



EMPLOYMENT TRIBUNALS

Claimant

Mrs K Poulter

Respondents

AND

Ealing Eventide Homes Limited

Heard by: CVP

On: 16 September 2021

Before: Employment Judge Adkin

Representation

For the Claimant: In person

For the Respondent: Mr T Hussain, Litigation Consultant

WRITTEN REASONS

1. The Claimant has requested written reasons for the decision given orally to dismiss her application for interim relief under section 128 of the Employment Rights Act 1996.

Evidence

2. I had the benefit of a 105 page two witness statements prepared on behalf of the Respondent and also 17 documents marked KP1 through KP17 supplied by the Claimant.
3. I received two witness statements, the first prepared on behalf and signed by Mr John Gilliland of the Respondent and the second by Ms Sunita Ramasawmy. The Claimant gave oral evidence herself in which she adopted the narrative attached to her second claim form and also, we discussed the documents and she answered questions put forward by Mr Hussain.
4. The oral evidence I heard was confined to the question of the date of termination, on which I needed to make a finding of fact which went directly to jurisdiction. The substantive application I dealt with based on written evidence and submissions of the parties.

5. With regard to the evidence given I find that both parties have done their best to assist the Tribunal based on their recollection and their interpretation of events, those interpretations differ but I find that they are honestly and held by both witnesses.
6. With the agreement of the parties I listened to the Claimant's recording made of that discussion between herself and Mr Gilliland and that was a recording that was made with the agreement of Mr Gilliland, it was not a surreptitious recording and in fact the party's agreed that I should listen to it to help me to resolve the dispute such as there was.

JURISDICTION

Effective Date of Termination ("EDT")

7. With regard to the procedure at this hearing it was agreed that I needed to determine as a preliminary point whether the Claimant had presented her application within the seven days of the effective date of termination.
8. Also by agreement I went on to make a finding as to when the effective date of termination is which I have done so by reference to the documents, live evidence from two witnesses and the submissions and also by agreement there were some differences of recollection as to a meeting that took place on 18 August 2021.

Findings of Fact

9. The Claimant commenced working for the Respondent as a Care Home Manager on 15 June 2021, following a poor CQC inspection for the Downhurst Residential Care Home. The Claimant says her brief was to continue with the action plan prepared by a consultant, implement and embed new systems and to change the culture within the staff.
10. On 10 August 2021 there was an incident where the Claimant overheard herself being discussed over a CCTV monitor and she joined the meeting at which Mr Gilliland and his wife were present and also a resident within the home operated by the Respondent. That conversation ended up according to the Claimant with Mr Gilliland's wife saying "good, go, you can leave or call the police". The Respondent says that the Claimant said that she would not be staying, she was leaving and that she would report to safeguarding and it is supported by a contemporaneous handwritten note taken by Ms Ramasawmy which confirms that she made those comments on that day.
11. On 11 August 2021 the Claimant did not attend work but wrote an email to Mr Gilliland where she says "has my employment been terminated, am I on suspension going through disciplinary, I need to be informed of where I stand due to the lack of communication".
12. Mr Gilliland responded the following day saying, "Good morning Kerry, thank you for communication but after your interruption of a private meeting your declaration that you resigned, I accept your resignation with effect on 10 August". I would note that his suggestion that there was a declaration of resignation goes somewhat further

than a handwritten contemporaneous note, but I will discuss that further in my conclusions.

13. The Claimant did not in fact attend work but she did reply on the same day 12 August to Mr Gilliland saying this “firstly, I would like to note that I did not resign, had I resigned I would have put this to you formally and fulfilled my notice period”. She goes on a bit later in the same email “if I had resigned, I would not have emailed yesterday to find out what your plans were where my employment was concerned” and then she signs off towards the bottom of page 92. “As I have not resigned from my position please let me know the way forward with this situation.”
14. She then followed on the same day with a further email with a Freedom of Information request which is not relevant for this application.
15. She submitted a formal grievance on 13 August 2021 and then submitted the first of three claims to the Employment Tribunal on 16 August 2021. In that claim form she suggests that she was unfairly dismissed, or she has ticked the box that says I was unfairly dismissed including constructive dismissal. The second of two pages of narrative attached to the claim form which is at page 14 of the Respondent’s bundle it says to date 16 August there has been no formal dismissal from JG however he emailed me to state he accepted my resignation which I have not given.
16. Also, on 16 August the Claimant wrote an email [document KP14] asking for an update on previous emails saying, “I would like to know your position with my employment by close of play today”. That was sent on 16 August at 13:14.

18 August 2021 discussion

17. On 18 August 2021 there was a telephone conversation and this was recorded by the Claimant with the agreement of Mr Gilliland and because it was not possible to agree in the hearing exactly what the content of that, that recording was played to me during the course of the hearing. The relevant exchange between Mr Gilliland and the Claimant contains this, he said to her that she had introduced a lot of new stuff, he made reference to the 10th, “more of a corporate image than a family home”, “I have decided that I should end the probationary period and pay to 6 September”, that is it and then he said, slightly indistinct,
18. The Claimant said “you are informing me that like it’s a dismissal”, to which Mr Gilliland replied “yes a termination”.
19. The Claimant said “on grounds of what”. Mr Gilliland replied “management style, there is no way we can continue”. The Claimant went on to ask “what are the grounds” and Mr Gilliland said “that is a much as I am saying”. It goes on a little bit further but that exchange is not relevant for the present purposes.

Second & Third claims

20. Also, on 18 August the Claimant presented the second claim to the Tribunal, on this occasion she indicated that it was an unfair dismissal with an effective date of termination of 18 August i.e. the day on which it was being presented and then subsequent to that the Claimant presented a claim form on 25 August. It was

clarified in correspondence by Regional Judge Wade that this amounted to an application for interim relief.

21. It was agreed between the parties that I essentially needed to decide whether the Claimant had resigned on 18 August in which case the interim relief application would be in time or if it was at an earlier stage.
22. Mr Hussain submits on behalf of the Respondent that the termination in fact took place on 10 August which was a resignation and in the alternative as a full back argument he says it was 12 August when Mr Gilliland confirmed that he accepted her resignation so making the matter clear.

Law – (resignation)

23. The general rule is that unambiguous words of dismissal or resignation may be taken at their face value without analysis of the surrounding circumstances. If I can give examples unambiguous words of dismissal or resignation might be for example, “you’re fired” or “I am dismissing you” or “I am resigning”.
24. There may be special circumstances if unambiguous words are used in the heat of the moment in which case it might be open to an employer to clarify to see whether those words were really meant.

Conclusions on EDT

25. I find that I do not need to consider whether this is a special circumstances case, my primary finding is that the words said by the Claimant which were “I am leaving” were ambiguous in the circumstances of the case. She was upset and removing herself from the work place, it was ambiguous in the sense that she might have meant that I am leaving employment but she might have meant words to the effect of I am not staying to listen to this or in fact she might have meant that because she says threatened with the police being called, which is something that is supported on page 93 an email of where she makes reference to the police on 11 August. She might have meant that she was staying because she did not want there to be any unpleasantness.
26. The content of page 92 which is Mr Gilliland’s email of 12 August where he says “your declaration that you resigned,” I find goes further than the words that were said or maybe that is an interpretation that goes further than the words that were said and in fact I find that I accept the content of his witness statement at paragraph 5 that the words said were that “she would not be staying, she is leaving and she would report of safeguarding”, which is confirmed by the contents of the contemporaneous note prepared by his colleague. If the Claimant had not returned at all and made no communication after a period of time it might have been reasonable for the Respondent to assume that that was the resignation, but that is not what happened. She emailed the following day to clarify the position and that event fortifies my conclusion that it was ambiguous wording that she used on the day. If I am wrong about this being ambiguous I find that this would be a special circumstances cases and by the Claimant saying on 11th that she wants to find out whether she has been terminated made it clear that she did not want to carry through the resignation.

27. From that point onward from the email of 11 August the matter was unresolved, there was correspondence back and forth but I find it was unresolved until the meeting on 18 August. The meeting of 18 August was an exchange which find was a dismissal by Mr Gilliland. He used the word termination and he also made it clear that his intention was that the probation would not be finished and the Claimant's employment would come to an end, and so in those circumstances I find that the termination did take place on 18 August. It follows therefore that the interim relief application was brought in time and I will go on to consider it on the substantive merits.

SUBSTANTIVE APPLICATION FOR INTERIM RELIEF

Law

28. Section 129(1) provides that an application for interim relief should be granted if "it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find that the reason or principal reason for dismissal was one of the statutory automatically unfair reasons (in this case, that the Claimant had made protected disclosures within s 43B of the ERA 1996).

29. The EAT has held that "likely" in this context means that the Claimant must show that his case has "*a pretty good chance*" of success, which means that something better than likelihood on the balance of probability (i.e. better than a 51% chance): Taplin v C Shippam Ltd [1978] ICR 1068, as approved and followed in London City Airport Ltd v Chacko [2013] IRLR 610 at para 10. In Taplin "interim relief" was described by Slynn J [p.1073 para D] as "an exceptional form of relief"

30. The Tribunal must be satisfied that the Claimant is "likely" to succeed on each necessary aspect of his claim, applying that high threshold, before relief can be granted, i.e. that it is "likely" she made a protected disclosure within the statutory definition (as to which see below) and that it is "likely" it was the sole or principal reason for his dismissal: see Ministry of Justice v Sarfraz [2011] IRLR 562 at para 14 per Underhill J (in which all of the elements are broken down).

31. The EAT in Chacko gave further guidance on the approach to be taken by the Tribunal at paragraph 23:

In my judgment the correct starting point for this appeal is to fully appreciate the task which faces an employment judge on an application for interim relief. The application falls to be considered on a summary basis. 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". To put it in my own words, what this requires is an expeditious summary

assessment by the first instance employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which 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.

32. It is not the role of an employment judge hearing such an application to make detailed findings of fact or indeed make findings of fact at all. I am reliant on the documents I have considered and for each side highlighting their strongest points. I am not making my own legal assessment based on findings of fact but applying rather a likelihood test as to how the claim for automatic unfair dismissal will play at a final hearing based on evidence, cross examination and submissions.
33. I have not heard any oral evidence that than that relating to the very restricted point of the date of the dismissal, given that this goes to jurisdiction.

Competing arguments of the parties and discussion

34. I have already determined that the Claimant was dismissed on 18 August 2021 as a result of which she is able to pursue an application for interim relief which she did so by submitting a claim form on 25 August 2021.
35. For the purposes of this application I have to consider whether it is likely that she will succeed in every aspect of her claim, the two principal elements are: first, that there were protected disclosures; and second, that those protected disclosures were the principal reason for her dismissal. Likely in this context has been defined by the appellants Tribunals as there be a “pretty good chance” of winning, this is a higher threshold than the simply balance of probabilities. It is a higher threshold than what is more likely or not.
36. The Claimant’s arguments are that this should be looked at cumulatively, that she was raising various health and safety and legal problems and that she was also causing reports to be produced and that that this influenced the way that her employer regarded her. She says that she was getting no response from the Respondent which I think by implication she inferred was a negative reaction. There was no action being taken, she says the disclosures made by her were causing a problem both in terms of requiring action which was unpopular but also the cost of remedying these problems. She pinpoints in particular on 9 August 2021 an environmental health officer report which was as she describes it the ‘icing on the cake’ in causing the deterioration of her relationship with the Respondent which led to the events on 10 August which ultimately led to her dismissal eight days later. She also suggests that she was querying the Respondent’s charitable status which was a protected disclosure that was unpopular with the Respondent for obvious reasons.

37. On the other hand, the Respondent does not concede that there were any single protected disclosures made that were qualifying within the statutory framework, it is emphasised by Mr Hussain that there is a high threshold that is required. Mr Hussain has pointed out that there were some other dynamics within the work place and these are set out in the witness statement of Mrs Ramasawmy so for example pages 81-83 of the Respondents bundle there is a letter of complaint of harassment written by Mrs Ramasawmy, the Deputy Manager, signed by her dated 9 August but according to her witness statement this follows up from comments that were made to Mr Gilliland a week earlier on 2 August.
38. The nature of the complaint is that Mrs Ramasawmy had a particular difficulty with the Claimant's management style. She complains about the way that she has been dealt with and she says never after 16 years of working in the care sector have heard such behaviour from a manager. She suggests that the Claimant's management style was aggressive and that she swore and so on. She says that she behaved like a prisoner governor. There were also a couple of other documents, page 84 there is a letter of complaint from a chef, a handwritten one-page document. On page 85 and 86 there is a letter of complaint from a resident.
39. The Respondent says it is the Claimant's personal style that was abrasive and that she was not getting on with people and was causing friction. Mr Hussain also says that there was no evidence of detriment, he said there is nothing in the emails from Mr Gilliland that suggests that there was a particular problem or an adverse reaction to the various matters that were being raised by the Claimant. The background to this matter is that there had been an inspection which had been critical of the way that the organisation was run and that was the reason why the Claimant was brought in. He says as regards costs, which might have been a point of friction, that it was natural for Managing Director and Trustee Mr Gilliland to be interested or concerned about costs, that is just the nature of his role. He submits that the events of the 10-18 August does not necessary suggest a clear intention on Mr Gilliland to dismiss the Claimant, it took a number of days to be resolved.

Conclusions

Protected disclosure

40. Starting with the protected disclosure it would it be likely to be found that there were qualifying protected disclosures. There are 17 documents which are labelled KP01 – KP17. On the face of it seems to me that some of these documents that would be likely to be protected disclosures although probably not the majority of these documents.
41. **KP03** which is an email forwarded by the Claimant on 10 August which refers to various health and safety problems, trip hazards, difficulties with fire escapes and the like. This is a disclosure of information, it does relate to health and safety difficulties, there is a fairly low threshold for the Claimant to establish reasonable belief in the public interest (Chesterton) because it affects not just staff but also visitors and also the residents of the home. I consider it "likely"(as defined for these purposes) that this would amount to a qualifying protected disclosure within s.43B(1)(d) health and safety.

42. The next document is **KP08** which is an email dated 20 July 2021 in which the Claimant concerns about weekly audits being carried out with not sufficient knowledge of medication audit. There is a lack of scrutiny about these audits being carried out. There are also concerns about foxes being deliberately feed with raw chicken and that this chicken is left out on mop buckets which contains a risk of diseases being brought into the home. Again this seems to me to be *likely* to engage s.43(b)(1)(d) health and safety.
43. Finally **KP13** which is the Claimant's grievance, it is really in two parts, one raises some general concerns about problems that are going on in terms of health and safety, fire safety and so on and the second part is to do with specific events on 10 August and I do not find that the latter part would be a protected disclosure but I do find that there are matters that are raised within the first part of that document that would be *likely* to be found a protective disclosure.
44. Finally, as to the charitable status of the Respondent I have not seen evidence on that but if it were something that had been raised by the Claimant I consider that it would be a pretty good chance of that being found to be a protected disclosure. Using colloquial language, I find that there is a pretty good chance of the Claimant being found to be a whistleblower having raised some protected disclosures. With regard to the remainder of the documents I am not convinced, applying a likelihood test, that they contain information, or they tend to show relevant failures or that they are raised in the public interest.

Sole or principal reason for dismissal

45. I have to consider whether those protected disclosures would be *likely* to be found the sole or principal reason.
46. I anticipate that there will be multiple reasons to be found for this dismissal so I do not find there is any question of there being the sole reason for the dismissal. The question is rather what was the principal reason.
47. It seems that on the evidence that I have seen likely that a Tribunal will find that there was something of a culture clash and the words that are used by Mr Gilliland in the final conversation on 18 August refers to the Claimant having more of a corporate approach than he does. To my mind that speaks of something of a clash of management styles. That might of course be a convenient "cover" if the actual reason was protected disclosures. It might be a genuine comment on there being a clash of approaches in relation to management style.
48. I understand the Claimant may say that these were simply the repercussions of the protected disclosures that she made and contend that the Gillilands were looking to get rid of her. A Tribunal at a final hearing may accept this, they may on the other hand take this evidence at face value and find that the Claimant had made herself unpopular with some members of staff and at least one resident. It is difficult for me to say without hearing live evidence and viewing any relevant documentary and witness statement evidence in its entirety which conclusion a Tribunal would be likely to come to.

49. If the Claimant had raised the question of charitable status I could see that that would “make waves”, that would be the sort of thing that the trustees would be likely to be concerned about. On the other side of it, it looks to me as if read through the documentation I have been provided that the Claimant was working extremely hard and trying to make a lot of progress on a lot of different fronts not all of which were protected disclosures. She was trying to effect a cultural change as well as raising particular health and safety matters that were a problem. It seems she was facing resistance.
50. I bear in mind that it is likely to be argued by the Respondent that when she forwarded as she did on 10 August 2021 a protected disclosure all she was doing was forwarding the concerns that had been identified by an external party. There will have to be an analysis of whether that would be likely to lead to personal animosity towards the Claimant or whether that was just a feature of her role which is that she was shepherding and fielding what were protected disclosures but they were concerns that were being raised by external agencies.

Conclusion

51. On the basis of the evidence I have considered in this inevitably short, summary process, I can identify potentially several factors at play and potentially more than one reason for the dismissal. In my assessment it is ‘likely’ that a Tribunal would find that some protected disclosures were part of the reason leading to dismissal. Focussing on the test I need to apply, however, I need to apply the test as to whether there was a *pretty good chance* that the protected disclosures or a protected disclosure were or was the *principal* reason for dismissal. In circumstances where there seems to have been more than one factor and it is contested between the parties the significance of those factors it is very difficult for me to find that it was likely or there was a ‘pretty good chance’ that it was the protected disclosures rather than the other factors that I have referred to.
52. In those circumstances I do not find that there is a “pretty good chance” that the protected disclosure(s) was or were the principal reason for dismissal given the competing factors that seem to be in play. Of course, the ultimate question as to whether it was the principal reason is not my decision, I have only been applying a likelihood test and that is something that will be considered at a final hearing if this matter goes to a final hearing.
53. For the reasons I have given this application is dismissed.

Employment Judge Adkin

22 October 2021

Sent to the parties on:

22/10/2021

For the Tribunal Office:

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