EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr W Graham	AND	Safemark Traffic Management Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY BY VHS ON 9 December 2022

EMPLOYMENT JUDGE N J Roper

Representation
For the Claimant: In person
For the Respondent: Mr N Henry, Consultant

JUDGMENT

The judgment of the tribunal is that the claimant's application for interim relief is dismissed.

RESERVED REASONS

1. In this case the claimant Mr William Graham claims that he has been unfairly dismissed, and that the principal reason for this was because he had made a protected disclosure and/or for health and safety reasons. This judgment deals with the claimant's application for interim relief. The respondent contends that the reason for the dismissal was misconduct (failing to comply with a reasonable instruction). It opposes the interim relief application.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Video Hearing Service. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.
3. I have heard from the claimant, and I have heard from Mr Henry on behalf of the respondent. I have considered the parties' pleadings and other relevant documentary evidence. I have not made any findings of fact because this is not required by the statutory test.
4. The dispute between the parties arose in the following circumstances. The respondent is a traffic management company which supplies traffic management services to building and groundwork contractors most typically in the context of repairs to roads and highways. These contractors are effectively clients of the respondent's business, and the respondent's employees control the traffic around the sites where the contractors are

repairing the roads. The claimant Mr William Graham was employed as a Traffic Management Operative from 23 February 2022 until his summary dismissal on 24 November 2022. The claimant has adduced copies of weather reports on the day of his dismissal which show that at that time in South Devon there was heavy rain, but in particular, extremely strong winds. The claimant had been allocated to work on a job at Kennford in Devon, but this had been cancelled the day before because of the strong winds and heavy rain.

5. Instead, the claimant went to work at a site in Starcross, which is on the exposed coast in South Devon. The claimant was supervising two other employees of the respondent, and their task was to maintain a safe traffic management system whilst their client, a tarmac contractor, made repairs to the road. This necessitated closing one lane of the two-lane road, with a Stop and Go traffic management system, by walkie-talkie, to control and allow traffic to pass safely.
6. The claimant discussed the worsening weather with the tarmac contractors and between them they decided to proceed. However, the weather forecast was that the weather would worsen until the middle of the day, but it would then improve during the afternoon. Unfortunately, by midday the wind was so strong that it repeatedly blew over the relevant safety signs which were in place to alert opposing traffic. The claimant decided that it was simply unsafe to continue and that he and the other two employees were put at risk and should not continue. The claimant was effectively the supervisor of health and safety matters at the site, and he instructed the tarmac contractors to discontinue.
7. The claimant had reported these events to supervisor Mr Warren who had agreed initially that the works should be suspended pending an improvement in the weather. The trouble was that subsequent to this discussion the tarmac contractors refused to discontinue work and the claimant was of the view that they were non-compliant with the relevant health and safety standards. The claimant then reported to Mr Warren that he refused to go back on site because he was concerned about the non-compliant contractors.
8. Mr Warren then required the claimant to report to the respondent's office at Buckfastleigh in Devon, and on arrival Mr Warren dismissed the claimant summarily. The claimant asserts that Mr Warren said to him "I'm not messing around, I'm letting you go". A subsequent letter in reply to the claimant's request for written reasons for dismissal was that the claimant had been dismissed for failure to comply with a reasonable management instruction to go back on site.
9. Having set out the above, I now apply the law.
10. Under section 43A of the Employment Rights Act 1996 ("the Act") a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that 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) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
11. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
12. Under section 48(2) of the Act, on a complaint to an employment tribunal it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
13. Under section 103A of the Act, an employee is to 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.

14. Under section 128 of the Act: (1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and – (a) that the reason (or, if more than one, the principal reason) for the dismissal is one of those specified in – (i) section 100(1)(a) and (b), 101A(d), 102(1) 103 or 103A, or (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or (b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met, may apply to the tribunal for interim relief.
15. I have considered the cases of London City Airport Ltd v Chacko [2013] IRLR 610 EAT; Ryb v Nomura International plc ET 3202174/09; Taplin v C Shippam Ltd [1978] ICR 1068 EAT; Ministry of Justice v Sarfraz [2017] EAT and Dandpat v University of Bath and anor EAT 0408/09.
16. The role of the Employment Tribunal in considering an application for interim relief requires the tribunal to carry out 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. This necessarily involves a far less detailed scrutiny of the parties' cases than will ultimately be undertaken at the full hearing – see London City Airport Ltd v Chacko. The statutory test does not require the tribunal to make any findings of fact – see Ryb v Nomura International plc. It must make a decision as to the likelihood of the claimant's success at a full hearing of the unfair dismissal complaint based on the material before it, which will usually consist of the parties' pleadings, the witness statements and any other relevant documentary evidence. The basic task and function is to 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."
17. 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 – see Taplin v C Shippam Ltd. The EAT confirmed that 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 being the "51% or better" test). For interim relief applications the EAT ruled out alternative tests such as a "real possibility" or "reasonable prospect" of success, or "a 51% or better chance of success".
18. This approach has been endorsed by the EAT in Dandpat v University of Bath and anor and in Chacko. More recently in Ministry of Justice v Sarfraz the EAT held that "likely" was nearer to certainty than mere probability - Underhill J as he then was stated in paragraph 16: "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."
19. It was also held in Dandpat at paragraph 20 that: "Interim relief is a draconian measure. It runs contrary to the general principle that there be no compulsion in personal service. It is not a consequence that should be imposed likely."
20. Following discussion today the claimant clarified and confirmed that he has two potential claims for automatically unfair dismissal. The first is for whistleblowing under section 103A of the Act relying on a verbal disclosure to Mr Warren that the tarmac contractors were not complying with their legal obligations and all that there was a risk to health and safety. The second is under section 100(1)(d) and (e) of the Act, namely that in circumstances of danger which were serious and imminent, the claimant refused to return to his place of work and/or took appropriate steps to protect himself and others from that danger.
21. On the information which I have to hand this second claim appears to be much more arguable because it was only when the claimant explained that he was refusing to return to work in circumstances of danger that Mr Warren summoned him back to the respondent's office in order to dismiss him. This seems to be to be the more likely reason for dismissal because the earlier disclosure to Mr Warren about seems to have met with Mr Warren's agreement that the claimant should suspend activities until the weather improved.

22. The difficulty with regard to an application for interim relief in these circumstances is that section 128(1)(a) of the Act does not allow an application for interim relief relying upon sub-sections 100(1)(d) and (e).
23. In these circumstances I cannot say that the claimant is likely to succeed in establishing that he was unfairly dismissed for reasons of whistleblowing, in the sense that he "has a pretty good chance of success", rather than for the health and safety reasons relied upon.
24. I therefore dismiss the claimant's application for interim relief. I have also made separate case management orders in relation to the full main hearing of the claimant's claims.

Employment Judge N J Roper
Date: 9 December 2022

Judgment sent to Parties: 30 December 2022

FOR THE TRIBUNAL OFFICE