EMPLOYMENT TRIBUNALS

Claimant: Mr Muhibur Rahman

Respondent: Next Distribution Ltd

HEARD AT: Cambridge Employment Tribunal 12 August 2022

BEFORE: Employment Judge Michell

REPRESENTATION: For the Claimant: In person

For the Respondent: Dawn Dickson (solicitor)

JUDGMENT

1. It is not likely that on determining the complaint to which the application relates the Tribunal will find that the reason or principal reason for the claimant's dismissal was because he made a protected disclosure for the purposes of s103A of the Employment Rights Act 1996 ("ERA").

2. The claimant's application for interim relief is therefore refused.

REASONS

BACKGROUND

1. The claimant was employed as a van driver from 17 May 2022 until 30 June 2022. Following his dismissal on alleged conduct-related grounds, by a claim presented to the tribunal on 5 July 2022 the claimant asserted that his dismissal was unfair.

The claimant did not go through the early conciliation process as a precursor to his claim. However, at paragraph 2.3 of his ET1, he ticks the box indicating that his claim consisted "only of a claim of unfair dismissal which contains an application for interim relief". (He also asserts in his ET1 that he is also making a claim for "detriment while taking my unpaid break." However, at today's hearing he explained that was simply part of the background rather than being a separate claim.) Hence he was not required first to go through early conciliation.

2. The respondent is named as "Kelly Grange". However, she was not the claimant's employer. "Next Distribution Ltd", a haulage company ("Next"), is named in the ET1 where the employer's address details are given. Ms Kelly acted as assistant site transport manager for Next.

3. In the particulars of claim, the claimant alleges that a colleague in a vehicle with him made various racially discriminatory remarks about third parties engaged in an on-street protest on 20 May 2022, and who were outside of the vehicle (and not in earshot).

4. He asserts that he "informed all the matters with the transport team". He does not say who he informed, when he informed them, or what he told them.

5. He explains that on 25 June 2022, he informed Next about the fact he received 10 points on his driving licence on 20 June 2022, as a result of an offence committed on 2 December 2021 to which he pleaded guilty on 20 June 2022. (He apparently declined to give a breathalyser test when asked to do so by the police. Hence he received a DR60 endorsement.)

6. On 29 June 2022, after Next had run a DVLA check on his licence the previous day, the claimant was invited to a disciplinary hearing taking place on 30 June 2022. At that hearing, he was dismissed. He asserts this was unfair (although he accepts he does not have the requisite continuity of employment to claim 'ordinary' unfair dismissal, and thus does not advance such a claim). He also asserts that he was not permitted to have a trade union representative present at the hearing.

7. He asserts in the ET1 that "the complaints which I raised earlier… influenced the employer to dismiss me".

8. At 9.48pm on 29 June 2020, shortly after the invitation to the disciplinary hearing but hours before it had taken place, the claimant sent an email to HR in which he asserted that various alleged racist comments by a colleague were made on 20 May 2022, and that the fact he had allegedly complained about those comments meant

that a “few individuals within the transport team kept a very close eye on me and monitored me excessively... the transport team wanted to get rid of me but they needed a valid reason to dismiss me”.

9. (Of course, it might be argued that this suggests management had a “valid reason” when it did dismiss him- otherwise, it would have dismissed him before, especially as he was still well within his probationary period.)

10. The claim was originally rejected by the tribunal on the basis of apparent non-compliance with the requirement to go through early conciliation. However, on 13 July 2022 the tribunal reinstated the claim and ordered that the matter be set down for an interim relief hearing.

11. Notice of the claim was sent to Kelly Grange at Next Distribution Ltd’s Hemel Hempstead address on 14 July 2022, giving her until 11 August 2022 to produce her response to the claim. Also on 14 July, today's hearing was listed. Ms Grange was on holiday at about the time the ET1 would have arrived. Next’s solicitors, Eversheds Sutherland, were not instructed until 8 August 2022. Thereafter they promptly produced an ET3 for their client, which amongst other things explains:

    a. The correct identity of the respondent was Next.
    b. Next’s job adverts make clear that van drivers are only allowed a maximum of up to six points on their licences.
    c. Next has a policy which means it will not employ people who have a “DR60” code offence (failing to provide a specimen) on their licence.
    d. The claimant had failed to report prior to Saturday 25 June 2022 that he had been involved in criminal proceedings from 2 December 2021, and that on Monday 20 June 2022 he had been told he would receive 10 points on his licence at the sentencing hearing when he pleaded guilty.
    e. Even if, which is denied, the claimant made a protected disclosure, it had nothing to do with the dismissal.

HEARING

12. Today was a remote hearing on the papers, which has not been objected to by the parties. The form of remote hearing was CVP. A face to face hearing was not held because it was not practicable and all issues could be determined at a remote hearing.

13. The claimant was unable to access a computer which had both a working camera and working audio equipment. He therefore attended via a telephone line. Having enquired of both parties, no issue was taken with the absence of visual connection. I was also satisfied, bearing in mind that I was not hearing any live evidence (see below), that an audio link was sufficient.

14. The documents to which I was referred were a 148 page bundle produced by Next (which contained amongst other things the pleadings), written submissions from both parties which I read before hearing from them and took into account, and various attachments to the claimant's written submissions.

15. Both I and the claimant only received the bundle shortly before the hearing. So, I ensured that the claimant had sufficient opportunity to read through the content so that he could address any points with me. The claimant confirmed with me that he had had sufficient chance to read through the papers when we reconvened after a reading break.

16. Rule 95 of Schedule 1 to the Employment Tribunal Regulations 2013 provides that a tribunal dealing with an interim relief application "shall not hear oral evidence unless it directs otherwise". The default position is therefore that evidence will not be heard -because generally, it ought to be superfluous. Neither party sought to give oral evidence, but instead relied on their written submissions.

17. At the hearing, in discussion, the following points were clarified:

    a. The claimant agreed that Next ought to be the respondent.
    b. The claimant's case is that in about the second week of June 2022 he orally raised the events of 20 May 2022 with a transport team manager named Fiona, and another male team manager who worked on night shifts with Fiona. He did so in the context of saying he did not want to go on shift with the individual concerned.
    c. The claimant asserted that he did not raise the matter earlier because he did not know who to report it to. However, he also accepted that the email address for HR which he used to send his 29 June 2022 email to HR was set out in the staff handbook, which he had at all material times.
    d. The claimant confirmed his case was that the principal reason for his dismissal was (just) his said complaint about the 20 May events in about the second week of June, and/or in his 29 June email.
    e. The claimant explained that he did not tell Next about his conviction before 25 June because he thought he might lose his job. He said he was off work

for some of the days between 20 and 25 June 2022. However, he accepted that he could have emailed Next to give the requisite information in the interim.

f. The claimant accepted that neither of the individuals to whom he allegedly raised an oral complaint was specifically involved in the termination process.
g. The claimant asserted that what he heard in the vehicle on 20 May 2022 amounted to a criminal offence, namely something which was "racially aggravated" (albeit only those in the vehicle heard the alleged offensive words).

18. It appears from the papers contained in the bundle that:

a. Advertisements for jobs of the kind for which the claimant was hired spell out the fact that drivers with more than six endorsement points on their licence will not be hired. Similarly, no one with a DR60 endorsement would be hired (and action would be taken "during employment" insofar as a listed endorsement was received).
b. The individual said to have made the offensive comment on 20 May 2022 later admitted to using the word "pikey" whilst in conversation with the claimant in a vehicle. He explained that use of the word was in response to the claimant asking him how various protestors outside the vehicle were allowed to 'get away' with their actions. He denied using some of the (even) more offensive language alleged by the claimant.

LEGAL FRAMEWORK

Statutory framework

19. The question to be considered upon an application for interim relief is set out in s129 ERA. Interim relief can be ordered where the tribunal finds that it is **likely** that a final hearing will decide that the reason (or principal reason) for dismissal was the employee having made protected disclosures contrary to s 103A ERA.

20. As explained in **London City Airport v Chacko** [2013] IRLR 610, the employment judge must 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. The employment judge is then required 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.

"Likely"

21. The meaning of the word 'likely' for these purposes has been considered in several cases. In **Taplin v C Shippam Ltd** [1978] IRLR 450, the EAT (Mr Justice Slynn) held that it must be shown that the claimant has a 'pretty good chance' of succeeding- which meant something more than merely on the balance of probabilities.

22. That approach to the word 'likely' has been followed in subsequent decisions. See e.g. **Dandpat v University of Bath** (2009) UKEAT/0408/09 UKEATPA/1284/09 UKEATPA/1285/09 UKEATPA/1391/09 unreported at para 20, **Ministry of Justice v Sarfraz** [2011] IRLR 562 at paras 16–17 and **His Highness Sheikh Khalid Bin Saqr Al Qasimi v Robinson** UKEAT/0283/17/JOJ, unreported (Qasimi v Robinson), at paras 8–11.

23. A 'pretty good chance' of success was interpreted in **Sarfraz** as meaning 'a significantly higher degree of likelihood than just more likely than not'. Underhill P held: "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" (para 16).

24. There are policy reasons why the threshold should be high. As Underhill P observed in **Dandpat**, "If relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing and pay the claimant, until the conclusion of proceedings: that is not a consequence that should be imposed lightly" (para 20).

25. The Claimant must show the necessary level of chance in relation to each essential element of s103A ERA. See **Simply Smile Manor House Ltd and ors v Ter-Berg** [2020] ICR 570.

26. The Claimant must therefore show that it is likely that the Tribunal at the final hearing will find each of the following:
    (a) he disclosed information to the appropriate entity;
    (b) he believed that the information tended to show one or more of the matters set out in s 43B(1) ERA;
    (c) he believed the disclosure(s) was or were made in the public interest
    (d) his belief in both these matters was reasonable; and
    (e) the disclosure(s) was or were the principal cause of the dismissal.

Protected disclosure

27. "Protected disclosure" is defined in s43A ERA: "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

28. "Qualifying disclosures" are defined by s43B ERA, "43B Disclosures qualifying for protection

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…"

29. ERA has to be construed in the light of its aim of "encouraging responsible whistleblowing"; thus, following **Croke v Hydro Aluminium Worcester Ltd** [2007] ICR 1303, its provisions "should be construed so far as one possibly can to provide protection rather than deny it.'

Disclosure of information

30. The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations): **Kilraine v LB Wandsworth** [2016] IRLR 422. By way of example, Ms Kilraine had asserted "there have been numerous incidents of inappropriate behaviour towards me, including repeated side-lining, all of which I have documented." Langstaff J held, and the CA agreed (at paras 21 & 38), that such an assertion "does not sensibly convey any information at all".

'Legal obligation'

31. The disclosure must, considered in context, be sufficient to indicate the legal obligation in relation to which the Claimant believes that there has been or is likely to be non-compliance, In **Blackbay Ventures Ltd v. Gahir** [2014] IRLR 416, EAT, para 98, Judge Serota said, "… the source of the obligation should be identified and capable of certification by reference for example to statute or regulation".

32. 'Legal' must be given its natural meaning. A belief that an employer's actions were morally or professionally wrong, or contrary to its own procedures, may very well not be sufficient, **Eiger Securities LLP v. Korshunova** [2017] IRLR 115, EAT, per

Slade J: "… Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation".

Reasonable belief

33. The test for "reasonable belief" has two-stages. See **Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837, at para 29. There, the two stages were identified as:
    (a) Did the claimant have a subjective genuine belief that the disclosure (i) tended to show one of the matters set out in s.43B(1) ERA, and (ii) was in the public interest? If so
    (b) Did the claimant have objectively reasonable grounds for so believing in both such cases?

34. The two stages ought not to be elided. See **Ibrahim v. HCA International** [2020] IRLR 224, CA, para 17, per Bean LJ.

35. In determining whether the reason for the Claimant's dismissal was an alleged disclosure, it is not sufficient for the disclosure to be "in the employer's mind" or for it to have influenced the employer. The Tribunal must consider whether that disclosure was the "sole or principal reason" for the dismissal. See **Eiger Securities**.

Public interest

36. As to 'public interest', see **Chesterton Global Ltd**. There, Underhill LJ held at para [31] that the meaning of 'in the public interest' was not defined by Parliament. Instead, ".. the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression". However, "the essential distinction" to be drawn was "between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest".

37. Underhill LJ also explained at paras [36] and [37]:"…the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers…".

APPLICATION TO FACTS

Employer

38. The first and most obvious point to make is that the sole respondent named in the ET1 did not dismiss anyone - at least, in a personal capacity. The appropriate respondent is Next.

Protected disclosure?

39. Did the claimant make a protected disclosure in his 29 June 2022 email? I suspect the claimant will have difficulties in convincing the tribunal that, in his reasonable belief, a criminal offence was committed by his colleague in the vehicle on 20 May 2022- assuming his version of what took place in the vehicle that day is accepted.

40. Even if he manages to persuade the tribunal on the issue of reasonable belief in that respect, or even if the matter is successfully put as breach of a legal obligation (e.g. some type of non-discriminatory obligation under the Equality Act 2010) -it is not put like that- I suspect the claimant is unlikely to persuade the tribunal that he reasonably believed his disclosure of the alleged wrongdoing was in the public interest. Otherwise, it is unclear why he did not report matters to HR at a far earlier stage. Of course, the claimant's case was that he gave verbal notification of the issues earlier on. But that was, as I have said, in the context of him apparently articulating the fact that he did not want to go on shift with the individual concerned- even then, about 3 weeks 'after the event'.

41. Of course, his 29 June email was sent on the cusp of a disciplinary hearing. Thus the tribunal may find self-interest, rather than public interest, motivated its transmission.

Causation

42. Even if I am wrong in my preliminary assessment as to whether or not it is likely the tribunal will find the claimant made a protected disclosure in relation to the events of 20 May 2022, the claimant must still show a sufficiently strong case on causation.

43. I consider it unlikely (and certainly not 'likely' in the **Taplin** sense of the word) that the tribunal will find the only or principal reason for the claimant's dismissal was any such disclosure. At this preliminary stage at least, I think the claimant will probably fail as regards causation. in particular:

    a. There was a gap of over a month between the claimant's first alleged mention of anything untoward on 20 May 2022 and his dismissal.

b. The verbal notification to management in the second week of June which the claimant relies upon now was not spelt out in the ET1, and still remains very vague. But that notification in any event was not given to anyone who was obviously involved in the dismissal. That bare fact is not necessarily fatal to the claim. But it does not help it.
c. The claimant gave no contextual explanation as to why, if he raised alleged racism on the part of a colleague, the respondent would (some time later) seek to dismiss him for doing so- albeit only when a "valid" opportunity arose (see paras 8 & 9 above).
d. The claimant's 29 June email, written at nearly 10:00 PM that evening, only came after the disciplinary hearing had already been diarised for the following day.
e. The claimant was a driver. On 20 June, he received 10 points on his licence, for an offence committed on 2 December 2021. He did not tell Next about that fact until 25 June (for the reasons I have explained above). I think it likely the tribunal hearing the matter will consider Next was entitled to take a dim view of that fact, and dismiss him for it
f. This is particularly so given that Next's policies provide that drivers could have a maximum of six penalty points, and should not have endorsements such as a DR60, upon commencement of employment. I think the tribunal is unlikely to be persuaded by the argument that such restrictions on penalty points and endorsements apply only to those starting, as opposed to doing, the job.
g. In fairness to the claimant, the dismissal letter does not refer in terms to the penalty points or type of endorsement. But as a matter of practicality, I expect the tribunal hearing the claim may well consider this was a matter of sloppy drafting rather than disinterest in the issue.
h. I also observe that the notes of the 30 June meeting - which are signed by the claimant- make no reference to the claimant asserting his dismissal was for reasons relating to any protected disclosure.

44. Accordingly, on all the material before me, I did not assess that there was 'a significantly higher degree of likelihood than just more likely than not' that the tribunal will decide at the final hearing that the protected disclosure was the sole or principal reason for dismissal.

45. I gave directions full the case under separate cover, including amendment of the respondent's name from Kelly Grange to Next Distribution Ltd.

Employment Judge Michell
Date: 12 August 2022

Sent to the parties on:
8 September 2022
For the Tribunal: