EMPLOYMENT TRIBUNALS

Claimant: Ms T H Motta Spinelli

Respondents: 1) Collingwood School Ltd
2) Mr L Hardie

Heard at: London South Croydon by CVP

On: 21 January 2022

Before: Employment Judge Tsamados (sitting atone)

Representation

Claimant: Mr A Sendall, Counsel
Respondent: Mr C Ludlow, Counsel

RESERVED JUDGMENT ON APPLICATION FOR INTERIM RELIEF

The application for an order for interim relief under the Employment Rights Act 1996 section 128 is refused.

REASONS

Introduction

1. Under the Employment Rights Act 1996 ("ERA") section 128, where, inter alia, an employee brings a complaint of unfair dismissal by reason of making a protected disclosure(s) s/he can make a claim to the Employment Tribunal for interim relief. Such a claim must be made within seven days of the effective date of termination and the ACAS Early Conciliation procedure does not have to be followed.

2. The Tribunal must then hold a hearing as soon as possible and can do so on at least seven days' notice. At the hearing the Tribunal will determine whether it is likely that the employee will succeed in his/her unfair dismissal case at the eventual hearing. If so, the Tribunal can make an order for interim relief, that is for reinstatement or re-engagement, if the respondent employer agrees or, if not, for a continuation of contract order.

The application

3. The Claimant presented her claim form to the Tribunal on 29 November 2021 raising complaints of automatic unfair dismissal and detrimental treatment as a result of making protected disclosures. The claim included an application for interim relief in respect of the unfair dismissal complaint brought under ERA section 103A. Her employment ended on 22 November 2021 and so the application for interim relief was brought within the time limit set out in ERA section 128(4).

4. Unfortunately, it took the Tribunal some time to serve the claim form on the Respondent and to set the date for this hearing.

5. The Respondents have not yet presented a response to the claim and have until 2 February 2022 in which to do so. They reserve their position on each and every allegation made by the Claimant in her claim. But for the purposes of this application they do not take issue with the Claimant's assertions that she made the alleged protected disclosures. However, they firmly deny that the Claimant was dismissed for making any or all of the protected disclosures.

6. As I understand it, Inspired Learning Group (UK) Ltd ("Inspired Learning") operates 18 schools and nurseries in London and the South of England, one of which is Collingwood School at which the Claimant had been employed.

7. At the start of the hearing, the parties indicated that the correct employer was Collingwood School Ltd. They jointly requested that the name of the First Respondent be substituted to Collingwood School Ltd. I therefore record that by consent the name of the First Respondent is amended to Collingwood School Ltd in place of Inspired Learning. Whilst they requested that I dismiss the claim against Inspired Learning I do not believe this is necessary.

Evidence

8. I was provided with bundles of documents by each party (the Claimant's bundle consisting of 334 pages, the Respondents' bundle consisting of 405 pages) as well as written submissions, supporting authorities and a cast list.

9. I was also provided with a witness statement from the Claimant, consisting of 17 pages and one on behalf of the Respondents from Mr Bowler, Inspired Learning's Interim HR Director, consisting of 5 pages.

10. Under rule 95 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013, oral evidence is not usually heard at an interim relief hearing. Indeed, the Claimant's application was made on the basis that no oral evidence would be heard.

11. So whilst I have read the witness statements, I take into account that they have not been subjected to cross examination and so have given them little weight where there are matters in dispute. Indeed, there are a number of areas where the witness evidence will be in dispute and those issues would need to be determined by the Tribunal at a full hearing.

12. I do not make any findings of fact at this hearing but it is useful to summarise the Claimant's claim under ERA section 103A, the parties' respective positions and, where appropriate, submissions.

Summary

13. The Claimant was employed by the First Respondent ("the School") as the Nursery Manager from July 2021 onwards. The Second Respondent, Mr Hardie, is the Headmaster of the School.

14. The Claimant was responsible for a number of children some of whom required special meals due to cultural, religious and medical reasons.

15. Between 12 October and 18 November 2021, the Claimant made 21 protected disclosures to the Second Respondent and others, including the NSPCC and the Local Authority Designated Officer ("LADO"), relating to her concerns, and in some cases continuing concerns, relating to the food being provided by the School to the nursery pupils.

16. In summary these included the following concerns: as to the incorrect labelling of ingredients and allergens on the food; on one occasion resulting in allergic reactions in pupils; on one occasion food containing fish being served to a pupil with a severe allergy to fish and gluten to another who was on a gluten free diet; children with known allergies receiving food containing allergens; the lack of appropriate records as to which children were served what, on any one day; food described on the menu as dairy free when one of its listed ingredients was milk; there being improper procedures for the listing of ingredients and allergens in food; that the food labelling remained inaccurate. The Claimant was also concerned as to the Second Respondent's response to her disclosures. These matters are set out more fully at paragraph 19 of the Claimant's submissions.

17. The fact of the protected disclosures and that they fall within the definition of qualifying disclosures within ERA section 43 is not disputed for the purposes of this hearing.

18. A virtual meeting took place on 16 November 2021 between the Second Respondent and the Claimant. This was conducted by Ms Ramila Vekria, Inspired Learning Group's Head of HR. I was referred to the notes of the meeting. This is described as a mediation meeting although the Claimant disputes that it was. During the meeting the Claimant raised her concerns about the food and about the way in which the Second Respondent dealt with the matter. The Second Respondent in turn raised his concerns about the way in which the Claimant had conducted herself and the impact it had on the School. The Respondents' position is that the Claimant's concerns about

the food, allergies and labelling were discussed but that both parties were unable to put their differences aside. The Claimant's position is that at this meeting it seemed to her that she was being told that if she wanted to keep her job she must not raise her concerns with Inspired Learning and outside agencies, which was something that she could not agree to. The notes of the meeting are inconclusive on this point.

19. The Claimant made a further disclosure on 18 November 2021 concerning the Second Respondent's response to her concerns and his conduct.

20. On 19 November she was instructed to attend a meeting with the Second Respondent and Ms Carrie Askew, the Head of Operations; Safeguarding and Health & Safety Governor, although the Claimant states that she advised that her mental health was at breaking point. She further states that she believed that she was going to be dismissed at this meeting. During the meeting she states that she had an anxiety attack and it was agreed that she should leave and work from home.

21. In a telephone call on 22 November 2021, the Second Respondent advised the Claimant that she was dismissed. During the conversation she states that the Second Respondent confirmed that the meeting she had on 18 November was indeed her dismissal.

22. By letter dated 22 November 2021, the Second Respondent wrote to the Claimant confirming the termination of her employment with immediate effect with one week's pay in lieu of notice. The letter indicated that this was as a result of what the Second Respondent describes as "an irretrievable breakdown in our relationship, which is to the detriment of our staff and our pupils".

23. The Claimant appealed against her dismissal on the basis that she believed she was unfairly dismissed for raising protected disclosures about food and allergens and about the Second Respondent's conduct and his management of the School.

24. Appeal meetings were conducted by Mr David Tidmarsh, Chair of the Advisory Board of Inspired Learning on 6 December 2021, 6 and on 18 or 22 January 2022 (the parties' notes of the last meeting contained these differing dates) with Mr Bowler in attendance. Subsequent meetings were held by Mr Tidmarsh and Mr Bowler with the Second Respondent and others on 8 and 9 December 2021.

25. At the appeal meeting held on either 18 or 22 January 2022, Mr Tidmarsh informed the Claimant that her appeal was not upheld. I was referred to the Claimant's notes of the meeting within their respective bundles. The Respondents' notes set out the reasons for dismissal in a series of bullet points which conclude with the words "I can see that the breakdown in your relationship was irretrievable so (the Second Respondent's) decision to dismiss you was reasonable". The Claimant's own notes do not difference substantially. It did not appear from the documents that the First Respondent has confirmed the outcome in a separate letter.

26. The Claimant's Counsel, Mr Sendall, submits that the protected disclosures are all matters of a similar nature which continued to occur despite the Respondents' assurances that action would be taken, although the Claimant accepts that some action was taken. The Claimant's concern was as to the ingredients and allergens contained within the food which posed risks to the children.

27. The Claimant's position is that she was dismissed as a result of the making of the protected disclosures. She relies on the following matters in support: the close proximity in time between the making of the disclosures and her dismissal; prior to sending the dismissal letter the Second Respondent had threatened to discipline the Claimant for making the protected disclosures; in a telephone conversation immediately prior to the sending of the letter of dismissal, the Second Respondent effectively told the Claimant she was being dismissed because she had made protected disclosures; the dismissal letter refers to a breakdown in the relationship between the two of them, but there is no evidence that the First Respondent took any significant or sufficient steps to seek to address the alleged breakdown other than an informal meeting described as mediation; the Second Respondent was not the Claimant's direct line manager, making the working relationship between them less of a critical issue; the Second Respondent characterised the protected disclosures as being personally "defamatory" of him, instead of matters of genuine concern raised by the Claimant; the First Respondent failed to conduct any form of procedure to address the alleged breakdown in mutual trust and confidence, and appears to have left it to the Second Respondent to make his own assessment of the situation and to take the decision to dismiss.

28. Mr Sendall urged me to be very cautious of any argument from the Respondents that it was the manner in which the disclosures were made rather than the fact of them that led to the alleged breakdown in the working relationship between the Claimant and the Second Respondent. He referred me to Martin v Devonshire Solicitors UKEAT/0086/10/DA in this regard. Particularly at paragraph 22 of the Judgment in which Underhill J said:

> *"Employees who bring complaints often do so in ways that are, viewed objectively, unreasonable. It would certainly be contrary to the policy of the anti-victimisation provisions if employers were able to take steps against employees simply because in making a complaint they had, say, used intemperate language or made inaccurate statements. An employer who purports to object to 'ordinary' unreasonable behaviour of that kind should be treated as objecting to the complaint itself, and we would expect tribunals to be slow to recognise a distinction between the complaint and the way it is made save in clear cases. But the fact that the distinction may be illegitimately made in some cases does not mean that it is wrong in principle."*

29. The Respondents' position is that they took all of the Claimant's concerns seriously, constructively engaged with her about resolving those concerns, engaged with third parties to resolve the concerns, and took timely and entirely appropriate action.

30. The Respondents' Counsel, Mr Ludlow, referred me to Parsons v Airplus International Ltd UKEAT/0023/16. This was an interim relief application in which the claimant alleged that she had been dismissed for making protected disclosures and the respondent alleged that she was dismissed because she behaved aggressively and inappropriately towards colleagues. The

Employment Tribunal rejected the application on the basis that although the claimant had a good and arguable case she could not be said to have a pretty good chance of success. On appeal the Employment Appeal Tribunal upheld the finding that the Employment Tribunal's task was not to decide the case but to assess the chances of the claimant succeeding and could not be criticised for ruling that matters were not sufficiently clear cut at that stage to have sufficient confidence in the eventual outcome so as to grant interim relief.

31. Mr Ludlow also referred me to Panayiotou v (1) Chief Constable Kernaghan (2) The Police and Crime Commissioner for Hampshire UKEAT/0438/13/RN in which the Employment Appeal Tribunal found that as a matter of statutory construction ERA section 47B (relating to whistle-blowing and detrimental treatment) does not prohibit the drawing of a distinction between the making of protected disclosures and the manner or way in which an employee goes about the process of dealing with protected disclosures.

32. Mr Ludlow also reminded me of the care that a Tribunal should take with arguments that say that the dismissal was because of tax related to the disclosure rather than the disclosure itself (Bolton School v Evans [2007] ICR 641, CA and also from Parsons). He further referred me to Shinwari v Vue Entertainment Ltd UKEAT/0394/14 in which the Employment Appeal Tribunal held that there was nothing in the legislation to prevent the drawing of a distinction between the making of protected disclosures and the conduct by the respondent that follows, which although related to those disclosures is separable from them. The Employment Appeal Tribunal also cautioned Tribunal's to take care to properly scrutinise such an argument if advanced by a respondent so that the legislation is not abused.

33. Mr Ludlow submitted that the evidence before me supports the assertion that the manner in which the protected disclosures were made and the consequences of having made them are separable from the fact of having made the protected disclosures, relying on Panayiotou and Parsons. He pointed to the following matters in support: as one would expect in any school or nursery, the First Respondent had a robust whistleblowing policy encouraging staff to raise concerns and guidance on how to do so; upon induction the Claimant was made aware of the various policies operated by the First Respondent, including its policies relating to safeguarding, welfare, health and safety and the whistleblowing policy; from when the Claimant raised her first concern on 12-13 October 2021, the Respondents took all of her concerns seriously; constructively engaged with her about resolving them; constructively engaged with third parties to seek to resolve the concerns; and took timely and tightly appropriate action (this is set out in some detail at paragraph 34 of his submissions).

34. Mr Ludlow further submitted that there was compelling evidence in support of the Second Respondent's reasoning for the Claimant's dismissal and he pointed to a number of documents in which this is set out. In summary these are as follows: difficulties had been caused by the Claimant with the chef; the breakdown of the relationship between the Claimant and the chef and kitchen staff to the point where they could not have a conversation with each other; inappropriate and irresponsible behaviour by the Claimant in texting

members of staff on a Sunday evening seeking statements; taking photographs of these private chats and posting them in an email to others; the attempted mediation between the Claimant and the Second Respondent resulting in the Head of HR concluding that both of them were unable to put their differences aside and move on, the notes of which meeting provide some clear insight of the Second Respondent separating the issues of the Claimant raising well-intentioned concerns and the way in which she dealt with them; in what is believed to be the Claimant's last email to the Second Respondent and others prior to dismissal, clearly demonstrating a complete breakdown in her relationship with the Second Respondent. Mr Ludlow also pointed to comments made in a number of meetings and statements within emails post-dating the Claimant's dismissal, including the Claimant's own witness statement which indicates that she accepted would be very difficult for the Second Respondent to work with her in the future. These are set out in some detail within paragraph 36 of Mr Ludlow's submissions.

Relevant law

35. ERA section 103A provides that:

> *"an employee who is dismissed shall be regarded for the purposes of this Part 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."*

36. For the purposes of an interim relief hearing, the issue under ERA section 129 is whether it appears to the Tribunal that it is likely that on determining the complaint the reason or principal reason for the Claimant's dismissal was the making of a protected disclosure(s).

37. In order to determine "whether it is likely" the Claimant will succeed at a full hearing, the Employment Appeal Tribunal said in London City Airport v Chacko 2013 IRLR 610, that this requires the Tribunal to carry out an "expeditious summary assessment" as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party. Clearly this involves less detailed scrutiny than will be undertaken at the full final hearing.

38. "Likelihood" has been interpreted to mean "a pretty good chance of success" at the full hearing - Taplin v C Shippam 1978 ICR 1068. The burden of proof was intended to be greater than that at a full hearing, where the Tribunal only needs to be satisfied on the balance of probabilities that the claimant has made out her case - or 51% or better. A pretty good chance is something nearer to certainty than mere probability.

39. So in essence, it is not for me to make findings of fact at this stage but rather to carry out a broad assessment of the evidence in order to reach a view as to whether the Claimant was likely to succeed on what is a higher test than balance of probability in her claims at a full hearing.

Conclusions

40. I conclude that the Claimant has not satisfied that burden (which is a very difficult one to surmount). She has not convinced me that her claim for

being dismissed for making a protected disclosure is nearer to certain, rather than a possibility. She has not demonstrated at this very early stage in the proceedings, that it is likely her claim will succeed at a full hearing, nor that it has a pretty good chance of success.

41. I am mindful of the fact that the complexity of a claim is not sufficient reason to conclude it does not have pretty good chances of success, In Raja v Secretary of State for Justice UKEAT/0364/09, the EAT criticised an Employment Judge's decision that interim relief orders should only be made in connection with simple factual disputes.

42. However, it is not clearcut that the Claimant can show that the principal reason for dismissal is the making of her protected disclosures or the way in which she brought those concerns as the Respondents allege.

43. Whilst there do appear to be procedural failings or any apparent investigation undertaken by the First Respondent into the alleged breakdown in the working relationship, these matters are not enough in themselves to meet the test of a pretty good chance of success.

44. Whilst the Claimant alleges that the closeness in proximity of the protected disclosures and the dismissal is highly indicative of the principal reason for the dismissal, one has to look at the wider context which indicates that steps were taken by the Respondents to address her concerns albeit she was not content that they were or that they were adequate.

45. In addition there are key areas of dispute between the parties, such as: whether prior to sending the dismissal letter the Second Respondent threatened to discipline the Claimant; whether during the telephone call immediately prior to sending the dismissal letter the Second Respondent told the Claimant she was being dismissed because she had made the protected disclosures; as to what happened at the mediation meeting and whether it was a genuine attempt to address the working relationship between the Second Respondent and the Claimant.

46. In straightforward terms, the central dispute is as to what caused the Second Respondent to dismiss the Claimant and was this the principal reason for her dismissal. This is highly nuanced between the parties. Was it his alleged irritation and threat posed to the Second Respondent by what the Claimant was raising or was it the alleged way in which the Claimant was raising those matters and the irretrievable breakdown in the working relationship between them as a result.

47. It is not possible for me to reach the conclusion on summary assessment that the Claimant reaches the higher standard of proof required for this application.

48. For these reasons the application is refused.

Employment Judge Tsamados

Date: 1 February 2022