



EMPLOYMENT TRIBUNALS

Claimant:
Mr R Morla

v

Respondent:
The Rank Group Gaming
Division Ltd

PRELIMINARY HEARING

Heard at: Reading

On: 3 February 2017

Before: Employment Judge J Hill

Appearances

For the Claimant: In person

For the Respondent: Mr D Massarella (Counsel)

JUDGMENT ON APPLICATION FOR INTERIM RELIEF

1. The application for interim relief is refused.

REASONS

1. In a claim presented on 12 January 2017, the claimant sought interim relief in relation to his claim of dismissal on the grounds of public interest disclosure. The effective date of termination was 6 January 2017. The claim was therefore presented within the prescribed time limit for pursuing such an application.
2. For the purposes of this hearing, I had before me the following documents: an opening skeleton argument prepared by the respondent which helpfully set out the law relating to interim relief; a bundle of documents prepared by the respondent which included draft witness statements; a bundle of documents prepared by the claimant; and written submissions on the application on behalf of the respondent. I heard oral submissions from the claimant.

How should an application for interim relief be approached?

3. Under section 128(1)(a)(i) of the Employment Rights Act 1996, an employee may apply for interim relief if he has presented a complaint to the tribunal that he has been unfairly dismissed and the reason or principal reason for his dismissal was that he had made a qualifying protected

disclosure. Interim relief should be ordered if it appears likely that on determining the complaint, the tribunal will find that the reason or principal reason for the dismissal was for the reason of making a protected disclosure.

4. In the case of Taplin v C Shipham Ltd [1978] IRLR 450, “likely” has been defined as meaning “a pretty good chance of success”.
5. Guidance has been given in a number of cases as to how to address an interim relief application. It is based on untested evidence, i.e. based on submissions only. I must set out a summary of the basis of the material before me and identify why I reached the view I did.
6. The burden of proof is on the claimant throughout the process.
7. The claimant was employed for only three months by the respondent. In order to pursue a claim of unfair dismissal, he must rely on a ground other than section 98 of the Employment Rights Act 1996. This claimant relies on section 103A of the ERA. In order to succeed, the claimant must show that the reason for his dismissal is because of his whistleblowing. It is not sufficient for him to demonstrate that it was part of the reason.
8. In order for the whistleblowing to form the reason for the dismissal, it is necessary that the individual dismissing officer’s decision was made because of the whistleblowing.
9. Within the bundle of documents produced by the respondent were two witness statements from Mr Ambersley and Mrs Bingham. These statements took me through the chronology of the events as far as the respondent was concerned that affected the claimant’s brief period of employment with the respondent.
10. In his oral submissions, the claimant went through the same process. From this information and the documentation produced to me, I gleaned the following.

The events leading to the dismissal

11. On 3 October 2016, the claimant was employed by the respondent as a data architect. His line manager was Mr Ambersley. Ms Bingham is the company secretary. She has responsibility for the respondent’s whistleblowing policy, known as “speaking up”.
12. The respondent’s terms and conditions of employment were set out to the claimant in a letter of 20 September 2016. This was the job offer and it said:

“Your role is also subject to satisfactorily completing the three month probationary period... If at the end of the probationary period the company considers that you have failed to reach the level of competence required to

successfully carry out the position, your contract of employment may be terminated with notice.”

13. The claimant signed the written contract sent to him on 20 September 2016.
14. The probationary period had three stages: a four week review; an eight week review; and a twelve week review. The claimant asserted that he was advised that the probationary process was a tick box exercise. The respondent says that this is an implausible argument given such a structured process.
15. When the four week probationary review meeting was held on 14 November, the claimant was marked as “improvement required” in relation to attendance as the claimant had worked from home on a number of occasions without gaining Mr Ambersley’s prior agreement. Mr Ambersley noted that having spoken to him about it, the claimant recognised that working from home was not applicable.
16. Prior to the eight week review, Mr Ambersley says that he held an informal meeting with the claimant on 25 November 2016 at 12.30 pm. The claimant asserts that the meeting that was held on that day was not as the respondent says to discuss the upcoming probation review but was to discuss the data breaches that had taken place – see para. 20 below.
17. I note that there is an email of 28 November 2016 with which the proposed probation report is sent to the claimant which states:

“Further to our discussion on 25 November regarding recent observations on your probation, please see attached report. You will recall we covered off: email to facilities, curt emails, contributions to meetings, resting eyes for a noticeable length of time, engaging the team, personal mobile phone distractions. I regret that it is not as positive as you and I would like it to be. However, I will continue to support you as much as I can to turn this around.”
18. On 1 December 2016, the claimant attached his response to that report.
19. The respondent relies on the fact of the response to say that the claimant is wrong in saying that the meeting was held on 25 November was about data leakages and/or breaches. They say it is clear that the claimant, by simply returning the probation report, accepted that what Mr Ambersley put in his email of 28 November correctly represented the discussion that had taken place on 25 November.
20. On 25 November at 16.18 pm, the claimant sent an email to Ms Bingham under the “speaking up” policy, setting out concerns about data scientists travelling with laptops on trains and senior management’s risks because of data protection law breakages.
21. At the end of that email, the claimant said: “Please keep my details anonymous as required. Am happy to be identified if full protection is

granted.” Ms Bingham confirmed that she would not reveal the claimant’s identity and asked for more information. A correspondence then ensued.

22. It is the respondent’s position that having received the claimant’s email, Ms Bingham endeavoured to set up a meeting with him and another employee. She asked Mr Ambersley if she could meet with the claimant and another member of staff using a pretext to expand her knowledge of data protection issues. There is an email trail to that effect.
23. On 1 December, the claimant emailed Ms Bingham asking her if at the proposed meeting she would ask him a particular question rather than his having to raise it.
24. On 1 December, Mr Ambersley held the eight week review. Mr Ambersley ensured that present at the meeting was Ms Lambourne of HR who took a note. The respondent drew to my attention that within those notes, Ms Lambourne had noted Mr Ambersley put to the claimant that it would be hard for him to improve if he were not prepared to accept the criticisms and comments made about him.
25. On 5 December, Ms Bingham met with the claimant and another member of staff. It was that other member of staff, Mr Hughes, who raised an issue regarding a recent potential data breach. At that time, Ms Bingham had not disclosed to any other member of the organisation the identity or gender of the whistleblower.
26. On 16 December, Ms Bingham reassured the claimant at a personal meeting that the only person who was aware of the existence of a whistleblower at all was the Director of Legal Services and he was unaware of the gender of that person.
27. On 17 December 2016, the claimant emailed Ms Bingham suggesting that Mr Ambersley was “character-blotting his record” because he had raised concerns. The claimant was again told by Ms Bingham that Mr Ambersley was unaware he had blown the whistle.
28. Mr Ambersley became aware of a tweet that the claimant had issued which Mr Ambersley perceived to be critical of one of the respondent’s business partners. The claimant, on being spoken to, disputed that the tweets were about work.
29. There had been an issue about the claimant’s ability to take holiday during his probation period.
30. On 22 December, the claimant advised Mr Ambersley that he would work from home that day and the next day because he had a bad back. Mr Ambersley was unhappy with this course of action as the claimant had not sought prior permission. He asked the claimant to provide a GP note to confirm his condition. None was provided. It is the respondent’s case that, at this point, Mr Ambersley decided that he would dismiss the claimant.

31. The twelve week review was due on 28 December 2016 but, as there were difficulties arranging it for that day, an invitation was sent for the meeting to be held on 6 January 2017.
32. On 23 December 2016, the claimant lodged a grievance about allegations relating to Mr Ambersley's treatment of him and made references to some form of discrimination without being specific.
33. On 3 January 2017, Mr Ambersley completed the claimant's twelve week probationary review report and emailed it to Ms Lambourne of HR. He told her that it was his intention to dismiss the claimant.
34. On 5 January 2017, Mr Ambersley emailed the twelve week probationary report to the claimant. The claimant provided his response the same day.
35. Also on 5 January, the claimant emailed Ms Bingham, informing her of his grievance and inviting her to reveal the fact he had previously made disclosures to her. The respondent asserts that this was a disingenuous act by the claimant; all his earlier attitudes had demonstrated he wanted to keep his identity hidden; they query his intention of now wanting to reveal his identity just when he had had the report that suggested his employment was about to be terminated.
36. Ms Bingham approached HR to enquire about the grievance and was advised by Ms Lambourne that in light of the serious performance concerns, the claimant was to be dismissed. Ms Bingham revealed then to Ms Lambourne about the disclosures. Neither of the women was present at the meeting held on 6 January 2017 when the claimant was dismissed.
37. The grievance hearing was held later that day with Ms Lambourne.
38. On 6 January 2017, Mr Ambersley held the twelve week probationary meeting and dismissed the claimant.

My conclusions on the application for interim relief

39. In order for the claimant to have a pretty good chance of succeeding in showing that the reason for his dismissal was because of his protected disclosure, he must be able to show that the person dismissing him was doing so because of his blowing the whistle. On the face of what was produced to me today, the claimant will struggle to show that.
40. Ms Bingham was at great pains to keep the whistleblowing private. At the time of making his decision that the claimant's employment should come to an end in late December 2016, Mr Ambersley was unaware of the claimant's whistleblowing to Ms Bingham. His witness statement said that he was unaware of the claimant's alleged protected disclosures until 25 January 2017 when being asked to prepare a statement for the purposes of this litigation.

41. For the claimant to succeed in his claim, he must be able to show that the reason for his termination of employment was for blowing the whistle. The respondent has produced to me today a clear paper trail showing concerns about the claimant's performance throughout his probation. The key issue which is going to have to be decided by the tribunal is what was the reason for the dismissal. There are conflicting reasons put forward by the claimant and the respondent.
42. The respondent says that concerns raised by the claimant were taken seriously and would not have been viewed as a matter for him to be the subject of any detriment. In support of this, they drew to my attention the following: - (i) the concerns raised by the claimant were clearly taken seriously by Ms Bingham who investigated and indeed referred the matters to the audit committee; (ii) there was an email of 25 November 2016 at 5.30 pm in which a data breach was brought to Mr Ambersley's attention by one of the claimant's colleagues. Mr Ambersley was not present at work but he escalated the matter to his line manager and a number of senior managers above him in order to put an immediate stop to the breach that had been identified.
43. The respondent raised concerns regarding the timing of the claimant's referral of issues to Ms Bingham. It was immediately after his being made aware there were concerns about his performance to be addressed at the eight week review. His reason for the referral will be a subject of challenge as regards his motive for doing so. Was it in the public interest or was it for some other ulterior motive?
44. My analysis of this case as set out above describes a scenario frequently before the tribunal. An employee considers that they are very good at their job. An employer does not. The employee, on becoming aware of criticisms of their performance, raises some issues, which may or may not be protected disclosures. The employer dismisses the employee for reasons they say related to the performance.
45. There are clearly two sides to this claim which a tribunal will need to consider. It is not a case where I could say that the claimant has a pretty good chance of succeeding in his claim, given that the concerns about the claimant's performance appear to pre-date his making any possible protected disclosure.
46. The application for interim relief is therefore rejected.

Employment Judge J Hill

Date: ...9 February 2017.....

Case Number: 3300061/2017

Sent to the parties on:

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For the Tribunals Office