



EMPLOYMENT TRIBUNALS

Claimant

Mr. Hitesh Varambhia

v

Respondent

**Department of Health &
Social Care (1)**

UK Health Security Agency (2)

Heard at: Birmingham via CVP On: 3 November 2022

Before: Employment Judge Wedderspoon

Representation:

Claimant: Mr. Crawford, Counsel

Respondents: Mr. Hurd, Counsel

JUDGMENT

1. The claimant's application for interim relief pursuant to section 128 of the Employment Rights Act 1996 is not well founded and is dismissed.
2. The Tribunal has no jurisdiction to determine this claim.

REASONS

3. By claim form dated 6 October 2022 the claimant brought complaints of automatically unfair dismissal pursuant to section 103A of the Employment Rights Act 1996. Within the claim form the claimant applied for interim relief. The purpose of the hearing was to determine the application for interim relief. There is no dispute that the claimant made a timely application.

Interim Relief

4. The relevant statutory provisions are set out at section 128 of the Employment Rights Act 1996. It states

*"128(1)An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and
(a)that the reason (of if more than one the principal reason) for the dismissal is one of those specified in –*

(i)section 100(1)(a) and (b), 101A(1)(d), 102 (1), 103 or 103A ..

may apply to the tribunal for interim relief.

5. The issue to be determined upon an application for interim relief is set out in s.129 of the Employment Rights Act namely whether

“it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find that the reason (or if more than one, the principal reason) for the dismissal is one of those specified in section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A.”

6. “Likely” was held to mean by the EAT in the case of **Taplin v C Shippam Limited (1978) IRLR 50** as “a pretty good chance” of succeeding. Mr. Justice Underhill interpreted “a pretty good chance” as a significantly higher degree of likelihood than just more likely see **Justice v Sarfraz (2011) IRLR 562**.
7. The burden of proof rests upon the claimant when making the application and in a claim pursuant to section 103A of the Employment Rights Act 1996 in order to make an interim relief order the Tribunal must decide that it was likely that the Tribunal at the final hearing would find :-
(a) the claimant had made a disclosure;
(b) that he believed that the disclosure tended to show one or more of the things sets out in (a) to (f) of section 43B (1) of the ERA;
(c) that the belief was reasonable;
(d) that the claimant reasonably believed that it was made in the public interest;
and
(e) that the disclosure was the principal reason for this dismissal.
8. Protected disclosure is defined in section 43A of the ERA as a disclosure namely of information of facts as opposed to mere opinion or allegations (a disclosure may be both information and opinions and allegations) see **Cavendish Munro Professional Risk Management v Geldud (2010) ICR and Kilraine v LB Wandsworth (2016) IRLR 422**.
9. In **Chesterton Global Limited (t/as Chesterton v Nurmohamed Public Concern at Work Intervening) 2018 ICR 731** it was held if the worker subjectively believes that the information he/she discloses does tend to show one of the listed matters and a 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 reasonable.
10. The fact that the claimant may or may not be mistaken as the existence of a legal obligation on which the disclosure was based does not prevent the claimant availing himself of statutory protection (**Babula v Waltham Forest College 2007 ICR 1026**)
11. The test for automatic unfair dismissal pursuant to section 103A of the Employment Rights Act 1996 requires the public interest disclosure to be the reason or the principal reason for the dismissal as opposed to being a material influence (see **Eiger Securities LLP v Korshunova 2017 IRLR 15**).

12. The guidance given in the case of **Blackbay Ventures Limited (t/a Chemistree v Gahir 2014 IRLR 416** to the Tribunal approach to claims by employees for victimisation for having made protected disclosures is as follows :-
- (1) Each disclosure should be identified by reference to date and content;
 - (2) The alleged failure or likely failure to comply with a legal obligation or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified;
 - (3) The basis upon which the disclosure is said to be protected and qualifying should be addressed;
 - (4) Each failure or likely failure should be separately identified;
 - (5) The source of the obligation should be identified and capable of verification by reference for example to statute or regulation;
 - (6) The employment tribunal should then determine whether or not the claimant has a reasonable belief referred to in section 43B(1);
 - (7) The employment tribunal should determine whether the disclosure was made in the public interest.

Hearing

13. The Tribunal was provided with a claimant's bundle of 143 pages of documentation; a witness statement from the claimant and a skeleton argument. The respondent also provided a bundle of documents of 183 pages and a skeleton argument. The parties had exchanged skeleton arguments and agreed the law as set out above.
14. At the commencement of the hearing the claimant applied to give oral evidence on the basis lack of disclosure of documentation. This was opposed by the respondent who submitted it was unnecessary to hear oral evidence; the tribunal's task was to make a summary assessment on the written material and make no findings of fact.
15. The Tribunal declined to hear oral evidence. Pursuant to Rule 95 of the 2013 Rules it states "*the Tribunal shall not hear oral evidence unless it directs otherwise..*" There was nothing unusual at these stage of proceedings for the disclosure of documents to be incomplete. The Tribunal would not be making any findings of fact but conducting a summary assessment. In the circumstances the Tribunal determined it was not in the interests of justice to hear oral evidence.

Background

16. From 30 November 2020 until 30 September 2022 the claimant was employed as a senior civil servant under a fixed term contract as part of the U.K. Health Security agency based at Rosalind Franklin Laboratory. The claimant was tasked with logistics and supply chain issues. Overtime his role expanded so that he was looking after procurement engineering, facility management and security.

Disputes of evidence

17. The claimant's case is that some public interest disclosures were made orally at senior management meetings. There is no documentary trace of such allegations but by inference the claimant invited the Tribunal to consider the documentation and to reach a conclusion that the claimant did raise a public interest disclosure with the respondents. The respondents dispute this and state that in the claimant's role as a senior manager in a new organisation dealing with the track and tracing of the pandemic that a number of issues were discussed; discussions about matters or how to improve or implement practices does not correlate with making public interest disclosures and context must be taken into account.
18. The claimant relied upon an oral conversation with H.R. prior to the submission of his grievance on 8 September 2022 which suggested his fixed term contract would be extended. Following the submission of his grievance, he was notified on 15 September 2022 that his contract would be terminated. The respondent disputes the alleged oral confirmation of an extension of the contract stating it is at odds with the view taken by the respondent as early as May 2022 (page 117) that his contract should not be extended and that extensions to contracts are contained in documents (not by oral communications) and reliance is placed on a written communication to the claimant in February 2022 extending his contract.
19. The respondent also states that the present pleadings fail to identify with specificity the actual public interest disclosures relied upon; they are general and vague which means that the Tribunal is in some difficulty in finding that the claimant is likely to succeed in his case at trial in the absence of really knowing what the case is.
20. In considering the interim application the Tribunal takes cognisance of the dispute of facts between the parties; the lack of documentary evidence of some alleged disclosures at this time in the proceedings; the public interest disclosures are not as precisely identified as they could have been and that context on hearing all of the evidence is a matter the tribunal will take into account at the final hearing.

The claimant's case

21. Counsel for the claimant identified the following matters in his skeleton argument as public interest disclosures :-
 - (1) Concerns about the contractual arrangements;
 - (2) Disclosures at meetings about ethics of certain contractual arrangements;
 - (3) Necessity for further equipment relying upon the email to Robert Bahl at page 88;
 - (4) The level of service; equipment may malfunction so that the contract could not be fulfilled relying upon pages 90 to 96;
 - (5) Failure to declare conflicts of interest of SLT members in respect of a senior leadership meeting at page 137;
 - (6) Reference by the claimant in an email at page 100 dated 23 February 2022 to be mindful of the conflict of interest principles;

(7) Locking of RFL senior leadership team in the office; reference to the decision in an email dated 12 January 2022 page 120

(8) Data security risks associated with third party personal sitting in secure office areas – reliance on pages 98 to 99 of a report of a security assessment of the SLT area;

(9) The claimant's grievance dated 8 September 2022 page 79 where the claimant contends he has made public interest interest disclosures about a breach of legal obligations;

(10) The difference of treatment of the claimant compared to Mr. Worrall who was also investigated for security breaches but his suspension was short and allowed to return to work; the claimant's investigation was protracted and he was suspended for a long period.

22. In respect of causation the claimant relies upon the proximity in time of lodging his grievance on 8 September 2022 and being informed his fixed term contract would end on 15 September 2022; the inconsistency of the respondent informing him orally his contract would be extended prior to the lodging of his grievance and then terminating shortly after receipt of the grievance; and the continued requirement for his role yet he was terminated.

The respondent's case

23. The respondent relies upon the dispute of fact between the parties and context of the claimant carrying out a senior position in a new organisation where there was likely to be significant discussions about a number of issues as to how things should work. The respondent relied upon pages 88 and 137 as indicating the claimant was asking questions; this is not making a disclosure. Further it contends that the claimant in the course of his senior leadership role was discussing issues at pages 90 to 96, 100. It is accepted that the claimant did object to the locking of doors for fire and safety reasons and that his grievance contends he had made public interest disclosures. The respondent also argues that the claimant was investigated for making over 200 breaches of security by sending emails to his personal email; this required investigation; the claimant was suspended but having considered the claimant's mitigation he was not dismissed but provided with a written warning. If the respondent had really wanted to dismiss him from his employment for making alleged public interest disclosures they could have done so. The claimant cannot compare himself with a colleague W; he too was investigated for security breaches but found there was no case to answer. In May 2022 the respondent had already determined the claimant was not going to be retained; this was evidenced in an email from. There was no extension of his contract orally; extensions are written as his extension was in writing in February 2022. There is no causative link between any alleged public interest disclosures and his dismissal. As time passed the organisation was established and the infection rates decreased so there was a diminished need for senior people including the claimant; the organisation made the claimant along with redundant.

Conclusions

24. The Tribunal makes a summary assessment on the material before it taking account that the claimant bears the burden of proof of establishing he is likely to

establish his claim at the final hearing in the sense that he has “a pretty good chance” as a significantly higher degree of likelihood than just more likely see **Justice v Sarfraz (2011) IRLR 562**.

25. The Tribunal is not persuaded that the claimant is likely to establish he made all of the disclosures he alleges which meet the definition of **Kilraine**. Although there is no rigid dichotomy between disclosing information and making an allegation the evidence shown to the Tribunal could easily be suggested as to be simply questions asked by the claimant and/or discussions he was engaged in at his senior leadership level. Context will be taken account of at final hearing; the claimant was in a senior leadership role; in a new organisation in an unprecedented situation of a pandemic; there was bound to be discussions about a number of different topics on how process could be improved which do not satisfy the definition of “disclosure of information” or a mixture of “disclosure of information and allegations”.
26. Turning to the points raised by claimant’s counsel before the Tribunal there is a factual dispute between the parties as to whether any oral disclosures (not evidenced in the documentation) were made by the claimant. This presents an evidential risk whereby the Tribunal cannot say it is likely that the claimant will establish he made such disclosures.
27. In respect of the alleged there was a necessity for further equipment, the claimant relies upon an email to Mr. Bahl at page 88. However, the content of the email is posed as a question; the Tribunal is not persuaded this would likely to be found as a disclosure. In regards to the alleged disclosure about level of service whereby the equipment had malfunctioned the claimant relies upon page 90 to 96. The Tribunal does not find it is likely that the claimant will establish that this is a protected disclosure; the general context must be considered namely that the claimant was a member of the senior leadership team and was discussing issues in his senior role as a leader.
28. In respect of a failure to declare a conflict of interest, the claimant relies upon page 137. However the claimant in this document again poses a question; it was an expectation that a senior individual such as the claimant would discuss and raise matters. The Tribunal can not say it is likely he would establish this was a disclosure of information or an allegation within the meaning of **Kilraine**. For this point (declaration of conflict of interest) the claimant also relies upon the email at page 100 dated 23 February 2022; within this email the claimant reminds individuals to be mindful of the conflict of interest principles; this looks rather more like guidance from an experienced senior leader as opposed to a disclosure of facts or the making of allegations in the **Kilraine** sense.
29. The respondent does not dispute that the claimant raised concerns about the locking of the senior leadership team in the office for health and safety reasons and that this could amount to a public interest disclosure that could be protected. The Tribunal finds that this is likely to be found to be a protected interest disclosure. Furthermore, the Tribunal finds that it is likely that the claimant will establish he made a public interest disclosure in respect of data security risks associated with third party personnel sitting in secure office areas. At pages 98 to 99 of the report commissioned by the claimant the security

assessment of the senior leadership area stated “it became apparent the request to install access control readers on each door leading into SLT area had been discussed at SLT meetings”. Furthermore, in his grievance dated 8 September 2022 at page 79 the claimant expressly contended that he had made public interest disclosures about breaches of legal obligations.

- 30.** However even if the claimant is able to establish taking the claimant’s case at its highest he made protected interest disclosures as contended, the Tribunal does not find it is likely that the reason or principal reason for dismissal was the making of such disclosures. The claimant was investigated for a serious security breach; he passed over 200 emails from his work email to his personal email. This was a gross misconduct offence. However, the respondent did not dismiss the claimant; it was an opportunity to do so if it was seeking to remove him from the organisation for making public interest disclosures. Instead, the respondent gave him a final written warning.
- 31.** The Tribunal is not persuaded that the timing of the decision to dismiss means it is likely that the reason of principal reason for the dismissal was his making protected interest disclosures. On 8 September 2022 the claimant raised a grievance; he then says he was told on 15 September 2022 he was to be dismissed (despite orally having been told his contract was to be extended). However, the previous extension of his contract made in February 2022 was in writing and there is a dispute of fact between the parties as to whether the claimant was orally told his contract would be extended. Further in May 2022 prior to the lodging of his grievance the respondent had determined that his contract should not be further extended. In addition there was a reduced need overtime for senior individuals such as the claimant. As the infection rates reduced the size of the senior leadership team reduced overtime. The claimant was not the only senior person to have their contract ended. The former operations director left in August 2021; the Head of IT left on 20 July 2022 and former HR director left on 27 October 2022.
- 32.** Taking account of the material before it, the Tribunal cannot find that the claimant is likely on the determination of his complaint to find the reason for his dismissal on 30 September 2022 was that he had made protected interest disclosures. In the circumstances the Tribunal cannot grant the relief sought.
- 33.** In the circumstances the parties agree that the Tribunal has no jurisdiction to determine this claim.

Employment Judge Wedderspoon

6 November 2022

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.