Case No: 2408104/2020
Code V

EMPLOYMENT TRIBUNALS

Claimant: Mr C Watson

Respondent: (1) Wallwork Nelson & Johnson
(2) Mr I Johnson

Heard at: Manchester Employment Tribunal

On: 14 July 2020

Before: Employment Judge Dunlop

Representation

Claimant: Ms B Grossman, counsel
Respondent: Mr P Gilroy QC

JUDGMENT

1. The claimant's application for interim relief under s.128 Employment Rights Act 1996 fails.

2. The claims continue and will be listed for hearing in due course.

REASONS

Introduction

(1) This was an application for interim relief under s128 Employment Rights Act 1996 ("ERA"). The claim was submitted on 18 June 2020 (the claimant's relationship with the first respondent having terminated on 11 June 2020). On 25 June 2020 the tribunal sent notice of this hearing to the parties, giving it a time allocation of 3 hours, and making case management orders for the provision of statements and other evidence.

(2) The "Code V" in the heading indicates that this was a remote hearing by video conference call to which the parties have consented. A face to face

hearing was not held because of restrictions arising from the Covid-19 pandemic.

(3) The parties had provided to the tribunal in advance an agreed bundle of documents which included the claimant's statement and exhibits (initially filed with the application), a witness statement from Paul Woodburn and exhibits (on behalf of the respondent), two additional statements on behalf of the respondent and various other documents. In addition, both counsel provided written skeleton arguments.

(4) I would like to thank the parties for their diligent preparation for this matter (necessarily at short notice) and for their restraint in limiting the documents and submissions. Both parties had focussed on the key relevant matters, which made it possible to have an effective remote hearing in the limited time available.

(5) Although there are two respondents in this case, the application for interim relief is an application against the (putative) employer, in this case the first respondent. References to 'the respondent' in this judgment, are therefore to the first respondent, unless otherwise stated.

Legal principles

(6) There is no dispute that this is a case in which interim relief is potentially available. The claimant has made a claim of 'automatic' unfair dismissal under s.103A ERA and the relevant formalities have been complied with.

(7) S.129 ERA provides as follows:

129.— Procedure on hearing of application and making of order.

(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—
(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—
(i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or
(ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or
(b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

(8) As is made clear by the remaining subsections, if this test is satisfied, the claimant is entitled to be granted interim relief.

(9) It is now well-established that in assessing 'likelihood' I am looking for something beyond the balance of probabilities. I must be satisfied that there is a "pretty good chance of success" (**Taplin v C Shippam Ltd [1978] ICR 1068**). Mr Gilroy emphasised the "exceptionality" of successful applications for interim relief. It may well be true that successful applications are exceptional as a matter of experience or statistics, but that is not the test that I am required to apply.

(10) The next question to consider is *what* must have a pretty good chance of success?

(11) This is a case where employment status in in dispute and the recent case of **Simply Smile Manor House Ltd v Ter-Berg [2020] ICR 570** helpfully confirms that the 'likelihood' test applies to all matters which would be relevant to determining whether the claimant will ultimately be successful in his claim under s103A. The wording of s.129(1) does not preclude the tribunal from having regard to the merits of other elements of the claim aside from the reason for dismissal. It is relevant in this case (as it was in **Hancock**) that establishing employee status is a hurdle that the claimant will face if he is to succeed in his claim. I have therefore considered the likelihood of the claimant establishing employee status.

(12) I have also considered the ingredients for the s.103A unfair dismissal case. These are conveniently summarised, in the context of an interim relief application, at para 14 of the case of **Ministry of Justice v Sarfraz [2011] IRLR 562**, to which Mr Gilroy referred:

> *Thus in order to make an order under ss 128 to 129 the Judge had to have decided that it was likely that the tribunal at the final hearing would find five things:*
> *(1) that the Claimant had made a disclosure to his employer;*
> *(2) that he believed that that disclosure tended to show one or more of the things itemised at (a) to (f) under s 43B(1);*
> *(3) that that belief was reasonable;*
> *(4) that the disclosure was made in good faith (which, for our purposes, must be amended to that the claimant had reasonable believe his disclosure was made in the public interest); and*
> *(5) that the disclosure was the principal reason for his dismissal.*

In respect of the fourth limb, for our purposes we must, of course, amend that to consider whether the claimant had a reasonable belief that his disclosure was made in the public interest, reflecting the statutory changes which have taken place subsequent to the **Sarfraz** judgment.

(13) Mr Gilroy then suggested, based on comments made in paragraph 38 of the judgment of Choudhury J in **Ter-Berg**, that I should also assess the practicability of the claimant re-joining the respondent's workforce, as that would also be a matter to be considered at the final hearing. It was contended that unless it was 'likely' that the claimant would be successful in obtaining an order for re-instatement or re-engagement at the conclusion of the final hearing, he was not entitled to interim relief.

(14) I do not accept that **Ter-Berg** broadens the test to that extent. A claimant who is 'pretty likely' to succeed in establishing a s103A unfair dismissal is entitled to succeed at an interim relief hearing, whether or not re-instatement or re-engagement is practicable. The fact that it might not be is recognised, and fully dealt with, by the interim relief regime, which provides for a continuation of contract of employment order, as set out at ss.129-130, as an alternative to a physical return to the workplace (or, indeed, a 'virtual' return, as may be more likely in the current climate). In those circumstances, I did not consider it necessary to have regard to several authorities relied on by the respondent which related to the practicability of ordering reinstatement or re-engagement following a final hearing.

(15) Finally, in reaching the conclusions set out below I have had regard to the guidance in **London City Airport v Chacko [2013] IRLR 61** and **Al Qasimi v Robinson EAT 0238/17** as to summary nature of the exercise, and the fact that I should be careful to make a broad and impressionistic assessment. Where I have stated matters of fact below, these are matters which appeared not to be in dispute between the parties. Where factual matters are in dispute, I have identified that dispute and set out my views insofar as they are relevant to this application only.

Analysis and conclusions

(16) The claimant is a chartered tax advisor. He was an employee of the first respondent and his employment commenced in 2010, when he began as a trainee. In 2017 he became 'tax partner designate'. He was formally promoted to the role of associate on 1 June 2018 and signed a new contract of employment with an extended notice period. He was, by this point, the most senior member of staff in the tax department. It is worth noting, in the context of this dispute, that the claimant is not simply a financial professional, but a tax specialist. Website extracts in the bundle show that he was described in the firm's literature as having specialisms in 'Income tax' and 'HM Revenue and Custom enquiries and investigations'.

(17) In April 2019 the status of the claimant, along with three other senior employees, changed. They were, in the words of the claimant "taken off the payroll" and began to be paid instead by way of fixed drawings. They were given the title of 'Associate Partners'. This was in contrast to the three existing equity partners. There is a dispute as to whether the claimant consented to be taken off the payroll at this time. He now says he did not. I consider that may be problematic for him to establish that. It seems inherently unlikely that this would happen without his consent, and there is no contemporaneous evidence of him disputing the decision, or even commenting on it. No partnership agreement was ever finalised between the parties, although there were discussions on a draft agreement in early 2020.

(18) Without rehearsing the evidence I have read and been directed to, it seems to me "pretty likely" from the sum of what I have heard that the claimant could satisfy the first two limbs of the **Ready Mixed Concrete** test for employment status; that (if there was a contract) it included a requirement of personal service, and that he was subject to sufficient control by the equity partners.

(19) The potential stumbling block is the third limb, which requires consideration of whether any features of the contract are incompatible with it being a contract for service. Specifically, I have to consider whether his Associate Partner role meant that he was in partnership with the equity partners and other associate partners i.e. whether they were "carrying on a business in common with a view of profit". If that was the case, the claimant held a status which was incompatible with the existence of any continued contract of employment.

(20) Emails from the earlier part of the relevant period demonstrate that he did not consider himself to be an employee following the April 2019 change. This view, from a tax-specialist chartered accountant, is more significant than it would be from a claimant working in another field. By November 2019, he began to moot the position that he was perhaps still an employee, and by 30 March he was adamant that he was. The respondent says that what changed in this period was that the claimant changed his view regarding which option was more favourable for him, particularly, latterly, in terms of Covid-19. A more charitable view might be that in the continued absence of any written agreement, and in circumstances where there had been little practical change to his status within the firm, the claimant's own view was legitimately evolving.

(21) There does seem to be relatively little that positively points to partnership status aside from the means of payments. It seems clear that the claimant was on a very different rung to the three equity partners, but the existence of tiered partnerships is common. With that, also comes division of responsibilities. The fact that every partner is not involved in every business decision is not something that prevents them from being genuinely in partnership. The claimant was clearly a senior figure with significant responsibilities, the fact that he may have assumed some of those as 'partner designate' whilst still in employment does not mean that they are to be disregarded altogether.

(22) The employment position of intermediate partners is something which has exercised the appellate courts, including in the cases referred to today (**Williamson & Soden Solicitors v Briars UKEAT/0611/10, Briggs v Oakes [1990] ICR 473, Tiffin v Lester Aldridge [2012] EWCA Civ 35**). Each of these arrangements must be examined with care, and on their own merits. On the summary view I have to take of this case, I conclude that the claimant has a respectable arguable case that he should be considered an employee, but I do not find that he is 'likely' to succeed for the purposes of s.129.

(23) Ms Grossman put forward a fall-back argument that if the claimant wasn't an employee, he was nonetheless a worker, by analogy with the position of an LLP partner in **Bates van Winkelhoof v Clyde and Co [2014] EWCA Civ 35**. That argument was not developed to any real extent. Whilst it may be sufficient for the purposes of the underlying claim to demonstrate that the claimant was a worker, it does not seem to me that it helps for the purposes of an interim relief application, as that remedy is available to employees (or at least 'likely' employees) only (see **Ter-Berg**). In any event, on the way this case is put it seems to me that the claimant either continued to be an employee after April 2019 or he became a Partnership Act partner. If the latter is the case, I am not satisfied that it is 'likely' that he will show that he was also a worker.

(24) For completeness I have also considered the question of disclosures and the reason for dismissal. Taking the points from **Sarfraz** in turn:

(25) Firstly, was a disclosure made? The disclosures relied on in this case are set out in emails so there is no factual dispute about what was said. Mr

Gilroy did not take any point regarding, for example, disclosure of information versus an opinion. Whilst that sort of point is not closed off to the respondent to take in future if appropriate, it need not give me cause for concern today.

(26) Secondly, did he believe the disclosure tended to show one or more the matters itemised at s.43B(1)? Here the relevant sub-paragraphs are (b) a failure to comply with a legal obligation and (f) deliberate concealment

(27) I considered the three protected disclosures contended for by the claimant in turn:

27.1 10 March 2020 email. I considered that the claimant was likely to establish that that is a disclosure of information tending to show that legal obligations have been breached, namely the failure to account properly for tax and national insurance due on the claimant's remuneration.

27.2 30 April 2020 email. I considered this to be more questionable, it alludes to the previous assertion but does not repeat it in express terms. The thrust of the email is the claimant's concern to protect his own interests.

27.3 1 May 2020. Again, this is more questionable, although possibly stronger than the second email.

(28) Having regard to the terms of the first email in particular, and also the fact that the tribunal will look at the emails together, and in the context of the factual background as they see it, I considered it is likely that the claimant will establish this part of his claim, at least in respect of one disclosure. If he establishes that then he is also likely to satisfy the third limb, that his belief was reasonable.

(29) Turning to the fourth question, I believe that it will be more difficult for the claimant to establish that he believed he was making the disclosure(s) in the public interest. This is an evolving area of law. I accept that there is no dichotomy between whistleblowers advancing allegations in their own interest and in the public interest (**Chesterton Global v Nurmohamed [2018] ICR 731**). It is certainly arguable that a disclosure concerning appropriate tax treatment of earnings is in the public interest, given the obvious public interest that employers and employees comply with their obligations to account to the state for the full and correct amount of monies due. Those monies ultimately pay for the services on which the public rely.

(30) However, there is room for legitimate debate on the proper tax treatment of earnings in given situations, and I am not convinced that an employee (using that term broadly) who disagrees with his employer about appropriate tax treatment is necessarily acting in the public interest when he does do. That must particularly be the case when that employee is a technical expert in the area and there is at least an appearance that he may be adopting a position from a perspective of self-interest.

(31) For that reason, again, in respect of the question of whether the disclosures amount to protected disclosures within s43A ERA , I am happy that the case

is arguable, but I am not satisfied that the chances of success are "pretty good".

(32) For completeness, if the claimant were successful in showing that his disclosures were protected disclosures, I would have been prepared to find that he was likely to succeed in showing that those disclosures were the principle reason for dismissal.

Conclusion

(33) The fact that I have reservations about the prospects of success in two discrete areas fortifies my overall conclusion that I cannot say the claimant is 'likely' to succeed in establishing the matters set out at s.129(1) in a final hearing. For that reason I dismiss the application.

(34) The matter will be listed for a case management hearing to determine the appropriate next steps towards a final hearing of the underlying claim. The parties will be notified of the date in due course and should prepare case management agendas and (if possible) an agreed list of issues.

(35) Mr Gilroy asks me to record that the respondent reserves its position as to any costs application it may wish to make as a result of this application.

Employment Judge Dunlop

Date: 17 July 2020

SENT TO THE PARTIES ON

21 July 2020

FOR EMPLOYMENT TRIBUNALS