EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
MS HILL	**ST PAULS C OF E VA PRIMARY AND NURSERY SCHOOL (1) AND 6 OTHERS**

PRELIMINARY HEARING

Heard at: **Watford Employment Tribunal (by CVP)** **On:31 January 2022**

Before: Employment Judge Skehan

Appearances:

For the Claimant: **Mr Stephenson, Counsel**
For the Respondents: **Ms Moss, Counsel**

ORDER

The claimant's application for interim relief under s128 of the Employment Rights Act 1996 is unsuccessful and dismissed

REASONS

1. Both counsel set out detailed written submissions and comprehensive oral submissions. I am grateful to both for their assistance. At the commencement of the hearing, I revisited the documentation submitted by the parties. The claimant had submitted a bundl ('CB') running to 390 pages. The respondent provided a separate bundle ('RB') stretching to 490 pages. References to page numbers below are references to these bundles unless otherwise indicated. I was provided with a witness statement from the claimant and a draft statement from Mr Nutton, (the Chair of Governors and third respondent).

2. There is no dispute between the parties in relation to the applicable law and I do not recite it in any detail herein. In general terms a tribunal can only grant interim relief if it decides that the claimant is likely to establish at a full hearing that the prohibited reason, (specified in section 103A ERA) was the reason, or principal reason, for the dismissal. 'Likely' in this context means more than just a reasonable prospect of success. While there is no need to establish that the claimant will succeed at trial, the tribunal should consider whether the claimant has a pretty good chance. The employment judge is required to make as good an assessment as he or she is properly able as to whether or not the claimant is

likely to succeed and, by necessity this involves a far less detailed scrutiny of the respective cases of each of the parties and the evidence that will ultimately be undertaken at a full hearing. Where interim relief is sought in a whistleblowing case under s.103A ERA, the claimant must show that there is a pretty good chance that the ET will find that:

a. She made her disclosure(s) to the employer;
b. She believed that it or they tended to show one or more of the matters itemised in section 43B(1)(a)-(f) ERA;
c. Her belief in that was reasonable;
d. She believed the disclosure(s) was or were made in the public interest;
e. That belief was reasonable; and
f. The disclosure(s) was or were the principal cause of the dismissal.

3. With this in mind, I turn to the claimant's case. Nothing within this decision constitutes a finding of fact. I have not heard any 'live' evidence and my conclusions have been reached following consideration of the available documentation and submissions only. By way of background, the claimant was a primary school teacher employed by the first respondent. The claimant says that she at all material times suffered from Long Covid or post viral fatigue and developed depression in May 2021. The claimant claims that her conditions amount to a disability as defined within the Equality Act 2010. The claimant sent her first ET1 to the ET on 9 September 2021. This litigation included claims of direct disability discrimination, discrimination arising from disability, harassment, victimisation and a failure to make reasonable adjustments. At this point the claimant remained employed. The claimant states at paragraph 30 of her first ET1 that she was told on 23 April 2021 to 'prepare [her] self for dismissal'.

4. The claimant sent her second ET1 to the employment tribunal on 23 December 2021. The claimant's legal claims are summarised in a schedule attached to the ET1 running to 30 paragraphs including an allegation that the claimant has been automatically unfairly dismissed on 16 December 2021 by virtue of S103A ERA 1996. The second ET1 also included the claimant's application for interim relief. The matter is defended, the first ET3 was submitted on 14 October 2021 and the second ET3 submitted shortly before this hearing on 24 January 2022. I do not attempt to set out the background to this litigation in any detail and concentrate only on the circumstances relevant to the claimant's application for interim relief.

5. The claimant's employer and respondent to this application is a relatively small single entry form primary C of E school. The headteacher is Ms Cohen (the fifth respondent). The school has 12 teachers, some who work part-time and a total staff of 32 The claimant relies upon her grievance of 27 October 2021 and her appeal against the outcome of that grievance on 14 December 2021 both separately and cumulatively as protected disclosure[s]. The claimant's grievance relates mainly to allegations that the respondent failed to comply with their obligation to make reasonable adjustments. The claimant highlights a large number of complaints and complains of bullying, harassment, victimisation, disability discrimination and failure to make reasonable adjustments on the part of the headteacher. The grievance concludes by requesting a reasonable adjustment for the governors to remove the claimant's line management responsibility from the headteacher and allocate her line management to the deputy head.

6. The respondent submits that the Claimant made inflammatory, malicious and baseless but serious allegations against the headteacher, like the suggestion the headteacher might have concocted evidence against her [237-238 RB]. The respondent points to specific parts of the claimant's grievance that they say indicate that the claimant could not have any reasonable belief that she had been bullied or discriminated against in the way that she has alleged and point to documentation potentially supporting their argument. For example:
    - Excessive negative scrutiny by MC [234-238 RB] cf. FS saying MC was nothing but supportive [351-353 RB];
    - Failure to plan creating distressing uncertainty for C [235 RB] cf. C making clear it was difficult for *her* to plan because she did not know her future fitness [230-231, 334, 351 RB]
    - "*Dictatorial and uncompromising*" [236 RB] cf. flexibility and compromise throughout, accommodating the C's demands [225, 227-229, 232, 334-335 RB]
    - "*Exceeding Doctor and OH recommendations… visit to the forest*" [237 RB] cf. C saying she was looking forward to that trip [231 RB]
    - "*Pressure to increase return to work…"* [237] cf. every step only proceeded if C agreed [227-229, 232, 334-335 RB]
    - *"No offers of assistance or help"* [236] cf. admitted adjustments made, weekly support meetings, team meetings to help with feelings of isolation [232 RB];
    - Requirement to sign the visitors' book and missing from birthday list [237 RB] cf. [174-175, 219-220, 337 RB];
    - MC saying "*why do you sit a lot"* as part of her bullying etc. [236 RB] cf. FS having said that, not MC [334, 352 RB]

7. The claimant's grievance was investigated by a third party (the seventh respondent), who produced a grievance investigation report. The claimant had sight of a draft grievance investigation, that the claimant says has been sent to her by mistake. The claimant thereafter received a substantially longer final grievance investigation. The claimant put considerable weight upon the expansion of final investigation report, saying Mr Nutton was instrumental in expanding the investigation report 'so that it demonised me and provided what looked like a valid reason to dismiss me……'. The claimant's grievance was unsuccessful and the outcome communicated by letter from Mr Nutton dated 7 December 2021. Within this letter an allegation of 'upward bullying' is made against the claimant and various conduct issues are set out. The letter says, 'the governing body will need to consider these recommendations further and take any necessary steps in accordance with our policies and procedures'.

8. The claimant appealed the outcome of her grievance by 10 page letter dated 14 December 2021. Within the first paragraph the claimant says, '… I regard the investigation as grossly one-sided and biased in favour of an outcome desired by the school and quite possibly the investigator personally….'

9. Mr Nutton said in his witness statement that the, '…. The final straw was when the claimant wrote to me on 14 December 2021 with her appeal. She raised a number of wild accusations……, The school had instructed an independent investigator at considerable cost to us. If we had really wanted to engineer an

outcome in our favour, which is denied, we could have just dealt with the grievance ourselves and not incurred significant cost…… It was clear that [the claimant's conduct] amounted to misconduct under the school's disciplinary policy. I carefully considered whether the schools policy should be followed……. I concluded that following the procedure would be futile and would lead to the claimant inevitably raising more malicious/unfounded allegations are questioning the integrity of the process….'. Mr Nutton called an extraordinary meeting of the governing body asking for volunteers to determine an issue relating to the claimant. Three governors volunteered to form a panel. They had no prior involvement in decisions relating to the claimant. They have not seen the claimant's grievance appeal at the time they made a decision to dismiss the claimant. Mr Nutton presented a management case and recommended summary dismissal. The panel deliberated in private and returned later that evening with their conclusion that the claimant's employment should be terminated summarily by reason of her misconduct or in the alternative some other substantial reason. We have not seen any minutes of the meeting and there has been no order for disclosure at this early stage of the litigation.

10. The claimant says that the panel who made the decision to dismiss had not seen her appeal letter. She says, 'Had [Mr Nutton] told the panel about my appeal, I suspect I would not have been dismissed……. '.

11. Mr Stevenson submits that the only plausible explanation in the circumstances is that the claimant was dismissed because of her protected disclosures.

12. The respondent says that the principal reason for the claimant's dismissal was a complete breakdown in the relationship between the claimant and the respondent or the claimant's conduct. It says that the relationship between the claimant and school was so broken that there was no point in following any disciplinary procedure as it would not have made any difference to the outcome but would have exposed the school and its staff to yet further malicious and untrue accusations from the claimant. The respondent submitted that the claimant must also have considered trust and confidence to be entirely broken by reference to her questioning of the motivation behind the most trivial of events and reference is made to a birthday list and a signing in book. Ms Moss submits that to the extent that the claimant's dismissal had anything to do with the grievance, it was because of the manner in which the grievance was raised, separable from the fact disclosures were made or because of the consequences of the grievance and similarly separable.

13. In considering this matter, although the claimant will have to prove all aspects of her claim, I have started with the issue of causation as it appears at first glance to be the most problematic. Other than the narrow points set out below, I do not consider whether the grievance and/or the grievance appeal is likely to constitute a protected disclosure in accordance with the statutory provisions.

14. The I note that:
    a. this is a claim where the claimant says that she was told in April 2021 that she should prepare herself for dismissal. The claimant subsequently issued proceedings and the alleged protected disclosures were made

following this time. This timeline alone raises potential alternative reasons for dismissal other than the alleged protected disclosures.

b. If it is found as fact that substantial elements of the claimant's grievance are malicious and untrue complaints against the headteacher, there is an argument that such matters are unlikely to constitute protected disclosures as (assuming that they meet the other statutory requirements) the claimant will have had no 'reasonable belief' that the allegations' tended to show breaches of the Equality Act. If the principal reason for the claimant's dismissal is found to be a breakdown of relations due to those complaints, the section 103A claim is unlikely to be successful. I am unconcerned for the purposes of this application in any 'ordinary' unfair dismissal or discrimination claim. While there has been no detailed consideration of the evidence, this is not a case of bare allegations made against the claimant, there is on the face of the documentation to which I have been referred, evidence appearing to support the respondent's position.
c. On the evidence available there appears to be an argument that the principal reason for the claimant's dismissal, is related to the claimant's conduct resulting in a breakdown in relationships that is properly severable from any alleged protected disclosure. This is impossible to assess without a detailed consideration of the evidence.
d. While the final written investigation report is longer than the previous draft, I am unable to assess whether it is likely that any adverse inference can be drawn from the disparity without a detailed consideration of the evidence.
e. I consider that there is considerable potential for different findings of fact relating to the part played by the claimant's grievance appeal in her dismissal. While Mr Stevenson relies upon the grievance appeal as a protected disclosure either alongside the original grievance or on its own, the dismissing panel were unaware of the appeal. Mr Stevenson relies upon a manipulation type argument referring to *Royal mail group Ltd v Jhuti [2019] UKSC 55*, alleging manipulation on the part of Mr Nutton in concealing the alleged protected disclosure. The facts of this matter do not reflect those of *Jhuti* and Jhuti is likely to be applicable to a very limited number of scenarios. It is difficult to commence any assessment of the chances of success of such an argument in the absence of detailed consideration of the evidence of the decision makers and Mr Nutton.
f. To be successful within her section 103A claim the claimant must show that the principal reason for her dismissal was the protected disclosure. A finding that the timing of the claimant's dismissal has been influenced by a protected disclosure or that the dismissal has been tainted or influenced by a protected disclosure or 'but for' her grievance and grievance appeal she would not have been dismissed would be insufficient.

15. In summary, in review of the entirety of the evidence and submissions presented to me I am unable to conclude that the claimant has a pretty good chance of success or is likely to succeed with her claim that the alleged protected disclosure(s) were the principal reason for her dismissal contrary to section 103A ERA. As I have reached this decision considering mainly maters of causation, I

do not go further to examine the other factors that the claimant would need to address to show a pretty good chance of success overall with this claim. I reiterate that this conclusion has involved a far less detailed scrutiny of the respective cases of each of the parties and the evidence than will ultimately be undertaken at a full hearing.

16. The application is refused and is dismissed.

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Employment Judge Skehan

4 February 2022

Sent to the parties on:

9 February 2022

For the Tribunal: