



EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant
MRS S SMITH**

AND

**Respondent
ENABLE TODAY LTD**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 28TH FEBRUARY 2022

**EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)**

APPEARANCES:-

FOR THE CLAIMANT:- IN PERSON

FOR THE RESPONDENT:- MR K ALI (COUNSEL)

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's application for interim relief pursuant to s128 Employment Rights Act 1996 is dismissed.

Reasons

1. By this claim the claimant brings claims of public interest disclosure detriment and a claim for automatic unfair dismissal (S103A ERA 1996) asserting that the reason (or principal reason) for her dismissal was that she had made public interest disclosures within the meaning of s43B ERA 1996.
2. The application before me today is for an order for interim relief in the making of a continuation of a contract of employment order (s129 ERA 1996). The respondent resists the application on the basis that it is not “likely” (within the meaning of s129) that the tribunal which determines the complaint will make a finding that the claimant was automatically unfairly dismissed pursuant to s103A ERA 1996.
3. The law is not in dispute. The tribunal can only make one of the orders set out in section 129 if it holds that it is “likely” that the tribunal which determines the complaint will find (in this case) that the reason or principal reason fell within s103A. “Likely” in the context of s129 means that there is “a good chance” that the tribunal will find in the claimant’s favour; and a good chance means something more than the balance of probabilities, indeed a significantly higher likelihood (*Ministry of Justice v Sarfraz [2011] IRLR 562 per Underhill P*). That test applies to all aspects of the claimant’s claim that may be in issue.
4. The case is slightly unusual in that during the hearing the claimant initially stated that trust and confidence between her and the respondent had broken down and that she was not seeking a continuation of contract order. However she subsequently resiled from that and stated that she would if necessary return and maintained that she was seeking an order. Accordingly I have considered the application.
5. The claimant was employed by the respondent from 17th August 2020 as a Live In Caregiver. In July 2021 she began caring for a client PD. The specific disclosures relied on have not all been identified, although at least one is in the bundle and is in fact relied on by the respondent (see below). Her case as set out in the “Background Information” attached to the ET1 is that she identified failings in the care of PD essentially because the respondent supplied untrained or poorly trained staff to assist her with PD’s care; in which allegation she is supported in particular by a WhatsApp message from PDs daughter which makes the same allegation; and asserts therefore that she is demonstrably telling the truth. Moreover she submits that she is very experienced and was specifically tasked with PDs care because of her skill and experience. There can in effect be no genuine reason for dismissal based on performance and the inevitable conclusion must be that there is some other reason which can only be that she had made the disclosures.
6. The respondent submits that there are two fundamental aspects of the claim, both of which are in dispute, and that on the information before the tribunal that there is not a

good chance that the final tribunal will find in the claimant's favour in respect of any of them. They are:

- i) Public Interest Disclosures – Although the nature of the disclosures and when and to whom they are alleged to have been made are not entirely clear from the ET1 claim form, the claimant confirmed that the disclosures related to information that untrained staff had been sent to assist with the client PD. This is factually in dispute, the respondent contending that all staff had received appropriate training and the respondent contends that in the circumstances there is a live issue as to whether the claimant can show that she had a reasonable belief that the disclosure tended to show any breach falling within s43B Employment Rights Act 1996.. Although all the disclosures relied on have not yet been identified the respondent points to an email of 28th November 2021 in which the claimant talks of being sent another new carer who is not experienced in moving and handling; and refers to both her and a previous carer causing the claimant to have hurt her back. It submits that on the face of it there is no disclosure of any untrained (as opposed to inexperienced) staff being supplied, and even if it is correct that the staff were inexperienced that could not without more be a disclosure that could fall within any category of s43B. Given the claimant's own assessment of her experience and expertise, to disclose information that she has been allocated inexperienced assistants does not in and of itself tend to show any breach falling within the s43B categories. Moreover the thrust of the email in fact concerns the claimant's own health rather than that of PD, and here is therefore a live issue as to whether there can have been any reasonable belief it was in the public interest.
- ii) Accordingly they submit that the case as to whether there were in fact any public interest disclosures is not at all clear, and that there is not a "good chance" on the information currently available of the claimant establishing that she made public interest disclosures
- iii) Reason or principal reason for dismissal- Even if they are wrong about the disclosures the respondent submits that the reason for the termination of the claimant's engagement is clearly set out in writing; is supported by documentary evidence; and that there is nothing, at least at present, to indicate that the reason given was not the true reason. They point to the fact that this was not a sudden or unexplained decision to dismiss. In October 2021 there had been a disciplinary investigation for similar matters which had resulted in a warning that any repetition could result in dismissal. In addition there had been concerns about similar matters raised in an earlier appraisal. Moreover one of the matters for which she was dismissed was the making of threats. The fact of the threat being made is clear from the Facebook post, and Mrs Flay's conclusion that it was directed at the respondent's employees was self-evidently reasonable.
- iv) Put simply a present there is at least a live issue as to the reason for dismissal; and on the documentary evidence here is clear support for the respondent's position. It cannot on any analysis at this preliminary stage be held that there is a good chance of the tribunal holding that the reason or principal reason for dismissal was any disclosure made by the claimant.

7. This is not a hearing I which I have heard any evidence and I am not making or purporting to make any finding of fact. The task before me is determine whether on the evidence I have that it is "likely" (in the sense referred to above), that the claimant will succeed at the final hearing. In my view the respondent is correct, particularly given the documentary evidence relating to the decision to dismiss, and this is not a case in which in my judgement the threshold for making such an order has been reached.

EMPLOYMENT JUDGE Cadney

Dated: 28th February 2022

**Judgment sent to parties on
9th March 2022 By Mr J McCormick**

For the Tribunal Office