



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**  
Miss S Messi

AND

**Respondent**  
Serco Group Plc

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL      ON:    10<sup>TH</sup> MAY 2021

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE)

**APPEARANCES:-**

**FOR THE CLAIMANT:-**      IN PERSON

**FOR THE RESPONDENT:-**    MR J CROZIER (COUNSEL)

### **JUDGMENT**

The judgment of the tribunal is that:-

1. The claimant's application for interim relief pursuant s128 Employment Rights Act 1996 is dismissed.

### **Reasons**

1. By this claim the claimant brings a number of claims including a claim for automatic unfair dismissal (S103A ERA 1996) asserting that the reason (or principal reason) for her dismissal was that she had made public interest disclosures within the meaning of s43B ERA 1996.
2. The application before me today is for an order for interim relief in the making of a continuation of a contract of employment order (s129 ERA 1996). The respondent resists the application on the basis that it is not "likely" (within the meaning of s129) that the tribunal which determines the complaint will make a finding that the claimant was automatically unfairly dismissed pursuant to s103A ERA 1996.
3. The law is correctly set out in the respondent's skeleton argument and is not in dispute. The tribunal can only make one of the orders set out in section 129 if it holds that it is "likely" that the tribunal which determines the complaint will find (in this case) that the reason or principal reason fell within s103A. "Likely" in the context of s129 means that there is "a good chance" that the tribunal will find in the claimant's favour; and a

good chance means something more than the balance of probabilities, indeed a significantly higher likelihood (*Ministry of Justice v Sarfraz [2011] IRLR 562 per Underhill P*). That test applies to all aspects of the claimant's claim that may be in issue.

4. The respondent submits that there are three fundamental aspects of the claim, all of which are in dispute, and that on the information before the tribunal that there is not a good chance that the final tribunal will find in the claimant's favour in respect of any of them. They are:
  - i) Employment Status – The respondent submits that the claimant was not employed by it and that if this is correct the claim is bound to fail.
  - ii) Protected Disclosures – The respondent submits that on an assessment of the existing documentary evidence the claimant is unlikely to establish that she has made any protected disclosure.
  - iii) Reason or principal reason for dismissal-The respondent submits that the reason for the termination of the claimant's engagement is clearly set out in writing; is supported by documentary evidence; and that there is nothing, at least at present, to indicate that the reason given was not the true reason.

#### Background

5. For the avoidance doubt in this section I will set out those matters that appear at present to be uncontroversial and unlikely to be in dispute. However I may be wrong and/or the position may change. I have heard no evidence and am not making, or purporting to make, any findings of fact.
6. The respondent holds contracts with national and local government including at the time of the events relevant to this claim contracts to provide coronavirus track and trace services. The claimant was engaged from 18<sup>th</sup> January 2021 until 1<sup>st</sup> April 2021 as part of the track and trace call centre operation making phone calls to members of the general public who had either themselves tested positive, or been in contact with someone who had.
7. On 26<sup>th</sup> March 2021, when she was still engaged by the respondent, the claimant submitted a claim to the tribunal against Serco Group Plc (R1 and the respondent to this claim), HR Go Recruitment (R2), and Andrew Giles (R3) (1401237/2021). She brings claims for race discrimination, disability discrimination, sex discrimination, public interest disclosure detriment, and a number of monetary claims. At Box 8.2 of the claim form she states, "*I work at Serco Group (hirer), employer is jackpotcomics ltd, and employment business is HR Go.*" She describes her public interest disclosure claims as "*victimisation after whistleblowing to the ICO of data breach and confidentiality breach of contact tracers ID details..*" and she attached to the ET1 an email sent at 6.43 pm 19<sup>th</sup> March 2021 in which she sets out details of alleged public interest disclosures.

8. On 1<sup>st</sup> April 2021, the day her engagement was terminated by the respondent, she submitted the current claim (1401285/2021) which is brought solely against Serco Group plc (R1) and which includes an additional claim for unfair dismissal and the interim relief application.

### Employment Status

9. The respondent contends that the claimant was not its employee, and that she does not have a good chance of demonstrating that she was. Again for the avoidance of doubt the respondent accepts that if its analysis of the contractual provisions is accepted that she was a contract worker, and that the fact that she was not an employee within the meaning of s230 ERA is not necessarily fatal to any of her claims except that of unfair dismissal.
10. It contends that it had a contractual framework agreement with HR Go (R2 in the first claim) which provides for the supply of agency workers on a temporary basis for a particular assignment. It has supplied in the bundle extracts of this agreement. It also entered into a temporary agency worker supply agreement with HR Go Liverpool, a branch of R2. Extracts of this agreement (albeit unsigned and undated) are also in the bundle. The claimant's services were supplied under these agreements. Again a copy of the assignment details form is in the bundle. The respondent accepts that at present it does not have any contractual documentation setting out the specific relationship between the claimant, Jackpotcomics Ltd and HR Go (although there is redacted contract in the bundle which they assume to be made between Jackpotcomics Ltd and the claimant) but they contend the contractual documentation in relation the claimant's engagement with them is absolutely clear. There is no direct contractual relationship and/or no employment relationship. On the basis of the existing documentation it submits that the picture is of an entirely conventional agency worker agreement in which the worker is the employee of the agency and/or possibly in this case Jackpotcomics Ltd, and that there is no need to imply any direct contractual relationship at all between it and the claimant let alone a contract of employment.
11. Moreover, they point to the fact that their understanding of the contractual relationship was shared by the claimant as recently as 26<sup>th</sup> March 2021 when she submitted her first claim in which she describes precisely the tripartite relationship in which the respondent is the hirer, HR Go the employment business and Jackpotcomics Ltd her employer. In addition she continues to make the same assertion in emails of 15<sup>th</sup> and 23<sup>rd</sup> April after this claim was submitted. This is wholly inconsistent with any allegation that she was an employee of the respondent.
12. The claimant's submission to me is that she was an employee of the respondent. In so far as the documents appear to show otherwise they have been forged and are not the documents in the form originally supplied to her, in particular the assignment details form. Had they disclosed the true documents they would have shown that she was directly employed by the respondent.

13. It may be that the claimant is correct and that the tribunal which hears the final claim will conclude that the respondent has forged some documents and withheld others in order to avoid disclosing the existence of a contractual employment relationship; and that she will be held to have been an employee of the respondent. But, the task before me today is to decide whether there is a good chance of such a finding. The difficulty for the claimant is that the documents before me disclose an entirely standard and conventional contractual relationship between a hirer, an employment business and the claimant which provides a full and complete explanation of how and under what contractual terms the claimant came to engaged by them. There is no evidence, beyond the claimant's assertion, that the picture painted by the documents is not the true picture. In my judgement there is nothing before me today which would allow me to come close to holding that the claimant had a good chance of being held to be an employee of the respondent.

#### Protected Disclosures

14. In the light of my findings above, which are fatal to the application for interim relief in any event, my views on the issue of whether there is a good chance that a tribunal will hold that the disclosures relied on are protected disclosures can be expressed relatively briefly.
15. The first disclosures relied on are set out in the email of 19<sup>th</sup> March 2021. The respondent submits that although in form it purports to be making qualifying disclosures within the whistleblowing provisions of the ERA it does not in fact do so. It purports to make disclosures about the failure to provide a safe system of work; or to observe the statutory duty of care and/or to provide a working environment that does not pose a foreseeable danger to life and limb; and sets out the various statutory provisions relied on. What it does not contain is any information as to how those provisions have been breached. There is in fact no disclosure of any information at all. This appears to me to be correct and I am not persuaded that there is a good chance that a tribunal would hold that these disclosures are qualifying disclosures.
16. On 3<sup>rd</sup> May 2021 the claimant complied with the earlier order of EJ Livesey to supply Further and Better Particulars of her claim. However these had not been copied to the respondent and not seen by me at the commencement of hearing (This may or may not be related to the fact that the claimant is a prodigious correspondent who had by the 28<sup>th</sup> April sent some 116 emails to the tribunal as EJ Livesey noted in correspondence). In any event the email was found and copied to the respondent. In it the claimant refers to the email discussed above (disclosure 5) and sets out four further protected disclosures. Two can be dealt with briefly. She asserts that on 30<sup>th</sup> March 2021 she sent a fit note with a hospital referral (disclosure 3). It is difficult to see how this could constitute a protected disclosure, and in my view there is nothing before me to give any basis for holding that there is a good chance that a tribunal would do so. On 1<sup>st</sup> April she received the communication that her assignment had been terminated (disclosure 4). As this is not a

disclosure made by her, but a document received by her, precisely the same conclusions apply.

17. That leaves firstly disclosure 1, the assertion that on 19<sup>th</sup> March 2021 she made a disclosure to the ICO of a breach of confidentiality and/or data protection by the disclosure of user IDs and passwords during training. This email is not in the bundle. However the respondent points to the fact that the claimant made a similar assertion to Beverly Harrison on 26<sup>th</sup> March 2021, and that in the reply from George Foster of 31<sup>st</sup> March he states that these are passwords and user names created by Serco, not the customers or clients and that their disclosure during training did not involve the disclosure of any confidential or sensitive material. The claimant does not accept this, but if this is correct, whilst the disclosures may well be capable of being a qualifying disclosure live issues remain as to whether the claimant could reasonably have believed that the disclosure tended to show any breach, or was in the public interest. In my judgement this is an issue which can only be determined by the tribunal which hears the claim having made detailed findings of fact. Although it is certainly possible that the tribunal may hold that this is a protected disclosure, on the information available to me today in my judgement I cannot go as far as to say that there is a good chance that it will do so.
18. Finally (disclosure 2) she asserts that she received a copy of an article from The Guardian website on 29<sup>th</sup> March 2021 concerning Serco's business practices and subsequently raised concerns to various bodies including the pension regulator, Companies House HMRC and the police. I do not have any of those disclosures, or the article itself, and it appears to me in those circumstances impossible to draw any conclusions as to the claimant's chances of persuading a tribunal that they were protected disclosures. It may well be that she is able to do so, but in the absence of seeing them, making any assessment of that is simply speculation. Again given that on the face of it, the claimant could have no personal knowledge of the accuracy or otherwise of the contents of the article, and that the claimant was apparently relaying information that was already in the public domain (which is for the avoidance of doubt not necessarily in and of itself fatal) live issues as to the reasonableness of any belief that the information tended to show any breach and/or that it was in the public interest appear to me to be very likely to arise.
19. For all those reasons on the information before me I am not persuaded on the information before me today, that there is a good chance that a tribunal will find that any or all of these were protected disclosures.

Reason/ Principal Reason for Dismissal

20. The respondent submits that the reason for dismissal/ the termination of the engagement is set out clearly in writing and they rely primarily on two incidents to support the decision both of which demonstrate the claimant's failure and unwillingness to abide by its Code of Conduct. The first is that she made a covert recording of a conversation with a

manager Mr Warrington which she shared internally and externally. There does not appear to be any factual dispute that this allegation is true; and even if there were the documentary evidence is in the bundle to support it. The second is that despite express instruction to correspond only with Georgina Foster that she continued to include a range of global Serco employees and external recipients. Again it does not appear that this is factually in dispute, and again if it were the documentary evidence in support is in the bundle.

21. The claimant contends that she had received no training on the Code of Conduct and that even if she was in breach of it that it was not reasonable to dismiss her/terminate her engagement for that reason. It is possible that a tribunal would accept this and possible that it could draw inferences that there must have been some other reason to dismiss/terminate the engagement in those circumstances. However the task before me is not to determine whether that is possible but whether here is a good chance of such a finding being made. Where at this stage in the proceedings there is a wealth of documentary evidence to support the factual basis of the reason given for dismissal it appears to me that at very least it is impossible to hold that there is a good chance of a tribunal making a finding in her favour.
22. Looked at overall it follows that I accept in respect of each of the areas of dispute, firstly that each is fundamental to the success of the claim and that if it is not possible to hold in respect of any one of them that there is a good chance of success that this application is bound to fail. In fact for the reasons given above in my view on the information before me it is not possible to make that finding in respect of any of them and it follows that the application is dismissed.

**Employment Judge Cadney  
Date: 13 May 2021**

Judgment and Reasons sent to the Parties: 14 May 2021

FOR THE TRIBUNAL OFFICE