EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Miss Y Rotaru	**v**	Dynamic Group Limited

Heard at: Cambridge (by CVP) **On:** 4 November 2020

Before: Employment Judge M Bloom

Appearances
For the Claimant: Ms S Forsyth, Law Centre Representative.
For the Respondent: Mr M Cirstean, Director.

COVID-19 Statement on behalf of Sir Ernest Ryder, Senior President of Tribunals
This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

JUDGMENT

1. The Claimant's Claim for Interim Relief fails and is therefore dismissed.

REASONS

1. This was an application by the Claimant for Interim Relief pursuant to the provisions of section 128 and 129 Employment Rights Act 1996. The Claimant was represented by Ms Forsyth and Mr Cirstean, a director of the Respondent, attended. The Respondent is yet to present its Response to the substantive claim but I have been told has until 16 November in which to do so. They deny liability.

2. The Claimant was employed by the Respondent in their account's office between 1 January 2019 and the effective date of termination of her employment on or around 23 June 2020. On 24 March 2020 the Claimant was informed, along with her colleagues, that she would be furloughed pursuant to the government scheme. As part of the scheme she would not be required to undertake any work. However, the Claimant alleges that notwithstanding that requirement whilst she was on furlough leave she continued to undertake work for the Respondent. Mr Cirstean accepted that from 24 March 2020 until the end of April 2020 the Claimant did undertake work whilst she was on furlough leave but when he recognised that this was not an appropriate way of proceeding he subsequently paid back to HMRC the furlough payments to which his business had benefitted. The Claimant continued to be employed and was paid by the Respondent from the beginning of May until her employment was terminated on 23 June 2020.

3. The Claimant's substantive claim is that she was automatically unfairly dismissed after she made a protected disclosure to the Respondent pursuant to the provisions of section 103A Employment Rights Act 1996. The protected disclosure in this case is the fact that she pointed out to Mr Cirstean on 8 June 2020 that she should not be required to work whilst on furlough leave and she did not wish to participate in an alleged fraud against HMRC. Of course the Respondent states that after the beginning of May 2020 the Claimant was not on furlough leave in any event.

4. In an email which was contained in a Bundle of Documents emailed prior to the Hearing dated 8 June 2020 at 17.46 the Claimant submitted representations to Mr Cirstean that she did not 'feel comfortable with working while on furlough' and she went on to say 'I was informed that HMRC will come down hard on anyone who is trying to defraud it of public funds'. The email then goes on to mention difficulties the Claimant was having with a member of her household who was shielding at the time. There is then a short exchange of emails between the Claimant and Mr Cirstean regarding that individual and whether or not the Claimant was able to continue in work. The following day 9 June 2020 at 11.47 hours the Claimant submitted a further email to Mr Cirstean. In that email she asked him to confirm on company headed paper the company's position regarding the requirement that she should return to work and pointed out that if her pay was affected she had not acknowledged in any contractual document her consent to any such reduction.

5. At 14.11 hours on 9 June 2020 the Respondent via Mr Cirstean submitted an email to the Claimant terminating her employment on notice. That email stated 'it is with regret that Dynamic Group has come to a very difficult decision to make your position and possibly others redundant in this current climate'. The email went on to say that the Respondent company was 'running at less than 40% of the work' it has before the lockdown in March 2020. During the course of this Hearing

Mr Cirstean expanded on that and stated that as a result of the considerable reduction in workload suffered by the business since the beginning of lockdown there was no requirement for the Claimant to continue in her accounts role and, as a result, her position became redundant and that was the reason and only reason for the termination of her employment.

6. It is clear to me that the Claimant's email of 8 June 2020 fell within the definition of a 'Protected Disclosure'. That appears not be a dispute between the parties. The issue ends up being one that requires determination as to the reason or principal reason for the termination of her employment. On the one hand the Claimant states it was because she made the protected disclosure but on the other hand the Respondent states it is simply coincidental and the reason for the termination of her employment was the fact that her job was redundant.

7. It seems to me that the dispute between the parties is one that should be determined at a substantive Hearing. That will necessitate detailed evidence being produced to the Employment Tribunal including relevant witness statements and the opportunity of both parties being able to present evidence on oath which will also be subject to appropriate cross examination and questions, if necessary, from the Employment Tribunal.

8. Section 129 (1) Employment Rights Act 1996 determines that on the Hearing of an application for interim relief I must be satisfied that 'it is likely' that the Employment Tribunal will find that the Claimant's dismissal was, in the circumstances of this case, one to which section 103A Employment Rights Act 1996 relates i.e. she was automatically unfairly dismissed for making a protected disclosure.

9. Importantly and central to my judgement is the issue relating to the burden of proof in determining applications for interim relief. As I have stated section 129(1) of the 1996 Act states that it must be 'likely' that the claim will ultimately succeed. This case involves a careful analysis of what is meant by 'is likely'. Neither party drew my attention to any authorities but I have never the less addressed my mind to the Employment Appeal Tribunal authority of Taplin v C Shippam Ltd [1978] IRC 1068. In that case the Employment Appeal Tribunal expressly ruled out alternative tests relating to the appropriate burden of proof such as 'real possibility' or 'reasonable prospect of success' and determined that the appropriate burden of proof was on the Claimant to show that she has 'a pretty good chance of success' at the full Hearing. From the evidence presented to me I am not satisfied that the Claimant has 'a pretty good chance of success' at the full Hearing. That does not mean she will not succeed but on the evidence presented to me to date where there is a clear conflict between the Claimant's case and the Respondent's case. It is one that must be determined by a full Tribunal Hearing, hearing all the relevant evidence.

10. For the above reason the Claimant's application for Interim Relief fails and is, as a consequence, dismissed.

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Employment Judge M Bloom

Date: 20 November 2020

Sent to the parties on: ...24/11/2020...
T Henry-Yeo
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For the Tribunal Office