EMPLOYMENT TRIBUNALS

Claimant: Mr T Hancox

Respondent: SK Heating and Cooling Limited

Heard at: Bristol

On: 4 November 2022

Before: Employment Judge C H O'Rourke

Appearances
For the Claimant: In person
For the Respondent: Mr P Bradley – HR consultant

REASONS

(Judgment having been sent to the parties on 4 November 2022 and Reasons having been requested the same day, subject to Rule 62(3) of the Tribunal's Rules of Procedure 2013, they are herewith provided)

Background and Issues

1. The Claimant was employed as a project engineer by the Respondent company, for approximately ten months, until his dismissal with effect 13 October 2022.

2. As a consequence, he brought a claim of automatic unfair dismissal on the grounds of having made a protected disclosure(s), alleging unsafe practices by his employer in the installation of air conditioning units that could lead to asphyxiation of residents in homes and hotels.

3. He also made an application for interim relief, subject to s.128(1) Employment Rights Act 1996 (ERA). It is not in dispute that that application meets the requirements of s.128(2), having been presented in time.

The Law

4. Section 129(1) ERA states:

(1) This section applies where, on hearing the 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. … 103A … (Protected Disclosure)

5. Section 43B ERA states:

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,

c. …

d. That the health and safety of any individual has been, is being or is likely to be damaged, or

e. …..

6. Section 43C ERA states:

Disclosure to employer ….

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure

a. To his employer …

b. …

7. When considering the 'likelihood' of the claimant succeeding at tribunal, the correct test to be applied is whether he or she has a 'pretty good chance of success' at the full hearing — *Taplin v C Shippam Ltd 1978 ICR 1068, EAT*. In that case, the Employment Appeal Tribunal (EAT) expressly ruled out alternative tests such as a 'real possibility' or 'reasonable prospect' of success, or a 51 per cent or better chance of success. According to the EAT, the burden of proof in an interim relief application was intended to be greater than that at the full hearing, where the tribunal need only be satisfied on the 'balance of probabilities' that the claimant has made out his or her case — i.e. the '51 per cent or better' test. This approach was endorsed by the EAT in *Dandpat v University of Bath and anor EAT 0408/09* and, more recently, in *London City Airport Ltd v Chacko* (above). In *Ministry of Justice v Sarfraz 2011 IRLR 562, EAT*, Mr Justice Underhill, then President of the EAT, commented that the test of a 'pretty good chance of success', which was accepted in Taplin, is not very obviously distinguishable from the formula 'a reasonable chance of success', which was rejected. However, in Underhill P's view, the message to be taken from Taplin was clear — namely, that 'likely' does not mean simply 'more likely than not' but connotes a significantly higher degree of likelihood, i.e. 'something nearer to certainty than mere probability'. Underhill P noted that it was understandable that

Mr Justice Slynn in Taplin declined to express that higher degree in percentage terms, 'since numbers can convey a spurious impression of precision in what is inevitably an exercise depending on the tribunal's impression'.

The Evidence/submissions

8. I was provided, at the outset of the Hearing, with a bundle of documents by the Claimant, which set out the following of relevance:

    a. His letter of 4 October 2022 (all dates hereafter 2022), to the Respondent's managing director, containing the allegations set out above.

    b. An email in response from the MD, acknowledging receipt and referring to the seriousness of the matter and indicating that an investigation would take place.

    c. Subsequent emails from the Respondent, seeking to accept a purported verbal resignation by him, on 3 October. (He said, in submissions at the conclusion of the Hearing that he had told colleagues that '*I would be leaving'*).

    d. Other emails from the Respondent, alleging that as he had indicated that he would be working for a competitor and also to prevent further 'grievances', he should be suspended (which he was).

    e. An email of 11 October from the Respondent, inviting him to a telephone disciplinary hearing, on 13 October, alleging gross misconduct on his part. The charges included poor time-keeping, which had resulted in a verbal warning on 20 September and concerns as to him writing to external '*stakeholders'*.

    f. An email following the disciplinary hearing, of 13 October, summarily dismissing him.

9. The Respondent had provided no documents at the outset of the Hearing, but during it, provided an email from the Claimant, of 5 October, to the Respondent threatening to contact customers of the Respondent about his concerns and seeking financial settlement.

10. I heard submissions from both parties, as follows:

    a. The Claimant stated the following:

        i. There is no evidence that he had resigned but was in fact dismissed.

        ii. All the allegations against him post-date his protected disclosure.

        iii. He was suspended to '*prevent further grievances'*.

        iv. No process was followed in the dismissal process and there were breaches of the ACAS Code. He was not provided with any

evidence, either documentary or in witness statement format, either in advance of or at the disciplinary hearing, to support the charges against him.

v. He denied that he had left work early to attend a job interview, as alleged.

vi. The Respondent had ignored its own whistleblowing policy and made no attempt to follow due process.

b. On behalf of the Respondent, Mr Bradley stated the following:

i. He had not, prior to this Hearing, had sight of the documents that the Claimant now sought to rely on.

ii. Even those documents are selective, and it will not be until the final hearing, when a document bundle is provided, supported by witness evidence that the Tribunal will be able to come to a decision on the merits of the claim. He considered that he had provided evidence to support the disciplinary charges.

iii. There are issues which led to the Claimant's dismissal and which pre-date the disclosure, such as his absences and leaving work early to seek employment with a competitor, for which evidence can be called at the final hearing.

11. Conclusions. My decision is to dismiss the application, for the following reasons:

a. I stress, at the outset that consideration of an application for interim relief can only be, by its nature, limited, based as it is on only partial documentation and no witness evidence. A decision one way, or the other, does not guarantee the same outcome at final hearing, due to the differing standards of proof in those processes.

b. I considered that the following factors weighed in favour of the application:

i. It appears likely that the Claimant did make a disclosure of information in his letter of 4 October.

ii. There are questions as to the procedure adopted in the disciplinary process, in particular as to what (if any) evidence was provided to him either at or in advance of the disciplinary hearing.

iii. There was no evidence provided of the asserted verbal warning of 20 September.

c. Factors weighing against were as follows:

i. He had threatened, on 5 October, to write to the Respondent's customers, setting out his concerns and which perhaps may have contributed to justifying disciplinary action against him.

ii. As he had new employment, which commenced on 17 October [his ET1] it seems likely that he had, as alleged, been seeking new employment, which of itself would not justify disciplinary proceedings, but might if he had taken unauthorised time off to attend an interview for it and if that employment was with a competitor (depending on the terms of his contract). (This conclusion is bolstered by his subsequent admission in this hearing that he had told his colleagues on 3 October that he '*would be leaving'*.)

iii. There must be a question mark as to the timing and motivation of his disclosure, bearing in mind that he said in his ET1 that he had been making similar verbal disclosures to his manager (which if true, related to potentially fatal consequences for members of the public) in March and April, but without result. Despite these potentially dire consequences, however, he delayed making his written disclosure until some five months later, apparently at a point at which he had obtained new employment.

iv. While he complains of the lack of procedure in the dismissal process, he did not appeal against the outcome.

d. I don't consider that the application meets the likelihood test in s.129 (but which, of course, is not to say that the claim will not succeed at final hearing). The guidance on that test, set out by Mr Justice Underhill, in *Ministry of Justice v Sarfraz* indicates that it is a high bar, being '*a significantly higher degree of likelihood i.e. something nearer to certainty that mere probability'*.

e. I don't consider that the application meets that test, for the following reasons:

i. There is at least some evidence of genuine concerns by the Respondent that the Claimant was going to contact customers of theirs, *potentially* justifying disciplinary procedures and thus, even if only on that basis, providing an alternative explanation for his dismissal.

ii. While there may be some questions as to the procedure adopted by the Respondent in the disciplinary process that does not, of itself, mean that the reason, or principal reason for his dismissal was any protected disclosure. A flawed procedure may be indicative of such, but is not conclusive, or bordering on '*certainty'*.

iii. The five months between the Claimant's stated verbal disclosures, making very serious allegations of life-threatening actions and his letter of 4 October at least opens the *possibility* of an alternative motivation for him deciding to send the letter when he did.

Employment Judge O'Rourke
Date: 9 November 2022

Reasons sent to the parties:
15 November 2022

For the Tribunal Office