



# EMPLOYMENT TRIBUNAL

**Claimant:** Miss D Dubow

**Respondent:** The Royal Marsden NHS Foundation Trust

**Heard via Cloud Video Platform (London Central) On:** 12 September 2022

**Before:** Employment Judge Davidson

## **Representation**

Claimant: did not attend

Respondent: Mr S Nicholls, Counsel

# JUDGMENT

## **Interim Relief**

It is not likely that, on determining the complaint to which the application relates, the Tribunal will find that the reason or principal reason for the claimant's dismissal is that specified in s103A ERA 1996. Interim relief is therefore not appropriate in this case.

## **Anonymity Order**

The claimant's application for an anonymity order fails.

# DISCUSSION

1. Today's hearing was listed as an open preliminary hearing to consider the following:
  - 1.1. the claimant's application for interim relief;
  - 1.2. whether any part of the claim should be struck out as having no reasonable prospect of success under Rule 37(1)(a);
  - 1.3. whether a deposit order under Rule 39 should be made in respect of any part of the claim on the basis that it stands little reasonable prospect of success;
  - 1.4. the claimant's application for an anonymity order under Rule 50 of the Employment Tribunal Rules; and

- 1.5. any necessary case management orders.
2. The claimant, by email dated 5 September 2022, requested a postponement of today's hearing on the grounds of her health condition and lack of legal representation. The respondent objected to the application. The tribunal declined to order a postponement in the absence of any medical evidence from the claimant. She has subsequently written to her doctor requesting this but it had not been received by the start of the hearing. She did not feel able to repeat the postponement application in person at the start of today's hearing.
3. Having considered the documents available to me and taking into account oral representations made on behalf of the respondent, I determined that I could deal with the Interim Relief application and the Anonymity application on the basis of the documentary evidence before me.
4. I took into account that the interim relief application should have been dealt with in September 2021 (or shortly thereafter) and had been identified as an outstanding application since 7 December 2021. There have been four subsequent hearings to consider the application, although for various reasons, it remains outstanding. Interim relief applications should be dealt with at the earliest opportunity and I consider it appropriate for me to deal with it today and I am satisfied that I have sufficient information to understand both parties' positions. It is the nature of interim relief applications that they are heard at an early stage and such applications are summary in nature. In this context, I will deal with this application notwithstanding the claimant's absence.
5. I also feel able to deal with the claimant's Anonymity application. The claimant has set out the grounds of her application and the respondent has set out its position in written submissions.
6. The claimant will have the opportunity to request a reconsideration of any judgment if she feels she has been prejudiced by her non-attendance.
7. I determined that it would not be appropriate to deal with the strike out and deposit order applications in the claimant's absence. These matters will be considered at the hearing listed for 17 October 2022. This was originally listed as a half day case management preliminary hearing but will be converted to an open preliminary hearing listed for a day to deal with these applications.
8. The claimant is reminded that she must submit the medical evidence she relies on in relation to her non-attendance at today's hearing. The claimant is put on notice that the respondent is considering whether to make a costs application at that hearing.

## **REASONS**

### Interim Relief application

9. By a claim presented on 25 August 2021, the claimant brought claims of unfair dismissal, disability discrimination, whistleblowing detriment (including automatic unfair dismissal) and money claims. She also applied for interim relief in relation to the automatic unfair dismissal claim.

10. The claimant did not attend today's hearing. The tribunal had the benefit of a bundle of documents, written submissions on behalf of the respondent and the witness statement of Natalie Percival, Divisional Nurse Director for Clinical Services who was the dismissing officer. The claimant had received all these documents in advance of the previous hearings and was aware of their contents.

#### The claimant's case

11. The claimant was employed by the respondent as a Healthcare Assistant from 2 September 2019 until the termination of her employment on 19 August 2021.

12. There are no protected disclosures alleged in the claim form. By way of further particulars dated 14 January 2022, the claimant set out 21 alleged disclosures on which she relies.

13. The claimant alleges that her dismissal was a result of her raising protected disclosures.

#### The respondent's case

14. The respondent disputes that any of the matters relied on by the claimant are protected disclosures.

15. The respondent asserts that the decision to terminate the claimant's employment was due to the serious breakdown in working relationships between the claimant and her colleagues, as set out in the claimant's grounds of resistance and Natalie Percival's witness statement and as communicated to the claimant at the time.

#### The law

16. The relevant statutory provisions and legal authorities are as follows:

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

**128. Interim relief pending determination of complaint**

*An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and –  
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, or  
paragraph 161(2) of Schedule A1 to TULRCA 1992,...*

*may apply to the tribunal for interim relief.*

18. The question to be considered upon an application for interim relief is set out in s129 ERA 1996:

**129. Procedure on hearing of application and making of order**

*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. Interim relief can therefore be ordered where the Tribunal finds that it is likely that a final hearing will decide that the reason (or principal reason) for dismissal was the employee having made protected disclosures contrary to s 103A ERA1996.
20. The meaning of the word 'likely' for these purposes has been considered in several cases. In *Taplin v C Shippam Ltd [1978] IRLR 450 EAT*, (decided under similar provisions relating to interim relief applications in dismissal for trade union reasons) the EAT 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.
21. A 'pretty good chance' of success was interpreted in the whistleblowing case of *Ministry of Justice v Sarfraz [2011] IRLR 562, EAT*, as meaning 'a significantly higher degree of likelihood than just more likely than not'. Underhill P stated in *Ministry of Justice v Sarfraz [2011] IRLR 562* that, "in this context 'likely' does not mean simply 'more likely than not' – that is at least 51% - but connotes a significantly higher degree of likelihood."
22. The Claimant must show the necessary level of chance in relation to each essential element of s103A ERA 1996 automatic unfair dismissal, see *Simply Smile Manor House Ltd and ors v Ter-Berg [2020] ICR 570*.
23. The Claimant must therefore show that it is likely that the Tribunal at the final hearing will find that:
  - 23.1. she made the disclosure(s) to the employer;
  - 23.2. she believed that it or they tended to show one or more of the matters listed in the ERA 1996 s 43B(1);
  - 23.3. her belief in that was reasonable;
  - 23.4. the disclosure(s) was or were made in the public interest; and
  - 23.5. the disclosure(s) was or were the principal cause of the dismissal.
24. "Protected disclosure" is defined in s43A Employment Rights Act 1996

*In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.*

25. "Qualifying disclosures" are defined by s43B ERA 1996,

*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—*

*...*

*that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject...that the health or safety of any individual has been, is being or is likely to be endangered...*

26. The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations), *Cavendish Munro Professional Risk Management v Geldud [2010] ICR; Kilraine v LB Wandsworth [2016] IRLR 422*.

27. The test for “reasonable belief” is a subjective test.

28. In determining whether the reason for the Claimant’s dismissal was her alleged disclosure, it is not sufficient for the disclosure to be “in the employer’s mind” or for it to have influenced the employer. The Tribunal must consider whether that disclosure was the “sole or principal reason” for her dismissal,

Decision

29. I have to assess whether it appears likely that a final hearing would find that the claimant succeeded in each of the elements of an automatically unfair dismissal claim for having made a protected disclosure.

*Has there been one or more protected disclosures?*

30. Having reviewed the alleged disclosures as a whole, there is evidence to suggest that the claimant did not, at the time, consider these as ‘whistleblowing’ and many of the matters now relied on are included in wider complaints relating to the claimant’s personal situation. I also note that not all the disclosures relied on were made to the dismissing officer. However, I have considered each alleged disclosure individually. Dealing with these in turn (in order of the alleged disclosure set out by the claimant):

- 30.1. I do not find that it is likely that a tribunal will consider that the information regarding job descriptions would tend to show a failure to comply with a legal obligation or, if it did find that, that the disclosure was in the public interest;
- 30.2. I do not find that it is likely that a tribunal will consider that the information regarding job descriptions would tend to show a risk to health and safety or, if it did find that, that the disclosure was in the public interest;
- 30.3. I do not find that it is likely that a tribunal will consider that the information regarding job descriptions would tend to show a failure to comply with a legal obligation or a risk to health and safety, if it did find that, that the disclosure was in the public interest;
- 30.4. I do not find that it is likely that a tribunal will consider that the information regarding patient seating would tend to show a failure to comply with a legal obligation or a risk to health and safety;
- 30.5. the claimant has failed to provide details of the oral disclosure she relies on and therefore I do not find it likely that a tribunal would consider this to be a qualifying disclosure;
- 30.6. I do not find that it is likely that a tribunal will consider that the information regarding a minor accident experienced by a colleague would tend to show a risk to health and safety;
- 30.7. I do not find that it is likely that a tribunal will consider that the information included within the claimant’s allegations of discrimination would find that the disclosure was in the public interest;
- 30.8. the claimant has failed to provide details of the disclosure she relies on and therefore I do not find it likely that a tribunal would consider this to be a qualifying disclosure;

- 30.9. the claimant has failed to provide details of the disclosure she relies on and therefore I do not find it likely that a tribunal would consider this to be a qualifying disclosure;
- 30.10. I do not find it likely that a tribunal would consider that information regarding the number of label stickers printed would tend to show a failure to comply with a legal obligation;
- 30.11. I do not find that it is likely that a tribunal will consider that the information regarding a minor accident experienced by a colleague would tend to show a risk to health and safety;
- 30.12. I do not find that it is likely that a tribunal will consider that the information regarding rest breaks would tend to show a failure to comply with a legal obligation or, if it did find that, that the disclosure was in the public interest;
- 30.13. I do not find that it is likely that a tribunal will consider that the information regarding a speculative medical issue of a colleague would tend to show a failure to comply with a legal obligation or a risk to health and safety or, if it did find that, that the disclosure was in the public interest;
- 30.14. the claimant has failed to provide details of the disclosure she relies on and therefore I do not find it likely that a tribunal would consider this to be a qualifying disclosure;
- 30.15. I do not find that it is likely that a tribunal will regard a paragraph expressing a general and unspecific concern about the redeployment policy mentioned within a long email regarding the claimant's personal situation as tending to show a failure to comply with a legal obligation or, if it did find that, that the disclosure was in the public interest;
- 30.16. I do not find that it is likely that a tribunal will consider an email relating to offering people in wheelchairs water in the hot weather would tend to show a risk to health and safety;
- 30.17. the claimant has failed to provide details of the disclosure she relies on and therefore I do not find it likely that a tribunal would consider this to be a qualifying disclosure;
- 30.18. the claimant has failed to provide details of the disclosure she relies on and therefore I do not find it likely that a tribunal would consider this to be a qualifying disclosure;
- 30.19. I do not find that it is likely that a tribunal will consider a request to deal with matters under the Bullying Policy/Disability Discrimination to amount to information tending to show a breach of a legal obligation or that this would be in the public interest;
- 30.20. I do not find that it is likely that a tribunal will consider information regarding an unsecured internet connection as tending to show breach of a legal obligation.
- 30.21. I do not find that a complaint regarding holidays would be regarded as information tending to show a breach of a legal obligation or a matter in the public interest.

*Was that the reason for dismissal?*

- 31. If I am wrong about the alleged disclosures not being protected disclosures, I must consider whether it is likely that a tribunal will find that such matters were the sole or principal reason for the claimant's dismissal.

32. I have reviewed the contemporaneous documentation, including the suspension documents, the dismissal letter and the appeal outcome, which set out the basis of the dismissal as being the claimant's contribution to the breakdown in working relationships with her colleagues. This was clearly communicated to the claimant at the time. I also note that the dismissing officer was not the person to whom many of the alleged disclosures were made. I therefore find that it is not likely that a tribunal will conclude that any protected disclosures were the sole or principal reason for the claimant's dismissal.

33. In conclusion, the claimant's application for interim relief fails and is dismissed.

#### Anonymity Order

34. The claimant applies for an Anonymity Order under Rule 50 of the Employment Tribunal Rules of Procedure on the grounds:

34.1. that she would suffer prejudice and problems with future employment if her name was visible in any tribunal order and

34.2. that her medical records and details of her disability should not be in the public domain.

35. The respondent submits that there is nothing in this claim which would justify a departure from the default position of 'open justice'.

36. The starting point in relation to public access to tribunal judgments is the principle of open justice, in particular that the exercise of the state over litigants belongs in the public domain unless there is a sufficiently countervailing factor in a particular case.

37. The burden is on the claimant to show why the principle of open justice should be derogated from by showing that harm would be done to her (or her family). The claimant has failed to show why her position is different from any other claimant bringing proceedings for disability discrimination or whistleblowing. She has not set out any factors which do not apply to all litigants who choose to pursue their claims in the employment tribunal. It is not clear why she would be disadvantaged in seeking employment if her disability was disclosed as any future employer would presumably need to be aware of it.

38. As required by Rule 50, I have balanced the claimant's Article 6 Convention Right to private and family life with the Article 10 Convention Right of freedom of expression. I find that the balance is in favour of Article 10 taking into account the requirement to give full weight to the principle of open justice and to the Convention right to freedom of expression.

39. In conclusion, the claimant has failed to show that an Anonymity Order under Rule 50 is appropriate. If she wishes to renew the application in relation to specific medical records, she may do so at a subsequent hearing.

#### Further hearing

40. An open preliminary hearing will be listed to deal with the outstanding strike out and deposit order applications and to make case management orders for the

matter going forward, to discuss and finalise a List of Issues and to list the hearing.

Employment Judge Davidson  
Date 20 September 2022

JUDGMENT SENT TO THE PARTIES ON  
20/09/2022

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing