



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr B Campbell

**Respondent:** Bread Ahead Ltd

**Heard at:** London South Croydon by CVP

**On:** 4 February 2021

**Before:** Employment Judge Sage

## **Representation**

**Claimant:** Ms Murphy of Counsel

**Respondent:** Mr Malec Director for the Respondent

**JUDGMENT** having been sent to the parties on 12 March 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 by the Claimant, the following reasons are provided:

## **REASONS**

*Requested by the Claimant.*

1. By a claim form presented on the 24 November 2020 the Claimant claimed that his summary dismissal was automatically unfair contrary to section 103A and for interim relief. He also claimed that he was subjected to a detriment and unlawful deductions from wages. The Claimant was employed from the 28 July 2020 to 17 November 2020 as an Area Manager. He was dismissed during his probationary period (which was 6 months). The Claimant stated that he orally informed Mr Parkinson of various health and safety issues on the 9 October. He then sent Mr Parkinson quotes (in relation to the EICR recommendations) for immediate attention on the 15 October. Mr Jones, the Director, told the Claimant not to proceed with the works as they had 5 years to complete them. Mr Jones also told the Claimant they did not have sufficient funds to rectify the pest control and the EICR issue on the 23 October 2020.
2. The Claimant was informed on the 17 November 2020 that he was dismissed because he was 'not strong enough' for the role. The Claimant stated that he made protected disclosure that were in the public interest (as they affected 80 staff) and his dismissal was because of these disclosures.

3. It was confirmed by the Respondent that an ET3 had been presented a few days before the hearing (but it was not before the Tribunal). The Tribunal had a document before it which was an email sent to the Tribunal on the 29 January 2021 identified as the 'Respondent's defence' which was seen at pages 46-7 of the bundle. This document made reference to the Claimant's 'H&S and Food Hygiene Issues raised by Mr Campbell'.

#### **Procedure at the Hearing.**

4. No evidence was taken at the hearing. The documents before the Tribunal was the ET1 and a bundle of documents comprising of 293 pages.
5. The Claimant produced a written skeleton argument which was read and taken into account.

#### **Submissions by the Claimant.**

The Claimant's additional oral submissions were as follows:

6. The main challenge is the causation test. The Claimant says that there is a substantial body of evidence of protected disclosures provided to show they were made on the 9 October but also a series of communications. There is therefore a pretty good chance of success in this case.
7. Causation is in issue, I say there are hidden reason for the dismissal, where nuances will be drawn from the evidence. These reasons are hidden in whistle blowing cases as they are in a discrimination case. You must bear that in mind. The key evidence in this case is on page 7 of the skeleton at paragraph 25.1; at that point he had raised the EICR report, which was 6 months old. At paragraph 25.2 he continued to make disclosures and was told by Mr Jones, the owner of the business, not to pursue the works (paragraph 9 of the POC). Tom the electrician said he spoke to Mr Jones on the 13 November and he told him not to pursue the matter and this was 4 days before the Claimant was dismissed. I expect the Respondent will say that there was no issue. The owner was not going to pursue the issue.
8. Paragraph 25.3 of the skeleton shows that the dismissal was not in line with the Respondent's procedures (page 289). In line with discrimination cases this could raise an inference, it is not enough for someone to say that the person was on probation. The contract states that prior to the review date there would be monitoring and appraisals, there was not in this case. That omission would be the basis for an inference, supporting the Claimant's case that he has a pretty good chance of succeeding.
9. The respondent specified at page 61 paragraph (1) that there was a probationary period and a specified review point, they dismissed him half way through the probationary period (paragraph 25.4 of the skeleton). The Respondent has not put forward a satisfactory explanation for doing this.
10. Paragraph 25.5 of the skeleton shows that the Respondent gave a vague and subjective reason for dismissal. Prior to that there had been no appraisals and no warnings. The reason was not performance and because it was subjective it is another factor from which an inference can be drawn.

11. Paragraph 25.7 of the skeleton refers to the letter dated the 30 December 2020 where Mr Malec gave instructions to Mr Parkinson to handle matters verbally, if that was accepted there is a suspicious reason for dismissal. Why take it off line?
12. Paragraph 25.8 of the skeleton shows that the Claimant alleged that he made the same protected disclosure to Mr Malec, was he the appropriate person to hear this? My solicitor has requested supporting documentation and he replied saying there were no documents. You can also take this into account.
13. You have to look at causation, Mr Malec may say that the Claimant didn't raise a protected disclosure and he was not dismissed on that ground but he said in a communication on the 1 December 2020 at page 281 that the company was ignoring concerns over statutory and compliance issues.
14. Even though the hurdle is a high one, he has satisfied at least 50% of this hurdle. In respect of causation, the Respondent dismissed the Claimant half way through his probationary period, they gave vague reasons for his dismissal and they were not prepared to act on the Claimant's concerns. This is against the background of making protected disclosures.

#### **The Respondent's response**

15. We authorised the Claimant to resolve the matters he raised as protected disclosures. In his role he was tasked with compliance, he was asked to look at these things. There is no challenge that the statements were made and there was dialogue about the things the Claimant raised. We asked him to resolve the Health and Safety and food hygiene issues.
16. In respect of performance, we handled the dismissal terribly. He was recruited into the role to deal with the issues he raised. There were a couple of instances on the 13 November 2020 which would have led to a dismissal for gross misconduct due to food hygiene breaches, in Borough Market where the Claimant was working. This matter was flagged up and he wasn't happy with the way it was raised with him. I spoke to the Claimant and the failings were raised with him. This is why he was dismissed. He was not dismissed due to the electrical report or the food hygiene policy. I did not feel there was anything untoward with the Claimant raising the issues.
17. His appeal was due to the manner of his dismissal and the incentive scheme. Protected disclosures did not feature. I accept that it was in his statement but the meeting was focussed on the manner of the dismissal and fiscal issues.
18. I wholly refute reliance on paragraph 25.7 of the skeleton – I did not say that Mr Parkinson should handle the matter verbally as 'no paper trail means no evidence'.
19. In respect of what is said in paragraph 25.8 of the Claimant's skeleton, there was a series of 3 meetings, I asked questions around performance, there

was Mr Parkinson, Jones and Landers, on the issue of Borough Market. I accept that there is a poor paper trail. The Claimant accepted that people had given him constructive feedback. No issues were flagged throughout his employment around protected disclosures and not being listened to, this was only raised after dismissal. He confirmed that the issue was that staff were not in uniform, food hygiene was not complied with and there were significant failures on the 13 November.

20. In the Claimant's role he had responsibility for compliance therefore performance and managing food hygiene are interrelated.

### **The Claimant's reply**

21. See paragraph 20(c) page 22 of the bundle in the particulars of claim, on the 13 November the Claimant said that Mr Jones unjustly reprimanded him. They put that as a health and safety issue, they say that health and safety is at the heart of the reason. There will be a dispute in respect of what Mr Jones said.

### **Cases Referred to by the Claimant**

22. *His Highness Sheikh Bin Sadr Qasimi v Robinson UKEAT/0283/17*

23. *Taplin v C Shippam Ltd [1978] ICR 1068 EAT*

24. *Steer Stormsure Limited UKEAT/0126/20EAT(V)*

25. *Chesterton Global Ltd (t/a Chestertons) and anor v Nuromohamed (Public Concern at Work Intervening) 2018 ICR 731 CA*

26. *Parsons v Airplus International Ltd EAT 0111/17*

27. *Eiger Securities LLP v Korshunova 2011 ICR 561 EAT*

28. *Simpson v Cantor Fitzgerald Europe 2020 EWCA Civ 1601 CA*

### **The Law**

#### **Section 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—

- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,

### **Section 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.]

### **Section 128 Interim relief pending determination of complaint**

(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—

(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

- (i) section 100(1)(a) and (b), 101A(d), 102(1), 103 or 103A, or
- (ii) paragraph 161(2) of [Schedule A1](#) to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met,

may apply to the tribunal for interim relief.

### **Section 129 Procedure on hearing of application and making of order**

(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—

(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

- (i) section 100(1)(a) and (b), 101A(d), 102(1), 103 or 103A, or
- (ii) paragraph 161(2) of [Schedule A1](#) to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

### **Decision**

29. Having considered all the documents before me and the helpful oral and written submissions of both parties I considered each part of the legal test in a claim for automatically unfair dismissal under section 103A. In a claim

for interim relief, the Claimant must meet all parts of the legal test to succeed in his application. They are referred to above.

30. The first issue is whether the Claimant made a qualifying and protected disclosure under section 43B(1)(b) and (d). There appears to be common ground that disclosures were made to the Respondent. The facts before me showed that the Claimant had responsibility in his role for health and safety and compliance matters from the 19 September 2020, when he was given an additional responsibility to assist the Respondent with compliance matters. In pursuance of this additional role he raised health and safety concerns on the 9 October at first orally, he then followed this up on the 15 October by confirming his concerns in writing (page 252 of the bundle). There was evidence to show that Mr Parkinson then asked the Claimant for full details of the costs and a list of priorities on the 17 October and the Claimant replied to this request on the 19 October (page 254).
31. The Respondent stated that they had no issue with the Claimant raising health and safety concerns as this was his role. There was evidence to suggest that Mr Malec and Parkinson engaged in discussion with the Claimant as referred to above. Mr Malec wrote to the Claimant asking about the state of hygiene in Wembley on the 2 November 2020 (page 260) and the Claimant subsequently sent Mr Parkinson quotes for the electrical works (as he had been requested to do) by the 12 November.
32. It did not appear to be disputed by the Respondent in this hearing that the Claimant raised these issues with them and that the issues raised were in the public interest. There was also no challenge to the submission that it was reasonable for the Claimant to raise these matters and that he had a reasonable belief that the disclosures tended to show a breach of either Section 43(B) (b) or (d). The issues raised were handled by the Respondent with reasonable expediency and no concerns were raised at the time about the fact that these matters were raised or the contents of the disclosures. This evidence corroborated that the Claimant raised protected disclosures both orally and in writing therefore the first part of the test is met.
33. The main issue for me today is whether the Claimant has shown the necessary causal connection between the making of the protected disclosure on the 9-15 October and his subsequent dismissal in November 2020.
34. The respondent stated that there was no such causal connection. They stated that compliance was part of the Claimant's role and the reason he was dismissed was his failure to comply with health and safety on the 13 November in relation to the food stall set up in Borough market. There was evidence in the bundle that corroborated that this was a concern raised by the owner of the business Mr Jones and Mr Parkinson with the Claimant at the time and this was in the Claimant's statement at page 281.
35. The evidence on the reason for dismissal is therefore disputed. The Respondent stated that they can show that the dismissal was not because the Claimant made a protected disclosure; they stated in their oral submissions that the Claimant was dismissed for the incident on the 13

November and not because he had previously raised health and safety concerns.

36. I have to consider all the evidence before me and whether that evidence shows that the Claimant is 'likely to succeed' at the full hearing, to show that he was dismissed because he made a protected disclosure. This is a high burden of proof as Mr Justice Underhill said in the case of the *Ministry of Justice v Sarfraz* [2011] IRLR 562 EAT, that this test is "something nearer to certainty than a mere probability". I also took into account the cases referred to above especially the comment by HHJ Eady in *Robinson* where she said that what was required was a summary assessment of the material which was necessarily a broad brush approach.
37. Although the Respondent on their own admission accept that they did not deal with the dismissal appropriately, an admission that they made after the appeal, it cannot lead to a conclusion that this admission will therefore lead to a finding that the dismissal will be found to be because of a protected disclosure. The burden of proof is on the Claimant to show the causal connection. The Respondent contends that they will be able to show that the dismissal was not because the Claimant raised a protected disclosure but because of a conduct issue that occurred on the 13 November.
38. There was evidence in the bundle to show that the Claimant came into conflict with Mr Jones in August citing the 14 and the 21 August where an altercation took place about the whereabouts of PPE on the first date and on the second date about the performance of the Chiswick site (page 279 - 280 of the bundle). Although this employment was short, this evidence showed that there had been problems early on in his employment and certainly prior to the Claimant taking over responsibility for health and safety issues and compliance matters and prior to making his first protected disclosure in October. This evidence will be relevant as to the facts taken into account by the Respondent when deciding to dismiss the Claimant.
39. It is accepted it would be unusual for a Tribunal to see evidence of a section 103A dismissal on the papers, as whistle blowing cases have similarities to discrimination cases, as they are based on inferences that are appropriate to draw from the facts. However it does not necessarily mean that it will be appropriate to draw such an inference in this case on the evidence before me. Much depends on the totality of evidence provided by both parties and it has been seen that there are significant disputes on the facts that will need to be resolved by a Tribunal. In the light of the dispute of facts in relation to the reason for dismissal and the Respondent being able to show evidence of conduct as being the reason for dismissal, it is not possible to say that the Claimant is likely to succeed at the full hearing. Even though the Claimant has suggested that a failure to adopt a fair procedure and a failure to comply with the contractual expectations may lead to an inference being raised, the Respondent has confirmed that the incident in November was sufficiently serious to amount to an act of gross misconduct. If that is proven it would be an answer as to why no procedure was followed.
40. I conclude therefore that the Claimant has failed to meet the high threshold required to succeed in a claim for interim relief. He has failed to show the

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necessary causal connection between the protected disclosure and the subsequent dismissal. It cannot be said on the evidence therefore that the Claimant is likely to succeed in his claim under section 103A.

41. The claim for interim relief is not successful.

Employment Judge **Sage**

Date: 4 May 2021