persuasive and had attraction, the causative link between her disclosures and the principal cause of her resignation, as identified at the hearing relating to the manner in which the grievance was dealt with, was less so. The grievance was investigated by an external HR organisation and did appear to demonstrate that the Respondent had taken the Claimant’s concerns regarding LH’s conduct seriously. Similarly the appeal. What the Claimant really appeared to be saying was that they were not taken seriously *enough* and/or that sufficient steps were not taken to rectify the problems that she had identified. A failure to provide the desired outcome from a grievance is not necessarily a fundamental breach of contract and it could not be said that the Claimant had a ‘pretty good’ chance of success in that respect even if other parts of her claim appeared stronger. On that basis her application for interim relief was dismissed.

#### Case management issues

18. The Claimant consented to a change in the Respondent’s name, as set out above, which accorded with the names shown on her contract of employment. She also consented to an extension of time in respect of the filing of the Respondent’s response which should now be capable of being drafted with greater precision in light of her submissions at the hearing.

Employment Judge Livesey  
Date: 01 September 2021

Judgment and Reasons sent to the Parties: 17 September 2021  
FOR THE TRIBUNAL OFFICE