EMPLOYMENT TRIBUNALS

Claimant	Peter Blak
Represented by	Mr Carmody (solicitor)
Respondents	Robert Browning Primary School
Represented by	Ms Van Loo (counsel)
Before:	**Employment Judge Cheetham QC**

Hearing held on 6 December 2021 at
London South Employment Tribunal by Cloud Video Platform

JUDGMENT

1. The application for interim relief is dismissed.

REASONS

1. This was an application for interim relief. The Claimant has previously brought two claims to the employment tribunal: 2300451/2021 and 2302230/21, so this is his third claim and it relates to his dismissal on notice on 10 November 2021. The Claimant was employed as School Business Manager from 23 June 2012.

2. The Claimant's 1st and 2nd ET1s contained alleged protected disclosures and the Claimant's claim is (in terms) that he was dismissed for making those disclosures.

The law

3. The relevant provisions of the Employment Rights Act 1996 are as follows:

s.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 … 103A …

…

(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 … 103A …

…

(2) The tribunal shall announce its findings and explain to both parties (if present)—

(a) what powers the tribunal may exercise on the application, and

(b) in what circumstances it will exercise them.

(3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

(a) to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or

(b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(4) For the purposes of subsection (3)(b) "terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed" means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6) If the employer—

(a) states that he is willing to re-engage the employee in another job, and

(b) specifies the terms and conditions on which he is willing to do so,

the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.

(8) If the employee is not willing to accept the job on those terms and conditions—

(a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and

(b) otherwise, the tribunal shall make no order.

(9) …

4. Under s.103A:

   "*An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason … for the dismissal is that the employee made a protected disclosure*".

5. The legal principles that should be applied were agreed by the representatives. In ***Hancock v Ter-Berg*** [2020] ICR 570, Choudhury P stated (at §21):

   The meaning of the word "likely" for these purposes has been considered in several cases. The leading case is Taplin v C Shippam Ltd [1978] ICR 1068 EAT, which was decided under similar provisions relating to interim relief applications in dismissal for trade union reasons. The EAT (Mr Justice Slynn) held that it must be shown that the claimant has a "pretty good chance" of succeeding, and that that meant something more than merely on the balance of probabilities. That approach to the word "likely" has been followed in several subsequent decisions. See for example, Dandpat v The University of Bath and Anor UKEAT/0408/09 unreported at paragraph 20, Ministry of Justice v Sarfraz [2011] IRLR 562 at paragraphs 16 to 17 and His Highness Sheikh Khalid Bin Saqr Al Qasimi v Ms T Robinson UKEAT/0283/17/JOJ, unreported, at paragraphs 8 to 11.

6. ***Taplin***, ***Dandpat*** and ***Sarfaz*** were cited in the written submissions, as well as ***Raja v the Secretary of State for Justice*** UKEAT/0364/09.

Decision

7. Both representatives provided full and very helpful written and oral submissions. I have not set those out separately, as they can be addressed through the reasoning behind the decision on the application, but I will summarise Mr Carmody's arguments as follows, which were by reference to the dismissal letter and which was the key document. He argued that:

   (i) the reference in the letter to fraud showed a clear link with protected disclosures that were about fraud;

(ii) the fact that the dismissal letter referred to the Claimant's ongoing views regarding school management, which were also the subject of the disclosures, also showed a clear link;

(iii) there had been no "last straw" in the allegedly threatening letter written by the Claimant, as it had been found that there was no real threat and it was a year before anyway;

(iv) there had been no attempt by the disciplinary panel to see what alternatives there were to dismissal and whether the relationship would work, including considering further mediation; and

(v) no reasonable employer could conclude that there was a breakdown in the working relationship.

8. It seems to me likely that the Claimant will establish that he made protected disclosures and it is not in issue that he was dismissed. The question is whether it is likely that the tribunal will find the dismissal was because he made those protected disclosures; in other words, that there was the necessary causal link.

9. The disciplinary panel's decision, as set out in the dismissal letter, was careful and detailed. After summarising the management case and the Claimant's case, the panel stated:

> *"The panel considered carefully the documents submitted by the management side as well as yourself as well as what had been detailed in the hearing in order to come to their decision. The panel agreed it was clear that the management felt that the relationship had broken down irrevocably and that it could not be repaired due to Kate's perception of the threat (which the investigating officer had concluded was not intended as a threat on the balance of probabilities) and your belief that Kate's decisions on behalf of the school were incorrect and that she was fraudulent and discriminatory. Therefore, we had to examine whether the trust and confidence had broken down on your part irreparably.*

10. The panel then looked at the reasons the Claimant gave as to why the relationship had not broken down, noting that the Claimant still felt passionately that the school was being mismanaged by the Head Teacher (Ms Kate Wooder) and – importantly – would not change that view until it was tested at some future point by the employment tribunal.

11. The panel considered that, based upon what the Claimant was saying, it was impossible to see a basis upon which the Claimant could return to work at the school. It looked at alternatives, but could not find any and nor could the panel feel optimistic over any further mediation. It therefore concluded that the relationship had irretrievably broken down and dismissed the Claimant on notice.

12. In his submissions, Mr Carmody contended that the dismissal letter could only be understood in the context of the disclosures. He said that, as they embraced fraud and mismanagement, the reference in the dismissal letter to fraud and mismanagement created an inescapable connection.

13. I disagree with that argument. From a careful reading of the letter, it is clear that the panel was recognising that those were indeed the Claimant's perceptions, but it does not follow that the decision to dismiss was because he had (arguably) made protected disclosures about fraud and mismanagement. What the panel was saying was that, if that is what the Claimant really believed – and one might add, rightly or wrongly – then it was impossible to see how the working relationship could continue.

14. The reference in the letter to the Claimant threatening the Head Teacher as being the "last straw" was also not conclusive. It may be the case that the letter had been found not to be threatening and was a year before, but nevertheless that remained the Head Teacher's subjective belief (again, rightly or wrongly). There was no reason, therefore, why the panel should not take that into account.

15. Mr Carmody's argument that the panel did not consider alternatives is based upon an incorrect reading of the letter, because the panel did so in a paragraph that began: "*The panel therefore had to consider if there were other steps that they could consider in order to keep you in employment at the Bridges Federation*". The panel did not conclude that there were any feasible alternatives. With regard to mediation, the panel stated:

    "The panel did note your wish to try mediation again but also noted why this had failed previously. Although the full details were noted to be confidential, during the hearing and in the paperwork it was clear that trying mediation again was unlikely to be successful due to your opposing beliefs in regards the nature of your grievances against Kate and what you would expect the school to change and Kate's feelings surrounding the email sent in September 2020."

16. Finally, there is the argument that no reasonable employer could have concluded that there had been a breakdown in the working relationship. However, the panel has set out cogent reasons whey they thought the relationship had broken down. They may be proved to be right or wrong, but it would be impossible to say at this stage that, on the facts as stated in that letter, no reasonable employer could reach that conclusion.

17. Mr Carmody's argument is essentially that, the protected disclosures being the context for the dismissal and the fact that they were raised in consequence of the Claimant's beliefs around mismanagement at the school, the decision to dismiss cannot be separated from the disclosures.

18. However, in my judgment and on the evidence before me, it does not appear to appear to me likely to that, on determining the complaint, the tribunal will find that the reason for the dismissal was that the Claimant made protected

disclosures. That may have been the context, but the evidence at this stage does not suggest that they were likely to be the cause.

19. The application for interim relief is therefore dismissed.

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Employment Judge S Cheetham QC
Date: 19 December 2021

Sent to the parties on
Date: 29 December 2021