EMPLOYMENT TRIBUNALS

Claimant: Miss Negar Vasfi

Respondent: PRC Architecture and Planning Limited

Heard at: Cambridge ET via CVP **On: 1 March 2023**

Before: Employment Judge Tuck KC

Appearances:

For the Claimant: In Person
For the respondent: Mr M Williams, Counsel.

JUDGMENT ON INTERIM RELIEF APPLICATION

The claimant's claim for interim relief fails.

REASONS

1. By an ET1 presented on 15 February 2023 the Claimant brought a claim that she had been automatically unfairly dismissed because she had made protected disclosures. She applied for interim relief. The ET3 is due to be presented by 22 March 2023.

2. By letter dated 22 February 2023 the hearing to consider the Interim relief application was listed, and has been heard today via CVP.

Law.

3. I identified the legal principles I would be applying at the outset of the hearing; they were helpfully agreed by Mr Williams.

4. Interim relief under s128 of the Employment Rights Act ("ERA") 1996 is available in relation to a number of categories of claims for automatically unfair dismissal, including where it is alleged that dismissal is because of

the making of a protected disclosure ('whistleblowing') under s103A ERA 1996. Section 129 ERA provides for the procedure on hearing an application for interim relief and states that a tribunal must decide if it "appears to the tribunal that ***it is likely*** that on determining the complaint, the tribunal will find that the reason (or principal reason) for the dismissal" is a protected disclosure. (emphasis added)

5. In *His Highness Sheikh Bin Sadr al Qasimi v Robinson UKEAT/0283/17 (22 December 2017, unreported)* the EAT summarised the relevant case law, and applied the leading case of *Taplin v C Shippam Ltd [1978] IRLR 450*, *EAT* (which arose in the original context in which interim relief was enacted, namely dismissal for trade union reasons). While certain elements of the test laid down in Taplin have to be excluded (in particular, the need for a trade union certificate) the test for 'likely' is the same – does the claimant have a 'pretty good chance' of success? In the whistleblowing case of *Ministry of Justice v Sarfraz [2011] IRLR 562, EAT*, this was interpreted as meaning 'a significantly higher degree of likelihood than just more likely than not'. Applying that to a whistleblowing claim it means that the claimant must show that level of chance in relation to the elements that:

   (1) she made the disclosure(s) to the employer;

   (2) she believed that it or they tended to show one or more of the matters itemised in the ERA 1996 s 43B(1);

   (3) her belief in that was reasonable;

   (4) the disclosure(s) was or were made in the public interest; and

   (5) the disclosure(s) was or were the principal cause of the dismissal.

6. As was made clear in *London City Airport v Chacko* [2013] IRLR 610, EAT – at para 23 - the application falls to be considered on a summary basis. The employment judge must do the best she can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The employment judge is then required to make as good an assessment as she is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the employment tribunal but whether it 'appears to the tribunal' . . . 'that it is likely'

7. If the tribunal agrees with the Claimant's application, it must announce its findings and explain to both parties what powers it can exercise and in what circumstances it will exercise them and then invite the employer to reinstate or reengage the employee on 'not less favourable' terms and conditions pending the final determination (s129(2) and (3) ERA). If the parties agree, the tribunal can make an order to that effect. Failing agreement, unless it determines that the employee has unreasonably refused an offer of re-engagement, the tribunal will then make an order for the continuation of employment compliant with s130 ERA / s164 TULR(C)A which preserves pay and other benefits and continuity of employment. The amount of pay must be specified in the tribunal order, taking into account any amounts already paid by the employer.

Today's hearing

8. I was provided with a PDF consisting of 135 pages and read such documents as I was taken to. This included what was described as a 'draft statement' from a Mr Simon Nobel, a Senior Architectural Technician employed by the Respondent; I also had a statement from Mr Mark Nugent, a "Level 4 Project Director" on behalf of the Respondent. The claimant took me through her claim form and to each of the emails referred to therein. Mr Williams made submissions on behalf of the Respondent.

9. In her ET1 the claimant cites correspondence sent by solicitors she instructed and solicitors for the Respondent. Mr Williams said that there had been an open letter sent on behalf of the Claimant on 30 January 2023, and also a letter headed "without prejudice save as to costs" was sent. That was responded to on 2 February 2023 by solicitors for the respondents, also using the heading of "without prejudice", and a reply to that was sent by the claimant's solicitors on 9 February 2023, again "without prejudice". Mr Williams further confirmed that the content of the three "WP" letters was indeed seeking to set out terms on which a settlement of the dispute between the parties might be achieved. Having explained the without prejudice rule, Ms Vasfi did not pursue the point that I needed to see those letters at this stage. This does not preclude her from making a future application in these proceedings should she be so advised.

Facts

10. It was agreed between the parties that the Claimant was employed as an Associate Architect ("Level 3") on 1 April 2022. In late 2022 she was working on the same project as Simon Nobel – he was responsible for the "Village Care Centre and Wellness Scheme" while she was working on residential properties. Mr Nugent (level 4) was senior to both Mr Nobel and the claimant; Mr Lane is a level 6 employee and so senior to Mr Nugent.

11. The Claimant was told by Mr Lane on 10 January 2023 that her employment was being "terminated with immediate effect". In a letter the same date, Marion Vignau, an Operations Executive wrote to the claimant saying that her "final employment date with PRC will be 10 February 2023. You are not required to work from Tuesday 10 January until your final date". The claimant asked for the reason for her termination to be set out and a second letter was issued on 10 January 2023 which included the sentence "this is due to compatibility issues with the projects, the team and more importantly our approach to work". The claimant presented her ET1 on 15 February 2023, so within 7 days of her effective date of termination.

12. The claimant set out in her ET1, and expanded to me orally today, that she made what I have categorised as three protected disclosures ("PDs"):

    a. "PD1" – the claimant relies on an email she sent on 13/12/22 at 18.14hrs in which she said "some of our windows currently don't comply with ADB 3.64… where the distance between the window to the apartments and window to the stair enclosure exceeds 1800mm"
        i. The claimant told me "ADB" refers to building regulation standards, and said she was concerned this was a fire safety issue.
        ii. A response at 06.25 following day from Mr Nugent said he would let "Si know" – ie Simon Noble, and said "I think we should ask the AI / Fire consultant regarding the window and the proximity as technically yes its within the 1800mm however not directly facing" . He goes on to say he thinks there may be another issue (re. Kitchen / Bedroom), and concludes "Negar we won't change anything yet but valid comments that need to be addressed".
        iii. The reference to "AI" is an "Approved Inspector" – who along with Fire Consultant had reviewed the drawings.
        iv. Simon Noble sent a response on 14/12/22 at 09.51hrs, which included him saying "yes will need to be raised to the AI."

    b. "PD2" The claimant sent an email to Mark Nugent (cc'd to Simon Nobel and Chris Lane) on 15 December 2022 15.34hrs entitled External Windows and Doors. She said – "planning drawings for building A3 that I believe has been granted planning approval, showing inconsistent layouts with tender/ working drawings of the same building. See below left for the screenshots…. I am uncertain if this change can be categories as a miner [sic] amendment, please let me know if this has been raised/ discussed?".

i. The claimant told me that in effect s171A of the own and County Planning Act 1990 requires that a building must, when built, be consistent with the planning permission which has been granted. She was concerned it would not be.
ii. The reply sent to the claimant (pg 69) was – "this has been noted and was an error on our part when the modern blocks were updated in the planning set… will have to go to the Planners at some point but the Tender is the correct orientation for that Block".
iii. Ms Vasfi told me she was concerned as to why the error had not been picked up earlier and the clients told. She thinks it arises because of a practice of 'cutting and pasting' from earlier projects.

c. "PD3" – in an email of 20 December 2022 at 16.47 the claimant wrote "amending all the cills to the standard type (as per your detail) will have a significant impact on planning and tender elevations (basically, all the elevations need to be updated)".
i. The claimant told me that "If cills are different to how shown between planning permission when built, it is a breach of s171A Town and County Planning Act 1990."
ii. She said that she received no substantive response from the project director.
iii. Simon Noble replied on 21 December 2022 "we will not need to update the planning or tender elevations. Anything like this will be picked up in stage 4".
iv. The claimant explained that "Stage 4" is a reference to RIBA the "technical design" stage – prior to manufacturing and construction. (Royal Institute of Building Architects). The Claimant said she was concerned that if cills were changed at stage 4, these would be significantly different to planning permission given – hence breach of s171A. Cl said she wanted clarity – and approval from the project director that cills were to be changed before she spent several days amending the plans which had been given permission.

13. The respondent's offices were closed over Christmas and New year. I understand that the claimant returned to work on 9 January 2023. On 21 December 2022 at 17.43 hrs the claimant had set out the rationale for needing two full time resources to get the work done by the end of March 2023. On 9 January she received a response from Mr Nugent at 08.53 saying "the plan is that you work directly on the Revit aspects to get the remainder done …. Appreciate that you would normally be running the package rather than doing it however we just don't have the current

instructions / fees agreed as yet to be able to do this hence the need for you to be working directly on the packages over the next period". The claimant described this as "removing a vital resource from me".

14. Mr Williams submitted that on receipt of the email of 9 January 2023 the claimant asked to speak to Mr Lane. I did not have any account from Mr Lane before me, and it is clear that the exchange/s between the Claimant and Mr Lane on 10 January 2023 will be of great importance. The claimant told me "to my shock I was dismissed. I was given no reasons. I asked for them and got the second letter". When I asked her why it was because of what she says were protected disclosures, the claimant said "15 years of experience, and the matters I was raising were shocking. I was making a great deal of noise and they were not responding. Mark had Simon respond to emails. Then they wanted me to work only on Revit". (Revit is the computer program on which architectural drawings are produced).

15. Mr Williams submitted that the claim does not have a good chance of succeeding. He said that the matters raised by the claimant in December 2022 were "par for the course" and nothing out of the ordinary, and were addressed. Moreover he said the claimant had failed to show any alleged link between these "disclosures" and her dismissal. His instructions were that the respondent was taken aback by the Claimant's refusal to work as part of a team, and her reliance on her rank which led to the dismissal.

Conclusions

16. I have considered in turn each of the five questions set out in *Sharfraz* and whether the claimant has a good chance of succeeding on each of them.

(1) she made the disclosure(s) to the employer;

It is clear that each of the matters relied upon by the Claimant were set out in emails to Mr Nugent. They were therefore to her "employer".

(2) *she believed that it or they tended to show one or more of the matters itemised in the ERA 1996 s 43B(1);*

I consider that the claimant has a good chance of establishing before a full tribunal, that her disclosure about the distance between windows and staircases shown on the relevant drawings, were, or were likely to be in breach of legal obligations and given the fire regulations, she had

reasonable grounds to believe there might be a risk to health and safety of future residents.
The second and third disclosures are more difficult because any breach of the planning legislation would only arise after construction, and the claimant was being told that her concerns would be addressed – essentially prior to construction. I have decided that as s43B provides for breaches that have occurred, or are likely to occur, the claimant has persuaded me that she is likely to succeed on this point before a full tribunal.

(2) her belief in that was reasonable;

I have regard to the claimant's expertise in building regulation and planning matters and do consider her beliefs to have been reasonable.

(4) the disclosure(s) was or were made in the public interest; and

There was no real dispute that the obligations to comply with building and fire regulations are of such importance in construction projects that these matters satisfy the "public interest" test.

(5) the disclosure(s) was or were the principal cause of the dismissal.

On this causation point, I am not satisfied that it can be said the claimant has a high degree – significantly above 51% - chance of succeeding. There will need to be careful consideration of the reason/s for dismissal, and it is stark that even in circumstances of having less than 12 months' service, the claimant was dismissed with no procedures being followed whatsoever. Whilst the claimant has told me she was "being noisy" in raising issues, the reactions in emails addressing those concerns and accepting their legitimate nature are of note. At this early stage of proceedings, I cannot be satisfied the claimant has met this high threshold.

17. Accordingly, I have dismissed the application for interim relief.

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Rebecca Tuck KC.

Dated this 1 day of March 2023

Sent to parties: 5th March 2023

GDJ