EMPLOYMENT TRIBUNALS
Bristol Region

Heard by video on 6/4/2023 starting at 1pm

Claimant: Mr P Josen
Respondent; SECOM PLC

Before: Employment Judge Mr J S Burns

Representation
Claimant: in person (joined late at 1.55 then lost connection after a few minutes)
Respondent: Mr R Bhatt (Counsel)

JUDGMENT

The Claimant's application dated 31/1/2023 against the Respondent for interim relief is dismissed.

REASONS

1. The Claimant, who was dismissed by the Respondent on 25/1/23 with one weeks' pay in lieu of notice, presented his ET1 on 31/1/2023 claiming automatic unfair dismissal under s103A ERA 1996 and a related claim for interim relief in accordance with s128.

2. I was referred to a Respondent's bundle of 89 pages which included various documents setting out the Claimant's version of events, and I read witness statements from Mr D Hanson Operations Manager (and the Claimant's erstwhile line manager) and Mr W Cumming Regional Operations Manager. I also received a Respondent's skeleton argument. The Claimant joined the video hearing late about 55 minutes after the scheduled start of the hearing. He told me he was absent for medical reasons in India and had technical problems using the video platform. He then made submissions about the interim relief application for about 5 minutes before becoming inaudible and losing connection and was then unable to re-join effectively. I was told by the Tribunal clerk who was in touch with the Video Platform Supervisor that there were no general "video outages" today, and that the problems experienced by the Claimant in participating in the hearing arose from the fact that he was outside the UK, a matter he had not informed either the Tribunal or the Respondent's solicitor about in advance.

3. Despite the limitations on the Claimant's participation, I decided to proceed with the hearing. The Claimant had absented himself from the UK without prior notification and had therefore deprived himself of the opportunity for effective communication. An interim relief application is supposed to be heard without delay and already over two months had elapsed since the dismissal. Instead of being in the UK ready to resume the employment in respect of which he claimed interim relief, he was in India.

4. I did not allow live evidence or cross-examination but considered the evidence before me.

Findings

5. The Respondent is a company carrying on the business of the supply, installation and maintenance of electronic security such as CCTV cameras, intruder alarms etc. The Claimant was engaged in the role of "Operations Supervisor" from 5/12/22. In this role he was required to operate as a service/installation engineer in addition to supervising a small team of service engineers.

6. The Claimant claims he made a protected disclosure in the form of a written report to the Respondent on 24/1/2023 about "*breaches of Health and Safety at Work Act 1974 and of the Electrical Wiring Regulations"* , on receipt of which the Respondent dismissed him.

7. The Claimant sent complaining emails on 24/1/2023 to Mr Hanson. In an account sent late on 24/2/23, he set out at length the Claimant's version of disagreements, friction and finally an altercation between the Claimant and Respondent's sub-contractor Mr O Reyland which had occurred at a client site (NatWest Bank in Kidderminster) on 23/2/23 and early 24/2/23.

8. The Claimant's complaint included the following record of a claimed conversation between the Claimant and Mr Reyland: "*You got on my nerves the moment you walked in yesterday, youre a prick, I don't want you here this is my job" said Oli. To which I replied "You want to talk about a mess? Have a look at this: Mains cable run from ceiling to RIO in same holes as the safe low voltage cables..Holes drilled in panels just big enough to get a main flex through..New mains flex run in false ceiling from Smart RIO to Smart RIO across the room. Not only is this unsafe, it is also against the law AND I know you don't have alarm cable to pull out of your pocket, just I wasn't expecting you to pull it out of your backside either"…You're a wanker, come outside I sort you out you prick" said Oli*…"

9. Also towards the end the Claimant's complaint reads as follows': "*Health and safety concerns such as sitting on top of a step ladder AND which has not been fully opened (Secom employee) dangerous mains work and in breach of the IET wiring regulations".*

10. Mr D Hanson says in his witness statement that he already had some doubts about the Claimant, (following unsatisfactory interactions in late December 2022 and early January 2023), that he investigated the 24/2/23 complaint by speaking to the other employees and Mr Reyland and obtaining emails from them in which they complained that the Claimant had acted like a "bull in a china shop", and as if he disliked Mr Reyland from the start, that the Claimant had told Mr Reyland to "put a roll of cable up his ass" and also that the Claimant's work was defective; that Mr Hanson and Mr W Cumming met the Claimant to discuss the issues with him on 25/1/2023 and, having done so, concluded that the Claimant had been the aggressor in the altercation, that he had provided an inaccurate version of the altercation, and that he had failed his probation, and hence that they decided to dismiss him. They say that the Claimant's references to Health and Safety and Electrical wiring safety issues was not the reason for the dismissal. Mr Cumming's witness statement is to the same effect.

Summary of correct approach to an interim relief application.

11. Under section 129(1) the application should be granted if it appears to the Tribunal that it is likely that on determining the complaint to which the application relates the Tribunal will find that reason or principal reason for dismissal was one of the statutory automatically unfair reasons . "Likely" in this context means that C must show that case has "a pretty good chance" of success, which means that something better than likelihood on the balance of probability (i.e. better than a 51% chance): Taplin v C Shippam Ltd [1978] ICR 1068, as approved and followed in London City Airport Ltd v Chackro [2013] IRLR 610 at para 10.

12. The ET must be satisfied that the Claimant is "likely" to succeed on each necessary aspect of his claim, before relief can be granted.

13. The application falls to be considered on a summary basis. The Employment Judge's role is to do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases, and to make as good an assessment as he is promptly able of whether the Claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. He must make an expeditious summary assessment as to how the matter looks to him on the material that he has. This will involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim.

Summary of law regarding dismissal contrary to section 103A ERA 1996

14. An employee is automatically unfairly dismissed if the reason or principal reason for the dismissal is that they have made a protected disclosure: s103A ERA 1996.

15. The employee bears the burden of establishing both that a qualifying disclosure was made and that the principal reason for dismissal was the qualifying disclosure, in circumstances where the employee does not have the necessary 2 year qualifying service for an unfair dismissal claim: Kuzel v Roche Products [2008] ICR 799 (at ¶61).

16. As to the reason for dismissal, the Tribunal must enquire into the mind of the decision maker – the "but for" test is not appropriate: Salisbury NHS FT v Wyeth UKEAT/0061/15.

17. A disclosure will amount to a qualifying disclosure if the following criteria in s43B ERA 1996 are satisfied: there must be a disclosure of information; which in the reasonable belief of the worker making it; tends to show that one or more of the specified types of malpractice, wrongdoing or failure has taken place, is taking place or is likely to take place; and that the worker reasonably believed that the disclosure was made in the public interest.

18. In Cavendish Munro v Geduld UKEAT/1095/09 the EAT provided the following guidance as to the meaning of "information" (at ¶24): the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around". Contrasted with that would be a statement that "You are not complying with Health and Safety requirements". In our view this would be an allegation not information '

19. Where reliance is placed on s43B(1) ERA 1996 (breach of legal obligation) and/or s43B(1)(d) ERA 1996 (danger to health and safety) in determining the "reasonable belief" issue, the Tribunal has to determine that the worker: (1) subjectively believed at the time that the disclosure was in the public interest and tended to show a breach of a legal obligation and/or danger to health and safety (as relevant in this case), and (2) that such belief was objectively reasonable: Babula v Waltham Forest College [2007] ICR 1026.

Consideration and Conclusions

20. I think it is likely (as defined above) that the Tribunal at the FMH would find that the Claimant's communications as summarised in paragraph 8 and 9 above were protected disclosures. They contain specific concerns about wiring and safety issues which the Claimant may well have been concerned about, and which, if true, the communication of which to the Claimant's line manager could be regarded as being in the public interest. While it may not be in the public

interest to prevent a specific Respondent employee falling off a step ladder, it could well be in the public interest for the Claimant to have reported his concerns about the installation of unsafe mains wiring and alarm systems in a bank. I make no finding whether the Claimant was correct in having these concerns.

21. However, I think it is unlikely that the Tribunal will conclude that the Claimant's complaints, or his references to health and safety concerns and wiring concerns in those complaints, were the cause of his dismissal. The Claimant's complaint was mainly about the altercation and the focus at the meeting on 25/1/23 is likely to have been on that rather than on the comparatively insignificant references in the Claimant's email to health and safety/electrical wiring matters.

22. I make no final finding binding on any trial Tribunal, but I think it is likely that the reason for dismissal was the fact that a serious altercation had taken place in a client work place between Mr Reyland and the Claimant and that the line managers concluded reasonably, on the available evidence, that this was primarily the fault of the Claimant, who had acted aggressively. If as the managers will say, that was their conclusion, then dismissal of the Claimant (who was still in his probation period) for that reason would have been a natural response.

23. I therefore conclude that the Claimant does not have "a pretty good chance" of success in his section 103A claim, and his claim for interim relief is dismissed.

J S Burns Employment Judge
6/04/2023

Sent to the parties on
19 April 2023

For the Tribunal Office