



EMPLOYMENT TRIBUNALS

Claimant: Mrs Julia Walker
Respondent: DePaul UK
Held at: Newcastle (by CVP)
On: 16 October 2024
Before: Employment Judge Loy
Appearances:
Claimant: In person
Respondent: Ms Karen Moss, counsel

JUDGMENT

The claimant's application for interim relief is refused.

REASONS UNDER RULE 62(3)

Background

1. The tribunal gave Judgment orally with reasons at this hearing.
2. The claimant asked for a written record of the decision under Rule 62(3).
3. This is that written record.

Application

4. This is an application by the claimant for interim relief under section 129 Employment Rights Act 1996 (ERA).

The Law

5. The relevant statutory provisions and legal authorities are as follows.
6. Section 129 Employment Rights Act (ERA) 1996 provides:
(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 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or

(ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

7. As to the term 'it is likely' in s129(1)(a) ERA:
 - a. This should be interpreted as the Claimant having 'a pretty good chance' of succeeding at a final hearing (Taplin -v- Shippam [1978] ICR 1068);
 - b. 'Likely' connotes a 'significantly higher degree of likelihood' than more likely than not (Ministry of Justice -v- Sarfraz [2011] IRLR 562)
 - c. The 'likely to succeed' test should be applied to every aspect of the complaint (Simply Smile Manor House Ltd -v- Ter-Berg [2020] IRLR 97)
8. The claimant must show the necessary level of chance in relation to each essential element of section 103A ERA, see *Simply Smile Manor House Ltd and Ors v Ter-Berg [2020] ICR 570*.
9. The claimant must therefore show that it is likely that the Tribunal at the final hearing will find that:
 - a. She made the disclosure(s) to the employer;
 - b. She believed that it or they tended to show one or more of the matters listed in the ERA 1996 section 43B(1);
 - c. Her belief in that was reasonable;
 - d. The disclosure(s) was or were made in the public interest; and
 - e. The disclosure(s) was or were the principal cause of the dismissal.
10. "Protected disclosure" is defined in section 43A ERA 1996,

In this Act a “protected disclosure” means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

“Qualifying disclosures” are defined by section 43B ERA 1996,

43B Disclosures qualifying for protection.

(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following —

...

that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject ..

that the health or safety of any individual has been, is being or is likely to be endangered ...

11. The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations *Cavendish Munro Professional Risk Management v Geldud [2010] ICR; and Kilraine v LB Wandsworth [2016] IRLR 422*).
12. The test for “reasonable belief” is a subjective test.
13. In determining whether the reason for the claimant’s dismissal was her alleged disclosure(s), it is not sufficient for the disclosure to be “in the employer’s mind” or for to have influenced the employer. The tribunal must consider whether that disclosure was the “sole or principal reason” for her dismissal.
14. The issue of causation is pertinent to this application. The tribunal has to be satisfied that at this early stage that it can safely form the view on its summary assessment of this case that it is likely that the required causation between any disclosure and the dismissal will be established,

Submissions

15. I have to assess whether it appears that at a final hearing it would be likely that the Tribunal would find that the claimant succeeded in each element of an automatically unfair dismissal within the terms of section 103A ERA.
16. The claimant’s case is that she was dismissed because of one or more protected disclosures. The claimant must persuade the tribunal that it is likely that she would succeed in showing that one or more of the protected disclosures was the reason or principal for her dismissal with the effect that the dismissal was automatically unfair contrary to section 103 A ERA 1996.

17. The respondent's position is that the case is not amenable to interim relief because the claimant cannot show at this early stage that all of the matters necessary for the tribunal to decide in the claimant's favour at a final hearing are likely to be determined in her favour. In those circumstances, the respondent submits that the claimant has not and cannot establish that it is likely that her claim will succeed within the terms of section 129 ERA.

My decision

18. I was not satisfied that the claimant could show at this early stage that the following necessary elements required under section 129 ERA are likely to be determined in her favour:
 - 18.1. whether all or any of the disclosures amount to a qualifying disclosure within the terms of section 43B ERA; and/or
 - 18.2. whether any such protected disclosures were the reason or principal reason for the her dismissal.
19. There is simply not sufficient factual clarity about the alleged disclosures for the tribunal to say it is likely that they are protected disclosures within the meaning of section 43B Employment Rights Act 1996.
20. Then there is the issue of causation. This is a fundamental problem for the claimant to establish at this early stage in the material in front of me.
21. The reason for dismissal is plainly contested. The claimant says that the principal reason for her dismissal is the disclosures that she made.
22. The respondent says that the claimant was dismissed following a probationary review which took into account a large number of complaints and grievances from colleagues and service users about the claimant's conduct and behaviour. The respondent says that none of those matters are connected to any disclosures.
23. The respondent says that the reasons for the claimant's dismissal included service users refusing to work with the claimant; the claimant refusing to complete mandatory training; the claimant telling a manager that she did not want not be confirmed in post; and the claimant sending emails to a personal email address in breach of the respondent's data protection policies.
24. I noted the claimant's position that a number of those colleagues who made complaints about her had been implicated in the claimant's own disclosures.
25. However, I considered that it was quite impossible at this early juncture to say whether or not it is likely that the was claimant's argument would be preferred to the respondent's argument. This is plainly a fact sensitive case with reasonably arguable points on both sides.
26. I asked the claimant on several occasions to explain to me the basis on which she contends that it is safe for the tribunal to say that the required threshold has been met. In other words, the claimant was invited to say why she says it is likely that the issue of causation between her disclosures and her dismissal would be established at trial.

27. On each and every occasion that I asked the claimant to answer this point, she simply chose to repeat the merits of her own case rather than focusing on the threshold that the tribunal needs to be satisfied has been reached for the purposes of interim relief. The tribunal has no doubt that the claimant sincerely believes in the case that she puts forward. Equally, the respondent has its own firm view on the reasons for which it dismissed the claimant which at this stage were expressed with equal sincerity and cogency.
28. In conclusion, the factual matrix necessary to determine the likelihood of success on the claimant's part is not amenable to any form of meaningful interim assessment to a standard of which view of the facts is likely to prevail. This case requires full ventilation of the facts and a factual determination by a tribunal at a final hearing before any meaningful assessment of the merits of the claim can be reached.
29. I therefore refuse the application.

Employment Judge Loy

18 October 2024

Sent to the parties on:

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