EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr S P McKendrick **v** **Cloud Central Convergence Limited**

RECORD OF AN OPEN PRELIMINARY HEARING

Heard at: Nottingham **On: Monday 17 December 2018**

Before: Employment Judge P Britton

Appearances
For the Claimant: In person – assisted by mother
For the Respondent: Mr T Parkes – Solicitor, Keelys LLP

JUDGEMENT

1. This claim of unfair dismissal by reason of having made public interest disclosures is dismissed as having no reasonable prospect of success.

2. The remaining claim for non payment of overtime, not being the subject of these applications and presenting triable issues, will proceed to hearing. Directions have been made today and published under separate cover.

REASONS

Introduction and legal framework

1. The claim (ET1) was presented to the Tribunal in this matter on 3 June 2018. The Claimant had prepared it himself. Essentially, he was employed by the Respondent from 7 November 2016 until his summary dismissal, the Respondent says for gross misconduct, on 22 February 2018. He had initially been employed as an IT Support Engineer but as per the beginning of September 2017 he had been promoted to Senior IT Support Engineer. His principle function was to undertake what I would loosely describe as all the IT support functions for a large customer, namely Dains LLP, which is an accountancy business.

2. The claims brought were defined before my colleague, Employment Judge Heap, at a lengthy telephone case management discussion on 3 October 2018. Withdrawn by the Claimant was first a claim for a redundancy payment and because this was not a redundancy situation and in any event he did not have the necessary 2 years qualifying service. Similarly, he withdrew a breach of contract claim. There were various other claims which my colleague rehearsed as to which see in particular

paragraph 8. Suffice it to say that these were all claims which would not be within the jurisdiction of the Tribunal. Thus left to proceed were two claims. The first was for unpaid wages namely non-payment of overtime. This was not quantified. The second and primary claim, as my colleague saw it, was based upon automatic unfair dismissal by reason of having made public interest disclosures (whistleblowing) pursuant to Section 103(a) of the Employment Rights Act 1996 (the ERA). She noted that the claim had already been listed for 3 days between 25 and 27 March 2019 at Nottingham and the usual directions given. She dealt with the disclosure issues which had arisen, but most important on the public interest disclosure front she ordered that the Claimant complete a Scott Schedule by the 25 October with the Respondent to reply by 14 November. She listed a further telephone discussion for 6 December 2018. I heard that case management discussion and suffice it to say that I first decided that we should stop because the Scott Schedule which I had before me, and which had been completed by both sides, was in such tiny print that it could not be read.

3. However, having taken myself back to the original pleading and the response thereto, I could see force in the argument of the Respondent that on the pleaded scenario to which I shall be coming, when it came to the unfair dismissal, where was the link between whistleblowing and the actual scenario which led to the dismissal?[1] Thus, what I decided to do was to let the Respondent make its applications in more detail as to whether or not the claim should be struck out as having no reasonable prospect of success or a deposit order made on the basis that it had only little reasonable prospect of success. What I had in mind, obviously therefore, was the 2013 Tribunal Rules of Procedure and specifically as follows:

> 3.1 Pursuant to Rule 37, the Tribunal can strike out a claim if it has no reasonable prospect of success.
>
> 3.2 Second and frequently in the alternative, under Rule 39, if the Tribunal considers that "*any specific allegation or argument in a claim has little reasonable prospect of success, it may make an order requiring (the Claimant) to pay a deposit not exceeding £1,000 as a condition of continuing to advance the allegation"*. If it does then this has implications for a Claimant because if he was to lose that claim at the final hearing, then essentially the costs threshold is reached and he is at risk of paying some or all of the costs of the Respondent incurred in successfully defending the proceeding.

4. Thus on the agenda to day is for me to determine whether this claim should be struck out or a deposit ordered. I have had before me the now readable Scott Schedule which I have considered very closely. I have also had a substantial amount of documentation in from the Claimant, together with his written statement. Third I have had before me a core bundle prepared by the Respondent's solicitor. I have heard submissions. I have obviously given considerable thought to my decision as I have sat over the original 3 hour intended time for this hearing.

5. Before I go to the factual scenario as I see it to be for purposes of today's adjudication, I of course remind myself that whistleblowing is tantamount to a form of protected act in terms of the approach to Equality Act discrimination cases. This was made plain by Mr Justice Elias in ***Ezsias v North Glamorgan NHS Trust 2007 ICR1126CA.*** So what it means flowing from the line of jurisprudence encapsulated in ***Aniyanwu & another v Southbank Students Union & another 2001 ICR391HL*** is

[1] There is no claim of detrimental treatment because of whistleblowing short of dismissal pursuant to s47B of the ERA; indeed even taking the Claimant's entries in the Scott Schedule at their highest, there is no such detrimental treatment. Thus the case is solely focused on the background in terms of the link to the dismissal and thus s103A.

that claims such as this should not be struck out except in the most obvious cases as they are generally fact sensitive and require full examination to make a proper determination. This was reiterated by Lady Smith in ***Balls v Downham Market High School and College 2011 IRLR 270 EAT***. But what is important is that the Employment Judge at a preliminary hearing such as this must consider whether on a careful consideration of all the available material he can properly conclude that the claim has no reasonable prospect of success. To turn it round another way and it that respect it follows from ***Shestak v Royal College of Nursing & others EAT 0270/08,*** a claim could be dismissed if there was undisputed documentary evidence, such as in the form of emails, which could not, even taken at its highest for a Claimant, support the Claimant's interpretation of events and thus found a prima facie case to answer.

My findings for the purposes of today

6. I wish to make it absolutely clear that I am by no means an IT expert, my province as a Judge is to get to the core issues of the case and not in that sense explore the minutiae if the essential theme is clear. In this case it is very clear. The Claimant is a very skilled IT specialist. He is most contentious in his role and has uppermost in his mind the need for absolute security in matters of an IT nature; indeed he has put before me the guidance that can be found in that respect at various high-level ports of call for instance, the National Cyber Security Centre.

7. In that context there is no doubt, looking at his entries in the Scott Schedule and taking his case at its highest, that from quite early on in his employment, certainly by the middle of 2017, he had concerns in that respect all of which are copiously referred in the Scott Schedule. A core concern was that the Respondent was wrongly allowing Spencer Wright to continue to have access to the data of Dains which in effect is under the control of the Respondent as it stores the same in " the cloud". For those who do not understand what cloud based is, and I think I do to some extent, it is a service whereby the user can avoid having hard drives, for instance, storing loads of data and instead can store it in the cloud of the provider, i.e the Respondent.

8. In any even the Claimant made plain his concerns to the principal Directors of the Respondent business who are Andrew McDougall and Simon Brittan. As per the Respondent entries in the Scott Schedule they disagreed with him pointing out that the now Managing Director/Senior Partner of Dains, Richard McNielly, had authorised the allowing of Mr Wright to have continued access. Although the Claimant may say that the HR Officer at Dains had told him Mr Wright should not have access the obvious question is by what authority? Subject to hearing the evidence self-evidently, the Senior Partner i.e Mr McNielly is the one who ultimately makes the decisions.

9. There are many other examples of where the Claimant says he had concerns. For the purposes of today I will accept that some of them, even possibly the concerns viz Mr Wright, are capable of being public interest disclosures within the definition at Section 43B of the Employment Rights Act 1996.

10. However, there is no evidence whatsoever, again taking the Claimant's case at its highest, that he was throughout the period treated detrimentally as a consequence. That is doubtless why he hasn't brought a case based upon that premise pursuant to s47B. Indeed, by the beginning of September and in terms of his promotion, he had been able to negotiate out of the new contract of employment reference to a probationary period, and he had also been able to negotiate the base salary up from £24,000 to £30,000 plus a £2,000 bonus.

11. Going towards the end of that year, there is no doubt that the Claimant was under pressure. There was a need to finish what I will summarise as the lap top conversion programme at Dains. Also, he was additionally under pressure in the sense that the Respondent wanted him to bring under his wing an apprentice: Alex Muir. All of this is obvious from the text and e-mail documentation before me.

12. The Claimant went sick in late January 2018 with what was described by his GP as low mood. Again, I will accept for the purposes of today that this may very well have been not only because of the pressure he was under but because of his concerns in one shape or form about the data protection integrity of the Respondent.

13. However what is self evident is that there was no link in terms of needing to complete the lap top programme or being asked to take on Alec and whistleblowing. The Claimant never alleged that there was and I again repeat that there is no s47B claim.

14. So that brings me to January 2018.I start with the context which is that the Claimant was based at Danes and clearly played a crucial role in the delivery of the cloud based service. Then I deploy the following premise based upon my extensive experience as an employment judge: any employee ultimately of course must work to the requirements of the employer unless they are unreasonable, in which case the normal course of action is to resign and claim for instance constructive unfair dismissal and if there is potential illegality report the matter to the appropriate authority. In the ever-increasing world of IT, with its vast influence on virtually every aspect of modern life, employees who have a password and thereby are able to access such as the data systems are the equivalent of key holders. They can in some circumstances, and this is one, by not giving up the password shut out, certainly in the short term, access with potentially dire consequences. And thus it follows beyond peradventure, despite the literature that the Claimant has referred me to, ie from the cyber agency and which is conspicuously silent on the obvious, that the ultimate ownership of a password being used by an employee for the purposes of access to the systems used by his employer, must be ultimately in the ownership of the employer.

15. Reverting to the scenario, once the Claimant went off sick, from the comprehensive text and emails library in the bundle before me including the additional ones put in by the Claimant, Mr Brittan and Mr McDougall panicked because they did not know how to fully access the systems in order to deal with the needs of Dains. And of course if they couldn't, then prima facie, their business could be at risk because of the obvious repercussions if that meant an inability to access data by Dains. All that needs to be said is that they therefore repeatedly asked the Claimant for help and in that sense, could he provide them please with the relevant passwords. Now the Claimant says, first and foremost, that "I cannot give up my passwords because it would be a breach of security": that is obvious from his text messages. A good example is 19 February: *"I can't give this out for security reasons. They call it non-repudiation, essentially it means if others have my password it no longer proves I'm the user of such account. They are other ways of getting issue resolved however".* What he did do was provide them under the heading *'Notes for reset for TECHIE'* with what is in fact a Microsoft hyperlink. Now I will accept what he says that this is not what I might call the point of entry hyperlink but is more sophisticated than that. But it is obviously no substitute for the password. And that is what the employer wanted and he repeatedly refused to give it. He was even visited at his home, which is not in dispute, by Messrs Brittan and McDougall because they needed the password. So, we reach the impasse point, the employer is requesting that the employee provide the password and the employee is refusing so to do. So, this ends up with the Claimant on 22 February 2018 being dismissed. The email reads:

> *"Further to our discussion on Monday you made it very clear that you are not prepared to hand over your domain password that we require for our client Dains which is a requirement in your employment contract. We have explained to you that we need this password and others to be able to continue to provide vital services to our client and you have still flatly refused to provide them. We treat your failure to provide the passwords as a failure to follow a reasonable instruction, which is a gross misconduct offence. Accordingly, we have decided to terminate your employment with immediate effect…"*

16. From an analysis of the documentation and even taking it at its highest as I said earlier, even if there may have been public interest disclosures in 2017, where is the link to the dismissal? There is nothing in the email and text traffic, and which speaks for itself, that raises any inference at all of any animus towards the Claimant by reason of what might have gone on before. He says to me *"they don't need my passwords to be able to access the systems"*. It is obvious that the Respondents from the emails and texts which I have got, reasonably believed that they did. The issue is a simple one, the password is the property of the Respondent. In circumstances like this it is not objectively unreasonable for it to request of an employee who performs a key IT role, the giving up of the passwords whilst he remains off sick. And it follows that to refuse to do so is a repudiatory act: hence the dismissal.

17. That brings me to Section 103A of the Employment Rights Act:

> *13.1 "An employee who is dismissed shall be regarded for the purposes of this part, as unfairly dismissed if the reason (if more than one the principle reason) for the dismissal is that the employee made a protected disclosure".*

18. After the most thorough analysis of the actual material events in this case and where there is no evidence of any animus whatsoever towards the Claimant in the period proceeding it comes down to this; the evidence is conclusive, there is no chain of causation stemming from whistle blowing. The Claimant was dismissed for refusing to give up the passwords. The requirement to give up the passwords is fundamental to the contract of employment given the nature of the job. Thus the dismissal had nothing at all do with whistleblowing. Thus he lacks the necessary 2 years qualifying service to bring a claim for unfair dismissal per se pursuant to s95 and s98 of the ERA.

Conclusion

I9. This claim has no reasonable prospect of success. Accordingly it is struck out.

20. The remaining claim for non payment of overtime, not being the subject of these applications and presenting triable issues, will proceed to hearing. Directions have been made today by me and published under separate cover.

_____

Employment Judge P Britton

Date:21 December 2018

Sent to the parties on:

…….

For the Tribunal:

……..