EMPLOYMENT TRIBUNALS

Claimant: Ms Rebecca Latham

Respondent: The Firs Care Home Ltd

INTERIM RELIEF HEARING

Heard at: Nottingham (in public) **On:** 26 November 2021

Before: Employment Judge Camp

Appearances
For the claimant: Mr A Adamou, counsel
For the respondent: no appearance

REASONS

1. This is the written version of the reasons given orally at the hearing for the decision rejecting the claimant's interim relief application, written reasons having been requested on the claimant's behalf at the hearing itself.

2. The claimant was employed as a care assistant by the respondent nursing home, which is in Breaston, Derbyshire, from 1 November 2020 to a date between 7 and 10 November 2021. She presented her claim form on 14 November 2021 and we are here today on 26 November 2021 dealing with her interim relief application.

3. The respondent is not here. The absence of the respondent is always unfortunate at an interim relief hearing. I am not, though, particularly surprised. The respondent is, I understand it, a relatively small nursing home. The claim form and the application for interim relief that accompanied it were only sent to the respondent on 15 November 2021 and were sent by post. The respondent has probably not had significantly more than the 7 days' notice that is the minimum it has to be given in accordance with the Rules of Procedure. However, given that it has had at least 7 days' notice, its non-appearance is not a good reason to postpone the hearing and accordingly I have dealt with the claimant's application today.

4. The claimant has attended represented by counsel.[1] The material I have on which to base my decision is limited to: the claim form; what is described as an "ET1 rider" – the document providing (some of the) details of claim; the document sent with the claim form containing the application for interim relief (which contains more details of the claim being made); a bundle of documents attached to the claimant's application, including a note apparently written to the claimant by a manager in or around July of 2021 and, probably most importantly of all, an undated letter, clearly written around the first week of November 2021, which is effectively a termination letter.

5. What I am calling the termination letter states: "*I am writing to inform you that as from November 11th, 2021 it has become law that all care home staff have to be double-vaccinated to work in a care home environment. Therefore, unless you can provide proof you have had the vaccination, your employment at Firs* [the respondent] *will be terminated. I believe your last shift will be on Sunday, 9th November 2021*". It is signed by an Acting Manager.

6. On the face of the claim form, the claimant appears to accept that it was indeed a termination letter and that she was conventionally rather than constructively dismissed. For present purposes I shall assume that she was and that the respondent is not going to argue otherwise.

7. There is some uncertainty as to the precise date of dismissal. My reading of the letter is that employment was terminated on 9 November 2021. If the claimant is right when she tells me that her last shift was in fact 7 and not 9 November 2021, I can see her argument for saying the effective date of termination was actually 7 November 2021. It could also be argued that her employment ended on the stroke of midnight on 10/11 November 2021. I don't think it matters which of these is right, but I shall return to it since a point has been made about the timing of termination in submissions.

8. As could be deduced from the contents of the termination letter, this case arises out of the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 – the "Regulations". This is the legislation that de facto – medical exemptions to one side – make it compulsory for nursing home staff to be vaccinated if they want to keep their jobs. The claimant does not rely on a medical exemption, has not had any doses of the vaccine, and, as I understand it, refuses to have the vaccine. That is the context within which this claim arises.

9. The claimant says – emphatically – that she is not an 'anti-vaxxer', but I think it would be fair to say she is very much anti-the-covid-19-vaccines. She alleges that she made some protected disclosures about her misgivings around the vaccines and the Regulations. They are described in three paragraphs of the interim relief application. The first of those paragraphs includes this: "*Shortly after the July announcement* [the Secretary of State making the Regulations on 22 July 2021, coming into force on 11 November 2021] *she* [the claimant] *spoke in the car park to* [a manager] *about needing the jab to keep her job and to let*

[1] I am unsure as to the basis of instruction, as there is no professional representative on the record.

them know". As I understand it from submissions, that should be read as if written, "… the claimant's manager spoke with the claimant about the claimant needing the jab to keep her job and said that the claimant should let the respondent know about that." The paragraph continues with the first alleged protected disclosure: "*The claimant disclosed that she did not believe the vaccines to be safe and she did not believe the instruction* [about the claimant needing the jab to keep her job] *to be legal.*"

10. Following that discussion in July 2021, the claimant alleges she was sent or given the note which is the other document in the bundle of documents that I have already mentioned. What that note says is, "*Rebecca* [the claimant]*, can you put in writing, please, that you will be leaving this employment due to not having your Covid jab. If you are intending to have the jab, we need to see proof of this because as of 11 November anyone who is not double-vaccinated cannot work in care. Thanks, Deb*".

11. The claimant says that she made another protected disclosure after this, "*towards the end of July*". This was in a telephone conversation between her and "*the manager of the business*", a Ms Dunbar. Ms Dunbar called her rather than the other way round. It is alleged that, "*Again, the claimant articulated that she would not be having the vaccine and she did not believe them to be safe and that it was unlawful to impose them upon her and others to remain employed*".

12. The third alleged protected disclosure, which we don't have the precise date of but which must have been made between the second disclosure and the start of November 2021, is: "*The claimant later had a telephone conversation with a manager … Again she disclosed in the public interest that she was not accepting a vaccine as she did not believe them to be safe for her or anyone, or the circumstances giving rise to the requirement to have such a vaccine was legal.*"

13. On paper at least, the claimant's case is that those three disclosures, or one or two of them, were the principal reason that she was dismissed, and that, accordingly, she was automatically unfairly dismissed in accordance with section 103A of the Employment Rights Act 1996 ("section 103A"; "ERA"). The claimant has a number of other claims as well, but the only claim with which I am concerned for the purposes of this interim relief application is that under section 103A. It is because she is making a claim under that section that the Tribunal has the power to order interim relief.

14. Turning to the relevant law:

    14.1 I gratefully adopt the summary of the law relating to interim relief applications set out in paragraphs 10 to 21 of a relatively recent EAT case, Queensgate Investments LLP & Others v Millet [2021] ICR 863;

    14.2 the particular aspect of the law relating to interim relief applications I wanted to highlight is what a high-threshold test the applicant has to satisfy. The claimant has to show it is "*likely*" that the Tribunal on determining the claim will find that the reason for dismissal was the relevant one – in this case that the claimant made a protected disclosure. "*Likely*" has been interpreted to mean having a "*pretty good chance*" of success. A pretty good chance of success has in turn been held (in

Ministry of Justice v Sarfraz [2011] IRLR 562) to mean "*a significantly higher degree of likelihood*" than "*simply more likely than not*";

14.3 what this means is that in order to succeed in her interim relief application, the claimant has to show that she has a significantly higher degree of likelihood of success at any final hearing in relation to each and every element of her section 103A claim; and that she does so notwithstanding the fact that at the final hearing she, as someone with less than 2 years' service, has the burden of proving both that she made one or more protected disclosures and that at least one of them was the principal reason for dismissal;

14.4 to show she made protected disclosures, she will have to, in relation to each of the alleged disclosure she made to the respondent, satisfy the Tribunal that:

14.4.1 she disclosed information;

14.4.2 she believed the disclosure of information was made in the public interest;

14.4.3 that belief was objectively reasonable;

14.4.4 she believed the disclosure of information tended to show at least one of the following:

14.4.4.1 a criminal offence had been, was being or was likely to be committed;
14.4.4.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;
14.4.4.3 a miscarriage of justice had occurred, was occurring or was likely to occur;
14.4.4.4 the health or safety of any individual had been, was being or was likely to be endangered;
14.4.4.5 the environment had been, was being or was likely to be damaged;
14.4.4.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed;

14.4.5 that belief was objectively reasonable.

15. In addition, in assessing the claimant's likelihood of success, I bear in mind that she needs to win on everything. For example, even if she persuaded the Tribunal at the final hearing that she disclosed information, that she reasonably believed the disclosure was made in the public interest, that the reason she was dismissed was that she made the disclosure, and that she believed the disclosure tended to show a failure to comply with a legal obligation, she would lose if she did not show that her belief in what her disclosure tended to show

was reasonable. I note that her chances of winning on every point are necessarily much smaller than her chances of winning on any one point.[2]

16. My decision, made on the basis of the material put before me by the claimant and on her behalf, is that she comes nowhere near meeting the significantly-higher-degree-of-likelihood-than-simply-more-likely-than-not test.

17. As to whether the claimant made protected disclosures, I think the claimant has most difficulties in relation to the reasonableness of her relevant beliefs.

18. In relation to her alleged belief that her disclosures of information were made in the public interest, something that is often misunderstood is that the question for the Tribunal is not whether the disclosed information was of public interest in a general sense, it is whether disclosing that information to the particular person it was disclosed to – making that disclosure in the circumstances in which it was made – was reasonably believed to be in the public interest. There is no discernible public interest in telling the manager of a nursing home that a vaccine and regulations, which she has no responsibility for or control over, are, respectively, not safe and unlawful. Even if the claimant was concerned about the employment situations of some of her colleagues as well as herself[3], the public interest involved in making such disclosures is hard to see.

19. As to the reasonableness of the claimant's belief about what the disclosures tended to show, the three things she is relying on are that they tended to show: that a criminal offence has been, was being or likely to be committed; that a person had failed, was failing or was likely to fail to comply with any legal obligation; and that the health and safety of any individual had been, was being or was likely to be endangered.

    19.1 When assessing the reasonableness of the claimant's alleged beliefs, I make full allowance for the fact that she is a lay person with, so far as I am aware, no particular expertise in legal and medical matters, and is someone who may well have obtained most of her information from sources who appear to her to be reputable and well-informed, but who may not in fact be so.

    19.2 The claimant may well believe, and have believed, that the commission of a criminal offence was involved, but not reasonably so, in my view. I do, though, really struggle to see how she could convince herself that the specific statements she allegedly made that she relies on as protected disclosures tended to show any such thing. And even if she did believe this, such a belief was not objectively based and was unreasonable.

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[2] Assessing a claim's prospects of success is, of course, not the same as assessing probability as a matter of mathematics, not least because arithmetical precision is impossible. Nevertheless, it is relevant that if, for example, the chances of a claimant winning on each of four points were as high as 80 percent, the chances of her succeeding on all four of them would be just 41 percent (80 percent of 80 percent of 80 percent of 80 percent).

[3] In her application, she refers to one other individual only, someone who allegedly, "*did get vaccinated, not for the benefit of her health but in order to remain employed*".

19.3 If the claimant is saying she disclosed information showing a criminal offence was being committed by the respondent seeking to enforce the Regulations, the proposition that the respondent would be breaking the law by complying with the law as it stood (and still stands) – i.e. with the Regulations – is a very odd one indeed.

19.4 Even putting to one side the questionable merits of the arguments the claimant seemingly relies on that were raised in judicial review proceedings challenging the Regulations[4], merely alleging that something is unlawful or illegal is not the disclosure of information tending to show a failure to comply with a legal obligation.

19.5 Similarly, putting to one side the validity of the claimant's concerns about vaccine safety (which are no doubt genuine; but that doesn't make them valid or reasonable), merely alleging the Covid vaccines are not safe is not disclosure of information tending to show they aren't.

20. Even if the claimant were certain to succeed at a final hearing on the question of whether she made protected disclosures, I would still refuse to grant interim relief because I think the section 103A claim is positively unlikely to succeed on the question of whether the reason or principal reason for dismissal was that the claimant made those disclosures.

21. The only objective evidence there is points to the reason for this dismissal being that the claimant did not get vaccinated. The claimant's case is that she made her first protected disclosure after she had been told she would lose her job if she failed to get vaccinated. The note I have already referred to is to the effect that she needed to get vaccinated in order to keep her job. The termination letter tells her she is losing her job because she has not been vaccinated. And the Regulations required the respondent not to allow her to do her job because she was unvaccinated. There is nothing suspicious or peculiar or strange about the note or the termination letter. The termination letter says exactly the kind of things I would expect a small employer in this sector to say to someone with less than two years' service who it was proposing to dismiss for not getting vaccinated.

22. Moreover, the claimant cannot win unless she satisfies the Tribunal that her alleged protected disclosures made some difference to what occurred. In other words, she must be alleging that, having told her – understandably, given the Regulations – that she would lose her job if she failed to get vaccinated, the respondent would (notwithstanding the Regulations) have back-tracked and that she would have kept her job if she had not made the protected disclosures and had said nothing. That allegation is almost preposterous. I note the claimant is not saying there was anyone who was unvaccinated and did not have a health

[4] Material directly or indirectly relating to those proceedings was put before me. When I gave my decision, I did not know – because no one told me – that that judicial review application had failed: permission was refused following a hearing before Whipple J several weeks before this hearing, having previously been refused on the papers by Eady J (R (Peters and Findlay) v Secretary of State for Health and Social Care [2021] EWHC 3182 (Admin)).

exemption (and who did not blow the whistle) who kept their job, or anything like that.

23. Frankly, I have struggled to understand the claimant's arguments to the contrary. I shall attempt to do them justice by to an extent using the exact words in which they were put forward by counsel in submissions.

24. The first argument is that the termination letter is suspicious when one considers its wording and the fact that it pre-dates 11 November 2021. It was sent before the 11 November 2021 date the legislation came in and stated that the claimant's last shift was 9 November 2021 when in fact it was [according to the claimant] on 7 November 2021. The respondent has therefore taken steps to dismiss the claimant before it needed to and before the latest point in time at which the claimant could have taken a different view of things.

25. Pausing there, if the claimant hadn't been vaccinated by when this letter was sent, around the beginning of November, and given she was not claiming a medical exemption, there is no way in which she could in practice have satisfied the requirements of the Regulations by 11 November 2021.

26. The first argument continues with a submission that the attempt to terminate the contract of employment "*early*" belies [presumably "reveals" or something like that is meant] the underlying intention [to be] that since making disclosures the respondent decided to allow the claimant's employment to lapse.

27. In other words, as best I understand it, it is argued that if the true reason for dismissal had been the Regulations and the fact that the claimant was unvaccinated, she would have been dismissed with effect on 11 November 2021 rather than with effect on 7 November 2021, as she alleges she was.

28. This argument lacks a logical basis. I have already made the point that the termination letter is just the kind of letter I would expect the respondent to send in the situation that pertained. The writer of the letter evidently believed, mistakenly or otherwise, that the claimant's last booked shift was on 9 November 2021. The Regulations were coming in on 11 November 2021. The gist of the letter is, 'We are terminating your employment because the Regulations are coming in. If you want your employment to continue, you need to prove that you have been vaccinated'. What else would a termination letter in these circumstances say? Of course it would have been better had the letter specified the effective date of termination, but I don't see how the lack of a clear date makes any difference. There is nothing in the letter that is remotely suspicious or untoward or that suggests any motive for dismissal other than a desire to comply with the Regulations, let alone something pointing so strongly towards this that the claimant is at all likely to succeed on the point.

29. The second argument made in support of the proposition that the true reason for dismissal was the claimant's disclosures is based on the respondent's apparent unwillingness to take up her concerns and on it allegedly doing nothing in response to them. Again attempting to summarise what was said by counsel in submissions using his own words so far as possible, the claimant is not necessarily suggesting that the respondent's failure to do something is the reason she was dismissed. From the claimant's perspective, what the Tribunal

should do is look at the respondent's lack of engagement as evidence of motive. Had the respondent genuinely sought to dismiss the claimant simply because of the refusal to have a vaccine, the respondent would have responded in person and in writing to say so.

30. Pausing mid-argument once again, the respondent seems to have done exactly that, by writing to the claimant in July 2021 asking her to confirm whether she intended to get vaccinated and telling her that her employment would end in November if she wasn't vaccinated by then.

31. Continuing with the submissions that were made in relation to this second argument, still largely using counsel's words, the claimant's position is that the respondent not discussing anything with her demonstrates that what the respondent had done was effectively make a decision at the outset to dismiss for raising the concerns knowing that it had the safety blanket of the deadline of 11 November 2021.

32. This argument is misconceived.

    32.1 The respondent's silence and inaction neither demonstrates nor even hints at any such thing. I can see no rational basis for thinking otherwise.

    32.2 Not engaging with the claimant's concerns about the safety of the Covid vaccines and the lawfulness of the Regulations is exactly what I would have expected the respondent to do. What investigation of these concerns could the respondent – a small nursing home, not staffed by virologists and public lawyers, busy looking after its residents – sensibly do? Is the claimant seriously suggesting that it should have defied the law and not enforced the Regulations, risking it being shut down by the authorities? What the claimant calls the respondent's inaction looks to me, on the basis of the material I have, like it simply sticking to its guns and repeatedly telling the claimant that she needed to be vaccinated if she wanted to keep her job.

33. The third and final argument raised in support of the proposition that the true reason for dismissal wasn't that the claimant had refused to get vaccinated but was instead that she blew the whistle overlaps with the second one. It is essentially a bare assertion that the decision to dismiss was taken when the first disclosure was made and that the respondent thereafter, rather than dismissing her straightaway because that would be suspicious, simply allowed the clock to run down to midnight on 10 November 2021. Suffice it to say that the suggestion that the respondent decided to sack the claimant because she was a troublemaker as soon as she blew the whistle and not because of the vaccine is unsupported by any of the facts the claimant relies on.

34. Earlier in these Reasons I used the phrase, "*On paper at least, the claimant's case is …*". I did so because I wondered during the hearing, based on some of the things said during submissions, whether that was really the claimant's true case. I detected hints that her true case might be along these lines: the respondent should have looked into her concerns when she blew the whistle; had it done so properly, it would have discovered that they were well founded and it would not have dismissed her. I raise this only to confirm that if that is her

true case, and even if she was 100 percent correct about what the respondent should and would have done and about having made protected disclosures, this would not make the reason for dismissal the making of those disclosures.

35. Finally in relation to the reason for dismissal, I look at the inherent probabilities of this situation. There are two competing possibilities: that the reason was whistleblowing; that the reason was the Regulations and the claimant choosing not to get vaccinated.

36. The former possibility finds no support in the facts as alleged or in logic. Why would the respondent care about the claimant expressing her views about the vaccine and the lawfulness of the Regulations to a couple of managers? The claimant is not relying on any disclosures that may have been made to other vaccine-hesitant staff; and if she were I would be questioning why, if they were the respondent's concern, it would wait until just before the Regulations came in to dismiss her, by which time any damage she was causing by talking to other staff about this would already have been done.

37. Contrastingly, all of the facts and evidence put before me point to the reason for dismissal being the justified belief that the claimant would not be vaccinated by 11 November 2021. The termination letter is conventional and consistent with this being the reason. Dismissal coincided with the Regulations coming in. It followed repeated warnings to the claimant to the effect that her employment would terminate unless she got vaccinated and that she could keep her job if she provided proof of vaccination. The first of those warnings was given before she allegedly blew the whistle. The Regulations were the law of the land and meant that the claimant could not lawfully do her job from 11 November 2021 onwards. There is no substantial basis for doubting the respondent's motives; there is nothing odd or that begs a question in what has been presented to me.

38. In conclusion, it is not "*likely that on determining the* [unfair] *complaint to which the* [claimant's interim relief] *application relates the tribunal will find that the reason … for the dismissal*"[5] was the one specified in section 103A. I think the claimant will in all probability lose at any final hearing. I therefore dismiss the application.

Employment Judge Camp

25 January 2022

Sent to the parties on:

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For the Tribunal Office:

……..……..

[5] ERA section 129(1)(a).