EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4121971/2018

Held at Glasgow on 30 November 2018

Employment Judge: Robert Gall

Mr T Henderson	**Claimant** **In Person**
River Clyde Property Management	**Respondent** **Represented by:** **Ms L Murphy – Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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

2. As stated at the Hearing, in terms of Rule 62 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, written reasons will not be provided unless they are asked for by any party at the Hearing itself or by written request presented by any party within 14 days of the sending of the written record of the decision. No request for written reasons was made at the Hearing. The following sets out what was said, after adjournment, at the conclusion of the Hearing. It is provided for the convenience of parties.

REASONS

1. This is an application for interim relief. The full Hearing in the case will no doubt take place in due course.

2. In considering an application for interim relief, a Tribunal has to have regard to the terms of Sections 128 to 132 of the Employment Rights Act 1996.

3. For a Tribunal to grant such an application it must appear to the Tribunal that the Tribunal hearing the case is likely to determine that the claim will succeed.

4. This has been interpreted as requiring the Tribunal to be of the view that when the case proceeds to a Hearing there is "*a pretty good chance of success"* for the claim.

5. Almost invariably at any Hearing of this type no evidence is led. The Tribunal hearing such an application has a difficult task as it involved an assessment of the papers available and submissions made. The Tribunal requires to undertake a broad assessment on the material available. Not having heard evidence this morning there are no findings in fact made.

6. As mentioned the test which I have to apply is whether the Tribunal hearing the case is likely in my view to find that the principle reason for dismissal was, in this case, a protected disclosure having been made.

7. The test I have to apply does not involve application of the balance of probabilities as the touchstone. The burden on a claimant in an application of this type is greater than is the case at a full hearing.

8. The difficulty is that there are two versions of events and, critically in this case, a dispute as to the reason for dismissal.

9. Broadly put, the claimant says that he made a disclosure which constitutes a protected disclosure. That was on 25 October 2018. He was dismissed later that day. He confirms that when he disclosed the material involved to the respondents they thanked him and sent their health and safety people to site later that day.

10. The respondents say that the claimant did visit their office on 25 October. They accept that they passed on material to them. The take issue as to whether a protected disclosure was made by him. They challenge whether any material passed on constituted a disclosure by way of information rather than being an allegation. They say that the subject matter may be such that no protected disclosure was made. They say that there was no reasonable

belief of genuineness in the position of the claimant. They further maintain that if there was a protected disclosure made, that was not the reason for dismissal. Mr Robertson made the decision. He was unaware, the respondents say, of the protected disclosure. It was therefore not in his mind at the time of the decision to dismiss being taken. Mr Robertson did however know of there being difficulties with the claimant as the respondent saw it and the behaviour or interaction by the claimant with them. That was the reason, they say, for his employment ending.

11. The claimant recognises and accepts that there were exchanges on site in the time he was with the respondents. He says that those were not as the respondents paint them. He doubts that Mr Robertson was unaware of the protected disclosure. He referred to the case of ***Royal Mail v Jhuti [2017] EWCA Civ 1632.***

12. I do not regard that case as assisting the claimant in that there is no suggestion here that Mr Robertson was misled. In any event the Court of Appeal decision supports the view that it is the mind of the dismisser which is of importance in this situation.

13. Weighing up the material and the information before me in forms ET1 and ET3 and also the submissions and comments made by both parties this morning and having considered the statute and what I regard to be leading cases in this area, I came to a view.

14. I applied the statutory test. The question involved is whether I am of the view that it is likely that the Tribunal determining in the complaint finds that the reason for dismissal was the protected disclosure alleged to have been made by the claimant.

15. On the current information I cannot say that. It is clear that there is a dispute. The claimant may ultimately be successful in the case. That is difficult to say. There is a substantial factual dispute. The claimant accepts however that there were some issues between the respondents and himself during the week of his employment. At best, he queried doing some tasks and

challenged the knowledge of the person in charge at site, contrasting that with his own knowledge. There appears to be a difference of view. The claimant accepts that the respondent's HR personnel said that they were grateful to him for reporting health and safety points, neutrally referring to the material he disclosed, and that health and safety personnel from the respondents were sent to site the day he raised matters with the respondents. He is not able to advance a basis on which Mr Robertson, the dismisser, was aware of the protected disclosure. Mr Robertson's position that he was not aware of the protected disclosure can be tested or challenged at the hearing and a finding is almost certain to emerge at the hearing.

16. This is not a case where there appears to be a "*smoking gun*" or no other explanation for dismissal. The claimant accepts there has been a difference of view between himself and the respondents in the lead up to his employment ending. There was no overt hostile reaction to the claimant reporting material to the respondents, on the claimant's case.

17. Looking at the material before me I was not satisfied that the statutory test had been met in this application for interim relief. The merits of the claim and response fall to be tested in normal fashion.

18. It seems to me that the case would now proceed by way of initial consideration and a Preliminary Hearing being arranged for case management purposes. I shall refer the file to the administration staff on that basis.

Employment Judge: Robert Gall
Date of Judgment: 30 November 2018
Entered in register : 13 December 2018
and copied to parties