EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Geoffrey Seers	**v**	**Metroline Limited**

RECORD OF A PRELIMINARY HEARING

Heard at: Watford **On**: 2 September 2019

Before: Employment Judge Tuck

Appearances

For the Claimant: In person
For the Respondent: Mr D Brown (Counsel)

JUDGMENT

Introduction

1. This case was listed today to consider the claimant's application for interim relief. I was provided by the claimant with a 16-page statement and a bundle of documents consisting of about 220 pages and by the respondent with a skeleton argument, a bundle of documents consisting of just over 194 pages and of two signed witness statements, from Mrs Fola Olawo-Jerome and Miss Irene Yesufu. None of the witnesses gave oral evidence on oath and none were tested by the other party in relation to their evidence.

Facts

2. The claimant submitted an ET1 on 9 August 2019 setting out that he had worked for the respondent from 25 June 2007 until his dismissal on 7 August 2019, latterly in the post of an operations manager. The ET3 has yet to be presented.

3. The claimant's case in relation to this application is that he made a public interest disclosure to Mr Sean O'Shea, the respondent's Chief Executive Officer in a meeting on 16 April 2019. In February and March 2019, the claimant had been a work place companion to an individual who was undergoing a disciplinary process. The claimant had concerns about the disciplinary process that was being pursued and in particular concerns that

disciplinary procedures were being applied in consistently in relation to more junior and less junior employees. He first made contact with Mr O'Shea about this topic by e-mail of 19 March 2019, saying that he believed his concerns came under the remit of the disclosure policy, and that the general public needed to be aware when they applied for jobs with Metroline "that policies and procedures mean nothing and that collusion from all grades from OM (Operational Manager) to OD (Operational Director) inclusive, is possible. Being the subject of this treatment could not help but impact on a person's health".

4. The claimant attended Mr N's appeal against his disciplinary sanction on 27 March 2019 and on 28 March 2019 he met Mr Hunter, the respondent's service delivery manager. In the course of this meeting, the claimant expressed his concerns that people in senior positions were failing to adhere to company values of honesty and integrity and expressed his wish that he wanted to continue to work with Metroline but wanted senior managers to act fairly and with integrity and honesty. Mr Hunter expressed a view that the working relationship between the claimant and respondent was broken and would take some work from both sides to heal.

5. On 11 April 2019, the claimant met Mr Brusa, the garage manager where he worked, in advance of a company conference which was to take place on 3 May. At that meeting, Mr Brusa expressed his views that at the previous company conference in November 2018, the claimant had not fully engaged or behaved in a manner that was considered by the company to be satisfactory.

6. On 16 April 2019 the claimant met Mr O'Shea and it was at this meeting that he says that he made oral disclosures of information which, in his reasonably belief, were in the public interest and tended to show that the health and safety of individuals was being, or was likely to be, endangered. The claimant orally today told me that in the 16 April meeting he voiced his concerns that there was an inconsistency as to how disciplinary policies were being applied to different grades of employees, and that he gave specific information in relation to the disciplinary process which had been undertaken for Mr N. He set out his health and safety concerns, saying that he believed that such inconsistent application of disciplinary processes would cause unnecessary stress.

7. The claimant met Mr Dalby, Mrs Olawa-Jerome and others on 2 May 2019 in advance of the planned conference on 3 May and again discussed their expectations of the claimant at that conference.

8. On 3 May the company conference took place. At that conference, the claimant again expressed his disquiet that operational managers were being disciplined and yet similar action was not being taken against general managers. The respondent noted that on that day, the claimant had arrived in jeans and a top, unshaven and looking dishevelled and that he had remained distant from the group at lunchtime and had remained seated when a speaker asked delegates to stand up if they were 'a decent human

being'. The claimant said today that he had not seen the instructions as to dress code, so it was correct that he had gone to the conference in jeans, and that it was correct he had not stood up when other delegates had, and that he had indeed remained somewhat distant from the other delegates at the lunchtime session.

9. On 7 May 2019, the claimant was placed on gardening leave by Mr Hill, the HR Manager and at that time a referral was made to occupational health because the respondent stated that it had concerns regarding the claimant's mental health. The claimant consented to this referral but did not consider that he had mental health issues but rather he had on a number of occasions expressed his concern about the company's abandoning, as he saw it, the core values of honesty and integrity.

10. Accounts of recent events concerning the claimant were written and sent to HR, certainly by Mr Hill and possibly also by Harris and the accuracy of those notes may well be an issue for a substantive tribunal.

11. On 14 May 2019, occupational health prepared a report, this said that the claimant had run into conflict with a lot of senior management and that there is a current major conflict situation in his work place. He was deeply upset about being stood down from duty and resented the suggestion that the conflict had been caused by his mental health problems.

12. The claimant went on one weeks' annual leave in late May 2019. By letter of 11 June 2019, he was invited to a meeting to take place on 17 June to "discuss the OH report and the next steps going forward". There are likely to be disputes of fact as to what was or was not said at that meeting and whether there was a 'protected conversation' on that date. On 19 June the claimant was provided with a draft settlement agreement. He had formed the view that he had been told he would be leaving the company's employment either way. The respondent's case is that if the claimant chose not to accept a compromise agreement, then the future of his employment would be examined, but that it was not a pre-determined issue. Obviously this is a matter for a substantive hearing.

13. On 2 July the claimant made it clear he did not want to accept any compromise agreement. On 25 July he was invited to a formal meeting and warned that an outcome of that meeting could be dismissal for some other substantial reason. That meeting eventually took place in two parts, the first on 29 July 2019, and the second on 7 August 2019. It was chaired by Mrs Olawo-Jerome who had secured various witness statements between the two meetings. At the conclusion of the meeting on 7 August she determined that the claimant's employment should come to an end "with notice from today for some other substantial reason". The termination letter sent on 12 August sets out that the dismissal was the 7 August and that the claimant thereafter be paid three months' wages in in lieu of notice.

14. An appeal hearing was scheduled but has been postponed until tomorrow, 3 September 2019, to take into account the judgment of the tribunal today.

15. The witness statement of Mrs Olawo-Jerome (which has not been tested by cross-examination), says that the reason she decided to dismiss was because she believed that the relationship between the claimant and the respondent had broken irretrievably and that it was solely her decision and that she was not motivated by any public interest disclosures.

Law

16. This is an application to the tribunal under section 128 of the Employment Rights Act 1996 ("ERA") for interim relief. Section 129 ERA sets out the procedure to be adopted by the tribunal before considering making such an order. Section 129(1) says that on hearing an employee's application for interim relief, if it appears to the tribunal that it is likely that on determining the complaint which the application relates, the tribunal will find that the reason, or if more than one, the principle reason for dismissal is one of those specified - for today's purposes, - section 103(A) ERA, then interim relief may be granted.

17. The case law relating to this provision was reviewed fully by Her Honour, Judge Eady QC, in December 2017 in the case of His Highness Seikh Khalid Bin Saqr Al Qasimi v Ms T Robinson UKEAT/0283/17. That case confirms that in interpreting the word "likely" in section 129(1) of the Employment Rights Act, the tribunal must be concerned with whether the claimant has "a pretty good chance of succeeding", not merely that the claimant could possibly win. This is a high bar because there is a risk of a respondent being irretrievably prejudiced if required to treat the contract as continuing until the conclusion of the hearing.

18. In the context of an application relying upon a public interest disclosure it is proper to have regard to section 43(B) ERA, which provides that a qualifying disclosure means any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following ……

> "d) The health or safety of any individual has been, or is likely to be endangered."

19. Section 103(A) ERA provides that a dismissal will be automatically unfair if the reason for it, or the principle reason for it is that the employee has made a protected disclosure. In the case of Eigar Securities LLP v Korshunova [2017] IRLR 115 saw Simler P make a finding that a disclosure being "on the respondent's mind" was not enough to satisfy the causation test.

Issues

20. As agreed with the parties at the outset of todays' hearing, the test today is whether it appears to me, to be likely that on determining this claim, a tribunal will be satisfied firstly that there was a public interest disclosure, and secondly that that was the reason or principle reason for the claimant's dismissal.

Discussion & Conclusions

21. The task I have to carry out is to take an impressionistic view of the evidence, of the material set out before me. No evidence has been given on oath and neither party has had the opportunity to cross-examination those who have set out various factual accounts in order to test that evidence. I have carried out a summary assessment of the material before me in order to form a view as to whether the claimant is likely to succeed in his claim.

22. In relation to the public interest disclosure, I consider it likely – i.e. in my opinion the claimant has a pretty good chance of succeeding- in showing that he gave information to Mr O'Shea orally on 16 April 2019, and that this information tended to show, in his reasonable belief that the health and safety of employees may be adversely affected if they were subjected to inconsistent applications of disciplinary procedures. It is clear that this was not a disclosure which was being made by the claimant in his personal interest. I have regard to the guidance of Underhill LJ in Chesterton Global Limited & Another v Nurmohamed 2017 IRLR 837 as to when a disclosure is in the public interest. I consider it likely that the claimant will persuade a tribunal that he had a genuine and reasonable belief that the information he was giving was in the public interest, given that he was discussing the procedures adopted by a relatively large local employer. My view therefore is that he does have a pretty good chance of succeeding in showing that he made a public interest disclosure.

23. As to causation, however, I have had regard to the minutes of the meetings of the 29 July 2019 and 7 August, to the dismissal letter and to the account that the claimant has given to me. The claimant very frankly, in his submissions, said that this was not a case in which there was a 'smoking gun' and that it was after a careful examination of the chronology that he began to make a connection between what led to his dismissal and his having made the arguments to Mr O'Shea. On the brief summary I have had of the evidence in the course of just one morning, I am not in a position to say that he has a pretty good chance of succeeding in showing that the reason or the principle reason for dismissal was the public interest disclosure. He may well have a good chance of showing that it was one of the factors that was weighing in the balance, but this is insufficient. I consider it is proper that these matters be tested at a final hearing.

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Employment Judge Tuck

Date: 5 September 2019

Sent to the parties on: 27 / 9 / 2019

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For the Tribunal Office