EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Onwuka	v	Tesco Stores Ltd

Heard at: Watford (in public; by video) **On:** 30 July 2021

Before: Employment Judge Quill (sitting alone)

Appearances:
For the Claimant: In person
For the Respondents: Mr J Crozier

JUDGMENT

The application for interim relief is refused.

REASONS

Introduction

1. The Claimant made an application for interim relief based on an allegation that the claimant's dismissal was contrary to s.103A of the Employment Rights Act. The dismissal was on 1 July 2021 and the procedural requirements for making an interim relief application were met.

2. I gave my decision and the reasons orally, and written reasons were requested. These are they.

The hearing and the evidence

3. At around 10am when we first started this hearing, the Claimant, was unable to join the video hearing. I allowed him until 10.15am to see if matters could be resolve, but they could not. With the consent of me and the Respondent's representative, the Claimant joined the hearing by telephone, in other words he phoned in to the video hearing room but his image was not present on screen. I and everyone else was able to hear him and he was able to see me and Mr Crozier and everyone else on his screen.

4. I had a bundle today of 476 pages from the respondent and also a bundle of 28 pages of witness statements. No oral evidence was taken. I had a document which was 13 pages of written submissions from the respondent and also some authorities

5. During the hearing, I discussed the Claimant's position with him and sought clarification from him, and he made his submissions in support of his application. This part of the hearing lasted from around 10.15am to 11.30am and then we had a break and I heard from Mr Crozier for about 30 minutes, and then I gave the Claimant the opportunity to comment in response.

The law

6. The statutory test which I must apply is the one that is set out in s.129(1) of the Employment Rights Act 1996.

> (1) This section 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—
> (a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—
> (i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or
> (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or
> (b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

7. In other words I must decide if it appears to me that it is likely that on determining the complaints 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 sub-paragraph 1(a). That includes s.103A of the Employment Rights Act 1996, which is the only such reason relevant to this application.

> 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. S.103A of the Employment Rights Act refers to the fact that an employee who is dismissed shall be regarded for the purposes of 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.

9. When making a decision on an interim relief application, I do not make any formal findings of fact which are intended to be binding at any later stage of the proceedings. I am assessing - amongst other things - the likelihood of disputed facts being proved in the claimant's favour at the final hearing. There is only limited material available to a judge making a decision on an interim relief application but my decision has to be based on whatever material is available to me.

10. When considering the likelihood of the claimant ultimately succeeding on the application the correct test to be applied is whether the claimant has a "pretty good chance" of success at the full hearing. This is the test first set out in Taplin v C Shipham Ltd [1978] ICR 1068. As numerous appellate decisions have stated (for example Ministry of Justice v Sarfraz [2011] IRLR 562 and Wollenberg Global

Gaming Ventures (Leeds) Ltd [2018] 4 WLUK 14; the latter of which is as recent as 2018), the test that was set out in 1978 in Taplin remains the appropriate one. The test does not simply mean "more likely than not"; it denotes in a significantly higher degree of likelihood.

11. For the claimant to succeed in his interim relief application, it is necessary for him to show that there is a pretty good chance of succeeding on each required element of the s.103A claim. In other words that he has to show there is a pretty good chance that the final tribunal will decide that there actually was a protected disclosure, as well as showing that there is a pretty good chance that the disclosure, if any, was the principal reason for his dismissal.

12. There are three requirements that need to be satisfied and for the definition of protected disclosure in s.43A of the Employment Rights Act to be met. There needs to be a disclosure within the meaning of the Act; that disclosure has to be a qualifying disclosure; and it must be made by the worker in a manner that is set out at sections 43C through to 43H.

13. The disclosure must contain information and there must be sufficient information in the disclosure if it is to qualify under s.43B(1).

> (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.

14. In terms of whether the employee thought that the disclosed information tended to show one of those things, the employee's actual subjective belief must be analysed by the tribunal both to decide what, in fact, the employee did believe and also to decide if the subjective belief was reasonable.

15. In relation to the public interest part of the criteria, as per Chesterton Global Ltd v Nurmohamed [2017] I.R.L.R. 837, the question for the tribunal is whether the worker believed - at the time he was making it - that the disclosure was in the public interest and whether that belief was reasonable. While the worker must have a genuine and reasonable belief that the disclosure of the information is in the public interest, this does not have to be the worker's motivation for making the disclosure.

16. If the claimant is unable to show that he has a pretty good chance of showing that the disclosure was made in accordance with any of s.43C through to s.43H then

interim relief should not be granted. (Although, for the purposes of this application, the Respondent did not seek to dispute this part of the requirement.)

17. It is for the Respondent to prove what its reason was for dismissing the employee. However, if the final tribunal decides that the reason or the principal reason for the claimant's dismissal was something other than a protected disclosure then the claim for breach of s.103A fails even if the dismissal was for a reason that is different to the one put forward by the employer see for example Kuzel v Roche Products Ltd [2008] ICR 799.

18. Evidence that the employer has acted in a high handed or unreasonable or peremptory fashion or has deliberately turned a blind eye to evidence that the employee was not guilty of wrongdoing are not necessarily sufficient. Their only relevance would be if they supported an inference that the employer's purported reason was not the true reason for the dismissal. As per the well-known case of Abernethy v Mott, Hay, Anderson, the reason for the dismissal of an employee is the set of facts known to the employer or the set of beliefs held by the employer which caused the employer to dismiss the employee. That is subject - in protected disclosure cases - to the Supreme Court decision in Royal Mail Group Ltd v Jhuti [2019] UKSC 55; where the real reason for the dismissal is hidden from the decision maker behind an invented reason, it is the tribunal's duty to look behind the invented reason. If an investigator or senior manager wants to get rid of the employee and they trick or deceive the dismissing officer into deciding that the employee had committed misconduct, then the reason which the investigator or the senior manager had for wanting to get rid of the employee can potentially be attributed to the employer as the dismissal reason for s.103A.

The parties' positions and my analysis

19. Turning now to the facts of this case. The respondent is a retailer and the claimant was employed in one of its distribution centres.

20. The respondent's purported reasons for the dismissal are contained in the dismissal letter of 1 July 2021 which is at page 388 of the respondent's bundle. The dismissing officer was Mr Djazouli. He made his decision following an investigation conducted by Mr Brennan. The dismissal reasons mentioned in the letter allegedly relate to conduct, being:

> *advising colleagues on a tax scheme and receiving monies from colleagues as a percentage payment in return*.

21. This was said to be gross misconduct The letter gives reasons for the both elements of that (the finding that the Claimant had done as alleged, and the reason for saying it was gross misconduct) in 7 bullet points. The stated reasons are very brief and – although they refer to loss of trust and colleagues being adversely effected – do not give details of the scheme

22. However, the Claimant does not deny that the dismissing officer had received a report from Mr Brennan which included the colleagues' statements mentioned briefly in the letter. The dismissing officer therefore had information that the Claimant was alleged to be taking significant sums of money (four figures) from colleagues when he apparently obtained a tax rebate for colleagues and then was refusing to repay the colleagues when HMRC ultimately decided that the rebates were not justified and/or when HMRC imposed penalties on the colleagues.

23. In this hearing, the Respondent's representative has alleged that what the Claimant is presumed to have done is a criminal offence (being deliberately supplying false information to HMRC to the effect that the individuals were self-employed when, in fact, as the Claimant is alleged to know, they were actually employees of the Respondent). I do not need to make any decision about that, save to note that that is not something mentioned in the dismissal letter or in Mr Djazouli's statement prepare for this hearing.

24. The Claimant appealed on 1 July 2021 and the appeal was not upheld. The decision maker was Mr Kennedy. The outcome is page 469.

25. The appeal, page 389, does not refer to alleged protected disclosures having been made, still less that those protected disclosures were the reason for dismissal. This is despite the fact that the Claimant makes several arguments for why the appeal should be upheld, including referring to past disagreements between him and Mr Francis. (Mr Francis being someone whom the Claimant says knew about the alleged PID and who was motivated to try to get rid of the Claimant)

26. On the claimant's side, there is no dispute that he was took certain actions for four colleagues (the Respondent alleges it was at least five, but the Claimant says that the fifth backed out). He says that what he did was not during work time or on work premises, and he suggests that: he did nothing wrong; he acted with the colleagues' agreement; and/or that it is a private matter which is none of the Respondent's business.

27. Paragraph 6 of his the Grounds of Complaint describes the protected disclosure he says he made. He confirmed that is a reference to page 458 of the bundle. The email has the heading "election malpractice". It was sent to his union and reads:

> I am writing to inform you on the election malpractices held on 6th to 12th of April in Reading DC. The election was conducted in my absence which I earlier pointed at before the election. The election was not free and fair and to this end am writing and requesting that investigation be l[a]unched. I have been on holiday and will be back to work by 30th of April. Am not in agreement with the election results.

28. That email refers to a union election in which the Claimant was a candidate, and the union official who received it is not an employee of the Respondent. Subject to that, it is largely self-explanatory. I do not read it as suggesting that the only

alleged malpractice was that the Claimant was on holiday at the relevant time. The implication is that there were other things that stopped it being "free and fair" (or otherwise amounted to "malpractice") and that the Claimant – potentially at least - seeks the opportunity supply more information during an investigation, following his return from holiday. Subject to that, I agree with the Respondent's representative that the information in the email was not the same information mentioned in sub-paragraphs 1 to 6 of paragraph 6 of the Grounds of Complaint on page 61 of bundle.

29. The Claimant also said in submissions that paragraph 7 of the Grounds of Complaint refers to a further protected disclosure on 18 May 2021. The Respondent argues that the Claimant would have to formally apply to amend his claim to make that argument. Two things are clear: (a) By implication paragraph 7 alleges that the Claimant had an oral discussion with Mr Kee on 18 May 2021, the subject of which was the Claimant's allegations of electoral malpractice made initially on 15 April 2021 and (b) the paragraph gives no specific detail of what information was allegedly supplied by the Claimant to Mr Kee on 18 May.

30. Taking into account that the Claimant is a litigant in person, and the detailed list of information in paragraph 6 of the Grounds of Complaint, I will proceed on the basis that the claim form makes the allegation that there were two occasions on which there was a disclosure and that, between the two occasions, the information communicated was that listed in paragraph 6. At a full hearing, it will be for the Claimant to prove that he did disclose that information. As well as the email on 458, another document is Mr Kee's note on 462. At the final hearing, there may well be other evidence which either supports or contradicts the Claimant's allegations that the information disclosed was as per paragraphs 6 (and 7) of the Grounds of Complaint.

31. I think there is a pretty good chance that the tribunal will decide that the Claimant genuinely believed that the union had breached a legal obligation by failing to conduct the election when he was at work and by failing to have the count scrutinised by people whom the Claimant regarded as fair and independent. I am not satisfied that there is a pretty good chance that the tribunal will decide that the Claimant's belief was a reasonable one. However, while that in itself would be sufficient for the application to fail, that is not the main reason the application fails.

32. For the claimant to succeed in his s.103A claim, the final tribunal would have to be decide one of the following:
    a. Either that the purported investigation, and the dismissal itself, were all part of an elaborate charade and Mr Djazouli wanted to dismiss the claimant because of the communications of 15 April and/or 18 May 2021 to the union, but he and the investigator, Mr Brennan, (and perhaps others), got together to use the claimant's actions in connection with colleagues' tax affairs as a sham excuse to dismiss him.
    b. Or, alternatively, that the investigator, Mr Brennan, genuinely carried out his duties in good faith but Mr Djazouli decided opportunistically of his own accord to dismiss the claimant, not because of the Brennan report, or the Claimant's dealings with colleagues, but because of the communications with union in April and May 2021.

c. Or, alternatively, as per the Jhuti point, that the investigator, Mr Brennan, and/or some other unknown individuals (senior managers in a position to influence the outcome) within the respondent, actually tricked Mr Djazouli in some way. In other words, they fooled him into dismissing the claimant with Mr Dajozouli thinking that the reason that he was dismissing the claimant was because of the dealings with colleagues but actually the other people who had tricked him into this course of action had really been motivated by the fact that they wanted to get rid of the claimant because of the disclosures to the union.

33. I do not think that the claimant has a pretty good chance of persuading the final tribunal that any of those alternatives is what happened.
    a. For one thing there was no evidence presented to me that would persuade me of any of those things might have happened.
    b. One of the Claimant's main issues with the decision is that the interactions with colleagues were away from work and not in work time. However, he admits the activity including taking payment for it. He does not suggest that the colleagues who made statements have been persuaded by the Respondent to lie about what is (potentially) the main substance of the allegation, ie that he had a course of dealing with HMRC about the colleagues' tax affairs, took payments from the colleagues and that HMRC have decided that, in fact, the colleagues should be taxed as employees, contrary to the information which the Claimant supplied to HMRC. It may or may not be relevant to the fairness of the dismissal (as per section 98 the Employment Rights Act 1996) for the final tribunal to make a decision about whether the Respondent had reasonable grounds for finding that the Claimant was at work when he carried out certain steps. However, even if hypothetically true that the Respondent has weak evidence about the exact time and place of the Claimant's activities, that would not give the Claimant a pretty good chance of showing that Mr Djazouli (or anyone else involved in the dismissal) was motivated to dismiss the Claimant because of the Claimant's communications with the union, as opposed to because of a genuine belief (which may or may not be erroneous) that he had acted inappropriately towards work colleagues, including taking significant sums of money from those colleagues. The Claimant is free to argue that the dismissal is unfair if the Respondent cannot show his actions were in work time, or on work premises, but that argument is not likely to carry much weight in support of his section 103A claim.
    c. Similar considerations apply to any argument that the dismissal was procedurally unfair given the timing of his departure from the hearing, and/or the wording of the letters sent to him about the process, and/or the timing of when he got the evidence pack.
    d. In my judgment, the Claimant does not have a pretty good chance of showing that any of Djazouli, Kennedy or Brennan knew about the alleged protected disclosures of 14 April and/or 18 May 2021, and he does not have a pretty good chance of showing that anyone who did know about them caused the dismissal (or, importantly, that they were motivated to try to bring about dismissal because of the disclosures).

34. On the contrary, the Respondent's alleged reasons for the dismissal are entirely plausible, both in terms of its argument that the evidence presented to Mr Djazouli, gave him reasonable grounds to believe that the Claimant had committed misconduct and in terms of the argument that the misconduct sufficiently serious that there should be a dismissal. It does not strike me as surprising or suspicious that an employer might decide to dismiss in these (alleged) circumstances. Obviously, I make the comments in this paragraph without having heard any evidence, and for all I know, the Claimant might ultimately prevail on his claims of automatic unfair dismissal and/or ordinary unfair dismissal. I make the comments purely in the context of explaining why – based on the material before me - the Claimant falls a long, long way short of the required threshold for interim relief to be granted.

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Employment Judge Quill

Dated: 30 July 2021

Sent to the parties on:

…….20/8/21.

For the Tribunal:

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