



EMPLOYMENT TRIBUNALS

Claimant

Mr S. McDade

Respondent

v Disability Times Trust, trading as the
Citizens Trust

PRELIMINARY HEARING

Heard at: London Central

On: 8 January 2018

Before: Employment Judge Goodman

Appearances

For the Claimant: Mr V. Khanna, trading as The Law Clinic

For the Respondent: Mr N. Shah, solicitor, Peninsula Business Systems Ltd

RESERVED JUDGMENT

The application for interim relief does not succeed.

REASONS

1. Today's hearing was to consider the claimant's application for interim relief made under section 128 of the Employment Rights Act because his claims included that he had been unfairly dismissed for making protected disclosures.
2. The claimant was dismissed purportedly for redundancy. The effective date of termination was 20 October 2018. The claim form was presented on 22 October 2018.
3. In order to decide the application I read the claim form and the response, a draft amended claim form, and witness statements from the claimant and from Mr Ian Whitehead, a former employee. The claimant gave evidence was questioned by the respondent and the tribunal; several matters discussed in the grounds of claim did not feature in the witness statement. Some relevant documents were attached to the claimant's witness statement. In the course of the hearing the claimant produced a letter purporting to be 5 April 2013, which he had been given by a colleague in June or July 2018, and a contract of employment dated October 2015, and the respondent its articles of association and a letter dated yesterday from solicitors acknowledging an enquiry about engagement to effect closure of the company.

4. I then heard submissions from each representative. At the conclusion I indicated I could give extempore judgment this afternoon, or reserve; the claimant's representative preferred a reserved judgment.
5. Section 129 of the Employment Rights Act 1996 provides that where "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... for the dismissal is one of those specified in section 103A" may order a nation of contract or re-engagement pending the final hearing.
6. What is meant by "likely" has been considered by the courts. In **Taplin v Shippam Ltd (1978) IRLR 450**, it was held that likely was more than "a reasonable prospect of success", it required a high degree of certainty but not as much as "a real possibility and success". Colloquially, it was that the applicant had established that he had a "pretty good chance" of success. In **Dandpat v University of Bath (2010) EWCA Civ 305** the Taplin test was reaffirmed, upholding the decision of the Employment Appeal Tribunal:

"The Employment Appeal Tribunal did not consider it appropriate to revisit the test in *Taplin*. It said *Taplin* has been recognised for 30 years and that there has been nothing in the experience of the intervening period to suggest it should be reconsidered unless it was satisfied that the decision was plainly wrong, which was far from the case. They in fact saw good reasons for having a comparatively high test in relation to interim relief, and it is obviously a very different context to that which I have just cited from Section 12 of the Human Rights Act 1998. The EAT pointed out that if interim relief was granted the respondent is irretrievably prejudiced because he is obliged to keep the contract continuing and pay the claimant until the conclusion of the proceedings, and for those reasons it was a consequence which should not be imposed lightly".

7. At this stage, with relatively few documents, and little evidence, the Tribunal has to take a broad brush approach to likelihood.
8. Section 103A provides that dismissal for making protected disclosure is unfair. Section 43B sets out what is required for a disclosure to qualify for protection. It means "any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and hence to show one or more of the following.." There follows the list of matters including the following claimed by the claimant in this case: (a) that a criminal offence has been committed, (b) that a person has failed to comply with any legal obligation to which he is subject, and (c) a miscarriage of justice has occurred.
9. I explored with the claimant and his representative which were the disclosures he relied on. They are:
 - (1) Discussion in a staff meeting 3rd of July 2018 about earlier promises to refund wage cuts (grounds of claim 17,18).
 - (2) A conversation with Sunita Parekh on 4th July 2018 about promises to repay wage cuts (20).

- (3) A written grievance lodged 9th or 10th of August 2018, failing to repay deductions from wages (24).
 - (4) Follow-up to grievance, 19 August 2018 (27).
10. The Claimant says these concerned a criminal offence, namely abuse shall under sections 4 and 11 Fraud Act 2006 by obtaining services dishonestly, alternatively failing to comply with the legal obligation to pay its staff as it had promised, alternatively miscarriage of justice in fraud and going back on a promise, and denying the promise had been made. In 21(c) the claimant adds an episode where the claimant worked on the roof without safety equipment because he had been promised payment of the shortfall if he did. In the amended grounds of claim he adds an allegation that the CEO, Teresa Moore, was dishonestly appropriating Trust assets or money, but the pleading does not state that he told this to anyone on the occasions of disclosure, and in the hearing he could not say that he said this on the occasions of disclosure.
11. The narrative of the claim is that in 2012, and then in 2013, staff were asked to accept a wage cut – first 20%, then 12% - because the trust, a charity and a company limited by guarantee, was in financial difficulty. The deduction of 12 % continued to termination. What is disputed is whether or when Ms Moore stated on one or more occasions that the deductions would be refunded as and when assets were realized. An email to staff of 18 April 2013 says they are made on a “permanent basis”. The disputed letter of 5 April 2013 says the company will refund the employees’ investment. The letter is said to have been found in staff personnel files around June 2018. The minutes of discussion of 3 July shows Ms Moore claiming the letter (in her name) was false, but taken from a letter she had sent to another Trust, which might merge with the respondent, in November 2017. It is not clear whether Ms Moore is saying the promise was made and that is why she wrote to the Shaw Trust as she did, or whether the letter to Shaw Trust was a (false) attempt to get them to pay the wages deducted, nor is it clear who prepared the letter said to be dated April 2013 and placed it on staff files, though the trustees; response to grievance in October 2018 indicates it was Steve Jones. The final hearing will have to make findings about what had or had not been said in order to decide whether the claimant’s belief that the wage cuts were deferred remuneration, rather than a variation in the contract term as to remuneration, was reasonable.
12. Confusingly, the terms and conditions the claimant signed on October 2015 gave his salary as the original sum, not a figure less 12%. He took no point on it at the time, and a tribunal will have to explore this when considering the reasonableness of his belief about whether the pay cut was permanent, but it requires explanation why it was stated that way if the respondent believed the 12% cut in 2013 was permanent.
13. The claimant, to succeed, will have to show the disclosures were made in the public interest. He argues that because the unkept promise was made by a charity it must be in the public interest. However, the public interest amendment to the statute in 2013 was made to remove complaints about an individual’s own contract of employment from protection. In a complaint about commission calculation was allowed in part because it concerned over 100 people, a section of the public, but also because it concerned proper statement

of profit in a public company. Here, the claimant is one of seven employees, and it appears his protest was very personal, as he had got into debt, made an IVA and was not able to meet even that (and the respondent then arranged to pay the amount owed, about £4,000).

14. If he could establish reasonable belief in Ms. Moore's wrongdoing with charity property was the nature of any disclosure, that is more likely to be held in the public interest, but as currently pleaded, it is not clear that he said this, and it is not in his witness statement.
15. The respondent argues that the claim must fail because he was dismissed for redundancy. On this, the staff were being told on 3 July they were at risk of redundancy because of difficulty making a profit from training contracts they had taken. It is noted they had been warned of redundancy as a possibility before, that having been the reason for the wage cuts in 2012 and 2013. By letter 17 July all staff were told the respondent's trustees had decided on 9 July to close and that all staff would be made redundant at the date of closure. On the same date the claimant and two other staff were told they were to take garden leave until closure so giving them time to look for other employment, and to hand in all passwords. In fact in August the claimant was asked to return to work at the Hounslow office. On 13 September he was dismissed for redundancy with effect from 20 October, though told his 13 weeks' notice was to run from 20 July. On 24 September there was a grievance meeting, and the claimant was sent the trustees' decisions on his grievance on 5 October. This included that the reason he and the other two staff had been sent on garden leave because of their rude conduct in the 3 July meeting. As the other four staff remain in employment, said to be so they can return money to London Councils for a training contract the Trust has returned, and as there is still no projected date for the Trust's closure, there may be some question as to whether these three were selected for redundancy in October 2018 because the contract was returned then, or because they had been vociferous in complaining about failures to repay wage cuts in July, the trustees' stated reason for sending them on garden leave until closure.
16. Rounding this up, in order to assess the likelihood that the claimant will establish he was dismissed by reason of protected disclosures, there is some evidence for holding that he and the other two were selected for redundancy in October 2018, when four others were kept on, because of what was said in the meeting on 3 July. What is not clear is that the claimant can establish that disclosures about failure to repay earlier deductions was a matter of public interest, rather than a dispute about individual employees' contract terms. An allegation that Ms Moore was improperly benefitting from charity assets is likely to be of public interest, but it is not clear from the pleaded case or witness statement that this in fact featured in any disclosure. Without it, the claimant might succeed in showing he was dismissed for asserting a statutory right (not to have unlawful deductions from his wages, if it is established that the deductions were conditional on later payment when assets were realised) but that does not attract the right to interim relief.
17. Given this difficulty, the claimant's case does not meet the test of "likely". There is no order for continuation of contract.

18. The respondent urged the tribunal to hold that such an order would be futile when the Trust was about to close. It was not clear to the tribunal that this was the case. The Trust is said not to have traded since the summer of 2018, but still employs four staff and its unpaid CEO, Ms Moore. It has not yet instructed solicitors to effect closure, which may take some weeks at least. That was not a reason for not making the order, though it was a reason for ordering disclosure of documents now, rather than at the next preliminary hearing for case management on 4 February, and for listing a final hearing on the first available date.

Employment Judge Goodman

Date: 8 January 2019

JUDGMENT AND REASONS SENT to the PARTIES ON

9 January 2019

FOR THE TRIBUNAL OFFICE