



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr Nicholas Knupffer**

**v 1. Advanced Micro Devices (UK) Limited  
2. Mr John Taylor**

**Heard at:** Watford by video

**On:** 11 May 2020

**Before:** Employment Judge Smail

## **Appearances**

**For the Claimant:**

Mr D Stevenson, Counsel

**For the First Respondents:**

Mr S Devonshire QC

Judgment refusing the application for interim relief was given with full oral reasons on 11 May 2020. Since then the Respondents have applied for costs within a permitted timescale. With view to dealing with that application, the Judge, upon his own motion, has had the Reasons that were given orally on 11 May 2020 typed.

## **REASONS FOR JUDGMENT ON INTERIM RELIEF APPLICATION**

1. By a claim form presented on 17 February 2020 the claimant claims: -
  - (1) automatic unfair dismissal for the reason, or principal reason, of having made one or more protected disclosures;
  - (2) detriment on the grounds of having made one or more protected disclosures; and
  - (3) general unfair dismissal.He also claimed interim relief in the claim form and hence the present hearing which is concerned solely with that.
2. There was a preliminary hearing before Employment Judge Bedeau on the telephone on 27 March 2020 which made a series of case management

orders with view to the full merits hearing in this matter being held over the 26 July to 5 August 2021.

3. The claimant was employed by the First Respondent between 4 July 2016 and 10 February 2020 as Head of Brand and Creative for the First Respondent globally. The First Respondent is a UK subsidiary of Advanced Micro Devices Incorporated ('AMD'). AMD is a US multi-national semiconductor company based in Santa Clara County in California. It develops computer processors and related technologies for business and consumer markets. The Second Respondent, Mr John Taylor, was the claimant's Line Manager holding the role of Chief Marketing Officer based in Austin, Texas. He in turn reports to Ruth Cotter, Senior Vice President, Worldwide Marketing, Human Resources and Investor Relations and she is based in Santa Clara. The Second Respondent is a party to the detriment proceedings not the unfair dismissal ones and so is not directly responding to the present application.
4. I have for today's purposes witness statements from Ms Cotter, Mr Taylor, Patricia Boyd and Rose Jennings on behalf of the First Respondent and from Ben Gallop and the Claimant on behalf of the Claimant.
5. Mr David Stevenson represents the claimant and Mr Simon Devonshire QC represents the First Respondent. I have had the benefit of skeleton arguments from both of them and I am grateful to both of them for those.

### **The approach**

6. We have agreed essentially the approach to today's proceedings. We have agreed that there are no findings of fact today because the evidence is untested. We agree that I am to form an impression on the evidence submitted as to whether it is likely that the claimant will succeed with this automatic unfair dismissal claim at the full merits hearing. The test that has withstood the test of time is whether the claimant has 'a pretty good chance' of winning his automatic unfair dismissal claim. I do not propose further to refine that. I am going to ask myself does he have a pretty good chance of winning that claim.
7. By s.103A of the Employment Rights Act 1996:  
  
"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".
8. By s.43A of the 1996 Act, a protected disclosure means a qualifying disclosure and s.43B(1) defines qualifying disclosure:

"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 or is likely to be deliberately concealed.”
9. The claimant alleges that he made three protected disclosures. The first is the Project Red disclosure. He said that he first made this to the Second Respondent on 15 February 2019 orally, followed up by an email dated 25 February 2019 and further submitted it to the internal anonymous reporting system called Alertline on 3 April 2019 and repeated it for a fourth time in his formal grievance on 30 December 2019. I agree with Mr Stevenson that it is sensible to regard this as one disclosure albeit with four iterations. The essence of the disclosure was that a colleague, Sasa Marinkovic, had purchased a service for \$460,000 that had been quoted for by another supplier at \$60,000 and had opened several purchase orders to an agency called Liaison in order to avoid scrutiny for his purchase. In April 2019 he floated the possibility that Mr Marinkovic must have been getting a kick-back for this.
10. The second disclosure was an allegation that the Second Respondent had encouraged the claimant and others to try marijuana when they were at an AMD event in Texas. Such would be against the criminal law of Texas.
11. The third disclosure was that the Second Respondent had tried to bribe Ben Gallop of Brand and Deliver to give the claimant a job taking him away from the First Respondent’s employment. As I say, this was put as bribery.
12. The second and third disclosures were made only in the grievance dated 30 December 2019. The claimant accepts that he brought that grievance to defend himself from performance proceedings commenced on 3 December 2019 and developed at a Performance Management meeting on 16 December 2019. The invitation to that meeting was written by Mr Taylor on 3 December 2019 stating in summary that he wished to bring to the claimant’s attention the following three concerns:

“First, poor collaboration with and across teams necessary to your role and function to be successful. You are expected to build productive working relationships with the business teams and across marketing teams in order to do your job effectively and help support the business.

Secondly, poor budget management and leadership of your own teams. You are responsible for understanding the work of your teams, successfully engaging with your teams and operating within your budget and managing the budget and expenses of the agencies with whom you engage to execute on your deliverables.

Thirdly, failure to take direction from your management resulting in ineffective/poorly presented brand strategy and in-meeting dynamic before key audiences. A recent example was the brand disruption meeting with the CEO.”

13. In my judgment, the claimant does not have a pretty good chance of establishing disclosures 2 and 3 as protected disclosures. They are only contained in the grievance dated 30 December 2019 which the claimant acknowledges he brought to defend himself from these performance challenges. He will struggle to show therefore that he believed these were in the public interest at all; and if he did, that they were reasonably so believed.
14. Further, there is no factual force in the bribery allegation relating to brand and deliver. There was a commercial discussion as to whether Brand and Deliver might employ the claimant and whether AMD might finance it but there was no element - even in the allegation - of anyone being bribed by AMD to bring this about. Even as alleged, this was a lawful commercial discussion and does not tend to show a breach of any criminal or civil obligation.
15. The marijuana allegation, whilst potentially amounting to an allegation of a criminal offence, suffers, as I have already observed, from difficulties with public interest. Consistently with that, it has all the hallmarks of a smear.
16. There is however a pretty good chance that the claimant will be found to have made a protected disclosure in the form of the Project Red disclosure. This has been made on four separate occasions. The fact that on the fourth occasion it was made in the context of the grievance does not, in my judgment, undermine that the allegation overall, and perhaps in particular in its first three iterations, tended to show a breach - at least - of civil obligation. The information contained in the allegation does tend to show unethical behaviour and conduct which would be in breach of the employee's duties of fidelity and reasonable competence. Given the facts that this company has shareholders and that it is a multi-national computer giant, the claim to their being a public interest element arguably is objectively reasonable.
17. So, as I say, the claimant does have a pretty good chance of establishing that the Project Red disclosure was a protected disclosure. But does the claimant have a pretty good chance that the tribunal will find that the Project Red disclosure was the reason or principal reason for the dismissal?
18. The claimant does have one or two factual points that he can rely on in support of this argument. He was dismissed at a performance meeting he could not attend because of certified illness. He asked for that meeting to be postponed. He submits with some force that any reasonable employer

would have postponed the hearing. Further he says it is surprising that it was Mr Taylor who made the decision to dismiss when Mr Taylor knew of the fact that the claimant had made personal allegations against him.

19. It is far from clear to me however that the Project Red disclosure was such a big deal. The claimant himself did not follow up on his own anonymous report; at least, evidence submitted by the First Respondent seems to suggest that he did not interrogate the relevant intranet as to the outcome of his grievance.
20. There had been questioning of Mr Taylor in the investigation of the anonymous disclosure and there had been an outcome that there had been no wrongdoing. The conclusion was that Mr Marinkovic had made a commercially defensible decision because the provider of the first quotation was not producing a product as suitable to the First Respondent's needs as the company with whom they eventually placed the business. I take on board the fact we are dealing with very valuable multi-national computer giant business here. There seems to have been no concern within the First Respondent, or in its parent company, as to what Mr Marinkovic had done here once they had been told of it. So, I do not follow on the face of it that the Project Red disclosure can explain the eventual dismissal of the claimant.
21. There is in contrast a strong body of evidence - or information at this stage - that the claimant struggled as a manager and the decision to commence performance management proceedings on the basis of managerial failures, in particular, was nothing new. Importantly, he was spoken to in early December 2019, before making the 30 December 2019 grievance, by his mentor and manager, two reports up, Ruth Cotter, to the effect that his future employment depended on him turning around his performance as a manager. An extract from the record of a discussion - the claimant recorded this discussion with Ms Cotter - appears in Mr Devonshire's supplemental skeleton argument. It is confirmed as being accurate. In the transcript dated 9 December 2019, after the claimant had been questioned on his PIP, Ms Cotter counselled the claimant that he needed to engage with the feedback as part of the PIP process. By way of example only, she referenced some of his behavioural traits that were giving cause for concern (see page 2) and that it was up to him whether he engaged in the PIP process or not but engagement was key if he wanted to retain a job at AMD. There is a specific quote as follows:

“You are at an important juncture as a leader and you need to be able to commit to really hearing feedback and acting on the feedback in the way that an American Company culture embraces. I believe you can do it if you make that commitment to yourself but it's going to make you uncomfortable and you'll have to be ok with being uncomfortable and not feel like you're being asked to compromise yourself in any way which would not be the right outcome and that's not what you're being asked to do. So that's why I'm pushing you to really think it through. I think AMD would benefit from you staying but we will only be mutually benefitted if you can figure out how to be a very successful leader in a

company that's based out of Austin and has that culture and values that are activated around them.”

22. That his job was at risk was clear from this.
23. There are numerous references in the documentation that has been prepared for today about concerns with the claimant as a manager. Mr Devonshire has carefully set them out at paragraph 10 of his skeleton argument. The First Respondent acknowledges that the claimant has creative ability in the marketing sphere but there has been consistently throughout his time concern that his individual skills need to be honed in a team environment and Mr Devonshire has carefully set them out, as I say, in paragraph 10.
24. I will take a few by way of example. So, by the end of October 2019, one of the claimant's reports Ms Annen was giving Mr Taylor advice that:

“The major challenge with Mick as our leader has been his inability or refusal to build positive respectful working relationships. This also makes it extremely difficult for myself and my team to work with the teams of folks with whom Nick has negative non-existent relationships with.”

25. As part of the PIP process there was a 360 degree feedback completed in early 2020 from 20 or so consultees some of whom were peers, some of whom were direct reports, and open ended comments were invited. They make disturbing reading in many respects. I will quote extensively from them so as to build up the picture that has been presented to me. The comments that were invited were in answer to this question: “Please provide start-stop-continue feedback regarding innovating more effectively”, So a supervisor said:

“Start treating team, peers, leadership with respect. Listen, engage with full team priorities not just pet projects. Plan and execute to budget. Stop undermining peers and leadership, belittling the work of your team. Continue to challenge the status quo using the start stop elements above.”

And another supervisor:

“Start listening to what people are saying more carefully. Recognise the team's success is his success. Small wins can lead to large wins. Everything doesn't have to be big all the time. Understand and respect that AMD is people and money resource constrained. Stop being so self-focused, aggressive and definitive. Continue to have out of the box thinking to stay attuned to the competition to be passionate.”

A peer:

“Start being a truly collaborate partner. Nick focuses on getting his ideas and objectives through; however greater consideration needs to be given to addressing BU and segment teams needs. Start putting greater focus on effectively executing

campaigns on time and on budget. Defining success matrix and ROI improving efficiencies. Stop isolating his team from the rest of the organisation. We are all one team and we will win or lose together. Continue proposing big ideas.”

Another peer says:

“Nick should start being a team player. Nick should stop working for his own benefit against the group and become a team player. AMD is relationship driven. He does not appear to get that. Continue being entertaining to watch... I really have nothing I want him to continue.”

26. I could go on at length going through these but there is a pretty consistent picture and the overall scoring is itself significant. The claimant scored himself highly in respect of all various competencies but significantly higher than the overall feedback from supervisors, peers and reports. In some cases, by a factor of 2.
27. So, this 360 degree review corroborates strongly the basis for starting the PIP process. But perhaps what speaks most volume is the content of the grievance brought by the claimant, other than those elements making reference to the alleged disclosures. There is a full throttled and fundamental challenge from the claimant to any of the concerns raised by Mr Taylor and there are a significant number of challenges from the claimant to Mr Taylor in this grievance. Rather than engage with the PIP there was a fundamental challenge to it - a fundamental challenge to Mr Taylor as a manager; all of which indicates a collapse of the relationship with the line manager.
28. Whilst Mr Stevenson is right that it is alarming that at the conclusion of this process, at a peer IP meeting, that meeting is not postponed given the claimant's certified sickness; and given that Mr Taylor makes the decision, one is not entirely surprised that a decision to terminate was made.
29. Stepping back from this, and looking it as a matter of impression, does one have the impression that the reason for the dismissal was the Project Red disclosure or for that matter, the other matters said to be disclosures, or was it performance?
30. The sheer weight of the performance concerns attested to in the statements, in particular from Ms Cotter and Mr Taylor, suggest to me that it is not likely that there is a pretty good chance that the Tribunal will conclude that the Project Red - or the other matters said to be disclosures - explain the reason for this dismissal. Performance concerns come across as being the reason for the dismissal.
31. There are factors around the dismissal suggesting a general unfair dismissal, a claim which will certainly procedurally have legs. For the moment, at this hearing, I do not have the view that the Tribunal is likely to conclude that the reason for the dismissal was the alleged protected disclosure. It does not seem to me that the claimant has a pretty good

chance that the Tribunal will conclude that. And accordingly, I reject the application for interim relief.

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Employment Judge Smail

Date: 21 May 2021

Sent to the parties on: .....

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For the Tribunal Office