EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111400/2019

Interim Relief Hearing held in Edinburgh on 8 November 2019

Employment Judge M A Macleod

Mr M Doherty	**Claimant** **In Person**
Avaloq Innovation Ltd	**Respondent** **Represented by:** **Ms J Packham - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's application for interim relief is refused.

REASONS

1. In this case, the claimant presented a claim to the Employment Tribunal on 3 October 2019, in which he complained that he was automatically unfairly dismissed by the respondent, and discriminated against on the grounds of both disability and sexual orientation.

2. In his claim form, he indicated that he wished to claim interim relief in respect of his claim.

3. The respondent submitted an ET3 response form resisting the claimant's claims and opposing his application for interim relief.

4. A hearing was listed to take place on 8 November 2019 in order to determine the interim relief application. The claimant appeared on his own behalf, and Ms Packham, solicitor, appeared for the respondent.

5. The respondent presented a short bundle of documents for the assistance of the Tribunal.

6. The claimant made a submission in support of his application for interim relief, in which he set out the history of the matter in some detail, expanding, where appropriate, on the different aspects of the claim that he was unfairly dismissed by the respondent for the reason, or principal reason, that he had made protected disclosures under section 103A of the Employment Rights Act 1996 (ERA).

7. The claimant identified those protected disclosures as being, broadly:

- that on 11 June 2019, he disclosed to the Head of HR that he was suffering from anxiety, blurred vision and white flashes in vision as a result of inadequate ventilation and lighting in his office, relating to his health and safety;

- that on 25 June 2019, he disclosed to the Head of Group Facilities, Petra Merkt, and Philppe Meraldi-Aebischer, a fellow director, that health and safety matters had been brought to the attention of the Head of HR by himself and by other members of staff on numerous occasions without any adequate response, relating in particular to display equipment and the lack of proper risk assessments being carried out in the office; and

- that on 25 September 2019, the claimant disclosed to John Corona, Head of Global HR that there were a number of serious governance failures in the Edinburgh office, relating in particular to data protection breaches of client and employee data, which he was concerned that he himself was accountable for and therefore wanted action taken.

8. The claimant argues that following the making of the protected disclosures, not only was the respondent's response quite inadequate, their attitude and

behaviour towards him changed. He considered the manner in which Mr Meraldi dealt with him in relation to his performance was entirely unjustified. Mr Meraldi sent him an email on 20 March 2019 from a flight to Singapore, which, being dyslexic, he said he was unable to read in full at the time because of its length, and in the course of that email quoted from feedback attributed to staff. The claimant asserts that that feedback was inaccurate, and that having checked with the team discovered that they did not agree with the summary given to him. His appraisal – Avaloq Appreciate – was similarly inaccurate and unfair to him, and he disputes the terms of the assessment contained in there.

9. The claimant argues that it is quite clear that the respondent's behaviour in the week beginning 23 September 2019, at the end of which he was dismissed, changed significantly and became very hostile to him. Not only was he dismissed, but the terms of the letter of dismissal were completely groundless; in addition, a board meeting at which he was due to attend on 26 or 27 September 2019 to put forward his disclosures and concerns was moved to the following week without any reason being given, and he was dismissed as an employee without his directorship being competently terminated at the same time.

10. The claimant submits that he has now been placed in a position of severe financial stress, and has suffered serious mental ill health, as a result of the decision to dismiss him, which he associates directly with his making public interest disclosures to the respondent.

11. For the respondent, Ms Packham submitted that the claimant has not succeeded in making qualifying disclosures within the meaning of section 43B of ERA, in that he has not demonstrated that any criminal offence was being committed, that any person had failed to comply with a legal obligation to which he was subject, or that the health or safety of any individual was being endangered.

12. The burden of proof, she said, falls on the claimant to demonstrate that he had made qualifying disclosures, which were made in the public interest, and she argued that he has failed to discharge that burden.

13. Further, the claimant has failed to show that the reason for the claimant's dismissal was because he had made qualifying disclosures, or that that was the principal reason among others for his dismissal. The respondent set out in the email of 20 March and in the Avaloq Appreciate document that they had concerns about his performance, which concerns were then consistently reflected in the letter of dismissal in September 2019.

14. The claimant requires to prove that he made a disclosure of information, as opposed to an allegation or expression of opinion.

15. Ms Packham then referred the Tribunal to a number of authorities, which I have taken into consideration in reaching my decision.

Decision

16. This is an application for interim relief under section 128 to 132 of ERA, and section 12 of the 1999 Act.

17. The claimant asserts, among other claims, that he was automatically unfairly dismissed by the respondent on 28 September 2019 on the basis that he had made protected disclosures to them.

18. The reason for dismissal is therefore the critical issue in this part of the case.

19. The Tribunal requires to make a decision as to the likelihood of the claimant's success at a final hearing based on the material before it in this hearing (section 129(1) of ERA).

20. The correct test is set out in the case of **Taplin v C Shippam Ltd 1978 ICR 1068**. The EAT made it clear, in that case, that the burden of proof is greater upon the claimant in an interim relief hearing than in a full hearing, and the question to be addressed by the Tribunal is whether the claimant has a "pretty good chance of success".

21. The case of **Ministry of Justice v Sarfraz [2011] IRLR 562** gives further guidance. The EAT determined that in order to make an order for interim relief in a case involving allegations of automatically unfair dismissal under section 103A of ERA, the Tribunal must decide that it was likely that the Tribunal at the final hearing would find five things: (i) that the claimant had made a disclosure to his employer; (ii) that he believed that that disclosures tended to show one or more of the things itemised at (a) to (f) in section 43B(1) of ERA; (iii) that the belief was reasonable; (iv) that the disclosure was made in good faith (which requirement is no longer in place following the amendment of this provision); and (v) that the disclosure was the principal reason for his dismissal. In that regard, the EAT said, the word "likely" does not mean "more likely than not" (that is, at least 51% probability), but connotes a significantly higher degree of likelihood.

22. I remind myself that this is not a case in which I am asked to make an assessment of whether or not the claimant has reasonable prospect of success, as would be required in a strike out application, but where I require to determine whether the high test of likelihood envisaged in section 129 has been met.

23. In my judgment, the test is not met, in this case.

24. I have reached this conclusion for the following reasons.

25. Firstly, the claimant faces a difficulty in proving that he made disclosures, on each of the occasions which he pleads, which meet the definition within section 43B. I do not say that he cannot, but on the basis of the opposition presented by the respondent, it is not likely that he will succeed on all fronts in showing that all of his alleged disclosures meet the standards required. In particular, it is clear that the question of whether or not his disclosures amounted to allegations or disclosures of information, whether they demonstrated breaches under section 43B and whether they were all in the public interest remain open for analysis by the Tribunal which hears the case. At this stage, I cannot find that the claimant's chances of proving this are pretty good.

26. Secondly, the reason for dismissal is fundamental to the claimant's claim. There is a dispute, strongly put by both parties, as to the genuine and real reason for dismissal. The claimant is convinced that he was dismissed because he made protected disclosures. He maintains that the respondent's behaviour towards him changed after he did so. He believes that their conduct in the final days of his employment was so suspicious as to be capable of no other interpretation than that they were acting in response to his disclosures. On the other hand, the respondent points to a letter of dismissal which, in conjunction with other management documents, suggests that the claimant's line manager was addressing performance concerns with him over a period of months, and that those concerns were consistently the same throughout. They say that the disclosures had nothing to do with his dismissal.

27. It is simply impossible for the Tribunal to reach any firm conclusion at this stage that the claimant has a pretty good chance of success, or is likely to succeed before the Tribunal which hears all the evidence. There are too many areas of dispute. I cannot resolve those areas of dispute without hearing and assessing the evidence in full. In my judgment, that means that I cannot find, at this stage, that the claimant is likely to succeed in his claim.

28. In these circumstances, I am unable to find that the claimant's application for interim relief should be granted.

29. I appreciate that this case is an important one, for both parties, and that the claimant has been concerned to convey the serious impact which the actions of the respondent have had upon him since his dismissal (and before). What is important for me to say is that the issues on which I have required to take an interim view remain very much alive, and available for consideration by the Tribunal. The claimant has lost nothing in terms of his right to advance his claim before this Tribunal and to proceed with his complaints. However, he has not met the high test which he requires to pass in order to succeed in his application.

30. Accordingly, the claimant's application for interim relief is refused.

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Date of Judgment: 08 November 2019
Employment Judge: Murdo Macleod
Entered Into the Register: 12 November 2019
And Copied to Parties