



EMPLOYMENT TRIBUNALS

Claimant:

Mr A T Lewis

v

Respondent:

TSG Building Services Plc

Heard at: Watford (via CVP)

On: 27 April 2023

Before: Employment Judge Fredericks

Appearances

For the claimant: In Person

For the respondent: Mr R Glendinning (CFO at the respondent)

JUDGMENT ON INTERIM RELIEF

The claimant's application for interim relief is refused.

REASONS

Introduction

1. These written reasons are produced at the claimant's request following my refusal of his application for interim relief in respect of his claim. The claimant represented himself at the hearing and the respondent was represented by its CFO and Chairman, Mr Glendinning. The claim was brought on 4 April 2023, and so the respondent has not yet filed its ET3. The only documentation available to me today was the claimant's ET1. This is usual for determination of interim relief applications. Given the nature of the application and the stage in proceedings when it is heard, there is usually very little information upon which to make a determination. Determination is naturally a broad brush assessment based on what is available.
2. Refusal of this application should not be taken as a ruling on the claimant's claim itself. It might be that, once all of the evidence is known and tested, the claimant is successful in his claim. For the same reason, nothing in these reasons should be interpreted as a factual finding which binds the Tribunal going forward. I have not heard or tested sworn evidence when making this assessment, and it might be that some of the conclusions I have drawn in this assessment are not sustained when the Tribunal has the benefit of hearing that evidence.

The claimant's engagement and submissions of the parties

3. The claimant was engaged by the respondent as a gas services engineer from 7 March 2023 to 31 March 2023. His role involved conducting landlord safety checks at gas users' homes, and taking appropriate action where he found the gas situation to be unsafe. He told me that he was a self-employed contractor but that he considered that he should be treated as an employee because of the agency worker exception allowing agency workers to benefit from whistleblowing protection. He also signposted me in his submissions to *Autoclenz Ltd v Belcher [2011] UKSC 41*, which indicates that he may seek to argue that he was an employee of the respondent.
4. The claimant brings a claim which he describes as unfair dismissal following his whistleblowing (protected disclosures) about health and safety issues at the respondent, specifically that its practices compromised gas safety at users' homes. His ET1 does not plead the whole claim and is likely to require amendment. He lists the issues encountered which he considers unsafe, but he does not link those issues to any detriment and does not outline how it led to his dismissal. He has ticked the 'unfair dismissal' box but has not provided any narrative about that. In this hearing, he read an e-mail to me which implies that his dismissal followed the respondent being unhappy with his response to what he considers to be safety issues encountered whilst working for the respondent.
5. In reply, the respondent asserts that the claimant was a self-employed contractor who was supplied to them through a recruitment agency. One of the individuals that the claimant references as being involved with his dismissal works at that agency. The respondent told me that the claimant was engaged as "*Ashley Lewis trading as Jan Gas and Electrical Services Limited*". The claimant confirmed in this hearing that this is his company, and he was wearing that company's t-shirt in the hearing today. The respondent also outlined that it had competence concerns about the claimant's work and, in particular, that he had disconnected ten appliances in his short engagement, which is far in excess of the annual rate for its regular engineers (which I was told is around 19 in total for all combined).
6. Over the course of the submissions, I became concerned about whether the claimant's case is that he had indeed made protected disclosures at all. When he complained about his supervisor remonstrating with him about disconnecting a boiler, he said the respondent found out because of a routine entry he had made on the case management system updating the file. He also mentioned providing updates about the work he had completed on a group Whatsapp operated by the respondent. The respondent told me that the claimant had not mentioned 'whistleblowing' or raised matters 'in the public interest' until after his engagement had ended. The claimant is, in Mr Glendinning's view, a disgruntled self-employed contractor whose engagement was terminated lawfully.

Legal principles

7. Interim relief is an interim remedy provided for by *section 128 Employment Rights Act 1996*, which says:

“an employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and... that the reason (or if more than one the principle reason) for the dismissal is one of those specified in –

Section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or

Paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992...

may apply to the Tribunal for interim relief.”

8. Section 129 of the same Act says that the interim relief procedure applies when *“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 principle reason) for the dismissal is [one of the reasons outlined above]”*.
9. Consequently, to even bring this application, the claimant needs to have been employed by the respondent as an employee. Further, to be successful in this application, the claimant has to show it is *“likely”* that the Tribunal on determining the claim will find that the reason for dismissal was the relevant one – in this case that the claimant made protected disclosures. *“Likely”* has been interpreted to mean having a *“pretty good chance”* of success. A pretty good chance of success has in turn been held (in Ministry of Justice v Sarfraz [2011] IRLR 562) to mean *“a significantly higher degree of likelihood”* rather than *“simply more likely than not”*.

Determination of application

10. The claimant must establish today that he was employed by the respondent to mount this application successfully. This is challenging for the claimant in this case, because he accepts that he was placed by an agency, works through his own company, and referred to himself several times as having been a ‘self-employed contractor’. He also mentioned being paid by the job rather than being paid a salary through PAYE.
11. Even setting that problem to one side, the claimant would need to satisfy me that he has a pretty good chance of being successful in his whole claim. This means that I need to consider there is a pretty good chance of the Tribunal finding that:-
 - 11.1 he was employed by the respondent;
 - 11.2 he made disclosures to the respondent which were protected; and
 - 11.3 the respondent dismissed him because of those disclosures.
12. The picture is further complicated today because the claimant’s pleadings do not currently articulate his whole claim, and so it is likely that he will need to provide further particulars if allowed to do so.
13. For me to consider that the claimant has a pretty good chance of being successful in all of his claim, I need to be able to see a relatively straight line through to that end without hurdles which appear inherently uncertain. The claimant’s case is very fact specific, including grasping the thorny issue about

the nature of his engagement and his employment status. These assessments rely significantly on evidence provided through disclosure and at a hearing. I do not consider that the claimant has a pretty good chance of establishing his standing to bring an automatic unfair dismissal claim, based on what I have seen and heard today.

14. Further, I do not consider, at this stage, that the claimant has a pretty good chance of establishing that he made protected disclosures as he contends he did. The claimant's own submissions today tend to cast doubt on that, and the respondent's submissions indicate that there will be a dispute about the nature of any information disclosed at the time it was disclosed.
15. Finally, I do not consider, at this stage, that the claimant has a pretty good chance of establishing that he was dismissed due to his protected disclosures (assuming that is what they were). The respondent says that it had concerns about the claimant's competence to perform the role required, which was being managed during his engagements (and which led to the assessments the claimant made about the issues he was encountering). The claimant will need to show that the reason or principal reason for dismissal is that he made protected disclosures. It appears the respondent will advance other justification for taking the actions it did, and the Tribunal will need to consider that and balance it against what the claimant evidences in order to make its decision. I do not have that evidence at this stage.
16. In conclusion, I do not consider that the claimant is 'likely' to be successful in his claim. I must therefore refuse this application.

Employment Judge Fredericks

Date: 27 April 2023

Sent to the parties on:

29.4.2023

For the Tribunal Office:

GDJ