



EMPLOYMENT TRIBUNALS

Claimant: Mrs T Cairns

Respondent: Lewis's Home Retail Ltd

Heard at: Liverpool

On: 11 February 2019

Before: Employment Judge Barker

REPRESENTATION:

Claimant: In person

Respondent: Mr Mensah, Counsel

JUDGMENT

The judgment of the Tribunal is that the application for interim relief fails and is dismissed.

The respondent is to submit its ET3 to the Tribunal on or before Monday 4 March 2019.

REASONS

1. The claimant makes an application for interim relief. The claimant tells the Tribunal that the sole or principal reason for her dismissal by the respondent was that she made a protected disclosure as per the Employment Rights Act 1996, and in particular section 43B.

2. The claimant therefore asks for interim relief to be granted by way either of reinstatement or re-engagement to her job, or that a continuation of contract order be made such that the claimant is to be paid her full salary and benefits pending the resolution of this dispute.

3. The test for granting interim relief is higher than the balance of probabilities test that Employment Tribunal decisions are usually made on, and the reason for that is that if Mrs Cairns is successful in her application for interim relief, the salary and benefits that she would receive pending resolution of the dispute cannot be recovered by the respondent in the event that Mrs Cairns is unsuccessful at the final hearing.

4. The test for Tribunals when deciding applications for interim relief is that set out in ***Taplin v C Shippam Limited*** 1978 ICR 1068, EAT and ***Dandpat v University of Bath***, 2009 11 WLUK 176, EAT, namely whether the claimant has a “pretty good chance of success” at the final hearing.

5. Tribunals, when assessing an application for interim relief, do not make any findings of fact. The Tribunal heard factual submissions from Mrs Cairns and legal and factual submissions from the respondent and from these, a broad assessment has been made as to whether the claimant would have a “pretty good chance of success” at the final hearing.

The Factual Submissions

6. Mrs Cairns was employed as an accountant by the respondent. Her dismissal took effect on 29 January 2019. She had started work less than two years previously so she does not have the two years’ service usually required to bring a case of unfair dismissal before the Employment Tribunal.

7. The claimant will say that she is entitled to bring a claim for automatic unfair dismissal, because on 11 January 2019 she sent an email to the owner of the respondent, Mr Anil Juneja, copying in Gerard Simpson and Ian Hamilton who are both senior financial officers of the company, raising an issue concerning what she believed to be the underpayment of council tax by the respondent for a number of years on a property called Audley House in Liverpool. Her email expressed her concern that council tax may have been underpaid between 2014 and 2018 and stated that she intended to raise the matter with Liverpool City Council and try to negotiate a repayment plan.

8. Mrs Cairns told the Tribunal that what prompted the council tax enquiry to Mr Juneja was that the respondent was applying to borrow £6million from a new lender, Close Brothers, and that Mrs Cairns in her role as the company’s accountant was being asked to disclose financial information to the bank about the company. She therefore wanted to check the accuracy of the respondent’s financial statements.

9. The claimant’s case is that, as a consequence of sending this email, her previously cordial and supportive working relationship with Mr Juneja deteriorated to the point where he did not speak to her again. She will also say that her relationship with Ian Hamilton, which was also previously cordial and cooperative, became much more strained and much more difficult after 11 January.

10. She will also say that no concerns had ever been raised about her performance during her employment at the respondent and that she had taken on additional duties when the respondent had found itself in difficulty, such as securing the removal of a winding up petition against the respondent that had been imposed by HMRC and securing the release of a financial penalty that HMRC had imposed as well as obtaining a VAT rebate.

11. She will also say that she had completed the November payroll for 2018 after the sudden departure from the company of the HR Manager, and generally helped out with the financial management of the respondent when it found itself in difficult trading conditions and in a precarious financial position. She will say that this was over and above her existing duties and that this was appreciated by the respondent’s

management. She will say that in early January 2019 she had a conversation with Jason Harmer in which he said that the work that her department had done had resulted in the respondent being in the best position ever in terms of its financial reporting.

12. However, following the email of 11 January 2019 to Mr Juneja and the deterioration in the personal working relationships previously discussed, she received a letter dated 24 January 2019 which invited her to a disciplinary hearing. It is headed "Notice of Disciplinary Hearing – Capability" and there were four key allegations of a lack of capability raised as follows:

- (1) Failure to manage her team in way that ensured the financial records of the business were accurate and delivered within deadlines;
- (2) Inability to provide explanations for basic accounting treatments and to investigate and resolve related issues;
- (3) Failure to deliver key tasks in a timely manner, thereby jeopardising the ongoing funding of the business;
- (4) Failure to prepare for audit in a way that resulted in delays and cost increases.

13. The claimant received this letter on Thursday 24 January and was required to attend a meeting with Mr Hamilton the following Monday, 28 January. Her case is that this put her in a very difficult position in that she had had little warning of this and little time to prepare for the meeting. It was put to her by the respondent's counsel that she could have asked for a postponement, but I accept Mrs Cairns' submission, which is that she has had a long career as an accountant and had never been challenged on her performance before, and so it did not occur to her. Instead, she wrote a letter to Mr Hamilton sent it to him on 27 January by email in order to set out the points she wished to raise.

14. In her letter of 27 January she says, *"I believe that the reason the disciplinary process is being pursued against me is that I have made a protected disclosure. I am aware that I have a right not to be dismissed for making a protected disclosure under the Public Interest Disclosure Act 1998"*, actually the Employment Rights Act 1996, but I accept that what Mrs Cairns was saying was that she believed that this disciplinary process was as a result of sending the email to Anil Juneja about the council tax shortfall on 11 January 2019.

15. What then followed would appear to me to indicate that, were this a case for "ordinary" unfair dismissal, that Mrs Cairns would be "pretty likely to succeed" in her claim before the Employment Tribunal. The notes of the meeting with Mr Hamilton are quite full. During the Tribunal hearing Mrs Cairns commented on the allegations that had been made against her and I found her version of events in relation to the allegations to be credible and thorough. I find that it is no coincidence that the email on 11 January was sent and then a disciplinary procedure was begun on 24 January. With no other material grounds raised by the respondent at this stage in the process, the cause of the disciplinary hearing would appear to be the claimant's email of 11 January.

16. Furthermore it is likely that a company in a precarious financial position did not want to find itself on the receiving end of a large council tax bill and that it may well be that the disciplinary hearing was called by Mr Juneja via Mr Hamilton in an attempt to silence Mrs Cairns and to prevent her from raising the issue with Liverpool City Council.

17. However, this is not an “ordinary” unfair dismissal claim. The application for interim relief does not stand or fail on the success of an ordinary unfair dismissal claim. The claims that form the basis for an application for interim relief are very specific with good reason: they relate to, for example, action taken against employees who complain of breaches of health and safety, action against employees who are trade union representatives or in Mrs Cairns’ case she says it is because she made a protected disclosure. They are all protections given to employees who disclose matters that are thought to be very important matters of employment protection and that satisfy various tests relating to matters of public interest.

18. Therefore, it is necessary to examine at this early stage whether it can be said that Mrs Cairns’ disclosure on 11 January was one that would have a pretty good chance of success of being classed as a public interest disclosure as per s43B and s43C of the Employment Rights Act 1996 and whether she has a pretty good chance of establishing that this was the reason for her dismissal.

19. Looking first at whether her actions satisfy the test in s43B: did she make the disclosures to the respondent? Yes, she clearly did. She made disclosures in an email dated 11 January.

20. The next question in s43B is whether she believed that it tended to show one or more of the following matters, which in this case are either that a criminal offence has been committed or that the respondent failed to comply with a legal obligation to which it was subject. Mrs Cairns was asked whether she alleges that the company was committing fraud and she did not accept that. It therefore follows that her case is that the respondent was failing to comply with a legal obligation to which it is subject, that is, the obligation of disclosure of accurate financial information to a lender.

21. She said that she was obviously very concerned that the respondent may not be presenting an accurate statement of its financial liabilities to the new lender, and that this may not only have implications for the respondent and the Bank but for her personally as a professional accountant.

22. The next question is: was her belief in that reasonable? The case of ***Babula v Waltham Forest College*** 2007 EWCA Civ 174 divides this belief into a subjective and objective element: firstly does Mrs Cairns believe that the information disclosed shows that the respondent failed to comply with a legal obligation to which it was subject? I consider that she has a pretty good chance of persuading a Tribunal that she does believe that. The second question is – objectively, is that a reasonable belief for her to hold? The respondent’s case is that Mrs Cairns is wrong in her belief, and there is a perfectly reasonable explanation for the council tax issue, but that does not defeat Mrs Cairns belief being reasonable: her belief may be reasonable even if it is wrong. Mrs Cairns put to the Tribunal a number of reasons why she believed that her belief was a reasonable one. She gave me several explanations that were perfectly credible. She is a very experienced accountant, and she believes that there should not be such an enormous discrepancy between the council tax bills of two comparable properties that

the respondent used in its business, leading her to believe that the Audley House bill was far too small.

23. The next question is whether the disclosure was made in the public interest. The respondent helpfully reminded the Tribunal of the recent Court of Appeal decision in ***Chesterton Global Limited v Nurmohamed*** [2017] EWCA Civ 979 which stated that this is a fact sensitive determination for the Tribunal.

24. Where an employee is alleging a breach of a legal obligation, the Tribunal must consider whether the breach is a personal matter such that it affects only the claimant or a small number of people, or whether it is a bigger matter of public interest.

25. Here, there are personal and public elements to the disclosure by Mrs Cairns; it is clear that there was a personal motivation for the disclosure which were possible adverse professional consequences for her as an accountant if it were said that she had not disclosed this information.

26. What the public element of the disclosure might be was not clearly pleaded and the Tribunal has been left to speculate as to what that might be, but it is far from clear which was Mrs Cairns' primary motivation – personal concern or public concern.

27. There is no precise definition of “public interest”, but broadly it refers to matters affecting public life or affecting people at large and is something different from that which might be interesting for the public to know. The public would be very interested to know that a large retailer might be misrepresenting its financial position in order to borrow £6million, but that is not the same as it affecting public life or people at large, particularly when it is noted that the respondent is a private limited company and not a public limited company. The Tribunal had no evidence at this stage of the nature of the financial information that the lender required or how that information was to be used.

28. Therefore, the situation before the Tribunal at present is that it could not be said whether Mrs Cairns has a “pretty good chance” of succeeding in persuading the Tribunal that the disclosure was in the public interest. The issue of the public interest in this case requires more evidence and to be more clearly pleaded on behalf of the claimant. The Tribunal was also not persuaded that Mrs Cairns had the public interest as her primary motivation rather than her own private interest in not being found to be in breach of her own professional obligations.

29. At this stage Mrs Cairns is not able to show that she has a pretty good chance of succeeding in establishing that her disclosure was made in the public interest, therefore the application for interim relief fails and is dismissed.

30. A case management order was made requiring the respondent to serve its ET3 response form by 4 March 2019.

31. The parties were provided with a full reasoned decision at the hearing. These written reasons are provided in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, having been requested at the end of the hearing by the claimant.

Employment Judge Barker

Date _____ 14 March 2019 _____

JUDGMENT AND REASONS SENT TO THE PARTIES ON

5 April 2019
FOR THE TRIBUNAL OFFICE

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.