EMPLOYMENT TRIBUNALS

Claimant: Ms F Shaheen

Respondent: Midas Manors Limited

Heard at: Leeds **On:** 28 November 2024

Before: Employment Judge Jones

REPRESENTATION:

Claimant: In person
Respondent: Miss M Diouf, Litigation Executive

AN ORDER having been sent to the parties on 29 November 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This is an application for interim relief brought by the claimant pursuant to sections 128 and 129 of the Employment Rights Act 1996. The claimant complains that she was unfairly dismissed pursuant to section 103A of the Employment Rights Act 1996, namely because she had made one or more protected disclosures.

2. The claim was presented on 9 September 2024 and included an application for interim relief. The claim was served on the respondent on 20 November 2024 with a requirement that they file a response by 18 December 2024. The claimant has set out the grounds for her application in a detailed background supported by 33 documents which are described as submissions.

3. The respondent resists the application.

The Relevant Law

4. By section 128 Employment Rights Act 1996 an employee who presents a claim to an Employment Tribunal that she has been unfairly dismissed and that the

reason or, if more than one, the principal reason for the dismissal is one of those specified, amongst others, in section 103A of the Employment Rights Act 1996, may apply to the Tribunal for interim relief.

5. By section 129 of the Employment Rights Act 1996, on hearing an employee's application for interim relief, if 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 103A, this section applies.

6. By section 129(2), the Tribunal shall announce its findings and explain to both parties what powers the Tribunal may exercise on the application, under what circumstances it will exercise them, and that will include asking the respondent if it is willing (pending the determination or settlement of the complaints) to reinstate the claimant – that is, to treat her in all respects as if she had not been dismissed – or, if not, to re-engage her in another job on terms and conditions not less favourable than those which would have been applicable to her if she had not been dismissed.

7. The matter is governed by the Tribunal's Rules of Procedure, specifically rule 95, which states that the Tribunal shall not hear oral evidence unless it directs otherwise.

Evidence

8. For the purposes of this hearing, I not only have the 33 documents (submissions) of the claimant, but I also have a bundle of documents submitted by the respondent, some of which duplicate those the claimant has submitted. They include grievance submissions and the disciplinary materials (or some of them). I have been sent a further document which is a whistleblowing record, being an anonymous claim received on 3 July 2024, and some further documents which I am told were considered at the disciplinary meeting.

9. I have chosen not to hear evidence in this case in accordance with rule 95 but I have made my decision based upon the materials and the arguments raised by the claimant on the one hand and Ms Diouf on behalf of the respondent on the other.

10. It should be borne in mind by the parties that the approach I have to take is not to make findings of fact.

11. In **London City Airport Ltd v Chacko [2013] IRLR 610** the Employment Appeal Tribunal stated that:

> "*The task of the Tribunal is to carry out an expeditious summary assessment as to how the matter appears on material available, doing the best it can with the untested evidence advanced by each party*."

It observed that that necessarily involves a far less detailed scrutiny of the parties' cases than will be undertaken at the full hearing.

12. In respect of what I must decide, it is whether I think that the claimant is likely to establish the dismissal was unfair under section 103A, and "likely" has further been considered in a number of cases, the most important of which was **Taplin v C**

Shippam Limited [1978] ICR 1068. The test is whether the case has a pretty good chance of success. In subsequent cases it has been held that approach survives the test of time. I bear in mind the statutory source from which that derives, which talks of "likely" to establish.

Summary of Factual Matters

13. I am not making findings of fact and any final decision in due course will not be bound by this summary assessment. It is an overview of a series of documents a witness statement, the chronology and the parties' written and oral comments upon them.

14. The history of this case is as follows.

15. The claimant commenced employment with the respondent on 27 September 2022. She became the Deputy Manager of the Mount Royal home, which is a registered home for children in care in Bradford. In addition to Mount Royal the respondent has another home in Bradford called Sovereign House.

16. In November 2023 the claimant became aware of drugs allegedly left in a work's car for the home Sovereign House. This information had been relayed to her by an agency worker, Z. He told the claimant that Y, a worker at Sovereign House, had found the drugs which had been left in that car by another worker, A. She had used the car to transport a service user and had noticed the drugs and taken a video of them on her phone. This information was shared with the claimant by Z, including information that Y had contacted A, who had told her not to dispose of the drugs but to keep them. A did not collect them and so Y subsequently disposed of them.

17. The claimant relayed what she had been told to the responsible person of Sovereign House, Ash. She subsequently spoke to Karen, the Registered Manager, as advised by Ash. There was an investigation, the outcome of which was that no further action was to be taken. The claimant points out that A was not suspended at the time, and nor was Y.

18. In January 2024 Philip Marshall was appointed by the respondent as the responsible person. At the beginning of March 2024 Kerry (who had previously been the Quality Assurance worker for the respondent) took over the role as Registered Manager at Mount Royal.

19. The claimant had taken a period of time from work between March and June, immediately after her marriage. She returned at the end of June.

20. On 27 June 2024 the claimant had a discussion with Kerry about candidates who had applied for a Deputy Manager role. The claimant had first become aware that these roles were to be advertised in a discussion with Philip, the responsible person, shortly before she returned. This alarmed her because she thought she held that role. The claimant was reassured these were additional appointments. In any event, the two candidates (A and B) were unsuccessful. The claimant says she was informed of this by Kerry and that A and B learned that they had not been successful in their applications when they overheard this discussion in the vicinity of the office where she and Kerry had been talking.

21. On 28 June 2024, the claimant says that Kerry was distant. She had discussions with A and B which were difficult. The claimant says that Kerry had told her that A and B had accused her of informing them they were unsuccessful for the role, but the claimant says she pointed out to Kerry that they had overheard this the previous day when they were in the office. The unpleasantness arose, according to the claimant, when A said to the claimant, "*what does it feel like when someone snitches on you?".* She said A called her a snake and used abusive language to her. The claimant says that continued.

22. On 3 July 2024 the claimant formally reported the rude conduct to her manager, Kerry. That is recorded in an email of that date at 10.36am. She stated that, in her view, it was a reaction to her having raised concerns about A leaving drugs in the car, and that it was her responsibility to escalate such concerns. The claimant said it appeared A had taken the action personally leading to the current behaviour.

23. A meeting subsequently took place on that day with A, Kerry and the claimant. Following that meeting the claimant went upstairs to the office and was later joined by Kerry. The claimant says that she raised a number of issues which would constitute protected disclosures with Kerry. Specifically, the claimant says these concerned A going home when he should have been co-working night shifts with two others; medication not being locked away safety; an occasion when a service user had come to the office and inappropriately asked someone to place their hand down their top to test their heart was working, but the worker did not accede to the request but subsequently Kerry did. The claimant said, in respect of the medication, that it had been left around in an unlocked room and that Kerry said staff should do better. The claimant complained about Kerry's partner who was the DIY maintenance worker who she believed would pose a conflict of interest because of his relationship with Kerry. She also said that a worker had sworn during the handover and a young person had recorded it; that that worker had then taken the phone, deleted it but also deleted inappropriate images on the phone. This was a vulnerable service user who had been taken into care.

24. These are matters the claimant had not specified in her claim form. I have no account from Kerry. However, the claimant subsequently raised grievances, on 12 July and on 13 August. She referred to having raised safeguarding concerns with the manager (Kerry) on 3 July. The claimant says in her formal grievance which was submitted later on 12 July:

> "*Shortly after merely eight days back at work I was suspended following an alleged anonymous whistleblowing complaint. To date I have not been informed of the specific reasons or evidence supporting my suspension. <u>On the same day I returned to work I raised legitimate concerns about conduct and practice within the home. Additionally I reported safeguarding issues which I believed required immediate attention.</u> It is worth noting that my suspension was initiated on the very day I reported these concerns, which I find highly coincidental and troubling*. [Emphasis added]"

25. The claimant was notified of her suspension after she returned home. The claimant says that whilst raising the concerns with Kerry, Kerry said that they would discuss it further the following day, on 4 July and cut her short. The claimant

received a contact shortly after 6.00pm from Mr Marshall to inform her about the anonymous complaint and that she was suspended. The claimant queried what had happened but did not receive a communication nor was her grievance followed up or acknowledged.

26. On 22 July 2024 the claimant attended an investigation meeting. She was given the anonymous complaint, which I have now seen having requested it at the end of this hearing. I am told that the identity of the author of the complaint was not revealed but the complaint refers to the difficult discussion on the previous Friday (28 June) when there had been words exchanged between A and the claimant. In the anonymous complainant it was alleged it was the claimant who said A was a snake.

27. There was a disciplinary hearing on 5 August 2024. This resulted in the claimant being given a written warning. This is a confirmed in a letter dated 9 August 2024. Mr Marshall found the claims of misconduct in respect of two matters substantiated – the first was alleged rude and objectionable behaviour on 28 June, when she had used abusive and offensive language to candidates and colleagues on several occasions; the second was informing colleagues they had been unsuccessful in their application for the Deputy Manager role.

28. In the letter, Mr Marshall noted the claimant's response to the second of the allegations but made no reference to the first. He stated that the warning would remain on the claimant's personnel file for six months and she should return to work at Mount Royal on 12 August. However, the claimant then received a message to attend a Teams meeting and not to return to Mount Royal. During that Teams meeting the claimant was informed that she could work at Sovereign House. She expressed concerns about that, having reporting Y the previous year, who still worked at that home. Mr Marshall approved her working from her own home. On 13 August he requested the claimant to undertake a home risk assessment but would not agree to her attending at the home physically. On 16 August the claimant received an invitation from Clare Kuyabakan to attend a grievance meeting on 19 August.

29. On 17 August, the claimant was requested to contact Mr Marshall, by phone, email or text. She called him. Mr Marshall made an offer, to pay the claimant three months' notice to leave the respondent. He stated returning to work would be uncomfortable for the claimant and staff. The claimant felt pressurised to leave. She refused the offer. The claimant said she had done nothing wrong. This message was recorded, although I have not listened to it. There is no dispute that this conversation included such an offer.

30. On 19 August the claimant attended a grievance hearing with Ms Kuyabakan. She submitted an additional grievance complaining that Philip had contacted her to try to offer her money to leave before the grievance hearing. She informed Ms Kuyabakan that she had recorded the conversation with Mr Marshall.

31. On 21 August the claimant had a further meeting with Ms Kuyabakan to discuss the additional grievance. The claimant submitted further emails of concern.

32. On 23 August the claimant emailed Mr Marshall and expressed concern about how matters were being dealt with. She had been suspended for a significant period

before the disciplinary hearing after which she had not returned to her work setting. She asked to have a discussion about returning there.

33. The claimant's appeal of the disciplinary warning, which she had lodged on 9 August, took place on 27 August 2024. It was outsourced to advisors, Peninsula. It was conducted by Sam Dickinson. The outcome is contained in a report of the same date, but not conveyed to the claimant until 2 September 2024. It sets out the allegations and the response, but there is no clear explanation in respect of the events of 28 June 2024. They are not explicitly connected to the anonymous complaint, but Ms Diouf submits they must relate to that.

34. The appeal was dismissed but the warning was substituted by summary dismissal for gross misconduct. The report briefly alludes to the covert recording of the "without prejudice" discussion of Mr Marshall. It states it would be a protected conversation under section 111A of the Employment Rights Act 1996 and that a recording of it would constitute a breach of trust. The report considers the propriety of substituting a sanction with a more serious one. It refers to authorities to the effect it may be permissible in certain circumstances, but would be dependent on the disciplinary policy. The author considered that, given the short amount of service the claimant had, it would be permissible for the respondent to use its discretion in respect of its disciplinary procedures, enabling it to substitute the sanction of dismissal. There is no suggestion that the recording of the "without prejudice" discussion was investigated or discussed with the claimant with a view to it being a possible act of gross misconduct. To that extent there was no compliance with the basic rules of fairness set out in the ACAS Code of Practice. I am not dealing with a procedurally unfair dismissal. The only question here is whether or not the claimant is likely (or has a pretty good chance) of establishing that her dismissal was unfair pursuant to section 103A of the Employment Rights Act 1996.

35. On 28 August the claimant tried to contacted Ms Kuyabakan to discuss an update following her grievance meetings the previous week.

36. On 30 August 2024 the claimant emailed again, raising her concerns to the responsible person, Mr Marshall. The claimant set out the history including the fact that she had not been allowed to return to her workplace. She stated that she had experienced these problems since raising concerns about wrongdoing, risks and malpractice within the company – matters she said she had raised in good faith, and she specifically referred to the Public Interest Disclosure Act. The claimant stated she had been penalised for this. Having set out the history, the claimant said she believed the actions were directly and indirectly related to her whistleblowing actions.

37. On the same day Ms Kuyabakan contacted the claimant to say that she was offering her two choices: to leave with a good reference by voluntarily resigning and taking two months' redundancy pay, or leaving with a bad reference and staying and taking two months' redundancy. The claimant says that Ms Kuyabakan falsely stated that the home was to shut and that all staff would be made redundant – a fact which has not come to pass because staff have not been made redundant, albeit I am told that Kerry has been suspended presently and that A has left the respondent.

38. On 30 August 2024 Ms Kuyabakan wrote to the claimant dismissing her second grievance against Mr Marshall and his alleged inappropriate conduct in suggesting the claimant leave the respondent with a payment.

39. The decision to dismiss was subsequently taken by the director of the respondent who has submitted a witness statement in this case (i.e. Mr Kamran Bhatti). Mr Bhatti says:

> "*I confirm that I made the decision to dismiss the claimant following her admission of recording 'without prejudice' discussions and other discussions without consent. I made this decision based on a reasonable belief of gross misconduct, namely a breach of trust and confidence and a breakdown of relationship. Due to the claimant's short service the previous disciplinary decision was upgraded to a dismissal. At the time of the dismissal I was not aware of the claimant's protected disclosure as I was under the impression that [Z] was the agency worker who reported the allegations against [A], however I am aware of the claimant's allegations of detriment raised on 3 July. No allegation raised by the claimant influenced my decision*."

40. By letter dated 2 September 2024 and signed Midas Manors the respondent wrote to the claimant and informed her she was dismissed with immediate effect. It recorded the grounds of the claimant's appeal and attached the report. It said:

> "*Please see the attached report for a breakdown of these points and additional information regarding covert recording of a 'without prejudice' discussion during this process. Having given full and thorough consideration to the information presented it the decision that the disciplinary appeal be dismissed in its entirety and the original sanction of a written warning to increased to dismissal without notice for gross misconduct for a breach of trust and confidence and breakdown in working relationships*."

41. I am told that there was an outcome to the grievance which was sent in September, but I do not have that before me.

Conclusions

42. The claimant states that the sequence of events leads compellingly to the conclusion that the reason for her dismissal on 2 September was because she had raised the protected disclosures with Kerry on 3 July and then drawn attention to others that this had led to a suspension but not been addressed by way of responding to and actioning her grievance. The respondent says that the principal (if only) reason for the dismissal related to the covert recording of the conversation with Mr Marshall on 16 August which it says was an act of gross misconduct.

43. As I indicated, I am not concerned with procedure of itself. Nevertheless, in cases of this type a Tribunal must consider the competing arguments against the circumstances and context within which matters occurred, because respondents do not admit that they dismiss people for making protected disclosures – they are matters they are reluctant to accept.

44. In this case I find that the claimant has a pretty good chance of establishing that she was dismissed for making protected disclosures. I was initially attracted by the point made by Ms Diouf, that one might have expected the respondent to have dismissed the claimant if that was the motivating feature, on 5 August, when they gave her a written warning. However, the claimant has met that argument because she has shown the respondent never actioned that outcome; the claimant was not

entitled to return to her place of work and no adequate reason was ever given for why that was the case. The claimant had to work from home for several weeks and was invited to leave by way of a payment on 16 August 2024 – an unsolicited request initiated by the respondent. The claimant declined it.

45. The claimant subsequently raised a concern about that and ultimately had a second proposal from the person who was conducting her grievances, the second of which complained of the very same approach. It was within three days of the second suggestion that she was informed that the sanction of a written warning was upgraded to a summary dismissal. That was a quite extraordinary turn of events.

46. The suggestion of the respondent that the evidence clearly would indicate that that was because of the covert recording of the call from Mr Marshall is (on the evidence I have seen) not impressive. Although I do not have regard to procedure of itself, I regard the failure of the respondent even to discuss that matter with the claimant, before it became the reason to upgrade the sanction, of significance. The representative of Peninsula, human resources and employment advisors, would have been expected to explore that type of behaviour and its context if it was the genuine reason for dismissal, particularly in the unusual circumstances when a sanction of a warning was being elevated to instant dismissal. Also, of real significance was the refusal to allow her to go back to Mount Royal, where she was the deputy manager and then the attempts to offer the claimant payments to leave. A compelling case is made that the real reason for the dismissal was because the claimant had drawn attention to issues concerning the running of the home which touched upon the health and safety of young persons. She was suspended the same day, drew attention to this in her grievance and it was not initially acknowledged then nor dealt with expeditiously. The content of what the claimant was disclosing to Kerry, on 3 July 2024, would in the reasonable belief of the worker tend to show the requisite wrongdoing with respect to health and safety and legal obligations and, in the reasonable belief of a worker, be in the public interest.

47. Under the case law of **Kuzel v Roche Products Ltd [2008] ICR 799** it is for the claimant to establish the principal reason for the dismissal. I am satisfied she is likely to establish that she made qualifying disclosures under section 43B of the Employment Rights Act 1996, that they were protected because they were made to the employer, under section 43C, and that the dismissal was because of this, under section 103A, given the wholly unimpressive explanation for converting a written warning to a summary dismissal, failure to acknowledge and progress her grievances and attempts to persuade her to leave, in conjunction with the sequence of these events. I do not consider the initial disclosure in November 2023 was likely to have been the motivating factor for the claimant's dismissal; it was likely to be the discussions with Kerry in July 2024 with suspension the same day which were the motivating factors behind the dismissal.

48. For those reasons I am satisfied the statutory test is met and I shall grant the claimant interim relief.

49. The respondent would not reinstate or re-engage the claimant.

Employment Judge D N Jones

Date: 20 December 2024