Case No: 2302048/2023

EMPLOYMENT TRIBUNALS

Claimant: Ms I Woodhead

Respondent: Shell International Trading and Shipping Company Limited

Heard at: South London (by video) **On:** 14 July 2023

Before: Employment Judge Evans

Representation
Claimant: in person
Respondent: Mr A Smith of counsel

JUDGMENT

The claimant's application for interim relief pending the determination of her claim of unfair dismissal fails and is dismissed.

REASONS

The judgment set out above was given orally with reasons at the conclusion of the hearing on 14 July 2023. The claimant has requested written reasons. These are those reasons.

Preamble

1. On 11 May 2023 the claimant presented a claim of unfair dismissal to the Tribunal following her dismissal with effect from 5 May 2023. Within that claim she included a claim for "automatic Interim Relief pursuant to section 128 of the Employment Rights Act 1996". That application was listed for hearing before me today. The listing was for a 3-hour hearing.

The hearing today, 14 July 2023

2. The parties had each produced very lengthy bundles of document. In addition, the respondent had produced a draft witness statement for Mr Alistair Tucker (who took the decision to dismissal the claimant) and a skeleton argument. This morning at the beginning of the hearing the claimant emailed to the Tribunal and to the respondent's representative her own skeleton argument running to 26 pages.

3. As is invariably the case in applications of this sort – see rule 95 of the Tribunal's rules - I did not hear oral evidence. There was a 30-minute adjournment to read the claimant's skeleton argument once it had been received. The parties then made submissions. Mr Smith made his submissions before the claimant so that as an unrepresented party she would have the advantage of having heard his submissions before she made her own. I then retired briefly to reach a decision. I then gave my decision with oral reasons.

The issues for the Tribunal to decide today

4. There was a brief discussion at the beginning of the hearing in which I outlined what I considered to be the relevant law – for the benefit of the claimant - and identified what appeared to me to be the relevant issues. The parties agreed with my analysis.

5. The claimant contends that the reason for her dismissal given by the respondent – misconduct – is a sham. In box 9.2 of the claim form she stated (page 97 of the respondent's bundle):

   I am claiming unfair dismissal by reason of whistleblowing and/or health and safety, and I am applying for Interim Relief pursuant to section 128 ERA 1996.

6. As such, what I must consider today is whether it is "likely" that on determining the claimant's unfair dismissal claim the Tribunal will find that the reason (or if more than one the principal reason) for the dismissal was that:

   6.1. The claimant had made one or more protected disclosures (with the result that the dismissal will be unfair under section 103A of the Employment Rights Act 1996); or

   6.2. The claimant, having been designated by their employer to carry out activities in connection with preventing or reducing risks to health and safety at work, had carried out or proposed to carry out any such activities (with the result that the dismissal will be unfair under section 100(1)((a) of the Employment Rights Act 1996). As short-hand I refer to this below as "carrying out health and safety activities".

The law

7. Section 129(1) of the Employment Rights Act 1996 sets out the relevant test on an application for interim relief. It provides where relevant that:

   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 100(1)(a) and (b), 101A(d), 102(1), 103 or 103A, or

8. The meaning of "likely" in this context has been considered in a number of authorities. The oldest of these is perhaps Taplin v C Shippam Ltd [1978] IRLR 450, in which Slynn J held, at [23], that "likely" means does the claimant have a "*pretty good*" chance of success?

9. More recently, in Ministry of Justice v Sarfraz [2011] IRLR 562, it was interpreted by the then President of the EAT, now Lord Justice Underhill, as meaning "*a significantly higher degree of likelihood*" than just more likely than not. This is a fairly high bar, and the reason for it being a fairly high bar was explained, again by the then President, in Dandpat v University of Bath [2009] UKEAT/0408/09/LA. He explained the rationale for keeping it high (at [20]): if interim 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*."

10. Further, in order to succeed the claimant must show that it is "likely" that all the necessary component parts of the relevant claim will be proved. So, for example, in the context of the claim that the reason or principal reason was that the claimant had made a protected disclosure, the claimant would need to show this in relation to matters including:

    10.1. that she made a disclosure of information;

    10.2. that she believed that the disclosure tended to show one of the types of wrongdoing identified in section 43B(1) ERA;

    10.3. that such belief was reasonable;

    10.4. that she believed that the disclosure was in the public interest;

    10.5. that such belief was reasonable;

    10.6. that the reason or principal reason for the dismissal was the fact that she had made a protected disclosure.

Conclusions

11. It does not appear to me to be "likely" that the Tribunal deciding the claimant's claim of unfair dismissal will conclude that the reason or principal reason for her dismissal was either that she had made one or more protected disclosures or that she had been carrying out health and safety activities.

12. That is to say it does not appear to me to be likely that the Tribunal will conclude that the claimant's dismissal was automatically unfair under either section 100(1)(a) or section 103A of the Employment Rights Act 1996. My reasons for reaching this conclusion are as follows:

    12.1. First, the backdrop to the claimant's dismissal was lengthy disciplinary proceedings beginning in or around September 2022. There is extensive documentary evidence contained in the respondent's bundle concerning these proceedings which resulted:

        12.1.1. Initially, in a final written warning dated 13 December 2022, said to result from the claimant's persistent failure to attend a Performance Improvement Plan

("PIP") meeting (and so her failure to follow a reasonable management instruction) and the fact that the relationship between the respondent and claimant had broken down. (pages172-176 of the respondent's bundle);

12.1.2. Subsequently, in her dismissal, said to result from her ongoing refusal to engage constructively with the PIP process (and so her failure to follow a reasonable management instruction) and the fact the relationship between the respondent and claimant had broken down (the dismissal letter dated 5 April 2023 is at pages 678 to 685 of the respondent's bundle).

12.2. Now it is of course possible that at the final hearing the Tribunal will conclude that in fact the disciplinary process ultimately resulting in dismissal was not followed for the reasons that the respondent states and that in fact it was pursued either because the claimant had made a protected disclosure or because she had been carrying out health and safety activities. However, given the volume of the disciplinary documentation and the lengthy period that it covers, it does not appear to me "likely" that that is what the Tribunal will conclude.

12.3. In reaching this conclusion I have taken into account that the disciplinary process resulting both in the initial final written warning and the dismissal was detailed and extensive. Further, I have taken into account that the documents appear to show the respondent choosing not to dismiss the claimant at the conclusion of the first disciplinary hearing in circumstances where the documents appear to show the respondent believed it had grounds to do so.

12.4. In summary, there is an extremely detailed and coherent narrative underlying the respondent's defence of the claim which is apparently reflected in extensive documentary evidence. Now of course it may be that the Tribunal will conclude, as the claimant contends, that the whole disciplinary process was a "sham", but it does not appear to me to be likely that it will do so. This is not a dismissal that came out of nowhere.

12.5. Secondly, and further and separately, the contents of the first claim with case number 2301998/2022 (which the claimant says are relevant to this claim – see [55] of the particulars of claim in this claim) and the contents of this claim, as set out in the particulars of claim, result in the argument that the claimant is seeking to pursue in this claim being unclear. In making this finding I have taken full account of the fact that the claimant is unrepresented and therefore cannot reasonably be expected to set out her claim as clearly as she would be expected to if professionally represented.

12.6. Turning to the first claim, the claimant presented it to the Tribunal on 12 June 2022 and a preliminary hearing for case management purposes was held in it on 5 July 2023 (page 80 of the respondent's bundle). The particulars of claim attached to the claim form are very long indeed (50 pages) and largely comprise a chronological account in which the legal basis for the claimant's claim is not clearly or concisely set out. The case management summary prepared following the hearing on 5 July 2023 records that the claimant confirmed during the preliminary hearing that in her first claim she pursued no complaint of being subjected to a detriment for having made one or more protected disclosures, which seems to call into question to some extent what is intended by [55] of the particulars of claim in this claim. Her claim of detriment for carrying out health and

safety activities appears to relate to events which took place sometime ago in 2020 (paragraph 5.3 of agreed list of issues included in case management summary at page 88 of the respondent's bundle) – this is more than two years prior to the dismissal.

12.7. I note in this respect that today the claimant had told me that paragraph 14 of the case management summary relating to the hearing on 5 July 2023 is not correct and that in fact she does pursue a complaint in the first claim of having been subjected to a detriment for having made protected disclosures. I make no comment in relation to this other than to find that this tends to highlight the lack of clarity in the first claim.

12.8. I then turn to the particulars of claim in the current claim. It is not clear from them either on what basis the claimant says she made protected disclosures – the way this is described at paragraph [55] of her particulars of claim does not explain the protected disclosure(s) on which she relies clearly at all, but simply refers to the first claim. Nor do they set out clearly what activities she says fell within section 100(1)(a) of the Employment Rights Act 1996.

12.9. I invited the claimant in her oral submissions to identify for me any passage in either the particulars of claim in this claim or her skeleton argument which sets out clearly the protected disclosures upon which she relies. She was not able to do so.

12.10. In summary, the claimant's case remains far from clear. Now of course it may become clearer as it proceeds, but at the moment it lacks the clarity and focus which would be necessary for it to appear likely to me that at the final hearing the Tribunal will conclude that the reason or principal reason for the claimant's dismissal was either that she had made a protected disclosure or that she had been carrying out health and safety activities.

13. Because it does not appear to me that the claimant has a "pretty good chance" of establishing at the final hearing that the reason or if more than one the principal reason for her dismissal was one of the two reasons upon which she relies, her application for interim relief fails and is dismissed.

Employment Judge Evans

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Date: 18 July 2023

JUDGMENT SENT TO THE PARTIES ON

10th August 2023

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