EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms S Cabrini	v	Key Horizons Ltd

Heard at: Reading **On:** 10 November 2022

Before: Employment Judge Hawksworth

Appearances:
For the Claimant: In person
For the Respondent: Miss H Platt (counsel)

JUDGMENT on the claimant's application for interim relief having been sent to the parties on 19 November 2022 and reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

Summary

1. I have decided that the application for interim relief has not succeeded. Just to be very clear, this does not mean that the claim stops. The claim itself will carry on, to be decided at the main hearing. It also does not mean that I do not think the claim can succeed, or that I think it is likely to fail. My decision only means that, on my summary assessment today, it does not appear to me that this is a case where I can say the claimant has a pretty good chance of succeeding with her complaint of whistleblowing dismissal. That is the test that I have to apply when considering the application for interim relief.

2. In summary, there are two main reasons why I have reached this decision. First, at the moment, there is a lack of clarity about what was said in the alleged disclosures. This makes it difficult for me to make an assessment that there is a pretty good chance of the disclosures being found to be protected disclosures. This is an essential element for a whistleblowing dismissal claim to succeed.

3. Secondly, there is an alternative explanation for dismissal that has been put forward by the respondent. I have decided that I cannot say, even if the tribunal finds that the claimant made one or more protected disclosure, that there is a pretty good chance that the tribunal will go on to find that, despite

what is said in the dismissal letter, a whistleblowing disclosure was the sole or principal reason for dismissal.

4. Those are my summary reasons. I will go into a bit more detail now, starting with an introduction about the claim and the hearing today.

Introduction

5. The respondent is a provider of care home services. The claimant worked for the respondent as a managing director from 31 January 2022 until she was dismissed on 14 July 2022. She presented her ET1 claim form four days later, on 18 July 2022. She says she was unfairly dismissed contrary to section 103A of the Employment Rights Act 1996 and she has made an application for interim relief.

6. The purpose of today's hearing is to determine the interim relief application. The hearing was originally listed for 5 August 2022. That hearing was postponed and rescheduled for today, as explained in the notice of hearing that was sent to the parties on 27 August 2022.

7. Before the hearing today, the claimant sent 88 documents which I consolidated into one PDF document. The pdf pack with the claimant's documents has 244 pages. The claimant also sent a witness statement with 29 pages (I have the updated version of 3 November 2022) and a 10 page application for interim relief.

8. The respondent sent a separate, paginated bundle to the tribunal and the claimant. It has 250 pages (there was some overlap between the respondent's and the claimant's bundles). There is also a witness statement by Mr Key and another by Mrs Key. The witness statements had 17 pages in total.

9. This morning Ms Platt sent the tribunal and the claimant a skeleton argument (5 pages) and a pack of 12 case reports (93 pages).

10. At the start of the hearing I explained the test that I have to apply when I am considering whether to grant interim relief. I explained the legal principles in respect of protected disclosures and in respect of unfair dismissal for making protected disclosures.

11. After that we took a break of one hour for reading. I suggested to Ms Cabrini that, during the break, she could read the respondent's skeleton argument. I asked her to focus, in her submissions, on what she said were the protected disclosures she had made, and I said that she could do this by reference to a table of alleged disclosures in the respondent's skeleton argument. The table was based on what the respondent understood from the claimant's claim form to be the alleged protected disclosures. I said I would find that helpful because the alleged protected disclosures are one of the areas that would be the focus for me today. I said it would be helpful for me to know from Ms Cabrini what were the disclosures she said she made, what were the relevant failures that she disclosed information about, whether she made her disclosures in a document or verbally, and on what basis she says her disclosures were made in the public interest.

12. When we started again, I heard submissions from Ms Cabrini first, and she very helpfully focused on the areas I had suggested. I then heard from Miss Platt. Finally, Ms Cabrini had an opportunity to reply. I did not hear any witness evidence today.

Ms Cabrini's submissions

13. Ms Cabrini's case is that she made eight protected disclosures. I refer to them by the numbering used in the table in Miss Platt's skeleton argument, which had 7 alleged disclosures. I have referred to the additional disclosure relied on by Ms Cabrini as disclosure 8.

14. Ms Cabrini said that disclosure 4, which is about accounting irregularities, was probably not a protected disclosure as it was not made in the public interest. Ms Cabrini explained, in respect of each of the other disclosures, how they were made, why she believed them to be in the public interest, and what relevant failure she says she disclosed information about.

15. She said that disclosure 1 was made in an email of 13 March 2022. I have not been able to find a copy of that email in either bundle.

16. She said that disclosures 2, 3 and 6 were made in written weekly reports. Copies of those reports were not available and were not included in the bundles. Disclosures were also said to have been made in meetings on 10 and 30 May 2022, although there were no minutes of those meetings in the bundles.

17. Ms Cabrini said that disclosure 5 was in made her first grievance (12 June 2022), that was in the bundle. The grievance started at page 75 of the respondent's bundle and at page 96 there was a reference to non-payment of pension contributions and non-payments to HMRC.

18. Ms Cabrini said that disclosure 7, which was a disclosure of financial irregularities, was made in her grievance dated 8 July 2022. That was in the respondent's bundle at page 163.

19. She said that she made disclosure 8, about government grants in weekly reports and in the meetings of 10 and 30 May 2022.

20. Ms Cabrini said that these disclosures were the reason for her dismissal.

Miss Platt's submissions

21. The respondent's case was that the claimant's disclosures do not meet the requirements to be protected disclosures. Disclosure 1 was not a matter of public interest. Disclosure 2 had not been made at all. Disclosure 3 was not made by the claimant. Disclosure 4 was not in the public interest. The respondent also denied that disclosure 5 had been made at all. Disclosure 6 had taken place after the claimant was dismissed. It was unclear which grievance disclosure 7 referred to, and it was difficult to see how it had been made in the public interest. Disclosure 8 had not been mentioned as a disclosure in the grounds of complaint.

22. Miss Platt said that even if there was a protected disclosure, the claimant

could not show any causal link between a disclosure and the dismissal. She pointed to the dismissal letter which set out 20 matters relating to the claimant's conduct which the respondent said were the reasons for dismissal. She said that none of these related to the claimant's alleged disclosures.

The law

23. The statutory provisions relating to interim relief are set out in sections 128 and 129 of the Employment Rights Act 1996. Section 128(1) says (as far as is relevant to this case):

> **"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 103A…
>
> may apply to the tribunal for interim relief."

24. Section 129 sets out the procedure for hearings of interim relief applications. It says:

> **"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 –
>
> (a) that the reason (of if more than one the principal reason) for the dismissal is one of those specified in –
>
> i) …section 103A…"

25. Sections 43A and 43B of the Employment Rights Act explain which disclosures are protected disclosures:

> **"43A Meaning of "protected disclosure"**
>
> 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.
>
> **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, 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, or is likely to be deliberately concealed…

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith—

(a) to his employer…"

26. Section 103A says:

"103A Protected disclosure

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."

27. The interim relief application is made under sections 128 and 129 of the Employment Rights Act. The test for me is whether the claimant's claim of whistleblowing dismissal is likely to succeed. Likely here means that the claimant has 'a pretty good chance' of success at the full hearing (Taplin v C Shippam Limited [1978] IRLR 450 (EAT), Dandpat v University of Bath and another UKEAT/0408/09).

28. It is important to emphasise that this is a high threshold. It is a significantly higher degree of likelihood than if I were to consider whether it was 'more likely than not' that the claim would succeed (Wollenberg v Global Gaming Ventures (Leeds) Ltd EAT 0053/18). And I have to consider whether the claimant has a pretty good chance of success on all of the required elements of the claim, that is all of the points that will have to be met in order for the claim to succeed.

29. The essential elements for a complaint of whistleblowing dismissal to succeed are the following. As to whether there was a qualifying disclosure, such that it could then be a protected disclosure (because the disclosures were made to the employer), the questions I have to consider are as

follows. First, was there a disclosure of information. Second, did the claimant believe that the disclosure tended to show a relevant failure, that is one of those six types of wrongdoing that are set out in section 43B. Third, if she did believe that, was the claimant's belief reasonable. Questions four and five relate to the public interest: did the claimant believe that the disclosure of information was made in the public interest and, if so, was her belief reasonable.

30. If those elements are met such that it seems to me that there is a pretty good chance of the claimant of establishing that she made one or more protected disclosure, I also need to consider whether there is a pretty good chance of success in showing that the protected disclosure or disclosures were the sole or principal reason for the dismissal. This would mean that there would be a pretty good chance of showing that the dismissal was automatically unfair.

31. Those are the legal tests that I have to apply. I have to make an 'expeditious summary assessment', doing the best I can with the untested evidence advanced by each party, of whether the claimant is likely to succeed (London City Airport Ltd v Chacko [2013] IRLR 610 (EAT).

Conclusions

32. Ms Cabrini is entitled to apply for interim relief and made her application in line with the required procedure.

33. Essentially, what I have to do today is carry out a summary assessment as to how the claim looks on the material that I have been given. I have, as I say, to consider the high threshold of whether the claim has a 'pretty good chance' of success. There are policy reasons for this high threshold, as the consequences that follow for an employer if interim relief is granted are serious.

34. I have not heard any oral evidence today, we have not had any cross examination or testing of witness evidence, and I am not undertaking a fact finding exercise. What I have to do is to carry out a broad assessment of the information that I have been shown, with careful consideration of the submissions that I have heard from the parties. What I am setting out now is the gist of my reasoning rather than very detailed reasons, this is appropriate where I am looking at an interim matter rather than a final judgment.

35. I will now come back to those questions that I mentioned earlier that are the elements required to establish a qualifying disclosure. In respect of the first three, I need to consider whether there was a disclosure of information which Ms Cabrini believed tended to show a relevant failure, and if so, whether her belief was reasonable.

36. I have not found this straightforward, primarily because I have not seen many of the documents which Ms Cabrini relies on as being written disclosures, and I have not seen evidence supporting what she says was said in verbal disclosures. The claimant's grievances were in the bundle but none of the other documents which are said to contain the disclosures were

available to me today.

37. This is important, because when the tribunal at the full hearing is looking at whether a document or conversation contained a protected disclosure, it will focus on the actual words used, to assess whether the various elements of the test are met. It will consider carefully which of the relevant failures is relied on. If the claimant says that there has been a failure to comply with a legal obligation, the tribunal will need to understand what legal obligation she says has not been complied with, and in what way she says that the employer failed to comply with it. If she says she has disclosed information that tends to show that a criminal offence has been committed, the tribunal will need to know what criminal offence the disclosure concerns. At this stage, I simply do not have enough information to even get an idea of how that detailed assessment would go. I do not have enough information to conclude that the claimant has a pretty good chance of succeeding in showing that she made disclosures of information about a relevant failure.

38. In respect of the grievances, copies of which are in the bundle, it is quite possible that the tribunal could conclude that in one or more of the grievances the claimant disclosed information that she believed tended to show one of the relevant failures, for example, that the respondent had failed to comply with a GDPR obligation, or an obligation to HMRC, or an employee pension obligation. (A protected disclosure can include a disclosure of information about which an employer is already aware (section 43L(3)). And it is also quite possible that the tribunal could conclude that the claimant's disclosures about the conduct of one of the respondent's employees amounted to information which tended to show that fraud, a criminal offence, had been committed. However, while these are possible outcomes, it does not appear to me on the material before me today that I have sufficient clarity on the nature of the information allegedly disclosed to be able to say that they are 'likely' outcomes, in the sense that the prospects of success reach the threshold that they are required to reach for me to make an award of interim relief.

39. I have reached a similar conclusion on the second part of the test for qualifying disclosure, that is the questions of whether Ms Cabrini believed that a disclosure was made in the public interest and, if she did, whether that belief was reasonable. Again, I think it is quite possible that a tribunal could determine that it was reasonable for the claimant to believe that a disclosure about fraud at a company which provided care to vulnerable people, and where that care was paid for by a local authority, was a matter of public interest. Similarly, a failure to pay tax to HMRC can often reasonably be regarded as a matter of public interest. But the lack of clarity about what was actually said and about the basis on which the disclosures were said to be qualifying disclosures (for example, about which legal obligation had been breached) means that my assessment is that this point also does not reach the threshold required to grant interim relief.

40. So, I have concluded that while there may be some prospect of Ms Cabrini establishing that she made one or more protected disclosure, my assessment of the evidence at this stage is that the prospect is not sufficiently high to meet the required threshold of the interim relief test.

41. Finally, if I had concluded that there was a pretty good chance of the claimant establishing that she made one or more protected disclosure, I would have to consider whether there was also a pretty good chance of her establishing that that a protected disclosure was the sole or principal reason for the dismissal. That requires there to be a causal link between a disclosure and the dismissal. The tribunal would have to decide that one or more protected disclosure was the reason for the dismissal.

42. This is not a case where the respondent has not put forward an alternative reason for dismissal; the respondent said matters of conduct or capability, or some other substantial reason, gave it grounds for dismissal. The respondent said it had identified conduct issues and had discovered information from which it thought, for example, that the claimant had provided references etc that were not genuine. In the dismissal letter the respondent listed 20 items which were said to amount to conduct issues. None of these relate to the alleged disclosures. I am not today making any findings about whether the alleged conduct issues happened or not. However, the alternative explanation for dismissal which the respondent has put forward is something which the tribunal hearing the final hearing may accept.

43. Again, it may be that the tribunal does not accept that evidence at the final hearing and concludes that the real reason for the dismissal was not the matters set out in the letter, but was one or more protected disclosure. However, having undertaken an assessment on the basis of the information I have today, it seems to me that the chances of the claimant succeeding in showing that the sole or principal reason for dismissal was a protected disclosure do not meet the required level of likelihood.

44. I have concluded that the test to award interim relief is not met in relation to either the question of whether the disclosures were protected, or the reason for dismissal. For these reasons, the application for interim relief cannot succeed.

45. Postscripts – I have added these notes at the time of providing written reasons:

    a. In paragraph 42 I refer to ‘references etc’. As I explained in a reconsideration judgment sent to the parties on 20 December 2022, by this I was referring to paragraphs 4, 6 and 7 in the dismissal letter, in which the respondent said that the claimant had failed to provide evidence about her educational and professional qualifications, had failed to disclose her surname history and address history, and had provided false information about her employment status and a false CV.

    b. At the hearing, I did not read out the statutory provisions set out in paragraphs 23 to 26 above. Instead, at the start of the hearing and in the reasons I gave at the hearing, I set out the summary of the legal principles which is at paragraphs 27 to 31 above. I have also added in these written reasons the names of the cases to which I referred in paragraphs 27 to 31.

c. I gave my judgment and reasons at the end of the hearing. The written judgment was sent to the parties on 19 November 2022. Ms Cabrini sent an email on 10 November 2022 after the hearing ended, requesting written reasons. I apologise for the delay in providing these written reasons. Ms Cabrini's request was not sent to me by the tribunal administration until 3 December 2022. The typing up of my recorded reasons, done by the tribunal administration, took a further 4 weeks because of high volumes of cases and the Christmas break.

_____

Employment Judge Hawksworth

Date: 16 January 2023

Judgment sent to the parties on

18 January 2023

For the Tribunal office