EMPLOYMENT TRIBUNALS
London Central Region

Heard by CVP on 17/8/2022

Claimant: Ms M Griffiths

Respondents: 1 Scarista Ltd
2 KKR Private Credit Opportunities Partners LP
3 Alcentra Ltd

Before: Employment Judge Mr J S Burns

Representation
Claimant: In person
Respondent 1 : Mr V-M Raikonen (Solicitor)
Respondents 2 and 3 no appearance

JUDGMENT

1. The Claimant's application dated 19/7/2022 against the First Respondent for interim relief succeeds.
2. The Claimant is to be re-instated in her employment immediately but with effect from 18/7/22 with the First Respondent under section 129(5) Employment Rights Act 1996.

REASONS

1. The Claimant who was summarily dismissed by the First Respondent on 18/7/22[1], presented her ET1 on 19/7/22 claiming against the First Respondent (hereafter referred to as "the Respondent") various claims including automatic unfair dismissal under s103A ERA 1996 and a related claim for interim relief in accordance with s128.

2. I was referred to a Respondent's bundle of 196 pages which included inter alia the Claimant's detailed claim and statements from John Everett, Jill Corfield, David Foster and Sarah Gomersall; and a Claimant's bundle of 147 pages.

3. I did not admit a witness statement from the Claimant which had been served only under a secure password at 2am on Tuesday 16 August 2022. This was unable to be read by the Respondent's solicitor and was served too late for him to take instructions on it, and was served contrary to the directions issued by the Tribunal on 1/8/22 and repeated on 3/8/22 that any documents to be relied on at the hearing should be served at least 3 working days before.

4. I explained the process and the correct legal approach as summarised below to the Claimant at the outset.

[1] During the submissions the Claimant took a point that under her employment contract any notice to be served by the Respondent (including notice of dismissal) was to be served personally or posted to her UK address, but that this had not been done). However, it was agreed and contended by both parties that the Claimant had been validly dismissed. I find that the Claimant waived that contractual requirement and that she was dismissed on 18/7/2022.

5. I adjourned for 30 minutes to read important pages in the Claimant's bundle as I received that only after the hearing started.

6. I did not allow cross-examination and allowed each side a maximum of 90 minutes to make submissions.

Summary of correct approach to an interim relief application.

7. Under section 129(1) the application should be granted if it appears to the Tribunal that it is likely that on determining the complaint to which the application relates the Tribunal will find that reason or principal reason for dismissal was one of the statutory automatically unfair reasons . "Likely" in this context means that C must show that case has "a pretty good chance" of success, which means that something better than likelihood on the balance of probability (i.e. better than a 51% chance): Taplin v C Shippam Ltd [1978] ICR 1068, as approved and followed in London City Airport Ltd v Chackro [2013] IRLR 610 at para 10.

8. The ET must be satisfied that the Claimant is "likely" to succeed on each necessary aspect of his claim, before relief can be granted.

9. The application falls to be considered on a summary basis. The Employment Judge's role is to do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases, and to make as good an assessment as he is promptly able of whether the Claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. He must make an expeditious summary assessment as to how the matter looks to him on the material that he has. This will involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim.

Consideration and Conclusions

10. I think it is likely (as defined above) that the Tribunal at the FMH will find that the following communications relied on by the Claimant were protected disclosures as defined by section 43B(1)(b) ERA 1996:

    (i) The Claimant's expressions of concern orally and then in an email 6 August 2021 etc to John Everett, Clare Belcher and David Foster about the Respondent's soliciting investments into a KKR fund. The Claimant's concerns were that the Respondent was not authorised to solicit investment business, especially not Private Equity investment funds around which there are very strict requirements as they are risky; and it was potentially in breach of its fiduciary duties towards clients as the remuneration arrangements created an inherent conflict of interest. Any such illegality or breach of trust was likely to affect a large number of persons. The Claimant had nothing to gain personally by raising this matter.

    (ii) The Claimant's complaints in March to June 22 about the fact that, contrary to representations made to her on recruitment, and the provisions of clause 6.4 of her employment contract, she had not been given 0.5% of equity in the Respondent. She raised this orally with David Foster and then by emails dated 4/3/22 and 22/4/22 to Gemma Le Cornu. These complaints were accepted as a formal grievance and on 11/6/22 Jill Corfield in an email referred to the topic by saying "*in your case there was every intention to allocate equity as reflected in the DSA (Directors Service Agreement*)." It was not only the Claimant who was affected by this, (as recognised in Sarah Gomersall's witness

statement which states "*In terms of the equity issue, this affected others, not solely Melanie"*.)

(iii) The Claimant's complaints (a) from about April 22 onwards to Gemma Le Comu and (b) on 20/6/22 to the Pension Regulator (which is a prescribed person for purposes of section 43F ERA 1996) about the fact that the Respondent was persistently late in sending employee and employer pension contributions to the pension provider. This default also affected the whole workforce.

11. These disclosures appear to have all been made in good faith and to have been about serious matters going to the heart of the Respondent's operations, and affecting groups of people rather than only the Claimant individually, hence satisfying the public interest requirement.

12. In support of the claim that the Claimant was dismissed because she had made one or more of the above disclosures the Claimant relies on a number of matters including the following:

(i) As shown in a note prepared for the Claimant's dismissal meeting, the persons overseeing the dismissal were aware of and recorded their awareness of the Claimant's grievance (which by then was about the pension and equity issues), which reference was then omitted in the dismissal letter of the same date.

(ii) Jill Corfield (Head of People) states in paragraph 6 of her statement about her knowledge at the time of dismissal as follows "*I was not aware of any protected disclosure or other complaints.*" It is abundantly clear from contemporary documents (for example from her email dated 11/6/22 referred to above), that in fact she was aware at the time of the Claimant's complaints.

(iii) The Claimant was dismissed in a summary manner on 18/7/22, without prior warning of any kind, given PILON, refused Garden Leave and denied access with immediate effect to her work email and the Respondents' website. In contrast, other employees who had not made PDs such as Gavin Devitt, Stephen, Kevin Bardon and Mark Porter who were dismissed at a similar time or over the same period (including several who did not have two years' service) were not treated in this summary manner and in various ways were treated differently and more favourably, for example being allowed to work their notice while looking for other positions within the Respondent, being allowed to maintain their work emails and profiles on the Respondent's website or otherwise manage their exits in a more controlled and planned fashion.

(iv) In paragraph 7 of her witness statement Jill Cordfield offers as an excuse for the fact that Gavin Devitt (whose role in Ireland disappeared in 2021) was allowed to continue in his employment (whereas the Claimant was not) as follows: "*There were other opportunities that we could explore for him because his skill set was in selling product, so potentially could be positioned to sell a different product. We didn't think that for Melanie because her*

role was reliant on her personal network in the London area." However Sarah Gomersall in paragraph 27 confirmed that "*Melanie's role was to sell these type of service or products to existing clients once they were introduced".* There is an apparent inconsistency here.

(v) The Respondent had a high level of staff turnover and was anxious to recruit and retain staff in the first half of 2022, so much so that on 12/4/22 John Gibbery was recruited to try to stabilise and expand recruitment of others. This situation flies in the face of the suggestion that two months later the Client was suddenly surplus to requirements.

(vi) As the Respondent were wishing to retain staff and recruit, one would have expected that if the Claimant's role was genuinely redundant, the Respondent should have consulted with her about whether she could fill another role, even though she did not have two years' service. The fact that it did not suggests an ulterior purpose.

(vii) The suggestions in Sarah Gomersal's witness statement that the Claimant was an expensive employee whose low fee generation meant that she was not worth keeping on, appears to be a retrospective excuse - if it was a real concern it would have been mentioned during her employment. It is agreed that the Claimant passed her probation and was never criticised for underperforming or failing to meet income generating or other targets. The Claimant's role was not business development in any event.

(viii) The Respondent suggests that the Claimant's role was made redundant as a result of restructuring but there is no documentation in the bundles to demonstrate any such plan; and on 9/6/22, shortly before the Claimant was dismissed, her Line Manager sent an email (in the wake of the departure of the CEO Mark) which reads "*we wish to reassure our team that it is very much business as usual".*

(ix) There appears to be a link between the KKR joining or planning to join R as shareholder and the Claimant's dismissal. The Claimant and other employees were told on 9/6/22 that KKR was going to invest heavily in the Respondent "*subject to regulatory approval*". David Foster's witness statement states that he notified the new shareholders of the Claimant's impending dismissal on 16/6/22. I accept the Claimant's submission that this was odd and unusual behaviour at the very least. By then the Claimant had made it clear that she was well-informed, inquisitorial and persistent in making well-focused complaints about the detail of the Respondent's regulatory short-comings - ie she was exactly the type of senior employee who might be seen as a potential risk to the finalisation of the KKK investment which itself was dependent on the removal of regulatory obstacles.

(x) The Claimant had been recruited as the successor to Roddy Balfour - who is still an employee and who as recently as 2 July 22 sent the Claimant a positive text "So perfect opportunity to have you alongside with a view to succession".

13. The Respondent's witness statements appear to me to contain various retrospective excuses and explanations for the Claimant's dismissal which are not supported by or which have very little support in contemporaneous documentation, despite the fact that two substantial bundles of documentation have been produced, and the Respondent is legally represented. If there was a genuine restructuring or redundancy situation or real concerns about the Claimant's performance or other legitimate reason for her sudden dismissal, then it is likely that there would be contemporaneous documents to show this but such material is conspicuous by its absence. By contrast, the Claimant's arguments and points summarised above are all supported by and consistent with such documentation.

14. For these reasons, and subject to the limitations of a summary assessment, I conclude at this stage that the Claimant has a "pretty good chance" of succeeding in her section 103A claim.

15. Having announced my decision and explained my powers under section 129 and after a short adjournment so the Respondent could confer with Mr Raikonen, the latter told me that the Respondent was willing to re-instate the Claimant so this was how I disposed of the application.

J S Burns Employment Judge
London Central
17/08/2022
For Secretary of the Tribunals
Date sent to parties : 18/08/2022