EMPLOYMENT TRIBUNALS

Claimant: Mr C Massey

Respondents: Wren Music (a company limited by guarantee) (1)
Mr J Dyer (2)
Ms S Owen (3)
Mr P Tucker (4)
Ms A Wilson (5)

Heard at: Southampton (by video)

On: 18 November 2022

Before: Employment Judge C H O'Rourke

Appearances
For the Claimant: In person
For the Respondent: Ms P Douglass – HR consultant

REASONS FOR GRANT OF INTERIM RELIEF

(Reasons having been requested at this Hearing, 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 communications and marketing officer by the Respondent company, for approximately eight months, until his dismissal with effect 21 October 2022.

2. As a consequence, he brought a claim of automatic unfair dismissal and detriment on the grounds of having made a protected disclosure(s), alleging failures of fire safety at their premises.

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. 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

6. I was provided with a bundle of documents by the Respondent. Subject to Rule 95 of the Tribunal's Rules of Procedure, I exercised my discretion to direct that oral evidence should be heard and I heard evidence from the Claimant and two Respondent witnesses, the second and fifth Respondents. The fourth Respondent did not attend the hearing to be cross-examined and I therefore gave his statement little weight. Where, in these reasons, I refer to the Respondent, it is to the First Respondent generally, through the actions of its managers.

7. An agreed chronology (all dates 2022) is as follows:

   a. 22 February – the Claimant's employment commences.

   b. 25 May and 14 July – the Claimant received positive feedback in reference to his review of the First Respondent's website and was told on the second

date that the '*Board was really impressed with how quickly we've been cracking on'* [221 & 215].

c. 23 June – the Claimant had a four-month review at which no concerns were raised as to his performance.

d. 25 July – the Claimant was instructed to prepare a short presentation on fire safety, for a staff meeting on 3 August.

e. 27 July – the Claimant undertook his assessment of the fire safety of the premises and states that he verbally informed Mr Tucker (R4) of his adverse conclusions that afternoon. Mr Tucker denies any such conversation. The Claimant emailed his concerns to Ms Wilson (copied to others) [75]. The Respondent accepted, in closing submissions that this email constituted a protected disclosure.

f. 1 August – a meeting the Claimant was to attend, entitled 'ways of working', scheduled for 2 August, was replaced, due to Ms Tucker being ill, for a meeting on the 3rd [225]. On the same date, he was informed by letter from Ms Wilson and Mr Dyer that that meeting was to be a formal probation review, at which he could be accompanied and which could result in his probation being extended, or he could be dismissed [129].

g. 2 August – the Claimant states that he reported his concerns to the Health and Safety Executive [205], but the Respondent deny any knowledge of such report or reaction from the HSE. He also raised a grievance [130]. He went on sick leave and did not return to work thereafter. Ms Wilson, who, she said, had just returned from holiday, responded positively to the Claimant's email of 27 July [75].

h. 4 August – Ms Wilson emailed the Claimant again, with a further update as to her response to his fire safety concerns [74].

i. 8 August – a fire assessment undertaken by a third party concluded that while there were issues to be addressed, the building was not unsafe to use [103-128].

j. 16 August – the hearing of the Claimant's grievance, which, on 30 August, was not upheld [188].

k. 8 September – the Claimant appealed against that outcome [189], which appeal was heard on 4 October and rejected on 6 October [202].

l. The Claimant was dismissed, by letter of 14 October [206].

8. <u>Summary of Evidence</u>

a. The Claimant stated the following:

i. He had had no concerns raised with him as to his performance, until receipt of the probation meeting invitation letter on 1 August. He pointed out that he had had a four-month review on 23 June, at

which no performance concerns had been voiced and that allowing for sick and annual leave, he had actually only been at work for seven working days in July, but that nonetheless, apparently, as Ms Wilson stated in evidence, his '*performance had stalled'* in that short period of time. Ms Wilson confirmed in cross-examination that she had reached the conclusion that the Claimant was no longer '*a good fit'*, due to his behaviour in those seven days.

ii. His concerns about fire safety were genuinely held. He had conducted the review because he had been instructed by Ms Wilson to prepare the fire safety presentation and felt that doing so would give him a good background from which to speak. He stressed that he had no professional qualifications in such matters and was approaching it as a layman, but on noting that there were no previous records of such inspections or fire drills and on viewing the premises, he felt his concerns were justified.

iii. The Respondent did not respond to his concerns until Ms Wilson's email of 2 August, which he said was only after the issue of the probation letter on 1 August and also him sending his grievance on 2 August. While the former is obviously the case, there was no evidence as to the timing of the transmission of his grievance on 2 August, as to whether it was prior to or after Ms Wilson's email. Her evidence was that she had been unaware of his grievance at the time.

iv. He resisted challenges to his reasonable belief as to the public interest in his disclosures, on the basis that he had not phoned managers immediately to raise these concerns and sent his disclosure email to Ms Wilson, despite knowing she was on leave. He said that he had raised the matter orally with Mr Tucker, on the day of his email, but that Mr Tucker had effectively brushed off his concerns, stating that the Respondent had always been aware of the problems, but it had '*always been a question of money'*. (In any event, the Respondent accepted, in closing submissions that his email did constitute a protected disclosure.)

b. The Respondent's evidence (effectively that of Ms Wilson) was as follows:

i. Her concerns as to the Claimant's performance arose from the week in July when he was at work, when the team was to work at a school for an important event, but to which the Claimant was reluctant to go. She said that when she confronted him about his non-attendance, he '*shrugged his shoulders and said it's too late now'*. The Claimant denied doing so and stated that it had been previously agreed that he would be attending a course on at least one of the days, which Ms Wilson agreed was the case.

ii. Ms Wilson said that on 13 July the board of trustees had '*raised a question about the Claimant's probation period, noting their concerns with the management of communications during his*

tenure', but provided no corroborative evidence of such comments. I note also that such comments do not tally with the documented reference on 14 July to the '*Board* (being) *really impressed with how quickly we've been cracking on'*.

iii. She also said that she had discussed the possibility of the adverse probation meeting with HR and the CEO, on 21 July, but again there was no corroborative evidence of such discussions, such as a file note, or subsequent emails, or a record of the scheduling of the probation meeting with the CEO.

iv. She said that the drafting of the probation letter was done on 26 July (so therefore the day before the Claimant's protected disclosure), but, again, she provided no corroborative evidence of this matter, such as a computer record showing commencement of the draft. She said that the lack of such evidence was an oversight on her part.

v. She categorically denied that the Claimant was dismissed because of his protected disclosure, which she in fact welcomed and quickly actioned, as evidenced by the subsequent fire safety inspection.

9. Conclusions. My decision is to grant the application for interim relief, for the following reasons:

a. As accepted, the Claimant made a protected disclosure on 27 July.

b. Apart from Ms Wilson's witness evidence, there was no other evidence whatsoever that the Respondent had concerns, prior to the protected disclosure, as to the Claimant's performance. It was agreed evidence that no such concerns had been raised in his four-month review in late June. While I note Ms Wilson's witness evidence now as to events in July, there is potentially clearly available evidence that she could have provided to support her assertions in this respect, however, she has not done so. I don't read any attempt at cover-up on her part as to the failure to provide that evidence. Nor do I consider it indicates a willingness on her part to make assertions, in the knowledge that in the absence of such evidence they can't be disproved and it may be, at the final hearing that such evidence will be forthcoming and that that Tribunal may, as a consequence, come to a different view, but I must decide on the evidence before me.

c. It is not necessary for the Claimant's protected disclosure to be the only reason for his dismissal and it may be the case here that Ms Wilson's concerns as to his performance did play a part, but were spurred on by what may have been perceived (despite the contents of her emails) as troublesome and perhaps officious involvement by the Claimant in matters that didn't concern him and which might lead to costly repairs, rendering the protected disclosure, in the absence of good evidence to the contrary, as the principal reason for his dismissal.

d. As stated, this decision does not mean that at the final hearing a different conclusion might not be reached, but based on the evidence before me I am satisfied that the test in *Sarfraz* is met and that there is a likelihood that a Tribunal will find that the Claimant was automatically unfairly dismissed for the reason, or if more than one, the principal reason of his protected disclosure.

10. Order

a. I set out the powers of the Tribunal in this respect (s.129) and following consultation the Respondent confirmed that they were unwilling to re-instate or re-engage the Claimant and accordingly the only option open to me was an order for the continuation of the Claimant's contract of employment, which I duly made, on the terms set out in that Order, of same date.

Employment Judge O'Rourke
Date: 18 November 2022

Reasons sent to the Parties:
23 December 2022

For the Tribunal Office