EMPLOYMENT TRIBUNALS

Claimant: **Mr S Thomas**

Respondent: **The Woodland Trust**

Heard at: **Nottingham** **On:** **Tuesday 15 October 2019**

Before: **Employment Judge P Britton (sitting alone)**

Representatives
Claimant: **In Person**
Respondent: **Mr S Rice-Birchall, Solicitor**

JUDGMENT

The decision of the Employment Tribunal Judge is that:-

1. The application for interim relief is dismissed.

2. The claim will therefore proceed in the normal way.

3. Post the filing of a response there is to be listed an attended Preliminary Hearing in order to give directions and discuss time limit and if applicable deal with any applications that there might at that stage be.

REASONS

The Issue

1. The Claimant presented his claim (ET1) to the Tribunal on 18 September 2019. He had been dismissed from his employment with the Respondent as a Data Protection Compliance Officer on 16 September 2019. He had been employed only from 8 July 2019. Thus he has not got the necessary 2 years qualifying service for what might be called an ordinary claim for unfair dismissal pursuant to Section 98 of the Employment Rights Act 1996 (the ERA). However he set out in some 40 pages of that claim how there had been a series of events which he said constituted detrimental treatment of him by reason of the fact that he had made public interest disclosures both in the run up to and thereafter during the short duration of this employment, and that as a consequence he had been dismissed. Therefore his claim was for automatic unfair dismissal by reason of whistleblowing pursuant to Section 103A of the ERA. And so he sought interim relief pursuant to the provisions at Section 128. That is why this hearing has been expedited in order to consider whether to grant him that relief. I remind the readers of this judgment that an interim relief order is tantamount to an injunction. It preserves the employment relationship until the final determination of the issues.

2. As to the approach that a Judge must take when determining whether to grant interim relief it has been accurately set out in the Respondent's skeleton argument commencing at paragraph 4. Indeed it is mirrored in the skeleton submissions of the Claimant.

3. It is not my function today to conduct an in depth hearing, including such as the taking of evidence and the forming of findings of fact or the issues and thus drawing together a judgment that would determine the facts for whoever hears this matter in due course. My job is to do my best on the documentation placed before me and the submissions and make a broad assessment so as to conclude one way or the other as to whether or not the claim has a "a pretty good chance of succeeding" as to which see the jurisprudence starting with **Taplin v C Shippam Limited** [1978] ICR 1068 EAT.

4. In determining the application I have had regard to a comprehensive bundle put together by the Respondent. The Claimant has also provided a bundle but much of that mirrors that which is before me in the Respondent trial bundle. And in any event when I put together the Claimant's detailed submissions and cross reference them to the first of those bundles I am able to get the necessary over view.

Findings

5. When the Claimant obtained this employment as a Data Protection Officer with the Trust, which is nationally known and of considerable size, he thought that this would be the kind of role performed by a Data Protection Officer within the ambit of the GDPR. Now that of course is a standalone role which is in effect independent. It is required under those regulations and in particular in relation to public bodies.

6. Relying on his perception of the role, Claimant was in due course to call into question the validity of the usual probationary clause that there was in the contract of employment he was issued with which provided that the first six months of employment would be subject to a probationary period. But of course it is usual for an employer to make that provision thus meaning that it could terminate the contract of employment thereof at the end of that period if it considered such as performance to be unsatisfactory.

7. In any event looking at the overall job description cross referenced to the advertisement for this post it is clear to me that the Trust wanted, albeit it was legally not required to do so, a Data Protection Officer who met the compliance regulatory requirements pursuant to the GDPR. But it also wanted somebody who could bring the charity forward in terms of improving its data protection practices ie in relation to fund raising and to steer the team ahead in that respect. So that is why as per the job description people skills were emphasised. So all I need to say today is that I think wires were crossed a bit at the start of this very short period of employment.

8. But it is clear to me that the Claimant albeit he has an extensive CV which he provided, did not really have the level of experience that the CV shouted out. A close scrutiny of the same cross referenced to his patchy and intermittent work record would have indicated that perhaps he was not as good as he thought he was. Certainly it would be difficult to see how he could get the level of skills with that patchy employment record. Be that as it may the Trust decided to take him on which is why I say it is a plague on both houses in that respect.

9. But the offer letter made plain that the employment was subject to the obtaining of satisfactory references. This was going to be undertaken for the Trust via an agency that they use namely Agenda Security Services. Whilst that was going on the Claimant came in for a day on 20 June 2019 to appraise himself of the working environment, deal with handover and matters of that nature. Thence he started the employment on Monday 8 July. By the Thursday the Claimant portrays a picture that matters were going rather awry. In that sense the villain of the peace so to speak is the head of HR, Anne Lightowler. He says she was waving papers at him in an aggressive way. As to context, the day or so before that the Claimant had gone to the warehouse area and looked at things such as the CCTV and talked with the head of facilities, Mr Oliver. He expressed his concern that there were widespread failures in the data compliance system and what he then did was to e-mail a copy of policies and guidance that might assist Mr Oliver. I will refer to this as " the report". There was in due course an investigation into the Claimant's concerns raised about those first four working days; having considered that report I think the Claimant on the face of it, and there is no more for me to look at today than that, perhaps read into things more than was actually there.

10. He was to say therein that in relation to his going off sick from Friday 12 July that it was inter alia because Ms Lightowler had taken a dislike to him; barely bothering to speak to him; standing a foot away from him and then as per the Mr Oliver issue waving papers at him. The counter to that in terms of the extensive investigation report undertaken into these matters is that she, having got a copy of "the report" viz Mr Oliver observed, knowing he had not written it, that it would be better to have one which was in plain English. Well of course that latter observation is perhaps a cri de coeur for many a manager or HR adviser. I only observe many such documents are to people such as the ordinary employee invariably incomprehensible and need greater clarity. So if that is meant to be a detrimental comment I have difficulty in seeing that it was.

11. Thereafter the Claimant therefore put in a report which was on Friday 12 July. This of course was only the fifth day of the employment. It was first raising concerns about failures in the data protection system of the Trust. Second he was raising bullying and harassment allegations particularly against Ms Lightowler. He also raised that he felt unsafe remaining at work. I am working on the premise that this report is in fact a public interest disclosure which complies with the definition at Section 43B. Thus I will henceforth refer to it as PID 1.

12. Following receipt of PID 1, the decision was taken by Helga Edwards, who is Director of Corporate Services and Company Secretary, to suspend the Claimant on full pay for the time being while the matters were investigated. I have read what she has to say and in the Respondent bundle; suffice it to say that the suspension letter is not worded whereby it could be interpreted as some sort of punishment. She was to make it clearer in due course that the reason she had suspended was that given the duty of health and safety care to an employee, as the Claimant was saying he felt unsafe to return to work, certainly until is concerns had been investigated, it would be in his interest and also to comply with the Respondent's health and safety responsibilities to so suspend. Of course if it hadn't, he would have been on sick pay. So it is difficult at this stage to see how that would be detrimental treatment.

13. His issues as per PID 1 were swiftly investigated and the final conclusions

published by 30 July as to which see Bp 53[1]. It was not accepted that the Respondent was in a parlous DPA state: "not in any worse position" than ie other similar organisations. It was however recognised the concerns he had flagged up: "*this has clearly been recognised by the business and we can now take steps to change this and put the trust in a better position should there ever be a complaint or breach".*

14. On the second front, a separate investigator having looked into the bullying and harassment allegations, they were all dismissed as being unfounded. Prima facie, and that is all that needs to be considered for my purposes today, that investigation meets best practice and looks to be full and fair: and I note that seven employees plus the Claimant were all interviewed.

19. So that takes matters up to 16 July. The Claimant appealed the outcomes and that was heard on 8 August 2019 by Norman Starks, the interim CEO. He gave a comprehensive decision which is to be found at Bp 89-96. Prima facie I cannot see that there is anything about what he did that would raise an adverse inference such as to support that the Respondent was about dismissing the Claimant for whistleblowing. It seems to me pretty clear that the aim at that stage was to try and now get the Claimant back to work.

20. As it is by this stage the Claimant had raised a SAR relating to e-mails trafficked between himself and the Respondent so to speak from the commencement of this employment. He sent that SAR request within three days of his PID. As to that documentation it is clear that there were some 253 e-mails involved. I do not have the actual request before me. It is not in any event said by the Claimant that the SAR is a public interest disclosure. The issue becomes this. On 14 August the Respondent complying with his SAR sent him what it thought was the entirety of the e-mail library but then realised it had only sent him 249. It therefore PDF'd the remaining four. Setting that aside for one moment, on 21 August Helga Edwards wrote to him raising of course the history and how he had felt unsafe to be at work; dealing with the outcome of the investigations and the processes so far and that therefore: "we now need to consider the future and your ongoing employment". Therefore she wished to meet with him. Set out inter alia was:

> *"How can we take your employment as Data Protection Compliance Officer forward from here when after a less than a week of employment you made serious allegations which after a thorough investigation appeals process were deemed to be unfounded…".*

21. The second issue now raising its head was relating to the references; and of course I remind the parties that this was a condition of obtaining the employment, namely that satisfactory references be provided. I am aware that there can often be a delay particularly with such as charitable trusts, public bodies etc if for instance they require DBS. So it is not unusual in the modern employment world to see people being employed whilst these references are still being obtained. The point of course was that by now the Claimant had refused to cooperate with trust.[2] And so matters were no further forward. So that needed to

[1] Bp = respondent bundle page.

[2] The Claimant had provided a DBS certificate but it was the rest of the references that were still being waited for; and the Respondent makes plain it did not need a DBS certificate given the nature of the role but it did need the references.

be on the agenda as well.

22. Not on the agenda at that stage for the purposes of that meeting was whether the SAR issue was also engaged. That meeting was put back to accommodate the Claimant's childcare arrangements and eventually took place on 3 September. In the meantime I now bring back in the SAR issue because on 28 August (Bp 111) the Claimant raised a second grievance. This was on the issue of whether or not he had got the complete library of the e-mails. This was a very serious accusation he was making**:**

"I believe Human Resources staff had purposefully deleted my e-mails…".

And thus referring to these four e-mails he said that these were personal information; thus would be covered of course by data protection; believed they had only now been e-mailed "to cover up wrong doing"; and referred to this being a criminal offence pursuant to Section 173 of the DPA.

23. Stopping there, it is self-evident looking at said e-mails (commencing Bp 208) that they are not personal information. They are in fact the kind of e-mails one would expect at the onset of this type of employment; thus requesting such things as the HR policies, data protection codes of practice and so on and so forth. It follows that although the Claimant may be appealing its decision, the decision of the Information Commissioner's office that data protection had not been breached, even if they had gone missing, as to which see the adjudication of 30 September 2019 (Bp250) appears correct. The point however becomes that he was raising this serious accusation. I will come back to whether prima facie it is a public interest disclosure in due course. What is correct from the bundle that I have before me is the following:-

23.1 These e-mails had been generated by the Claimant. He had not deleted them himself and they remained on his mobile phone. In that sense of course he did not need them.

23.2 They were not personal information covered by the DPA.

23.3 There had not actually been deleted by the Respondent because how could it have then sent them by a PDF. They remained on the phone/laptops of the relevant employees to whom they had been sent.

24. What then becomes of importance is 3 September. The minutes of that meeting are at Bp 161 onwards: Helga Edwards chaired it, Anne Lightowler was there and Nicola McDonnell. The take I have on that meeting is that Helga Edwards very much like the previous meeting to which I have referred was about how they could get the Claimant back into work. And indeed encapsulated by Anne Lightowler (Bp 163):

"I would like to understand how you would integrate back into the business? Hopefully this is welcome news to you."

And the Claimant's reply was:

"Oh. This was not in your e-mail. I would like to think about it. I am surprised you have offered this. I need to think about it."

And there was then a break after which it reads that this was quite a constructive discussion about how the Claimant could be reintegrate himself.

25. The crucial point then becomes this however. The Claimant in relation to the grievance now already raised of course on the subject of these missing e-mails, previously directed at three employees including Ms Lightowler, was amplified in the statement that he sent in in respect thereof on 5 September to Norman Starks, the acting CEO (Bp 199/202 plus enclosures). He now increased the chain of conspirators about the missing e-mails. It now covered essentially not only more or less the whole of senior HR and Helga Edwards, but now also Donna Burgess who was head of legal and the Claimant's line manager; the preceding grievance investigators; and lastly *"unknown members of IT … under instructions from the above".* And all of it *primarily* masterminded by Anne Lightowler: "*deliberate defacing, blocking, erasing, destroying or concealing of information with the intention of preventing a disclosure."*

26. That therefore brings me into whether this was a public interest disclosure. I therefore start with the definition which is at Section 43B of the Employment Rights Act; I shall recite only the bits engaged:-

> "*1. In this part 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:-*
>
> > *a) That a criminal offence has been committed, is being committed or is likely to be committed.*
> >
> > *b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.*
> >
> > *(f) That the information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed."*

27. Now I repeat that I albeit do not know much at all about the Claimant, I can deduce from the evidence that he found the job very difficult to cope with within days. I have referred to his somewhat patchy and infrequent employment record. Is it that the Claimant had now become obsessed? Why do I say that? Because a reasonable belief, albeit it is stated to be of the worker and will of course have a subjective element to it, must also have some objective substance to it. In this case there is none. These e-mails had not been deleted. Therefore how can it have been a belief that had any reasonable substance to it? To me at this stage this is a fundamental point that leads me therefore to an inescapable conclusion. Namely that this was not a reasonably held belief.Thus it is not prima facie a PID.

28. In this respect, it is self-evident that faced with that very serious widened accusation as to conspiracy viz the e-mails, the employer's conciliatory approach to getting the claimant back to work changed. By this stage it had also obtained evidence that the Claimant on the face of it had not been truthful about his last period of employment it not having been for five or so months as he had said, but only two weeks. And so it was inviting him to a disciplinary hearing. Before I go there it replied via Mr Starks on the issue of the alleged conspiracy at length on 9 September (Bp222). Reiterated was that there had been no conspiracy. Prima facie that of course is the case.

29. And so I come to the last chapter of events. The Claimant was sent what

is referred to in ACAS best practice common parlance as a step one disciplinary letter on 12 September 2019 (Bp 234). Essentially:-

29.1 The preceding issue of the allegations made "after less than a week of employment" which after a thorough investigation the appeals process was determined to be unfounded.

29.2 Second this issue about the employment references.

29.3 That despite the meeting and the olive branch held out, so to speak, on 3 September, the Claimant had gone on to make the serious accusation on 5 September and now against some eight employees. And all of which was unfounded and false.

29.4 So he was being told he could inter alia bring a companion to the disciplinary hearing and that an outcome could be his dismissal.

30. The dismissal hearing was on 16 September (Bp239-240). It is clear the employer had already made its mind up. I do have reservations as to whether, given they were so much part of the accusations, as to whether Helga Edwards, Anne Lightowler and Nicola Mcdonnell should have been presiding at that disciplinary hearing. However the decision to dismiss (Bp 247-8) was based as set out clearly in the dismissal letter : first on the misleading as to the length of the last employment: second the unfounded grievance on the SAR issue: therefore on both fronts a fundamental loss of trust and confidence.

31. There was no mention made of the first report/grievance back at the beginning of that first week of employment to which I have already referred. The Claimant appealed. It was a paper appeal and the decision to dismiss him was upheld.

32. I therefore take myself finally to Section 103A of the Employment Rights Act:

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

33 . My analysis from the evidence that I have reviewed is as follows:-

33.1 The first PID and the accusations against inter alia Mrs Lightowler had been found to have no substance. That of course would not mean that it would be fair to dismiss the employee for having made the said disclosure; but it is clear to me from the evidence that I have reviewed and particularly of 3 September that that was intended to be water under the bridge as long as the Claimant accepted that he needed to put it behind him and get back to work.

33.2 The primary reason in terms of what might prima facie be whistleblowing would of course be therefore the SAR issue; but it is not on my analysis protected by whistleblowing as per Section 43B because on what I have I do not conclude for the purposes of today that the Claimant had a reasonable belief to found that accusation. Thus he loses the shield of Section 103A.

33. The Gamesys (last employer) issue is of course irrelevant. It has never been part of the Claimant's allegations vis whistleblowing: and even if it were, prima facie the reason he was dismissed is not because he might have raised a public interest disclosure, although I fail to see where there is one, but because he had misled the Respondent Trust in his CV as to the length of the last period of employment.

Conclusion

34. It follows that I cannot conclude that this claim has a pretty good chance of success and therefore I am not going to grant interim relief.

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Employment Judge Britton

Date: 15 November 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE