EMPLOYMENT TRIBUNALS

Claimant: **Mr S Williams**

Respondents: **(1) ABP(London) Investment Limited**
(2) Ying Xu
(3) Wei Ping Xu

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **19 February 2021**

Before: **Employment Judge McLaren**

Representation
Claimant: Mr. A Sendall, Counsel
Respondent: Mr. T Coghlin, QC

UPON APPLICATION made by letter dated ***05.01.21*** to reconsider the judgment dated ***27.10.2020*** under rule 71 of the Employment Tribunals Rules of Procedure 2013

JUDGMENT

1. **The respondents' application for the judgment of 27.10.2020 to be reconsidered succeeds.**

2. **The interim relief judgment is revoked.**

3. **The application for interim relief is refused.**

REASONS

Background

1. This has been a remote hearing on the papers which was not objected to by the parties. The form of remote hearing was CVP.A face to face hearing was not held because it was not practicable. The parties referred to a bundle of agreed documents of 268 pages, together with the original bundle of 166 pages,

a supplemental bundle of claimant's documents of 40 pages and correspondence from the claimant's solicitors of 29th of January 2020. I was also provided with written submissions from both Counsel.

2. There had been a preliminary hearing on this matter on the 16.2.21 at which it was agreed that the respondents would not rely on ground 1 of the written submissions, the EDT, but on grounds 2- 8 only. It was also agreed that questions as to the admission of new evidence and any application for a stay of the current judgment would be addressed today.

3. I have not set out the relevant law in relation to interim relief as that is set out in the judgement which I am asked to reconsider.

Grounds for the application – interests of justice

4. The application for reconsideration is made pursuant to:

(1) rules 70 and 71 of the Rules of Procedure on the ground that it is necessary in the interests of justice; and/or

(2) section 131 of the Employment Rights Act 1996 ("ERA") on the ground of a relevant change of circumstances since the making of the order.

5. Mr Coghlan made general submissions on the interests of justice. He referred to article 6 considerations, being entitled to a fair and public hearing within a reasonable time. It was also submitted that I needed to consider the overriding objective and that this expressly included the quantum of the claim as part of any proportionality consideration.

6. It was said that this case presented extraordinary circumstances and that both article 6 and the overriding objective required the interim relief judgement to be reconsidered in the interests of justice. The case should also be approached with flexibility to admit new evidence and entertain arguments not previously advanced.

7. It was further submitted that the obtaining of new evidence represented a relevant change of circumstances, as did the claimant's amendment to his claim form expressly to now say that no winding up petitions had been presented.

8. Mr Sendall submitted that reliance on article 6 was, at its highest, a reason for an expedited hearing only, and not a right on which the whole basis of interim relief could be re-examined. While it is the case that the respondent may be left to pay an irrecoverable sum, that is the nature of interim relief. Article 6 is about when parties can get a hearing. It is not a sufficient ground for a decision to be reconsidered.

9. I accept Mr Sendall's submissions on this point. Interim relief means that one party may be unjustly enriched but, provided the matter comes to a full hearing within the usual time frame (and this matter is listed for 8 days in November 2021), the fact that the respondent must keep on paying until a final determination of this issue, and the sum is not recoverable, is not in itself a ground on which to reconsider the judgment.

10. I do of course accept Mr Coghlin's submissions that I must have regard to the overriding objective and view the application with the objective in mind.

11. The respondent made an application to admit new evidence by three witness statements and some additional documents at pages 130—203 of the application bundle. I was directed by Mr Coghlin to Ladd v Marshall [1954] 1 WLR 1489. The three conditions to be satisfied to admit new evidence are:

a. that the evidence could not have been obtained with reasonable diligence for use at the trial.

b. the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.

c. that the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

12. Mr Coghlin's written submissions answered these points in turn as set out below:

"The first condition: that the evidence could not have been obtained with reasonable diligence for use at the trial

(a) the Court of Appeal stressed in Rawding v Seager UK Ltd[2015] EWCA Civ 113at [44], "the standard required is reasonable diligence, not higher."

(b) In applying this test of reasonable diligence (as part of the broader analysis of the interests of justice), the tribunal will be mindful that the hearing in question was not a trial or even a preliminary hearing listed at several weeks' or months' notice. Rather, it was an interim relief hearing, listed at short notice. At an interim relief hearing a respondent is required to act with enormous haste, and it is inevitable that even with reasonable diligence, not all relevant evidence will be marshalled. There will have been no time for a proper disclosure exercise on either side, and there will rarely be time to take instructions from the client so as to identify the full shape of the defence, let alone collate all necessary documentary and witness evidence.

(c) Here, the respondent did not even have time to prepare an ET3. The respondent and its representatives faced very particular difficulties which set the case rather apart from the norm. The respondent's representatives needed to obtain instructions and documentary and witness evidence from a client based in China and who does not speak English, and who required documents to be translated……..

(d) The respondent's representatives acted as quickly as they reasonably could, and made an appropriate application for a postponement of the hearing. That application was turned down since the interim relief procedure is one which by its nature has to

be undertaken quickly. But that need for expedition should not serve as a tool of injustice.

(e) Overall, the respondent and its representatives used reasonable diligence in preparing for the interim relief hearing: they did the best they reasonably could. The fact that it is only subsequently that important evidence has emerged is wholly unsurprising.
The second condition: that the evidence would probably have an important influence on the outcome of the interim relief application, though it need not be decisive

(a) The evidence is obviously highly relevant. The relevance of different elements is explained in the witness statements provided, and in the submissions below, but it includes among other things evidence which, if accepted as accurate, will show:

ii. That the tribunal made a material error in its approach to the insolvency issues at play in the case by finding that there had been winding up petitions presented, county court judgments issued, and bailiffs demands received, when none of these things was true ….

iii. That the respondent's parent company had committed to providing funding for a further 12 months……

(b) These matters are clearly fundamental to the case, and any one of them could have had an important influence on the outcome of the interim relief application. The third condition: that the evidence in question must be apparently credible, though it need not be incontrovertible

(a) *Largely the evidence comprises documents, such as audited accounts and letters, which are not only apparently credible but unlikely to be seriously capable of being disputed. In summary, the three Ladd v Marshall conditions are clearly met, and it is therefore in the interests of justice that the respondent should be permitted to adduce this evidence".*

13. I was also directed to Jasinarachchi v GMC 2014 EWHC 3570 paragraphs 31 and 37 and reminded that documents may be relied upon even if they do not meet all parts of the Ladd v Marshall conditions. I accept this submission and note that the test is of reasonable diligence.

14. Mr Sendall, on behalf of the claimant, submitted that the new evidence which the respondent sought to introduce could have been reasonably known and foreseen at the time. He questioned why, when the first respondent has staff in both London and China who speak English as a first or second language, solicitors could not take instructions from them. He also submitted that the first respondent would be expected to have resources at its disposal to be able to deal with important issues quickly and effectively, even if it entails documents in English. Interim relief hearings are by their nature speedy and in this case 11

days' notice was provided which it is submitted was adequate time for instructions to be taken.

15. Mr Sendall referred to the fact that Mr Rudwick, who is the first respondent's director of operations, HR and administration and who handles all London HR issues, would have been the obvious person to take instructions in relation to matters surrounding the claimant's termination of employment.

16. He submitted that the documents relating to questions of solvency could have been dealt with by London office staff and there was no cogent evidence that the need to translate everything into Chinese led to any material delay in seeking obtain instructions from the relevant people. Further, the respondent was able to obtain sufficient instructions to make submissions on the point of the support from ABP China, and so the company accounts could and should have been identified as relevant to this issue. While the shareholder letters are not in the public domain Mr Sendall submits that the existence of the document at p 182-184 could be inferred from the financial statements. No explanation is given as to why this and the document at p185-7 could not have been relied on at the first hearing.

17. I have considered the submissions made to me. I accept that solicitors needed to obtain instructions from the chairman of the respondent organisation, particularly as he is a named respondent. While no doubt some instructions could have been taken from London, in the circumstances of this case it was appropriate to take these from the chairman. I also accept that as this required taking instructions from a non-English speaker resident in China where there is a significant time difference, and this is an individual with other calls on his time, his evidence could not have been obtained with reasonable diligence at the time of the interim relief hearing.

18. While others may have had knowledge of the exchange of emails relating to the February meeting, I accept that the need for these would become more readily apparent from speaking to the chairman. The director's reports are public documents, but the letters from shareholders are not. While their existence could perhaps have been inferred, and some instructions were given on the position of support from the parent company, without the benefit of being able to take full instructions I accept that the documents now provided were not ones that could reasonably have been presented. Overall, I accept that the communication delays the respondent's solicitors faced meant they were not in a position to provide the witness statements or documents they now seek to introduce applying the standard of reasonable diligence

19. I also conclude that the evidence will probably have an important influence on the result of the case. Mr Sendall disputed this in relation to the accounts and other documents at pages 142-190 as in his submission they supported the claimant's position and so did not advance the respondent's case. This is clearly a contested point and I conclude that the documents are relevant to the case and may have an important influence on its result one way or the other. There is no dispute that the documents are credible.

20. While I appreciate that an interim relief hearing is always dealt with at short notice, and in this case the respondent had more than the required seven days' notice, nonetheless on the facts of this case I find that it is in the interests

of justice to reconsider my decision and further that the availability of this new evidence together with the claimant's amended pleading amounts to a relevant change of circumstances.

Other specific grounds

21. I will deal briefly with the specific grounds on which the application was made. Ground 2 is a submission that my reasons suggest I applied the wrong test for interim relief by considering each hurdle the claimant must pass for a "whistleblowing" claim and not then considering the position in the round. I agree with Mr Sendall's submission that the claimant had to meet each hurdle to the appropriate level, as otherwise his application would fail, but then the matter must be looked at in the round and I must be satisfied that the claimant met the required standard as a whole. While the reasons could have been better expressed at paragraph 48, that was intended to express the holistic approach and I do not find this is a ground to reconsider the judgment.

22. Grounds 3 and 5 are effectively addressed in considering the new evidence which is now before me. Ground 4 is a relevant change of circumstance and I have found that this, together with the new documents, is a ground for review.

23. Grounds 6 and 7 are a criticism that insufficient analysis was carried out that the claimant could have a reasonable belief that legal obligations that amount to wrongful or fraudulent trading had been breached or were likely to be breached. Mr Sendall submits that it does not matter if a legal obligation has technically been broken or not, what matters is the reasonableness of the belief of the person making the disclosure.

24. Ground 8 is a criticism that many of the disclosures did not have the required level of specificity which is answered by Mr Sendall that there was plainly sufficient evidence in respect of the allegations of breach of contractual obligations. For grounds 6,7 and 8 Mr Sendall submits that there are no grounds to reconsider one or even a few aspects of the protected disclosures as it would not affect the outcome.

25. I would agree with Mr Sendall and would not reconsider on just these grounds. However, as part of the reconsideration I have determined to carry out on other grounds I will consider the claimant's amended schedule of disclosures and his solicitor's letter of 17th February 2020 as representing the claimant's position on his state of knowledge and belief.

Reconsideration

Evidence as to the meeting on 28 February 2020

26. The witness statements of Ms Baird, Mr Xu and Miss Xu address the claimant's dismissal. They referred to a meeting which took place on 28th of February 2020. The claimant's amended claim form (page 204 – 216) now makes further detailed reference to this meeting at paragraph 24 and 26.

27. The claimant specifies in his claim form that the chairman made it clear to the claimant that he wanted him out of the business by the end of March 2020. The claimant's amended claim further states that he reminded the chairman he

was entitled to 6 months written notice of termination and they agreed to meet again to discuss how the terms on which he is employed might end and if a consultancy agreement could be established.

28. The documents now admitted included at page 131 a calculation headed "Sam exit payments". At page 134 was a letter from the claimant to Mr Rudwick dated 12 March 2020. The claimant accepts that this email was sent and it was a proposed basis for negotiation of the settlement agreement, but he says that no further meeting took place to seek to agree a basis of the possible termination of his employment or the creation of a consultancy agreement and no such agreement was reached subsequently. The newly admitted documents also includes at page 137 a note from the claimant of 11 June which refers to the respondent feeling they no longer needed his services and that they were still in the process of negotiating his exit from the company.

29. It had been agreed between the parties that this matter was not raised as one of jurisdiction, but it is raised by the respondent to show that any alleged protected disclosures occurring after February 2020 were unlikely to be of any causative potency. This was in fact, ground three of the reasons for reconsideration.

30. On behalf of the claimant it was submitted that the respondent has still not come up with any reason for dismissal, other than what is now said to have occurred in February 2020. It was not credible that they had determined to dismiss him in February when in submissions at the original interim hearing the respondent had relied on matters which had arisen after February as reasons to dismiss.

31. To succeed in his application for interim relief the claimant must show a number of things, but key is that he has a "pretty good chance" of persuading the tribunal that the reason for his dismissal were what he says were the protected disclosures. What exactly occurred in the February 2020 meeting is disputed, but it is clear from the claimant's own pleadings and the contemporaneous documents that he knew that the respondent wanted him out of the organisation and that he knew that from 28 February. It is arguable that the decision to end his employment had already been taken at this point. I therefore conclude that the claimant does not have a pretty good chance of persuading a tribunal that disclosures made after this date were the reason he was dismissed, as it appears that the decision may have been taken in February and all that was left was to determine the terms of the exit.

<u>The nature of the disclosures prior to 28 February and reasonable belief</u>

32. There were, however, 5 disclosures prior to this meeting. While this is not the claimant's pleaded case, as he relies on all disclosures, I have considered whether these could have amounted to a reason to dismiss him. They are set out in the schedule of disclosures and all are said to show a criminal offence of fraudulent trading due to cashflow and /or balance sheet insolvency, breach of contractual obligations to pay debts, breach of contractual obligations to pay liabilities as and when they fell due, and wrongful trading due to cashflow insolvency.

New documentation relating to the respondent's solvency and support from the Chinese shareholder

33. I have considered the issue of the claimant's reasonable belief as to likely insolvency in the light of the new information and documents. I had concluded at paragraph 29 of my reasons that winding up petitions, County Court judgements and bailiff demands were variously served against the first respondent. I did so adopting an assertion made in the claimant's skeleton argument. Ms Baird's witness statement referred to a document at page 141 from the London Gazette which showed that there had been no winding up petitions and there were no County Court judgements served against the first respondent at any time before the application for interim relief and therefore no bailiff demands arising from any county court judgement.

34. The claimant has now corrected this in his amended pleadings to specify that *threats* of winding up petitions et cetera were received. In written submissions on behalf of the claimant, counsel sets out references to a number of emails at pages 55, 68 and 70 – 71. These do make reference to the fact there are outstanding creditors and that they could call for a winding up petition. The document at page 68 specifies that many creditors are now threatening to take action over overdue invoices.

35. Mr Coghlin on behalf the respondent took me to pages 142 – 160, being the directors' report and financial statements of the year ended December 2018. At page 151 the net assets of the company were shown at nearly £11 million, and at page 153 there is a statement saying that the parent company, along with the ultimate owner, has confirmed their intention to support the company to meet its liabilities as they fall due for at least one year from the date of approval of these financial statements. It was not disputed that the claimant as finance director would see these documents.

36. I was also taken to the new document at page 161 – 181, the directors' report and financial statements for the year ended 31 December 2019. Again, at page 171 the company has net current assets of just under £11 million but the notes to the financial statements (expanded at page 174) make it clear that the company is reliant on financial support from its parent. That parent needed to raise further funds. It was noted that there were no legally binding agreement in place in relation to any fundraising or refinancing, that the success of raising finance is outside the control of the company and there could be no certainty that the parent company would be able to raise further funds. A material uncertainty which could cast significant doubt about the company's ability to continue as a going concern was raised.

37. The new bundle also included a letter 25th of June 2020 confirming that the parent has both the financial ability and intent to provide financial resources to the respondent, although it noted the letter was not legally binding. Page 189 – 190 confirmed that shareholder support had been received and money had been paid in May 2019, December 2019 and July 2020.

38. On behalf of the claimant it was submitted that net assets are not the crucial point, the company's stock was dependent upon completion of the building project. Had that not occurred then there would have been no assets. It was also submitted that the 25 June 2020 letter was expressed not to be legally

binding. The claimant's position was that although some funding had been provided, it was not enough and not being provided in time to meet contractual obligations as they fell due and therefore risked insolvency. He accepted that some funding had been provided. It was submitted on his behalf that these additional documents simply confirm the position the claimant had already acknowledged, that they were non-binding expressions of comfort. They did not deal with the concern that China might "pull the plug" on funding support and leave the business insolvent in breach its obligations to creditors.

39. In reaching the view that the claimant had met the necessary standard of "pretty good chance" in showing that he had a reasonable belief that his disclosures showed wrongful and /or fraudulent trading– both of which require insolvency, I took into account the serving of winding up petitions. There is a significant difference between creditors threatening to act and the service of winding up petitions, bailiff demands and County Court judgements.

40. In considering the reasonableness of the claimant's belief I had also taken into account that there was no evidence produced by the respondent that the Chinese shareholder had responded to the claimant's requests and concerns. The new documentation presents a different picture. There is in fact evidence that the respondent had the support of its parent and that money had been forthcoming. I am no longer persuaded that there is a pretty good chance that the claimant will be able to show a reasonable belief in the organisation's potential insolvency. It follows that he would not meet the high test required for an interim relief to be granted in relation to disclosures that show wrongful or fraudulent trading.

Disclosures of breach of contractual liabilities

41. I have also considered the five disclosures made prior to 28 February meeting and whether the claimant could have a reasonable belief that they disclosed a breach of an obligation to pay liabilities when they were due.

42. I was taken to a letter from the claimant solicitors of 17 February 2021 which accompanied the claimant's list of protected disclosures. That states at paragraph 1.3 that the various legal obligation allegations were based on the claimant's reasonable belief. It states that he could see that liabilities were not being paid as they fell due, insufficient funding was available to properly maintain the property assets, UK valuers had valued properties significantly below the carrying value in the accounts and only limited amounts of funding would be remitted by the respondent parent to pay salaries and the most urgent creditors. This all set out in the December Board report. This letter goes on to say that the UK companies were fully reliant on the survival of financial support from the Chinese parent which seemed uncertain and that it was the claimant's suspicion that the parent company had its own financial problems. I note that it specifies that China was sending money to pay the most urgent creditors.

43. I was taken to Krause v Penna and Darnton v the University of Surrey and it was submitted that the claimant's suspicion of financial issues in the parent which might lead to it not supporting the UK was insufficient to allow the claimant to show that he had the necessary reasonable belief that a legal obligation had been breached or was likely to be in breach. As "likely" means "more probable than not", that requires more than suspicion.

44. The claimant's submissions suggested it was very hard to see how there was any doubt in respect of the many breaches of contract that were pointed out in his disclosures. It was said it was common ground that the business was failing to pay all of its creditors on time and was frequently providing funding after breach of the payment obligation had taken place. This was not accepted by the respondent. In contrast it was submitted that no evidence was provided as to the payment terms that had been agreed, whether there had been any variation in these or what was the course of dealing.

45. Mr Coghlin submitted that if one takes away the wrongful and fraudulent trading allegations, one is left with the finance director pointing out things that are within his job description to flag up and that is not plausible to be dismissed for this.

46. I was asked to consider two authorities, Blitz v Vectone holdings UK EAT/0253/10 and Blackbay Ventures v Gahir [2014] ICR 747. Mr Coghlin submitted this was a finance director doing his job. Mr Sendall submitted that these cases are not authority to hold that you can not be dismissed for pointing out problems, even if that falls within your job.

47. I agree with Mr Sendall that it is possible to be dismissed for making protected disclosures that are within your job role. However, I accept Mr Coghlin's submissions that a belief that debts will not be paid, which is based on a suspicion that the Chinese company may be unable to pay (particularly when the claimant acknowledges that money is sent to pay the most urgent creditors) mean that the claimant has not established that there is a pretty good chance of him showing a reasonable belief that there were breaches of obligations. Nor has he established to the required standard that these were the cause of his dismissal.

Conclusion

48. Based on the new evidence that I have now had the opportunity to consider, I have reached a different conclusion. On his own case the claimant accepts that the respondent had reached a decision to end his employment on 28 February 2020. He does not have a pretty good chance of establishing that the disclosures after this meeting were a cause of his dismissal.

49. Considering the disclosures made prior to that date as a possible cause of that decision, the claimant does not have a pretty good chance of showing that he was dismissed for raising concerns relating to wrongful or fraudulent trading as I have concluded that he has not been able to establish his reasonable belief in these two possibilities to a sufficiently high standard. I have also concluded that he cannot establish to the appropriate standard required for interim relief a reasonable belief that there were breaches of obligations.

50. Considering the matter overall and in the round, I conclude that the claimant does not discharge the burden on him to show he has a pretty good chance of persuading a tribunal that he had a reasonable belief in the matters he raised so as to amount to a qualifying disclosure, or that these were the principal reason for his dismissal.

51. For these reasons I revoke my order for interim relief by finding that such an order should not be made.

Employment Judge McLaren
Date: 2 March 2021