Case Numbers: 2302657/17
2302658/17

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE MARTIN**
(sitting alone)

BETWEEN:

Mr G Kalu & Mr O Ogueh **Claimants**

AND

Brighton and Sussex University Hospitals NHS Trust
Respondent

ON: **2 November 2017**

Appearances:

For the Claimant: **Mr Elesinnla - Counsel**
For the Respondent: **Mr O Segal QC - Counsel**

RESERVED JUDGMENT ON APPLICATION FOR INTERIM RELIEF

The Judgment of the Tribunal is that the application for interim relief is dismissed.

REASONS

1. This is a claim which includes dismissal and detriment on grounds of having made a Public Interest Disclosure under section 47B Employment Rights Act 1996 in respect of detriment, under section 103A in respect of dismissal and in the alternative for ordinary unfair dismissal under section 94 of the Employment Rights Act 1996. It is also a claim of race discrimination.

2. The effective date of termination for both Claimants was 22 September 2017. The Claim to the Tribunal was presented on 29 September 2017. There were no procedural matters raised by the Respondent. The Claimants application for interim relief is made under the provisions of section 128 of the Employment Rights Act 1996.

The hearing

3. I had before me the Claimant's bundle of documents comprising 97 pages, the Respondent's bundle of documents comprising 408 pages; the claim form; a witness statement on behalf of both Claimants and a witness statement of Dr George Findlay. I have considered all the documents specifically referred to by the parties. No oral evidence was heard.

4. My role is to consider the evidence before me and make a broad assessment as to whether the Claimant's application for interim relief should succeed.

Issues

5. The issue for the Tribunal was whether under section 129 of the Employment Rights Act 1996 it appeared that it was likely that on determining the complaint to which the application related, the Tribunal will find that the reason (or if more than one the principal reason) for the dismissal was specified in section 103A - namely that the Claimant had made a protected disclosure under section 43B of the same Act. The Claimants have brought claims of race discrimination and made submissions on this jurisdiction, however this is not covered by the provisions relating to interim relief and therefore not considered in this judgment.

The law

6. Section 128 of the Employment Rights Act 1996 provides that an employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and that the reason (or if more than one the principal reason) for the dismissal is one of those specified in - ….section 103A….may apply to the tribunal for interim relief.

7. Section 43B of the Employment Rights Act sets out the types of disclosure 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, tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

8. An application for Interim Relief will be granted where, on hearing the application, it appears to the tribunal that it is likely that on determining the complaint to which the application relates, a tribunal will find that the reason for dismissal is the prohibited reason relied on (*s163 TULRCA*)

9. The case of **Taplin v Shippam Ltd (1978) ICR 1068 EAT** defines "likely" in this context as a "*pretty good chance of success*". That test has been re-affirmed in the case of **Dandpat v The University of Bath and Others UKEAT/0408/09/LA**

10. The standard of proof required is greater than the balance of probability test to be applied at the full hearing. The EAT recognised in the ***Dandpat*** case that such a high burden of proof is necessary as the granting of such relief will prejudice a Respondent, who will be obliged to treat the contract as continuing until the conclusion of the proceedings. Such a consequence should therefore not be imposed lightly.

11. Mr Justice Underhill then President of the EAT in ***Ministry of Justice v Sarfraz*** at paragraph 14 set out guidelines for the Tribunal to consider in this type of application.

"I have to decide that it was likely that at the final hearing the Tribunal will find five things: That the Claimant had made a disclosure to his employer; That they believed the disclosure tended to show one or more of the things itemised at (a) to (f) under section 43B(1); 1. That the Claimant had made a disclosure to his employer; 2. that the belief was reasonable; 3.that the disclosure was made in good faith; and 4. that the disclosure was the principal reason for his dismissal."

Submissions

12. I was provided with written submissions and heard oral submissions from both parties. I considered both parties submissions in coming to my decision.

Findings

13. Although it is not the function of the Tribunal at this hearing to make findings of fact, some background information is required to put the case into context. Both Claimants are long standing Consultant Gynaecologists employed by the Respondent. It was common ground that the Claimants have had a long history of disagreements with the Respondent with litigation by the Claimant's and others being part of this. This history relating specifically to this claim goes back to January 2014.

14. There was no dispute about the fact that the Claimant's attended a BME Network meeting on 28 January 2014 during which remarks were made by the Chair of that meeting Dr Lyfar Cissie to EB resulting in her submitting a grievance alleging that the treatment she received was homophobic and discriminatory. Her grievance was in relation to Dr Lyfar Cissie not about anyone else. As part of the grievance process Dr Kalu, the first Respondent accompanied Dr Lyfar Cissie to the grievance meeting which took place in July 2014. At that meeting, Dr Kalu expressed his view that EB should be punished for remarks she had made about Dr Lyfar Cissie in her grievance.

15. The outcome of the grievance included criticisms of Dr Lyfar Cissie who in turn brought a grievance against EB on 22 December 2014, accusing her of making false allegations against her in EB's grievance. EB appealed some of the findings made.

16. The first Claimant then wrote to the BME network to discuss what action to take and a collective grievance was sent to the Respondent on 12 January 2015 signed by both Claimants and six others. This related to EB's grievance of 5 February 2014. This was the first protected disclosure.

17. The second protected disclosure was done after the Respondent appointed Ms Henrietta Hill QC to investigate the collective grievance together with other related grievances. The Claimants complained about Ms Hill QC being appointed without consultation and that the Respondent decided to investigate all grievances together in a single investigation alleging that this was discriminatory. Despite being asked to co-operate in the investigation, the Claimants refused to do so. The outcome of the investigating was that those who had brought the collective grievance should face disciplinary action for having victimised EB.

18. Two different processes were used. The Claimants went through a process for medical staff, whereas the other six were not medical staff so were subject to different processes. The other six were given final written warnings on the basis that the grievance had not been brought in good faith and were acts of victimisation.

19. The Claimants were investigated by Dr Marco Maccario, a Clinical Director. His report was dated 12 July 2017. The Claimant's refused to co-operate because Mr Elesinnla was not allowed to accompany them. They said he was their friend. They allege this is discriminatory. This is the third disclosure relied on by the Claimants. The outcome of the investigation was that Dr Maccario considered there was sufficient evidence of the disciplinary charges and referred the report to the Case Manager Mr Carter, who concluded that disciplinary action should take place. A disciplinary hearing was held on 20 September 2017 with Dr Findlay being the disciplining officer. The first Claimant attended and requested a postponement which was refused and then left. The second Claimant did not attend as he is currently working in Nigeria on a Career Break. Dr Findlay found the allegations to be proven and both Claimants were dismissed.

My conclusions

20. The first consideration as set out in the **Sarfraz** case above, is whether it is likely that the Tribunal at the final hearing would find that the Claimants had made a disclosure to their employer. The Claimants relies on three disclosures in their particulars of claim which are set out above. Clearly, they made disclosures. During the hearing the Claimants alluded to other disclosures which they said were protected. No other disclosure other than those set out below appeared in the particulars of clam and as a consequence no other disclosures were considered.

21. Secondly I have to consider whether it is likely that the Claimants have a pretty good chance of convincing the Tribunal at the final hearing that they believed that the disclosures tended to show one or more of the matters at paragraphs (a)-(f) under section 43B(1) of the Employment Rights Act 1996 (which is set out above).

22. The Claimants rely on sub-paragraph (b) of that section. I have considered sub-paragraphs (b) which provides that the person has failed is failing or likely to fail to comply with the legal obligation to which he is subject. The legal obligation relied on by the Claimants are the provisions of the Equality Act 2010 and the Respondent's policies and procedures.

23. The first disclosure was the collective grievance of 12 January 2015. I do not propose to set it out in full. The grievance does not mention race discrimination specifically, but does refer to BME Network Members, not all of whom are black. Of the eight who signed the collective grievance two are white European. The Claimants argue that it was obvious to the Respondent that this was a complaint of a breach of the Equality Act 2010 and of race discrimination. The Respondent does not agree submitting that there is no allegation in this collective grievance that EB had acted unlawfully. The second disclosure is the complaint about the appointment of Ms Hill QC to conduct investigations. In that disclosure it is stated: *"We consider your behaviour to demonstrates contempt for us, because we are black and this is the basis of our grievance (sic)*". The third disclosure is an oral disclosure alleging that the refusal to allow Mr Elesinnla to accompany them was discriminatory.

24. The Respondent submitted that these disclosures do not amount to the giving of information that tends to show the Respondent was in breach of its legal obligations. I have reservations as to whether the disclosures are sufficient to satisfy the legal tests set out above and whilst I think it is possible that at Tribunal it may be found that they provide information (as opposed to making allegations) that tend to show that the Respondent has failed to comply with their legal obligations this is not the same as saying that the Claimants have '*a pretty good chance of success*' as there are other factors in meeting the definition of a protected disclosure which I do not find that the Claimant has shown to have a pretty good chance of success. This is a higher burden of proof which I do not consider the Claimants have met.

25. The third limb is whether the Tribunal will find at the full hearing that the Claimant's belief was reasonable. The Respondent submitted that it was not reasonable, on the wording of the grievance, for the Claimants to believe that EB had accused them of being homophobic and that this was a racial slur.

26. The fourth limb is whether the disclosures were made in good faith. The Claimant submitted that they were, the Respondent submitted that they were not and were acts of retaliation and victimisation

27. Finally, the fifth limb is whether the disclosures (assuming they are found to be protected disclosures) were the principal reason for the dismissals. The Respondent denies that the reason for dismissal was because the Claimants had made protected disclosures. The reason for the dismissals given by the Respondent in respect of both Claimants is gross misconduct on three grounds:

    i. Victimising a fellow employee in bad faith

    ii. Failing without reasonable excuse to comply with repeated, reasonable and important instructions to participate in an independent investigation into issues of great concern to many employees of the Respondent including the Claimant and to the Respondent itself; and

    iii. By refusing to participate in that independent investigation, acting in a way calculated or likely to destroy mutual trust and confidence between themselves and the Respondent.

28. The burden on the Claimants proving that they have a pretty good chance of success at the final hearing is a high one. I do not consider that the Claimants have succeeded in reaching this level. There is nothing in papers I have before me to persuade me that the Claimants have a pretty good chance of succeeding in their claim for unfair dismissal for making protected disclosures. Even were they to show that the disclosures were protected I do not consider there is a pretty good chance of showing that the protected disclosures were the principal reason for dismissal.

29. I therefore find that as the Claimants have not shown they have a pretty good chance of success at the final full merits hearing and their applications for interim relief is dismissed.

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Employment Judge Martin
Date: 06 November 2017