EMPLOYMENT TRIBUNALS

Claimant: Mr P Parry

Respondent: University of Surrey

Heard at: **Reading** **On:** **22 February 2022**

Before: **EJ Milner-Moore**

Representation
Claimant: In person
Respondent: Not in attendance

RESERVED JUDGMENT

1. The claimant's application for interim relief, made under sections 128 and 129 of the Employment Rights Act 1996, is rejected.

REASONS

The hearing

1. This case was listed for a one-day hearing to consider the claimant's application for interim relief under sections 128 and 129 of the Employment Rights Act 1996 ("the ERA") the claimant having alleged that, in contravention of section 103A ERA, he had been dismissed for making protected disclosures . The respondent was on notice of the hearing but did not attend. The hearing took place via CVP. Although there were occasional delays, the connection was generally good, and I was able to see and hear the claimant and to be seen and heard by him.

2. The claimant has another claim against the respondent (case number 33021133/21) and a case management hearing in that case has been fixed to take place on 31 March 2022. The claimant is content that this claim should be joined with his other claim and that the case management hearing on 31 March should consider both matters. I have therefore made a separate order to that effect.

3. I did not hear evidence from the claimant, but he made submissions to me by reference to the documents that he had provided. I had before me the

claimant's form ET1 but no response/ET3 had been filed by the respondent. There was no indexed hearing bundle. However, the claimant had supplied two zip files containing around 35 individual pdfs. documents covering various events during his employment with the respondent. I confirmed with the claimant which documents he considered I should focus my reading on. During that discussion it became apparent that the claimant had not provided two key documents specifically identified in the ET1 as documents in which protected disclosures were made (grievances brought by the claimant on 13 February 2020 and 19 September 2020). The claimant provided these, together with some additional documents which he considered to contain the substance of the disclosures relied on. By the end of the hearing it was evident that there were other relevant documents which I had not been provided with. For example, the claimant was the subject of a collective grievance brought by some of his colleagues and was also subject to a disciplinary process, but I was not provided with the key documents in relation to these matters.

4. The claimant confirmed that he relied on four disclosures which he considered to be "protected disclosures" within the meaning of section 43A of the ERA.

    a. **PD1** - A disclosure, contained in an email sent to the University Vice Chancellor in July 2019, regarding an alleged breach of legal obligation in relation to the issue of parking fines and the access by private parking providers to DVLA records in order to enforce those fines. The claimant identified the legal obligation at issue as schedule 4 of the Protection of Freedom Act 2014.
    b. **PD2** - A disclosure, contained in a grievance dated 13 February 2020, regarding alleged breaches of GDPR in relation to the respondent's proposed arrangements for collecting and processing personal data for parking permit applications.
    c. **PD3** – A disclosure contained in a grievance of 19 September 2020 and related documents. This concerned the alleged endangerment of health and safety arising from the arrangements adopted for a rota for staff working on the respondent's reception desk.
    d. **PD4** – A disclosure contained in four documents sent by the claimant in response to Adam Childs' grievance investigation report. The claimant says that these amount to a disclosure of information regarding a breach of legal obligation. The legal obligation concerned is the duty to make reasonable adjustments under the Equality Act 2010 to support the claimant's mental health.

The issues for determination and relevant legal principles

5. The claimant says that he was dismissed in contravention of section 103A ERA because he had made the protected disclosures set out above. In determining the claimant's application for interim relief under section 129 ERA, the issue that I was required to consider was whether

> *"129 (1) 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 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A"*

6. In determining that question I would need to consider whether it was likely that the Tribunal which hears his unfair dismissal case would make the following findings:
    a. The claimant had made a disclosure of information (as opposed to a mere allegation or a statement of opinion);
    b. he believed the disclosure tended to show one of the matters set out at 43B1 (a) to (f),
    c. his belief that it tended to show such a matter was a reasonable one,
    d. he believed the disclosure to be in the public interest;
    e. his belief that the disclosure was made in the public interest was a reasonable one;
    f. his having made the disclosure was the reason or principal reason, for his dismissal.

7. If I concluded that it was "likely" that the Tribunal would make such findings then it was open to me to make the orders indicated at section 129(2) to (9) ERA 1996.

8. In the context of an interim relief application the word "likely" has a specific meaning. It is not necessary for the claimant to show that he will definitely succeed at a final hearing, but it is not enough for the claimant to show that it is "possible" that he will succeed, or that he will succeed only on the balance of probability. The level of "likelihood" required has been described as being that a claimant "has a pretty good chance" which is the test derived from the case of **Taplin v Shippam** [1978] ICR 1068. This phrase is intended to describe a significantly higher degree of likelihood than 51% or balance of probability. What is required is "something nearer to certainty than mere probability" (**Safraz v Ministry of Justice** [2011] IRLR 562 EAT).

9. My role therefore is to make a summary assessment as to whether the claimant can be said to have a "pretty good chance" of succeeding with his claim at a final hearing. I am not engaged in making a summary determination of the claim. The reasons that I am required to give are correspondingly less detailed and it is sufficient for me to give the essential gist of the reasoning.

10. Sections 43B of the ERA sets out when a disclosure will be a qualifying disclosure

> "43B Disclosures qualifying for protection.
>
> (1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d)that the health or safety of any individual has been, is being or is likely to be endangered,
(e)that the environment has been, is being or is likely to be damaged, or
(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed. "

11. In considering whether any of the disclosures identified amount to protected disclosures under sections 43A and B of the ERA 1996 I have reminded myself of the following principles established by some of the key authorities:

    a. A protected disclosure must contain "information" as opposed to being purely an expression of opinion or an allegation without any supporting factual content. However, information and allegation are not mutually exclusive categories. Whether a disclosure contains information needs to be assessed by reference to the context in which it is made. (**Kilraine v London Borough of Wandsworth** [2008] EWCA Civ 1436**).** It may be that a disclosure of information is found in the cumulative effect of a number of communications.

    b. An individual need not prove either that the facts disclosed are true or that they are capable in law of amounting to one of the categories of wrongdoing listed in legislation. What is necessary is that the individual subjectively believes that the wrongdoing has occurred/is likely to occur and that this belief is objectively a reasonable one. A reasonable but mistaken belief as to these matters will suffice (**Babula v Waltham Forest College** [2007] 1026 ICR)

    c. Even where the disclosure relates to some personal interest of the claimant, or to a breach of the claimant's contract of employment, it is possible for there to be a public interest in the disclosure. The decision in **Chesterton v Nurmohamed** [2015] UKEAT 0335 provides helpful guidance about the four factors which are likely to be of particular relevance in assessing whether the public interest is engaged in such a case. The factors are the numbers in the group affected, the nature of the interests affected and the extent of the wrongdoing (is it an important matter or a trivial one), the nature of the wrongdoing (is it deliberate or inadvertent) and the identity of the wrongdoer.

Factual background

12. I am not engaged in making findings of fact, but it is necessary for me, in explaining the conclusions that I have reached, to set out something of the factual background as it appeared from the evidence before me.

13. The claimant has been employed by the respondent University since 13 September 2013 as a Programmes Officer. The respondent employs around 3000 employees and has a student body of around 16000. Since 2019 the claimant has raised various grievances and concerns and his

relationship with the respondent has become increasingly strained. The difficulties appear to have begun when the claimant was issued with a penalty notice for parking on the University grounds without displaying a parking permit.

14. **PD1** – The claimant wrote to the Vice Chancellor in July 2019 to say that he believed that, due to the inadequacy of the parking signage displayed on the campus, the parking provider could not legally enforce the penalty notices that it was issuing. He made reference to a county court judgment made in favour of a student at the University to this effect. He also made reference to the Protection of Freedoms Act 2014, schedule 4 of which dealt with the circumstances in which a company can obtain registered address details from the DVLA in order to enforce a penalty notice. He suggested that schedule 4 did not apply where, as in this case, the penalty notice was unenforceable, and that the parking provider was illegitimately obtaining information from the DVLA. The claimant's position was that he believed that there was a public interest in his raising this issue as it was one that potentially affected large numbers of students and staff. The claimant met the Vice Chancellor later in 2019 to discuss the matter and was advised to pay the penalty notice and put matter behind him. Out of respect for the Vice Chancellor the claimant decided not to pursue the matter further.

15. **PD2** – In 2020, the respondent introduced a new parking permit allocation policy. The claimant explained that the respondent intended not to provide parking permits to persons living near to the University but that it would make exceptions for persons with childcare responsibilities or with medical conditions which meant that they needed a parking space. When applying for a parking permit, staff and students were asked to provide some personal data in support of the application, including details of their address and whether they had childcare responsibilities or medical issues. On 13 February 2020, the claimant raised a grievance against a member of the respondent's transport team. The grievance stated that the claimant had raised concerns with the transport team and with the respondent's Data Protection team. The claimant's concern was that the respondent's seeking personal data was unjustified, or in breach of GDPR. The grievance largely consists of allegations to the effect that the respondent had failed to demonstrate that its approach was compliant with the GDPR. It did however contain a factual assertion that the respondent had not completed a Data Protection Impact Assessment and that it was legally required to do so given that it was processing data about medical conditions. The claimant's position is that he believed this disclosure to be a matter of public interest given the numbers of students and staff affected. The claimant explained that the policy was subsequently withdrawn because it had caused a great deal of upset to students and staff.

16. **PD3** – On 19 September 2020, the claimant submitted a further grievance in relation to Karen Field (his line manager) and this gave rise to an investigation conducted by Adam Child. The claimant considered that he had made protected disclosures in this grievance and during his subsequent meeting with Adam Child. The grievance raised a large number of issues which Adam Child summarised as a complaint that Karen Field was not taking sufficient account of the claimant's welfare. (The allegations included that the respondent had withdrawn previous flexibilities allowed to the claimant, had unfairly threatened him with disciplinary action and

inappropriately shared the claimant's personal information). The grievance also alleged that the respondent had failed to conduct a proper risk assessment of the proposed operation of a rota system for the reception desk. The system was that employees would be rota'ed in turn to sit at the reception desk. The claimant's grievance stated that this amounted to "hot desking" which the respondent's general Covid risk assessment had said should be avoided due to transmission risk. (In fact, the risk assessment said that if hot desking could not be avoided there should be appropriate cleaning of the work area between different users so as to minimise the risk of transmission). The claimant stated to Mr Childs that he considered that the respondent should perform a separate risk assessment in relation to the helpdesk rota and that he was concerned that there had not been adequate consideration of the risks faced by BAME and pregnant staff. The claimant relies on this disclosure as tending to show that his health and safety and that of his colleagues had been endangered. His position was that there was a public interest in the disclosure because, although the numbers of staff affected was small, the reception area was open to members of the public and students.

17. Adam Child issued an investigation report in October 2020 setting out the conclusions that he had reached in relation to the claimant's grievance. He did not uphold the grievance. In relation to the health and safety concern he noted that the respondent had arrangements in place to mitigate transmission risks having provided for cleaning to take place between users of the reception desk. He also noted that anyone who had a concern about their working arrangements could be referred to Occupational Health for assessment. Although he did not uphold the grievance, he made a number of recommendations which were supportive of the claimant, including that there should be a referral to occupational health to ensure that the claimant was supported on his return to the office and that the respondent should allow the claimant reasonable flexibility in accordance with its policies where the claimant needed this for domestic reasons.

18. **PD4** – The claimant relied on matters set out in various documents in which he responded to Adam Childs' investigation report as amounting to a further protected disclosure. The claimant considered that these documents contained information tending to show that the respondent was in breach of its obligations under the Equality Act 2010, to make reasonable adjustments which would have supported his mental health. The claimant's position is that these disclosures were in the public interest because they were illustrative of a broader lack of understanding on the respondent's part about mental health issues which would impact on its ability to provide support to students with mental health conditions.

19. It is relevant to record that in one of these documents the claimant accuses Adam Child of pushing him towards suicide and states "it is important to me to ensure you are fully aware of my views and the contempt that I have for your report. Repression cannot be tolerated, and actions of disempowering and silencing must be challenged and resisted at every opportunity".

20. On 28 July 2021, the respondent wrote to the claimant informing him of disciplinary charges in relation to his conduct and advising him of a collective grievance which had been submitted against him. The disciplinary charges related to: failure to follow reasonable management instructions on

a number of occasions, unacceptable conduct in relation to emails sent to Adam Child and the claimant's line manager, unauthorised absence from work in July 2021 and an irretrievable breakdown in the working relationship and in the trust and confidence between the respondent and the claimant. The collective grievance appears to have raised factual issues which overlapped with the disciplinary allegations.

21. The subsequent processes were delayed by the claimant's sickness absence. The matter was referred to a disciplinary panel and a hearing was due to take place on 2 December 2021. That hearing was rescheduled to 9 December 2021 due to the claimant's ill health. On 7 December 2021, the claimant's sister emailed to say that the claimant was not medically fit to attend a hearing. As a result, on 7 December 2021, the respondent's HR officer, Andrew Male, wrote to seek advice from the respondent's occupational health adviser as to how to proceed. The claimant places reliance on the content of Mr Male's letter of 7 December as evidence which makes it "likely" that he will succeed in showing that the principal reason for his dismissal was that he had made protected disclosures. He says this because the letter makes reference to the fact that the claimant was engaged in bringing legal proceedings against the respondent and which he considers indicates that the respondent had improper motives for the dismissal. However, I did not consider it likely that the claimant would succeed in persuading a tribunal to draw such an inference from this letter. In summary, the letter states that the respondent wanted occupational health advice as to whether the claimant could be fit to engage with a disciplinary hearing on 9 December or whether he might be fit to do so at some future date or whether the best course would be to proceed in the claimant's absence. It was in that context, that Mr Male drew to the occupational health adviser's attention the fact that the claimant, though unfit to participate in a disciplinary hearing, had been able to bring separate legal proceedings. The occupational health advice was to proceed in the claimant's absence. The occupational health adviser described the claimant as chronically embittered.

22. The disciplinary hearing went ahead in the claimant's absence and I have seen the notes of the panel's deliberations and a letter dated 10 December 2021 terminating the claimant's employment. These documents set out the respondent's explanation of its reasons for dismissal. They state that the Panel had concluded that there had been a complete and irretrievable breakdown in the working relationship and in trust and confidence between the claimant and the respondent. The letter records that the panel considered that the claimant "seemed unable to maintain an effective working relationship with anyone who disagreed with you or had authority over you" and that the claimant wished to be left to work as he saw fit rather than complying with accepted ways of working. The panel also noted that the claimant's behaviour had caused a significant adverse impact on his colleagues, who had been the subject of repeated complaints and grievances including threats of civil and criminal action. The documents show that the Panel considered whether the respondent had contributed to this breakdown or whether action could be taken to repair relationship. It considered that the respondent was not at fault and that there was no further action that could be taken. The documents record that the Panel's view that the claimant had been supported by the respondent in a number of respects in that: the respondent had delayed taking formal disciplinary action for a

considerable period, had not subjected the claimant to formal absence management despite his absence history, had not reclaimed overpayments of sick pay, had made efforts to support the claimant's mental health and well-being, had shown care with the language used in its communications with the claimant (in contrast to the claimant's approach to colleagues) and had followed its grievance policies where the claimant raised concerns. The dismissal letter records that the Panel considered it unlikely that the claimant would engage reasonably with any effort to repair the working relationship.

Conclusions

23. I have concluded that the claimant has not shown that he has a pretty good chance of succeeding at a final hearing and establishing that the reason, or principal, reason for his dismissal was that he had made protected disclosures. I have reached that conclusion for the following reasons.

Protected disclosures

24. I considered (on the limited evidence that I had seen) that it was sufficiently likely that the claimant could show that PD1 and PD2 were protected disclosures. The letter at PD1 appears to contain information tending to show to a breach of a defined legal obligation (the Protection of Freedom Act 2014). The grievance at PD2 contains information tending to show a breach of GDPR in relation to the alleged failure to conduct a Data Protection Impact Assessment in relation to the processing of medical information. The claimant appeared to have researched the position in relation to both matters and, even if his assessment of the facts and the law are proved to be incorrect on the final analysis, I considered that it was likely that he could demonstrate a reasonable belief both that his disclosures tended to show breaches of legal obligation and (given the numbers potentially affected and the identity of the respondent) that the disclosures were in the public interest.

25. PD3 – Whilst the claimant may have disclosed information which he subjectively believed tended to show endangerment of health and safety, I did not consider that he had "a pretty good chance" of showing that his belief in this respect was objectively reasonable, given that the respondent had made clear that there were cleaning arrangements in place to minimize transmission risks and that anyone with specific concerns about risks to health could seek occupational health advice on their working arrangements. I was also not satisfied that the claimant was likely to succeed in showing that he had a reasonable belief that his disclosure was made in the public interest. In reality, the concerns raised appeared to affect the claimant and a small group of colleagues who were asked to work on the reception desk. The fact that the reception desk was in an area open to the public did not make it likely that he would successfully show that the disclosure was made in the reasonable belief that it was a matter of public interest.

26. PD4 – I did not consider that the claimant was likely to succeed in showing that he made disclosures of information which he reasonably believed tended to show a breach of the Equality Act 2010. The documents that the

claimant produced largely consisted of allegations and expressions of disagreement with the conclusions reached in the investigation report, rather than providing information. Additionally, I did not consider that the claimant was likely to succeed in showing that he had any reasonable belief that the disclosure was made in the public interest. The disclosure clearly relates to the claimant's personal grievances rather than any issue of public interest, there was nothing to connect this matter with any broader issue as to how the respondent supported student mental health.

Reason for dismissal

27. Although I think it is likely that the claimant will be able to show that he made protected disclosures in relation to PD1 and PD2, I did not consider that the claimant had a "pretty good chance" of showing that these disclosures were the reason, or principal reason, for his dismissal. I reached that conclusion for the following reasons:

    a. The disclosures were made in late 2019 and early 2020 and were made in relation to parking issues which were subsequently resolved, the first by the claimant's decision to let the matter drop and the second by the respondent's withdrawal of the policy. It was unlikely that a dismissal almost two years later would be motivated by these disclosures.
    b. More significantly, there was substantial evidence (in the dismissal letter and in the panel's notes of their deliberations) to indicate that the respondent's reason for dismissal was its perception there had been a complete and irretrievable breakdown in the working relationship of trust and confidence and that this breakdown was due to the manner in which the claimant had conducted himself towards his colleagues and to his mistrustful attitude towards the respondent. I did not see the evidence which the respondent had collected through its disciplinary process, or the evidence of the collective grievance which had been brought against the claimant. However, I have made reference to the intemperate language that the claimant used towards Mr Childs when responding to the grievance report in which he had made recommendations which were supportive of the claimant. That response appeared to me to be illustrative of the concerns recorded by the respondent in its dismissal letter.

28. For these reasons the application for interim relief fails.

Employment Judge Milner-Moore

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Date 24 February 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

25 February 2022

FOR EMPLOYMENT TRIBUNALS