EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
Ms Helen Chapman	AND	Cornwallis Care Services Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY BY VIDEO (VHS) ON 18 May 2023

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: Mr N Henry, Advocate

JUDGMENT

The judgment of the tribunal is that the claimant's application for Interim Relief is hereby dismissed.

RESERVED REASONS

1. In this case the claimant Ms Helen Chapman claims that she has been unfairly dismissed, and that the principal reason for this was because she had made protected disclosures. This judgment deals with the claimant's application for interim relief. The respondent contends that the reason for the dismissal was misconduct, and it opposes the interim relief application.
2. This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Video Hearing Service. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 56 pages, the contents of which I have recorded. The order made is described at the end of these reasons.
3. I have heard from the claimant, and I have heard from Mr Henry on behalf of the respondent. I have considered the parties' pleadings and other relevant documentary evidence. I have not made any findings of fact because this is not required by the statutory test.
4. The Background:
5. The claimant asserts in her originating application that she was employed by the respondent care company as a Staff Nurse at the Frances Bolitho Nursing Home in West Cornwall (the Home) from

20 June 2022 until she was dismissed by letter dated 27 March 2023 (which she did not receive until 3 April 2023). She issued these proceedings for interim relief on 11 April 2023 at the end of the relevant time limit of seven days. The claimant sets out in her originating application a number of incidents in which she raised her concerns about health and safety matters at the Home, and which she relies upon as her five protected public interest disclosures.

6. The first disclosure was said to be overnight on 31 December 2022 and 1 January 2023 to the Registered Manager of the Home (Ms Sinead Clancy) to the effect that there was no Treatment Escalation Plan in place for patient who had been the subject of an emergency admission. The second disclosure was said to have been on 18 January 2023 when the claimant reported on Incident Report Form number 1160 that controlled medication had been left out and had not been securely locked away. The third disclosure was said to have been on 28 January 2023 on Incident Report Form number 1198 when she reported that spO2 monitoring equipment which was needed to assist a resident was missing which gave rise to health and safety concerns. The fourth disclosure relied upon was on 29 January 2023 when she reported on Incident Report Form number 1200 to her manager that a metal knife and fork had been found under a resident in her bed. The fifth disclosure was said to have been overnight on 1 February 2023 during the night shift when she complained verbally to Ms Clancy that there were no slide sheets for the staff to help move residents between beds, which was a danger to staff and residents, and that there were no proper evacuation plans in place.
7. The claimant asserts that she was then suspended and dismissed as a result of having made these disclosures on the basis of an unfounded complaint from a resident, and an unjustified finding of gross misconduct against her.
8. The respondent asserts that the claimant was dismissed for gross misconduct following a complaint of abuse against a resident which had been raised by that resident. This required the respondent to investigate the matter, and it was appropriate to suspend the claimant in order to do so. The Registered Manager Ms Clancy investigated the circumstances and took the decision to dismiss the claimant. She preferred the evidence of the resident who had complained. Ms Clancy also denies that she was aware of the disclosures which the claimant now relies upon.
9. Having set out the above submissions by the parties, I now apply the law.
10. <u>The Law:</u>
11. By reason of section 108 of the Employment Rights Act 1996 ("the Act") the claimant does not have sufficient qualifying service to complain of general unfair dismissal pursuant to section 98(4) of the Act. However, under section 103A of the Act, an employee is to be regarded 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. No qualifying period of service is required for reliance upon this provision.
12. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that 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 – (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.
13. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
14. Under Section 47B a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected

disclosure. This provision does not apply to employees where the alleged detriment amounts to dismissal.

15. Under section 48(2) of the Act, on a complaint to an employment tribunal it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
16. Under section 128 of the Act: (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(d), 102(1) 103 or 103A, or (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or (b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met, may apply to the tribunal for interim relief.
17. I have considered the cases of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT; Kilraine v London Borough of Wandsworth EAT/0260/15 Fecitt and Ors v NHS Manchester [2012] ICR 372 CA; Kuzel v Roche Products Ltd [2008] ICR 799 CA; Blackbay Ventures Limited t/a Chemistree v Gahir UK/EAT/0449/12/JOJ. [PUBLIC INTEREST? – Chesterton Global Ltd (t/a Chestertons) and Anor v Nurmohamed [2017] EWCA Civ IDS 1077 p9; Underwood v Wincanton Plc EAT 0163/15 IDS 1034 p8].
    London City Airport Ltd v Chacko [2013] IRLR 610 EAT; Ryb v Nomura International plc ET 3202174/09; Taplin v C Shippam Ltd [1978] ICR 1068 EAT; Ministry of Justice v Sarfraz [2017] EAT and Dandpat v University of Bath and anor EAT 0408/09.
18. The role of the Employment Tribunal in considering an application for interim relief requires the tribunal to carry out an "expeditious summary 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 will ultimately be undertaken at the full hearing – see London City Airport Ltd v Chacko. The statutory test does not require the tribunal to make any findings of fact – see Ryb v Nomura International plc. It must make a decision as to the likelihood of the claimant's success at a full hearing of the unfair dismissal complaint based on the material before it, which will usually consist of the parties' pleadings, the witness statements and any other relevant documentary evidence. The basic task and function is to make "a broad assessment on the material available to try to give the tribunal a feel and to make a prediction about what is likely to happen at the eventual hearing before a full tribunal."
19. When considering the "likelihood" of the claimant succeeding at tribunal, the correct test to be applied is whether he or she has a "pretty good chance of success" at the full hearing – see Taplin v C Shippam Ltd. The EAT confirmed that the burden of proof in an interim relief application was intended to be greater than that at the full hearing (where the tribunal need only be satisfied on the "balance of probabilities" that the claimant has made out his or her case being the "51% or better" test). For interim relief applications the EAT ruled out alternative tests such as a "real possibility" or "reasonable prospect" of success, or "a 51% or better chance of success".
20. This approach has been endorsed by the EAT in Dandpat v University of Bath and anor and in Chacko. More recently in Ministry of Justice v Sarfraz the EAT held that "likely" was nearer to certainty than mere probability - Underhill J as he then was stated in paragraph 16: "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."
21. It was also held in Dandpat at paragraph 20 that: "Interim relief is a draconian measure. It runs contrary to the general principle that there be no compulsion in personal service. It is not a consequence that should be imposed likely."
22. Decision:
23. There are clear conflicts of evidence and factual disputes which need to be resolved to determine this case in accordance with the interests of justice. In the first place, Ms Clancy denies that she was aware of the disclosures relied upon by the claimant. Given that Ms Clancy took the decision to dismiss the claimant if she is right then the reason for the claimant's dismissal cannot be the disclosures. Secondly, the claimant denies that any gross misconduct took place, but the respondent asserts that it was investigated only because a resident had raised the complaint in the first place.

Thirdly, Ms Clancy preferred the evidence of the resident despite the claimant's denials following her investigation.

24. In these circumstances in considering the claimant's likelihood of success in her claim under section 103A of the Act, I cannot conclude that the claimant has a "pretty good chance of success" in her claim.
25. For these reasons I dismiss the claimant's application for interim relief under section 128 of the Act.
26. Separate case management orders have now been made and the claimant's claims have been listed for their full main hearing.

_____

Employment Judge N J Roper
Date: 18 May 2023
Sent to Parties on
7th June by Miss J Hopes

For the Tribunal Office