Case number: 2602593/2022

EMPLOYMENT TRIBUNALS

Claimant: Mr Ranjit Dhanda

Respondent: Erewash Credit Union

Heard at: Nottingham in public

On: 1 December 2022

Before: Employment Judge Clark (Sitting Alone)

Representation

Claimant: Mr Dhanda in person.
Respondent: Mr R Quickfall of Counsel.

JUDGMENT

1. The application for interim relief **fails and is dismissed.**

Reasons were given orally at the hearing. These reasons are provided upon the Claimant's application in accordance with Rule 62(3) of the 2013 rules.

REASONS

1. Introduction

1.1 This is an application for interim relief.

1.2 The claimant was dismissed on 1 November 2022. Six days later, on 7 November 2022, he presented his ET1 claim form alleging automatic unfair dismissal on the ground he had made a protected qualifying disclosure. He sought interim relief under section 128(1)(a)(i) of the Employment Rights Act 1996 ("the act") alleging his dismissal was automatically unfair under section 103A of the act.

1.3 Coincidentally, the application came before me in duty work and I made orders for it to be listed. Notice of today's hearing was sent on 11 November 2022. The respondent has had the necessary 7 clear days' notice of today's hearing for it to be properly listed.

2. Preliminary Matters

2.1 The parties are both relatively well-prepared for such an urgent application as this. I have seen a bundle and a witness statement from Beth Belding of the respondent. I did not hear evidence and did not make any findings of fact. Both sides addressed me on the issues in the case making reference to the contemporaneous documentation.

3. Law

3.1 The test on whether to grant interim relief is set out in section 129(1) of the act as: -

> ***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 …. 103A, …***

3.2 Case law has established that the phrase 'appears to the tribunal that it is likely" means there is a "pretty good chance" of success. That has to be applied to all elements of the substantive claim. The standard of what is a "pretty good chance" has been said to be something higher than merely the balance of probabilities. Indeed in **Ministry of Justice v Sarfraz 2011 IRLR 562, EAT**, the then president of the EAT interpreted the test as being one which "connotes a significantly higher degree of likelihood, i.e. something nearer to certainty than mere probability"

3.3 Applying this test requires me toto make 'a broad assessment on the material available to try to give the tribunal a feel and to make a prediction about what is likely to happen at the eventual hearing before a full tribunal. Other cases have described this as an 'expeditious summary assessment' as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party. (**London City Airport Ltd v Chacko 2013 IRLR 610, EAT**). This involves a far less detailed scrutiny of the parties' cases than will ultimately be undertaken at the full hearing. In summary, I do my best to gain an impression of the case and apply the test to that.

3.4 Against that law, for today's purposes, the claimant carries the burden of showing he is likely to succeed at a final hearing in establishing each of the necessary

constituent elements of a claim of automatic unfair dismissal on the ground of having made a qualifying protected disclosure. In summary, those constituent elements are: -

a) That he made a disclosure.

b) To his employer.

c) Of information.

d) Which in his reasonable belief tended to show one of the relevant failures.

e) And doing so was, in his reasonable belief, in the public interest.

f) That he was subsequently dismissed.

g) That the reason (or if more than one the principal reason) was that he had made the disclosure.

4. The Submissions

Claimant Submissions

4.1 The claimant says he made one or more protected disclosures in March 2022 with possibly the email in April continuing as part of that disclosure; that he conveyed it to the Respondent which he says he did by email to his team and to the Chief Executive that in those emails he disclosed facts of the existence of loans that had been obtained from the Respondent Credit Union by borrowers who appeared to him not to be the real person. To put it another way, the person identified was not the person who had applied for the loan meaning the organisation didn't know the true identity of the borrower and that some third-party individual had used that other persons ID to obtain those funds. He says that is a relevant failing in the sense that it tends to show a criminal offence of fraud had, was or was likely to be taken place and, in addition, that the Respondent may be failing to comply with a legal obligation in respect of its obligations to the FCA or under the Money Laundering Regulation. He says that he reasonably believed that to be in the public interest even though he did not see himself as a whistle blower at the time as he was just doing his job. He says his dismissal was because of the protected disclosure and was the reason or principal reason. He says inferences can be drawn as to causation because when you look at the process adopted by the employer and the reasons it relied on to dismiss the Claimant they don't stand up to scrutiny and are false or mistaken or misunderstood. He says the process was conducted hastily and there is evidence of a predetermined intention to dismiss him. He says as the reason given by the employer will fall away that leaves him to invite the Tribunal to draw adverse inferences that the true reason that he was dismissed was that he had made that disclosure.

Respondent Submissions

4.2 The Respondent's position is that it says it was grateful for the Claimant raising what he had discovered, and I note the issue about whether this is part of his job. If it was part of his job that much would not be surprising. The Respondent says it did have an issue about him exceeding his role by way of investigating and dealing with these potentially fraudulent loans and also in respect of its criticism of the Chief Executive Officer in her response to those matters. That I should add is not relied on as a disclosure. The Chief Executive was herself new. She was in post barely longer than the Claimant on his account and slightly shorter service than him on the Respondent's account. Indeed, Beth Belding who features in this matter and to whom I will return to, wasn't even employed at this time.

4.3 After these "disclosures" were said to have been made both parties agree that no further issues arose. Nothing of concern arose further over the Summer and there were no further disclosures made. Beth Belding started in May as a new Manager. Her evidence will be that she is not aware of these early disclosures. The two worked well during the Summer. The one-to-one meetings I have seen show the Claimant was initially held in a positive light. Beth Belding was clearly getting to grips with her role over the first few months. By August, she had become aware of certain issues on certain accounts that the Claimant managed. Her concern about those led her to undertake an audit of his work where she found substantial problems and asked him to resolve them. It seems the process of resolving them was then the source of other concerns about what he was doing on his cases generally, in context of following the organisations own procedures. Those concerns, the Respondent will say, were sufficient for her to implement a performance improvement plan ("PIP") that took place from late September. The first weekly review appeared to be positive in the sense that things were going in the right directions. The later ones were not so positive and indeed the concern evolved to concern about the Claimant's own acknowledgement or recognition of the existence of any concerns and, indeed, his inability to explain his actions.

4.4 Around that time other concerns come to light about the Claimant accessing the building out of hours. He was asked why, and the Respondent says he did not give any response or any satisfactory response at the time. That became an issue of trust and an additional conduct issue in what would then become the formal process towards the end of the PIP. I say towards the end of the PIP because it seems it moved to that stage slightly before the planned expiry on 25 October the invitation was given to the Claimant to attend a formal hearing. The respondent agreed to his request for that to be put back to 1 November. The Claimant then didn't attend. He emailed that morning setting out why he couldn't attend and that he wouldn't be available for the next two weeks. Based on the information before it, the employer went ahead and will say it was entitled to

reach that decision in the circumstances. Having considered all the information before it decided it, the decision reached was to dismiss the claimant.

4.5 Within that process was some HR advice from an external HR Company and there seems to have been some focus on the fact the Claimant's length of service being less than 2 years. That maybe in reference to the qualifying service for unfair dismissal or, as seems relevant in this case, that his service was sufficiently short not to engage some of the formal procedures this employer had. The reasons for the decision to dismiss was set out in the letter and the Respondent says they are the reasons why and they are in no way related to any disclosures if indeed disclosures have been made. Whilst the issues have been raised the Respondent's position is that they don't satisfy the constituent elements of any protected qualifying disclosure.

5. Discussion

5.1 This is broad brush approach and I have to make that assessment on the impression gained. Taking things in the order they arise; the first stage is whether there was a protected qualifying disclosure at all.

5.2 I have to assess the likelihood of the claimant showing he made a disclosure containing all of the constituent elements. It seems to me that for today's purposes, that there is a pretty good chance of him being able to show there was some sort of communication. There is no issue that communications were made to his employer. I don't have the emails of March before me but I do have the April email. It will not be in dispute that the issue of fraudulent loan was raised and that the April email is a culmination of those earlier communications. It seems to me, therefore, that there is a pretty good chance that that the disclosure contained information about the fact of the loans obtained fraudulently which were potentially as a result of the deficiencies or omissions in identity checks. It seems to me, again, there would be a pretty good chance of showing that there was a reasonable belief in the Claimant that this tended to show one of the relevant failures i.e. the offence of fraud or the obligations in respect of Money Laundering Regulations etc. The nature of this subject matter means again, I am satisfied there is a pretty good chance of him showing that in his reasonable belief the disclosure was in the public interest. I reach that conclusion notwithstanding the point, and it's a fair point, that the Claimant himself didn't regard himself as making a public interest disclosure at the time but was simply doing his job.

5.3 Of course, if his job is to identify and convey things which may in themselves contain the constituent elements of a protected disclosure, that may be enough for it to be a protected qualifying disclosure, but it may also have implications for the evidential landscape when the question turns to the employer's response to an employee making

that disclosure. If it is part of the job that the employee is employed to do, the question arises why an employer would then be concerned about somebody doing that?.

5.4 For completeness I record that there is no issue that the claimant was in fact dismissed and in all other respects may present a claim for automatic unfair dismissal.

5.5 We then turn to causation. Can the Claimant satisfy todays test that there is a pretty good chance of him proving that the disclosure was the reason, or if more than one the principal reason, for his dismissal?

5.6 One peculiarity of unfair dismissal law of course is it admits more than one reason and the law is only concerned with the principal reason. Theoretically at least, that could mean that a prohibited reason was part of the reason but not the principal reason. However unpalatable that might be to argue, and whatever other implications arise from it, it is at least an aspect that has to be borne in mind particularly when todays question is whether the Claimant can show or is likely to show that was the principal reason.

5.7 There are factors which I think could point towards some sort of causal link although many of them are qualified.

a) There is some evidence of a critical response to the Claimant in April soon after the disclosures and the manner and nature in which Claire Hale communicated that with the Chair does disclose a degree of hostility towards the Claimant. But the qualification is that taking the email on its face, it appears to be focussing on the Claimant exceeding the boundaries of his own role within the organisation after the initial disclosure and proceeding to investigate a potential fraud. It also goes to the matter of him criticises how she was dealing with those matters.

b) I also have regard to the positive one to one meetings after this which begs the question why, when things appeared to be going relatively well, did they suddenly go so bad? Again, there is some qualification to that. Firstly, I can see Beth Belding was new to her post and there will undoubtedly have been a time during which she was simply getting to grips with her own role. That will include building relationships. It also seems to be the case from what else has been put before me that there were other grounds for criticism about the organisation's previous management before most of these key players were appointed relating to training and induction or to previous post holders' management. They are put in the sense that there appears to have been some turnover of staff and, indeed, these key events all take place in a time when 4 out of 6 members of the team are brand new to the organisation in relative terms.

c) The high point, I think, of the Claimant's concerns relate to the impression of the dismissal process and at least an initial assessment of the reasoning. The PIP was conducted swiftly. A tribunal will want to scrutinise that. It appeared to arise swiftly against a background of some positive one to one meetings and the duration was short, being less than four weeks. It may be putting it too highly to say that Beth Belding was pleased with the Claimant's first review, but it was at least pointing in the right direction. There are some inconsistencies in how that programme has been reviewed by others leading some scepticism that will no doubt lead to some scrutiny later on. There is also the fact that the process started potentially within the context of a dismissal decision. Whether or not this is linked to the advice the advice based on the claimant's length of service, that was certainly something that was raised in the contemporaneous documents about the process. That does give some sense of there being an expected outcome by way of termination

d) I add to this the suspension that was not a suspension but clearly had the same effect. The PIP itself as I say wasn't concluded but the response at appeal stage was bordering on the dismissive in the sense the Chairman who conducted the appeal took the view that the Claimant would have failed anyway. Again, these are areas a Tribunal will undoubtedly look at carefully.

e) There is also the process itself. The apparent urgency of proceeding with the termination process on 1 November although, again, the Respondent will have evidence to explain that decision against the context of the Claimant having had one adjournment and suggesting he wouldn't be available for a further two weeks. All those elements of the dismissal decision making, particularly against a decision underpinned by performance concerns, raise a particular level suspicion that would prompt some scrutiny when the evidence is tested but of course by this time there was more than the concern about performance, there was now the Claimant's response to the concerns about performance and, of course, the issues about working outside normal hours. That will take on perhaps a particular significance if, as suggested by the Claimant, that he was only doing that to comply with the PIP targets. But it seems up to hearing things today and looking more carefully at the explanations given at the time that's not really the issue and certainly it can't be the issues to the extent that the attendance outside of hours was happening before the PIP was in place.

f) I was initially concerned about the suggestion that the Respondent's real concern was that by him not recording additional work done out of hours, that amounted to fraud. That was a most unusual position for any employer to take in my experience, still less one that was likely to lead to disciplinary action being taken. Nevertheless, those issues on the out of hours working become something

added to the employer's concerns and clearly are in the nature of conduct as opposed to capability.

g) And the Claimant finally also points to other basic errors of the Respondent failure to follow its own procedure, how it has gone about things and how that might suggest its focus was not in fact on the issues that are on the face of the documentation.

5.8 But there are also factors that point against there being any causal link.

a) The issues the organisation had in April with the Claimant were clearly focussed on matters which are not the making of the disclosure but in respect of him exceeding his role and challenging the Chief Executive's performance of her role. On the face of it, the documentation appears to show the Chief Executive acknowledging that the Claimant was correct to raise the disclosures. It also appears to show that the identification of these apparent frauds was actioned with whichever third party organisations they needed to be actioned with and were certainly reported elsewhere within the organisation.

b) There is the relative lack of proximity between the disclosures that take place in March (possibly early April) and the decision to dismiss on 1 November. Even the earlier PIP proposes doesn't commence until late September. Perhaps more significantly, there is the intervening positive period with the one-to-one meetings with Beth Belding. They are consistent with there not being any immediate detriment. In fact, it is common ground that things went well over the Summer. That in itself is a factor which suggests other reasons were prompting what became the PIP and the dismissal.

c) On the face of it the concerns that Beth Belding had about the Claimant's role appeared to be aspects that a Line Manager in her position was entitled to take issue with and I remind myself that she was also new to the organisation. It takes four months until August when these things start to unfold which is consistent perhaps with a new Line Manager getting to grips with a new organisation and beginning to move from the initial finding out about her team and the systems and actually imposing some management standards and systems of her own.

d) There is also the fundamental question of knowledge. The Claimant has to show the decision makers have knowledge of the disclosure to make out the causal link. I accept that is not always absolutely determinative because of the case of **Jhuti** in so far as unfair dismissal is concerned and there is a possibility of a malevolent influencer altering the course of an innocent decision maker. However, if Beth Belding did not in fact have knowledge of his disclosures as she will say in evidence, that is still a further hurdle and obstacle for the Claimant to

overcome to demonstrate that he has a pretty good chance of showing that the disclosure was the reason or the principal reason.

e) The fact of knowledge is an area that clearly will be scrutinised at any hearing and the facts of this case give fertile ground for that close examination. It's a very small organisation of six people. The Chief Executive had already shared her view with others that the Claimant had overstepped his mark. A new Line Manager joins a month later and it is certainly plausible and quite probable that those views are shared again with her. Beth Belding accepts in her own evidence that there were discussions on other topics but these are sufficiently approximate for a Tribunal to consider she may have known about the disclosures. Certainly it seems natural that the potential fraud issue would have been something of sufficient significance that there seems some force in the Claimant's contention that she is more likely than not to have known of that and that he was the person that had identified it. If nothing else, that may well arise simply from that fact of her being his Line Manager and needing to know that fact. Whether there is a pretty good chance of that doesn't really answer the question today for other reasons which I will come to.

f) One important thing that comes out of today is that there may be simply differences of opinion about the boundaries of the claimant's role, the responsibility, whose view was correct of how the internal procedures should operate or who fully understood them, whose view of external processes like CCJ's is correct or fully understood and what other staff may have understood or misunderstood when they reported things to Beth Belding all go into the mix but one thing that does come across is that those things were being put to Beth Belding from various sources without any obvious connection to the fraud disclosure and the consequence of those to the extent they do form part of the ultimate reasoning for dismissal. The consequences is that the Claimant now has a higher and broader hurdle to overcome because there has to be some sort of sense of collusion, if not conspiracy, to raise these matters in the way that they have been raised and of course, as Mr Quickfall explains, in some of the claimant's contentions the analysis requires one to look at what those allegations really mean because it's one thing to raise false allegations but for many of these aspects it isn't really challenged that there is some foundation at least of opinion even if that opinion is wrong which places them on a foundation of truth. Indeed, Mr Dhanda makes some concessions about aspects of Beth Belding's concerns even if they were erroneously informed or erroneously informed by other colleagues who were themselves erroneous or were at least the genuine belief of Beth Belding.

5.9 So, bringing all that together with the conclusions there are some factors which cast doubt on the Respondents process for the PIP and the decision to dismiss, the timing and manner in which it happened. They are aspects of the evidence from which Mr Dhanda is perfectly entitled to make submissions to invite the Tribunal to draw adverse inferences and the Tribunal setting things on the balance of probabilities after hearing live evidence and evidence being tested may feel able to do so, that's not a task for me today because I am not making findings of fact, I am as I say gaining an impression and assessing the prospects of that outcome happening against the statutory test.

5.10 Having said that, I don't think the prospect of an inference being drawn is beyond my scope today. Whilst it is not open to me to actually draw the inference, it is open to me to consider the prospect of such an inference being drawn against the relevant test but it has to be considered in the context of other conclusions that could be reached on the evidence or other inferences that could be drawn on the evidence by the Tribunal having the benefit of full evidence and full evidence being tested.

5.11 Against that, I do see a concern there seemed something quick and rushed about the decision to dismiss. The question is does that necessarily mean there is a pretty good chance the Claimant will establish the real reason for dismissal was him making a disclosure if the Tribunal were to reject the Respondent's position. I remind myself of course that in this very field **Kuzel V Roach** dealt with that question that because two parties come to the issue with two competing views, if the finders of fact reject one parties view it does not follow that the other parties view holds out. Even if the Respondent failed to show that Miss Belding's concerns about the claimant's attendance out of hours and the lack of adequate explanation for it or his response to the issues to his performance and indeed his actual performance were the reason, the void is not filled automatically by the fact the Claimant made a protected disclosure. It is a possibility. It is an arguable case and some of the issues that might point in that direction might gain more weight after a trial and after Mr Dhanda has cross examined the relevant witnesses. Equally, they may be adequately explained, fully explained or explained with absolutely certainty. I can say my view of the case after 3 hours of hearing the review of the various aspects of it is far less critical of the Respondent than when I first read the Claimant's application. That is not to weigh into my decision, but it does indicate that the more time one has to digest what was going on in a particular case, the view can change.

5.12 There appears to be an arguable explanation by the Respondent, the Claimant has to not only displace that but has to fill the space with his contention that the real reason was his protected disclosure. Even if he does adequately challenge the reasons proffered by the employer, even if there is some malicious motive to remove him from the workplace that could be because he oversteps his role in his investigations, it could

be because he criticises the Chief Executive, it could be because simply the recent changes in the management of the team mean that they are now changes, systems and cultures, that Mr Dhanda doesn't fit, could be because the HR advice was that you don't really have to have a reason he just doesn't have service to take it to the formal procedures and you are under no obligation to act fairly in a dismissal at least in as far as the ordinary concept of fairness is concerned. Of course, it may remain that the true reason is in fact the view that Miss Belding formed of the Claimant's performance and his inability to explain why he was entering the building at odd hours.

5.13 As this is an inference case, the question is what can I do with it today when I have to decide whether the Claimant has established a pretty good chance of showing the reason. As I say, I think inferences are still within my scope today, but they really only can engage where there is one of two reasons. If there is no other competing conclusion that a Tribunal might reach, it might be possible for me to say there is a pretty good chance of that inference being drawn. If the reasons that the employer advances for the dismissal really did completely fall apart at an interim relief hearing such as this, I might also be able to say there is a pretty good chance of the claimant establishing the prohibited reason but the fact is they haven't and because they haven't and because there are a range of conclusions that the Tribunal might settle on as to why things happened as they did and because there isn't any smoking gun, to coin a phrase, in the contemporaneous documentation and because there are as many factors pointing away as there are towards the disclosure being in anyway connected to the dismissal, my conclusion has to fall short of the line for showing "a pretty good chance of success".

Employment Judge Clark

Date: 6 February 2023