Case No: 3305257/21

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr R M Chitsa Pandect Precision Components Ltd

Heard at: Watford by CVP and telephone On: 20 April 2021

Before: Employment Judge Manley

Appearances:

For the Claimant: In person
For the Respondent: Mr Ferguson, manager

JUDGMENT having been sent to the parties on 21 April 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013 (albeit received one day late on 6 May 2021), the following reasons are provided:

REASONS

Introduction

1. This was a hearing to determine an application for interim relief. The claim form was completed by the claimant and was presented on 1 April 2021. There was no ACAS certificate and the claimant had ticked the box to indicate he was claiming interim relief. It appeared to be a claim for constructive unfair dismissal because of public interest disclosures, the claimant having resigned after almost five years working for the respondent.

2. As is required by the tribunal Rules, the matter was listed for an urgent hearing on the interim relief application before the response was received. It was listed to take place by CVP and Mr Ferguson attended by CVP. The claimant had no device to connect to CVP so he attended by phone. Neither party had legal representation and there were no documents apart from the claim form.

The hearing and the issues

3. I explained to the parties the reason for the listing of the hearing. Neither party was aware of the implications or what was needed but did want the matter progressed. I explained that interim relief was available in limited circumstances, including public interest disclosure cases, but only if I

considered there was a pretty good chance of the claimant succeeding in his claim.

4. The claimant told me that he had spoken to ACAS but he could not say when. He did not seem to understand why he ticked the box for interim relief but did believe he had a "whistleblowing" claim. He said he resigned by letter of 30 March 2021 and that Mr Ferguson had told him he could leave. Mr Ferguson agreed that the claimant had sent a number of letters raising some of the issues he mentions in the claim form, relating to Covid safety and other matters. The claimant says he was paid to the end of April 2021 and left because of the way he was spoken to. He said he had worked very well but without support and no health check was done when he asked for one.

5. The issue for this hearing is whether the claimant is likely to succeed in his claim that the reason or principal reason for his dismissal was because he made protected disclosures. This requires me to consider first whether he is likely to succeed in showing all the elements needed to show there were one or more protected disclosures and, secondly, if he can show that, whether he is likely to succeed in showing that was the reason or principal reason for the dismissal. Because the claimant resigned, he also has to show he has a good chance of showing a fundamental breach of contract by the employer which caused him to resign.

The Law

6. Sections 128-132 ERA are the relevant sections for interim relief applications, providing for the right to apply in limited claims for unfair dismissal. Section 129 (1) ERA states that on hearing an 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 ……S103A"*

7. *Section 103A ERA states that 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) is that the employee made a protected disclosure"*.

8. The leading case on the test for interim relief is Taplin v Shippam [1978] ICR 1068. That case summarised the application of the test of *"likely"* to succeed as follows "*the tribunal should ask themselves whether the employee had established that he had a "pretty good chance of succeeding in his complaint".* Earlier cases reflect the original interim relief applications which were then only available for trade union activities cases. This was more recently confirmed by EAT in Wollenberg v Global Gaming UKEAT/0053/18/DA in a protected disclosure unfair dismissal case, applying Taplin *"an application for interim relief is a brief urgent hearing at the which the employment judge must make a broad assessment. The question is whether the claim under section 103A is likely to succeed. This does not simply mean more likely than not. It connotes a significantly higher degree of likelihood*"

9. Another relatively recent case decided in EAT is Sheikh Khalid Bin Asqr Al Qasimi v Robinson UKEAT/0283/17, where tribunals were reminded, in a protected disclosure case, that the judge would have to consider whether the claimant was likely to show they had made a protected disclosure that was likely to meet the public interest test as well as likely to show that was the reason or principal reason for dismissal. This was said to be a "*comparatively high*" test, reflecting on what was said in Dandpat v University of Bath UKEAT/0408/09 that there were "*good reasons of policy*", because a finding that the application succeeded would lead to a continuation of a contract and a continuing obligation to pay the claimant who might not be ultimately successful. In the case of Parsons v Airplus International Ltd UKEAT/0023/16 the EAT judge recognised the nature to the ET judge's task on an interim relief application and, whilst that ET judge had stated the claimant had a "*good arguable case*", they had not been able to say it had a "*pretty good chance of success*" and the refusal to grant interim relief was upheld. The task was described in London City Airport Ltd v Chacko [2013] IRLR 610 as "*an expeditious summary assessment*" on the material before the judge.

10. The substantive legislation and case law on protected disclosures needs also to be considered. The definition appears at sections 43A and 43B ERA. A qualifying disclosure is disclosure of information (Kilraine v LB Wandsworth [2018] ICR ICR 1850 which, in the reasonable belief of the worker tends to show is a) in the public interest AND b) one or more 6 things – criminal offence; failed to comply with legal obligation; miscarriage of justice; health and safety; environment damage or one of above deliberately concealed. The tribunal must assess whether what was said is sufficiently clear to meet those tests.

11. The claimant must show he had genuine and reasonable belief that the disclosure was in public interest but that does not have to be his motive Chesterton v Nurmohamed [2018] ICR 7311 – helpfully stating that the tribunal will need to consider all the circumstances but useful tools might be questions such as numbers affected; nature of interests, nature of wrongdoing and identity of alleged wrongdoer. Only once the claimant can show one or more qualifying disclosure, can they go on to argue that the reason or principal reason for any dismissal was caused by that disclosure.

12. Finally, the claimant resigned and, to succeed in an unfair dismissal claim, would have to meet the test set out in section 95 (1) c) ERA that he "*terminated the contract without notice by reason of the employer's conduct*". A substantial body of case law including Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27 makes it clear that the employee has to show a serious breach of contract amounting to a repudiatory or fundamental breach, which was the reason for him leaving, to show a dismissal.

Conclusions

13. It was not entirely clear to me that the claimant actually intended to make an application for interim relief, not least because he had resigned and it did not appear to be that he was seeking a continuation of his contract. Because both parties had attended and were unrepresented, I did consider

the application. First, I looked at the likelihood of the claimant succeeding in showing that he made public interest disclosures. It is possible that his letter(s) contain information that might tend to show health and safety issues if he was raising concerns about Covid infections. Unfortunately, I did not see copies of those letters. The claimant would also have to show, in his reasonable belief, such disclosures were in the public interest. On a broad summary assessment, it is simply not possible for me, at this stage, to find the claimant has a pretty good chance of succeeding in showing the necessary elements. Even if that were clear, I would still have to be sure, it was, in his reasonable belief, in public interest. To put it plainly, some of what the claimant reported to me might be in the public interest, such as personal safety in the pandemic but others, such as the lack of support might not.

14. Secondly, even if I were able to say that the claimant has a pretty good chance of showing at least one protected disclosure, I cannot say, on this summary assessment, that he has a pretty good chance of showing that was the reason or principal reason for his resignation.

15. The claimant also has the burden of showing a fundamental breach of contract for the constructive unfair dismissal claim and there is insufficient information before me to determine that he has a pretty good chance of showing any such breach. Finally, he would have to show that the principal reason for the dismissal, if there was one, was because he had made the disclosures. Again, I am unable, at this stage to make an assessment that he has such a chance.

16. This is not to say that the claimant's case is not arguable. He raised a number of issues with his employers, some of which have the potential to amount to disclosures of information which could tend to show issues of health and safety or breach of a legal obligation. But I cannot decide, on what I have before me, whether he reasonably believed that to be the case not whether, in his reasonable belief, it was in the public interest. Nor can I say he has a pretty good chance of showing that the employer's conduct was the reason for him resigning and showing the necessary link between any such protected disclosure as found and the decision to resign. I refuse the application for interim relief.

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Employment Judge Manley

Date: ……21/6/2021

Judgment sent to the parties on

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For the Tribunal office