Case Numbers: 2405507/2020
2408947/2020
2417420/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr B Webster

Respondent: Diamond Bus (North West) Ltd

Heard at: Manchester (remote public hearing via CVP)

On: 16 June 2021

Before: Judge Brian Doyle

Representation
Claimant: In person
Respondent: Mrs S Cummings, counsel

JUDGMENT

1. The claimant's application for interim relief under sections 128 and 129 of the Employment Rights Act 1996 is refused.

2. On hearing that application it does not appear to this Tribunal that it is likely that on determining the complaint to which the application relates the Tribunal at final hearing will find that the reason or principal reason for the claimant's dismissal by the respondent is a reason specified in section 103A of the Employment Rights Act 1996.

3. The "without prejudice" correspondence dated 1 June 2020 arising during Acas conciliation is not admissible at the final hearing.

4. The claims shall now proceed to final hearing on 13-17 September 2021, as listed.

REASONS

Written reasons

1. These are the written reasons for the oral judgment delivered at the preliminary

hearing on 16 June 2021. They follow a timely application made by the claimant at the hearing under rule 62 of the Employment Tribunals Rules of Procedure 2013.

2. The procedural history of these claims is set out by Regional Employment Judge Franey in his case summary and orders made at a preliminary hearing (case management) on 20 May 2021.

"Without prejudice" correspondence

3. The first issue for the Tribunal is to decide is whether "without prejudice" correspondence dated 1 June 2020 and arising during Acas conciliation is admissible at the final hearing (and appropriate for consideration at the present hearing).

4. The document in question appears at [64-66] of the preliminary hearing bundle. The claimant seeks its admission, which is opposed by the respondent.

5. For present purposes, the relevant legal principles are to be found in *Unilever plc v Procter & Gamble Co* [1999] EWCA Civ 3027 and *Ofulue v Bossert* [2009] UKHL 16. Reliance is not being placed by either party upon section 111A of the Employment Rights Act 1996.

6. In principle, neither communications during Acas conciliation nor "without prejudice" correspondence are admissible in a Tribunal hearing unless one of the well-known exceptions to non-admissibility apply. Here there was an existing dispute between the parties. Offers and counter-offers were made as an attempt to settle the dispute. Admissions were made "without prejudice" in order to promote the possibility of settlement. The protection afforded to such communications extends to the subsequent litigation. Privilege has not been waved. None of the exceptions to the rule apply (or are contended for by the claimant).

7. In the Tribunal's judgment, the correspondence in question is not admissible in evidence for those reasons.

Application for interim relief

8. The main issue for this preliminary hearing is the claimant's application for interim relief. This arises from the claimant's claim of unfair dismissal under section 103A of the Employment Rights Act 1996. There is no right to interim relief in respect of any claim the claimant might be making under section 104. The Tribunal has had regard to the provisions of section 103A and, in particular, section 43G and section 43G(3).

9. The application for interim relief falls under section 128 of that Act. The application complies with the procedural requirements for such an application. The background is that the application is being addressed some months after the ET1 claim had been presented, but then rejected by the Tribunal – a rejection that was wrongly made and which has subsequently been corrected

by an order of the Employment Appeal Tribunal on appeal.

10. The Tribunal heard oral submissions from the claimant. The respondent had prepared a written skeleton submission presented at the hearing. The claimant objected to the timing of the presentation of this skeleton. The Tribunal did not consider that the submission of a skeleton was covered by the previous order governing the preparation of documentary evidence for the preliminary hearing. In the event the skeleton did no more than capture counsel's oral submissions. The skeleton was permitted.

11. It might be helpful to begin by summarising the legal principles that the Tribunal must bear in mind in considering the interim relief application.

12. Section 128 of the 1996 Act provides, so far as is relevant, that an employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and that the reason (or if more than one, the principal reason) for the dismissal is one of those specified in section 103A may apply to the tribunal for interim relief. The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date). The tribunal shall determine the application for interim relief as soon as practicable after receiving the application. The tribunal shall give to the employer not later than 7 days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing. The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

13. Section 129(1) then applies where, on hearing an employee's 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 that the reason (or if more than one the principal reason) for the dismissal is one of those specified in section 103A. It is not necessary to set out the remaining provisions of section 129 or of sections 130-132, which are concerned with the consequences of the tribunal finding that it is likely that the tribunal will find that the reason (or if more than one the principal reason) for the dismissal is one of those specified in section 103A.

14. The case law on the test for likelihood of success is instructive. It is to be found in *Taplin v C Shippam Ltd* [1978] ICR 1068 EAT; *Ministry of Justice v Sarfraz* [2011] IRLR 562 EAT; *London City Airport Ltd v Chacko* [2013] IRLR 610 EAT; and *Al Qasimi v Robinson* EAT 0283/17. That case law may be summarised as follows.

15. The test in section 129(1) requires the Tribunal to conduct an expeditious summary assessment of the relative merits of the claim and the response (if available) based upon how the matter appears from the material before it. It is to do the best that it can with the untested evidence put to it by the parties. Clearly, this involves a less rigorous evidential and forensic process than would be expected at the final hearing. It is inevitable that only limited pleadings and

limited evidence will be before the tribunal (although unusually in this case, the passage of time has meant that both the claim and the response are fully pleaded).

16. As a result, the statutory test does not require the Tribunal to make findings of fact. Instead, the decision is one based on the likelihood of the claimant succeeding at the final hearing of his unfair dismissal complaint based upon the public interest disclosure provisions. That decision can only be made on the basis of the material put to the Tribunal at the interim relief application hearing. Its basic task and function are said to be to make a broad assessment of the material available to it and to try to give the tribunal a feel (and to make a prediction about) what is likely to happen at the final hearing of the claim.

17. The test to be applied is whether the claimant has a "pretty good chance of success" at the final hearing. This is not the same as a test of "real possibility" or "reasonable prospect" of success. It is not a test of the balance of probabilities being measurable as being 51 per cent or more. The burden of proof at this stage is intended to be greater than at the final hearing. Nor does "likely" mean "more likely than not". What is indicated is a significantly higher degree of likelihood – "something nearer to certainty than mere probability".

18. What this Tribunal is required to do is to make a decision on the application without making findings of fact and without tying the hands of the Tribunal at final hearing. The task is an impressionistic one. The Tribunal must then explain its conclusion in a way that avoids being "over-formulistic", but which gives the "essential gist" of its reasoning. Provided it does so in a way that the parties can understand why the application succeeded or failed by refence to the issues raised and the test to be applied, it has discharged its task.

19. Turning then to the material before this Tribunal. It had an agreed bundle comprising 172 pages (references to which are in square brackets below). It considered the claimant's three ET1s and the respondent's ET3s. It reviewed the claimant's witness statement and those of the respondent's witnesses, Mr Butler (Operations Manager) and Mr Carroll (Staff Manager), who had been involved in the management of the claimant and the decisions taken in relation to him. It heard no witness evidence. It made no findings of fact. It took account of the parties' submissions.

20. The claimant drew the Tribunal's particular attention to his employment contract and to clause 3.1 [7] as to his place of work. Reference was also made to [58], [59] (complaints made by the claimant in March 2020 about working time), [163] paragraph 6 (travelling time), [164] paragraph 4 (hours of work and working time) and [139] (working time records). The Tribunal asked the claimant to focus upon the public interest disclosure complaint and what he needed to establish to make good his application for interim relief. He referred the Tribunal to his ET1s and to section 43B(1)(b) of the 1996 Act.

21. The claimant's position is that he should not have been the subject of disciplinary action. He says that his absence was relied upon as a reason for his dismissal. Three absences had previously been dealt with by Mr Carroll.

Why were they then revisited later and only after a dispute had been raised by him? The disciplinary action was because he had raised a dispute. That is his case.

22. For present purposes only, the Tribunal has assumed the following chronology.

23. The claimant's employment as a bus driver began on 9 December 2019. On 25 February 2020 he attended a disciplinary hearing concerning unsatisfactory attendance. He submitted a grievance on 25 March 2020. On 12 May 2020 he presented his first ET1 claim. On 18 May 2020 a customer complained about the early running of a service for which the claimant was the driver. There was an investigatory meeting about this matter on 11 June 2020. The claimant then commenced a period of absence on 15 June 2020. He was due to attend an employment review meeting on 19 June 2020, but this was rescheduled at his request. A second employment review meeting was due to take place on 19 June 2020. This was again rescheduled, this time due to the claimant's absence. He should have attended an occupational health appointment on 2 July 2020, but he did not do so. He failed to attend a third employment review meeting on 6 July 2020. The respondent dismissed him on 9 July 2020. Two further ET1s then resulted on 9 July 2020 and 27 October 2020.

24. The Tribunal has considered the provisions of sections 43A, 43B, 43G and 103A of the Employment Rights Act 1996. It will be for the claimant to establish that he made a protected disclosure and that the reason for his dismissal was that he made that protected disclosure. The Tribunal has assumed for present purposes only that the claimant's grievance, upon which he relies as a protected disclosure, qualifies as such, although this is not admitted by the respondent. The Tribunal is not necessarily persuaded that the presentation of the first ET1 claim will be treated as a qualifying protected disclosure and it considers that the respondent is likely to establish that it does not meet the requirements of section 43G and of section 43G(1)(c) in particular. Nevertheless, it regards the point as at least arguable and it will assume that the claimant might be able to make out his case on this matter.

25. The significant impression that the Tribunal gleans from the witness statements, however, is that it is not likely that the claimant will establish that the reason for his dismissal was that he had made protected disclosures. That is not to say that his case has little or no reasonable prospect of success (which is a different test for a different purpose), but the Tribunal is not satisfied at this stage of the proceedings that the claimant has "a pretty good chance of success". On the basis of the witness statements of Mr Butler and Mr Carroll, it is more likely, and even probable, that the respondent will establish that the reason for the dismissal was the concerns about his time management, attendance and/or unsatisfactory performance (together with his failure to attend performance review meetings and an occupational health appointment), and that he had not met the minimum standards expected of him in order to pass his probationary period.

26. The Tribunal accepts the respondent' contentions in support of this impression. (1) There was a background of earlier concern about the claimant. (2) A

customer complained about the early running of his service. (3) The investigation of the claimant was prompted only by that complaint. (4) Mr Carroll had not been aware of the claimant's grievance or his first ET1 claim. (5) The early running matter was a sufficient concern to warrant a possible dismissal. (6) The claimant had admitted the matter. (7) There were genuine concerns about his attendance record. (8) He had further absences after 15 June 2020. (9) He failed to attend three attendance review meetings. (10) He failed to attend an occupational health appointment. (11) Other employees were disciplined in similar circumstances. (12) There is no other evidence to suggest that the respondent was motivated against the claimant because he had raised concerns – indeed there is evidence to the contrary.

27. The connection in time between the claimant's grievance and his ET1 claim, on the one hand, and the respondent's steps leading towards his eventual dismissal are in the Tribunal's assessment neither here nor there. The coincidence of these events, of course, does raise a question to be answered as to what was the real reason for the dismissal. However, the respondent has demonstrated for present purposes that it may well be able to answer that question satisfactorily. The coincidence in time is not conclusive.

28. In summary, for the purposes of the application for interim relief only, it does not appear to the Tribunal that it is likely that on determining the complaint to which the application relates the Tribunal will find that the reason (or if more than one, the principal reason) for the dismissal is one of those specified in section 103A. The application does not pass the test of whether the claimant has a "pretty good chance of success" at the final hearing.

29. The claimant's application for interim relief under sections 128 and 129 of the Employment Rights Act 1996 is refused.

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Judge Brian Doyle
Date: 2 July 2021
JUDGMENT & REASONS SENT TO THE PARTIES ON

28 July 2021

FOR THE TRIBUNAL OFFICE