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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105297/2020

10 **Interim Relief Hearing Held by Cloud Video Platform (CVP) on 23 February 2021**

Employment Judge - A Strain

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Mr D Robertson	**Claimant** **Represented by:** **Ms L Neil** **Solicitor**
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Glencairn Crystal Studio Limited	**Respondent** **Represented by:** **Mr A Mellis,** **Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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

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REASONS

Background

1. The Claimant was represented by Ms Neil, Solicitor. The Respondent was represented by Mr Mellis, Counsel.

2. The Claimant asserted a variety of claims. For the purposes of this interim relief hearing the relevant claim is automatic unfair dismissal for making protected disclosures, contrary to s.103A **Employment Rights Act 1996** (**ERA**).

3. He originally initiated his claim by ET1 dated 3 September 2020 [Production 4]. That claim was rejected by the Tribunal. A second ET1 was presented on 28 September 2020 [Production 19]. The Claimant requested reconsideration of the rejection. It was contended that the original ET1 was rejected due to no ACAS Certificate having been attached and that this was wrong in the context of an interim relief application. This is of significance in that section 128(2) ERA provides the Tribunal *"shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination"*. The Effective Date of Termination (**EDT**) in this case was 31 August 2020.

4. It was open to the Tribunal to allow the reconsideration application to proceed even though it had been received outside the 14 day time limit in Rule 13.

5. It was not clear to the Tribunal whether or not the reconsideration application had been determined by the Tribunal. The Tribunal made enquiry of the Administration and in the meantime reserved the issue and proceeded on the basis that if the reconsideration application had not been determined then the Tribunal would determine the issue in the context of this interim relief hearing.

6. The Tribunal noted the Respondent's position was neutral with regard to whether the rejection of the first ET1 was correct or not.

7. The Parties had lodged a Bundle of Documents with the Tribunal.

8. Ms Neil informed the Tribunal that she wished to lead evidence from the Claimant. Mr Mellis opposed this on the basis that this was an interim relief hearing and that the matter should be determined on the papers and submissions. The Respondent did not intend to lead any witnesses for this hearing and had no notice of what the Claimant might say in oral evidence. There would be prejudice to the Respondent if this was allowed. Ms Neil wished the Claimant to give evidence with regard to the various oral disclosures that were claimed to be protected. The Tribunal considered this in the context of the overriding objective and determined that the Claimant should be heard and his evidence be subject to cross-examination.

9. The Claimant gave evidence.

10. There were no witnesses for the Respondent.

Evidence

11. The Claimant set out the history of the matter. He set out 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 ERA.

12. The Claimant asserted those protected disclosures were made by email and orally in his oral evidence and on the papers:

   a. 20 March 2020 emails [Production 17]; and

   b. Undated oral disclosures (detailed in page 63 of the Bundle) about health and safety issues (likely to have been after 4 April 2020) to:

      i. Alan McPhee about:

         1) The need for ventilation, distancing and his concerns about vape smoke settling at head height in the workplace being evidence of the spread of particals exhaled and the need for ventilation. The workplace resembled an “80s nightclub” due to vape ‘smoke’;

2) The risks of transmission through handling material that work colleagues had handled;

3) He would leave if a colleague looked unwell;

4) He would work by the back door with it open for ventilation;

5 5) He would go for lunch by himself due to the risks in the workplace;

6) Alan McPhee and his team leader about the need for face masks, ventilation and gloves in the workplace. The Claimant provided his own;

7) Staff should not be permitted to mix/congregate/share tools or
10 equipment or products;

8) A colleague should have self-isolated for 14 days after his return from Italy and when he developed symptoms;

20 March 2020 Emails

13. The Claimant sent 3 emails to Karen Barclay (HR) of the Respondent. In the
15 first he copies a link to a Youtube video which he states:

> "*Hi Karen Was going to call and see what set up is at work with coronavirus tomorrow. With schools closing etc? Saw this video on youtube to yourself, Paul & co. I have friends in amsterdam and texas on lockdown. Worried about the older staff.* "

20 14. In the second he states:

> *"Hi Karen, My girlfriend's had the cold and isolating. (That's her story anyway) I've got a headache and runny nose but no coughing or fever yet. Guidance on tv is shocking re symptoms. People who have it complain of sneezing and diarrhoea but on tv they say these aren't "not*
> 25 *symptoms." I'll wait and see if I feel better or worse by monday Been in*

house all week since Thursday except to go to shops or drop shopping at my parents' house. Cheers David"

15. In the third he states:

"Hi Karen I will call in tomorrow. I'll need to stay home this week. Got sore head & cough. And I also suffer from asthma Need to get medication sorted. Inhalers etc. Government advice to stay home. I would be happy you guys using my June holiday allocation. As my parents' cruise is cancelled now. If this helps the business My girlfriend's also a key worker whose had cold since last Thursday. So not even seeing her at moment I heard I'd be quiet on the Lehr for a while. So hope this is ok. As tsunamis coming and only way to avoid it is to isolate and keep people at a distance. Certainly don't want to spread anything. Even having cold and flu is dangerous with this other virus on the loose. I'll also be happy to work shifts when this hits. As long as people are keeping their distance most of my families in 60s,70s and 80s. Some with dementia. Stay safe guys. Think the nhs will only have a fighting chance if we get ahead on isolating. The less people are outside. Less numbers in hospitals. If there's anything I can do to help let me know. Don't care if I have to work 12 hour night shifts. Sincerely David Robertson"

22 March 2020 email

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"Hi Karen I will call in tomorrow. I'll need to stay home this week. Got sore head & cough. And I also suffer from asthma Need to get medication sorted. Inhalers etc. Goverment advice to stay home. I would be happy you guys using my June holiday allocation. As my parents cruise is cancelled now. If this helps the business My girlfriend's also a key worker whose had cold since last Thursday. So not even seeing her at moment I heard I'd be quiet on the Lehr for a while. So hope this is ok. As a tsunamis coming and only way to avoid it is to isolate and keep

people at a distance. Certainly dont want to spread anything. Even having cold and flu is dangerous with this other virus on the loose. .I'll also be happy to work shifts when this hits. As long as people are keeping their distance most of my families in 60s,70s and 80s. Some with dementia. Stay safe guys. Think the nhs will only have a fighting chance if we get ahead on isolating. The less people are outside. Less numbers in hospitals. If there's anything I can do to help let me know. Don't care if I have to work 12 hour night shifts. Sincerely David Robertson"

Reason or principal reason for the dismissal

16. The Claimant's case is that the reason or principal reason he was dismissed was for making the protected diclosures detailed above. The oral disclosures were made between 4 and 17 April 2020. He was at work for the period 4 to 17 April 2020 after which he was not back in the workplace. He was on furlough until 31 August 2020. He considered that he would be employed until the end of the furlough period around 31 October 2020.

17. He considers that he was dismissed for making the disclosures. He gave evidence of antagonism between himself and Alan MacPhee and the threat of dismissal from him. In his Further and better Particulars he states:

The claimant is aware of several individuals who have been hired following his dismissal and the fact that the respondent have significantly extended their premises. This shows that, rather than a failure in the business, it continued to thrive. Combined with a long list of employees who joined after the Claimant who all kept their jobs. The respondent alleged in the ET3 and the claimant's dismissal letter that 10% of staff were reduced from each department. This was evidently not the case. The Respondent did not apply "last one in, first one out" policy.

Rather than being dismissed due to financial issues as reported, the claimant was dismissed due to his repeated assertions that health and safety was being breached

The Respondent's position

5 18. The Respondent denies that the oral disclosures were made and there is accordingly a factual dispute. The Respondent further asserts that the email and oral disclosures do not amount to protected disclosures and that the Claimant's selection for Redundancy was in no way connected to any disclosures.

10 19. The Claimant's evidence was challenged on the basis that some of the oral disclosures he gave evidence about were not contained within his pleaded case. Inaccuracies in his evidence with regard to bringing the disclosures to the attention of the Respondent's Managing Director were highlighted. The emails were adressed to Karen Barclay (HR) and the oral disclosures were all
15 made to Alan McPhee.

20. The reason or principal reason for dismissal was redundancy. There had been a reduction in headcount within the Claimant's department and his duties were covered by existing, longer serving staff. The Respondent's had opertaed a "last in first out" selection criteria. This indicated another clear factual dispute
20 between the Parties.

The Relevant Law

Approach of the Tribunal to Interim Relief Casees

21. The Tribunal had regard to the guidance of HHJ Eady QC contained in His Highness Sheikh Khalid Bin Saqr Al Qassim v Robinson [2018] UKEAT
25 0283/17 and in particular of the following:-

"(1) A Tribunal will not normally hear oral evidence on an interim relief application.

(2) The application has to be determined expeditiously and on a summary basis.

(3) The Tribunal has to do the best it can with such material as the parties have been able to deploy at short notice and to make as good an assessment as it is able to do so.

(4) The Tribunal has to be careful to avoid making findings of fact that might tie the hands of the Tribunal which is ultimately charged with the determination of the substantive merits of the case.

(5) The Tribunal is required to decide whether it is likely that the claimant will succeed at a full hearing of the unfair dismissal complaint. When considering the likelihood of the claimant succeeding at Tribunal the test to be applied is whether the claimant has a pretty good chance of success at the full hearing."

Burden of Proof in interim relief cases

22. 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".

23. 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.

Qualifying protected disclosure

5 24. In terms of sections 43B – 43H of the Act to be a qualifying protected disclosure the Claimant needs to satisfy the Tribunal that:

(a) There was a disclosure of information;

(b) The subject matter of this disclosure related to a "relevant failure";

(c) It was reasonable for him to believe that the information tended to show
10 one of these relevant failures;

(d) He had a reasonable belief that the disclosure was in the public interest; and

(e) the disclosure was made in accordance with one of the specified methods of disclosure.

Disclosure of information (*section 43B(1))*

25. The Employment Appeal Tribunal in the case of ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325*** provide guidance to the Tribunal highlight a distinction between "information" and an "allegation". The EAT held the ordinary meaning of "information" is conveying
20 facts". ***Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436, CA*** highlights a distinction between "information" and an "allegation". The Court of Appeal in ***Kilraine*** noted that there can be a distinction between "*information*" (the word used in ERA 1996 s.43B(1)) and an "*allegation*". However, the concept of "*information*" as used in ERA 1996 s.43B(1) is capable
25 of covering statements which might also be characterised as allegations.

There must be a Qualifying Disclosure (section 43B(1)(a-f))

26. 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.

27. This requires the Tribunal to consider whether or not the disclosure was (in the reasonable belief of the Claimant) (i) in the public interest and (ii) showed one or more of the matters contained within section 43B(1)(a-f) as set out by the Court of Appeal in ***Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979***. The Tribunal should determine whether the employee subjectively believed at the time of the disclosure that disclosure was in the public interest. If it was then the Tribunal should ask whether that belief was objectively reasonable.

Reasonable Belief

28. It is the Claimant’s belief at the time of disclosure that is relevant and it is not necessary for the Claimant to prove that the infoirmation disclosed was actually

true (***Darnton v University of Surrey 2003 IRLR 133)***. The Tribunal must assess the Claimant's belief on an objective standard (***Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4***).

29. The EAT in ***Phoenix House Ltd v Stockman and anor 2016 IRLR 848***, give further guidance on the approach to be adopted : "*on the facts believed to exist by an employee, a judgment must be made as to whether or not, first, that belief was reasonable and, secondly, whether objectively on the basis of those perceived facts there was a reasonable belief in the truth of the complaints*."

The reason (or, if more than one reason, the principal reason) for his dismissal

30. Once the Claimant has established that he made a qualifying protected disclosure he must then establish that the fact of making the disclosure was the reason (or, if more than one reason, the principal reason) for his dismissal.

31. In determining what the reason or principal reason for the dismissal was the Tribunal should ask itself whether, taken as a whole, the disclosures were the principal reason for the dismissal (***El-Megrisi v Azad University (IR) in Oxford EAT 0448/08***).

Submissions

32. Both Parties made submissions orally.

The Claimant

The Tribunal was referred to the case of ***Dandpat v University of Bath & Anor*** **UKEAT/0408/09/LA** and invited to follow the EAT's approach. Furthermore, it ws submitted, "likely" meant "could well happen".

The various disclosures were addressed and it was submitted (under reference to authorities) that they clearly satisfied the tests in section 43B. The Claimant had brought health and safety concerns to the Respondent's attention (which were protected disclosures) and these were the reason for the dismissal.

The Tribunal needed to consider the context the various disclosures were made in. A statement that is an allegation may be a qualifying disclosure viewed in context.

The Tribunal had evidence before it that others were employed after the Claimant was dismissed. The Respondent was not in financial difficulties at the time of the dismissal.

The Respondent

33. The Respondent made oral submissions and also lodged skeletal submissions.

34. It was submitted that the disclosures made did not satisfy the requirements of section 43B. In particular, all the Claimant was doing was asking questions or seeking reassurance.

35. The Tribunal could not say that the Claimant had a pretty good chance of success. It was a high threshold and it had not been satisfied.

36. The Claimant' evidence was contradicted by his own praise of the Respondent. His evidence was inconsistent.

Discussion and Decision

Reconsideration of Rejection of Original ET1

37. The Tribunal ascertained that no Decision had been made on the reconsideration application. It was evident that the original ET1 had been rejected due to there being no ACAS Certificate. In an application for interim relief (which was clearly made on the ET1) there is no requirement for an ACAS Certificate. The ET1 had been wrongly rejected. The Tribunal considered that (a) it it was in accordance with the overriding objective to extend the time limit for presenting the reconsideration application in term of Rule 5; and (b) the rejection of the originl ET1 was wrong and the ET1 should be accepted. The Tribunal accordingly granted the Claimant's application for reconsideration and accepted the original ET1.

Burden of Proof

38. The Tribunal applied the test identified in ***Taplin v C Shippam Ltd 1978 ICR 1068***. 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”.

39. Following ***Ministry of Justice v Sarfraz [2011] IRLR 562*** the Tribunal considered whether it was likely that the Tribunal at the final hearing would find: (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; and (iv) that the disclosure was the principal reason for his dismissal. The word “likely” does not mean “more likely than not” (that is, at least 51% probability), but connotes a significantly higher degree of likelihood.

40. The Tribunal considered that the test was not met, in this case for the following reasons:

The oral disclosures

41. The Claimant faces a difficulty in proving that he made the oral disclosures, on each of the occasions which he pleads, and that they meet the definition within section 43B. The Tribunal do not say that he cannot, but on the basis of the opposition presented by the Respondent and the clear factual dispute between the Parties, the Tribunal cannot say that it is likely that he will succeed on all fronts in showing that all of his alleged disclosures meet the standards required.

42. The Claimant’s evidence in relation to the oral disclosures was in some respects vague and imprecise. His oral evidence supplemented what was stated in his pleaded case. Some disclosures appeared to amount to statements of intent by the Claimant as to action he would take in certain circumstances such as leaving the workplace if someone appeared unwell, others to be questions seeking reassurance.

The email disclosures

43. The Tribunal could not identify content in the emails amounting qualifying to disclosure of information about what was happening within the Respondent's premises or that there was any "relevant failures" by the Respondent falling within *section 43B(1)(a-f)* of **ERA**.

44. It is clear that the question of whether or not his disclosures amounted to disclosures of information, whether the disclosures were (in the reasonable belief of the Claimant) (i) in the public interest and (ii) showed one or more of the matters contained within section 43B(1)(a-f) as set out by the Court of Appeal in ***Chesterton Global Ltd (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979*** remain open for analysis by the Tribunal which ultimately hears the case. At this stage, the Tribunal cannot find that the Claimant's chances of proving this are pretty good.

The reason (or, if more than one reason, the principal reason) for his dismissal

45. On the basis of the evidence given by the Claimant, contained within the productions and the clear factual dispute with the Respondent the Tribunal considered that this question also remained open for analysis by the Tribunal which hears the case and would require an evaluation of the conflicting evidence. At this stage, the Tribunal cannot find that the Claimant's chances of proving this are pretty good either.

Employment Judge: A Strain
Date of Judgement: 18 March 2021
Entered in register: 1 April 2021
and copied to parties