



EMPLOYMENT TRIBUNALS

Claimant: Mr P Calvert

Respondent: North East Ambulance Service NHS Foundation Trust

HELD at Newcastle CFCTC

ON: 18 January 2023

BEFORE: Employment Judge Loy

REPRESENTATION:

Claimant: No appearance or representation

Respondent: Miss Claire Millns, Counsel

JUDGMENT

The Judgment of the Tribunal is that the claimant's application for interim relief is dismissed.

REASONS

1. The Tribunal gave Judgment orally with reasons at this hearing. The claimant asked for a written record of the decision under Rule 62(3). This is that written record.

Background

2. The claimant, Mr Paul Calvert, claims that he has been unfairly dismissed by the respondent and that the principal reason for his dismissal was because he had made protected disclosures. This Judgment deals with the claimant's application for interim relief. The respondent contends that the reason for the claimant's

dismissal was due to an irreconcilable breakdown in the relationship between the Trust and Mr Calvert. It opposes this interim relief application.

3. The claimant was neither present nor represented at this interim relief hearing. The claimant's representative from the Tribunal record is a Ms Sharon McGurk. Ms McGurk had indicated before this hearing that she would be unable to be present at this application to represent the claimant. There was no application for this interim relief hearing to be postponed. Enquiries were made on the morning of this application to see if the claimant's representative could attend by CVP. She was not able to do so. She was currently on holiday with no access to equipment.
4. The administration asked Ms McGurk if she was agreeable to the hearing proceeding in the claimant's and the claimant's representative's absence on the basis of the information that the Tribunal has available to it on paper. Ms McGurk confirmed to the administration that she did not object to that approach. The hearing accordingly proceeded.
5. After this hearing, but prior to this written record being sent to the parties, Ms McGurk changed her position to contend that the hearing in the claimant's absence was unfair. That was in plain contradiction to the position adopted by Ms McGurk when contacted by the administration by telephone on the morning of this hearing.
6. I therefore considered the paperwork and the accompanying documentation. The respondent produced a bundle of documents incorporating the claim form in these proceedings. The bundle which ran to 253 pages which included the documentation recording the reason that the respondent gave for the claimant's dismissal on 19 December 2022 (on notice) together with the claimant's own correspondence leading up to that dismissal. The claim form was presented on 21 December 2022. I was satisfied that I could deal fairly with the interim relief application on the basis of the documentary evidence before me.
7. The claimant's application for interim relief relates to his contention that he was automatically unfairly dismissed by the respondent contrary to section 103A of the Employment Rights Act 1996 in that the reason or principal reason for his dismissal was that he had made protected disclosures. Those protected disclosures are set out in the first set of proceedings between the same parties in case number 2501609/2021.

The claimant's case

8. The claimant was employed by the respondent as a Coroner and Claims Officer until the termination of his employment on notice with effect from 19 December 2022. The respondent is an NHS provider of unscheduled care services to respond to emergency calls as well as providing scheduled care services on a pre-planned basis. It provides those services across the North East of England.
9. In his claim form (bundle page 82) the claimant sets out his case in support of his application for interim relief. The claimant says he was dismissed from employment following raising concerns made in 2019, 2020 and 2021 which he says fall within the definition of protected disclosures under section 43B of the Employment Rights Act 1996 (ERA). The claimant says that his "*dismissal is a direct result of such disclosures, the causal link is clear and unambiguous.*"

10. Upon consideration of the documents in the bundle (which I read in their entirety) it appeared that the claimant's position is that because his ill-health is, in his contention, attributable to the treatment he says he received from the respondent in relation to his disclosures, it follows that his dismissal is unfair. As the claimant puts it, he would not have ended up in the position of not being able to return to work had he not made his disclosures. On that basis, the dismissal is a direct result of such disclosures and therefore contrary to section 103A ERA.

The respondent's case

11. The respondent's case is that the claimant was not dismissed for making protected disclosures. He was dismissed because the employment relationship had irretrievably broken down. Significantly in relation to this interim relief application, the respondent points out that it was the claimant's own position, reflected in his own contemporaneous correspondence, that there were no circumstances in which he would be able to return to work from his ill-health related absence. In those circumstances, the respondent says that the claimant's interim relief application should fail.

The Law

12. The relevant statutory provisions and legal authorities are as follows.
13. 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 the Trade Union and Labour Relations (Consolidation) Act 1992, ...

may apply to the tribunal for interim relief.

14. The question to be considered upon an application for interim relief is set out in section 129 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.

15. 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

that the employee had made protected disclosures contrary to section 103A ERA.

16. The meaning of the words “likely” for these purposes has been considered in several cases. In *Taplin v Chippam [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.
17. 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* 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.”
18. The claimant must show the necessary level of chance in relation to each essential element of section 103A ERA, see *Simply Smile Manor House Ltd and Ors v Ter-Berg [2020] ICR 570*.
19. The claimant must therefore show that it is likely that the Tribunal at the final hearing will find that:
 - (1) He made the disclosure(s) to the employer;
 - (2) He believed that it or they tended to show one or more of the matters listed in the ERA 1996 section 43B(1);
 - (3) His belief in that was reasonable;
 - (4) The disclosure(s) was or were made in the public interest; and
 - (5) The disclosure(s) was or were the principal cause of the dismissal.
20. “Protected disclosure” is defined in section 43A ERA 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.

“Qualifying disclosures” are defined by section 43B 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 ...

21. 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; and Kilrairie v LB Wandsworth [2016] IRLR 422*).
22. The test for “reasonable belief” is a subjective test.
23. In determining whether the reason for the claimant’s dismissal was his alleged disclosure(s), it is not sufficient for the disclosure to be “in the employer’s mind” or for to have influenced the employer. The Tribunal must consider whether that disclosure was the “sole or principal reason” for his dismissal.

Decision

24. I have to assess whether it appears that at a final hearing it would be likely that the Tribunal would find that the claimant succeeded in each elements of an automatically unfair dismissal claim for having made protected disclosures.
25. I was prepared to accept for present purposes that the claimant had made one or more protected disclosures.
26. I must therefore assess the likelihood that at a final hearing the Tribunal will conclude that the protected disclosures were the reason or principal reason for the claimant’s dismissal. That is the key issue which will determines the success or failure of this application for interim relief.
27. The respondent contends that the claimant was dismissed for some other substantial reason on account of an irretrievable breakdown in a relationship of trust that must exist in a contract of employment. Disclosures, the respondent says, played no part whatsoever in that decision.
28. In the claim form the claimant says that between his disclosures and his dismissal is “clear and ambiguous”. I disagree.
29. It is apparent from the contemporaneous correspondence, both under his own hand that of his representative, Ms McGurk, that it was the claimant’s own case that trust and confidence had broken down between himself and the respondent. It was the claimant’s own position that he was would never be able return to work or to any employment with the respondent. For example, on 12 July 2022, the claimant’s own position was that the employment relationship was beyond repair and that he could not return to employment. Mediation was proposed by the respondent with an external independent mediator appointed. The claimant’s position was that he was not prepared to attend any work related meeting. An independent investigation was undertaken in relation to matters connected to the claimant’s disclosures and the claimant being reinstated by the respondent onto half pay to assist with the process of giving evidence to that independent review.

Despite this, the claimant showed no indication wither of returning to work or engaging with the independent review.

30. On page 130 of the bundle, Ms McGurk writes to the independent mediator in the following terms:

“Dear Lana

Following discussions with Mr Calvert, and reviewing your involvement to date, we have concluded that there is little merit in continuing with your involvement in these matters. We will therefore not be entering into any further dialogue with yourself.

Thank you for the time you have given to this.

Kind regards.

Sharon McGurk”

31. On page 141 of the bundle, Ms McGurk writes on 8 September 2022 to the independent mediator in the following terms:

“In response, I feel it pertinent to reiterate the facts already discussed regarding Mr Calvert’s employment with the Trust. During my last telephone conversation with you, I explicitly and definitiavley (sic) explained to you that under no circumstances would Mr Calvert ever be in a position to return to his employment at the NEAS. Indeed, I also advise that, due to his mental and physical ill health, it is unknown whether Mr Calvert would ever be able to participate in any gainful employment in the foreseeable future.”(emphasis added). This is categorical.

32. It does not assist the claimant’s claim for interim relief that the claimant also attributes his ill health (both physical and mental) to his treatment short of dismissal by the Trust as a whistleblower. The interim relief application is concerned with the reason or principal reason for the dismissal. It is not directly concerned with how the circumstances in which the reason for that dismissal may or may not have been brought about. This is not a claim under section 94/98 ERA in respect of which an application for interim relief does not in any event lie. Any argument that the respondent should have waited longer to dismiss the claimant if the employer was responsible for the underlying reasons that led to the dismissal is not relevant to assessing whether the principal reason for the claimant’s dismissal was that he had made protected disclosures.

33. In addition Miss McGurk says on 8 September 2022 (page 141) that:

“No process known can prevent the user of the process from being dishonest. A breakdown in trust is fundamental to the breakdown in the relationship from Mr Calverts (sic) standpoint...

Mr Calvert will never been in a position to return to his employment at the Trust, and I am attaching correspondence that will reiterate this.” This is again categorical.

34. The Trust's Director of People and Development, Karen O'Brien, writes to the claimant on 14 November 2022 (page 158) in terms which include the following:

"I'm saddened to read that your mistrust of the organisation is beyond repair, that under no circumstances will you return to your employment with the Trust, and that the thought of doing so worsens your health."

The current situation does not appear to be satisfactory for you or the Trust. As has been explained in correspondence to you over the past two years, the Trust remains keen to find a way in which you could look to return to work. However this does not seem to be realistically achievable given how explicit you have been that you are not going to return and the thought of doing so makes you unwell. ... I am therefore writing to ask you to confirm whether you are therefore wishing to resign from your position as Coroner and Claims officer. ..."

35. On 19 December 2022, the claimant receives the letter terminating his employment (page 223). The meeting which led to the claimant's dismissal took place in his absence. The letter states:

"I think it is important to state that the panel regretfully came to the conclusion that there are irreconcilable differences between you and the Trust. The panel was satisfied that the Trust has made meaningful and genuine efforts to find a way in which the employment relationship could be improved so you could consider a return to work, which is evidenced by the attempts from July 2022 to September 2022 to see if some sort of mediation forum could be established with you. Including that there had been an irreconcilable breakdown in the employment relationship, the panel were mindful of the clarity of the words used by you in your letter to Karen O'Brien of 12 July 2022, and those used by Sharon McGurk to Lana Walsh of Capsticks on 8 September 2022. In both of these communications the Trust was told in very clear terms that you would never return to the Trust."

36. In these circumstances I find it cannot be said that the claimant has a "pretty good chance" of establishing a causal link between any protected disclosure and the reason for his dismissal. The claimant therefore does not meet the threshold of likelihood required for an interim relief application to succeed. The evidence on the paper, including from the claimant directly and on his behalf by his representative Ms McGurk, is unequivocal and it is to the effect that the claimant will never be able to return to the Trust.
37. Obviously this is necessarily a broad brush assessment. Matters may look very different at a final hearing when all of the evidence is tested in cross-examination. I must, however, make a summary assessment and having done so find that the claimant has failed to meet the threshold for the granting of interim relief.
38. I therefore refuse the application.

Public access to Employment Tribunal Decisions, Judgments and Reasons for the Judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and the respondent(s) in a case.

Employment Judge Loy

24 March 2023

Sent to the parties on:

27 March 2023

For the Tribunal:

Miss E Cook