EMPLOYMENT TRIBUNALS

Heard at: London South, by CVP **On:** 4 July 2024

Claimant: Miss M Onu

Respondent: The Secretary of State for Work and Pensions

Before: Employment Judge Ramsden

Representation:

Claimant In person

Respondent Mr T Mallon, Counsel

RESERVED JUDGMENT ON AN APPLICATION FOR INTERIM RELIEF

1. The Claimant's application to for interim relief is refused.

REASONS

Background

2. The Claimant began employment with the Respondent on 13 March 2017, and worked as a Work Coach at Job Centres until her employment was terminated by the Respondent on 7 May 2024.

3. Before presenting this claim the Claimant brought a different claim against the Respondent (with case number 2301135/2022) on 31 March 2022, for disability discrimination (she suffers from narcolepsy), arrears of pay and reimbursement of certain expenses (the latter complaint was dismissed given the Claimant's then-continuing employment). On 18 June 2024 the Claimant withdrew that case

upon reaching COT3 settlement terms with the Respondent. Both parties agree that settlement of that case does not affect this one.

4. Following the Claimant's dismissal on 7 May 2024, she emailed the Tribunal on 14 May 2024 attaching a document entitled "Interim Relief Application". The Claimant subsequently submitted an ET1 Claim Form via the Tribunal's online portal on 31 May 2024, referring to the fact that she had already made an application on 14 May 2024. The substance of the email attachment and the ET1 particulars (the attached interim relief application) are confirmed by the Claimant to be the same document.

5. In it she asserts that she was automatically unfairly dismissed by the Respondent for the reason that she made protected disclosures in July 2023 (in contravention of section 103A of the Employment Rights Act 1996 (the **1996 Act**)).

6. The Claimant says that those disclosures concerned health and safety risks posed by the location of work coaching appointments for clients of Peckham Job Centre who are aged 50 or over (this group comprised the clients the Claimant worked with). Those appointments were conducted in an area on the first floor of the Peckham Job Centre sited in an extension to the original building accessed via a bridge, which is itself accessible by means of the stairs or a single lift. The Claimant says that many of her clients have mobility and other health issues, and she says that raised with the Respondent that there was a real risk that many of them 'would not make it out in time' from that area in the event of a fire.

7. The Claimant says that she made these disclosures:

   a) To the Customer Service Lead, Ms Fihosy, at the muster point after a fire drill in July 2023;

   b) Later that dame day to her line manager, Mr Ramjuan, in a team huddle where others were present; and

   c) "*Some days later*", but still in July 2023, to Mr Payne, the Respondent's District Manager.

8. The Respondent resists the Claimant's application for interim relief. It says that the Claimant was dismissed for conduct unrelated to the matters about which she avers she made a protected disclosure. Rather, the Respondent says that she was summarily dismissed for:

   a) Taking a laptop belonging to the Respondent out of the country to Spain without the Respondent's permission (this allegation was admitted by the Claimant);

   b) Contacting a LBC Radio 'phone-in' in which she disclosed that she is a Civil Servant, mentioned her Customer Service Leader and suggested that her line manager discriminated against her (this allegation was also admitted by the Claimant); and

c) Recording conversations with her line manager without his permission for two years (the Claimant admitted recording conversations with her line manager, but said she did so for a shorter period of around four or five months).

9. The purpose of this hearing is to hear and determine the Claimant's application for interim relief.

The hearing

10. The Respondent was represented in the hearing by Mr Mallon. The Claimant represented herself.

11. The Respondent prepared a hearing bundle of 151 pages in length, which included written witness statements from five witnesses on its behalf, and a skeleton argument. The Claimant had not prepared a witness statement, but confirmed that she wished her application to stand as her evidence.

12. Each of the Respondent and the Claimant made submissions in support of their respective positions.

Law

13. Interim relief is an emergency interlocutory remedy the effect of which is to maintain the *status quo* as regards employment – i.e., to order that the claimant continues in the respondent's employment until the final hearing to determine the merits of the claimant's underlying unfair dismissal claim. It is only available in certain prescribed circumstances, set out in section 128 of the 1996 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 … 103A, …

may apply to the tribunal for interim relief.

(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date)…".

14. Once the claimant shows that their application is within the four corners of section 128, it is for the tribunal to determine their application by either granting or dismissing it.

15. While not binding on this tribunal, it is noted that the interim relief application in the case of *Astle v Travis Perkins PLC* ET Case No. 2403488/2020 failed when it came before EJ Franey in the Manchester Employment Tribunal, because that

Tribunal observed that section 128(2) does not give the tribunal power to extend the seven day time limit.

16. The burden of proof sits with the applicant, i.e., the claimant seeking interim relief. Section 129(1) sets out the relevant test to be applied by the tribunal considering whether to grant interim relief, which is whether:

"*it appears to the tribunal that it is **likely** that on determining the complaint to which the application relates that the tribunal will find [that complaint well-founded]*" (my emphasis).

17. The tribunal is required, on the basis of the material before it, to make a summary assessment of the chances of the claimant succeeding (*Parsons v Airplus* UKEAT/0023/16). It is not the role of the tribunal to decide the issue as if it were a final issue (*Parkins v Sodexo Ltd* [2002] IRLR 109).

18. The meaning of the word "*likely*" in section 129(1) was considered in *Taplin v C Shippam Ltd* [1978] IRLR 450, where the EAT found that it required the applicant to establish:

"*that he has a 'pretty good' chance of succeeding in the final application to the Tribunal. In order to succeed… an applicant must achieve a higher degree of certainty in the mind of the Tribunal than that of showing that he just had a 'reasonable' prospect of success*",

and noted that it is "*an exceptional form of relief*".

19. The EAT in *Ministry of Justice v Sarfraz* [2011] IRLR 562 held that the word "*likely*" does not mean "*more likely than not*" (that is, at least 51% probability), but rather "*connotes a significantly higher degree of likelihood*".

20. This was characterised in the EAT decision of *Dandpat v University of Bath* UKEAT/0408/09 as a "*comparatively high*" test, set as such for "*good reasons of policy*" given that, "*If relief is granted the Respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the Claimant, until the conclusion of proceedings: that is not [a] consequence that should be imposed lightly*".

21. The same "*likely to succeed*" test has to be applied to all aspects of the complaint (of a kind listed in section 128(1)) that might be in issue (*Simply Smile Manor House Ltd v Ter-Berg* [2020] ICR 570). As summarised in *Sarfraz*, where a claimant says they were unfairly dismissed for making a protected disclosure and seeks interim relief, the judge hearing that application has to decide whether it is likely that the tribunal at the final hearing would find five things:

    a) that the claimant had made a disclosure to his employer;

    b) that they believed that that disclosure tended to show one or more of the things itemised at (a) to (f) under section 43B(1) of the 1996 Act;

    c) that that belief was reasonable;

d) that the disclosure was made in good faith; and

e) that the disclosure was the principal reason for their dismissal.

22. Rule 8(1) of the Employment Tribunals Rules of Procedure 2013 (the **ET Rules**) states that:

"*A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule.*"

Application to the claims here

23. Taking the list enumerated in *Sarfraz* and expanding it to include the precursor questions of whether the conditions to make an application for interim relief are satisfied (and satisfied in fact – these are not questions of likelihood), the tribunal needs to address seven questions:

a) Did the Claimant present a complaint to the employment tribunal that she has been unfairly dismissed, and the reason is one of the reasons specified in section 128(1) of the 1996 Act?

b) Did the Claimant make an application in the time prescribed by section 128 of the 1996 Act?

c) Is it likely that the Claimant will persuade the Tribunal at the final hearing that she had made a disclosure to her employer?

d) Is it likely that the Claimant will persuade the Tribunal at the final hearing that she believed that that disclosure tended to show one or more of the things itemised at (a) to (f) of section 43B(1) of the 1996 Act?

e) Is it likely that the Claimant will persuade the Tribunal at the final hearing that that belief was reasonable?

f) Is it likely that the Claimant will persuade the Tribunal at the final hearing that she made the disclosure in good faith?

g) Is it likely that the Claimant will persuade the Tribunal at the final hearing that the disclosure was the reason or the principal reason for her dismissal?

<u>The First Question: Did the Claimant present a complaint to the employment tribunal that she has been unfairly dismissed, and the reason is one of the reasons specified in section 128(1) of the 1996 Act?</u>

24. Yes: it is not disputed that the Claimant presented (on 31 May 2024) a complaint to the employment tribunal that she has been unfairly dismissed for the reason or principal reason that she made a protected disclosure.

The Second Question: Did the Claimant make an application in the time prescribed by section 128 of the 1996 Act?

25. This is a point of contention between the parties. The Claimant says that she did, by email on 14 May 2024. The Respondent agrees that the email was 'an application', but avers that:

    a) The terms of section 128 provide that it is a prerequisite to the making of an application for these purposes that the applicant has also made a complaint of unfair dismissal. Here, when purporting to make her application by email on 14 May 2024, the Claimant had not yet made an unfair dismissal complaint, as Rule 8(1) requires the presentation of a claim (which contains the complaints) to be by completion of a claim form, which the Claimant did not do until 31 May 2024.

    b) As the Claimant had not *both* presented her complaint and made her application until the Claim Form was presented on 31 May 2024, her application is out of time, and (consistent with the decision in *Astle*) the Tribunal has no power to extend time. The Respondent says, in consequence, that the Claimant's application cannot be entertained by the Tribunal.

26. The Tribunal considers the statutory language in section 128(1) significant in answering this question. It reads: "*An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed [in the prescribed circumstances] may apply to the tribunal for interim relief*". The statutory draftsperson's choice of the present tense does not indicate that the presentation of the claim form must, as the Respondent contends, precede the application. This interpretation is supported by the fact that the second-listed condition, that the application is made within seven days immediately following the effective date of termination, is separately described, in a distinct sub-section of section 128. Had the draftsperson wish to make these conditions both subject to a seven-day deadline then they could easily have done so. There is nothing, save for the order in which these conditions appear, that indicates that it is a condition to making an application that a claimant must *first* have presented a complaint, and that is insufficiently persuasive in light of the other considerations. The Tribunal concludes that the seven-day timeframe only applies to the presentation of the application, not the complaint.

27. Consequently, the tribunal finds that the Claimant did make an application in the time prescribed by section 128 of the 1996 Act, and that it does not matter that the complaint was presented later than seven days after the effective date of dismissal provided it was presented within the timeframe for presentation of an unfair dismissal complaint (which it is accepted by the Respondent that it was in this case).

The Third Question: Is it likely that the Claimant will persuade the Tribunal at the final hearing that she had made a disclosure to her employer?

28. While the Respondent disputes whether two of the three averred disclosures were made, it accepts that the Claimant raised health and safety concerns at the group huddle to Mr Ramjuan. It is therefore likely that the Tribunal at the final hearing will answer this question positively.

The Fourth Question: Is it likely that the Claimant will persuade the Tribunal at the final hearing that she believed that that disclosure tended to show one or more of the things itemised at (a) to (f) under section 43B(1) of the 1996 Act?

29. While the Claimant cited the Building Safety Act 2022 in her application, she confirmed in submissions that in fact she is relying on section 43B(1)(d) in support of her assertion that the disclosures she made were "qualifying disclosures", as being a disclosure made in the public interest that tends to show "*that the health and safety of any individual has been, is being or it likely to be endangered*".

30. The Respondent does not dispute that the Claimant believed that the disclosure tended to show this, and the Tribunal at the final hearing is therefore likely to accept the Claimant's assertion that she did.

The Fifth Question: Is it likely that the Claimant will persuade the Tribunal at the final hearing that that belief was reasonable?

31. The Claimant says that it *is* likely that the Tribunal at the final hearing will find her belief reasonable, but the Respondent disagrees.

32. The Respondent says (and its witness evidence supports) that there were two health and safety representatives on site, and the Tribunal in the final hearing is unlikely to find that both of them overlooked the risk that the Claimant has identified. If, as the Respondent avers is more likely, those representatives were aware of that risk but did not act on it, that is highly suggestive that the Claimant's belief was not reasonable. This, the Respondent says, means it is likely that the Tribunal in the final hearing will find that the Claimant's belief is not reasonable.

33. This tribunal considers that the answer to this fifth question is one that will come down to the force and credibility of the evidence that will be examined at the final hearing. It is not a matter where this tribunal can say that the Claimant has a "*pretty good*" chance of succeeding (*Taplin*), or a significantly higher than 51% probability (*Sarfraz*) of doing so.

The Sixth Question: Is it likely that the Claimant will persuade the Tribunal at the final hearing that she made the disclosure in good faith?

34. Again, the Claimant's position is that she made the disclosure in good faith, out of concern for the safety of her clients.

35. The Respondent has not questioned this, and in light of that, the Tribunal at the final hearing is likely to find the answer to this question to be "yes".

The Seventh Question: Is it likely that the Claimant will persuade the Tribunal at the final hearing that the disclosure was the reason or the principal reason for her dismissal?

36. This is the third point of contention between the parties.

37. The Claimant says that:

    a) The Respondent's reasons for dismissing her do not stand up to scrutiny, because they unreasonably ignored the mitigating circumstances relating to her disabilities. The Claimant avers that the Respondent's reasons for dismissing her are not to be believed.

    b) Rather, she says, the Respondent was actively trying to get rid of her, and she dates that back to July 2023 and the aftermath of her disclosures. The Claimant says that there was a powerful force of determination from the Respondent to get her out of its organisation, where everything she said was dismissed completely by it.

38. The Respondent says:

    a) Its reasons for dismissing her were the ones identified to the Claimant at the time and investigated and canvassed thoroughly as part of its disciplinary processes. Those were weighty incidents of misconduct, and justified dismissal as a response.

    b) The Respondent undertook lengthy and involved investigatory and disciplinary processes – this was not a 'quick fix' to get rid of a troublesome employee.

    c) Furthermore, no-where in the course of those investigatory or disciplinary processes did the Claimant raise any concern about fire safety for her clients. No evidence was provided to the Tribunal from the dismissing officer, but each of the two investigating officers have said that they were not aware of the concern the Claimant raised regarding the health and safety risk to her clients.

    d) There was a significant time gap between when the disclosures were, or were supposedly, made in July 2023, and the decision to dismiss the Claimant in May 2024. This gives credence to the Respondent's position that the disclosure(s) were not causative as regards the dismissal.

39. These considerations, the Respondent says, means it likely that the Tribunal at the final hearing will conclude that the disclosures were not the reason or principal reason for the Claimant's dismissal.

40. Similarly as for the fifth question, the Tribunal cannot conclude that it is likely that the Tribunal in the final hearing will find that the Claimant's dismissal was for the reason, or principal reason, that she had made disclosures. A significant part of answering that question will come down to how the relevant investigatory officers and decision-makers respond to cross-examination and Tribunal questions.

Conclusions

41. It falls to the Claimant, as applicant, to satisfy this Tribunal that it is likely that the Tribunal in the final hearing will find her complaint of automatic unfair dismissal for having made protected disclosures well-founded. For the above reasons, namely that this Tribunal is not sufficiently confident that the Claimant will persuade the Tribunal at the final hearing of the elements of the test identified as the fifth and seventh questions above, the Claimant's application fails.

Employment Judge Ramsden

Date 5 July 2024