



EMPLOYMENT TRIBUNALS

Claimant: A Rawlins-Catterall

Respondent: The Veterinary Defence Society Limited

HEARD AT: Manchester (by video platform) **On:** 20 April 2022

BEFORE: Employment Judge Batten (sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: K Skeaping, Solicitor

JUDGMENT having been sent to the parties on 21 April 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant's presented his claim to the Tribunal on 8 March 2022. The claim included an application for interim relief. This hearing was listed to deal with that application.
2. There was no dispute that the claimant was an employee of the respondent and that his employment commenced on 16 June 2021 and ended on 2 March 2022. The claim was presented to the Tribunal within 7 days of the effective date of termination of the claimant's employment. The claim was accepted as a complaint of unfair dismissal for making protected disclosures which was accompanied by an application for interim relief. Therefore, the claim did not need an ACAS early conciliation certificate. However, a further complaint of disability discrimination was rejected for lack of ACAS early conciliation.

Available evidence

3. The respondent had prepared a bundle of 60 pages, being 30 pages of pleadings and 30 pages of assorted emails, correspondence and documents.

In addition, the respondent tendered a short witness statement from Raman Sankaran, the respondent's Chief Executive Officer.

4. The claimant produced written submissions totalling 47 pages together with 50 exhibits of 171 pages consisting of emails, reports and other documentation. He also referred to a document entitled, "Guidelines on Data Protection Officers", produced by the European Union Data Protection Working Party, dated 13 December 2016.
5. The Tribunal heard first from the claimant about his application. He addressed the Tribunal at length and in detail, and then the respondent's solicitor made oral submissions. The Tribunal did not hear oral evidence and did not make findings of fact.
6. The parties were reminded that the role of the Tribunal, in relation to an application for interim relief, is to assess the prospects of success of the whistleblowing unfair dismissal complaint, for the purposes of granting, or not, the interim relief sought.

The applicable law

Interim relief

7. Section 128(1) of the Employment Rights Act 1996 ("ERA") provides that an employee who presents a complaint of unfair dismissal, and alleges that the reason for his dismissal is the making of a protected disclosure under section 103A of the Employment Rights Act, may apply to the Tribunal for interim relief. The claimant's application in this case has been brought in time, pursuant to section 128(2) ERA.
8. The procedure on hearing an application for interim relief is set out in section 129 ERA, namely that interim relief shall be granted where it appears to the Tribunal it is likely that, on determining the complaint of unfair dismissal, the Tribunal will find that the reason or principal reason for the dismissal was that the claimant made a protected disclosure and so was unfairly dismissed for doing so.
9. The task for the Tribunal is to make a broad assessment of the case on the basis of the material available to it at the interim relief hearing, and to consider what is likely to be the result at the final hearing of the claimant's claim.
10. The leading case of Taplin v C Shippam Limited [1978] IRLR 450 held that "likely" in ERA section 129 does not mean simply "more likely than not". The test is one of likelihood of success; that is to say whether the claim has more than reasonable prospects of success, or a "pretty good chance" of success at a final hearing.
11. In the case of Ministry of Justice v Sarfraz [2011] IRLR 562 the Employment Appeal Tribunal confirmed that the word "likely" in section 129 ERA does not simply mean "more likely than not", it connotes a significantly higher degree of

likelihood, something nearer to certainty than mere probability. The test is therefore set comparatively high.

12. To succeed with an interim relief application, therefore, the burden of showing there is a “pretty good chance of success” is on the claimant, who must show that he has a good case for saying his dismissal was because of a protected disclosure on the basis that there are more than reasonable prospects of succeeding with that contention.

Whistle-blowing dismissal

13. Section 103A ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure as defined in section 43A ERA.
14. A disclosure which qualifies as a “protected disclosure” is a disclosure of information to the employer or to a prescribed person which, in the reasonable belief of the worker is in the public interest and tends to show one or more matters set out in ERA section 43B, including a failure to comply with a legal obligation, or that a criminal act has been committed.
15. The disclosure must be of information, that is to say of facts but not mere opinion or allegations, for which see Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325. Giving judgment, Slade J stressed that the protection extends to disclosures of information, but not to mere allegations. Disclosing information means conveying facts.

The application

16. The claimant's case is that he made protected disclosures to the respondent over a period of approximately 8 months, in his role as Data Protection Officer. The claimant says that his disclosures were the real or the principal reason for his dismissal, whereas the respondent says the claimant was dismissed for poor performance.
17. In his written submissions for this preliminary hearing, the claimant asked that the Tribunal grant him interim relief and, in addition, determine whether a Data Protection Officer ought to qualify in any event for interim relief if the principal reason for dismissal is in connection with what the claimant described as a “protected role”. In this regard, the claimant likened the role of a Data Protection Officer to that of a trade union representative, designated health & safety officer or pension trustee. The Tribunal explained to the claimant that the purpose of the preliminary hearing was to consider his application for interim relief only and not to determine wider issues of law; nor was it the function of this preliminary hearing to grant interim relief merely on the basis of the claimant having carried out a particular job role, and thereby dispense with any consideration of the requirement for a causal link between a protected disclosure and dismissal or the prospects of success of the claim.

18. The Tribunal asked the claimant first to identify the protected disclosures he relied upon, and he struggled to do so with any precision. Instead, the claimant provided copious explanations of how he considered the respondent to be in breach of its legal obligations with regard to data protection. That may or may not be the case but it was not a matter pertaining to the prospects of success of the claimant's application for interim relief.
19. The claimant's submissions included a chronology of 40 events or matters he said he relies upon. They span the period from 18 June 2021 to 25 February 2022. The claimant's chronology appears at pages 18-40 of the claimant's submissions and describes variously how the claimant discharged his duties, issued his reports, and sets out his views of communication between himself and the respondent's management. The claimant records his opinion on events and the actions of management, describing the position of a data protection officer as constrained by secrecy so they cannot make a protected disclosure to any other body than the employer. The Tribunal considered these matters, having regard to the legal tests to be met for establishing a protected disclosure. In essence, the claimant must show that he made a disclosure of information, to the respondent, which tends to show a breach of one of the matters in section 43B ERA - the claimant in this case says it was a breach or breaches of legal obligations; and that the claimant's belief in the substance of his protected disclosures was reasonable; that they were in the public interest and that the protected disclosures were the sole or principal cause of dismissal. The burden of proof is on the claimant to establish those five elements.
20. The Tribunal concluded that many of the matters set out in the chronology and relied upon by the claimant did not and could not, in fact, amount to protected disclosures at all. He describes certain matters raised as being his "professional opinion" and suggests that breaches of data protection arose because the respondent's managers had failed to engage with him as the data protection officer or that his "expert advice" was not followed or that the respondent had not kept him informed of its actions. The claimant had not said how he brought a number of these matters to anybody's attention, or to whom at the respondent they were directed. For example, the claimant describes merely observing a number of matters and noting them.
21. The Tribunal accepted the respondent's submissions to the effect that what the claimant described were, at best, the reporting obligations within his role as a Data Protection Officer. Nevertheless, the Tribunal considered that the claimant might be able to establish, within the context of his role, that he had made certain disclosures which might qualify for protection, depending on further evidence being produced at a final hearing, for example the substance of his reports to the respondent in September and/or December 2021. However, the detail provided at this hearing was lacking and so not sufficient to succeed with an interim relief application, having regard to the test in Taplin.
22. In those circumstances, the Tribunal advised the claimant that, for the purposes of submissions at this preliminary hearing, assuming he could establish a protected disclosure or protected disclosures, he should address

the Tribunal on causation, that is to say how he says he can establish a link between the reporting activities undertaken in his role as a data protection officer and his dismissal.

23. For this, the claimant proceeded to take the Tribunal through his submissions, paragraphs 52-64. The claimant contended that there had been a breakdown in trust between himself and a senior colleague, which had led to allegations about his performance and criticisms of his approach. The claimant was, however, unable to articulate how this alleged breakdown in trust arose because of any protected disclosure contended for, including for example the reports he made to the respondent in September and/or December 2021. In the circumstances, the Tribunal could find no evidence to demonstrate a link between any alleged protected disclosure and the claimant's dismissal.
24. The claimant's submissions relied also on the proximity of what he alleged to be protected disclosures, to his dismissal - see paragraph 81 of his submissions in which the claimant contends that such "shows sufficient causal link". The Tribunal rejected this contention. The claimant's employment was only 9 months long. Proximity alone does not find causation. There needs to be a causal link between those disclosures (if they qualify for protection) and the dismissal, and there was no evidence of that in this case.
25. The thrust of the claimant's submissions appeared to be that, as a Data Protection Officer, he ought to qualify for interim relief, as he said in his submissions, "in any event". The Tribunal rejected this contention which amounts to a misunderstanding of the basis for an entitlement to interim relief. It is not an automatic right: the claimant has to show that there are prospects of succeeding with an unfair dismissal claim because of protected disclosures. The claimant had not demonstrated any element of such to the degree required.
26. The claimant also advanced an argument that his disability had a part to play in the respondent's attitude to him changing, which led ultimately to his dismissal. The claimant told the Tribunal that, within a week of him informing the respondent of his disability, the respondent's General Counsel's approach to him changed entirely. In addition, the claimant said that he had raised complaints about the respondent's claims handlers' conduct, and that this too set the respondent against him. These matters constitute alternative reasons, advanced by the claimant, by which the respondent may have sought to dismiss him. In light of these matters, the Tribunal concluded that the claimant himself is uncertain as to the reason, or the principal reason, for his dismissal because he has advanced several potential reasons. At one point in the hearing, when seeking to explain his position, the claimant tellingly said that, "if it was not performance it must be another reason", which is a statement of uncertainty that, of itself, fails to meet the degree of certainty required for interim relief.
27. Further, the claimant addressed the Tribunal in submissions to the effect that he believed that the respondent would be unable to show that he had been dismissed for poor performance and, therefore, his dismissal must be for

protected disclosures. The Tribunal considered the claimant's conclusion to be a non-sequitur. As the respondent's representative argued, that does not meet the test for interim relief. In addition, the claimant was unable to explain why the respondent would have invested considerable time and effort in one-to-one meetings with him and followed a lengthy capability procedure for an employee with under 2 years' service and whose service they could simply have dispensed with.

28. It is a high hurdle for a claimant to establish an entitlement to interim relief. It has not been met in this case based on the material before the Tribunal and despite the extensive submissions of the claimant.

Conclusion

29. In all the circumstances, based on the material before it, the Tribunal concluded that the claimant is unlikely to establish that the reason or the principal reason for his dismissal was because of a protected disclosure. The Tribunal therefore considers that the claimant has not established that he has a pretty good chance of succeeding with his case of unfair dismissal pursuant to section 103A ERA and certainly not to the extent or with the degree of certainty required to succeed with an interim relief application. The application is dismissed.

Employment Judge Batten
Dated: 4 July 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
22 July 2022

FOR THE TRIBUNAL OFFICE

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