EMPLOYMENT TRIBUNALS

Claimant: Mr J Leary

Respondent: Emplas Window Systems Ltd

Heard at: Watford Employment Tribunal (by video)

On: **4 December 2020**

Before: Employment Judge Quill (Sitting Alone)

Appearances
For the Claimant: Mr T Sheppard, counsel
For the respondent: Mr D Sillitoe, solicitor

Judgment having been given orally, written reasons were requested after the hearing. These are those reasons.

REASONS

1. This is a claim for interim relief based on an allegation that the claimant's dismissal was contrary to s.103A of the Employment Rights Act 1996. The tribunal has accepted prior to today that the procedural requirements to consider an interim relief application were met and that has resulted in the public hearing today. I had an agreed pdf bundle of 304 pages. There were two additional pages submitted before the hearing and also one additional page submitted during submissions. No oral evidence was heard, but there were three written statements; one from the claimant and two on behalf of the respondent, one each from Mr Johnson and Mr Brown. I have also received written and oral submissions from each side and case law references from each side.

2. The statutory test which I must apply is that set out in s.129 of the Employment Rights Act 1996. I must decide if it appears to me that the tribunal which will decide on the merits of the case is likely to find that the reason falls within s.103A. S.103A says "An employee who is dismissed should be regarded for the purposes of this part" (that is Part X) "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".

3. So today I do not make formal findings of fact, certainly none that are to be binding at any later stage of the proceedings. What I am assessing, amongst other things, are the likelihoods of the disputed facts being proven in the claimant's favour. There is only a limited amount of material available to me but the decision that I make is based on that material. When considering likelihood, the correct test to be applied is whether the claimant has a pretty good chance of succeeding at the full hearing. See Taplin v C Shippam Ltd 1978 IRLR 450. It is not appropriate to put a percentage figure on what "pretty good chance" means, but the appellate courts' guidance is clear that the chances need to be significantly higher than merely 51% for interim relief to be granted. It is necessary that the claimant can show that there is a pretty good chance of succeeding on each necessary ingredeint of the s103A claim. So, for example, he must satisfy me that there is a pretty good chance of persuading the tribunal at the final hearing that there he made one or more protected disclosures, as well as that there is a pretty good chance of showing that any such disclosure(s) found to be protected was/were the principal reason for the dismissal.

4. The requirements that need to be satisfied for the definition of protected disclosure to be met, are that: (a) there needs to be a disclosure within the meaning of the Employment Rights Act; (b) that disclosure must be a qualifying disclosure; and, (c) it must be made by a worker in the manner set out in the legislation, at sections 43C to 43H.

5. In this case, it is accepted that the claimant was an employee and therefore there is no dispute that he meets the definition of "worker".

6. To be a qualifying disclosure, the disclosure must contain information and it must be sufficient information. S.43B says, in part:

   (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—
   (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, is being or is likely to be deliberately concealed.

7. In other words, information about criminal offences is covered as well as information that somebody is failing to comply with a legal obligation and information that somebody is covering up a criminal offence or an alleged failure to comply with a legal obligation. These cover the type of matters that are relied on by the Claimant in this case.

8. The word "likely" in that sense in the sense set out in 43B, that was discussed in Kraus v Penna plc 2004 IRLR 260, and the EAT decided that a reasonable

belief by a worker that an employer's (alleged) actions might lead to a breach of some legal obligation would not necessarily be sufficient. Rather the test is whether, the information disclosed - in the reasonable belief of the worker at the time of the disclosure - tends to show that it is more probable than not that the employer will fail to comply with the relevant legal obligation.

9. The employee's actual subjective belief about what the information tends to show needs to be analysed by the tribunal and that needs to be done as part and parcel of deciding whether that belief was reasonable. That applies to both elements of the test, ie that the employee had a reasonable belief that the disclosure was in the public interest as well as that the information tended to show – as per the subparagraphs of section 43B(1) – that (for example) that there had been, or was likely to be, a breach of a legal obligation or criminal offence or concealment.

10. It is not necessary for the employee to be correct about whether there is actually a breach of a legal obligation (or criminal offence, or deliberate concealment) so long as the employee's belief was a reasonable one.

11. In terms of public interest, while the worker must have a genuine reasonable belief that the disclosure is in the public interest, that does not have to be the employee's predominant motivation for making the disclosure in question.

12. In terms of the principal reason for the dismissal, it is – by definition - the employee's case under s.103A that the principal reason was the (alleged) protected disclosure(s). The respondent might put forward a different reason (perhaps one which is a potentially fair reason within the Employment Rights Act) for the dismissal, as opposed to accepting that the disclosure was the reason for dismissal and arguing that it was not a protected disclosure. In that case, the tribunal will have to make findings as to the principal reason. Although the onus is on the employer to prove what the dismissal reason was, the mere fact alone that the tribunal is not satisfied that the employer has demonstrated that the dismissal was for the particular (fair) reason relied upon does not automatically mean that the employee must succeed on his s.103A claim. The tribunal might still decide that the dismissal was for a reason other than the protected disclosure.

Discussion of the arguments in this particular case

13. The respondent is a manufacturer of windows and doors. The claimant was - at the relevant times - its sales and marketing director, having been employed since 2011. He was summarily dismissed on 5 August 2020 (a decision confirmed in writing the following day) and the reasons for that dismissal are in dispute. The Respondent says it was for misconduct. The invitation to the meeting was dated 30 July 2020 and there is a dispute about when the (alleged) investigation commenced and whether there was any genuine investigation at all, and about what motivated the Respondent to dismiss.

14. On or around 24 March 2020, the respondent informed staff that they would be placed on furlough due to the pandemic. Also on or around 24 March, the claimant took delivery of a new vehicle. The claimant's work sometimes

required him to be at the respondent's premises and sometimes required him to travel to the locations of prospective customers. The provision of the vehicle and also the insurance for that vehicle were arranged by the respondent. In late March, there was a delay in making the insurance arrangements for the new vehicle and the reasons for that delay are in dispute. However, it does seem to be accepted that between approximately 24 March and approximately 30 March the vehicle was not insured. In other words if anybody did drive the vehicle during that period then they may have been committing a criminal offence.

15. During the furlough of the employer's staff, and starting in late March, senior members of the respondent's staff took part in meetings and engaged in correspondence via email. It also seems likely to me that the claimant would be able to prove that some more junior members of staff also did some work during this period. I do not need to consider whether or not the work that was being done by those individuals meant that the respondent was acting unlawfully in connection with the funding that it was receiving from the government. However, I think it likely that if the Claimant will be able to prove that he had a reasonable belief that the Respondent's actions were unlawful.

16. A crucial factual issue which will need to be determined at the final hearing is whether the claimant did, in fact, make disclosures of information and - of course - whether the actual contents of any such disclosures were as he alleges. In his grounds of complaint, the claimant alleges:
    16.1 that he made oral disclosures on 30 March 2020 and 25 May 2020. He says these were protected disclosures.
    16.2 he made a written disclosure on 29 May 2020 (his grievance which he submitted on that date) and he says that is a protected disclosure.

17. Potentially, at the final hearing, the claimant might also seek to rely on two other disclosures. I do not need to decide for today's purposes whether they are included in the grounds of complaint or whether an amendment is necessary. I can just flag them up as being things that the claimant has referred to in his witness statement: an alleged oral disclosure on 14 May and also what he said during the hearing(s) in June in relation to his grievance.

18. In relation to what the claimant might be able to show that he said on in May and June, in particular, it is going to be crucial for the tribunal to first decide (in my opinion), what the claimant was being asked to do as of that date. In my judgment, it is likely that the tribunal will be persuaded that the claimant and some other sales staff were being told that they were going to have to do some work before officially coming off furlough, and that, in particular, they were being told that they needed to do work to prepare to do sales (at least) and possibly actually make sales transactions while they were still on the furlough scheme. I also think it is likely (ie that there is a pretty good chance) that the claimant will be able to persuade the tribunal that there was some discussion between him and Mr Johnson in which the claimant either objected to having to attend company premises (and/or customer's premises) while still on the furlough scheme. I also think it is likely that the Claimant will be able to

demonstrate that he, the claimant, made the point that if he was working then he should potentially be entitled to full pay from the respondent rather than reduced pay as funded by the Government. I also decide that it is likely that the claimant will be able to demonstrate that - as part of his argument - he mentioned that it would be unlawful to have him working for the respondent while being kept on the Government's furlough scheme.

19. I am not convinced that it is likely that the tribunal will be persuaded that the claimant referred (on 30 March or at all) to whether other employees were being asked to work unlawfully. In any event, I am not persuaded that it is likely that the tribunal will find that the conversation on 30 March played a direct role in the claimant's later dismissal.

    19.1 The evidence is likely to show that the claimant was part of the management team and he was being treated as such by the respondent, including by Mr Johnson. The claimant was not being treated as a potential problem at this time and he was not regarded as somebody who would potentially report the respondent to HMRC or to any other outside body.

    19.2 On the respondent's case, the email sent to the claimant around about 14 May in relation to a newspaper report in the Manchester Evening News about people allegedly blowing the whistle on their employers to HMRC was sent to the claimant in order to warn the claimant that the claimant should not put pressure on other people to do work. Regardless of whether I think that particular claim is plausible - and regardless of whether the tribunal for the final hearing eventually accepts the respondent's assertion about the reasons for sending that particular email - I think, and I expect the final tribunal to find, that it is implausible that Mr Johnson would have sent that email to the claimant if the claimant was someone that Mr Johnson though might go to an outside agency to report on the Respondent's practices.

    19.3 Similarly, it seems implausible that Mr Johnson would have sent that particular email to the claimant if Mr Johnson was already planning - as a result of anything that the claimant had said on 30 March - to be dismissing the claimant at some future date (or subjecting him to any other detriments) because of the 30 March conversation.

20. In terms of the claimant's account of an alleged 14 May telephone conversation with Mr Johnson after receiving that email, I do not think that there is a pretty good chance that the claimant's version of events will be proven to the satisfaction of the tribunal. Even if it is, I do not think it is likely that any alleged conversation on 14 May will be found to have been a significant contributory factor to the claimant's eventual dismissal.

21. In terms of the alleged oral disclosure of 25 May, the events of 25 May are very much disputed between the parties. On the claimant's case he was making a protected disclosure to the effect that he was concerned that the respondent was proposing to require various employees to do work contravening the rules of the Coronavirus Job Retention Scheme. On the

respondent's case, the claimant was mainly concerned about his own position and he did not want to agree to a pay cut if he came off furlough and started work. I do not find the claimant's written account of that conversation to be any more plausible than Mr Johnson's. I am not persuaded that it is likely (ie that there is a pretty good chance) that the claimant will demonstrate that he made a protected disclosure on 25 May. I do not think that it is likely that the claimant will be able to demonstrate that the potential redundancy dismissal (mentioned to him orally that day on his own account) was connected to anything that he might have said to the respondent about the rules of the Coronavirus Job Retention Scheme. It seems at least as likely to me that the tribunal will be persuaded that the respondent's reasons for proposing to make the claimant redundant were that the claimant was refusing to accept a pay cut once he came off furlough and/or that he was refusing to do the work the respondent told him would be necessary on his return from furlough.

22. On 29 May 2020, the claimant submitted a document which the respondent has admitted contained protected disclosures. On the face of that document the claimant asserts that some of the matters raised therein had previously been raised orally. That might be an accurate assertion and that might be what the tribunal eventually does decide. However, I cannot say that the existence of that email means that the claimant has a pretty good chance of showing that the alleged earlier oral disclosures were actually made. It is not necessary for me to comment in great detail about credibility, but, in the email, the claimant refers to the possibility of bringing claims for automatic unfair dismissal. Therefore, one potential inference from that fact is that – at the time he wrote this email - the claimant was already aware that in order to succeed on a claim that his proposed redundancy (mentioned to him on 25 May 2020) was because he had made protected disclosures, it would be necessary for him to be able to demonstrate that he had made protected disclosures before being told about potential redundancy.

23. In any event, I do not propose to say much more about either the grievance or the proposed redundancy. The respondent went through the steps of following a grievance procedure and - for what it is worth - the respondent found that there was no evidence to support the claimant's allegations of having made protected disclosures prior to 29 May. Obviously that is a self-serving finding and has no particular significance to me today. It is a matter that can be analysed by the tribunal in due course.

24. It is common ground that the claimant, while he was eventually dismissed, he was not dismissed by reason of redundancy. It is common ground that the claimant's actual dismissal was with effect from 14 August 2020 and the purported reasons that the respondent gave were disciplinary reasons and they related to his new car. The respondent's case is that an investigation into the relevant matters started in March 2020. I think it is likely (ie there is a pretty good chance) that the tribunal will decide that that is not true. For one thing, there is no contemporaneous evidence that an investigation started then. In saying that, I do acknowledge that there is an email from Mr Brown to the car provider stating that Mr Brown had not previously been made aware of the claimant's change of vehicle, but my assessment is that the tribunal is

likely to find that that email falls a very long way short of demonstrating that Mr Brown or the respondent thought that there might be any disciplinary issues at play at the time. Any issues about the time of creation of various documents (or amendments to them) can be considered by the tribunal.

25. The three issues put forward in the dismissal letter, paraphrasing slightly, are:

25.1 that the claimant benefitted from having a cheaper vehicle while still claiming the original allowance for a vehicle. It is suggested that that was a financial benefit and that that was dishonest. I do not think it is likely that the tribunal will be persuaded that that was the reason for the dismissal. On the contrary, that seems so far-fetched as a dismissal reason, that it is highly likely that the tribunal will find that the Respondent's reliance on this as a purported reason for dismissal means that there was actually some hidden reason for the dismissal.

25.2 In relation to the insurance issue, I do not think it is likely that the tribunal will be persuaded that that was the reason for the dismissal. The tribunal is likely to accept that Mr Brown was indeed very busy in early March and then there was the pandemic, which meant that many people were on furlough and his workload was vastly increased. However, I still think that the tribunal will find it is quite implausible that if the respondent had any genuine concerns in March that the claimant might have committed a criminal offence (by driving the vehicle at that particular time), it would not have been raised more promptly with the claimant. Mr Brown seems to have been in full possession of all of the facts in relation to the insurance issue by 30 March at the latest because that is when he asked for the new vehicle to be insured.

25.3 So that leaves the mileage issue. I do not think it is likely that the tribunal will be persuaded by the claimant that the claimant had been told by Mr Brown or by any other members of the respondent's staff that the claimant should deliberately put in excess mileage claims. It is not necessary or appropriate for me to consider today whether the tribunal will be persuaded that there was dishonesty and/or gross misconduct on the claimant's part. If there was gross misconduct then - while the respondent might have been entitled to summarily dismiss the claimant - that would not necessarily mean that the claimant's claim under s.103A is bound to fail or that an ordinary unfair dismissal claim is bound to fail.

26. I do think it is likely that the tribunal will be persuaded that the respondent was looking for a disciplinary excuse to dismiss the claimant. If the tribunal does find that the respondent was looking for an excuse to dismiss the claimant (summarily, and/or for a disciplinary reason) then it will have to ask itself why that was. If it decides that the Respondent was seeking to dismiss for a disciplinary reason in order to save the costs of redundancy or because they were annoyed that the claimant would not accept a pay cut, then the claim under s.103A would not be likely to succeed. On the other hand, if the tribunal decides that the Respondent was seeking to dismiss for a

(hypothetically false or weak) disciplinary reason then that could be treated as evidence that the respondent's reason for dismissing the claimant was that he made on 29 May (or on another date) one or more protected disclosures. There are arguments both ways on this point and the tribunal hearing the case will have the benefit of far more evidence than I have seen. I would expect that they will have the benefit of cross-examination of those involved in investigation and dismissal, for example, and how all witnesses for both parties answer questions when they are cross-examined. I was told today that the respondent made a disclosure to HMRC that it had received money improperly and paid some of it back to HMRC. The final tribunal might think it relevant to find out exactly what happened and when, and whether it was because of anything that the claimant had done? Or was it because the respondent realised that they had made an honest and accidental mistake?

27. I am not satisfied that the claimant meets the necessary hurdles to be granted interim relief. The claimant's case is that he started making disclosures as early as 30 March, but it does not seem that the Respondent was looking for a misconduct excuse to dismiss the claimant from dates soon after 30 March. It does seem to me that the respondent first formed the decision to dismiss the claimant by reason of redundancy and only later changed its decision in order to try to dismiss the claimant for a disciplinary reason instead. It is certainly conceivable that an employer might change a reason from redundancy (or potential redundancy) to a disciplinary reason because they were annoyed about whistleblowing or because they were seeking to discredit the whistle blower. However, based on the documents that I have seen in this case, I think that it is at least as likely that the tribunal will decide that the relationship broke down for other reasons and that, even if the dismissal was unfair, the dismissal was not because of protected disclosures, if there were any.

28. So my decision on this application is that it fails.

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Employment Judge Quill

Date: 25/3/2021

Sent to the parties on: 14/7/2021

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For the Tribunal Office