



EMPLOYMENT TRIBUNALS

Claimant: Mr O Mohamed

Respondent: Red Fortuna Limited, trading as Ciao Baby Restaurant

HEARD AT: Manchester

On: 11 May 2021

BEFORE: Employment Judge Batten (sitting alone)

REPRESENTATION:

For the Claimant: In person

For the Respondent: Ms R Deakin, FILEX

JUDGMENT having been sent to the parties on 13 May 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant's presented his claim to the Tribunal on 7 April 2021. The claim included an application for interim relief. This hearing was listed to deal with that application. The claimant was assisted at the hearing by an interpreter, Mr Al-Jubouri, to whom the Tribunal is grateful for his assistance. In particular, the interpreter usefully translated the documents in the bundle for the claimant, which took some time and delayed the start of submissions.
2. There was no dispute that the claimant was an employee of the respondent and that his employment with the respondent ended on 1 April 2021. His claim was therefore submitted within 7 days of the effective date of termination of his employment. The claimant said in his claim form, "I was also dismissed for an automatically unfair reason. I challenged my employer

for fraudulently claiming furlough pay from the Government. They were claiming furlough pay for me when I was working for them”.

3. The Tribunal was provided with a small bundle of documents prepared by the respondent which consisted of witness statements which the respondent had gathered from its staff and text messages passing between the claimant and the owner of the respondent at the time when his employment ended. Both parties made submissions in respect of the application.

Applicable law

4. The Employment Rights Act 1996 (“ERA”) section 128(1) provides that an employee who presents a complaint of unfair dismissal and alleges that the reason for his dismissal is the making of a protected disclosure under section 103A ERA may apply to the Tribunal for interim relief. The claimant’s application has been brought in time pursuant to section 128(2) ERA.
5. The procedure on hearing an application for interim relief is set out in section 129 ERA, namely that interim relief shall be granted where it appears to the Tribunal that it is likely that, on determining the complaint of unfair dismissal, the Tribunal will find that the reason or principal reason for the dismissal was that the claimant made a protected disclosure and so was unfairly dismissed.
6. The task for the Tribunal is to make a broad assessment of the case, on the basis of the material available to it, and to consider what is likely to be the result at the final hearing of the claimant’s claim. The leading case of Taplin v C Shippam Limited [1978] IRLR 450 held that ‘likely’ does not mean simply ‘more likely than not’. The test is one of likelihood of success - whether the claim has more than reasonable prospects of success or a “pretty good chance” of success at a final hearing.
7. In Ministry of Justice v Sarfraz [2011] IRLR 562 the Employment Appeal Tribunal confirmed that the word “likely” in section 129 ERA does not simply mean ‘more likely than not’. Rather it connotes a significantly higher degree of likelihood; something nearer to certainty than mere probability. The test therefore is set comparatively high.
8. To succeed with an interim relief application, therefore, the burden of showing that there is a “pretty good chance of success” is on the claimant who must show that he has a good case for saying that his dismissal was because of a protected disclosure, on the basis there are more than reasonable prospects of succeeding with that case.

The available evidence

9. The Tribunal heard submissions from the claimant and from the respondent. It was apparent that the factual matrix surrounding the ending of the claimant’s employment is in dispute, to the extent that the respondent disputes that it dismissed the claimant at all. The submissions from the

claimant on the matter consisted of a number of bold assertions and allegations to the effect that the respondent was lying and that the respondent's witnesses are also lying. However, the claimant presented no evidence to support his position that he had in fact been dismissed or that he had made a protected disclosure.

10. In the bundle of documents to which the Tribunal was referred, there are a number of important text messages between the parties. Page 27 shows that the claimant sent a text on 1 April 2021 to the respondent in which he wrote, "Hi I want to stop I don't want to be working anymore and I want my P45". That statement is made in response to the respondent asking the claimant, "What happened today at chippy Sam?". The Tribunal was informed that "Sam" was the claimant's nickname. The Tribunal considered that the claimant's text did not suggest that the claimant had been or was dismissed by the respondent but that he had wanted to leave and had asked to leave his job. The content of the texts on 1 and 2 April 2021 and the context presented by the statements did not, in any sense, suggest that the claimant had been dismissed. The Tribunal considered that, on a balance of probabilities, the respondent would have referred to the fact that he had sacked the claimant, in the course of the texts, but he does not say that at any point.
11. In light of the content of the texts, the Tribunal did not consider that the claimant will succeed in persuading the Tribunal that he was in fact expressly dismissed. The claimant does not pursue his claim on the basis that he resigned and was constructively unfairly dismissal nor does he pursue a claim of detriment for making a protected disclosure. Without some evidence of a dismissal, the Tribunal did not consider that the claim of unfair dismissal could succeed, and certainly it does not have a "pretty good chance of success" which is required for interim relief.
12. In addition, the claimant asserted that the respondent had thrown him out of his home in addition to dismissing him. That assertion is inconsistent with the respondent's text to the claimant asking him when he is moving out, and it is also inconsistent with a number of other texts in the bundle, on pages 28, 29 and 30, which show a conversation between the claimant and respondent that is very different to the picture the claimant painted at this hearing. The Tribunal took account of the fact that the texts were contemporaneous and that they are consistent with the content of the statements from employees of the respondent to the effect that the claimant had sought to leave his employment.
13. The claimant did not challenge the validity of the texts. Instead, he told the Tribunal that 'Google translate' had "got his words wrong". The Tribunal found that explanation did not fit with the content of the texts, which do not display confusing language, nor errors or inappropriate words as might be expected. Likewise, nowhere in the texts was there any correction(s) or suggestion by the claimant, at the time, that the text conversation or particular words in it were not what he meant.

Conclusion

14. In all the circumstances, based on the material before it, taking into account the contemporaneous text messages which exist and the conduct of the parties at the time, the Tribunal concluded that the claimant is unlikely to establish either that he was in fact dismissed or that the reason or the principal reason for his dismissal was because of a protected disclosure. The Tribunal therefore considers that the claimant has not established that he has a pretty good chance of succeeding with his case of unfair dismissal pursuant to section 103A ERA or with the degree of certainty required to succeed with an interim relief application. The application is dismissed.

Employment Judge Batten
Date: 6 July 2021

REASONS SENT TO THE PARTIES ON

9 July 2021

FOR THE TRIBUNAL OFFICE

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