Case Number: 2300447/2017;
2301301/2016

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THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

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

BETWEEN:

Miss Phyllis Clarke	**Claimant**
AND	
Glaxosmithkline Services Unlimited	**Respondent**

ON: **22 February 2017**

APPEARANCES:

For the Claimant: **Mr D Stephenson, Counsel**

For the Respondent: **Ms G Crew, Counsel**

JUDGMENT

The Judgment of the Tribunal is that the Claimant's application for interim relief under sections128 and 129 Employment Rights Act 1996 ("ERA") is refused.

REASONS

1. The Claimant Ms Clarke sought interim relief in the second of her claims to the Tribunal, the first case (number 2301301/2016) having been presented on 12 July 2016 whilst she was still employed. The two claims have now been consolidated. The new application to the Tribunal, case number 2300447/2017 follows the termination of the Claimant's employment on 27 January 2017. It is common ground that the

application was correctly made within the seven day time limit and no procedural issues have arisen in the case.

2. I made it clear at the outset that I would not be hearing oral evidence and would be deciding the case on the basis of the witness statements of Mr Hernandez and the Claimant herself, the two bundles of documents that I was supplied by the parties and the third bundle, which had been prepared previously for the adjourned preliminary hearing. It was also agreed by the parties that the key issue in the application was whether there was sufficient evidence of the required causal connection between the Claimant's dismissal and her having raised concerns with the Respondent, some of which she contends amounted to protected disclosures under s.43B ERA.

3. The applicable law and the relevant authorities are helpfully set out in the Respondent's written submissions and as Mr Stephenson did not take issue with them I adopt them for the purposes of this judgment. The test that I am concerned with is still that set out in the case of ***Taplin v C Shippam Limited [1978] IRLR 450*** namely that the Claimant has a "pretty good chance of success" in establishing that the reason that she was dismissed was that she had made protected disclosures. I gave some consideration during the course of reading the witness statements as to whether the Claimant would have a pretty good chance of being able to show that she had in fact made protected disclosures however I decided that it would not be necessary for me to make any determination as to whether the ***Taplin*** test was met in relation to the nature of the disclosures themselves and I would therefore confine myself to dealing with the causation issue. For the avoidance of doubt I make no findings as to whether any of the disclosures relied on by Ms Clarke amounted to protected disclosures within s.43B.

4. The relevant undisputed facts are briefly as follows. There was at the Respondent a discussion of a possible restructuring of the division in which Ms Clarke is employed as long as ago as 2015. In April 2016 a more detailed restructuring proposal was put forward by Sergio Hernandez who had been appointed by the Respondent to head up its Supply and Planning Hub for the UK, reporting to Winnie Jones. Mark Shelmerdine was one of Mr Hernandez's reports. Ms Clarke reported to Mr Shelmerdine and had made a number of complaints about him both of race discrimination and of breaches of various procedures at the Respondent. The latter formed part of the complaints that she asserts amounted to protected disclosures under the s43B ERA. The Claimant was suspended from her employment on disciplinary grounds in January 2016 and she remained suspended until the termination of her employment. During that time a number of grievance and disciplinary investigations were carried out in relation to her by the Respondent. I am not concerned with the details of those procedures for the purposes of this application and I make no findings about them.

5. Formal consultation about the potential redundancies arising from Mr Hernandez's restructuring proposals began in September 2016. The Claimant was still suspended at the time and her participation in the process was therefore conducted by phone and email. She made Mr Hernandez aware that she was involved in legal proceedings against the company, but not of the details of her complaints. She was consulted and told that her role would no longer exist in the new structure but she was informed of two roles at one grade higher than her existing grade seven, the NPI planning manager role and the supply planning process manager role, both of which in Mr Hernandez's view could constitute alternative employment for her. However Ms Clarke informed the Respondent that she did not think that these roles would be a good fit for her and instead she expressed interest in the grade five role of supply planning director.

6. She subsequently applied for that post and was interviewed by Raphael Wiezenegger by telephone on 16 December 2016 Mr Wiezenegger did not consider that Claimant was suitable for the role and he gave her feedback to this effect by telephone on 22 December. Ms Clarke was reluctant to accept the feedback or the outcome and sought further feedback from Mr Hernandez. In spite of a further conversation with Mr Hernandez she remained unhappy and a third conversation took place on 13 January 2017 between her, Mr Hernandez and Mr Wiezenegger. Her dismissal for redundancy took effect on 27 January and shortly afterwards she applied to the Tribunal complaining of that her dismissal was unfair and making her application for interim relief.

Submissions and decision

7. Mr Stephenson made a number of submissions in support of Ms Clarke's contention that she was entitled to interim relief. He submitted that the restructuring proposals made in August 2015 had not in fact involved the disappearance of the Claimant's role, leading him to suggest that the restructuring proposal put forward in April 2016 had been deliberately engineered to ensure that her role would disappear. For the purposes of this hearing I am only to adopt a broad brush approach to the facts based on the available evidence, which is naturally far more limited than that which will be available at the full merits hearing. As there was no document available as to the 2015 proposals I was unable to accept this contention or the Claimant's suggestion that the April 2016 proposal was deliberately designed to ensure that her post would be removed. The fact that Ms Clarke did not refer to this particular argument in her ET1 or her witness statement reinforces my conclusion. Mr Hernandez's evidence is that the structure put forward on both dates was the same, which would rule out the possibility that there was any deliberate attempt to design the proposals in such a way as to engineer the disappearance of Ms Clarke's job on the basis that she had made protected disclosures.

8. Mr Stephenson submitted that it was inconceivable that, contrary to what

Mr Hernandez said in his witness statement, he would not have known about the detail of Ms Clarke's complaints. He had four arguments in support of this proposition. The first was Mr Hernandez's position in the hierarchy between Mr Jones and Mr Shelmerdine. The second was the content of the Respondent's own written policies, particularly the safeguarding policy, which required active steps by the Respondent to protect a whistleblower from retaliation and would therefore have obliged the Respondent's employees to notify managers involved in procedures concerning Ms Clarke that they should not take any steps that could be regarded at retaliatory. The third was the fact that Respondent seemed to have taken measures as early as April to ensure that Mr Hernandez was not given details of the Claimant's complaints, but given that the Claimant was not at risk of redundancy until September it was unclear why the Respondent would have taken such a step. Fourthly, he submitted that given the Claimant's situation, namely that she had been suspended but had also raised a number of grievances and concerns and had then in July 2016 brought Tribunal proceedings, it was inherently improbable that someone in Mr Hernandez's position would not have been aware of the circumstances and the substance of her complaints. I understood Mr Stephenson to be inviting me to infer from these four factors that on a balance of probabilities Mr Hernandez's conduct towards the Claimant was caused by her having made protected disclosures.

9. I could see the force of Mr Stephenson's submissions but I preferred the Respondent's submission that it is insufficient in an interim relief application for the Claimant to point to circumstances that might make it possible for an inference to be drawn that a decision maker was motivated by the Claimant's protected disclosures. Something more concrete than that is required to establish that a Claimant has a pretty good prospect of success in claiming that the dismissal was caused by whistleblowing allegations. The test is a more stringent test than that of the balance of probabilities. On the basis of my overview of the evidence I do not consider even on a balance of probabilities that Mr Hernandez actually knew the details of Ms Clarke's complaints. The fact of protective measures being taken in April 2016 seems to me unsurprising given that April was the point at which the restructuring proposals were published indicating that the Claimant's post was likely to be deleted. I do not find it surprising that members of the Respondent's HR department would have considered it appropriate to take some protective steps at that stage. Even if Mr Stephenson were right, that it is pretty likely that Mr Hernandez knew of the Claimant's history in more that the bare outline to which he admits in his witness statement, it does not follow that it is pretty likely that the Claimant will be able to show that he acted on that knowledge. The Respondent submitted and I accept that there is no evidence at all that Mr Hernandez did so. Mr Stephenson invited me to draw from Mr Hernandez's email at page 108 an inference that Mr Hernandez had been pleased that the Claimant was not applying for the two grade six roles which he had identified as possible suitable

employment for her. I am not prepared to draw that inference. The meaning of that email is at best ambiguous and it is not enough to show to the standard of proof required in an interim relief application that Mr Hernandez was "gunning" for the Claimant or endeavouring to engineer the process to ensure that she left the Respondent's employment. I did not accept Mr Stephenson's submission that Mr Hernandez was showing his true colours by giving the Claimant more negative feedback that Mr Weizenegger did at page 134.

10. It is quite clear in fact that Mr Weizenegger had serious reservations about Ms Clarke and said so in terms in the written feedback that he set out in that document. The reason that Mr Hernandez gave further feedback to the Claimant page 140 and 141 was that the Claimant had asked him to do so. This was not the evidence of a conspiracy behind the scenes that Mr Stephenson was suggesting. Mr Stephenson also referred to page 143 and Mr Weizenegger's reference to a "gut feeling" about the Claimant. Again I was not prepared to infer that this meant that Mr Weizenegger was influenced by the Claimant's complaints. There was no evidence at all that Mr Weizenegger was aware of any aspect of the Claimant's history. The fact that an interviewer, properly or not, relies to some extent on intuition rather than objective evidence of competency does not establish a causal link between conduct (in this case the non-appointment to the director role) and the Claimant's whistleblowing complaints to the required standard in an interim relief application.

11. Mr Stephenson also submitted that the overall treatment of the Claimant - the disproportionate suspension in January 2016, his suggestion that the Respondent then sought to effectively "dig more dirt" on her during the suspension period and the unwarranted length of the suspension, all point to the Respondent having acted detrimentally towards the Claimant in a manner that demands explanation. Whatever the merits of those arguments they rely on inference rather than facts. Mr Stephenson submitted that the requirement for hard facts - as he put it a "smoking gun" - would always make an interim relief application extremely difficult. This does however represent what I considered to be correct position as confirmed by the decision of the then Mr Justice Underhill in ***Dandpat v University of Bath and another UKEAT/0408/09*****,** in a passage quoted in the Respondent's submissions. The hurdle is a high one and it is not in my view enough to point to a state of affairs which might require explanation by the Respondent.

12. Detailed application of the burden of proof provisions applicable in a discrimination claim and in the claim of detriment for making a protected disclosure can only in my view take place at a full merits hearing when the facts have been properly aired. For the purposes of an interim relief application on the other hand there must be some hard evidence that gives the Claimant a pretty good prospect of succeeding at the full merits hearing. That was Ms Crew's principal submission, which I accept. Ms

Crew also submitted that in her witness statement the Claimant did not make any attempt to set out a positive case as to what Mr Hernandez had known about her history. The prima facie facts suggest that he was not involved at any stage in the suspension decision, the grievance procedures or the disciplinary process. The documentary evidence of the redundancy process and the process of giving feedback on the Claimant's unsuccessful application for the director role disclose no evidence whatsoever of a connection with the Claimant's disclosures. As to Mr Stephenson's submission that the redundancy was a sham the Respondent submits that the evidence clearly points the other way. Documentation such as the consultation pack, the new structure documentation and the business case for the reorganisation which entailed the disappearance of the Claimant's role, all point to a genuine exercise undertaken for objective reasons.

13. Ms Crew submitted that the certificate signed by Ms Clarke at page 96 accepting that she had been genuinely consulted during the course of the redundancy process is also incompatible with the assertion that the redundancy was a sham, as was the fact that there were other employees in the organisation who also lost their jobs. It would be stretching credibility to suggest that the Respondent would have gone to such lengths to ensure that Ms Clarke lost her employment. Mr Stephenson then sought to reframe his argument as one of opportunism by the Respondent rather than conspiracy, but on the fact as I am able to discern them from the evidence I considered, I do not accept that the Claimant will be pretty likely to establish that the Respondent took advantage of the redundancy situation to remove her from its employment because she had made protected disclosures.

14. Finally the evidence does not point to the Claimant's grievances having been left unresolved. I make no findings on that issue or indeed on any other factual matter except for the undisputed facts that I have set out at the start of this judgment, but again I conclude that the Claimant's assertion that her grievances were not resolved does not assist her in showing to the required standard of proof in an interim relief application, that she has a pretty good prospect of showing that her dismissal was causally linked to her disclosures.

Employment Judge Morton
Date: 17 March 2017