



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE BALOGUN

BY CVP VIDEO CONFERENCE:

BETWEEN:

MOHAMMAD SADIQ

Claimant

AND

CO-OP GROUP LIMITED

Respondent

ON: 2 February 2022

Appearances:

For the Claimant: In Person

For the Respondent: Ms K Moss, Counsel

DECISION ON INTERIM RELIEF APPLICATION

The application for interim relief is refused.

REASONS

1. By a claim form presented on 12 March 2019, the claimant claims, among other things, that he was automatically unfairly dismissed by the respondent for making protected disclosures pursuant to section 103A of the Employment Rights Act (the "ERA"). Included within the claim was an application for interim relief pursuant to section 128 ERA.
2. The issue I had to determine in relation to this application was whether the claimant's automatic unfair dismissal claim was likely to succeed at the substantive hearing.

The Law

3. By section 128(1) ERA, an employee who presents a complaint of automatic unfair dismissal pursuant to section 103A may apply to the Tribunal for interim relief.
4. An application for interim relief will be granted where, on hearing the application, it appears to the Tribunal that it is likely that on determining the complaint to which the application relates, a tribunal will find that the reason for dismissal is the one specified. (s.129(1) ERA)
5. The case of Taplin v Shippam Ltd (1978) ICR 1068 EAT defined "likely" in section 129(1) as a "pretty good chance of success". That test was reaffirmed in the case of Dandpat v The University of Bath and Ors UKEAT/0408/09
6. The standard of proof required is greater than the balance of probability test to be applied at the main hearing. The EAT recognised in the *Dandpat* case that such a high burden of proof is necessary as the granting of such relief will prejudice a Respondent who will be obliged to treat the contract as continuing until the conclusion of the proceedings. Such a consequence should therefore not be imposed lightly.
7. Section 103A ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason or principal reason is that the employee made a protected disclosure.
8. Section 43B ERA defines a qualifying disclosure as any disclosure of information which is made in the public interest and which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs a-f. The claimant relies on paragraph d – *that the health and safety of any individual has been, is being or is likely to be endangered*.
9. I need to be satisfied on the evidence before me that it is likely that each element of the 43B definition is likely to be met and that the final Tribunal is likely to find that the principal reason for dismissal was the disclosure.
10. For the purposes of this hearing, I was provided with separate bundles of documents from the parties. References in square brackets in the judgment prefaced with a "C" or "R") are to documents in the claimant's and respondent's bundle respectively. In addition the respondent provided witness statements from Stuart Peter Reaks (SPR) Area Manager and Sunura Dharmasiriwardana (SD) Store Manager. I did not hear from these witnesses as this was not a fact finding hearing. However, I reviewed the statements for

the sole purpose of understanding the case that the respondent intends to put forward at the final hearing, in the absence of the ET3 response; which is yet to be filed.

11. The claimant says that he started working for the respondent as a Retail Team Leader on 14 September 2021. It is common ground that the claimant was dismissed on 23 November 2021 by his line manager (SD) during his probationary period.
12. The claimant relies on an undated grievance letter to "SM" as his first disclosure. He says that he sent it to the respondent by email on 18 October 2021. The respondent's case is that it was received on 22 October 2021. I have not been provided with a copy of the accompanying email though I am told that not much rests on the date. The letter accuses the respondent of being in breach of health and safety and of the Working Time Regulations 1998 by having only 2 employees working in the shop [R65]
13. Based on this limited information, I cannot say that it is likely that the final Tribunal will find that the provisions of section 43B(1) have been satisfied. For one, it is difficult to assess without more what view the final Tribunal will take on whether it was reasonable for the claimant to believe that the matters complained about tended to show the breaches alleged or for him to believe that they were in the public interest.
14. The claimant relies on an email he sent to SPR on 18 November 2021 as his second disclosure. In it, as well as reiterating the earlier grievance, the claimant raises a new matter – a complaint that SD had asked him to follow him in a chase of a shoplifter on 17 November in breach of health and safety [R44]
15. The respondent submits that the complaints are disingenuous and that the claimant could not have had the requisite reasonable belief because the earlier complaint (the first Disclosure) had been resolved and the second allegation was untrue. The respondent also raises an issue about the timing of the disclosure, which followed a letter on the same day inviting the claimant to a re-arranged probationary review meeting and containing a warning that the outcome could be dismissal [43]
16. There are key factual disputes relating to the second disclosure that can only be resolved after all the evidence has been heard. The place for that to occur is at the final hearing and until then, it is not possible for me to say that it is likely that the Tribunal will find that the second disclosure is a qualifying one.
17. In relation to the dismissal, the respondent's case is that the claimant was dismissed because he did not pass his probationary period. The claimant contends that this is a made up reason. Within the respondent's bundle are various notes of, what are said to be, probationary review meetings with the claimant. These record discussions with the claimant about his conduct and performance and the improvements the respondent expects to see going forward [R33, R34, R35, R39] The last of these occurred on the day of dismissal and the claimant's conduct, attitude and some areas of his performance were marked as "Unacceptable" while other areas of performance were marked as "Partially Achieving." [R48-49]
18. These documents do not suggest a causal link between the alleged disclosures and the dismissal, quite the opposite. It will of course be a matter for the final Tribunal to determine the veracity of the respondent's case and only then will it be possible to properly determine the motivation behind the dismissal. However, on the information

before me, I cannot say that the final Tribunal is likely to find that the reason or principal reason for the dismissal was the disclosures.

19. The application for interim relief is therefore refused.

Employment Judge Balogun
Date 10 February 2022