



EMPLOYMENT TRIBUNALS

Claimant: Ms Kader

Respondent: Mayor's Office for Policing and Crime

Heard at: London Central by CVP in public

On: 3 April 2024

Before: Employment Judge Goodman

Representation

Claimant: in person

Respondent: Rad Kohanzad, counsel

JUDGMENT

The application for interim relief does not succeed.

REASONS

1. This was a hearing of the claimant's application under section 128 of the Employment Rights Act 1996 for interim relief in respect of her claim of unfair dismissal for making protected disclosures.
2. The claimant was a probationer police constable. Police constables as a rule are excluded from making unfair dismissal claims, but dismissal for making protected disclosures (whistleblowing) is an exception to that rule.

Conduct of the Hearing

3. The statute requires a tribunal to determine an application for interim relief "as soon as practicable". It is only now being heard. Regrettably this is because tribunal staff did not process this claim when presented on 20 October 2023. It was never referred to a judge for vetting and only came to light when the parties referred to it at a case management hearing on 20 February 2024 before Employment Judge Khan on two earlier claims the claimant had made against the respondent. It was then vetted, served, and listed for hearing.
4. The respondent has filed a response to the unfair dismissal claim. It was not required to plead to other claims as there was no early conciliation certificate (interim relief claims are exempted from the early conciliation requirement).

Whether the other claims on this claim form are covered by earlier contact with ACAS is a matter for another hearing.

5. Today I had a 110 page bundle of documents prepared by the respondent, which includes the pleadings, the claimant's March 2022 grievance, and correspondence and hearing notes for the process for ending a probationer constable's employment, starting in February 2023 and ending in October 2023, when her employment was terminated. I had a witness statement from Assistant Commissioner Louisa Rolfe, who decided to end the claimant's employment, a chronology prepared by the respondent, and a 13 page document of further information prepared by the claimant.
6. In order to understand the background, I had also read the pleadings and case management summaries and orders in the earlier claims, 2204707/22 and 2214851/23, which are to be consolidated for final hearing with this one. A further case management hearing to clarify the issues in all three is listed for 23 April 2024.
7. The claimant was not represented, but a companion, Derya Yildirim of Nia Project, was present for moral support. I explained that I was not making findings or hearing evidence today and was just assessing the likelihood that she would succeed in establishing that she was dismissed for her protected disclosure.
8. I heard representations from both parties and then reserved the decision.

Relevant Law

9. By section 129(1):

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...section 103A”,

the tribunal is to order reinstatement, or if the employer is unwilling, make an order for continuation of the employee's contract until the final hearing. There is also an option of reengagement in another role if the employee consents to take what is offered. There is no provision for refund if in the event the employee does not succeed in his claim.

10. What is meant by “likely” to succeed is clarified in **Taplin v C. Shippam Ltd (1978) ICR 1068**. It means: “a greater likelihood of success in his main complaint than either proving a reasonable prospect or a 51 per cent. probability of success and that an industrial tribunal should ask themselves whether the employee had established that he had a “pretty good” chance of succeeding in his complaint of unfair dismissal”. This formulation was affirmed in **Dandpat v University of Bath (2009) UKEAT/0408/09/LA**, where it was said: “there were good reasons of policy for setting the test comparatively high... 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”. In **Ministry of Justice v Sarfraz (2011) IRLR 562** “likely”

meant a “significantly higher degree of likelihood” than “more likely than not”. In **Parsons v. Airplus International Ltd UKEAT/0023/16/JOJ**, it was said that the claim should be “clear cut”.

11. The task of the tribunal hearing an interim relief application: is “to make an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he or she has... doing the best he or she can with the untested evidence advanced by each party” – **London City Airport v Chacko (2013) IRLR 610**. The tribunal is not required to make findings or reach a final judgment on any point - **Parkins v Sodexho Ltd (2002) IRLR 109**. As stated in **Parsons**: “The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself. In giving reasons for her decision, it is sufficient for the Judge to indicate the “essential gist of her reasoning”: this is because the Judge is not making a final judgment and her decision will inevitably be based to an extent on impression and therefore not susceptible to detailed reasoning; and because, as far as possible, it is better not say anything which might pre-judge the final determination on the merits”.
12. To succeed in the claim of unfair dismissal for making a protected disclosure the claimant must establish three things. She must establish that she made one or more disclosures of information which in her reasonable belief tended to show one of the forms of wrongdoing set out in section 43B (1)(a) to (f) of the Employment Rights Act. She must then establish that making a protected disclosure was the reason, or if more than one, the principal reason for the dismissal – section 103A.
13. As classically set out in **Abernethy v Mott, Hay and Anderson (1974) ICR 323**, “the reason for the dismissal of an employee is a set of facts known to the employer, or it may be, of beliefs held by him, which cause him to dismiss the employee”. Finding the reason is a finding of fact. This may involve a search for the real reason for dismissal, looking behind any invented reasons planted by a person in the hierarchy of responsibility above the employee: **Royal Mail Group Ltd v Jhuti [2019] UKSC 55**.

Factual Summary

14. This summary is based on the pleadings and the documents. I have done my best, but the picture was still not entirely clear, and there may be some factual disputes to be decided when the evidence is heard. Given the complexity of the history I have suggested to the claimant that she may find it helpful to write herself a chronological narrative of everything that happened which may be helpful at the next case management hearing, where the judge will try to finalise the list of issues.
15. The claimant started work for the respondent as a probationer police constable on 17th July 2017. The normal period of probation lasts 2 years, but may be extended if the probationer may improve or develop. The claimant heartburn A probationer for over six years when she was discharged. Under the Police Regulations 2003, a probationer may be discharged under regulation 13 if he (or she) “is not likely to become an efficient or well conducted constable”.

16. The claim form is brief. The claimant says that after reporting a serious incident that took place at work by male police officers on a night shift, a matter that was never dealt with, she had a long period off sick, and PTSD in 2021. Despite this incident she had to work with the same team. She was told that she would lose her job because of an excessive sick period. When she met the Assistant Commissioner for the second time on 19th October 2023, the Commissioner was fully aware of what had happened. The claimant showed her photographic evidence. She believed she had been targeted because of her race (she is from Saudi Arabia), religious beliefs (Muslim) and victimised for making a few complaints and taking photos as evidence for. Her complaints had not been dealt with.
17. The protected disclosure apparent on the claim form therefore concerns an episode which she dates to May 2019, when on the night shift she asked two male officers who were watching an adult TV channel showing women's breasts and buttocks to switch channels. They refused and, she says, told her to grow up. The claimant says she reported this next day to her line manager, Kate Vallance. There is a factual dispute about the date: the respondent believes the incident was in May 2020. The probation report shows that Kate Vallance did not become the famous lane line manager until August 2020, but the claimant said today that this was "a lie". In March 2022 she lodged a written grievance about the failure to take action on this complaint. In the grievance she said she had been bullied by the line manager because if the two officers concerned was suspended the team would not meet minimum strength, as they were blue light and Taser officers. She also alleged that her line manager told the street duty sergeants not to sign off her paperwork. This meant that none of the paperwork about her performance on tasks was signed off and she was recommended for dismissal. The grievance also refers to "another serious sexual harassment incident which wasn't investigated properly", when she was called a liar and under criminal investigation. The grievance concluded "this has to be stopped and officers must face consequences that are inappropriate behaviour. This can't be classified as a banter".
18. The Respondent treated this grievance as misconduct on the part of the two officers, as shown by emails in the bundle. The claimant does not know the outcome of the procedure.
19. The "serious sexual harassment incident" referred to in her grievance occurred in June 2018, the claimant said in this hearing. She complained to Trevor Jones that she had been sexually touched by Sergeant Dan Bacon, her line manager. According to the claimant, within eleven months of her two year probation period she had completed the paperwork for all 14 areas required, twelve of which had been signed off by various managers, but Dan Bacon would did not sign off the other two when requested in November 2018. She also says that he put her on a misconduct charge for giving a false date of birth, after a conversation about celebrating two birthdays in Saudi Arabia, and another charge of taking unauthorised holiday in 2018. This impeded the conclusion of probation, because a probationer cannot be signed off if there are misconduct allegations pending. She also had to be assigned restricted duties.

20. The undated probation log (it is not known whether this a summary of other documents or when and why it was prepared) shows that in November 2018 Sergeant Bacon deemed the claimant not yet competent because her performance fell off when she was unsupervised. From May 2019 she had various changes of line manager. In January 2020 her then line manager, Sergeant Rogers, reviewed her performance and assessed her development as not yet competent. Sergeant Valance expressed concern about the claimant's poor attendants - she was then under the care of her GP for stress and anxiety. She had a phased return to policing in May 2020 but went sick in August 2020 when she was told there was a criminal investigation against her (see below). In 2021 she had several periods of absence with stress and anxiety, some difficulty with childcare, an episode of COVID, and her son being unwell, such she did not return to work until February 2022. In November 2021 she was charged with fraud for failing to disclose past arrest history relating to driving without insurance: the claimant protested that she had never owned a car and the matter was eventually dropped as mistaken identity. In spring 2022 she went sick again and had several months of home treatment for stress and anxiety. During this time off she was charged with misconduct for being in Mecca when off sick - the claimant says she had expressly asked whether she should book holiday instead of sick leave for this visit, and the charge was dropped. Towards the end of 2022 the claimant suffered bereavement when first her grandmother and then an uncle died. There was also an assault by her ex-husband.
21. Between 7th April and 8th November 2022 she was suspended on misconduct allegations. On the 5th December 2022 her probation was extended by three months and on 6th February 2023.
22. The claimant says that in all there were 9 miscellaneous allegations of misconduct (some have already been mentioned). One of these was in August 2020, when she was told there would be a criminal prosecution for making a false allegation of sexual assault on the part of Dan Bacon. The CPS declined to pursue it, it then proceeded as an internal gross misconduct investigation. A final hearing on the misconduct charge was listed for March 2024, but it was dropped the previous day. The claimant says this is because allegations against the officer had been made by other women on three separate occasions. This is of course new material which respondent has not had the opportunity to challenge – there could be another reason.
23. Another episode leading to a misconduct charge occurred when the claimant was a passenger in a police vehicle which struck a pedestrian who later died. The claimant says she had in February 2022 already been upset by the standard of driving. She attended the trial and gave evidence. Nevertheless, two misconduct charges arose from this incident, one for failing to attend court, another for saying she was at the trial when (it was alleged) she wasn't. Both were later found to require no further action.
24. Once the seven month suspension was lifted in November 2022, her probation was extended by a further three months, but in February 2023 she was considered for termination. Her Police Federation representative at that time stressed her difficulties through family events, 9 misconduct allegations over four years, all but two of which had been dismissed without action) the stress of the prolonged Regulation 13 process, and that she had been

punished by colleagues for the allegation of sexual touching (2018). She had a meeting with Assistant Commissioner Rolfe on 16th April, as result of which her probation was extended first to 29th July 2023, then to 29th October 2023. According to Ms Rolfe, her time was extended because of the seven month suspension in 2022, so that she could have the further opportunity to demonstrate good attendance, but between April and October 2023 her attendance had continued to be poor. Ms Rolfe says in her statements that she knew ,from discussion in the meeting in April 2023, about the March 2022 grievance and did not consider this relevant. The claimant had had “exceptional periods of extension” to demonstrate performance and attendance, which remained unsatisfactory.

25. An obvious conclusion to draw from this incomplete narrative is that the factors leading to the claimant's dismissal are complex. On the claimant's case, she suffered considerable hostility from colleagues because she had complained – whether the 2018 touching or the TV incident - leading to unfair treatment of her paperwork, unpleasant remarks (being a lesbian, smelling of fish), the sequence of misconduct charges, causing considerable stress which led to her prolonged sickness absence. It is possible that she will be able to prove a claim of sexual harassment, or victimisation by way of unfair misconduct allegations, for example, causing or contributing to prolonged ill health with the consequence that she failed probation. She may be able to establish that she has suffered detriment for making one or more protected disclosures (assuming she can negotiate the formal hurdles of establishing protection). I note for example that four disclosures are relied on in the first claim, three of which relate to the TV episode). On the respondent's case, however, she has been unfortunate, but has not been poorly treated by male colleagues, or if she was, this was not responsible for her failures in performance or attendance.
26. However, the decision for today is whether she is likely to establish that Assistant Commissioner Rolfe dismissed her because of her complaint about the TV episode. The respondent accepts that the claimant made a formal grievance in March 2022 about the lack of investigation of her earlier complaint, whether that was 2019 or 2020. There is no doubt that Ms Rolfe knew about it, because the claimant explained it all at the first meeting with her, but there is also no doubt that the claimant's probation was already impeded when, on her case, Sergeant Bacon would not sign off on two of her reports in 2018, before the TV incident occurred (May 2019 on the claimant's case). Whether Assistant Commissioner Rolfe knew the extent of the claimant's account that she had been subjected to misconduct allegations and her health affected by the hostility of her colleagues is a matter for cross examination. On what is known about the case today, I conclude that it cannot be said that the claimant has a “pretty good chance” of establishing she was dismissed because of her May 2019 (or 2020) or the March 2022 grievance. Her poor attendance record was the outstanding factor behind the decision, and it is hard to see that the claimant is likely to establish that was the *sole or principal* reason for the decision to terminate. What was going in the back story - whether that attendance record was caused by detriments because of protected disclosures, or victimisation because (on her account), her colleagues and line manager were punishing her for complaining about them - must be decided after hearing the evidence.

27. Accordingly, the application for interim relief does not succeed.

Employment Judge Goodman

Date 3 April 2024_____

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 April 2024
.....

.....
FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>