EMPLOYMENT TRIBUNALS

Claimant: **Mr L Urwin**

Respondent: **Cleveland Transit Limited**

HELD at Newcastle CFCTC by CVP **ON: 13 April 2023**

BEFORE: **Employment Judge Loy (sitting alone)**

REPRESENTATION:

Claimant: **Mr Clegg, Lay representative**
Respondent: **Mr Nuttman, Solicitor**

JUDGMENT having been sent to the parties on 3 May 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

Background

1. By a claim form presented on 3 April 2023, the claimant brings a claim for automatically unfair dismissal contrary to section 103A Employment Rights Act 1996 ("ERA"). The claimant contends that the reason or principal reason for his dismissal was because he had made certain protected disclosures to his employer as defined in section 43B ERA.
2. The respondent is a bus transport operator. The claimant was employed by the respondent as a Chargehand which was a supervisory role and included duties such as fuelling and shunting buses in preparation for their next scheduled routes in accordance with operational timetables.

This hearing

3. This is an application for interim relief under section 128(1)(a)(i) ERA pending determination of the substantive complaint under section 103A ERA.

4. I explained to the parties the powers available to the Tribunal where interim relief is granted. The respondent confirmed that it was not willing to reinstate or otherwise reengage the claimant.

Factual considerations

5. The claimant provided a witness statement which was taken as read but upon which the claimant was not cross-examined. The Tribunal was also provided with a file of documents of 90 pages to which both parties had access.

6. The respondent contends that the sole reason for the claimant's dismissal was his misconduct. The respondent says that on 3 March 2023, the claimant withdrew his agreement to work on Saturday 4 March 2023 on less than 24 hours notice. This posed a direct risk to the respondent's ability to run its scheduled and published timetable services the following day.

7. The respondent says that the background to the claimant withdrawing his notice was a disagreement between the claimant and Mr Robertson. Mr Robertson was a co-worker of the claimant and Mr Elliot. The disagreement arose out of clearing up broken glass in the yard. The respondent says that the claimant did not want to work with Mr Robertson and that is the reason he withdrew his labour.

8. The respondent then arranged at short notice for another employee, Anthony Elliot, to cover the shift that the claimant had declined to work. The respondent says that the claimant then attempted to dissuade Mr Elliot from covering the shift despite the claimant knowing full well what the impact would be if the buses were not fuelled. The respondent believes that the claimant did this as part of his ongoing disagreement with Mr Robertson by attempting to leave Mr Robertson working on his own on what is a two person job. The respondent says that this was a wilful denial of the claimant's operational and supervisory responsibilities for which he was suspended, investigated and fairly dismissed.

9. It was common ground that the claimant was dismissed with effect from 28 March 2023. That dismissal was effected by a letter of 28 March 2023 in which dismissal was expressed to have immediate effect. The claim form was presented on 3 April 2023 within 7 days of the effective date of termination. A dismissal contrary to Section 103A ERA is within the restricted number of types of unfair dismissal claims that are susceptible to an application for interim relief under section 128(1)(a)(i) ERA. The Tribunal therefore has jurisdiction to consider this application for interim relief.

Protected Disclosures - the claimant's position

10. The claimant says he made three protected disclosures.

11. The first was said by the claimant to have been made orally by him to Mr McCleary (Fleet Manager) on Thursday 2 March 2023. This is set out as box 8.2 of the claim form and at paragraph 5b of the claimant's witness statement.

12. The second protected disclosure was in an email from the claimant to Mr McCleary on Sunday 5 March 2023. In both the first and second alleged disclosures the claimant says that he brought to Mr McCleary's attention that health and safety of individuals was likely to be endangered if Mr Elliott and Mr Richardson were to

work in close proximity due to the ill-feeling amongst the employees undertaking the fuelling and shunting. The second disclosure relates to the same issue.

13. The claimant says that these are disclosures of information which amounts to a reasonable and genuine belief tending to show that the health and safety of an individual was likely to be endangered. The claimant says that this disclosure therefore qualifies for protection under section 43B(1)(d) ERA and is protected under section 43C(1) ERA since the information was disclosed to his employer.

14. The third protected disclosure was said to have been made in writing by an email sent by the claimant to Mr McCleary on Sunday 5 March 2023. This email disclosed information regarding lost property which was put on social media in an effort to alert the loser. It is not referred to in the claim form.

15. The claimant says that this is a disclosure of information which amounts to a genuine and reasonable belief tending to show that the respondent was in breach of a legal obligation under the GDPR Regulations. The claimant says that this disclosure therefore qualifies for protection under section 43B(1)(b) ERA and is protected under section 43C(1) ERA since the information was disclosed to his employer.

16. Protected Disclosures - the respondent's position

17. The respondent says that the claimant has not disclosed any information that is likely to be considered by a tribunal at a final hearing to be a qualifying disclosure under section 43B ERA.

18. The first two alleged disclosures draw the respondent's attention to the fact that there were two employees who were not getting along. The respondent says that this is no more than information that two people have a fractious relationship in the workplace. It also lacks, the respondent says, the required degree of public interest to qualify for protection. It is a matter of day-to-day working life.

19. The third disclosure is not referred to in the claim form or the witness statement that the claimant has produced for this hearing. That shows its irrelevance to the claimant's claim.

Principal Reason for Dismissal – the claimant's position

20. The claimant says that the protected disclosures were the ulterior and real reason for the claimant's dismissal.

21. The claimant says that it is very rare for an employer to give whistleblowing as the express reason for dismissal. The reason given by this employer in this particular case was conduct as set out in its letter of 28 March 2023 at page 68 of the bundle.

22. The claimant refers to the absence of clarity and consistency around the ostensible reason for dismissal from which he invited the Tribunal to draw an inference that at a final hearing the tribunal is likely to find that the real reason for his dismissal was whistleblowing and not the reason which was ostensibly given.

23. Principal Reason for Dismissal – the respondent's position

24. The respondent's case is that the first and second protected disclosure do not disclose information tending to show the required level of endangerment to health and safety and do not fall within any of the other provisions of section 43B(1) ERA.

25. The third disclosure relied on today as I have said is not in the claim form so beyond the scope of today's hearing.

26. The respondent also points out that the claimant's position on whistleblowing is internally inconsistent. The claimant wants to say that his disclosures were not taken with the seriousness they deserved and yet at the same time he wants to maintain that those very same disclosures were the principal reason for his dismissal.

27. The respondent says that there is no reason to go looking for any different reason for the claimant's dismissal than the one expressly given to the claimant at the time, namely misconduct. The claimant was a supervisor whose responsibilities included ensuring that there was sufficient resource for the fuelling and shunting to be done so that the buses were ready to run the timetabled services the following day. Instead, the respondent says that claimant withdrew his labour due to a dispute he had with Mr Robertson, which to the claimant's obvious own knowledge would leave the respondent under resourced. The claimant then compounded the problem he had himself created by seeking to dissuade Mr Elliot from covering the gap on the shift that the claimant's change of mind had caused in the first place.

Relevant Law

28. The relevant statutory provisions and legal authorities are as follows.

30. Section 128 Employment Rights Act (ERA) 1996 provides:

128 Interim relief pending determination of complaint.

An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and —

that the reason (or if more than one the principal reason) for the dismissal is one of those specified in —

> *section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or*
>
> *paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, …*
>
> *may apply to the tribunal for interim relief.*

31. The question to be considered upon an application for interim relief is set out in section 129 ERA 1996:

129 Procedure on hearing of application and making of order

> *This section applies where, on hearing an 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 that the reason (or if more than one the principal reason) for the dismissal is one of those specified in section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A.*

32. Interim relief can therefore be ordered where the Tribunal finds that it is likely that a final hearing will decide that the reason (or principal reason) for dismissal was that the employee had made protected disclosures contrary to section 103A ERA.

33. The meaning of the words "likely" for these purposes has been considered in several cases. In *Taplin v Chippam [1978] IRLR 450 EAT, (*decided under similar provisions relating to interim relief applications in dismissal for trade union reasons) the EAT held that it must be shown that the claimant has a "pretty good chance" of succeeding, and that that meant something more than merely on the balance of probabilities.

34. A "pretty good chance" of success was interpreted in the whistleblowing case of *Ministry of Justice v Sarfraz [2011] IRLR 562, EAT,* as meaning "a significantly higher degree of likelihood than just more likely than not". Underhill P stated in Ministry of Justice v Sarfraz that, "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."

35. The claimant must show the necessary level of chance in relation to each essential element of section 103A ERA, see *Simply Smile Manor House Ltd and Ors v Ter-Berg [2020] ICR 570*.

36. The claimant must therefore show that it is likely that the Tribunal at the final hearing will find that:

(1) He made the disclosure(s) to the employer;

(2) He believed that it or they tended to show one or more of the matters listed in the ERA 1996 section 43B(1);

(3) His belief in that was reasonable;

(4) The disclosure(s) was or were made in the public interest; and

(5) The disclosure(s) was or were the principal cause of the dismissal.

37. "Protected disclosure" is defined in section 43A ERA 1996,

In this Act a " protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

"Qualifying disclosures" are defined by section 43B ERA 1996,

43B Disclosures qualifying for protection.

(1) In this Part 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 —

…

that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject ..

that the health or safety of any individual has been, is being or is likely to be endangered …

38. The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations *Cavendish Munro Professional Risk Management v Geldud [2010] ICR; and Kilraine v LB Wandsworth [2016] IRLR 422).*

39. The test for "reasonable belief" is a subjective test.

40. In determining whether the reason for the claimant's dismissal was his alleged disclosure(s), it is not sufficient for the disclosure to be "in the employer's mind" or for to have influenced the employer. The Tribunal must consider whether that disclosure was the "sole or principal reason" for his dismissal.

Decision

29. I have to assess whether it appears that at a final hearing it would be likely that the Tribunal would find that the claimant succeeded in each elements of an automatically unfair dismissal claim for having made protected disclosure.

30. I must therefore assess the likelihood that at a final hearing the Tribunal will conclude that the claimant made protected disclosures and that one or more of those protected disclosures were the reason or principal reason for the claimant's dismissal. These are the key issues which will determine the success or failure of this particular application for interim relief.

31. There are a number of inherent difficulties in the claimant's case before me today. It is the claimant's own position that the respondent was not taking his complaints of the danger posed by Mr Elliot and Mr Richardson working together sufficiently seriously, treating the matter in Mr Clegg's own words as "par for the course".

32. To my mind that involves a plain inconsistency with the claimant's own contention that the real reason for his dismissal was the disclosure of certain information. Mr Clegg describes that as a paradox. Whether paradoxical or not, the threshold of likely success at a final hearing is not in my judgement made out. Similarly at page 51 of the bundle, there is an email from the claimant asking to be relieved of his chargehand duties. This is consistent with the respondent's case that the claimant was uncomfortable with supervisory or managerial functions.

33. The reliance placed by the claimant on the respondent's reference to 3 as well the 4 March 2023 in the letter of dismissal does not take the claimant's case any further forward. As Mr Nuttman pointed out, it was the events of 3 and 4 March 2023 that led to the claimant's dismissal. It was on these dates that the claimant initially agreed to cover a weekend shift, then resiled from that commitment, then (unbeknown to Mr McCleary) contacted Mr Elliot with a view to dissuading Mr Elliot from covering the shift the claimant had already backed out of. That is what the respondent says led to the claimant's dismissal.

34. There is a cogency to the respondent's argument that the reason for dismissal can and should be taken at face value, not least because the central facts are not disputed by the claimant. In contrast, there are inconsistencies in the claimant's submissions with the effect that in my summary assessment it cannot realistically be said that the Tribunal would be likely to find the ostensible reason (conduct) was not the real reason for the claimant's dismissal.

35. Nor does it assist the claimant whether he advised Mr Elliott that Mr Richardson would be working on the weekend shift or if he advised Mr Elliot not to work that shift. However it is put, the claimant was giving Mr Elliot information or advice the consequence of which would be to deter Mr Elliot from undertaking the shift that the claimant had himself resiled from working and which Mr Elliot had already agreed to cover. The practical effect would be to leave Mr Richardson as a sole worker on the shift, an outcome which the respondent says the claimant may have desired given the difficulties in the claimant's relationship with Mr Richardson but which would put the respondent's operational responsibilities in significant jeopardy. These are all highly fact sensitive matters that are not possible to assess to the standard of likelihood that needs to be met in an application for interim relief.

36. Similarly, I find that it cannot be said that the tribunal is likely upon determining the complaint to find that the claimant has made protected disclosures. The first two alleged protected disclosures are not concerning matters that a Tribunal is likely to consider without further explanation tend to show the endangerment of health and safety or breach of a legal obligation; and are there is on the face of things a highly arguable case that neither were made with a reasonably held belief that the information being disclosed was a matter in the public interest. The third alleged protected disclosure was not even pleaded. In any event, like the first two disclosures, there is no cogent basis on which to consider that they were in any way causative of the claimant's dismissal.

37. This is necessarily a broad brush assessment made at a preliminary stage. Matters may look very different at a final hearing when all of the evidence is presented and tested in cross-examination. I must, however, make a summary assessment and having done so, I find that the claimant has failed to meet the threshold for the granting of interim relief.

38. I therefore refuse this application.

Employment Judge Loy
8 May 2023

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