EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs M Pirie	**V**	**Liquid Telecommunications Ltd**

Heard at: London Central **On**: 22 and 25 November 2019

Before: Employment Judge Joffe

Representation

For the Claimant: Mr D Panesar, counsel

For the Respondent: Mr J Lewis, counsel

JUDGMENT

The claimant's application for interim relief under s 128(1)(a) ERA 1996 is refused.

REASONS

1. This was a decision on the claimant's application under s 128(1)(a) ERA 1996 for interim relief in accordance with rule 95 of the Employment Tribunal Rules of Procedure.

2. The claimant presented a claim form on 4 November 2019 complaining that she had been automatically unfairly dismissed under s 103A ERA 1996 for having made public interest disclosures, dismissal having taken place in the course of a meeting on 29 October 2019.

3. Both parties had to prepare for the hearing with extreme haste and I am grateful to solicitors and counsel on both sides for their very significant efforts under difficult circumstances.

4. I was provided with separate bundles of documents from the respondent and claimant, totalling over 400 pages but with significant overlap of documents.

5. I was provided with witness statements from the claimant and, for the respondent, from Mr Nicholas Rudnick, Chief Executive Officer, Ms Lauren Roberts, Head of UK Legal and Group and Mr Anthony Peplar, Group Audit Executive.

6. I had a skeleton argument from Mr Panesar and a speaking note and chronology from Mr Lewis. I spent some time reading the witness statements, skeletons and documents the parties directed me to and I heard oral submissions from both parties.

7. Submissions having been completed at near to 4 pm, I ultimately decided to reserve my decision to the following working day in order to ensure that I had the necessary time to complete the assessment required without delaying the decision any longer than was necessary to do justice to the issues.

Issues

8. There was no dispute that the claimant presented her claim within seven days as required under s 128(2) ERA 1996.

9. So the remaining question under s 129 ERA 1996 was whether the claimant was likely to succeed in the claim presented in her claim form that the reason or principal reason for her dismissal was that she made protected disclosures.

Law

Test for interim relief

10. I had regard to London City Airport Ltd v Chacko 2013 IRLR 610, in which the EAT stated that an application for interim relief requires the tribunal to carry out an 'expeditious summary assessment' as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party. This involves a far less detailed scrutiny of the parties' cases than will ultimately be undertaken at the full hearing.

11. Following guidance in Chacko I therefore had to consider on the basis of an expeditious summary assessment of the evidence whether I was able to conclude that the claimant is likely to succeed in establishing that the reason or principal reason for dismissal was because she made protected disclosures.

12. The test of likelihood is that, per Taplin v Shippam [1978] IRLR 450, she has a 'pretty good' chance of succeeding. As the authorities make clear that is a higher test than more probable than not / 51 %; see Ministry of Justice v Sarfraz [2011] IRLR 562 and Dandpat v University of Bath and another UKEAT/0408/09/LA.

13. I also had regard to the recent case of Hancock v Ter-Berg and anor EAT 0138/19 which makes clear that s129 ERA does not preclude the tribunal from having regard to the merits of other elements of the claim aside from the reason for dismissal. In that case, the tribunal was entitled to apply the 'likelihood of success' test to the question of employment status.

14. It is right to say that I understand the importance of this application to the claimant and what is said about the consequences of claimant's dismissal on claimant and her family but it is also clear that those matters are not part of the test which I am considering.

Automatically unfair dismissal for having made protected disclosures

15. Under Employment Rights Act 1996, s103A, it is an automatically unfair dismissal if the reason or principal reason for dismissal is that the employee made a protected disclosure.

16. Under s43B(1), 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, inter alia, one or more of the following:
    (a) 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 information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

Burden of proof

17. If the claimant has over two years service, it is for the respondent to establish the reason for dismissal and that it was a potentially fair one.

18. If the claimant does not have two years service: the burden of proof lies on her on ordinary principles: Maund v Penwith District Council [1984] IRLR 24, CA, applied in the whistleblowing case of Kuzel v Roche Products Ltd [2008] EWCA Civ 380, [2008] ICR 799.

Uncontroversial facts

19. The claimant worked for Econet Wireless International from 1 June 2011. That is a company in the same group as the respondent to put it neutrally.

20. The respondent is a data, voice and IP provider in eastern, central and Southern Africa.

21. The claimant was seconded to the respondent from June 2018, then entered into a contract of employment with the respondent dated 24 July 2018 which provided that her employment with the respondent commenced on 1 September 2019.

22. The claimant was dismissed from her position as group chief human resources officer of the respondent on 29 October 2019.

23. Some relevant individuals for the purposes of these claims are:

- Strive Masiyiwa, executive chairman and founder of the respondent and of the group of which it forms a part;
- Nicholas Rudnick, the CEO of the respondent, located in the UK and the claimant's line manager;
- Antony Peplar: group head of internal audit;
- Lauren Roberts, head of UK legal and group;
- Ahmad Molkes, group chief operating officer.

Claim form

24. I have to decide whether the claimant is likely to succeed in a claim that she was dismissed because of the protected disclosures pleaded.

25. These disclosures are not entirely clearly set out in the claim form. It is necessary for me to be very clear when conducting this exercise as to what the pleaded case is because the claimant in her witness statement relies on a total of five disclosures or sets of disclosures, a number of which are not in her claim form. It follows that the respondent has had no opportunity to adduce evidence in respect of the unpleaded disclosures.

26. I can only fairly conduct this exercise if I summarily assess evidence gathered in respect of the facts and matters actually in the claim form and I return to this issue when assessing the evidence.

27. In submissions, Mr Panesar accepted that the additional disclosures were background and it was the likelihood of the pleaded case succeeding that I had to assess.

28. First, to make sense of the history, I should set out the unpleaded disclosures and the pleaded disclosures, together with some of the narrative which ties those disclosures together:

29. The unpleaded disclosures were:

29.1 First disclosure: The claimant's evidence is that on 10 June 2018 [apparently a typo as the context makes clear it is 2019], Mr Masiyiwa told the claimant that the respondent's management team was too male and too white and instructed her to start employing only black female employees in the Liquid executive management structure. The claimant said to Mr Masiyiwa that that action was illegal.

This goes beyond what is pleaded in the claim form at paragraph 8 in a section entitled 'Background to relevant disclosures' both in terms of the nature of Mr Masiyiwa's instruction and the evidence that the claimant responded by saying it was illegal. Paragraph 8 of the claim form states that Mr Masiyiwa expressed disappointment that the management team was 'too male and too white' and that he wanted a transformation. Nothing is said about the claimant's response; there is no possible disclosure.

29.2 Second disclosure or set of disclosures: On 11 June 2019, the claimant sent an email to Mr Rudnick which I have seen. There are references in the email to the alleged discussion with Mr Masiyiwa including a reference to 'internal African female talent' but no overt allegation of illegality. The claimant says: 'Please let me know when you have time to discuss'.
The claimant's evidence in her witness statement is that she then informed Mr Rudnick orally the following day that Mr Masiyiwa's instruction was unlawful and Mr Rudnick said that was the way Mr Masiyiwa did things.
The difficulty is that no such disclosure was pleaded and Mr Rudnick has not dealt with it in evidence. The claim form at paragraph 9 simply says: 'The Claimant subsequently followed up on this matter in writing with Mr Rudnick asking to meet with him, inter alia, concerning the suggested 'black African female requirements'.'

30. In terms of the narrative, the claimant pleaded that she was asked by a colleague on a business trip in South Africa on 25 September 2019 why her role was being advertised on social media. She contacted Nyasha Mutsai, Southern Africa Regional Head of HR, who said that Mr Mohkles had said he was seeking highly skilled black females to fill roles of Group Head of HR and finance in the respondent in the UK.

31. The claimant raised the issue with Mr Mohkles the same day and found out the following day that Ms Mutsai's employment had been terminated

32. There are then disclosures or sets of disclosures pleaded in a section entitled 'Relevant disclosures'.

33. These are:

33.1 Oral disclosures to Anthony Peplar on 26 and 27 September 2019 that the respondent was operating a discriminatory recruitment process and had unlawfully terminated Ms Mutsai's employment;

33.2 Para 17 of the claim form says that 'The Claimant made various further attempts to discuss matters and advised and disclosed to Mr Rudnick her concerns in relation to 'cover up''.

In evidence these alleged disclosures appeared to be that the claimant:

- Informed Mr Rudnick of concerns about these matters by email on 25 and 27 September 2019;
- Informed Mr Rudnick about these concerns by email on 10 October 2019 in more detail.

33.3 Disclosures to Mr Peplar in a report dated 15 October 2019 – 'the whistle-blower report' - sent to Mr Peplar under cover of an email dated 17 October 2019. That report sets out events from 25 September 2019 and raises concerns that the respondent failed to comply with a legal obligation not to discriminate and that, in dismissing Ms Mutsai, the respondent had tried to conceal its unlawful instruction to recruit a black female to the claimant's post.

Conclusions on a summary assessment of evidence

34. I reminded myself that it was not my role to make findings of fact but a summary assessment of the evidence which I have considered.

35. Where there is a dispute on the evidence, as there is between the parties on the issue of the reason for dismissal, it is important to look at what other evidence is available and whether that is likely to compel a conclusion of the tribunal in one direction or another.

<u>Burden of proof</u>

36. I must give some consideration as to where the burden of proof is likely to lie in assessing whether the claimant is likely to succeed.

37. There is a dispute between the parties about whether claimant's employment with Econet Wireless International is continuous with her employment with the respondent. If it were continuous, she would have more than two years service and be able to bring an ordinary unfair dismissal claim.

38. I was not provided with evidence which showed to the requisite standard that the claimant is likely to succeed on this point. The evidence which I had was Ms Roberts' evidence that the claimant's previous employer was not an associated employer within the meaning of s 218(6) ERA 1996 because Econet Global Limited did not have a controlling interest in the respondent at the time when the claimant's employment moved from Econet Wireless International to the respondent.

39. Therefore, on the main issue and for the purposes of this application I proceed on the basis that the burden would be on the claimant to show the reason for her dismissal.

Protected disclosures

40. In order to be satisfied that interim relief should be granted, I would have to consider whether the claimant is likely to succeed in showing that what she said on or around 27 September and thereafter constituted protected disclosures.

41. However the parties did not really address me to any significant extent me on this issue. The submissions were addressed almost entirely to the issue of whether the disclosures, whatever their character, were the reason for the claimant's dismissal.

42. I therefore propose to address those submissions first in these Reasons. Because of my conclusions on the claimant's prospects on the reason for dismissal issue, I have not had to return to the issue of whether the claimant is likely to show that there were protected disclosures.

Reason for dismissal: respondent's evidence

43. The respondent 's case in brief was that Mr Rudnick had significant performance concerns about the claimant which predated any of the pleaded disclosures and which were the reason for the dismissal and that he was only aware of the disclosures to him and not the further disclosures to Mr Peplar prior to making the decision to dismiss the claimant. The respondent took advice on the dismissal and concluded that no particular procedure need to be followed because the claimant had less than two years service and no contractual entitlement to the respondent's written procedures.

Reason for dismissal: the claimant's evidence and argument

44. The claimant pointed to a number of features of the evidence which she said showed she was likely to succeed in establishing that the protected disclosures were the reason for her dismissal.

45. I consider these in turn and what I make of them on the basis of my summary assessment of the evidence before me whilst working through the chronology of events and then stand back and consider the evidence presented to me in the round.

The background evidence and background disclosures

46. My understanding is that I am being asked to find that the claimant is likely to succeed in showing that a deterioration in her relationship with Mr Rudnick which predates any of the pleaded disclosures was caused by the unpleaded disclosures. The claimant's evidence is that these disclosures led to a change in attitude and Mr Rudnick beginning to criticise her performance for the first time in late August / early September 2019.

47. It was submitted that I should take this evidence into account as supporting the claimant's case on the later disclosures being causative of the final decision by Mr Rudnick to dismiss the claimant.

48. It is impossible for me to fairly say on a summary assessment that the claimant is likely to succeed in establishing these disclosures occurred and were protected disclosures since I have not been able to summarily assess all of the relevant evidence which would have included the respondent's evidence in response.

49. It may be that the claimant will apply to amend her case and it may be that these matters if established will be material to the tribunal's findings as to the reason for the claimant's dismissal but the respondent has had no opportunity to deal with a case presented in this way.

50. I should reiterate that that is not a mere technical or pleading point; it is a fundamental point relating to fairness. Under this procedure I have to conduct a summary assessment of the evidence and that must be evidence which has been prepared to meet the pleaded case.

Failure to raise any performance concerns prior to the protected disclosures

51. Again a tribunal at trial may have to consider whether performance concerns only began to be raised in response to the earlier at present unpleaded disclosures. The respondent's case is that Mr Rudnick had performance concerns which predate *the pleaded disclosures*. I was taken to a number of documents which were capable of supporting Mr Rudnick's account in his witness statement that he had genuine and escalating performance concerns. He set out his concerns in his statement under headings:

> *Dubai procurement issue*: staff being recruited in Dubai without proper process. Amongst other documents, there was an email of 22 July 2019 from Mr Rudnick which refers to a key issue which needs to be addressed being why group HR permitted recruitment to take place without an open competitive recruitment process taking place
>
> *Employee issue with employee K*
>
> *Issues about delay in preparation of senior executive contracts*
>
> *Concerns about the claimant 's handling of group remuneration policy*
>
> *Concerns about an employee grading exercise*
>
> *Concerns about the way the claimant presented the results of a benchmarking exercise.*

52. In relation to each of these issues he referred to documents which I was taken to and which in my view are at least capable of persuading a tribunal that his concerns were genuine and substantial and unrelated to any disclosures. They may not do so but I cannot form a view that his evidence is likely to be rejected on the basis of the untested evidence and the documents.

Communication of performance concerns

53. I was also referred to some documents which suggested that Mr Rudnick expressed unhappiness with the claimant's handling of particular issues to the claimant herself prior to any of the pleaded disclosures.

54. Other documents showed that there were concerns or complaints by others in the business about actions taken by the claimant in the period prior to the pleaded disclosures which again are at least capable of being the basis for performance concerns.

55. I cannot say on the basis of a summary assessment of the evidence whether a tribunal will ultimately find these were substantial issues or whether these were, as submitted on the claimant's behalf, just ordinary day to day business issues which have now been gathered together to paint an unjustified picture of performance concerns.

56. The documents also show that Mr Rudnick communicated performance concerns to the claimant prior to the pleaded disclosures:

56.1 In particular there is Mr Rudnick's email of 21 August 2019 in which he said that he was unhappy with the way the claimant was managing the HR department and that it could not continue any longer. He said he was unhappy with being ignored and receiving lots of complaints. In looking at the picture as a whole, I cannot ignore that significant piece of evidence which predates any pleaded disclosure;

56.2 On 30 August 2019 Mr Rudnick wrote to the claimant saying that he wanted to have a meeting with her to discuss her performance and said there would be an overall performance review 'to discuss all aspects of your role'.

Credibility of the 'last straw'

57. There was then a meeting between the claimant and Mr Rudnick on 4 September 2019.There is a dispute between the claimant and Mr Rudnick as to the content of this meeting which cannot be resolved on the basis of untested evidence. The claimant says that unfair concerns were raised about data from a Deloitte benchmarking report and that Mr Rudnick said there was unhappiness with her in business but could not give specifics.

58. There were no formal notes of this meeting, but the claimant sought to address issues with Mr Rudnick in her email of 14 October 2019, which Mr Rudnick said in his email reply contained factual inaccuracies, which inaccuracies he elaborated on in his statement.

59. Mr Rudnick says he had not decided at the stage of 4 September 2019 meeting what to do about the claimant's employment but that her email of 14 October 2019 was the last straw. Mr Rudnick's evidence is that the claimant was determined to resist criticism and not engage constructively to improve her contribution, he no longer had trust in her, and the relationship had broken down. The claimant's case is that her email is perfectly reasonable and that it could not possibly be a last straw; Mr Rudnick's response to a perfectly reasonable email trying to sort out the issues demonstrates that it was the protected disclosures which were the operative cause of a decision to dismiss.

60. Again, it did not seem to me to be possible to form a view of a tribunal's likely conclusion as to this aspect of the evidence on the basis of a summary assessment.

61. There is clearly a factual dispute between the parties as to whether Mr Rudnick had grounds to take issue with the contents of claimant's email / what was said in the meeting on the bases which he sets out in his witness statement but I cannot say on the basis of the documentary and other evidence which I am assessing that it is likely in the required sense that Mr Rudnick's response will be held to have been not genuine and influenced by the protected disclosures rather than a tribunal accepting Mr Rudnick's evidence that the contents of the email caused him to conclude that the claimant was unwilling to accept suggestions and criticisms.

62. Mr Rudnick's evidence and that of Ms Roberts is that Mr Rudnick then spoke with Ms Roberts about terminating the claimant's contract on 15 October 2019. Ms Roberts says in her witness statement that she had an initial discussion with Mr Rudnick on 15 October 2019 and Mr Rudnick confirmed on 17 October 2019 that he was proposing to terminate the claimant's employment on performance grounds and wanted Ms Roberts' assistance.

63. They took additional legal advice and initially decided that they would arrange to meet with the claimant on 23 October 2019 to inform her of the decision to terminate. Ms Roberts' evidence was that having taken advice, they did not feel the need to undertake a more detailed performance management procedure as the claimant had less than two years service and the procedures were stated to be non-contractual.

Mr Rudnick's dismissive response to disclosures

64. It was submitted that other material from which a tribunal might draw inferences is the fact that Mr Rudnick's response to the disclosures in the form of the 25 and 27 September and 10 October emails from the claimant which were expressing significant concerns was lacking in detail and appeared not to grapple with the claimant's concerns. The claimant says Mr Rudnick was avoiding contact with her. Mr Rudnick's evidence about that is that he was busy and, to paraphrase his evidence, essentially there was nothing to take seriously in the claimant's emails.

65. It may be that a tribunal would ultimately draw inferences on the basis of these responses, that Mr Rudnick was seeking to cover up the issue or avoid discussion and that would be material to its conclusions as to the reason for the dismissal. I was not able to conclude on the basis of a summary assessment of the evidence that a tribunal was likely to come down one way rather than another of this issue; this was the type of point which was likely to depend very much on oral evidence tested by cross examination and then examined in the context of the evidence as a whole.

The coincidence of timing

66. In terms of the chronology, the claimant made her whistleblowing report to Mr Peplar on 17 October 2019.

67. The claimant points to the fact that, once she had made the detailed whistleblowing report to Mr Peplar, she was swiftly dismissed without any proper procedure.

68. Mr Peplar's untested evidence is that he did not communicate that disclosure to Mr Rudnick at the time and Mr Rudnick's evidence is in agreement. There is no documentary evidence to contradict that evidence.

69. Ms Roberts emailed the claimant on 24 October 2019 to invite her to a meeting which she confirmed later was to discuss the claimant's role. The claimant wrote to Mr Peplar the same day 'I can only assume this is the end of the road'.

70. Mr Rudnick received the whistleblowing report on 28 October 2019 from Mr Peplar, whose evidence is that he had been requested to provide it by the claimant (WhatsApp messages were provided in the respondent's bundle to this effect) before he actually dismissed the claimant. The claimant's case was that this must have been the last straw on a downward trajectory caused by previous disclosures but I cannot conclude on the basis of evidence which I have that it is likely a tribunal will reject Mr Rudnick's evidence and that of Ms Roberts that the decision to dismiss was already made by then.

Failure to follow procedures

71. The claimant points to the respondent's wholesale failure to follow any performance procedure before dismissing her, including its own written procedures. The respondent accepts that there was no procedure followed.

72. That might be evidence at trial which ultimately assists a tribunal in drawing inferences that protected disclosures were the reason or principal reason for dismissal.

73. However, the respondent's account is that the reason for the lack of procedure is the evidence given by Ms Roberts that, having taken external advice, they were satisfied that, as the claimant did not have continuous service and the respondent's various disciplinary and performance procedures were said to be non-contractual, they did not have to follow a formal procedure.

74. I have to consider whether that is a circumstance which of itself or taken in conjunction with other features of the evidence shows that the claimant is likely to succeed. I bear in mind in so doing that it is not uncommon in the

experience of those practicing in this field and of tribunals for employers of whatever size and with whatever resources to fail to follow process in cases where an employee does not have sufficient continuous employment to have ordinary unfair dismissal rights. It may not be a laudable practice, but I cannot say that it is extraordinary or of itself persuades me that the claimant is likely to succeed.

75. I was also asked to consider the evidence of the dismissal meeting itself, the notes of which I have read with care. The minutes of the meeting show that the claimant sought to have a discussion about performance concerns and that Mr Rudnick was clearly seeking to move towards terminating the claimant's employment. It must have been a very difficult and upsetting meeting for the claimant but the refusal by Mr Rudnick to engage in detail with the performance concern seems to flow from the previous decision that the claimant could be dismissed without any formal procedure.

76. Finally, the claimant's unblemished record with Econet is further material which a tribunal ultimately hearing the case will have to weigh up with the other matters in deciding what the reason for dismissal was and I bore it in mind in my overall assessment.

77. Having looked at individual features of the evidence, I must look at the whole picture. It does not seem to me that it is possible to say on the basis of the untested evidence, bearing in mind all of the features I have set out, that the claimant is likely to succeed, in the required sense, in showing that the dismissal was caused by the protected disclosures.

78. It therefore was not necessary for me to undertake a closer scrutiny of whether the claimant was likely to succeed in establishing that she had made protected disclosures since I was satisfied that she had not succeeded in meeting the test for interim relief in relation to establishing that the disclosures were the reason for dismissal.

79. In the circumstances, the application for interim relief is dismissed.

Employment Judge JOFFE

Date 10/12/2019

JUDGMENT SENT TO THE PARTIES ON 12/12/2019

FOR THE TRIBUNAL OFFICE