



EMPLOYMENT TRIBUNALS

Claimant
Mrs Doris Hemmings

Respondent
OCS Group UK Limited

v

Heard at: Watford

On: 3 August 2018

Before: Regional Employment Judge Byrne

Appearances

For the Claimant: In person
For the Respondent: Mr Johnston - Counsel

JUDGMENT

1. The claim for interim relief under the provisions of Section 128 of the Employment Rights Act 1996 fails and is dismissed. This is because it has not appeared to the Tribunal that it is likely, on determining the complaint to which the interim application relates, that the Tribunal will find that the reason, or if more than one the principal reason, for the dismissal is one specified in Section 103A of the Employment Rights Act 1996.

REASONS

1. The application for consideration in this case of interim relief is brought under the provisions of Section 128 and 129 of the Employment Rights Act 1996 by the claimant Mrs Hemmings.
2. She was employed as a cleaner by the respondent OCS Group UK Limited and was carrying out cleaning duties as a result of the respondent's contract with the Central North West London HNS Foundation Trust, that is a Mental Health Trust, and her cleaning duties were at hospitals where there were patients being treated for mental health issues.
3. The basis on which an application for interim relief is made in this case is that the claimant had made a disclosure qualifying for protection under Section 43b of the Employment Rights Act. The disclosure that she relies on is a disclosure by email to the Care Quality Commission, the CQC, and it was made on the 29 June 2017 by her to the CQC raising concerns that she

set out with regard to patient care at the Northwick Park Hospital. Now clearly, and it is not disputed by the respondent, that is a disclosure that qualifies for protection applying the provisions of Section 43b 1ab and d of the Employment Rights Act.

4. The disclosure was not made to her employer, but it was made under the provisions of Section 43f to a prescribed person and the CQC is specifically mentioned within the Public Interest Disclosure Prescribed Persons Order 2014 as a prescribed person to whom a qualifying disclosure can be made, but as I have said it does not appear to me that any points are taken in relation to that so far as the respondent is concerned. The other point I make about disclosure is it clearly was not made to her employer but it was made to the CQC who thereafter looked in to it with the Trust.
5. Now, again there is no issue that this application for interim relief was made within 7 days of presentation of the claim form in this case. What I have got to do is quite clear from the authorities, is that in considering under Section 129 whether it appears that it is likely on determining the complaint which this application relates the Tribunal will find that the reason, or if more than one the principal reason, for dismissal was in this case Section 103a an automatically unfair dismissal by reason of making a protected disclosure.
6. I have to make a broad assessment on the material available to try to get a feel and to make a prediction as what is likely to happen at the eventual substantive hearing of these claims and I have had reference to the relevant authorities which I have to take account of. The known authority Taplin against Shippam Limited, and I also had brought to my attention today in considering this application, London City Airport Limited against Chacko, XXXX against University of Bath and another, all those judgments relevant to how I should approach this. The phrase that is helpful to Employment Judges in this situation is considering whether there is a pretty good chance that a claimant will establish that they were dismissed for the particular reason they relied on, in this case protected disclosure. Well I have come to the view that I am not persuaded on the basis of what I have considered. I stress that I am not making any findings of fact that it is likely a Tribunal on hearing all the evidence in this case, that evidence being tested will come to the view that it was because Mrs Hemmings had made a protected disclosure and I will go on to explain why I have come to that view.
7. The protected disclosure was made on the 29 June 2017 and it appears common ground that the claimant was suspended on the 21 July 2017. There was an investigation meeting with the claimant on the 29 August 2017 and that was to look into matters she had raised in a detailed grievance letter dated 4 July 2017. That was after the making of the protected disclosure and she appears to claim in that grievance letter about concerns as to the way that she was treated by colleagues and by those she came into contact with in the work place. She does make reference in that letter in the final paragraph that she raised concerns about patient care to CQC and that it is as a result of that she was being suspended and that appears to be what she is raising there. I have not, as I have said, heard detailed evidence, the evidence has not been tested.

8. It appears to be argued by the respondent that the reason she was suspended was for her own safety at that stage and the grievance that she raised was investigated. Her line manager Sue Miller appears to have been interviewed on the 19 September 2017 and on the 2 October 2017 in a detailed response her grievance was not upheld and that is all set out in a letter from Mr Shelton who has provided a witness statement today. I again I have not heard evidence from him, I have simply had regard to what is in the witness statement that has not been tested in any way. Essentially his letter of the 2 October 2017 says he did not find anything to uphold her concerns and he refers there to the claimant having been sent home and he says that that was for valid reasons for the claimant's own safety and considerations for her own welfare.
9. Mrs Hemmings appealed that outcome and a grievance appeal took place on the 13 October 2017. I was provided with copies of what was said in the course of that meeting and I have considered carefully what is in there. There is some reference there to CQC, there were suggestions that the claimant was being dealt with badly by her manager Sue and what is recorded as the claimant having said and that is that the XXX towards her escalated after she had raised matters with the CQC. Her appeal was considered and she was notified of the outcome of that appeal by a letter of the 8 November 2017, a detailed just over 3 page letter from Mr Derek Andrews, Operations Director.
10. Just after that on the 9 November she received details of the outcome of an investigation in relation to complaints about her conduct having caused disruption to patients and alleged disruptive behaviour whilst working in the ward area. She was told that no further action would be taken at that time because there was insufficient evidence that the behaviour was disruptive and she was asked to return to work on the 13 November, which I understand from what she said to me today is what happened. She also says that she was paid in relation to the period that she was off work until the 13 November 2017.
11. I am not aware that anything else, from the documents I have seen, happened until we move into February of this year when the claimant was given notice of a disciplinary hearing to consider allegations that there had been a serious breach of safety procedures on the 26 December. In essence, what was said is that she had gone into a patients room at Eastlake Ward and Mental Health Unit and cleaned the room whilst the patient was inside without the patient having consented to that procedure happening. Those matters were investigated and on the 21 February there was a disciplinary hearing which looked into those matters.
12. On the 23 February the outcome was confirmed to her by Mr Shelton which was that she was to be given a final written warning. The claimant, Mrs Hemmings, appealed that on the 1 March. The appeal hearing took place on the 20 April and in fact the final written warning was set aside and it was substituted for a written warning. That was the outcome of that process.

13. Following an incident on the 16 May when the respondent was informed that there had been a confrontation between Mrs Hemmings and an ex-patient at the premises at which the respondent provided services at one of the NHS Trust premises the claimant was invited to an investigation meeting. That took place on the 24 May and there was subsequently on the 20 June an invitation to a disciplinary hearing which took place on the 6 July 2018.
14. There were a number of matters that were raised in terms of conduct which the respondent was concerned about and that was said to be gross misconduct by abusive behaviour to clients and colleagues, gross misconduct by bringing the company into disrepute, gross misconduct by making threats towards colleagues and gross misconduct by wilful refusal to carry out reasonable instructions. Following the disciplinary hearing on the 6 July, on the 10 July the claimant was dismissed for gross misconduct and one of the particular allegations that the respondent states in that letter it was concerned about was the fact that the claimant had made a threat of hitting an ex-patient. As I understand, what the claimant said to me about that today is that she does not appear to disagree in essence with what is recorded in the notes of the investigation meeting which were looked at at the disciplinary hearing, but says that she would have hit the person, maybe they would not accept that she had said that if they had hit her again she would hit them with a XXX buckets referred to in the note. She said it was not a bucket it was a waste bin. In any event, that resulted in the dismissal on the 10 June and that in turn resulted in the claimant presenting a claim of unfair dismissal on the 14 July and making an application for interim relief today.
15. I have looked at documentation that postdates the dismissal, in particular some notes of what appears to be an appeal against the dismissal. Clearly what I have to look at when making my broad assessment is whether it is likely that at an eventual hearing, when all these matters are tested in evidence, the claimant has a pretty good chance of establishing that she was dismissed for making a protected disclosure.
16. A couple of points to note. Mr Shelton who was required by the respondent to deal with the investigational matters that resulted in the final written warning and also in relation to the ultimate dismissal and whilst it is clear he was aware of the claimant having contacted the CQC, he had not seen the actual disclosure itself nor had his organisation. He received a report to his knowledge, that is what his statement says. The claimant disputes that, she says that her line manager Sue Miller was made aware by someone she refers to as Steve from the NHS Trust of the outcome of the CQC investigation but she herself has not seen any copy of the report. Certainly making my broad assessment given that the person who dismissed was not in any way a party to or involved in looking at any matters that were raised in the disclosure to CQC, indeed have not seen that and on the base of what is in the witness statement was unaware of the outcome of any referral to the CQC. Further the respondent would not be entitled, as I understand the position, to details of what was set out in any report from CQC because of course the respondent simply provide services to the NHS Trust. It is the

NHS Trust to which the CQC would refer findings it had made following any investigation. So Mr Shelton who made the decision to dismiss was clearly well removed from anything the claimant might have raised.

17. Another factor for me to take into account when making my broad assessment on the material that is currently available is that there is a completely unconnected sequence of events it would appear to the lead up to the dismissal, namely the concerns that were raised in the invitation to the investigation meeting and subsequent disciplinary which resulted in the dismissal. All of those do not seem on the face of it to have any connection at all with any disclosure made to the CQC and indeed the most recent and certainly as the respondent say the most serious of those matters was the confrontation with an ex-patient on the 16 May. It appears from what is said to me by Mrs Hemmings today, and I appreciate I have not heard evidence and I am simply taking account of what was brought to my attention today, but in essence she does not appear to dispute that she had made a threat that she would hit the ex-patient. So, for all of those reasons having made my broad assessment to try and get a feel of this case, to make a prediction about what is likely to happen at a full hearing it does not on the face of what I looked at today appear to me likely that the claimant would be successful. I cannot come to the view that she had a pretty good chance of success applying the test I have to in the authorities. So, for all those reasons the claim for interim relief fails and is dismissed.

Regional Employment Judge Byrne

Date: 22 August 2018.....

Sent to the parties on:

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For the Tribunal Office