RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms J Young**

Respondent: **Brit College Limited**

Heard at: **East London Hearing Centre**

On: **31st July 2019**

Before: **Employment Judge Reid**

Representation

Claimant: Mr N Hanning, Anthony Gold Solicitors
Respondent: Mr Crawford, Counsel

RESERVED JUDGMENT

1. **The Claimant's application for interim relief under s128 Employment Rights Act 1996 is dismissed.**

2. **Under s129 Employment Rights Act 1996 it is not likely that the Tribunal when determining the Claimant's claim will find that the reason for her dismissal (or the principal reason) was the reason specified in s103A Employment Rights Act 1996 (protected disclosure).**

REASONS

Background

1 The Claimant presented a claim form on 5th July 2019 claiming unfair dismissal under s103A Employment Rights Act 1996, together with claims of whistleblowing detriment under s47B(1A) ERA 1996 and claims of discrimination and harassment on the grounds of race, disability and religion or belief under s13, s15 and s26 Equality Act 2010.

2 On the same date the Claimant applied for interim relief under s128 ERA 1996 (page C18A).

3 The Respondent's response to her claim is due on 15th August 2019. It resisted this application for interim relief. It was confirmed on behalf of the Respondent that it

would not agree to reinstatement or re-engagement of the Claimant should she succeed in her application, the only potential outcome therefore being a continuation of contract order under s130 ERA 1996.

4 The parties attended the hearing and there was a bundle from each party plus witness statements from the Claimant and from Mr Muraduzzaman of the Respondent (HR) and Mr Miah of the Respondent (Director of Compliance and Student Services). I heard submissions on both sides and was provided with a skeleton argument on behalf of the Claimant.

The issues

5 The first issue was whether the Claimant's application was made within the 7 day time limit in s128(2) ERA 1996, with the Claimant saying it was because she did not open and read the email dated 27th June 2019 (at 5.26pm) communicating her dismissal to her until 28th June 2019 and the Respondent saying that she read it on 27th June 2019 so that her application was out of time.

6 If her claim was in time the second issue was whether it was likely that, on determining her claim, the Tribunal will find that the reason for her dismissal (or if more than one, the principal reason) was the reason specified in s103A ERA 1996, namely because the Claimant had made a protected disclosure. She claimed she had made three disclosures.

The time limit issue

7 I decided at the hearing that the Claimant's claim for interim relief was brought within the applicable time limit because she was not dismissed until 28th June 2019 (the effective date of termination). I gave reasons orally at the hearing.

Relevant law as to the application for interim relief

8 The relevant law is set out in s128-132 ERA 1996. The test I am required to apply under s129 ERA 1996 is whether it appeared to me that it was likely that the Tribunal, when it heard the Claimant's claim, will find that the reason for her dismissal (or if more than one, the principal reason) on 28th June 2019 was the claimed protected disclosures she made in February, March and April 2019.

9 The test means that the Claimant must show she has a pretty good chance of success (*Taplin v C Shippam Ltd [1978] IRLR 450*). The test is not whether she has a reasonable chance of success or whether it is probable she will succeed.

10 It is not for me to make findings of fact on the substance of her claim but to assess likelihood, applying the above test.

11 *Kilraine v Wandsworth LBC [2018] IRLR 846* decided that when determining whether a worker had made a protected disclosure within s43B ERA 1996, the decision in *Cavendish Munro Professional Risks Management Ltd v Geduld [2010] I.C.R. 325* was not to be read as requiring an employment judge to decide whether the employee had

"disclosed information" or "made an allegation". There was no rigid dichotomy between the two; a disclosure might provide information and make an allegation at the same time, provided it had sufficient factual content and specificity. I have to consider the context of the disclosure.

12 *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731* decided that if the worker subjectively believes that the information he or she discloses does tend to show one of the listed matters, and the statement or disclosure he or she makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his or her belief will be a reasonable belief.

13 The test for a detriment claim is different to the test for an unfair dismissal claim in terms of showing the link between the act complained of and the protected disclosure. In a detriment claim the test is whether the protected disclosure materially influences the employer's detrimental treatment of the worker, whereas s103A ERA 1996 requires the protected disclosure to be the reason or principal reason for dismissal (*Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372).*

Assessment of likelihood of success under s129 ERA 1996

(A) The claimed protected disclosures

The first claimed disclosure (para 1.1 ET1, page R51-53, email dated 27th February 2019 (08.16) from the Claimant to the Chief Executive, Mr Ahmed)

14 The claimed disclosure related to a complaint received on 26th February 2019 (page R52) from Shafiqur Rahman making an allegation about payment being accepted by a member of staff (Mr Ali) for arranging for students to be admitted to the college when they did not have the required level of English. The complaint was specific and from an identified individual on a specific date. That complaint was sent to the Claimant and to the Chief Executive Mr Ahmed and to a Mr/Ms Abmrazi. On 27th February 2019, the next day, the Claimant emailed Mr Ahmed asking for the matter to be progressed that day because of the QAA response she was working on. On 26th February 2019 Mr Ahmed had already forwarded the student's email to Mr Al Amin (page R52) who in turn had asked Mr Miah (Director of Compliance) to investigate as it was a serious matter (page R51, R53). On the basis of these emails it appears therefore that the matter was already being taken seriously and being investigated before the Claimant emailed Mr Ahmed about it. However the fact that the Respondent was already aware of the complaint does not mean that it cannot be a qualifying disclosure by the Claimant, if it amounted to her drawing the Respondent's attention to information (s43L(3) ERA 1996).

15 The Claimant's email to Mr Ahmed does not disclose information or draw the Respondent's attention to information (for example because the Respondent was not dealing with it) but in the light of the complaint asks Mr Ahmed to progress the matter that day so that the QAA response can be completed. The Claimant's email was not bringing information it already knew about to the Respondent's attention (s43L(3) ERA 1996) because the Respondent was already dealing with the complaint. What the Claimant was saying in her email was that the matter needed to be progressed. In effect she was asking Mr Ahmed to hurry up and deal with it but this was not said in the context of the

Respondent not dealing with it or delaying unnecessarily in dealing with it, in which two situations she might be said to be bringing it to the Respondent's attention. Her email is also not the same thing as bringing the information to the Respondent's attention because implicit in her email is her acceptance that the matter was already being dealt with, but that she felt it needed to be progressed more quickly.

16 It is therefore not likely that the Tribunal will find that the Claimant made a qualifying disclosure (within s43B ERA 1996) by way of her email dated 27th February 2019 to Mr Ahmed. The Claimant was not disclosing information about the complaint or drawing the Respondent's attention to the complaint, but was asking the Respondent to progress the response to it that day so that she could complete the QAA response. The email from the Claimant to Mr Ahmed said to be the qualifying disclosure added nothing to the complaint. It is not likely that the Tribunal will find that her email to Mr Ahmed had sufficient factual content to amount to a qualifying disclosure because her email did not convey any facts. Even taken in the context of the complaint email, her email did not add anything, but asked the Respondent to progress dealing with the complaint, which it already was. It is not likely that the Tribunal will find that this was a situation of the Claimant bringing a matter (information about which it was already aware of) to the Respondent's attention, because the complaint already had the Respondent's attention.

<u>The second claimed disclosure (para 1.2 ET1, page R56-58, 4th March 2019)</u>

17 The claimed disclosure related to an email the Claimant received on 4th March 2019 from a student, R Begum (page R56) claiming that a member of staff (again Mr Ali) was accepting money in return for providing answers to exam questions. The Claimant was likely to have forwarded the email to Mr Ahmed (page R57) because Mr Ahmed responds to the Claimant and to R Begum around two hours later asking Mr Masum to deal with it urgently. It is therefore likely that the Claimant will be able to show that the information was communicated to Mr Ahmed that day by the Claimant, even though I do not have the specific email said to be the email forwarding R Begum's email to Mr Ahmed. This is because the only person who could have communicated that information to Mr Ahmed was the Claimant who had received the email from R Begum.

18 It is likely that the Claimant will be able to show that this amounted to a disclosure of information because the facts conveyed are that there is a complaint from an identified individual on an identified date that Mr Ali is or has been taking bribes in connection with the taking of exams, a matter Mr Ahmed agrees with the Claimant about as being a serious allegation of misconduct.

19 The facts disclosed are that a member of staff is taking exam bribes, a matter likely to be something as tending to show, in the reasonable belief of the Claimant, that a criminal offence has been committed/is being committed (s43B(1)(a)) or that there is a failure to comply with a legal obligation (s43B(1)(b)). It is likely that the Tribunal will find that the Claimant held such a reasonable belief because the Claimant had received a complaint from someone making a specific allegation against a named member of staff which was serious enough to tend to show one or both of these factors. It is also likely that the Claimant will show that she reasonably believed she made that disclosure in the public interest because of the nature and seriousness of the allegation going to the heart of a fair examination system and in the context of ongoing issues identified by the HESA, Pearson, the QAA and the Student Loan Company (C ws para 13) and in the light of her role at the

Respondent as Dean of Academic Quality and Enhancement.

20 I therefore conclude that that it is likely that the Tribunal will find that the second claimed disclosure was a qualifying disclosure within s43B ERA 1996 and a protected disclosure within s43C ERA 1996, as made to her employer.

The third claimed disclosure (para 1.3 ET1, meeting with Mr Ahmed 3rd April 2019)

21 The claimed disclosure was made by the Claimant in an undocumented meeting on 3rd April 2019 with Mr Ahmed where it is claimed the Claimant told Mr Ahmed that she had been told by another member of staff that evidence of language skills and attendance records were being faked and that students were given exam answers to ensure pass rates were met. The Claimant set out in her witness statement (paras 14-18) what she said was discussed at a meeting lasting an hour. There were no notes of that meeting, emails setting up that meeting and no subsequent emails provided referring to those discussions even obliquely in the following days (although the Claimant's next working day was not until 11th April (para 19)).

22 It is therefore not likely that the Tribunal will find that the Claimant made a qualifying disclosure during this meeting. At present she asserts that she did make a disclosure amounting to a qualifying disclosure but there is no additional evidence beyond her assertion about the meeting and what was said which brings the Claimant up to the level of showing that is likely (taking into account the threshold to be met) that the Tribunal will find that the claimed disclosure was made and that it was a qualifying disclosure ie meeting all constituent elements of what constitutes a qualifying disclosure.

23 The only qualifying disclosure the Tribunal is likely to conclude was made is therefore the second one made in March 2019.

(B) Reason (or principal reason) for dismissal

24 The Respondent invited the Claimant to an investigation meeting on 11th April 2019 (page C62) to discuss her conduct and performance, after which she was suspended to investigate allegations of misconduct (page C63). Eki Omoregie from Peninsula, an independent external advisory organisation, interviewed the Claimant and produced a report identifying the concerns (page C67-71). Ms Omoregie had a detailed document from Mr Ahmed setting out his concerns on multiple matters (page R10). As a result of that meeting Ms Omoregie recommended that a disciplinary hearing be held on the allegations identified on page C71-72. It is likely that the Tribunal will find that those allegations are sufficiently serious to justify starting the disciplinary process.

25 Of those allegations the fifth (confidence in colleagues and in the Respondent) related to student data and student recruitment numbers, neither of which were matters covered by the claimed (second) disclosure I have assessed as likely to be found by the Tribunal as having been made which was about bribes made to a member of staff. The only one of the disciplinary allegations even tangentially connected to the making of a disclosure therefore related to other issues not covered by the second disclosure. The ninth allegation also referred to difficult relationships and while this might be said to implicitly link to the making of an unwelcome disclosure, it is not likely that the Claimant

will show this link because I cannot conclude that that argument will succeed based on implication alone. The other seven allegations were matters related to the Claimant's conduct and attitude based on specific matters apparently not connected to the disclosures the Claimant says she made, the most recent being the incident with Mr Miah on 3rd April 2019.

26 The matters identified as areas of concerns were presaged to a degree by matters in the Claimant's January 2019 end of probation report, namely being too judgmental and not having trust and confidence in the organisation (page C55) which in broad terms linked to the first, fourth, sixth and eighth allegations (page C71-72). The fourth allegation related to a matter arising in November 2018 regarding a complaint from Maleeha Ashraf about the Claimant (page R8) which was subsequently resolved by the Respondent (page R10). Whilst the Claimant said she was not told about this complaint at the time it was nonetheless a matter the Respondent might reasonably be likely to raise if raising other matters some months later, if a pattern was emerging. It is not likely that the Tribunal will find that the allegations therefore came out of nowhere. Although there were issues about her work which were going well as evidenced by other areas in her end of probation report, it remains the case that some concerns were identified and recorded in the report.

27 The issue in the end of probation report about stepping on colleagues' toes and discussions not being two way (page C55) in broad terms linked to the third allegation (shouting at Mr Miah) and the eighth allegation (claiming to have been excluded from a discussion).

28 The matters identified in the allegations are likely to be found to be allegations which an employer would reasonably investigate, taking into account the summary produced by Mr Ahmed. The Claimant's case is that it is too much of a coincidence that these matters came up so shortly after the claimed meeting on 3rd April 2019 with Mr Ahmed, but such a claimed coincidence does not fit with other matters existing which reasonably justified investigation. Although drawing an inference is something the ultimate Tribunal can do, an assessment of whether the Claimant is likely to succeed on the coincidence argument should not be based on drawing inferences at this stage when no facts are being found.

29 It is therefore not likely that the Tribunal will find that the allegations were either a sham or were trumped up or entirely resurrected old allegations, even if the Claimant does not agree that they were sufficiently serious to warrant disciplinary action and thinks it was unfair.

30 Mr Rudston from Peninsula (a different person) held the disciplinary hearing with the Claimant on 9th May 2019 (page C129). Mr Rudston had the investigation report and the other documents identified on pages C131-132 to include a statement from Mr Miah about the incident on 3rd April 2019 (R83) and from three other colleagues about their working relationship with the Claimant and particular incidents (pages R77,79,82). The third allegation (shouting at Mr Miah) and the fourth allegation (unconstructive feedback) were upheld (pages C134, C136). The Claimant had accepted that she had raised her voice to Mr Miah and that a warning might be found to be necessary (C96). The fifth allegation (no confidence in colleagues and the Respondent) and the ninth allegation (difficult relationships with other staff members) were also upheld (page C137, C140), in relation to the latter specifically finding that there was a distinct lack of trust and

confidence going both ways. The Claimant had accepted that there had been difficulties with colleagues but blamed colleagues for this (page C124). The recommendation was that the Claimant be given a written warning (page C141) live for 6 months (page C141) though noting that an option was termination on notice in line with the disciplinary procedure (page C142). The quote from the procedure did not match entirely the relevant provision in the procedure on page C36 para F(2) and referred to capability procedures (when this was not about capability), but the substance was the same ie a shorter serving employee may not receive warnings before dismissal.

31 The Respondent said it dismissed the Claimant because there was a distinct lack of trust and confidence between them (page C144). This was said to be a two way thing and not said to be just because it was considered that the Claimant did not have trust and confidence in the Respondent, but also vice versa. Allegations 3 and 4 (unconstructive feedback and the Mr Miah incident) were more conduct matters though they could contribute to a lack of trust and confidence in the Claimant. Allegations 5 and 9 (lack of confidence in colleagues/the Respondent and relationships with other staff members) were more about the relationship going both ways, in line with the finding that there was a distinct lack of trust and confidence (page C140). The decision was not on the face of it in line with the disciplinary recommendation but was in line with the alternative option for a short serving employee. The stated reason for dismissal was in line with the upheld allegations when looked at in the round.

32 I do not conclude from the failure to follow the recommendation of only a warning that it is likely that the Tribunal will find that the reason (or principal reason) was the making of a protected disclosure because in the context of the upheld allegations (in particular the separate finding of a distinct lack of trust and confidence) the Respondent might reasonably take a different view. The claimed mis-match between the recommendation of a warning and the decision to dismiss would be more relevant to an ordinary unfair dismissal claim but what I have to consider is what it is likely the Tribunal will find as to the reason (or principal reason) for dismissal, which is something different. Whilst it was argued that the reason for dismissal was because the Claimant did not trust the Respondent with regard to data and processes (ie in effect linking back to her claimed disclosures), the stated reason was a two way thing and it is not likely that the Tribunal will find that it only went one way. In addition, the second claimed disclosure (the one I assess that the Tribunal will be likely to find was made) did not relate to trust in the Respondent's data or processes but was about the acceptance of bribes by a member of staff. An assessment of whether the Claimant is likely to succeed on the one way argument should not be based on drawing inferences when no facts are being found and where there is a stated finding by the independent investigator that it went both ways.

33 It is therefore unlikely that the Tribunal will find that the disciplinary process was not a legitimate response to issues in the Claimant's employment or that they were trumped up allegations or very weak historic allegations brought up when they were because the Claimant had made a protected disclosure and in order to justify a dismissal.

34 I therefore conclude in the light of the above analysis, that the Claimant is not likely (assessed by reference to the 'pretty good chances of success' test) to establish that the reason for her dismissal or the principal reason for dismissal was the second protected disclosure.

35 In the light of the above analysis, the likelihood that the Tribunal will find that the disciplinary process was a legitimate response to the issues about the Claimant also means that even if the first claimed disclosure was a protected disclosure and/or the third claimed disclosure was made and was a protected disclosure, the Tribunal is likely to find that the reason or principal reason for the dismissal was not either (or both) of those disclosures either.

36 The Claimant's application under s128 ERA 1996 for interim relief is therefore dismissed.

Employment Judge Reid

5 August 2019