EMPLOYMENT TRIBUNALS

Heard at: Ashford (by video) **On:** 3 June 2024

Claimant: Mrs Sandra Messi

Respondent: Change, Grow, Live

Before: Employment Judge Fowell

Representation:

Claimant In person

Respondent Jonathan Davies of counsel

JUDGMENT ON A PRELIMINARY ISSUE

1. The application for interim relief is dismissed.
2. The claimant shall pay the respondent's costs of the application in an amount to be assessed.

REASONS

Background

1. Mrs Messi brought her claim on 2 May 2024. It included an application for interim relief. Such applications are dealt with urgently and notice of today's hearing was sent to the respondent by letter on 15 May 2024. Because of the short timescales it is sometimes the case that the respondent is not represented at such hearings, and it was therefore no great surprise that Mrs Messi was the only one on the video call when the hearing began at 10 am this morning. However, she told me that she had had emails from the respondent's solicitors, DMH Stallard LLP, and that they had provided a bundle for the hearing. That news led to a series of short adjournments while the position was investigated.
2. It became apparent that two emails had been sent by DMH Stallard (via one of the partners, Mr Bellm) at about 5 pm on Friday evening last week, ahead of this Monday hearing. One of them attached a bundle of 278 pages, a witness statement from Ms Adamson and a skeleton argument. Unfortunately the case

number was not correctly stated in the header and so those emails were not picked up and forwarded to me in time.

3. The other email revealed that Mr Bellm expected the hearing to be in person. The hearing was in fact changed to a remote hearing at the request of Mrs Messi. Further enquiries were made to see if anyone for the company was in attendance at the Croydon hearing centre, and they were - Mr Davies, a colleague of his, Ms Goodman, and Ms Adamson.

4. Arrangements were made to install them in a hearing room with video access, which took some time. It was not achieved until after 11 am, which made serious inroads into the time available for this three-hour hearing.

5. My initial view was that it was unlikely that we could go ahead with the hearing in the time remaining, given that I had not had time to look at the bundle and had not seen the skeleton argument or witness statement. (Mrs Messi had emailed the bundle to me by that stage). However, Mr Davies' preference was to proceed with the hearing on the basis that the respondent's case was very simple: Mrs Messi had not been dismissed and so could not claim interim relief.

6. Mrs Messi had been reluctant to adjourn before the respondents joined, but changed her position at this point and felt that it was inappropriate to have what she described as a mini-trial. I took the view that the question of whether or not she had been dismissed was straightforward enough to address in the time available, so I decided to deal with the application on that basis.

The essential facts

7. It is agreed that on 2 May 2024 Mrs Messi sent an email making various allegations. The email itself is in the bundle at page 96. She stated that she was raising concerns in the public interest, in good faith, and in the belief that the respondent was not complying with its legal obligations, in particular on GDPR. Attached to it were about 20 pages of material in support of her allegations of impropriety. The company's position is that on 7 May 2024 she was suspended because of the breaches of confidentiality involved in this disclosure and that her access to the company's computer systems were disabled.

8. Mrs Messi has not provided any narrative account of the events in question, apart from the brief details in the claim form, and I attempted to explore with her why she says she was dismissed rather than being suspended. She said that she had a telephone conversation with someone in the IT department on 2 May 2024 and that that the person informed her that the Finance Manager, Mr Gallagher, was dismissing her or wanted to dismiss her, and she took from that that she was in fact dismissed.

9. I was keen to establish whether there was anything in writing from her after that conversation, such as an email to the company protesting at being dismissed

and making the obvious connection with her email of 2 May. She identified one particular email, and only one, which sent to the Tribunal over the weekend, and which had 22 attachments. On examination however, these were all the attachments which accompanied her initial disclosure email on 2 May, so there was nothing in writing between 2 May and 7 May to suggest at the time that she believed she had been dismissed.

10. The only exception is her tribunal claim, which was submitted on 3 May. In that she stated that she had been dismissed for making a protected disclosure. It did not give the date of dismissal and does not explain how it came about.

The appropriate test and approach

11. In **Al Qasimi v Robinson** EAT 0283/17 the correct approach to such applications was summarised by Her Honour Judge Eady QC as follows:

> 'By its nature, the application had to be determined expeditiously and on a summary basis. The [tribunal] had to do the best it could with such material as the parties had been able to deploy at short notice and to make as good an assessment as it felt able. The employment judge also had to be careful to avoid making findings that might tie the hands of the [tribunal] ultimately charged with the final determination of the merits of the points raised. His task was thus **very much an impressionistic one**: to form a view as to how the matter looked, as to whether the claimant had a pretty good chance and was likely to make out her case, and to explain the conclusion reached on that basis; not in an over-formulistic way but giving the essential gist of his reasoning, sufficient to let the parties know why the application had succeeded or failed given the issues raised and the test that had to be applied.' [Emphasis added]

12. This test of a 'pretty good chance' derives from **Taplin v C, Shippam Limited** [1978] ICR 1068. It has been considered more recently by the Employment Appeal Tribunal in **Ministry of Justice v Sarfraz** 2011 IRLR 562, EAT. There, Mr Justice Underhill commented that this form of words was not very obviously distinguishable from the formula 'a reasonable chance of success', which was rejected in that case. In his view, the message to be taken from **Taplin** was that 'likely' does not mean simply 'more likely than not' but connotes a significantly higher degree of likelihood, i.e. 'something nearer to certainty than mere probability'.

13. So I have to form a view on the limited material available whether, applying this guidance, there is a pretty good chance that Mrs Messi was dismissed on 2 May, as she alleges. It is not the case, as she submitted, that I have to take her case at its highest.

14. If she was dismissed, it must also follow that the suspension letter of 7 May 2024, which is also in the bundle, is a sham and that the company is pretending not to have dismissed her and are now going through a fair process. That is of course possible but it would be an unusual feature of the case.

15. There is in fact little material on which I could conclude that Mrs Messi was dismissed. There is certainly nothing in writing. No P45 has been issued, and she received a pay slip for May 2024, albeit mainly for sick pay, for reasons which are unclear.

16. In the ordinary course of events it is unlikely that someone in the IT department would have the authority to dismiss her, or would choose to pass on a rumour or message to the effect that she had been dismissed or even was likely to be dismissed, and if that had happened it also seems to me very likely that she would immediately have protested by emailing the company. In those circumstances I cannot see that Mrs Messi's case approaches the required threshold of a pretty good chance of success.

17. It is not therefore necessary to consider the other elements of a protected disclosure claim. For those reasons the application is dismissed.

Costs

18. Mr Davies applied for the respondent's costs of this hearing, in the sum of £8,176. That application had been set out in the skeleton argument, which I have not seen, but which had been sent to Mrs Messi. He accepted that the accompanying breakdown of costs had not been provided to her.

19. The main basis of the application is that this is the 11th application for interim relief which the company is aware of. Details of the judgments in the other ten cases were included in the bundle. Essentially therefore, he submitted that the claimant has made a practice of making whistleblowing allegations and then making claims for interim relief, all of which have been refused.

20. He drew my attention to some in particular. The last one was made as recently as 23 April 2024. The employer on that occasion was Castlebridge Tours Limited (2213167/2024) and the fact that the application was made indicated that Miss Messi regarded herself as employed by them at or shortly before that time, whereas in fact she was or ought to have been working for the respondent. Another was refused in Edinburgh (8000219/2024) after a hearing on 19 March 2024. The employer on that occasion was User Testing Limited. Suffice to say that Mrs Messi is familiar with the principal legal cases in this area.

21. Mr Davies also referred me to her application for interim relief against Precise Media Monitoring Limited (2200391/2023), heard on 21 February 2023, which led to an application for costs. Employment Judge Heath refused the application but stated:

> "17. I have no doubt that any competent legal representative would have advised the claimant against bringing an application for interim relief. I do not judge the claimant against the standard of a professional representative, however. A litigant in person can often lack objectivity about their own case, can become highly emotionally invested in it and can become highly suspicious about what their former employer or legal representatives may say about the strength of their case.

> 18. From the documents I saw during the interim relief application, my impression was that the claimant is very invested in her claims. She probably lacks objectivity about them, and her pursuing her application for interim relief in spite of the respondent's solicitors' reasonable observations about the strengths of her application is understandable.
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> 19. There is considerable force in the respondent's solicitors' suggestion that as an experienced litigator the claimant should have known that she was pursuing a hopeless application. But as I have observed, she is very invested in these claims and probably lacks objectivity about them. I suspect that her previous experience counts for little in how she views her present claims.
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> 20. This probably comes as cold comfort to the respondent, but I would have (subject to means, about which I know practically nothing) in all likelihood made an award of costs against the claimant had she been represented. However, I do not consider that in this instance the claimant's conduct passes the threshold of unreasonableness for me to consider whether to exercise my discretion to make an award of costs.

22. Apart from the reference to being an experienced litigator there is no mention in this decision of previous applications for interim relief, and these applications are by no means the full extent of the number of claims presented by Mrs Messi.

23. The Employment Tribunals Rules of Procedure, at paragraph 76(1), provide that a tribunal *may* make a costs order and *shall* consider whether to do so where it considers that:

    a) a party has acted vexatiously, abusively, disruptively or otherwise unreasonably in either bringing the proceedings… or the way that the proceedings… have been conducted; or

    b) any claim or response had no reasonable prospect of success. …

24. Mr Davis relied squarely on the first ground, that the application was vexatious, rather than on the prospects of success. I have to agree. Applications for interim relief are relatively rare. To have brought so many, in so short a space of time, against so many employers, and to have had them all rejected indicates that this is a scheme which Mrs Messi is engaged in rather than any genuine pursuit of justice. This is in my view a plainly vexatious application and, it follows, totally without merit.

25. Accordingly I am obliged to consider whether to award costs. Given the previous warning by Employment Judge Heath on this aspect, and the pattern of applications which has been exposed by the respondent for this hearing, only one conclusion is possible, that costs should be awarded.

26. The amount of those costs cannot however be determined at this hearing in the time remaining and I have not been provided with a copy of the relevant schedule. That will need to be summarily assessed on the standard basis, i.e. an assessment must be made of the costs reasonably and properly incurred in

connexion with the application, with the benefit of any doubt being resolved in favour of the claimant.

27. The following directions will apply.

a) the respondent is to supply a copy of its schedule of costs to the claimant within seven days.

b) the claimant is to make any written submissions to the tribunal on that schedule and supply any documents (including any submissions or documents in relation to her ability to pay) within 14 days. If she wishes to have a further hearing at which to make representations over the amount of costs to be awarded she should say so in those submissions.

Footnote

28. There is a right of appeal to the Employment Appeal Tribunal if this decision involves a legal mistake. There is more information here https//www.gov.uk/appeal-employment-appeal-tribunal. Any appeal must be made within 42 days of the date you were sent these written reasons.

29. There is also a right to have the decision reconsidered if that would be in the interests of justice. An application for reconsideration should be made within 14 days of the date these written reasons were sent.

Employment Judge Fowell

Date 3 June 2024

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/