



EMPLOYMENT TRIBUNALS

Claimant: Miss A Lopez

Respondent: Foxtons Ltd

Heard at: London South

On: 8th November 2023

Before: Judge Reed

Representation

Claimant: Ms Y Stouton, Relative

Respondent: Mr C Macnaughton, Solicitor

RESERVED JUDGMENT

The application for interim relief is dismissed.

REASONS

Introduction

1. This hearing was listed to determine the application by Miss Lopez for interim relief pursuant to s128 Employment Rights Act 1996.
2. Miss Lopez worked for Foxton's as a Lettings Negotiator between 17th July 2023 and 28th September 2023. She was dismissed during her probationary period.
3. Miss Lopez alleges that the reason for her dismissal was that she made a number of protected disclosures. This is denied by Foxtons, who say that her performance and behaviour during her probationary period had lead to a break down in trust and confidence.
4. Miss Lopez also brings claims for age, race and disability discrimination.

Alleged protected disclosures

5. All of Miss Lopez's alleged protected disclosures relate to health and safety in her workplace and, specifically, allegations that the temperature was too high. In particular, she refers to an occasion on 9th September 2023 when she describes the heat as oppressive, causing her to feel dizzy and experience a panic attack. She said that one of her managers, Ashley, hid the key to the air conditioning, so that the temperature could not be adjusted.
6. Miss Lopez says that she communicated these concerns to Foxton's on a number of occasions:
 - a. On 9th, 11th and 12th of September 2023 to colleagues, including to her manager Dipan Shah.
 - b. On 15th September 2023, during a grievance meeting with Jasmine Brock.
 - c. On the 19th September 2023 verbally to Dipan Shah.
 - d. On 27th September 2023 verbally to Dipan Shah.
7. On each occasion Miss Lopez says that she indicated that the temperature in the office was excessive, that this was a health and safety risk and that it was inappropriate for a manager to leave staff with no ability to adjust the temperature to an acceptable safe level.
8. Foxton's denies that Miss Lopez communicated such concerns to Mr Shah. It accepts that concerns were raised during the 15th September 2023, although does not accept that these amounted to a protected disclosure.

Dismissal

9. It is common ground that Miss Lopez was dismissed on 28th September 2023. Miss Lopez alleges that this was because of protected disclosures, as set out above. Foxton alleges that it was because of a breach of trust and confidence by Miss Lopez, in that they allege she was given a dishonest account of her work and movements.

Law

10. This claim includes what is generally termed a claim for 'automatically unfair dismissal' or a 'whistleblowing dismissal'. The stems from s103A ERA, which provides that an employee will have been unfairly dismissed if the reason (or principal reason) for the dismissal is that they made a protected disclosure.
11. A disclosure becomes protected for these purposes if a) it is a qualifying disclosure meeting the criteria set out at s43B ERA and b) it is made in accordance with the requirements of s43C to 43H (which, broadly deal with to whom a qualifying disclosure must be made if it is to be protected).
12. S43B defines a qualifying disclosure as:

... 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. Identifying a qualifying disclosure therefore requires consideration of five separate criteria:

- a. Has there been a disclosure of information? This is often distinguished from a mere allegation, which contains no actual information (although this should not be allowed to suggest a simple bifurcation in which a statement can only ever be either an allegation or the provision of information).
- b. Did the employee believe that the disclosure was made in the public interest?
- c. If the employee did so believe, was their belief reasonably held?
- d. Did the employee believe that the disclosure tended to show one of the matters listed in paragraphs (a)-(f) above?
- e. If the employee did so believe, was their belief reasonably held?

14. The requirement that an employee reasonably believe that a disclosure was made in the public interest means that disclosures that concern purely private matters or disagreements between an employee and employer will not generally fall within the whistleblowing protection. Guidance on the meaning of public interest has been set out by the Court of Appeal in *Chesterton Global Ltd v Nurmohamed* [2017] IRLR 837. Lord Justice Underhill notes that it is not an issue that lends itself to absolute rules and should be approached by a Tribunal considering all the circumstances of the case. He indicates that Tribunals should be cautious before concluding that a disclosure relating to the breach of an employee's contract could reasonably be believed to be in the public interest, but does not conclude it could never occur. He suggests that a Tribunal could usefully consider four particular factors:

- a. the numbers in the group whose interests the disclosure served;
- b. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

- c. the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
 - d. the identity of the alleged wrongdoer – “the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest” – though he goes on to say that this should not be taken too far.
15. Section 128 Employment Rights Act 1996 allows for interim relief in certain claims, including those under s103A. Following s129 interim relief should be granted where it appears to the Tribunal that, on determining the complaint, it is likely that the tribunal will conclude that the reason (or the principal reason) for the dismissal fell within s103A.
16. ‘Likely’ in this context means that the claim has ‘a pretty good chance of succeeding’, see *Taplin v C Shippmam Ltd* [1978] IRLR 450. This is not the same as ‘more likely than not’, which connotes the balance of probabilities or a chance of success of 51%. What is required for interim relief is something greater than that – something closer to a certainty than a probability (although certainty is not required), see *Ministry of Justice v Safraz* [2011] IRLR 562.
17. An interim relief assessment requires an expeditious summary assessment as to how the matter appears on the basis of the available material and the untested evidence advanced by the parties, see *London City Airport Ltd v Chacko* [2013] IRLR 610.

Conclusion

18. I have concluded that Ms Lopez has not established that this claim is likely to succeed. This is for two main reasons.
19. First, there seems to me to be a real question as to whether the disclosures made by Ms Lopez were in the public interest, as that is defined by the legislation. Taking the allegations at their highest, it involves an unsatisfactory temperature within a single workplace, affecting a small number of employees working there and a similarly small number of clients. It is also, in the context of health and safety disclosures, a relatively minor matter. A too warm office could be uncomfortable and could cause significant problems for some individuals, particularly those with pre-existing conditions. It is not, however, a matter of comparable seriousness to something like exposed asbestos or similar immediate risks of very grave harm. It seems to me, based on the summary assessment today, that the nature of this dispute is far more a private dispute between Ms Lopez and Foxtons, albeit one that might also involve her colleagues and a small number of clients.
20. I am not satisfied, therefore, that Miss Lopez has established that it is likely that a Tribunal will conclude that she made a protected disclosure, because she has not established that a Tribunal is likely to conclude that she reasonably believed that the relevant communications were made in the public interest.

21. Second, I have concluded that Miss Lopez has not established that it is likely that a Tribunal will find that the reason (or principal reason) she was dismissed was the alleged protected disclosures.
22. It is convenient, before turning to the detail of this finding, to deal with one submission from the Respondent.
23. In his submissions, Mr Macnaughton argued that I should draw inferences on this basis that there was significant documentary evidence to support Foxton's disciplinary action. In brief, he said that there was ample evidence to support a finding of misconduct and that it therefore followed that this was the most likely reason for the dismissal. The evidence he referred to was not produced to the Tribunal and I am not able to take any account of it. I therefore do not draw the suggested inference. It would be inappropriate to draw any form of negative inference against one party on the basis of evidence that the other party asserts exists, but has produced. The proposition only has to be stated in those terms for its flaw to be apparent.
24. Therefore, the position is as follows. It is accepted that Miss Lopez was dismissed by Mr Shah. Beyond that, I have little direct evidence of Mr Shah's decision-making process. There are competing accounts given by the parties. Ms Lopez's account, that he was motivated by annoyance when she raised health and safety matters is not, on its face, an implausible one. Such dismissals do occur. Foxtons' account, that Miss Lopez's behaviour was unsatisfactory and Mr Shah dismissed her during her probationary period because he lost trust in her is also not implausible. Similar dismissals are equally common. This is not a case where only one plausible motive for dismissal has been suggested. Or one where there is significant evidence to support one account over another.
25. I also note Miss Lopez's account of disagreements over her lunch break and whether she was able to return home and the documents relating to this that have been produced. Ultimately the issue was resolved in her favour, with Foxtons' concluding that this time was hers to do with as she wished. This, however, would not preclude some element of unhappiness or resentment over this disagreement and Miss Lopez's insistence on her rights through the grievance procedure. This might also have caused or contributed to her dismissal. It would not, however, fall within the s103A claim advanced by Miss Lopez.
26. With at least two and possibly more plausible versions of events leading to Ms Lopez's dismissal, I do not conclude that a Tribunal is likely to accept one of them. There is at this stage, nothing to choose between these competing accounts. Certainly, it is not possible to conclude that Miss Lopez's account is not only more likely to be preferred, but sufficiently more likely that I could find that she has a pretty good chance of succeeding.

Employment Judge Reed

Date 26th February 2024

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