EMPLOYMENT TRIBUNALS

Claimant ***Mr R Harmsworth***

Respondent ***21st Architecture Ltd***

HELD AT: **London Central** **ON: 12 April 2021**

BEFORE: Employment Judge D A Pearl (sitting alone)

Representation:

For Claimant : Ms K Liebert (Solicitor)
For Respondent: Mr J Wallace (Counsel)

DECISION ON INTERIM RELIEF APPLICATION

1 The application for interim relief is refused.

REASONS

Legal principles

1 I start by referring to the appropriate test on such applications. Section 129 provides that interim relief can be granted where:

"It appears to the Tribunal that it is likely that on determining the complaint … the Tribunal will find that the reason (or if more than one the principal reason) for the dismissal is …. specified in …. section 103A."

2 The case law is that "likely" in this context involves asking whether the Claimant has established that he has a pretty good chance of succeeding in the final application to the Tribunal.

3 In **Ministry of Justice -v- Sarfraz** [2011] IRLR 562 (EAT) Underhill J said in paragraph 16: "Nevertheless, the basic message of the judgment [Taplin] read as a whole is clear. In this context 'likely' does not mean simply 'more likely than not' – that is at least 51% - but connotes a significantly higher degree of likelihood. Slynn J understandably declined to express that higher degree in percentage terms, since numbers can convey a spurious impression of precision in what is inevitably an exercise depending on the Tribunal's impression." In paragraph 19 he referred again to "the essential point which emerges from *Taplin*: 'likely' connotes something nearer to certainty than mere probability."

The two issues

4 The claim is for automatic unfair dismissal on the basis that the Claimant made a public interest disclosure. The relevant facts for this application fall within a relatively small compass, although they have given rise to considerable legal debate. He relies on a single disclosure, the short email to the Director, Mr Keenan, dated 3 December 2020: "Dear Paul, Whilst I remain on the Furlough Scheme and in line with the scheme's requirements I am unable to undertake any work for you." On 11 December he was dismissed and Mr Keenan's letter of that date states that this was for unsatisfactory performance.

5 Two questions arise. (1) Is it likely that the 3 December email will be seen as a public interest disclosure? (2) If so, is it likely that the reason or principal reason for the dismissal was this 'whistleblowing' disclosure?

The disclosure

6 On the face of it, the argument that the 3 December email qualifies as a protected disclosure is not strong. This is because the words do not seem to disclose information which tended to show breach of a legal obligation. That much is apparent from the bare words. However, Ms Liebert has made a forceful submission to the contrary. She submits (a) that the evidence shows that the Respondent flouted the furlough rules by requiring employees to work while claiming their salary from public funds under the scheme; (b) that until 3 December the Claimant had no realistic option but to go along with this; and (c) that there was an understanding by both parties to the email that the Claimant was alleging that the Respondent had committed a criminal offence, namely the making of fraudulent furlough claims.

7 Mr Wallace submits that the Claimant is likely to fail. The disclosure must tend to show dishonesty. He relies on the EAT decision in Williams v Brown UKEAT/0044/19 to this effect, although I am not sure that the citation supports the broad proposition. The case, however, draws on Kilraine a Court of Appeal authority [2018] EWCA Civ 1436. The disclosure must have a sufficient factual content and specificity such as is capable of tending to show one of the listed matters. The tribunal must make "an evaluative judgment" in the light of all the facts of the case. The "particular context" in which the

disclosure was made must be considered. Ms Liebert places emphasis on this and submits that the context is that both parties knew that the rules had been broken.

8 I have not found this an especially easy matter to rule on. I need to stress that I am making a summary assessment only. I have not heard any evidence and much may turn on evidence in due course. I am in no position to say that the Respondent did breach the furlough rules. The most I can conclude is that the Claimant has, in this application, made an arguable case and that the Respondent's evidence so far does not meet it. I therefore assume that the Claimant will establish his version of the facts. However, it is difficult to predict whether the context, background and overall circumstances will take the words of the disclosure into the statutory provision. The arguments are balanced. If it were the sole issue on which the application turned, I would favour the Claimant's likelihood of success. The surrounding facts here are capable, in my judgment, of turning an apparently innocuous statement into a protected disclosure; and, if so, I consider it pointless to try to assess the prospects more precisely. I would resolve the first issue in the Claimant's favour. As matters have transpired, however, the second issue is clearer and I cannot make the same adjudication.

The reason for dismissal

9 The Claimant commenced employment in June 2019 as an architectural assistant and there is a major issue about his performance. Mr Keenan states: "From early on ...concerns were being raised as to his overall ability." He criticises his work and also says it was slow. He also says he would not acknowledge mistakes. He gives an example, a barn project, at paragraphs 15 and 16.

10 He deals with a Finance meeting followed by a Board Meeting on 24 November 2020. As work had reduced during the pandemic, he says that it was necessary to cut costs and it was decided to dismiss the Claimant. This was 9 days before his alleged disclosure. I can omit further detail and explanation that Mr Keenan gives. Mr Diamond, a director, corroborates this evidence. He also criticises the Claimant's performance, with a further example.

11 Ms Liebert submits that this is all disingenuous. She criticises the truthfulness of Mr Keenan's evidence and makes a number of submissions to the effect that the Respondent's case is 'a front' and that the real reason for dismissal was retaliation for the disclosure.

12 Each party alleges that the other has manipulated evidence to construct a case. The Respondent says that the Claimant has never accepted shortcomings in his work and has searched around for a basis to bring a claim. The Claimant says that the Respondent has 'pretended' that a decision was taken on 24 November to dismiss, in order to hide the retaliatory dismissal. It would follow that the 4 paragraphs of criticism in the dismissal

letter have been fabricated, as has the entire defence, in order to mask the true reason for dismissal.

13 All of this is material that must go to trial, but on the evidence I have seen, and the impressive submissions that both parties have made, I find that I am not able to say that the Claimant has 'a pretty good chance' of succeeding on the causation issue, as it has been described in the rival arguments. One aspect of this is that the Claimant is not merely challenging a single piece of evidence, as occasionally happens. He necessarily alleges that the Respondent has manufactured a fiction and that its witnesses have been prepared to lie about the November meeting and create a false narrative in the dismissal letter in order to cover up the dismissal of a whistle blower for telling his employer they were breaking the law, a matter both parties would have known on the Claimant's case. The most I could say is that the Claimant has a 50/50 chance of success, and that is not enough.

14 I also need to bear in mind that the reason for dismissal is not just a straight choice between 2 possible outcomes. As Mr Wallace correctly argues, one possible finding in such cases is that the Respondent fails to establish its reason, but that the tribunal finds a different reason from that asserted by the employee. I do not want to say too much about this for fear of infecting the subsequent evidence, but the terms of the 3 December email do suggest to me that this is not entirely out of the question. It is a subsidiary, but further impediment that the Claimant will need to overcome.

Conclusion

15 On the issue of causation, ie the reason for dismissal, the Claimant's case fails to reach to required likelihood of success and I decline to make any order for interim relief.

Employment Judge Pearl

Date: 22nd April 2021

JUDGMENT & REASONS SENT TO THE PARTIES

22nd April 2021

For the Tribunal Office