EMPLOYMENT TRIBUNALS

Claimant: Mr A

Respondents: Ms B, Ms C, Ms D and The Organisation

Heard at: Nottingham

On: 27 May 2022

Before: Employment Judge Victoria Butler (sitting alone)

Representation
Claimant: In person
Respondent: Mr Quickfall, Counsel

JUDGMENT

The Employment Judge gave judgment as follows:

The Claimant's application for interim relief fails and is dismissed.

REASONS

Background

1. The Claimant presented his first claim to the Tribunal on 4 March 2020 claiming whistleblowing detriments. The case was subject to a successful application for a deposit order, and I deal with this more below.

2. The Claimant presented this claim on 7 May 2022 alleging automatically unfair dismissal after making the protected disclosures relied on in the first claim.

3. The Claimant made an application for interim relief within his originating claim and today's hearing was listed to hear it.

4. I was provided with two separate bundles of documents from both the Claimant and the Respondent. I was also provided with two witness statements on behalf of the Respondent but did not hear any oral evidence.

5. I heard submissions from the parties and have had regard to both.

Agreed background

6. The Claimant commenced employment with the Respondent under a fixed-term contract between 1 May 2019 until 30 April 2022 as a Research Fellow to work on a Biotechnology and Biological Sciences Research Council funded project.

The Claimant's case

7. In brief summary, the Claimant says that he made two protected disclosures. The first was an oral disclosure in July 2019 regarding rat feeding. The second was made orally in the first instance on 23 October 2019 and repeated thereafter in an email on 28 October 2019 which we referred to as "the Metacam disclosure".

8. Thereafter, the Respondent attempted to use the disciplinary procedure against him, placed him on furlough without his consent, unilaterally imposed a new role on him, forced him to deal with his grievance appeal alongside his redundancy consultation and, ultimately, dismissed him.

The Respondent's case

9. The Respondent denies the claim. In brief summary, in October 2019, the Claimant's access to the animal unit was revoked pending further training which could not be carried out on the Respondent's site. This was in consequence of adverse incidents arising during his surgery on rats.

10. Rather than dismissing him, the Respondent sought to find him alternative work that would see him through to the end of the fixed term, such work being funded by the Respondent itself, rather than externally. This was an unbudgeted cost and, therefore, an exceptional and time-limited measure.

11. At the end of the fixed-term contract, there was no budget available for ongoing exceptional research. This was due to a change in government policy requiring the Respondent to prioritise the recruitment, and consequent cost, of additional teaching staff post-pandemic. Accordingly, the Claimant was dismissed at his contract's natural end.

The deposit order

12. As above, the Claimant was required to pay a deposit before being permitted to continue with his claim which he duly paid. Relevant extracts from Employment Judge Butler's ("EJ Butler") judgment are repeated below.

13. Paragraph 3.1:

> "*His disclosure was made under section 43B(1)(b) as it involved persons who failed to comply with a legal obligation. They had breached the protocols in force under the licence granted to them by the Home Office in relation to the use of animals in research. The Claimant made two disclosures to the third Respondent. The first was in July 2019 when he alleged the second Respondent was over starving rats and the second was the first Respondent's refusal to administer an analgesic called Metacam pre-operatively to a rat. The Claimant considers both matters indicate a breach of legal obligation.*

14. Paragraph 3.2

> "*The disclosures were in the public interest because non-compliance with licence conditions leads to a breakdown in the system, animal research is carried out for the benefit of humankind and the welfare of the animals and the sciences is in the public interest".*

15. Paragraph 17

> " ……. *In this regard, there is likely to be some difficulty for the Claimant in establishing to the Tribunal's satisfaction that his protected disclosures as opposed to the complaints actually caused the detriments*".

16. Paragraphs 23 & 23

> *"It seems from the documents that a toxic atmosphere was brewing between the Claimant and the second Respondent. This seems to have ignited in October over the Metacam issue. The first Respondent felt bullied by the Claimant and decided to raise a complaint against him. The second Respondent effectively joined in with that complaint. These issues arose after a history of ill-feeling between them. The documents do not show the disclosures made by the Claimant caused the alleged detriments. Further his insistence that the first, second and third Respondents be publicly named in these proceedings lend weight to the argument that the proceedings are indeed retaliatory and bring into question the Claimant's reasonable belief that the disclosures were in the public interest."*
>
> "*Having reviewed the submissions of the parties, and allowing for the fact that the Claimant is a litigant in person*, *I consider the claim to be weak and one which had little reasonable prospect of success"*.

The law

17. Section 128 of the Employment Rights Act 1996 ("ERA") provides:

> *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 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or (ii) paragraph 161(2) of Schedule A1 to TULRCA 1992,… may apply to the tribunal for interim relief.*

18. Section 129 ERA provides:

> *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 that the reason (or if more than one the principal reason) for the dismissal is one of those specified in section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A*

19. Accordingly, interim relief can be ordered where the Tribunal finds it is likely that the Tribunal will decide at a final hearing that the reason or principal reason for the Claimant's dismissal was because he made protected disclosures contrary to section 103A ERA.

20. The EAT said in ***Taplin v C Shippam Limited*** **1978 ICR 1068, EAT** that '*likely*' means that the Claimant must show that there is a '*pretty good chance'* of succeeding which means something more than merely on the balance of probabilities.

21. In ***Ministry of Justice v Sarfraz*** **[2011] IRLR 562, EAT** it was stated that *"'"likely" does not mean simply "more likely than not" - that is at least 51 per cent - but connotes a significantly higher degree of likelihood."*

22. Section 103A ERA provides:

> *"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".*

23. Section 43B ERA provides:

> *"(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— …..*

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject".

24. The Claimant must show it is likely he will establish at a final hearing that;

    i. He disclosed information.

    ii. He believed that his disclosure(s) tended to show that the Respondent(s) failed, was failing or was likely to fail to comply with any legal obligation to which he is subject

    iii. His belief was reasonable.

    iv. He believed the disclosure(s) were made in the public interest.

    v. His disclosures were the sole or principal reason for his dismissal.

Conclusions

25. EJ Butler has already determined that the Claimant has little reasonable prospect of success of establishing that he made disclosures which are protected in law and I cannot go behind his judgment and substitute an alternative view. Accordingly, the Claimant is unable to meet the test of showing that it is likely that the Tribunal will decide at a final hearing that i) he made protected disclosures and, therefore, ii) that such disclosures were the sole or principal reason for his dismissal. Accordingly, his application must fail at this early stage.

26. In addition, Mr Quickfall submitted that the causation test in a whistleblowing detriment claim is lower than the causation test in a whistleblowing unfair dismissal claim. Given that it has already been determined by EJ Butler that the Claimant has little reasonable prospect of success in establishing the lower causative link between his disclosures and detriments, he has, in essence, less chance of establishing that they were the sole or principal reason for his dismissal. I agree with his submission.

27. For completeness, even if a deposit had not been ordered, from a summary assessment of the documents I would not have been satisfied that the Claimant is likely to succeed in his claim at the final hearing.

28. Mr Quickfall submitted that, at its highest, the Claimant has a 50% chance of success simply because there are core issues of dispute that can only be resolved after the evidence has been heard. This does not meet the requirement of '*likely*' to succeed as defined by case law. I agree with his submission.

29. Even if the Claimant was likely to establish that his disclosures were protected in law, I am mindful that when the Claimant was removed from his research project pending further training, the Respondent did not seek to dismiss him. Rather, it sought to find him alternative work that would take him to the end of his fixed term and used its own funds to do so. It did so *after* the Claimant made the disclosures

which naturally begs the question, if the Respondent wanted to dismiss the him because he made them, why did it not do so at that stage?

30. The Respondent advances plausible reasons for the Claimant's dismissal, namely that his fixed term had come to an end and there was no internal budget available to fund him in alternative work any longer. Furthermore, the dismissal occurred circa two-and-a-half to three years after the disclosures.

31. Accordingly, the factual background does not point to the Claimant having a pretty good chance of succeeding in his claim at a final hearing.

32. Given all the factors above, I conclude it is not likely that the Claimant will be able to establish firstly that he made disclosures that were in the public interest and secondly that those disclosures were the sole or principal reason for the dismissal.

33. The application for interim relief fails and is dismissed.

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Employment Judge Victoria Butler

Date: 7 July 2022

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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