



EMPLOYMENT TRIBUNALS

Claimant: Mrs O Swieca

Respondent: Lindal Valve Company Ltd

Heard at: Watford ET: by CVP **On:** 7 December 2021

Before: Employment Judge Tuck QC (sitting alone)

Appearances

For the Claimant: Mr P Swieca

For the respondent: Mr G Irons, Solicitor

JUDGMENT

The Application for interim relief fails and is dismissed.

REASONS

1. By an ET1 presented on 16 October 2021 the Claimant brought a complaint of automatically unfair dismissal contrary to section 103A of the Employment Rights Act 1996. Her effective date of termination was 15 October 2021 and she applied for interim relief.

Today's hearing

2. The ET1 was served on the Respondent on 18 November 2021, and on the same date a Notice of Hearing of today's Interim Relief application was sent to the parties. That provided for all documents being relied upon at the Hearing to be sent to the other parties no later than three working days prior

to the hearing. The Claimant sent to the Respondent a bundle of documents and witness statement for the Claimant on Thursday 2 December.

3. Mr Irons emailed a bundle of documents consisting of 22 pages and an 8 page statement from Mr Littleton, Finance Director of the Respondent, at 20.28 hrs on Monday 6 December. Mr Swieca objected to those documents or the statement being read or taken into account.
4. Mr Irons applied for them to be considered even though they were delivered late. He said that the Claimant has presented three ET1s arising out of her employment, the first is a claim for unlawful deductions from wages (case no: 3322707/21), this is the second claim, and the third claim largely duplicates this one, claiming automatically unfair dismissal (case no: 3321297/21). No ET3s have been served yet. Mr Irons explained that his clients instructed him promptly on claims being received in November, but that unfortunately the notice of hearing for today's hearing had been overlooked by the Respondent. When they received the Claimant's documents on 2nd December, they immediately contacted him, and he contacted the Tribunal and received confirmation of today's hearing. He applied for a postponement on Friday 3 December 2021 (a day on which he was out of the office as he was speaking at a conference). The application was refused. Meanwhile, he worked over the weekend and yesterday (Monday 6 December) despite it being booked as annual leave because of personal appointments, and completed a statement for Mr Littleton and short bundle which he sent to the claimant and ET last night.
5. Whilst no satisfactory explanation as to how the Respondent overlooked the notice of hearing was given, I have no hesitation in concluding that it is in accordance with the overriding objective to take into account the written response of the Respondent set out in Mr Littleton's statement and the accompanying bundle, in order to properly consider the issues before me today. Mr Swieca was correct in saying that Mr Littleton had been able to respond to the Claimant's statement in his, but I invited him to make submissions as to any aspect on which I should place less weight given this undisputed fact.
6. Today's application was made on the basis of written statements and oral submissions. No live evidence was heard.
7. The application for interim relief is made under section 128 of the Employment Rights Act 1996, the claimant alleging that she was automatically unfairly dismissed for making a protected disclosure. Section 129 ERA requires consideration of whether "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 principal reason for the dismissal, is – in this case- within s103A ERA.

8. I was provided with, and following the application described above, considered:
 - a. The claimant's bundle of documents consisting of 84 pages- in addition to which I was provided with a full copy of the Respondent's employee handbook as an administrative error on the part of the respondents had resulted in only every other page being scanned and submitted as part of the Claimant's bundle. This bundle included a witness statement form the claimant.
 - b. A witness statement from Mr Littleton.
 - c. A Respondent bundle consisting of 22 pages.
 - d. Written submissions from Mr Irons.

Issues.

9. At the outset of this CVP hearing, I typed into the "chat box" function the following questions which the parties agreed were those relevant for today's application:

Is the Claimant likely to be able to show:

- (1) she made the disclosure(s) to the employer;
- (2) she believed that it or they tended to show one or more of the matters itemised in the [ERA 1996 s 43B\(1\)](#);
- (3) her belief in that was reasonable;
- (4) the disclosure(s) was or were made in the public interest; and
- (5) the disclosure(s) was or were the principal cause of the dismissal.

Facts.

10. The Claimant was employed by the Respondent as an Assistant Ledger Clerk from 1 September 2021 until her dismissal six weeks later on 15 October 2021.
11. The Claimant says that she made two protected disclosures, the first on 30 September 2021 and the second on 15 October 2021.
12. In her statement the claimant says that during a meeting with Mr Julian Littleton on 30 September 2021 she was told to backdate the date on the

financial system to post outdated invoices, so that the Respondent could reclaim VAT on the transactions. She says she objected as she considered that amounted to tax evasion, and that Mr Littleton said she must do this or would “be fired”. This account has not yet been tested in cross examination, and I note that Mr Littleton denies that this topic was discussed at all. In particular while the Claimant is clear that she thought what she was being instructed to amount to tax evasion, it is not clear at present whether expressed that view to Mr Littleton.

13. The claimant worked alongside Ms Gosia Piatek, the Ledger Accountant, who was providing the claimant with day to day advice /instruction. The respondents bundle included a number of emails from Ms Piatek giving her opinion that the claimant was not progressing or performing well. Many of these were not sent to the Claimant, who in her bundle highlighted occasions on which the Claimant was praised. On 23 September Mr Littleton replied to an email from Ms Piatek saying “I will start the process on Monday, I’ll speak to the agency about new cv’s”. on 28 September he emailed an Emma Smith of industrious recruitment saying that the feedback about the claimant had not been good; he said “I feel we cannot keep her on at Lindal” and he needed to start the recruitment process again. On 29 September 2021 he emailed his line manager, Manfred Schnor saying “the lady who I took on to take over ... the purchase ledger is not up to the standard we need...”, and referring to informing the Claimant that she would not be able to “stay with us any longer”. At 2pm on 30 September 2021 (2.5 hours before the meeting with the Claimant which started at 4.30pm) Mr Littleton told Ms Piatek that he had been “looking at Olga’s contract today and for the process of exiting her from the business...”.

14. Mrs Samantha Morgan, HR Manager, wrote to the Claimant on 13 October 2021 “to confirm, as communicated in a meeting earlier that day”, the dismissal of the claimant. The reason given was unsatisfactory performance which included (i) using incorrect codes on invoices resulting in the wrong suppliers being paid, (ii) incorrect GL codes for new invoices and (iii) missing crucial deadlines. The Claimant was paid one month in lieu of notice and told her employment would terminate on Friday 15 October 2021.

15. On 15 October 2021 the Claimant emailed Jerome Marion, Head of Group Finance. The Claimant wrote:

“During the meeting with the Finance Director dated 30 September 2021, Mr Julian Littleton (Finance Director) told me that I needed to backdate the date on the financial systems in order to post outdated invoices to the financial system so that Lindal Valve Co Ltd could reclaim the input VAT on these transactions from HMRC. I refused and objected to that. The finance director also told me that I needed to be subordinate or else I would be fired. ...

...

In my opinion I was victimised by Mr Julian Littleton (Finance Director) and Ms Gosia Piatek (Ledger Accountant) because I refused to commit a criminal offence”.

Law:

16. As set out above, this application is made under section 128 ERA, and the relevant test is set out in section 129 ERA which provides:

[(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.]

17. The test for 'likely' is well settled and requires asking whether the claimant have a 'pretty good chance' of success. In the whistleblowing case of **Ministry of Justice v Sarfraz** [\[2011\] IRLR 562](#), EAT, this was interpreted as meaning 'a significantly higher degree of likelihood than just more likely than not'. Applying that to a whistleblowing claim according to the existing case law, as read along with the legislative amendment to whistleblowing law in 2013, it means that the claimant must show that level of chance in relation to the elements that:

- (1) she made the disclosure(s) to the employer;
- (2) she believed that it or they tended to show one or more of the matters itemised in the [ERA 1996 s 43B\(1\)](#);
- (3) her belief in that was reasonable;

- (4) the disclosure(s) was or were made in the public interest; and
- (5) the disclosure(s) was or were the principal cause of the dismissal.

Submissions:

18. Mr Swieca made oral submissions. He said that the Respondent is a VAT registered business. The Claimant started her employment on 1 September 2021 working on inputting invoices from suppliers. Her line manager was Mr Littleton, Financial Director. She received access to the financial systems on 7 September; she did not receive any job description and Mr Littleton has invented this in his statement and nor did she receive any induction training. The Claimant received instruction from Ms Gosia Piatek who gave her good oral feedback. The Claimant saw for the first time yesterday emails from Ms Piatek about performance issues with the Claimant.
19. In September 2021 the claimant identified discrepancies between invoices and purchase orders which concerned VAT. The Claimant was told, he says, by Ms Piatek to “play with the VAT”. Mr Swieca relied on an email of 26 September from Ms Swieca to a Mr Ian Taylor asking him to “correct the PO 769626 into the unit price of £20.03 net.” He said this showed her refusing to “play with VAT”.
20. An email of 17 September 2021 from Mrs Piatek said “all correct, well done”, showing that the Claimant was correctly coding invoices.
21. Another job required by Mrs Piatek was participation in payment runs. Mr Swieca said that the claimant was having to deal with a backlog of invoices from July and August 2021. Mrs Piatek required the missing invoices to be sent to her for payment; the claimant did this on 14 September 2021 and received an email reply thanking her. He said that in early October, emails were still being sent to the previous post holder, giving rise to a risk of correspondence being missed.
22. On 30 September 2021 the claimant was invited by Mr Littleton to a meeting at 4.30pm to “discuss a performance review”. Mr Swieca says this was the final day of the VAT quarter, and Mr Littleton instructed the Claimant that she would have to backdate invoices which would be received into October, to September in order to recover more VAT from HMRC. When invoices would be received, dated September, she would enter them onto the system and change the date to September, as it would default to the actual date in October. The Claimant said no. She considered this would be tax evasion. Mr Swieca said that Mr Littleton replied that she “needed to be subordinate or she would be fired”.
23. **On 1 October Ms Piatek sent an email to the claimant at page 45 at 8.16am; she instructed the claimant “when you open the [Great Plain] the date can be changed in the left hand bottom corner....”. This, said Mr Swieca, confirmed the instruction to commit tax evasion.**

24. Looking at the test set out in **Sarfraz**, Mr Swieca said:
- (i) On 30 September, the information the Claimant disclosed was her stating that she refused to change dates on the financial system as it was amounted to tax evasion.
 - (ii) She says this tended to show a criminal offence.
 - (iii) Mr Littleton in his statement says that it is legitimate to leave a purchase ledger open for three days after the end of the quarter, which will involve amending the date on the system. I asked Mr Swieca whether the Claimant had a reasonable belief that changing the dates on the first three dates of a new quarter to reflect that the invoices came in, in September, amounted to a criminal offence. He said she did have a reasonable belief that this was a criminal practice.
 - (iv) Disclosures about tax evasion are, he says in the public interest.
 - (v) Dismissal was because of the disclosure on 30 September. He says that the three reasons given in the dismissal letter dated 13 October 2021 were without foundation.
 - a. The first reason given was wrong suppliers being paid, but this was not a task of the Claimant, but of Ms Piatek.
 - b. The second reason cited was “issuing incorrect GL Codes on invoices” – but the Claimant relied on an email in which Ms Piatek had said “all correct, well done”.
 - c. Missing deadlines – again, this was not evidenced.
25. The Claimant relied on the lack of any investigation or disciplinary process, and the lack of any appeal process, in breach of the Company Handbook and ACAS Code of Practice. Mr Swieca said this demonstrated that performance was not the true reason for dismissal.
26. The Claimant does not rely on the disclosure of 15 October 2021 as being causative of her dismissal coming, as it did, two days after she was told she was dismissed.
27. The Respondent’s bundle included an email of 28 September 21 to the recruitment agency which said that the feedback in relation to the Claimant had been poor, that she would not be kept on and the recruitment exercise would have to be started again. I asked Mr Swieca about this, and he said that this showed the lack of any performance procedure. He said it was because of earlier concerns about her being told she needed to “play with the VAT” that this view had been taken.
28. Mr Swieca said this case is very similar to that of **Jhuti v Royal Mail** 2019 UKSC 55 because the reason for dismissal was bogus, with Ms Samantha Morgan being instructed to dismiss for poor performance which was not evidenced, ignorant of the protected disclosure made to Mr Littleton.

29. Mr Irons produced written submissions and added to those orally. He said that there were performance issues with the Claimant, evidenced not only by emails about the claimant, but also by emails to her. The review meeting on 30 September was characterised as a performance review.
30. The claimant alleges a protected disclosure made on 30 September 2021; Mr Littleton denies any conversation about the dates of invoices being posted or VAT on that date, and told the claimant there were issues with her performance. However, for today's purposes Mr Irons submits that taking the Claimant's version of events at its highest, she fails to disclose any "information". Her evidence is that she was told to backdate invoices, and she objected. In her statement she does not set out why she objected. Both in her statement and orally it was emphasised the Claimant perceived this instruction to amount to tax evasion, but it is not alleged that she said that it amounted to tax evasion.
31. Mr Irons accepted that the Claimant's belief tended to show a criminal offence, but addressing the third limb, he does not accept her belief was reasonably held. She was a new employee, unfamiliar with the Respondent's processes and receiving support and training. He noted that she did not seek to engage with the Respondent to understand why the process was carried out in the way it was so as to give rise to a reasonable belief that the process would result in tax evasion. Mr Irons said that the criminal intent appears to have been added only after dismissal. He accepts that if the claimant satisfies limbs 1 – 3, it would be in the public interest to uncover tax evasion.
32. As to the question of causation, emails before the meeting of 30 September 2021 show that Mr Littleton had made his decision to dismiss the claimant because of her performance. He relied on emails of:
- a. 28 September 2021 to the recruitment agency
 - b. 29 September to Manfred Schnor (Mr Littleton's line manager, copied to the Group HR Business Partner)
 - c. 30 September 2021 at 2pm (prior to the 4.30pm meeting) to Ms Piatek
33. The Respondent submits that the Claimant cannot pass the threshold of showing a 'pretty good chance' of demonstrating that a qualifying disclosure was the principal reason for her dismissal.
34. In reply, Mr Swieca replied relying on emails at pages 48 and 62 of the Claimant's bundle, the first referring to a ledger not being open and the second fixing training for the Claimant for 14 October 2021.

Conclusions on the Issues.

35. Section 129 requires consideration of whether “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 principal reason for the dismissal, is – in this case - within s103A ERA. As set out above, the **Sarfraz** case held that “likely” means 'a significantly higher degree of likelihood than just more likely than not'.
36. There are clearly significant disputes of fact as to what was said in the meeting of 30 September 2021 – and at present it is not clear whether the claimant’s own case relies on her stating specifically that the instruction being given to her was one she interpreted as amounting to tax evasion – which is the “information” relied upon to bring the disclosure within s43B(1) ERA. Whilst it is accepted by the Respondent that the claimant believed that the instruction she received tended to show a criminal offence would be committed, and that any disclosure regarding this would be in the public interest, there is also a dispute as to whether the Claimant’s belief in this was, in all the circumstances “reasonable”.
37. It is however in relation to the fifth of the ‘**Sharfraz**’ questions (i.e. was the principal reason for the dismissal the disclosure) that I cannot be satisfied that it is likely the claimant will succeed. Even if the Claimant was able to show that she was “likely” to establish a protected disclosure on 30 September 2021, whether based on good or bad reasons, the limited documents before me indicate that Mr Littleton had decided by 28 September that the claimant’s probationary period was “not working out”. In the two days prior to his meeting with the Claimant he told his line manager, the Group HR director, the recruitment agency and the purchase ledger of his intention to terminate the probationary period of the Claimant.
38. I am therefore unable to conclude on the information before me at present that the Claimant has passed the threshold of showing it is significantly more likely than ‘more likely than not’, that any disclosure on that date was the principal cause of her dismissal.

EJ Tuck QC.

Dated this 7th Day of December 2021

Sent to the parties on: 26/1/2022

for the Tribunal