EMPLOYMENT TRIBUNALS

Claimant: Dr M Abdulwhab

Respondent: Manchester University NHS Foundation Trust

HELD AT: Liverpool, (via CVP) **ON:** 28 February 2025

BEFORE: Employment Judge Johnson
(sitting alone)

REPRESENTATION:

Claimant: unrepresented
Interpreter: Ms Rania Elkhen (Arabic speaking)
Respondent: Mr Sam Proffitt (counsel)
Ms Phoebe Mather (pupil barrister)
Ms Jeni Burrell (HR manager)

JUDGMENT

(1) The application for interim relief does not succeed.

REASONS

Introduction

1. This claim was presented by the claimant against the respondent on 6 February 2025, following early conciliation on 4 February 2025. It arises from his employment as a Senior LED in Asthma Research from 5 August 2024 until then apparent ending of his contract on 31 January 2025.

2. The respondent says that the claimant was engaged as maternity cover for this period and the person who was on maternity leave, was due to return to work on or around 31 January 2025. They say there was insufficient funding to pay for the claimant's job which would effectively be an additional role was the person he was covering for returned to work.

3. The claimant says that the real reason for the dismissal was not the ending of a fixed term contract, but (amongst other things), the making of protected disclosures relating to failures in vetting by the respondent when recruiting staff.

4. The claim form brought complaints of race and disability discrimination, breach of contract, holiday pay and unpaid wages. However, in relation to the interim relied application today, what was relevant was the complaint of whistleblowing and in particular the complaint of automatic unfair dismissal because of making a protected disclosure contrary to section 103A Employment Rights Act 1996 (ERA) and including an application for interim relief.

5. The application for interim relief hearing was accepted by the Tribunal and listed for today.

6. The respondent is yet to present a response and a Notice of Claim and Notice of Preliminary Hearing will be sent to the respondent/parties in due course.

7. The claimant produced hearing bundle of 307 pages including the documents surrounding his recruitment, his employment including the grievance/alleged protected disclosure and the ending of his employment.

8. The respondent also produced a hearing bundle of 335 pages which in many ways was a duplication of the claimant's bundle. However, it included internal documents connected with the alleged protected disclosures and documentation relating to the terms and conditions upon which the claimant was recruited, performance review documents and correspondence regarding an application to extend the fixed term contract and its refusal.

9. Mr Proffitt also provided a skeleton argument this morning which was helpful as it summarised the law and articulated how and why the respondent challenged the claimant's application for interim relief. He also provided a draft grounds of resistance and bundle index.

10. I observed that the claimant was a litigant in person and moreover, he had Multiple Sclerosis (MS) and did not speak English as his first language which was Arabic. I applied the principles outlined within the overriding objective under Rule 2 of the Tribunals Rules of Procedure and the relevant chapters of the Equal Treatment Bench Book relating to unrepresented parties and neurological conditions such as MS. The claimant confirmed that it would assist if he could have breaks every 15 minutes or so and that Ms Elkhan would (unless he agreed otherwise), interpret on his behalf.

11. I did explain that with the significant number of documents available, the need for breaks and the need for interpreting, it would be very challenging to complete the hearing within the 3 hours provided. However, I also explained that this was a summary process and needed to be dealt with quickly given that the claimant was seeking an order for continuation of the contract of employment under section 130 Employment Rights Act 1996, it was essential that the decision was reached without delay.

12. As it was, I was able to incorporate breaks within reading time, the parties helpfully provide concise but relevant submissions, and I was able to complete

the hearing and deliver my judgment by 1:30pm which was slightly over the time listed of 3 hours.

13. Unfortunately, the claimant did have a habit of interrupting Mr Proffitt when he was delivering his submissions in reply to the claimant's application. While I was patient with the claimant and had explained the order in which the hearing would proceed, I did have to warn him that he was placing us at risk of having insufficient time to conclude the case. I did allow the claimant the opportunity to make a few additional points following Mr Proffitt's reply even though they did not relate to questions of law, but had to restrict them to his identification of a few additional documents within his bundle and permitting Mr Proffitt the opportunity to comment as appropriate.

14. I am grateful to Mr Proffitt for adopting a pragmatic approach to this issue and not objecting to this adjustment which supported the claimant and allowed him to participate effectively at the hearing today.

15. I reminded the parties that my task at this hearing was not to hear any live evidence or to make any findings of fact. It was to consider the relevant written documents and what parties told me in oral submission (by which I mean he told me why he believed his claim of automatic unfair dismissal would succeed) and then to decide whether the claimant had established that it was likely that at the final hearing the Tribunal would find in his favour on the automatic unfair dismissal complaints under section 103A of the ERA.

The claimant's case.

16. The claimant referred to himself as being disabled with MS and explained that he has to take 10 different forms of medication as part of the management of his. condition. He said he is the only breadwinner within his family. He said his ability to practice medicine in the UK was at risk because of what had happened and therefore a positive decision in this interim relief application was crucial to him.

17. He said that the respondent recruited him as a senior doctor, did not seek proper disclosure and banning information when he was recruited as part of vetting. He was concerned that the respondent was not carrying out proper checks and therefore he made a protected disclosure. He said that he was unfairly dismissed for making that disclosure and therefore he is making his application for interim relief.

18. He said that the reason provided by the respondent for the dismissal namely that a fixed term contract had come to an end was not genuine. The claimant said that the real reason was that he had made a protective disclosure in good faith arguing that the respondent had failed in its legal duties on health and safety grounds and that he was refusing to cover any wrongdoing on their part.

19. He accepted that there were some complaints in his claim which were not covered by this application and made reference to discrimination and his requests for flexible working while he was employed by the respondent.

20. He asked me to note that the respondent effectively dismissed him on the 16 January 2025 when they refused his access to his e-mail account and on the 23, 24 and 27 of January 2025 when he was removed from the WhatsApp group for his department. Additionally, he also referred to the removal of card access to buildings on the 28 January 2025 before his fixed term contract officially ended on 31 January 2025.

21. He concluded that his applications should succeed because it was evident from the chronology of events that the respondent had chosen to end his employment because of the protected disclosure which he had made.

The respondent's case.

22. Mr Proffitt remind me of the overarching principles in determining an interim relief application and submitted that in this hearing the claimant has failed to demonstrate the complaint of automatic unfair dismissal arising from whistleblowing in terms of the relevant test that applied. He said that the claimant had simply failed to demonstrate a pretty good chance of success.

23. Mr Proffitt said that there was nothing within the documents provided by either party, which revealed anything that could be considered suspicious in terms of the way in which the respondent treated the claimant during his employment and the way that they ended the employment.

24. His main argument was that there was a clear intention that the claimant's employment would always be subject to a fixed term contract and the contractual documents and correspondence supported that. He said there was no ambiguity concerning this. It was submitted that the claimant would need to show that the fixed term contract changed during his employment so that it was extended and then changed back to the original end date because of the protected disclosure.

25. Mr Proffitt emphasised that there was literally no evidence in either the respondent's or claimant's bundles which revealed that the respondent had said that the claimant would have an extension of time nor was there any indication to him of scope that there would be an extension of time granted before the employment ended.

26. In particular he referred to discussions and the notes of those discussions between the claimant and HR in November and December 2024 which reflected that the parties knew that the claimant's employment was coming to an end. Reference was made in particular to pages 210 and 224 of the respondents bundle in this regard.

27. Mr Proffitt also referred me to the letter of 2 December 2024 revealing the outcome of the three month probationary meeting review and confirming that the claimant's contract will come to an end on 31 January 2025. He therefore said there was no intention that anything other than a termination of employment on this date would take place.

28. He added that while the claimant had applied for employment elsewhere and argued that his references had been withdrawn by the respondent, this is a detriment rather than a dismissal under section 103A ERA and did not form part of the consideration being given to the application for interim relied on which related to the dismissal.

29. Mr Proffitt also referred to the e-mail of 27 January 2025 where the claimant was informed that the fixed term contract must end by the agreed date because the person who was subject to maternity leave was returning to work and there was only funding for one doctor in this post.

30. He reminded me that the requirement of section 103A ERA was that the *principal* reason for the dismissal must be that the claimant made a protected disclosure. The claimant had in fact made in his arguments reference to a number of reasons including discrimination and flexible working applications. Under this rationale he said, how could whistleblowing be a principal reason for the dismissal.

Relevant Legal Framework

31. I was grateful to Mr Proffitt for providing details of the law in relation to interim relief applications and whistleblowing unfair dismissal complaints within his skeleton argument.

<u>The law relating to interim relief generally.</u>

32. The application for interim relief was brought under section 128 of the ERA. The test for whether it succeeds or not appears in section 129(1) as follows:

'(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…

33. In assessing the prospects of success, I had regard to the legal framework which applies to the substantive complaints of automatic unfair dismissal and as provided by the guidance given in <u>*Hancock v Ter-Berg & anor*</u> UKEAT/0138/19/BA.

34. Moreover, I noted the guidance given by Slynn J in *Taplin v C.Shippam Limited* [1978] ICR 1068 and that when making an order for interim relief, a Tribunal should be satisfied that the relevant complaint has a *'…pretty good chance of succeeding'.*

35. Mr Proffitt referred to the case of *Ministry of Justice v Sarfaz* [2011] ICR 562 and Underhill P described *'pretty good chance'* as meaning *'something nearer certainty than mere probability'.*

36. This was revisited by Eady HHJ (as she then was) *Al Qasimi v Robinson* EAT 0283/17, and who helpfully provided a summary explaining the challenges which a Judge is confronted by in an application for interim relief and what is expected from the decision maker.

37. Accordingly, I was reminded that:

    a) my decision today was a summary one,

    b) that I must do the best I can based upon the available materials and the short notice involved,

    c) avoid findings that will bind the hands of the Tribunal at a future hearing,

    d) adopt what can be described as an *'impressionistic'* approach based upon how the matter looked to me,

    e) consider whether the claimant has a *'pretty good chance of succeeding',*

    f) explain my conclusion in a way that provides the 'gist' and which is *'not overly formulaic'.*

Dismissal because of making a protected disclosure

38. Parts IVA of the ERA defines a protected disclosure within section 43B with subsequent sections dealing with relevant persons to whom the protected disclosure can be made.

39. The key requirements are that the claimant must have made a disclosure of information rather than a bare allegation, that he must reasonably have believed that the information tended to show one of the matters set out in section 43B(1), and that he reasonably believed that his disclosure was made in the public interest. If those requirements are met, a disclosure to an employer will qualify for protection.

40. If a protected disclosure has been made, the complaint will succeed only if the reason or principal reason for dismissal is that the employee made a protected disclosure. Where the decision is that of one person it is the sole or principal reason in her mind which matters. It is not enough for any protected disclosure to have had a material influence if it is neither the sole nor the main reason for dismissal. However, this is subject to the decision of the Supreme Court in *Royal Mail Ltd v Jhuti* [2020] 3 All E.R. 257 where at paragraph 62, it says that

' … if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.'

41. I am also grateful to Mr Proffitt for the case law relating whistleblowing as follows and which were noted:

    a) *Cavendish Munro Professional Risks Management v Geduld* [2010] ICR 325 EAT.

    b) *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, CA

    c) *Blackbay Venture Limited v Gahir* [2014] ICR 747.

    d) *Chesterton Global Ltd v Nurmohamed* [2017] ICR 731.

42. Section 103A of the ERA provides that *'An employee who is dismissed shall 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'.*

Conclusions

43. Based upon the claim form, grounds of complaint, the proposed amended grounds of resistance and all of the documentary evidence available to me and what the claimant and Mr Proffitt told me, I drew the following conclusions:

Dismissal because of making a protected disclosure.

44. I was not satisfied that it is likely; in the sense of there being 'a pretty good chance of success' that the claimant would succeed with his claim of dismissal because of making a public interest disclosure.

45. The documents support the contention that the claimant entered into a fixed term contract covering for maternity leave and that this would end on 31 January 2025. This was the contract that he entered into, and which is supported by the contract of employment dated 10 July 2024. The claimant referred to other documents, I was not persuaded that they established that the agreed 31 January 2025 end date would be varied or extended. While the claimant did refer to a document at page 55 of his bundle describing a fixed term contract of 8 months in length it pre-dated the issued July 2024 contract of employment. Moreover, it had an end date of 31 December 2024 and not 31 January 2025.

46. The claimant also referred to a document at page 65 of his bundle with the end date of 21 February 2025 being mentioned, it was in an email pre-dating the issued contract of employment. As Mr Proffitt stated in his reply to the claimant, the claimant's grievance decision at page 274 of the respondent's bundle, recorded the investigating manager finding that the claimant had not pursued that

matter with the respondent further with the consequence that the contractual end date of 31 January 2025 applied.

47. I was not persuaded that the limited evidence regarding the ending of email account access, WhatsApp group access and building access supported the argument that the whistleblowing complaint had a pretty good chance of succeeding.

48. The claimant may ultimately be able to demonstrate that some of the alleged protected disclosures satisfied the requirements of section 43B ERA, but for the purposes of the application seeking interim relief, I am not satisfied that there were disclosures which resulted in the ending of the claimant's employment for the ***principal*** (my emphasis) reason that he had made protected disclosures. It may be that a full consideration of the evidence at a final hearing will on balance persuade a Tribunal that there were protected disclosures under section 43B and that they were the principal reason for the dismissal, but that requires the provision of relevant witness evidence and documents and a full consideration of that evidence.

49. The fact that the claimant is also relying upon other potential reasons for the dismissal in support of the discrimination complaints adds to my conclusion that it is not clear what the principal reason for the dismissal was, if the claimant succeeds in arguing that it was not because his contract of employment ended. That of course remains an arguable reason for the dismissal and one which is reasonable for the respondent to make as part of their grounds of resistance to the claim.

50. Accordingly, while I am not satisfied that all elements of a complaint of automatic unfair dismissal under section 103A are likely to succeed for the purposes of an application for interim relief, this is not to say that there is not an arguable case. It however, a matter which requires further case management and the provision of oral evidence.

Employment Judge Johnson
Date: 28 February 2025

JUDGMENT AND REASONS SENT TO THE PARTIES ON
7 March 2025

FOR THE TRIBUNAL OFFICE

Notes

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