EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Mr M Rahman **Argos Limited**

v

Heard at: Watford **On**: 7 December 2020

Before: Employment Judge Milner-Moore

Appearances

For the Claimant: In person
For the Respondent: Mr S Liberadzki - Counsel

JUDGMENT

1. The claim for automatic unfair dismissal (pursuant to Section 103a of the Employment Rights Act 1996) fails and is dismissed. The claimant was not unfairly dismissed by the respondent.

2. The continuation of contract of employment order made under section 130 of the Employment Rights Act 1996 ceases with effect from 7 December 2020.

REASONS

1. This case had been the subject of an earlier hearing before Employment Judge Vowles under the Tribunal's powers to grant interim relief in section 129 and 130 of the Employment Rights Act 1996. Following that hearing an order for continuation of contract had been.

2. This case was listed before me to consider a complaint of automatic unfair dismissal pursuant to Section 103A of the Employment Rights Act 1996. The following issues arose for determination.

    1.1 Was the claimant dismissed by the respondent on 15 January 2020?

        1.1.1 The claimant says that he was expressly dismissed by his supervisor Miss Fernandopule.

        1.1.2 The respondent denies that the claimant was dismissed. The claimant was asked to leave the premises but not dismissed.

1.2 What was the reason for dismissal?

1.2.1 The claimant alleges that he was dismissed for making a protected disclosure. He states that he disclosed to Miss Fernandopule that he had been threatened with assault by one of his colleagues.

1.2.2 The respondent denies that the claimant was dismissed or adversely treated for making any disclosure regarding threats of assault. He was asked to leave the premises initially because he had reached the end of his shift and later because he was behaving aggressively to colleagues and being insubordinate to his manager.

1.3 If the reason for dismissal was that the claimant had made a disclosure to the respondent, was any such disclosure a protected disclosure within the meaning of section 43A of the Employment Rights Act?

1.3.1. Did the claimant disclose information to the respondent?

1.3.2. Did he reasonably believe that the information disclosed tended to show that a criminal offence had been committed.

1.3.3 Did the claimant reasonably believe that his disclosure had been made in the public interest?

Preliminary Issues

3. On 17 November 2020, after statements had been exchanged, the claimant made an application to amend his claim to add a complaint of whistle-blowing detriment (pursuant to section 47B of the Employment Rights Act 1996). He alleged that he had been subjected to a detriment in that Miss Fernandopule had shouted at him and had falsely recorded that the claimant had refused to be searched on exiting the store. He alleged that this had occurred because he had made the protected disclosure already described. This complaint also related to the events said to have taken place on 15 January 2020.

4. I considered the application but refused it, having had regard to the factors identified as relevant in the **Selkent** case. I noted that this was a substantial amendment adding a new statutory ground of complaint and involving new factual allegations. Although this was not a determinative point, the application had been made outside the relevant statutory time limit. It was made at a late stage in the proceedings, around two weeks before the final hearing. The claimant had attended two previous hearings at which he had an opportunity to explain the claims that he wished to bring and to make any application to amend if he considered it necessary to do so. There was no good reason why the claimant could not have included a complaint of whistleblowing detriment in his original claim form or made an earlier application to amend at one of these hearings. I considered that the addition of this issue would cause some prejudice to the respondent. It would require additional evidence to be taken from the duty manager, to explain the search

processes operated at the respondent and their application to the claimant's work location. I recognised that there would be prejudice to the claimant in not being allowed to pursue the additional claim. However, given the claimant's failure to advance any good reason either for his failure to include the allegation when the claim was originally submitted, or for the delay in making the application to amend, I did not consider it to be in the interests of justice to allow the application.

5. The claimant had previously made an application to postpone the hearing pending a criminal investigation in relation to the events of the 15 January 2020. However, he confirmed to me that he was no longer pursuing that application. The claimant also confirmed that he no longer opposed the amendment of the respondent's name to Argos Limited and so by agreement I have amended the name of the respondent to Argos Limited.

Facts

6. I heard evidence from the claimant and from Ms Fernandopule, the manager in charge on 15 January 2020, Mr Safouaue and Mr Miah. I received an agreed bundle of documents. In light of the evidence that I heard, I made the following factual findings.

7. The claimant began employment with the respondent on 1 June 2018, working as a customer fulfilment advisor. The respondent is a large retail organisation. In or around January 2019, the claimant underwent a disciplinary process and received a final written warning. There is some dispute as to exactly what the warning was for but it is clear that it was for disciplinary misconduct of some sort. I do not understand the claimant to dispute that he received such a warning. It is relevant to note this history only because the claimant, having undergone a formal disciplinary process on a previous occasion, would have known that his employer's response to any repetition of misconduct would be likely to involve a further, formal disciplinary process rather than immediate, informal management action.

8. On 15 January 2020 the claimant was on shift. Towards the end of that shift there was no further work available for him to complete. He was told by Miss Fernandopule, who was managing the shift, that he could leave if he wished to. She understood the claimant to have worked the 20 hours for which he understood he was contracted to work that week. It is not disputed that shortly afterwards a disagreement arose between the claimant and another employee, Nathan, and that Nathan said that he would hit the claimant if the claimant "didn't stop". The claimant's evidence was that he then reported Miss Fernandopule that Nathan had threatened to knock him out and that Nathan had invited the claimant to come outside for a fight. Miss Fernandopule's evidence was that she overheard the tail end of the dispute and intervened to tell both the claimant and Nathan to stop. Miss Fernandopule's evidence was that Nathan did stop arguing with the claimant but that the claimant continued to be aggressive (goading Nathan to punch him) and insubordinate towards her.

9. I accept that the claimant did tell Miss Fernandopule that Nathan had threatened to hit him. In other respects, I preferred the evidence given by Miss Fernandopule. She had prepared a detailed note of the events on the day and this note was consistent with her evidence. Her evidence was also supported by the recollections of other employees who witnessed the events. Statements were taken in a subsequent disciplinary investigation from a number of employees. Two employees (Ms Robinson and Mr Lennon) said that they overheard the claimant behaving aggressively towards Nathan before Miss Fernandopule then intervened. Nathan was also interviewed in the disciplinary hearing and accepted that he had threatened to hit the claimant. Other employees confirmed that the claimant continued to behave in an aggressive and insubordinate way after the incident.

10. There is then a further dispute between the parties as to Miss Fernandopule's subsequent interactions with the claimant. The claimant's case is that after informing Miss Fernandopule of the threats made by Nathan and making a call to the police to report Nathan's behaviour, he was told by Miss Fernandopule to leave and that he was being dismissed. The claimant's evidence is that Ms Fernandopule made reference to his being dismissed on two occasions: immediately after the incident and then again as he was being escorted from the building. Miss Fernandopule's account is different. She says that she told the claimant to leave the building. Initially she had told him to leave because he had finished his work and completed his contracted hours. After the incident with Nathan, she asked him to leave again because she felt that he was provoking trouble with Nathan and being insubordinate towards her. She was quite clear that at no point had she told the claimant that he was being dismissed. Her evidence was that, on a couple of occasions, the claimant had said to her that she had dismissed him and that, when replying, she had made it quite clear to him that she had not said any such thing and that she merely wanted him to leave the building. Ms Fernandopule believed that the claimant was recording their conversation on his phone and saying out loud, for the purpose of this recording, that she had dismissed him in the hope of creating evidence of a dismissal which had not in fact occurred. No such recording was ever disclosed by the claimant.

11. Having considered the evidence of both parties I preferred the account of Miss Fernandopule. I find that she asked the claimant to leave the store because he was continuing to be aggressive and insubordinate. I find that she did <u>not</u> say to the claimant that he had been dismissed and that, on the contrary, she specifically informed the claimant that he had not been dismissed. I preferred her evidence because she had produced a detailed written account shortly afterwards. Her account is also consistent with the accounts given by other members of staff in the subsequence disciplinary investigation and in particular, with that of Mr Kingham. Mr Kingham said that Miss Fernandopule had simply asked the claimant to leave the store. I also regarded it as implausible that a manager of a large organisation such as the respondent would dismiss an individual summarily without attempting to follow any sort of due process or to comply with the company's disciplinary procedure. I also had regard to the fact that the claimant's ET1 (which he submitted very shortly after the events in question) states that after he had

told the duty manager about Nathan's behaviour "*she ignored me and said to me I am going to send you home. She then forced me to leave the building and escorted me out of the building"*. He does not there suggest that he was expressly told that he was dismissed. The account given by the claimant in his ET1, shortly after the events in question, is consistent with what was said by Miss Fernandopule. Ms Fernandopule's account is also consistent with the respondent's subsequent treatment of the claimant.

12. On 19 and 20 January 2020, the claimant was due to work but did not attend for his rostered shifts. On 20 January 2020, Miss Fernandopule spoke to the claimant by telephone. The claimant said that she had dismissed him and that he had raised a grievance. Miss Fernandopule again confirmed that she had not dismissed him and that he was expected to attend for work. This message that the claimant had not been dismissed was repeated by the respondent on other occasions.

13. On 24 January 2020, Mr Miah informed the claimant that he had not been dismissed. He later sent a letter confirming to the claimant that he remained employed but was being suspended by the respondent pending a disciplinary investigation into alleged misconduct. Mr Miah subsequently conducted an investigation and interviewed the claimant on 4 February 2020. He found that there was a case to answer of insubordination and aggressive behaviour. The claimant thereafter remained suspended until he was later dismissed following a disciplinary hearing that he declined to attend. The respondent's position is that the claimant was dismissed for misconduct by a letter of 30 April 2020. The fairness of the dismissal on 30 April 2020 is not in issue today.

14. The claimant was asked why he believed that the disclosure which he claims to have made to Miss Fernandopule was in the public interest. His only explanation for this was that, had he gone outside with Nathan, as he was invited to do, then both would have found themselves in a public area and, had a fight taken place, it might have caused alarm to members of the public.

Law

15. I have found that the claimant was not expressly told that he was being dismissed by Miss Fernandopule. Where words are used that are ambiguous but are said to amount to a dismissal (such as an instruction to leave the workplace) it is necessary to consider whether, in all the circumstances of the case, a reasonable employee would have thought that he was being dismissed. The relevant circumstances will include not only what happened during any incident in which dismissal is said to have occurred but also the events immediately afterwards.

16. Section 103A of the Employment Rights Act provides that a dismissal will be unfair where the principle reason for the dismissal is that the employee made a protected disclosure.

103A. Protected disclosure.

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 principal reason) for the dismissal is that the employee made a protected disclosure.

17. Where, as in this case, an individual does not have two years qualifying service, the burden is on the individual to show that the reason, or principle reason, for dismissal was that a protected disclosure had been made.

18. The definition of protected disclosure appears at Sections 43A-C of the Employment Rights Act 1996

43A. Meaning of "protected disclosure".

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H

43B.— Disclosures qualifying for protection.

(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,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed

43C.— Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure [...]2 —
(a) to his employer, or
(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or
(ii) any other matter for which a person other than his employer has legal responsibility,
to that other person.
(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

19. In considering whether or not the public interest test at section 43(B)(i) of the Act is met it is relevant to have regard to the guidance given by Lord Justice Underhill in the case of **Chesterton v Nurmohamed v PCAW** [2017] EWCA Civ 979

'*27. First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula (see para. 8 above). The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.*
28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. The parties in their oral submissions referred both to the "range of reasonable responses" approach applied in considering whether a dismissal is unfair under Part X of the 1996 Act and to "the Wednesbury approach" employed in (some) public law cases. Of course we are in essentially the same territory, but I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the Tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking – that is indeed often difficult to avoid – but only that that view is not as such determinative.
29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable. [4]

30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at para. 17 above, the new sections 49 (6A) and 103 (6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase "in the belief" is not the same as "motivated by the belief"; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it.

31. Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression. Although Mr Reade in his skeleton argument referred to authority on the Reynolds defence in defamation and to the Charity Commission's guidance on the meaning of the term "public benefits" in the Charities Act 2011 , the contexts there are completely different. The relevant context here is the legislative history explained at paras. 10-13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest"

20. Lord Justice Underhill stated that, in considering whether a disclosure serves only the personal interest of the worker making the disclosure or engages a wider public interest, it would be relevant to consider matters such as:

"(a) the numbers in the group whose interests the disclosure served – see above;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

(d) the identity of the alleged wrongdoer – as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far.

21. He went on to observe:

36. The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the Parkins v Sodexho kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B (1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

37. Against that background, in my view the correct approach is as follows. In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B (1) where the interest in question is personal in character 5), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker. Mr Reade's example of doctors' hours is particularly obvious, but there may be many other kinds of case where it may reasonably be thought that such a disclosure was in the public interest. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph.

Conclusions

Was the claimant dismissed by the respondent on the 15 January 2020 and, if so, what was the reason or principal reason for dismissal?

22. I considered that the claimant was not dismissed by the respondent on the 15 January 2020. Even if I am incorrect about this, I do not consider that any dismissal was on grounds of his having made a protected disclosure.

23. For the reasons I have given, I found that Miss Fernandopule did not expressly inform that claimant that he was dismissed. She merely asked him to leave the building. I have found that she did so, not because he had informed her of the threats made by Nathan, but rather because he was continuing to be argumentative and insubordinate.

24. I have also considered whether the claimant understood his being asked to leave the building as a dismissal and whether, if so, this would have been a reasonable interpretation of those words. I do not consider that a reasonable employee would have understood his being asked to leave the building to amount to a dismissal, given the surrounding circumstances. Miss Fernandopule had already informed the claimant that he could leave because he had completed his work. When she later intervened to prevent the escalation of the argument that asked him to leave as a means of bringing the argument to an end. She explicitly confirmed to the claimant at the time that he was not being dismissed. It is also clear from the respondent's subsequent conduct that the respondent did not consider itself to have dismissed the claimant. The claimant was contacted within a few days of the events of 15 January 2020 to establish why he was not at work. He was told by both Miss Fernandopule and by Mr Miah that he had not been dismissed. He was sent correspondence confirming that he was not dismissed but suspended. I considered that a reasonable employee would have understood that he had not been dismissed on 15 January 2020.

Did the claimant make a protected disclosure within the meaning of section 43A Employment Rights Act 1996?

25. I have considered whether or not any disclosure made by the claimant was a protected disclosure and have concluded that it was not.

26. I accept that the claimant made a disclosure of information to Miss Fernandopule. He complained to her that Nathan had threatened to hit him. I consider that the claimant had a reasonable belief that the information he had provided tended to show the commission of a criminal offence, namely assault. It is not necessary for the claimant to be correct about whether or not a criminal offence had been committed, it is merely necessary for him to have a reasonable view that it may have been committed. I consider that, given the facts that I have found, the claimant had such a reasonable view.

27. However, I do not consider that the claimant reasonably viewed the disclosure as being made in the public interest. First, I do not consider that the claimant, in fact, had a subjective belief that he was making his disclosure in the public interest. When asked about this in cross examination the only thing that the claimant could point to by way of public interest was that had he gone outside and continued his altercation with Nathan then this would have occurred in a public area. That explanation was in my view an invention after the fact. I considered that the claimant did not genuinely believe, at the time, his disclosure was in the public interest.

28. Second, I do not consider, applying the guidance in *Chesterton,* that the claimant could have had any reasonable belief that this was a matter that engaged the public interest. This was an argument between two employees in a private area of the store, which had got out of hand and which was brought to a close by the intervention of a manager. It concerned a small number of individuals. There is nothing to suggest this engaged the interests of any larger group of employees because this was representative of some broader management failing or of a prevailing atmosphere or practice in the

workplace. It did not impact on the public. On that basis, I do not consider that the disclosure made by the claimant was a protected disclosure within the meaning of section 43A-C of the Employment Rights Act 1996.

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Employment Judge Milner-Moore
Dated 8 February 2021

Date: ……..

Sent to the parties on:.....

For the Tribunal Office