



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mrs Daphne Robertson

v

The Orders of St John Care Trust

Heard at: Norwich (by CVP)

On: 17 May 2022

Before: Employment Judge Postle

Appearances

For the Claimants: Miss Venkata, Counsel

For the Respondent: Mr Searle, Counsel

JUDGMENT

on

APPLICATION for INTERIM RELIEF

The Claimant's Application for Interim Relief under Section 128 of the Employment Rights Act 1996 is not well founded.

REASONS

1. This is an Application for Interim Relief under Section 128 of the Employment Rights Act 1996 ("ERA"). The Claimant has two claims: claim one is for whistle blowing detriment, essentially the alleged detriments relate to a meeting with her, following a meeting with her Manager, and Ms Axtell on 30 June 2021 and the Respondents dealing with the subsequent Grievance, the Grievance Appeal and further the Claimant's Subject Access Request claim; claim two is also for the whistle blowing detriment, that is constructive dismissal, automatic unfair dismissal and because of protected disclosures the alleged disclosures and detriments are essentially a repeat of claim one plus five further detriments.
2. In this Hearing we have had a Bundle of documents consisting of 791 pages, a Witness Statement from the Claimant, the Respondent's Response to that Witness Statement and written submissions from both Counsel for the Claimant and Counsel for the Respondents. As they are in writing, no disrespect is intended to Counsel, I need not rehearse those.

The Law

3. Section 129 of the Employment Rights Act 1996 requires a Tribunal to consider whether the Claimant is likely to succeed and all elements of a complaint should be the subject of the likely to succeed test. The actual test is whether 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 automatically unfair reason for dismissal will be established. This requires the Tribunal to carry out an expeditious assessment as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party. This necessarily involves a far less detailed scrutiny of the parties' cases than ultimately would be undertaken at a full Hearing. The statutory test does not require the Tribunal to make any specific findings of fact, rather, I must make a decision as to the likelihood of the Claimant's success at a full Final Hearing of the unfair dismissal complaint based on the material before me.
4. Therefore, the basic task is to make a broad assessment on the material available to me and to make a prediction about what is likely to happen at the eventual Hearing before a full Final Tribunal. Therefore, the correct test is whether the Claimant has a pretty good chance of success at a Full Hearing.
5. The Employment Appeal Tribunal ("EAT") has said that the burden of proof at in Interim Relief Application is intended to be greater than that at a Full Hearing. Underhill has said in Ministry of Justice v Saffrars [2011] IRLR562,

"Likely does not mean simply more likely than not, but denotes a significantly higher degree of likelihood, i.e. something nearer to certainly than mere probability."
6. In this case there were five alleged protected disclosures made. Four accepted as being made, by the Respondent, although not accepted as a qualifying protected disclosure; the first is not accepted by the Respondents and that is said to be made at a one to one meeting on 30 June 2021 with Miss Louise Axtell.
7. Essentially, the Claimant's position is that she wanted to work from home and was said to be concerned about social distancing in seven sites she was required to work at. Particularly it was said that there were five sites which had small offices. The Claimant, in a nutshell, says as a result of raising these various disclosures over a period of time she was subject to criticism by her Line Manager which was unjust. Followed by the failure to address her Grievance and Appeal and a subsequent Subject Access Request which forced her out, resigning on 1 April 2022 claiming a repudiatory breach of the implied term of trust and confidence as a result of the Claimant making the protected disclosures.

8. Set against the above, the Respondent's position is that the new Manager Ms Axtell came to post in April 2021, this was not the first time the Claimant has been criticised about her performance. There had been issues previously raised by Managers about the Claimant's performance, particularly in 2018 and 2019.
9. The Respondents say that the Grievance was thoroughly investigated and a detailed outcome was provided, albeit with some delay (the reason for that delay being holidays), that Grievance was not upheld. The Claimant then went off sick and the Respondents then agreed to pay the Claimant her full salary. This continued for some months thereafter. The Claimant appealed against the original Grievance outcome and again there was a detailed outcome in the Appeal, not upholding the Claimant's Grievance. The Respondents say it had been thoroughly investigated and a number of people were interviewed in the course of that investigation.
10. Following the outcome of the Appeal, the Respondents then wanted to discuss the Claimant's return to work in February and March 2022. They believed that the Claimant was unreasonably refusing to attend meetings to discuss the return to work and therefore stopped her full contractual pay in the hope that this would result in a meeting. The Claimant then resigned, the Respondents say clearly there was no repudiatory breach and that it was nothing to do with any alleged qualifying protected disclosures.
11. I note in this case that the first five of the claims of detriment appear to be potentially out of time, i.e. before 14 July 2021. There appears to have been concerns about the Claimant's work previous to Miss Axtell raising them in June 2021, by previous Managers; we see that at page 168 – 170 of the Hearing Bundle.
12. The Claimant wanted to work from home and when she was asked to return to work she went off sick. The Respondents allowed her to go on paid leave whilst she was submitting sick notes, exercising their discretion to pay the Claimant above contractual sick pay.
13. There was a delay in dealing with the Grievance, the explanation being staff on leave and as such this was not a malicious delay. The Respondents agreed to deal with the Subject Access Report before finalising the Appeal and there were issues over providing documentation because of the large volumes, they were legitimate issues by all accounts. The Respondents allowed the Claimant, outside their normal procedure, to be represented by her brother at the meeting. The fact that the Claimant was on paid leave for seven months and the Claimant's reasoning, best known to herself, namely the refusal to attend any meetings to discuss a planned return to work. Added to that, the Claimant appeared to have a free hand where she wished to work.
14. Taking all those matters in the round and considering the test that I have to adopt, I cannot conclude that the Claimant has a pretty good chance

and is likely to make out her case at a Full Hearing, in showing that the principal or main reason that caused her to resign was the making of the qualifying protected disclosures and an alleged repudiatory breach by the Respondents of the implied term of trust and confidence.

15. For those reasons, the Claimant's Application for Interim Relief does not succeed.

Employment Judge Postle

Date: ...22 June 2022.....

Sent to the parties on:

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For the Tribunal Office.