THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs S Messi	**v**	**Alvarez and Marshal Europe LLP**

Heard at: London Central **On**: 2 October 2023

Before: Employment Judge Glennie

Representation:
Claimant: In person
Respondent: Mr E Kemp (Counsel)

JUDGMENT ON INTERIM RELIEF APPLICATION

The judgment of the Tribunal is that the application for interim relief is refused.

REASONS

1. By her claim to the Tribunal presented on 23 August 2023 the Claimant made complaints of automatic unfair dismissal contrary to section 103A of the Employment Rights Act 1996 and detriment for making protected disclosures contrary to section 47B of the Act. She also included an application for interim relief.

2. The legal principles applicable to the application for interim relief are as follows. Section 128 of the Employment Rights Act 1996 includes the following provision:

   (1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and –

   (a) That the reason (or if more than one the principal reason) for the dismissal is one of those specified in -

(i) Section 100(1)(a) and (b)……..section 103A..

may apply to the tribunal for interim relief.

3. Section 129 of the Act provides that:

(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find –

(a) That the reason (or, if more than one, the principal reason) for the dismissal is one of those specified in –

(i) ……section 103A...

4. The Claimant's application relies on her case as set out in the claim form in the following terms:

"The principal reason for my dismissal is because I made protected disclosure to the ICO on 22.8.2023 for GDPR breach who shared my sensitive information without my consent. 2. Raised concerns of health and safety to the HSE on 22.8.2023 and the EHRC for failing to comply with the Equality Act 2010."

5. The Claimant did not make any reference to the HSE complaint in her written representations or in the course of the hearing. Mr Kemp observed that he took it that the Claimant was not relying on a disclosure to the HSE, to which the Claimant made no objection. I was not taken to any complaint to the HSE.

6. In her written submissions the Claimant referred to a disclosure to the EHRC and in her oral submissions said that she had sent an email to the EHRC stating that the Respondent was not complying with the Equality Act. I was not provided with a copy of the email, and was not therefore in a position to form any view of its contents.

7. The effect of section 129 is that, to succeed in an application for interim relief, a claimant must show that it is likely that the Tribunal will ultimately find in her favour on each of the elements necessary for a complaint of automatic unfair dismissal. In the context of the present case, these are:

7.1 That as a matter of fact, she made the disclosure relied on.

7.2 That the disclosure satisfies each element of a qualifying disclosure under section 43B(1) of the Act.

7.3 That the disclosure satisfies each element of a protected disclosure under the relevant sections (in this case, potentially section 43F) of the Act.

7.4 That the disclosure was the sole or principal reason for the dismissal.

8. The relevant elements of section 43B are as follows:

(1) …..a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:

(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.

9. Section 43F provides that:

(1) A qualifying disclosure is made in accordance with this section if the worker –

(a) Makes the disclosure to a person prescribed by an order made by the Secretary of State for the purposes of this section, and

(b) Reasonably believes –

(i) The relevant failure falls within any description of matters in respect of which that person is prescribed; and
(ii) That the information disclosed, and any allegation contained in it, are substantially true.

10. In **Ministry of Justice v Sarfraz [2011] IRLR 562** Underhill J confirmed that "likely" in section 129(1) should be understood as meaning a "pretty good chance" of success, which in turn means "not simply more likely than not – that is at least 51% - but connotes a significantly higher degree of likelihood." In **London City Airport Limited v Chacko [2013] IRLR 610** Mr Recorder Luba QC said that what is required "is an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim."

11. The Claimant's case is that on 21 August 2023 she sent a fit note marked "private and confidential" to specific addresses within the Respondent's organisation, and that one of the recipients forwarded this to someone who then shared it with other individuals, without the Claimant's consent. On 22 August 2023 the Claimant sent an email to the Information Commisioner's Office (ICO) at page 51 of the bundle provided by the Respondent which read:

"I am raising concerns in good faith that Alvarez and Marshal breached their own data protection policy and breached confidentiality law when Samantha disclosed my sensitive information to HR WITHOUT my consent. I sent an email specifically requesting not to disclose my sensitive information without my consent and this was NOT acknowledged causing me anxiety, panic attacks and being nervous.
See attached evidence [evidently including an email of 21 August 2023 attaching the fit note marked "not to disclose without my consent" and referring to reasonable adjustments and the fit note]……"

12. I have had to consider the application of the test of whether it is "likely" (in the sense explained above) that the Tribunal will find in favour of the Claimant on the various elements of her claim. I should emphasise that, where I express the view that a particular finding is not likely to be made, that does not mean that I regard it as impossible, or fanciful, but only that I do not regard it as likely.

13. I have seen no evidence of a disclosure to the HSE or the EHRC. On the material before me, I do not find it likely that the Tribunal will conclude that such disclosures were made. Furthermore (as I have not seen such disclosures as may have been made) I cannot say that it is likely that a Tribunal will find that they contained qualifying disclosures.

14. I have seen the email relied on as a disclosure to the ICO. Mr Kemp submitted that this was insufficiently specific as to the legal obligation involved. I concluded, contrary to this, that it was likely that a Tribunal would find that the reference to breaching confidentiality law and the description of what had happened gave a sufficient indication of the breach of legal obligation relied upon.

15. I do not, however, consider it likely that a Tribunal will find that the Claimant believed that the disclosure was made in the public interest, or that any such belief was reasonable. To the extent that it might be said that there is, in a general sense, a public interest in organisations or individuals complying with their legal obligations, the "public interest" element in section 43B must mean more than that, otherwise it would always be satisfied and would be a redundant requirement. I do not consider that a Tribunal is likely to find that the Claimant believed that she made the disclosure in the public interest, as the sharing of information that she wished to be kept confidential was a matter of concern to her as an individual, and not obviously a matter of concern to the public. For essentially the same reason, I do not consider it likely that, if a Tribunal were to find that the Claimant had this belief, that it was reasonable for her to believe it.

16. That finding means that the interim relief application fails, as I have found that it is not likely that the Tribunal will find in the Claimant's favour on an essential element of the claim. I will, however, deal also with the other elements.

17. Although Mr Kemp also submitted that it was not likely that the Claimant would be able to satisfy the requirements of section 43F, I found it likely that she would. So far as I can judge from the information available to me, the information contained in the email to the ICO was substantially true, meaning that it is likely that a Tribunal would find that the Claimant reasonably believed it to be true. I also consider that the matter complained of seems to fall within the responsibility of the ICO, such that it is likely that the Tribunal would find that the Claimant believed that it did, and that such a belief was reasonable.

18. I do not, however, consider that it is likely that a Tribunal will find that the making of the disclosure was the sole or principal reason for the Claimant's dismissal. It is true that the Claimant sent Ms Daly a copy of her email to the ICO, and that Ms Daly was one of those present when the decision was made to dismiss the Claimant. That said, I do not find it likely that a Tribunal will ultimately decide that the disclosure (whether it was a protected disclosure or not) was the sole or principal reason for the dismissal, for the following reasons:

    18.1 Beyond the point that Ms Daly knew about the disclosure, I have not seen anything that suggests that it was a factor in the decision to dismiss the Claimant.

    18.2 The letter from Ms Tobin notifying the Claimant of her dismissal contains what I consider to be understandable reasons for that decision. I do not regard the absence of any reference to the disclosure as particularly significant: if it had been a factor in the decision, one would not expect the employer to say so. The letter, however, relies on the role being office based, and the Claimant initially seeking to work from home because of builders working there, and subsequently sending a fit note and a request to work from home as a reasonable adjustment. The letter continued that the conflicting explanations for the request to work from home indicated a lack of candour on the Claimant's part. The letter also stated that the Claimant had failed to give details of her previous employers, as required by the Respondent.

    18.3 I emphasise that I am not deciding that the Respondent would have been in any sense "right" to decide to dismiss the Claimant for these reasons, but I find it understandable that an employer might make such a decision. These are not the sort of stated reasons that lead me to think that there must have been something more to the reason for the decision than the Respondent said at the time.

    18.4 The Claimant covertly recorded the meeting on 23 August, referred to in Ms Tobin's letter, and following which the decision to dismiss her is said to have been made. The Claimant asked me to listen to this, and I played it through twice before reaching my decision. Ms Tobin began the meeting by saying that the Claimant was meant to start on

Monday (21 August). The Claimant said she was not well, that she was seeking adjustments, in particular working from home. Ms Tobin said that part of the role was working from the office. The Claimant said that she did not understand why her fit note had been shared, and that she had been pressured to come to the meeting without a companion. The discussion then returned to adjustments and working from home. Although the Claimant made a single reference to the sharing of the fit note, none of this suggests that Ms Tobin, or the Respondent more generally, had the complaint to the ICO in mind at this time. The discussion reflected the Respondent's stated concern about the issue over working from home.

18.5 The Claimant sent to the Tribunal 3 further documents in the course of the hearing. All were from 22 August 2023. One was an email from Ms Daly noting that the Claimant had not attended her induction and asking her to attend a Teams meeting the following day (as in fact happened). In my view, this did not add anything to the issue about the reason for the dismissal. The second (from earlier the same day) was an email from the Claimant to Ms Daly and others asking for an update on reasonable adjustments, also asking why additional background checks were being requested, and asserting "is in indication of retaliation and victimisation from raising….." This could be taken as showing that the Claimant had in mind potential or actual retaliation or victimisation as a result of making disclosures, but it does not tell me anything about the Respondent's reasons for dismissing her. The third was an email from the Claimant in reply to the first from Ms Daly which contained nothing of significance to the question of the Respondent's reasons for dismissing the Claimant.

19. Ultimately, I find that it is not impossible that, having heard all of the evidence, a Tribunal may find that the disclosures were at least the principal reason for the dismissal. I cannot, however, say that this is likely. There is no material which could lead me to that conclusion. This in itself is also sufficient to cause me to find that it is not likely that a Tribunal will find that the reason or principal reason for the dismissal was that the Claimant had made a protected disclosure.

20. The application for interim relief is therefore refused.

Employment Judge Glennie

Dated: ……..…13 October 2023……..……..

Judgment sent to the parties on:

13/10/2023

For the Tribunal Office