EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
Diego Arroyo Ornelas	**Fidera Management Limited and others**

Heard at: London Central (by CVP) **On**: 1 March 2023

Before: Employment Judge Lewis

Representation

For the Claimant: Mr R Dennis, Counsel

For the 1st Respondent: Mr C Glyn, KC

RESERVED JUDGMENT ON INTERIM RELIEF

The application for interim relief is not granted.

REASONS

Claims and interim relief application

1. This is an application for interim relief against the 1st respondent.

2. The claimant presented his Claim form on 8 February 2023 naming four respondents. He brought claims for whistleblowing detriment, automatic unfair constructive dismissal for whistleblowing, and for ordinary unfair constructive dismissal. Later on 8 February 2023, the claimant submitted an application for interim relief in respect of his claim for automatic unfair dismissal as a result of making one or more protected disclosures. The claimant copied his application to each of the respondents.

3. The parties had worked hard in preparation for this hearing. I was presented with skeleton arguments from each Counsel; a trial bundle of 294 pages from the claimant as an exhibit to his witness statement; a separate trial bundle of 325 pages prepared by the respondent; the claimant's witness statement (39 pages); a bundle of 8 witness statements from the respondent totalling 89 pages; a chronology and cast list; and a bundle of authorities.

4. The agreed approach was that I would read the claimant's witness statement and each skeleton argument and then each Counsel would have one and a half hours to make submissions, referring to any extracts from the witness statements which they wished to draw attention to. They each then had a short right of reply. I was not asked to read all the witness statements.

5. Mr Glyn is instructed by all the respondents but for the purposes of the interim relief, he was representing the 1st respondent against whom the application was made.

The law

Whistleblowing

6. Under Employment Rights Act 1996, s103A, it is automatic unfair dismissal if the reason or principal reason for dismissal is that the employee made a protected disclosure. Under s43B(1), a 'qualifying disclosure' means any disclosure of information which, in the claimant's reasonable belief was made in the public interest and tended to show, inter alia, that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject or that information tending to show this had been or was likely to be deliberately concealed.

7. There can in principle be a distinction between a protected disclosure and conduct associated with or consequent on the making of the disclosure. The fact-finding tribunal has to evaluate whether the reasons really were separate from the protected disclosures.(Kong v Gulf International Bank (UK) Ltd [2022] EWCA Civ 941. See also Bachnak v Emerging Markets Partnership (Europe) Ltd UKEAT/0288/05 and Bolton School v Evans [2006] EWCA Civ 1653.)

8. In Kuzel v Roche Products Ltd [2008] IRLR 530, the CA said this regarding the burden of proof on claims for automatic unfair dismissal for making a protected disclosure. Where an employee positively asserts there was a different and inadmissible reason for his dismissal, eg making protected disclosures, he must produce some evidence supporting the positive case. However, he does not have to discharge the burden of proving dismissal was for that reason. It is enough to challenge the employer's reason and provide some evidence for doing so. Then having heard the evidence for both sides, the tribunal should make findings of fact based on direct evidence

or reasonable inferences from primary facts. The tribunal must then decide what the reason or principal reason for dismissal was. If the employer does not show to the tribunal's satisfaction that the reason was what it asserts, it is open to the tribunal to find it is what the employee asserted. The tribunal is not obliged to so find, although that may often be the case.

Constructive dismissal

9. The claimant says he resigned because of a breach of the implied term of trust and confidence by his employer. It is a well-known test. An employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

10. The repudiatory breach or breaches need not be the sole cause of the claimant's resignation. The question is whether the claimant resigned, at least in part, in response to that breach. (Nottinghamshire County Council v Meikle [2004] IRLR 703, CA; Wright v North Ayrshire Council UKEATS/0017/13.)

11. In ordinary unfair dismissal claims under s98(4), an employer must prove the reason for dismissal. If it was a constructive dismissal, the employer must prove its reasons for its conduct which entitled the employee to resign (Berriman v Delabole Slate Ltd [1985] ICR 546, CA).

12. There is a dispute between the parties as to the effect of constructive dismissal in a whistleblowing situation. Mr Dennis argued that there are two stages: first, did the claimant resign at least in part, because of a repudiatory breach; therefore it is sufficient for only one of the six breaches identified at paragraph 63 of his Grounds of Claim to be repudiatory. Second, was the reason or principal reason for the breach in question that the claimant made a protected disclosure?

13. Mr Glynn said this was wrong. He pointed out the test for detriment and the test for dismissal is different (which I accept). He said that Meikle was a discrimination claim, not one for whistleblowing. He argued that the claimant must prove the reason or principal reason for resigning was in response to the protected disclosures. As six reasons had been pleaded in the claim form, this meant that at least three of those reasons must relate to his protected disclosure.

14. I did not hear full argument on this, but I think it is likely that the tribunal at the full merits hearing would accept Mr Dennis's position. The protected disclosure must be the sole or principal reason for the dismissal (including a constructive dismissal), not for the resignation.

Interim relief

15. Under s128(1) of the Employment Rights Act 1996, an employee who presents a complaint to an employment tribunal that her dismissal was

automatically unfair under s103A may apply to the tribunal for interim relief. The tribunal will order interim relief if it appears 'likely' that on determining the complaint to which the application relates a tribunal will find the reason (or if more than one the principal reason) for the dismissal was that in s103A.

16. There is long-standing guidance from the EAT on the meaning of 'likely' in Taplin v C Shippam Ltd [1978] IRLR 450:

> Nor do we think that it is right in a case of this kind to ask whether the applicant has proved his case on a balance of probabilities in the sense that he has established a 51% probability of succeeding in his application, as has at one stage been contended before us. Nor do we find Mr Hands' alternative suggestion of a real possibility of success to be a satisfactory approach. This again can have different shades of emphasis. It seems to us that the section requires that the employee shall establish more clearly that he is likely to succeed than that phrase is capable of suggesting on one meaning. On the other hand it is clear that the Tribunal does not have to be satisfied that the applicant will succeed at the trial. It may be undesirable to find a single synonym for the word 'likely' but equally, we think it is wrong to assess the degree of proof which has to be established in terms of a percentage as we have been invited to do. We think that the right approach is expressed in a colloquial phrase suggested by Mr White. The Tribunal should ask itself whether the applicant has established that he has a 'pretty good' chance of succeeding in the final application to the Tribunal.

17. In Dandpat v University of Bath and others UKEAT/0408/09, the EAT said this:

> Taplin has been recognised as good law for 30 years. We see nothing in the experience of the intervening period to suggest that it should be reconsidered. On ordinary principles, we should be guided by it unless we are satisfied that it is plainly wrong. That is very far from being the case. We do in fact see good reasons of policy for setting the test comparatively high, in the way in which this Tribunal did, in the case of applications for interim relief. If relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the claimant, until the conclusion of proceedings: that is not consequence that should be imposed lightly.

18. In London City Airport Ltd v Chacko UKEAT/0013/13, the EAT again endorsed the Taplin guidance:

> As long ago as the decision of this Employment Appeal Tribunal in Taplin v C Shippam Ltd [1978] ICR 1068 it was held that the appropriate test is higher than simply establishing that the balance is somewhat more in favour of the employee's prospect of success. It must, on the authority of Taplin, be established that the employee can demonstrate a pretty good chance of success. While that cannot substitute for the statutory words, it has been the guiding light as to the meaning of "likely" in this context that has been applied over the subsequent three of more decades by the EAT

The parties' arguments and my conclusions

19. As I told the parties, my conclusions are based on the arguments and limited evidence put to me. These are preliminary views which should not affect the findings of the tribunal at the full merits hearing.

20. Although, for reasons I shall explain, the claimant has not met the high threshold of 'likely' to succeed, I am not saying the claimant has a weak case. However, it will need to be fully explored at a hearing.

Background facts

21. The claimant was employed as an investment adviser by the 1st respondent, Fidera Management Limited. He was originally employed by York Capital Management Europe (UK) Advisors LLP ('YDAF'). His employment transferred under TUPE to Fidera Vecta Limited in March 2022 and to the 1st respondent in September 2022.

22. The claimant had been part of the YDAF team which was led by the 2nd respondent, Mr Rafiq, as fund manager. In the period 2020 – 2022, Mr Rafiq was involved in negotiations to transfer the management of investment funds from YDAF to a new entity, Fidera Vecta. Many of the alleged disclosures relate to assurances made by Mr Rafiq to investors and employees concerning the transfer.

The alleged disclosures

23. The alleged protected disclosures were contained in two letters, the first dated 21 October 2022 written by the claimant to the 4th respondent, Ms Meldrum, the Chief Compliance Officer ('PID1'). This letter contained essentially 3 disclosures. The second letter was dated 1 January 2023 ('PID2') and emailed to Ms Meldrum, Ms Goulding and Ms Bussinger. This related to one transaction for the purchase of a hotel.

24. In respect of investors, the legal obligations which had allegedly been breached were essentially requirements of integrity in the FCA's Handbook. Some of the disclosures concerned personal matters involving the claimant's contract. I am simplifying for the purposes of these Reasons, but I have considered them in detail.

25. Mr Glyn said that the 1st respondent did not accept the claimant had reasonable belief either that there was a breach of legal obligation or that disclosure was in the public interest. However, he was going to concentrate his submissions on causation.

26. I am conscious that it is not necessary for all the alleged disclosures to amount to a protected disclosure. I am also mindful of the fact that the claimant need not have been right in his suspicions. He only needed a reasonable belief. My problem at the interim relief stage was the detail and complexity of the corporate relationships.

27. I do not feel that I can say at this preliminary stage say the claimant is 'likely' to prove he made protected disclosures. The most problematic issue is whether the claimant's beliefs that there was or might be a breach of legal obligation were 'reasonable'. This requires an examination of what documentation he had looked at and what information was in his possession. So for example:

    27.1. In relation to the disclosure that Mr Rafiq misled Investors and the Team, particularly by disguising that daily control would no longer be with Mr Rafiq but with Mr Bour, Mr Glyn says this was not a reasonable belief, because the claimant had all the relevant documents, from which it was clear to someone with his knowledge in the field that Mr Rafiq retained sole legal control. A tribunal would need to see exactly what the representation was to Investors and the team, and whether legal control was relevant or not.

    27.2. In relation to the disclosure that Mr Rafiq misled Investors as to the stability of the Team in order to induce them to transfer $2.5bn Assets, I was unable to examine the full facts before the claimant. The claimant alleged that Mr Rafiq had explicitly stated the entire team was staying whereas in the previous two months, 3 of the 4 investment professionals had resigned, and 2 of those 3, although they had reneged on that, had negotiated reductions in their notice period to 1 week or less. Mr Glyn says this was not a reasonable belief because it was a team of 23 and 18 of the team did move. A tribunal would need to resolve this difference in evidence.

28. I am not going to attempt to go through all the evidence and arguments on each of the alleged disclosures because, even if it were likely that a tribunal would find some of the disclosures were protected, I cannot say it meets the 'likely' threshold that these were the reason or principal reason for the claimant's constructive dismissal.

<u>The alleged breaches leading to resignation</u>

29. For the purposes of the interim relief application, Mr Dennis wanted to rely on three matters (inter alia) over which he said the claimant resigned:
    29.1. The decision on 30 November 2022 to defer the determination and payment of the claimant's 2022 bonus
    29.2. The alleged 'protected conversation' on 24 January 2023
    29.3. The claimant's suspension on 1 February 2023.

<u>Bonus</u>

30. Annual bonuses were normally paid in December. On 21 October 2022, the claimant made his first batch of protected disclosures. In his cover note to Ms Meldrum, he said he was unsure whether the whistleblowing or grievance procedure applied; he believed his disclosures were in the public interest, but they had also had an effect on him personally. On 22 November 2022, the

claimant emailed Ms Goulding to say he had not heard anything about what investigations had been carried out into his protected disclosures. He said he had been informed the previous day that he would be facing a formal performance improvement plan. He said he wished to add the detriments he was experiencing as a result of his disclosures to his grievance. He asked that first the matter be dealt with under the Whistleblowing Policy and then for his personal grievance to be heard.

31. On 22 November 2022, Ms Goulding emailed the claimant to say the 1st respondent had investigated the claimant's whistleblowing complaints about external matters and had taken appropriate steps. Regarding internal matters, did the claimant wish these to be dealt with under the grievance procedure?

32. On 28 November 2022, the claimant wrote to say he had already raised a written grievance; that the company had refused to consider that grievance; and he now wished to raise a further grievance. He added a list of supplemental issues which included that, on 21 November 2022, in an evening performance review discussion, Mr Rafiq had told him that his bonus would be down from $500k and had indicated that the date of payment would move from December to the end of January.

33. On 29 November 2022, Ms Bussinger emailed the claimant to say that 'now you have raised this grievance, I think it only appropriate that your performance review process be postponed to allow the company to address your grievance'. She proposed an initial meeting on 5 December 2022. The claimant replied that he was unhappy that the performance review process was merely postponed rather than stopped, and he still wished to be paid his bonus in December as usual. Ms Bussinger replied on 30 November 2022 that it was impossible to be precise about how long the grievance investigation would take, but given that the claimant had raised concerns about fundamental breach on his work, the sensible course was to postpone determination of his bonus until the conclusion of the grievance investigation and the subsequent performance procedure.

34. Mr Dennis asks why on 21 November 2022, Mr Rafiq had said the bonus would be delayed till end of January, whereas on 30 November 2022, he was told it would await the end of the grievance procedure and subsequent performance procedure. Mr Dennis says the only thing that had changed was that Mr Rafiq and Mr Bour had been told for the first time (on the respondent's case) about the claimant's protected disclosures. This had happened at a meeting with Ms Meldrum, Ms Bussinger, Ms Goulding and the 1st respondent's legal advisers to discuss the protected disclosures.

35. Mr Glyn says the trigger for the proposed bonus delay was that the claimant had on 28 November 2022 submitted his grievance (without the whistleblowing elements) about the performance process. Logically this needed to be completed before the performance process could proceed and then the bonus be decided upon.

36. I think this point on causation is open to exploration at the hearing, and will also need to be looked at in a wider context, including the claimant's contention that until he made protected disclosures, he had not received criticisms of his performance for nearly 10 years, and indeed more recently that Mr Rafiq had sought to tie him down to the company. All this requires evidence. I cannot go as far as saying at this point that it meets the high threshold of 'likely' to succeed because I see the arguments both ways.

Protected conversation

37. On 24 January 2023, the claimant was invited to a 'protected conversation' with Ms Meldrum and Ms Bussinger. The claimant says this did not satisfy the statutory requirements of a protected conversation, and that it was held because of his protected disclosures. As I have said, the claimant made his first batch of disclosures on 21 October 2022 and his second batch on 1 January 2023, the latter to Ms Meldrum, Ms Goulding and Ms Bussinger.

38. Ms Meldrum began by reading a pre-prepared script. As this was a written script, there is no dispute as to what she said.

39. The script said that they were having a protected conversation under section 111A which meant that the facts and the conversation may not be admissible in any subsequent unfair dismissal claim. Ms Meldrum then moved on to say that the respondent had discovered the claimant appeared to be in serious breach of the respondent's IT and Cybersecurity Policy. Preliminary investigations had revealed that over a substantial period of time, he had been transferring substantial amounts of company files and data to WhatsApp. She said investigations were continuing and may well reach the stage where they had to suspend the claimant pending possible disciplinary action. She said that was a situation they would prefer to avoid given the business's long relationship with the claimant. With that in mind, they were asking him to spend 4 days away from work 'to reflect on the situation' and after that, they would meet again.

40. Mr Dennis argues that this shows the respondent was trying to pressurise the claimant to resign because of his protected disclosures. He says that if the respondent was genuinely concerned about the misuse of company information, the natural first step would have been simply to ask the claimant whether and why he had removed confidential information, rather than jumping straight to a s111A discussion whose statutory purpose is negotiations with a view to termination of an employee's employment on agreed terms. The claimant believes further that the reason for wanting him to leave was his protected disclosures.

41. Mr Glyn argues that no employer, on finding a data breach, goes straight to the employee in question, as the employee can make it difficult to investigate by hiding their traces. An employer will always do a level of investigation first. Indeed when looking at what the claimant actually did, albeit that the respondent did not fully know at the time, such caution makes sense. Mr Glyn says the evidence subsequently showed that the claimant had

taken elaborate steps when he was transferring documents to hide that he was doing so; that he had taken a large number of documents; and that when he was asked to return his company iPad and smartphone having been alerted to the fact that the 1st respondent was aware, he had wiped them clean.

42. The 1st respondent's witnesses will say that the purpose of the protected conversation was not to manage the claimant out of the company, but to avoid having to suspend him, by asking him to stay away voluntarily. Mr Glyn says even if a tribunal believed the true reason was that the 1st respondent did indeed want the claimant to leave, the reason would have been the data breach, not the protected disclosures.

43. The key sequence of events was as follows, although this inevitably omits other potentially relevant events which the final tribunal will consider.

44. Ms Meldrum will give evidence that on 10 January 2023, she was told by a senior employee (Mr Nagly) that he had seen the claimant dragging items from his pc screen into a WhatsApp online in another screen. This would mean those items were leaving the 1st respondent's IT systems. Ms Meldrum says Mr Nagly was unaware of the protected disclosures.

45. The 1st respondent decided to instruct a firm of forensic IT experts to investigate. Ms Meldrum will say that the firm investigated from 10 – 24 January 2023 and the 1st respondent discovered on 24 January that the claimant had shared files with himself in breach of company policies.

46. On 23 January 2023 there was an exchange of emails between the claimant and Mr Rafiq. This appears to be part of the recent micro-management and criticisms of his work which the claimant refers to. The claimant's email concluded:

'On a related note, as you are intimately aware throughout the almost 10 years that we have worked together you have truly been a supportive and trusted mentor and a valued personal friend. Your current behaviour toward me has left me extremely hurt. I increasingly feel like you now have no interest in my wellbeing, professionally or personally'.

47. On 24 January 2023 was the 'protected conversation'. The claimant will say he received a calendar invitation to the meeting with Ms Meldrum and Ms Bussinger at 16.45 on 24 January and was collected from his desk and escorted to a meeting room with no indication as to what the meeting would be about.

48. On 25 January 2023, when the claimant had returned the company supplied iPad and smartphone as requested, the 1st respondent discovered that both devices had been completely wiped of data. The claimant had also refused to hand over the company SIM card as requested. (The request was after the protected conversation took place.) Ms Meldrum wrote to the claimant about this the same day. She said that as discussed the previous

day, investigations showed he had transferred numerous files and data over several months outside of the company's IT network and systems. Some of that data was the subject of binding non-disclosure agreements with third parties. The claimant was required to provide a full list of all data and files which he had transferred.

49. The investigations into the alleged data breach and arguments regarding whether the claimant was cooperating escalated in the following days.

50. It was not made clear to me exactly what the 1st respondent knew about the level of the data breach at the time of the protected conversation or what triggered the discussion that particular day. However, it is clear that an outside IT firm was engaged to investigate data breaches in the period leading up to that conversation. If it is true that the original information came from Mr Nagly and that Mr Nagly did not know about the protected disclosures, it is significant that he thought a potential data breach serious enough to report. I can see why an employer might choose to carry out a level of investigation before alerting the employee in question. I can also see that the context of dispute over protected disclosures, grievances and micro-management may have put it in the 1st respondent's mind that it was possible the claimant was doing something unacceptable, whereas had there been no disputes, they may have given him the benefit of the doubt and just had a chat before starting any investigation.

51. As regards the protected conversation, I think it is likely that a tribunal would think it was intended to encourage the claimant to leave or to start a negotiation about leaving under the pressure of having discovered his unauthorised transferring of data. The 1st respondent was getting legal advice at the time and the script shows they knew what s111A meant.

52. However, I think there is still an argument to be had over whether the reason for this approach was because the claimant had made protected disclosures or because the respondent was concerned that matters had descended to unauthorised copying of confidential files and data (if that was a severable reason). I cannot at this stage go as far as saying it is 'likely' the claimant will show the principal reason the 1st respondent held the protected conversation as it did was because of the claimant's protected disclosures.

53. Mr Dennis did urge upon me in respect of this and other matters, that I should draw conclusions from the failure of respondent witnesses in their witness statements to deny certain actions were carried out because of the protected disclosures, when the witnesses had taken the trouble at other points in their witness statements to deny the connection with other actions. This is not an irrelevant consideration for the final tribunal, but I think it would want to hear the matter addressed on cross-examination, to be confident there was any significance in the omissions as opposed to drafting error or style.

<u>Suspension</u>

54. This is a continuation of the deteriorating situation.

55. In her letter of 25 January 2023, Ms Meldrum asked the claimant to provide by 5pm the next day, a full list of the files and data which he had supplied, and either written confirmation that he had disclosed none of those files or data to third parties or full details of what he had so disclosed. He was told he was not at that stage formally suspended, but they were asking him to refrain from carrying out any work duties other than as requested by Ms Meldrum.

56. On 27 January 2023, the claimant replied that he did not agree to staying away from work voluntarily. He considered that he had been suspended because of his protected disclosures. He said he had wiped his devices because they contained personal data. He had not shared and did not intend to share the files with anyone except for his legal advisers. He said he had retained copies of documents which he considered relevant to his employment with the firm including his whistleblowing complaints, his grievance and the poor performance procedure. He said he had stored the documents securely and was happy to send the 1st respondent a link so they could see what the documents were.

57. Ms Meldrum replied on 30 January 2023, stating that the claimant's reasons for wiping his devices and not returning the SIM card were not credible. She said failure to cooperate with the internal investigation, which was ongoing, could lead to disciplinary action including dismissal. She required the claimant to provide by 6 February 2023 a signed affidavit setting out a full list of the files he had transferred; how and when he had accessed them; why he believed he was authorised to access them; where he had transferred them to; whether he had made copies or printed them out; and whether he had deleted them. Ms Meldrum asked the claimant to continue to stay away on paid special leave.

58. The claimant replied the next day that he declined the request to stay away voluntarily as his absence from work was damaging his reputation. He stated his intention to return to work at 9 am the next day.

59. A few hours later, Ms Meldrum emailed that she would like to have a protected and privileged short conversation with the claimant and asked what number she could call him on.

60. The claimant did not take her up on this. On 1 February 2023, the claimant attended the office and was suspended. Ms Meldrum will say it was because she feared he may commit further data breaches. She says the purpose of the protected conversation would not have been to force the claimant to negotiate a termination as he alleges, but to explain to him the consequences of him being formally suspended, that they would have to notify the FCA and that may impact on his ability to find a job in the future. The claimant will say he was as good as told by Ms Meldrum on 1 February 2023 that unless he agreed to negotiate a termination of his contract in a protected conversation, he would be suspended.

61. I believe it is likely a tribunal would find that the purpose of the proposed protected conversation was to strongly encourage the claimant to negotiate a settlement to leave. However, was this because he had made protected disclosures or was it because relationships had soured to the point where the claimant was transferring company data and files? And was the latter a genuinely severable reason from the fact of the whistleblowing disclosures?

62. I also note that the claimant says no one tried to discuss his second protected disclosure with him right up to his suspension.

63. Had it not been for the data issue, I would have said that it was 'likely' a tribunal would find that the principal reason for holding the first so-called protected conversation, the attempt to have a second protected conversation and the suspension, was that the claimant had made protected disclosures. However, the fact that the 1st respondent discovered the claimant had secretly transferred data outside the firm without its consent complicates matters and could provide a different explanation for the 1st respondent's actions. It brings it below the 'likely' threshold for interim relief. It is something to be explored fully in a tribunal hearing.

Conclusions

64. For the above reasons, I do not grant interim relief. I cannot go as far as saying at this point that the claim is likely to succeed in the sense of having a 'pretty good chance of success'. However, as I have said, this should not be taken to mean I think it is a weak case. I do not think that it is weak.

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Employment Judge Lewis

Dated: ……2 March 2023……..

Judgment and Reasons sent to the parties on:

…….....2 March 2023.....

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For the Tribunal Office