

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103947/2018 Held at Glasgow on 3 and 8 May 2018

5

Employment Judge Shona Maclean

Mr D Banks

Claimant
Represented by:
Ms I McGhee
Solicitor

Glasgow Prestwick Airport Limited

Respondent
Represented by:
Mr B Campbell
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

10 The Judgment of the Employment Tribunal is that the claimant's application for interim relief under Sections 128 and 129 of the Employment Rights Act 1996 is refused.

REASONS

The Application

15 1. In the claim form sent to the Tribunal's office on 10 April 2018 the claimant sought interim relief in relation to his claim that he was dismissed unfairly and that the reason or principal reason for his dismissal was that he had made a qualifying protected disclosure. The effective date of termination was 3 April 2018. The claim form was therefore presented within the prescribed time for pursuing an application under Section 128(1)(a)(i) of the
20 Employment Rights Act 1996 (the ERA).

2. While the claimant also makes allegations of detriment while in employment that was not the focus of the interim relief hearing which only applied to the unfair dismissal complaint.

E.TZ4(WR)

Evidence and Submissions

3. For the purposes of the interim relief hearing the witness statements provided by the claimant; Stewart Adams, interim Chief Executive Officer; Andrew Miller, Chairman; and Sonia Rafferty, HR Director were taken as
5 read. The witnesses were cross examined and re-examined in the usual way. The parties produced two sets of documents. The representatives provided written submissions which they read and made some additional comments.
4. Interim relief should be ordered if it appears likely that on determining the
10 complaint, the Tribunal will find the reason for the dismissal was for the reason of making a protected disclosure.
5. Without prejudice to the respondent's position in the claim at large, it accepted that for the sake of argument within the scope of the of the interim relief hearing that claimant may have made a protected disclosure in his
15 interactions with the respondent's senior office holders in relation to the Halcion/Breedon procurement issue.

The Law

6. The applicable law and relevant authorities are set out in the respondent's submissions. As there was no dispute between the parties about the legal
20 principles which applied I adopt them for the purposes of this judgment.
7. The test is that the claimant has a "pretty good chance of success" in establishing that the reason that he was dismissed was that he had made a protected disclosure (*Taplin v Shippam Limited [1978] ICR 1068*). In that case the EAT expressly ruled out alternative tests. According to the EAT,
25 the burden of proof in an interim relief application was intended to be greater than at a full hearing, where the Tribunal need only be satisfied on the "balance of probabilities" that the claimant had made out his case.
8. I noted that at an interim relief hearing I required to make a summary assessment based on the material before me of whether the claimant had a
30 pretty good chance of succeeding on the relevant claim. I should not make

a summary determination of the claim. In giving reasons, it is sufficient to indicate the “essential gist” of my reasoning; this is because I am not making a final judgement and my decision is inevitably based on impression and is therefore not susceptible to detailed reasoning; and because so far as possible it is better not to say anything that might pre-judge the determination on the merits (*Parson v Airbus International Limited* UKEAT/0023/26).

Summary Assessment

9. In my summary assessment, I am not making any findings of fact but setting out my observations based on the material before me, of the likelihood of the claimant succeeding at a full hearing in his complaint under Section 103A of the ERA.
10. The claimant’s case is that he made several qualifying disclosures and because he did so this triggered a shift in behaviour towards him and led to his dismissal.
11. The respondent’s case is that the claimant was dismissed because of his performance and lack of engagement with the business.
12. My understanding is that respondent is a private limited company and receives loan funding from the Scottish Government, its only shareholder. Andrew Miller is the Chairman of the Board of Directors. He does not chair the Audit and Risk Committee or the Remuneration and Compensation Committee.
13. The respondent employed the claimant from 2 May 2017 as Finance and Commercial Director. He was part of the Executive Team initially comprising Sonia Rafferty, HR Director; Jules Matteoni, Operations Director and Ron Smith, CEO.
14. It appeared that the claimant had a good relationship with Mr Smith who left the respondent on 18 September 2017. My impression was that the Board of Directors did not consider that Mr Smith was an effective CEO.

15. Mr Adams is an experienced CEO/Managing Director who had worked with Finance Directors in his other roles. He joined the respondent on an interim basis on 17 October 2017 specifically to improve cost control and increase revenue.
- 5 16. Around September 2017 the claimant and Ms Rafferty had opposing views about a disciplinary process involving a junior female colleague (the Barcelona Incident). My impression was that Barcelona Incident led to significant friction between the claimant and Ms Rafferty to the extent that Mr Miller spoke to the claimant about his behaviour around 1 November
10 2017.
17. Around September 2017 the claimant says that he disclosed to Susan Dunn the Chair of the Audit and Risk Committee, Ms Rafferty's alleged non-compliance of the expenses policy. The manner of this disclosure was unclear.
- 15 18. The claimant also says that around 25 September 2017 he spoke to Gail Shaw, HR Business Partner about unlawful deductions from wages if the Salary Spine Review was implemented. Again, the manner of this disclosure was unclear. However, this issue was addressed before the changes in salary were implemented in April 2018. The issue was referred
20 to the respondent's external auditors BDO to provide feedback which Ms Rafferty took on board.
19. Mr Adams said that these disclosures were not raised with him and he was unaware of them. The claimant said that he raise them with Mr Adams in October 2017. My impression was that if this was done, it was not in writing.
- 25 20. On the face of the evidence before me it did not appear that the clamant had a pretty good chance of these disclosures being found to be protected disclosures. They appeared to be verbal and it was disputed that they were made to Mr Adams. There was in my view a lack of clarity in what information was being disclosed at the time; the extent to which disclosures
30 were made to the claimant's employer; and why the claimant believed that the alleged non-compliance of expenses issues was fraudulent.

21. The claimant also mentioned Mr Matteoni's non-compliance with the procurement policy and process. I agreed with the respondent's submission that this alleged disclosure did not appear in the claim form and therefore I did not consider it further.
- 5 22. Another alleged protected disclosure was Ms Rafferty's use of on-site fuel to fill her car. Mr Adams did not dispute that the claimant mentioned this to him around January 2018. It was not clear to me why the claimant reasonably believed that this was a criminal offence or breach of a legal obligation; and why the claimant thought he was acting in the public interest in mentioning
10 this to Mr Adams. It therefore did not appear that the claimant had a pretty good chance of that disclosure being found to be a protected disclosure.
23. The next alleged protected disclosure was the Halcian/Breeden procurement issue. This issue was first raised by Matthew Main, Procurement Manager to the claimant before Mr Adams joined the
15 respondent. The claimant told Mr Adams following which the claimant instructed the respondent's external auditors BDO to consider the matter. The claimant prepared a report which he provided to BDO. Mr Adams agreed to the claimant instructing Anderson Strathern to prepare a report. In February 2018 Mr Adams accompanied the claimant at meetings with BDO
20 and Anderson Strathern. Mr Miller received the claimant's report in early March 2018. Ms Dunn then Chair of the Audit and Risk Committee was aware of the issue. Anderson Strathern issued its report to the claimant and Mr Adams in late March 2018. The disclosure of the Halcian/Breeden procurement issue was initially verbal then in writing. It disclosed facts and
25 information which the claimant reasonably believed amounted to a criminal offence and was in the public interest. I considered that the claimant had a pretty good chance of establishing that the Halcian/Breeden procurement issue was a qualifying disclosure.
24. I then turned to consider whether the claimant has a pretty good chance of
30 establishing that he was dismissed because of the making protected disclosures.

25. The claimant said that the performance issues upon which Mr Adams relied were not raised with him during his employment nor were they material errors. The claimant also referred to the timing of the email that Mr Adams sent to him on 6 March 2018 which followed a discussion between Mr Adams and Mr Miller that morning about the claimant's report.
26. Mr Adams said that the reason for dismissal was the claimant's performance. He considered that the claimant was not properly engaged in his role. Mr Adams referred to his reasoning set out in the email sent to Mr Miller on 6 March 2018. Mr Miller said that in February 2018 Mr Adams had raised his concerns about the claimant's performance and attitude. Mr Miller told Mr Adams that he had his authority to replace the claimant. The meeting between Mr Adams and Mr Miller on 6 March 2018 was routine. Various matters were discussed. The Halcian/Breeden procurement issue was not mentioned in Mr Adams' email to Mr Miller of 6 March 2018 setting out the concerns about the claimant performance and attitude.
27. My impression was that Mr Adams had no allegiance to any of the Executive Team. I considered that it was entirely plausible that following his appointment Mr Adams would take time to assess the Executive Team's performance individually and collectively.
28. The Barcelona Incident that caused friction between the claimant and Ms Rafferty; the disclosure of non-compliance with the expenses policy to Ms Dunn; and the disclosure of the salary spine review to Ms Shaw all predated Mr Adams' appointment.
29. When the claimant raised with Mr Adams the issue about the use of on-site fuel to fill her car Mr Adams spoke to Ms Rafferty. She did not know that the claimant had raised the matter and in any event accepted that in future she should not do this and claim expenses for mileage.
30. The Halcian/Breeden procurement issue was ongoing when Mr Adams joined the business. In my view he was involved in meetings with third parties investigating the matter and encouraged the claimant to report developments to Mr Miller and Ms Dunn and her successor. There was no

suggestion that the issues raised by the claimant involved Mr Adams. It seemed plausible to me that having obtained a report from Anderson Strathern the matter should be progressed by the Chair of the Audit and Risk Committee.

5 31. My impression from the evidence was that if Mr Adams was aware of issues he dealt with them and sought to ensure that relevant people within the business were informed of matters within their remit. He did not have anything to fear from the issues that the claimant was raising.

10 32. The evidence before me indicated that although the claimant challenged the severity, several matters did come to Mr Adams' attention concerning the shortcomings in the claimant's performance and attitude. Given the circumstances of Mr Adams' appointment, the timeframe in which he was working; the seniority of the claimant's position and length of service it was in my view plausible that rather than become involved in a process of
15 managing the claimant's performance Mr Adams decided in February 2018 to speak to Mr Miller about obtaining approval to replace the claimant on the grounds of his performance and suitability. Mr Adams was given the authority to replace the claimant if that was his decision.

20 33. Mr Miller and Mr Adams had a routine meeting on 6 March 2018. One of the issues that Mr Miller raised was paragraph 50 of the claimant's report on the Halcian/Breedan procurement issue. Mr Adams candidly told the claimant about this discussion in an email sent to the claimant on 6 March 2018 in which Mr Adams asked the claimant for more information about the unsubstantiated allegation. This email seemed to me incongruent with Mr
25 Adams being already aware of who was implicated as the claimant suggested. The claimant's report had already been provided to third parties who were investigating and preparing a report which was produced in March 2018.

30 34. Mr Adams sent an email to Mr Miller on 6 March 2018 setting out why he wanted to replace the claimant. That email made no mention of the Halcian/Breedon procurement issue or indeed any other of the alleged

protected disclosures. My understanding was that a replacement was not recruited until early April 2018.

35. A significant amount of the evidence is disputed and not all relevant documents were produced at the interim relief hearing. I could not say that the evidence of Mr Adams, Mr Miller and Ms Rafferty was implausible. I considered that given the circumstances of Mr Adam's appointment and his view of the claimant's performance while Mr Adams was in post I could not say that the claimant has a pretty good chance of showing that the sole or principal reason for his dismissal was the making of protected disclosures.

io 36. I therefore refuse the application for interim relief.

Employment Judge: S Maclean
Date of Judgment: 10 May 2018
Entered in register: 11 May 2018
and copied to parties