Case: 1801490/2020

EMPLOYMENT TRIBUNALS

Claimant: **Mr I Bull**
Respondent: **JNP Group Consulting Engineers Limited**

AT A HEARING
BY TELEPHONE CONFERENCE CALL

Heard at: **Leeds** **On: 7th April 2020**
Before: **Employment Judge Lancaster**

Representation
Claimant: Mr P Smith, counsel
Respondent: Ms S Brewis, counsel

JUDGMENT

The application for interim relief is refused.

WRITTEN REASONS

1. The decision was reserved after hearing submissions from both counsel. Written reasons are therefore required.

2. This is a summary assessment on the material available at an interim relief hearing, which was necessarily listed expeditiously, and before service of the Response (ET3) – though the factual issues in relation to the dismissal ae to a large extent already covered in the Response to claim 180101/2020.

3. As previously directed under rule 95 no oral evidence has been heard, but I have seen witness statements from the Claimant and Mr Cook, the dismissing officer, for the Respondent. Both sides have also submitted documentary evidence, the contents of which are not in dispute.

4. the parties are agreed as to the legal principals and I direct myself following the relevant authorities (London City Airport Ltd v Chacko [2013] IRLR 610 (EAT); Qasimi v Robinson (2017) UKEAT/0283/17/JOJ (EAT); Ministry of Justice v Sarfraz [2011] IRLR 562 (EAT); Taplin v C Shippam Ltd [1978] IRLR 450 (EAT)). Looking at the material circumstances I must decide whether in my view, at this stage, the Claimant has satisfied me that he has a “pretty good chance” of succeeding on his complaint of

automatically unfair dismissal, having regard to all the elements of that complaint which would have to be established.

5. The Claimant was dismissed by letter dated 3rd March 2020.

6. He asserts that the reason, or if more than one the principal reason for his dismissal was that he had made a protected qualifying disclosure. The ET1 is not at all clear in identifying what protected disclosure is relied upon, or indeed whether it is a prospective disclosure to be made at some future date. However, as directed , further information was provided on 1st April 2020, and the disclosure is that: "*the Respondent was fraudulently overcharging a Contractor of Network Rail Limited for work to be carried out by the Claimant in his role as Senior Technician. This Disclosure was made in a Grievance Letter submitted by the Claimant to the Respondent on the 17th January 2020 and in a Grievance Meeting with one of the Respondents Directors Colin Cook on the 30th January 2020."* That is, as is clearly set out in the Claimant's witness statement and confirmed by Mr Smith, an alleged disclosure of information that tends to show that a criminal offence had been committed. The claim is based solely , therefore, on section 43B (1) (a) of the Employment Rights Act 1996.

7. In so far as there is any information contained within the grievance of 17th January 2020 it is not contentious that the Claimant, disclosed that he had been allocated a task to complete within 7 ½ hours as part of a piece of work commissioned on behalf of Network Rail, where the Respondent had quoted for the work based upon an internal document (the CTR) which had allocated 20 hours to drawings to be done by a senior technician, which was the Claimant's grade. Indeed, Ms Brevis, dos not take issue with the fact that this potentially constitutes the provision of information.

8. Equally uncontentious, however, is the fact that the Respondent tendered upon the basis of a global price for the piece of work, £5,438.00 plus VAT, and that this price included significant amounts of work (including a site visit and travel) that were to be done by somebody other than the Claimant or any other senior technician. Although the tender quotation included, as a schedule, a copy of the internal CTR document there is no suggestion within the contractual documentation that the client was to be billed only for those hours actually worked. The pre-contractual CTR document is certainly not an invoice for 20 hours of the Claimnt's work purportedly done. The tender was successful and the client paid the agreed fixed price for a completed piece of work which the Respondent had contracted to deliver, whether it was in fact produced within or without budget. Network Rail got what it paid for.

9. In that context I am not satisfied that there is a "pretty good chance " of the Claimant being able to show that he in fact held a reasonable belief that this information tended to show the commission of a criminal offence. I am perfectly satisfied (and I speak with the experience of 25 years practising at the criminal bar) that no criminal offence whatsoever has in fact been committed. That is not, of course, a prerequisite to the Claimant succeeding, but it serves to cast some doubt upon the objective reasonableness of his stated belief.

10. I take into account the fact that any allegation of the commission of a criminal offence of fraud is part and parcel of the Claimant's assertion – also made within his grievance of 17th January – that this may amount to "money laundering". That accusation is

clearly wholly unreasonable. It therefore colours the reasonableness of the parallel assertion that this is somehow criminally fraudulent activity.

11. I also take into account that the Claimant's principal focus when complaining about the allegedly insufficient time allocated to him to complete this piece of work is his belief that he was thereby being set up to fail. The allegedly unrealistic target for this work is pleaded in claim 180101/2020 as an instance of direct disability discrimination, indirect disability discrimination, harassment on the grounds of disability and victimisation. Within that claim it is alleged, not that any criminal fraud had been committed by overcharging Network Rail, but the time afforded to the Claimant for this task had been "fraudulently" reduced from 20 hours. In actual fact the Claimant alleges that the work took him considerably longer that the time allocated on the work sheet: it is not his own case that the client was charged for 20 hours of his work when only 7 ½ had been done.

12. Nor am I therefore satisfied that there is a "pretty good chance" that the Claimant will also succeed in showing that he reasonably believed this disclosure to be in the public interest. Whilst the disclosure of a criminal offence, or of information which is reasonably believed to tend to show the commission of an offence, must be in the public interest, that does not necessarily follow where the reasonableness of that belief in the commission of any actual offence is questionable. Rhetorically, where is the public interest in disclosing information that a commercial organisation, even one such as Network Rail, got what it had agreed to pay for under a commercial contract?

13. More significantly I find that on the information before me it cannot be said that the Claimant has a "pretty good chance" of succeeding in his claim that the principal reason for his dismissal was in fact the making of any protected disclosure.

14. The reason for dismissal is set out in Mr Cook's letter of 3rd March 2020 which followed a disciplinary hearing held on 2st February. That in turn had followed the Claimnt's suspension on 19th February to investigate an allegation that he had disobeyed a reasonable instruction to carry out work allocated to him on that day.

15. The suspension was effected by a manager who had not been implicated in any of the Claimant's many allegations of harassment or discrimination. There is nothing sinister whatsoever in the note of that suspension being copied into Mr Cook, even though Mr Cook had received on the evening before the Claimant's voluminous appeal against his grievance of 17th January – which included his disagreement with the dismissal of his "whistleblowing" complaint. Mr Cook could be expected to have been kept informed: he had travelled specifically on 17th and 18th February in order to oversee the Claimant's return to work following lengthy periods of sickness absence and then the next day an issue arose as to the Claimant's alleged failure to engage with an attempt at a sustained rehabilitation into the work place.

16. There is in my view a perfectly plausible reason advanced for the dismissal, which has nothing to do with any alleged protected disclosure. I accept Ms Brewis's submission that, for the moment at least, the dismissal letter must be read in the round. Taken in isolation, as Mr Smith submits it should be, I agree that the dismissal as a result of the Claimant not doing any work on 19th February may be "heavy-handed", and this will no doubt form part of the considerations to whether the dismissal was fair if that event is found to have been the factual matrix that was

relied upon as the reason for dismissal. However for present purposes the entirety of the letter is relevant, and it discloses an overarching allegation of a breakdown in trust and confidence following a pattern of alleged disruption and lack of co-operation on the part of the Claimant.

17. There does appear to be a supporting evidential basis for that finding in the tone of the long appeal letter submitted late on 18th February: a fair reading of that document with its numerous accusations indicates a breakdown of relationships, and a complete mistrust on the part of the Claimant, which suggests that he may indeed have behaved disruptively and uncooperatively upon his return to work. Whether or not there may have been a legitimate explanation, on 19th February it is not in dispute that the Claimant was 1 ½ late for work and that by the time he was suspended he had not actually done any productive work. The allegations which immediately gave rise to his suspension do not appear, therefore, to be properly categorised as a "fabrication". And looking at the entirety of the dismissal letter the reason advanced are not so clearly unsustainable that it can be said that it likely that they will be inferred to be false. Of course, even if the tribunal ultimately rejects the purported reason advanced by the Respondent that does not mean that it will be obliged to accept the Claimant's assertion that the real reason was his alleged protected disclosure.

18. The Claimant's grievance had been heard and an outcome given by Mr Cook on 11th February 2020. Whilst it is correct that that decision letter referred to the allegations of fraud as being very serious, I do not accept that that provides any clear basis for saying that the Respondent was particularly concerned by this alleged disclosure such that it can be inferred that the Claimant is likely to establish that it was the reason for dismissal. It is a commonplace to say that an allegation of fraud – which in any legal proceedings will require a high standard of proof -is a particularly serious accusation to make, especially when it is coupled with an unfounded suggestion of money laundering.

19. The Claimant's assertions had been answered with an explanation as to how the work on the contract for Network Rail had in fact been apportioned. The Claimant still does not accept this account, but again it appears to be plausible and there is no indication that the CTR was a specification of the work to be done, and which could not be altered in the course of the contract, provided that the fixed price was adhered to. More importantly the grievance outcome had asserted the Respondent's position, which I am quite satisfied is the correct interpretation, that this is not fraud: to all intents and purposes so far as the Respondent was concerned the matter had been addressed and concluded.

20. It is less likely to have formed the reason for the later dismissal where the Claimant's allegation of fraud (which is admittedly a very serious accusation to make) had already been addressed and rejected for what appears to be good reason. There is not a "pretty good chance" in these circumstances that the potentially fair reason put forward by the Respondent will be displaced.

21. The fact that the Claimant had, at 11 pm on 18th February, submitted an appeal against that grievance outcome does not, in my view, make it any more likely that just one of the appeal points, out of a 25 page letter, was then seized upon as a reason to dismiss him. The grievance appeal has not been considered, but the most

likely explanation for that is simply that shortly afterwards the Claimant ceased to be an employee. As I have said the suspension on the afternoon of 19th February was on the face of it wholly unconnected with the submission of that appeal. There is certainly no apparent connection between the suspension and the earlier alleged disclosure, which had already been addressed.

22. There is no reason whatsoever to connect the service by the Tribunal of claim 180101/2020, which had been presented on 13th February and was coincidentally effected on 19th February 2020, with the immediately following disciplinary procedure. As I have pointed out the references to the Claimant's work on the Network Rail project within that claim do not assert that the making of any protected qualifying disclosure is relevant to any complaint.

23. Doing the best that I can, having reviewed the information put before me at this early stage in proceedings and having considered the respective submissions, it does not appear to me, under section 129 of the Employment Rights Act 1996, that it is likely that the tribunal will find that the principal reason for dismissal was in fact the making of a qualifying protected disclosure as defined by Part IVA of the 1996 Act.

24. If I had granted this application the Respondent would not have been willing to re-instate or re-engage. The only order that could have been made would therefore have been for a continuation of contract. The Claimant is still unfit to work. I would only have ordered payments to be made for future pay periods, commencing when the Claimant is certified fit to work (currently anticipated to be in some 2 weeks), and those payments would have been only at the rate and at the times that moneys would fall to be recoverable from the government as if the Claimant had been placed on furlough during the current pandemic. I observe that in the present rapidly changing circumstances I would not have been surprised, however, if any order made now were to be the subject of an application for variation or revocation as the situation develops.

EMPLOYMENT JU DGE LANCASTER

DATE 8th April 2020

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