



EMPLOYMENT TRIBUNALS

Claimant: Dr Matthews

Respondents: (1) Greencoat Limited
(2) AB Agri Limited

Heard at: Cardiff (in person)
On: 24th January 2024

Before: Employment Judge Howden-Evans

Representation

Claimant: In person
Respondents: Mr Salter (Counsel)

JUDGMENT

The claimant's application for interim relief under section 128 Employment Rights Act 1996 fails and is dismissed.

REASONS

Background

1. The claimant makes an application for interim relief (pursuant to s128 ERA) pending the determination of her complaint of automatically unfair dismissal under section 103A Employment Rights Act 1996 ("ERA").
2. It is conceded that the Claimant has presented her application for interim relief within the time limit: her effective date of termination was 31st Dec 2023 and her ET1 was presented on 6th Jan 2024.
3. It is agreed that she was an employee and was dismissed (with notice) during a meeting on 11th December 2023. It is also agreed that Dr Matthews did not have 2 years continuous employment at that time, as she had recommenced employment with the First Respondent on 5th December 2022.

4. The Claimant provided a bundle of 811 pages and the Respondent provided a bundle of 416 pages. I was fortunate to receive electronic versions of these the night before the hearing which helped me to get ahead with the reading.
5. At the start of the hearing, I clarified with the parties the documents that were being relied on - in addition to the bundles, I had:
 - a. the Claimant's witness statement (in three parts);
 - b. a witness statement from the Second Respondent's HR Director Janette Logan; and
 - c. the Respondents' Counsel's Skeleton Argument.
6. Both parties and the tribunal had copies of the above documents.
7. Having met the parties at 10am, we adjourned the hearing at 10.30am to enable me to finish my reading and to give the Claimant and Mr Salter time to reflect on documents that had been served at the eleventh hour. At midday, I heard oral submissions, firstly from Mr Salter and then from Dr Matthews. I took time to deliberate, and gave the parties an oral decision at 4pm.

The law

Interim relief

8. The relevant provisions of the Employment Rights Act 1996 are as follows:

9. Section 128(1) provides:

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) ... 103A the reason or principal reason for the dismissal is that the employee made a protected disclosure ...

may apply to the tribunal for interim relief.

10. Section 129 provides:

(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 (or if more than one the principal reason) for the dismissal is one of those specified in—*

(i) *section ... 103A*

11. Section 129 explains the consequences if it appears to me that it is likely that the tribunal on determining the complaint will find that the dismissal was automatically unfair ie that the reason or principal reason for the Claimant's dismissal was that she had made protected disclosures.
12. The meaning of the word "likely" in section 129(1) Employment Rights Act 1996 has been discussed in a number of cases. In *Taplin v CC Shippam Ltd* [1978] ICR 1068 the Employment Appeal Tribunal explained that it meant a "**higher degree of certainty in the mind of the tribunal than that of showing that the claimant just had a "reasonable" prospect of success**". It went on to suggest that I "*should ask myself whether the applicant has established that she has a "pretty good" chance of succeeding in the final application to the tribunal*".
13. In *Ministry of Justice v Sarfraz* [2011] IRLR 562 the Employment Appeal Tribunal stated "*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*".
14. The likely to succeed test applies to all elements of the claim (*Hancock v Ter-Berg* UKEAT/0138/19). In a claim of automatic unfair dismissal under section 103A ERA, this means satisfying the test in respect of all the elements relating to protected disclosures in the Employment Rights Act.
15. I must find the Claimant has a pretty good chance of demonstrating each of the following:
 - a. that the Claimant had made a disclosure of information to her employer;
 - b. that the Claimant believed the information disclosed tended to show one of the things listed in s43B Employment Rights Act 1996 – here the claimant is often saying she believed the disclosure tended to show a criminal offence was being committed or health and safety was being endangered;
 - c. that her belief was reasonable;
 - d. that she reasonably believed the disclosure was being made in the public interest; and
 - e. that the disclosure was the principal cause of her dismissal.

16. I am to carry out an “expeditious summary assessment” of the material put before me, doing as best as I can with the untested evidence put forward by each party. This will necessarily entail a less detailed scrutiny than would happen at final hearing. My task is to assess how the matter appears to me, and Rule 95 Employment Tribunals Rules of Procedure 2013 states that the tribunal shall not hear oral evidence unless it directs otherwise. I am also to avoid making findings of fact that could cause difficulty to a tribunal hearing the final hearing of this matter (*Raja v Secretary of State for Justice* UKEAT/0364, *Dandpat v The University of Bath* UKEAT/0408/09/LA and *London City Airport v Chacko* [2013] IRLR 610, *Al Qasimi v Robinson* EAT/0283/17).

Automatic unfair dismissal

17. Section 43A ERA provides that “*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*”.

18. Section 43B ERA provides:

(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—*

(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.*

19. In *Chesterton v Nurmohamed* [2017] IRL 837 the Court of Appeal set out factors to be considered by a tribunal in deciding whether a disclosure was made in the public interest. They are the numbers whose interests the disclosure serve; the nature of the interests affected; the nature of wrongdoing disclosed; the identity of the alleged wrongdoer. Where a

disclosure raises questions of a personal character, the question of whether it is reasonable to regard it as being in the public interest is to be answered by considering all of the circumstances of the case.

20. An employee will only succeed in a s 103A claim of automatic unfair dismissal if the tribunal is satisfied, on the evidence, that the 'principal' reason for dismissal is that the employee made a protected disclosure. The principal reason is the reason that operated on the employer's mind at the time of the dismissal.
21. The added challenge that the Claimant faces is that as she does not have 2 years' service, she has the burden of proving that the reason / principal reason for her dismissal was the protected disclosures.

My findings in relation to the application

22. I have heard no oral evidence and I do not seek to make findings of fact. I am setting out my impression of events limited to the documents placed before me. On an expeditious summary assessment of these documents, I note:
 23. The Claimant having previously worked for Greencoat Limited was effectively headhunted to take this role.
 24. It is a key safety role and the Claimant's expertise made her well qualified for the role.
 25. The Claimant asserts since 31st December 2022 she has made over 50 protected disclosures – 59 are listed in her extract of whistleblowing actions.
 26. She said that in these disclosures she provided evidence of breaches that she believed could amount to criminal offences in respect of animal feed safety and food safety (where animal feed is being supplied to horses in countries where horses are consumed by humans).
 27. The information included in the alleged protected disclosures range from
 - a. reporting concerns about the risk of green lipped mussel contaminating ruminant feed, where the Claimant went on to suggest action to ensure feed safety going forward.
 - b. misuse of the HMRC licence to trade specific denatured alcohol 3 where the Claimant asserts she raised concerns about stock control and sensory additives exceeding maximum levels.
 - c. use of non-approved additives in feed products.
 - d. concerns about medicinal claims made in marketing materials.
 - e. concerns about compliance with the EU Reach Regulations

- f. health and safety concerns regarding a colleague's alleged failure to act to protect other employees' health and safety following a spillage.
28. In closing submissions, the Claimant has submitted she can establish a link between her alleged protected disclosures and dismissal because she met a key person at Nutritional Advance Formulas on 24th November 2023 and made them aware of their responsibilities under the EU Reach Regulations. She says she relayed to them her concerns that they could be held accountable for breaches of EU Reach Regulations. The Claimant asserts this was a further protected disclosure.
29. The Claimant asserts the Respondent's alleged reasons for dismissal cannot be true.
30. The Respondent's reason for dismissal identified three reasons:
- a. the Claimant's work performance
 - b. complaints received from colleagues and
 - c. the Claimant's general unhappiness with management
31. From the documents I have considered, it appears the Claimant was struggling to define her role. She was struggling with the workload and how to prioritise her work.
32. The Claimant also had difficult working relationships with a number of key personnel, ranging from Sally, Matt and latterly Paul. (I am avoiding identifying individual's full names as I am conscious this is a public document and these individuals have not had the opportunity to give evidence yet).
33. It appeared to me that the Claimant was struggling to find the right balance of risk level and communication required by her role.
34. Decisionmakers had received complaints regarding the way the Claimant had spoken to colleagues. The Claimant may not have been aware of it at the time, but there is evidence of
- a. the Claimant offending an agency worker Adam and
 - b. of an informal complaint and meeting with Sally in Summer 2023
35. During today's hearing the Claimant has accepted she can be brusque in her tone. Conversely from the documents, many of her colleagues sing her praises and valued the Claimant as an excellent manager.
36. I must consider whether the Claimant is likely to succeed at the final hearing in respect of all elements of her automatic unfair dismissal claim.

37. The claimant may well succeed in establishing that some of her concerns amounted to protected disclosures. Having heard her submissions today I can see that she may be able to establish each of the elements of a protected disclosure.
38. However, it does not appear to me that the claimant has a “pretty good” chance of succeeding in establishing that the principle reason for her dismissal was that she had made those protected disclosures – she might be able to do so, but I cannot go as far as saying she has a pretty good chance of doing so
39. Unfortunately, there is credible evidence of difficult relationships. The Claimant did not have 2 years’ service, so the Claimant has the burden of proving the principal reason was that she had made those disclosures and no other reason, such as her deteriorating relationship with her new boss.
40. I have been careful to avoid making inconvenient findings of fact for a future tribunal. I am also conscious that my impression of the case may not be one that a tribunal dealing with the matter at a final hearing will share. However, it is a summary assessment of all the relevant material before me.
41. The claimant’s application for interim relief fails and is dismissed.

Employment Judge Howden-Evans

Date 30th April 2024

REASONS SENT TO THE PARTIES ON 1 May 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche