Case No: 2300258/2019

EMPLOYMENT TRIBUNALS

Claimant: Craig Stead

Respondent: Ligman Ltd (in liquidation) (1)
Sakchai Manawongsukul (2)

Heard at: London South (by cvp) On: 29 & 30 March 2021

Before: Employment Judge Housego
Tribunal Member S Lansley
Tribunal Member D Rogers

Representation

Claimant: In person
Respondent: Ergin Balli, Solicitor of BYLaw

JUDGMENT

1. The claim against the 1st Respondent is stayed.
2. The Claimant was dismissed because he made public interest disclosures.
3. The 2nd Respondent is ordered to pay to the Claimant the sum of £75,953.13.

REASONS

Summary

1. The 2nd Respondent is a Thai businessman. He set up a UK limited company, the 1st Respondent. The Claimant was asked to be its managing director. He was summarily dismissed shortly after raising concerns with the 2nd Respondent about breach of GDPR in a proposed company email management programme. He says it was for this reason, and for other matters he said were also public interest disclosures. The 2nd Respondent says it was for poor performance. The 1st Respondent is now in liquidation. The Claimant cannot claim ordinary unfair dismissal as he had not worked there for the necessary 2 years.

The law

2. The relevant section of the Employment Rights Act 1996 ("ERA") is S103A. There is no claim for pre-dismissal detriment. That section provides:

> *"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."*

3. The burden and standard of proof applicable is set out in Kuzel v Roche Products Ltd [2008] EWCA Civ 380.

4. It is for the employer to put forward the reason for dismissal, here conduct or some other substantial reason. The Tribunal must first make its primary findings of fact. It must then decide what was the reason or principal reason for the dismissal, the burden being on the employer to show it was as asserted. If the employer does not do so, then it is open to the Tribunal to find that the reason was that asserted by the employee. But the Tribunal does not have to do so. It does not follow that if it was not for the reason given by the employer it must have been for the reason advanced by the employee. The true reason may have been another reason. An employer may fail to show a fair dismissal, but that does not mean that the employer must fail in disputing the case put forward by the employee. But it is not for the employee to prove that the dismissal was for a public interest disclosure reason.

5. This was summarised at paragraph 30 of Royal Mail Group Ltd v Jhuti [2019] UKSC 55:

> *"Section 103A is an example of what is often called automatic unfair dismissal. It is to be contrasted with the provision in section 98, entitled "General", under which, if pursuant to subsection (1) the employer establishes that "the reason (or, if more than one, the principal reason) for the dismissal" is of the kind there specified, the fairness of the dismissal falls to be weighed by reference to whether it was reasonable in all the circumstances pursuant to subsection (4). The application of subsection (4) to section 103A is excluded by section 98(6)(a). So there is no weighing by reference to whether the dismissal was reasonable in all the circumstances: under section 103A unfairness is automatic once the reason for the dismissal there proscribed has been found to exist. In Kuzel v Roche Products Ltd [2008] EWCA Civ 380, [2008] ICR 799, the Court of Appeal addressed the location of the burden of proof under section 103A. It held that a burden lay on an employee claiming unfair dismissal under the section to produce some evidence that the reason for the dismissal was that she had made a protected disclosure but that, once she had discharged that evidential burden, the legal burden lay on the employer to establish the contrary: see paras 57 and 61 of the judgment of Mummery LJ."*

Evidence and hearing

6. Mr Balli acted for both Respondents in the past. He advised the Tribunal that

the 1st Respondent entered an insolvent liquidation in 2020. Mr Stead accepted that the claim against it could not proceed as there was no consent from the liquidator nor an order of the Court to permit it. The Tribunal therefore ordered that the claim against the 1st Respondent be stayed.

7. Mr Balli made application under Rule 37(c) and (d) to strike out the claim. He asserted that Mr Stead had failed to comply with directions of the Tribunal, and had not pursued the case actively. Mr Stead accepted that he had failed to supply documents to the Respondents, as required by an Order made on 15 May 2019. On enquiry from the Tribunal, Mr Balli said that the Respondents had not complied either. His submission was that it was not for the Respondents to chase the Claimant, for it was the Claimant's case. The Tribunal noted that no application to strike out had been made before, and no application for an unless order, even when there was a joint application to adjourn a previous hearing date. Mr Balli said that it was not possible for there to be a fair hearing as he had not the opportunity to take instructions on the witness statement provided only on Friday last week, or on the documents provided by the Claimant.

8. The Tribunal considered this a case where both parties have failed dismally to comply with their obligations to one another and to the Tribunal under the overriding objective.

9. The application to dismiss was refused. The Tribunal limited the documents to the bundle of documents prepared by Mr Balli at the end of last week, and the witness statement of the 2nd Respondent, and other documents only by application on individual basis as occasion arose. The Claimant's witness statement was not adduced as evidence and he would rely (he agreed) solely on his claim form as his evidence in chief. Thus, there was no prejudice to the 2nd Respondent.

10. The witness statement of the 2nd Respondent was admitted, but is of little weight as he had decided not to attend. The reasons given were not good reason not to attend. He was said to be "hard to pin down". This is not a good reason to fail to attend a hearing as a respondent. Covid 19 was said to have an effect, but reasons related to covid do not apply, as this is a cvp hearing. The asserted language difficulty does not apply, as a direction for an interpreter was given. No adjustment was sought for time difference between the UK and Thailand, but Tribunal can sit hours to suit. No issue was raised about sovereignty issues about the giving of evidence from Thailand.

Issues

11. The issues were set out in a case management order. In short, were the 3 matters put forward public interest disclosures? If yes, were they the (or a principal) reason for dismissal?

12. The three matters claimed to be public interest disclosures were:

    12.1. An email of 19 February 2018 to the 2nd Respondent about the absence of CE marks on products he was trying to sell to UK companies to rebrand and sell. He stated that if products were sold without there was

a criminal offence punishable with a prison sentence, and he asked how soon the CE mark could be certified. The 2nd Respondent had replied the same day, in essence saying that his global experience in the lighting industry exceeded Mr Stead's in the UK, and that if he was still afraid and lacked confidence in Ligman he should go and work for any other company, and that he (the 2nd Respondent) would not be stopping him doing so.

12.2. An email of 01 October 2018 about GDPR breaches in a company wide email management program (it would involve sending client details to the company's server in Thailand, and so outside the EU, for which client consent was required and was not being obtained). Mr Stead refused to implement that part of the program, but implemented the rest of it, requiring all employees to sign amended contracts of employment requiring them not to put client details on the system. The 2nd Respondent had replied the same day:

> *"I don't accept any more postpone as I have been waiting your correspondence for weeks without any sense. You have two options are leaving this job or do it. I mad decision as investor."* (sic)

12.3. An email on 22 October 2018 about the company failing to meet its contractual obligation to deliver to clients in 21 days, leading to loss of business opportunity.

13. No issue was taken by the 2nd Respondent about whether he could be personally liable as a respondent to the claim.

Findings of fact

14. The Tribunal was told that the 2nd Respondent has made several attempts to set up UK companies. The 1st Respondent was incorporated on 10 October 2017. It was put into creditors' voluntary liquidation, and winding up commenced on 18 September 2020. Ligman UK Ltd was dissolved on 22 April 2014. Ligman Lighting UK Ltd was dissolved on 20 March 2012.

15. Mr Stead was approached to lead the 1st Respondent and he accepted, starting on 01 October 2017 after a period setting up the 1st Respondent, when he was paid as a consultant by the EU company based in the Czech Republic of which the 1st Respondent was a subsidiary (Ligman Europe s.r.o.).

16. The 2nd Respondent is a businessman based in Thailand who is the sole owner of his businesses, which he runs autocratically. He was said by his solicitor to be a man who does not espouse the approach to employment law taken in the UK.

17. Mr Balli attacked the credibility of Mr Stead's evidence on the basis that he had drafted his own contract of employment and had a subordinate sign it for the company, so slipping advantageous terms past the 2nd Respondent, in that he had 6 months' notice entitlement and everyone else had 3 months. The company solicitor drafted a contract, for both the 1st Respondent and for Mr Stead. Mr Stead had objected to the restrictive covenants, so the solicitor ceased to act as there was then a conflict of interest. The Tribunal accepted Mr

Stead's evidence that it was the solicitor who drafted the contract who had suggested 6 months' notice for the managing director on the basis that it was usual for that role, and a protection for the company as well as an advantage to the post holder.

18. The Tribunal assessed Mr Stead's evidence carefully, and accepted his account as truthful. It was consistent over time, plausible, credible and supported by contemporaneous documentation. The tenor of the messages from the 2nd Respondent was also indicative of the veracity of Mr Stead's account. The Tribunal did not accord the witness statement of the 2nd Respondent much weight. While it has a statement of truth, he did not take any part in the hearing, without any good reason. The document is in English, and the 2nd Respondent sought in interpreter to give evidence, and so he is unlikely to be the author of it. Accordingly in any event further explanation of its preparation and contents would be necessary before it could be accorded much weight.

19. Mr Stead's business plan was to grow the business over time, but he was aware that the 2nd Respondent was impatient for results. He had realised soon after starting the role that it was, in Mr Stead's phrase "a race against time" to become profitable. He decided on a three pronged approach. Short term, to sell "white label" products to others to sell on. Secondly, the sale of lumières (very big and expensive light installations for large public spaces). Thirdly, project work, in the UK and overseas, with architects and developers, which could be very substantial and remunerative but which would have long lead times.

20. He had problems with the first two and not enough time to bring in results in the third.

21. The white label sales ran into difficulty, for although Mr Stead was negotiating with a major player in the industry, Felio Sylvania, for the supply of millions of pounds worth of product, he ran into problems over the lack of CE certification. The 2nd Respondent said that he had been selling in Europe for 12 years and had laboratory testing of all products. He did not provide any evidence that there was testing to CE certification levels, and so Mr Stead had to withdraw from those negotiations. The email relied on by Mr Stead is described above, as is the response of the 2nd Respondent.

22. The Tribunal did not accept that Mr Balli's line of questioning on this topic had any validity. He asked Mr Stead to prove that light fittings needed CE certification, and in the absence of such proof not to accept the submission that it was required. Mr Stead had provided a gov.uk website printout about CE certification. It is everyday knowledge that light fittings have to be CE compliant and certified. In any event it is not a requirement of the legislation that the disclosure be true, just that the person making the disclosure reasonably believes it to be so. Mr Stead would pass that test even if he was not correct (he was) about the matters disclosed.

23. The sale of lumières was not successful as Mr Stead could not get the products he needed to be able to supply.

24. The entire employment was only a little over 12 months, so there was not enough time to get any project to the stage of ordering products. The Tribunal

accepted Mr Stead's evidence that a multi million pound order in one of the Gulf states subsequent to his dismissal was the direct result of work done by him.

25. On 07 January 2018 the 2nd Respondent by email summarily demoted Mr Stead, limiting him to UK Sales Director, instead of being managing director for the UK and the EU.

26. On 01 June 2018 Mr Stead told the 2nd Respondent that his sales target for the calendar year was £1.5m. This, if achieved, would not be enough to break even. The company cost about £40,000 a month to run.

27. Because of the problems with product, Mr Stead went out selling. The total sales to the date of dismissal were about £120,000 of which about £80,000 was Mr Stead's own sales. Throughout, Mr Stead provided monthly reports about his activities and plans for the business in a format approved by the 2nd Respondent.

28. The Tribunal did not accept the contention put forward by Mr Balli that Mr Stead had declined to implement the software program so that he could hide away what he was doing, or not doing. He wanted what he was doing to be visible, and whether he wanted it or not he had implemented all the program save the part which breached GDPR. It is clear that the program did breach GDPR if implemented, for internal company documentation only a few days before Mr Stead's dismissal confirmed this. It was Mr Stead's email that brought this to the 2nd Respondent's attention. Mr Stead's email drawing this to the attention of the 2nd Respondent was on 01 October 2018.

29. On 22 October 2018 Mr Stead emailed the 2nd Respondent with an update on business sought and obtained. He also listed 3 matters, where he had tendered samples for contracts worth £250,000, £40,000 and £80,000, but in each case the samples were delivered weeks late and the opportunities were lost, he said as a result of the lead times. This is the 3rd matter said to be a public interest disclosure.

30. On 23 October 2018 the 2nd Respondent emailed Mr Stead (and copied everyone using the internal global address book) and dismissed him:

> *"Craig,*
> *As your email sent to me with argument and blaming me as Ligman poor service. I have been doing Ligman business and growing over the past 23 years. You are only one that blaming Ligman poor service without truth. You are paying game with me. I as business owner of Ligman Lighting I wanted to fire you and today onward you are no longer Managing Director of Ligman Ltd in UK. All data available with me evidence you are not perform and no working system and discipline even respect company who you are working with. I am taking seriously situation that you are not serving right to company who pay for you.*
>
> *Emre,*
> *You talk to LLUK remaining team and manage business forward."* (sic)

Conclusions

31. The third email was not a public interest disclosure. There is no public interest in whether a company trading for profit breaches a contractual term about speed of delivery of products ordered.

32. The other two emails are clearly public interest disclosures. The Tribunal applies the legal test set out above.

33. The first disclosure points out that the sale of goods in the UK that are not CE certified and marked is a criminal offence (and even if it were not, Mr Stead clearly believed that to be the case so it would be a public interest disclosure in any event). The second points out (correctly, but again it does not have to be proved to be correct) that the program sending client information to Thailand without client consent was a breach of GDPR, which would be a criminal offence for both Mr Stead and the 2nd Respondent.

34. The dismissal closely followed the matter said to be the 3rd public interest disclosure, and the dismissal email refers to its' subject matter. The Tribunal decided that while the 2nd Respondent's (unrealistic) expectations of performance and pique at being criticised for not delivering the goods (literally) come across in this dismissal email, the intense irritation of the 2nd Respondent (only shortly before this) about the GDPR issue thwarting his attempt to get all information from Europe into his Thailand headquarters is apparent from the email sent instantly in reply to Mr Stead's email about it (set out above). The irritation over Mr Stead's request for CE certification was also clear, started in February, but continued for some time. The email response also invited Mr Stead to depart. Mr Stead, rightly, wished to conduct business in an ethical and legal way. The 2nd Respondent had no time for such scruples. His view was that he had been in business 23 years, he owned the company, and he called the shots. He was satisfied with what he was doing and that was enough for him. He paid Mr Stead, and so Mr Stead should do what he was told. The disclosures were a principal reason for the dismissal of Mr Stead. The email from the 2nd Respondent in reply to the GDPR disclosure clearly indicates that the 2nd Respondent was looking to get rid of Mr Stead for that disclosure related reason. The email of 23rd October 2018 (said to be a 3rd disclosure) was the pretext he used to do so. The claim therefore succeeds.

Remedy

35. Mr Stead's claim is of automatically unfair dismissal, and so there is no injury to feelings award.

36. The basic award is £762.50 (1½ week's pay at statutory cap), plus 25% = £190.63, making £953.13.

37. Mr Stead had a six month notice period (and the Tribunal has rejected the 2nd Respondent's assertion that this was in some way slipped past him by Mr Stead). Mr Stead always regarded the role (only after he had accepted it) as a race against time to satisfy the 2nd Respondent. It is clear that this was a race he was never going to win. He would have been dismissed at some point, probably after another 3 months, with 6 months' notice or pay in lieu. His salary was £140,000 a year. The loss cannot in any event extend beyond the

liquidation of the 1st Respondent.

38. Mr Stead was unemployed for 3 months, then obtained new employment at £90,000 a year, which job he had for 9 months until he moved to the job he now has.

39. His loss is therefore ¼ of £140,000 = £35,000 for 3 months, and 6 months at an annual loss of £50,000 = £25,000. This totals £60,000.

40. There was no process of any sort, so the Acas code was not followed. Summary dismissal by email without process is as bad as it gets, and the Tribunal uplifts the award by 25%. That is £15,000 bringing the total to £75,000.

41. The recoupment regulations do not apply, as for a short period Mr Stead received non recoupable state benefits.

42. Mr Stead acknowledges that it will be difficult to enforce this award, but brings this claim as a matter of principle, in the hope that this judgment will serve as a warning of what may lie in store for anyone tempted to become involved in a 4th attempt by Sakchai Manawongsukul to set up a UK company.

Employment Judge Housego

Date 30 March 2021