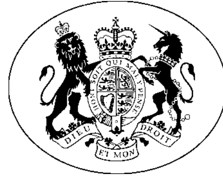
Case No: 1600182/2023

1600595/2023



EMPLOYMENT TRIBUNALS

Claimant:	**Mr G Davies**	
Respondent:	**University of South Wales**	
Heard at:	**Cardiff (in public)**	**On: 30 May 2023**
Before:	**Employment Judge R Brace**	

Appearances
For the Claimant: Ms A Mison (Lay representative)
For the Respondent: Ms S Keough (Counsel)

Reserved Judgment on Interim Relief

The Claimant's application for interim relief is dismissed.

Reasons

1. This was a reserved judgment, insufficient time having been allocated to deliver an oral judgment.

2. The Claimant was represented by Ms Mison, a lay representative and previously a colleague of the Claimant whilst he had been employed by the Respondent.

3. At the outset of the hearing, Ms Mison confirmed that the Claimant did not seek reinstatement or re-engagement, but was looking for continuation of the contract of employment. Later in the hearing, she confirmed that the Claimant would be prepared to be reinstated.

4. Some time was spent before hearing submissions understanding what documents had been filed and were relied on by the Claimant, the Claimant providing a further hard copy file of papers to the Tribunal on the morning of the hearing.

5. The Respondent had filed a 117 page bundle of documents and documents from that bundle are denoted by [] in these written reasons. They also relied

on a Response to the Application for Interim relief document and a Skeleton Argument.

6. The Claimant had previously emailed a large body of documents to the Tribunal and it was agreed, after an adjournment to enable the parties to work together to agree which documents would be relevant, that in addition to the Respondent's bundle, the hard copy file from the Claimant would be referred to which, in addition to further copies of the ET1, ET3, ACAS Certificate and Notice of Hearing, included documents entitled:

    a. 3 Questions to be answered for the Interim Relief Hearing; and

    b. Evidence Items 1-8.

7. No witness statements were provided by the Claimant and no verbal evidence was relied on.

8. It was agreed that:

    a. the Claimant had been employed by the Respondent and that on 10 January 2023 had submitted his resignation, giving notice for his employment to terminate on 10 April 2023.

    b. On 31 January 2023, the Claimant had filed an employment tribunal claim, having first entered into early conciliation on 16 December 2022, conciliation which had ended on 19 December 2022 (EC Certificate R148305/23/60). That ET1 had attached a 22-page Word document in which the Claimant set out some details of his claims dating back to December 2021. The Claimant brought a complaint, amongst other complaints, of automatic unfair dismissal but did not include an application for interim relief within that ET1.

9. For reasons not within my knowledge, that ET1 claim was not processed by the Cardiff tribunal administration on receipt or by 21 March 2023, when the Claimant filed a second ET1 claim [36]. The Claimant did not include an EC number within that claim but did, in Box 2.3 of that ET1 claim form, indicate that his claim consisted only of a complaint for constructive unfair dismissal which contained an application for interim relief. The word attachment to that ET1 claim appeared to cover some of the facts set out in the first ET1 and made clear that the Claimant was seeking interim relief.

10. On 7 May 2023, Angela Mison, the Claimant's representative emailed the ET as follows:

    'Due to the passage of time, please could you update me on the progress of this application for interim relief'

11. Both claims were referred to Judge Povey on 17 May 2023 who directed that both claims be accepted and that the Claimant's application for interim relief be listed for 3 hours today.

12. The Respondent accepts that the application for interim relief, made on the second ET1 claim form, was made in time despite their further assertion that the second claim from was itself an abuse of process, being a duplication of the constructive unfair dismissal claim set out in the first claim form, and ought to be struck out.

13. The Claimant's representative explained that the second claim was indeed a duplication of the first claim and had only been issued as the Claimant had believed that an application for interim relief had to be made within an ET1 claim.

14. We considered the impact of that duplicated claim for the purposes of today's application and it was accepted by the Respondent that the Claimant has made a procedurally correct application for interim relief. This was therefore not an issue of dispute and I accepted that the Claimant had complied with the provisions of s.128(2) Employment Rights Act 1996 ("ERA 1996").

15. The issue of whether the second ET1 claim should be struck out will be dealt with by way of separate directions.

The Law

16. Under s128(1) ERA 1996 an employee alleging unfair dismissal can claim interim relief if the reason (or principal reason) for the dismissal was one of the reasons set out in sub-section s128(1)(a). This include making a protected disclosure under the Public Interest Disclosure Act 1998 (s.103A ERA).

17. If the claimant has made a procedurally correct application the Tribunal must go onto to decide whether it is likely that he will succeed at the full hearing of the unfair dismissal complaint (s129 ERA 1996).

18. When considering the 'likelihood' of the claimant succeeding, the correct test to be applied is whether the claimant has a 'pretty good chance' of succeeding at full hearing (**Taplin** v **Shippam Limited [1978] IRLR 450 EAT**), which is greater than balance of probabilities.

19. A 'pretty good chance' was interpreted in a whistle-blowing 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'. The Claimant must also show the necessary level of chance in relation to each essential element of s.103A ERA (**Simply Smile Manor House Ltd and ors v Ter-Berg [2020] ICR 570**).

20. The Claimant must therefore show that it is likely that the Tribunal at the final hearing will find that:
    a. He made the disclosure(s) to the employer (or in accordance with any of the sections 43C – 43H ERA 1996);
    b. He believed that it or they tended to show one or more of the factors listed in s.43B(1) ERA 1996;

c. His belief in that was reasonable;
d. The disclosure(s) was or were made in the public interest; and
e. The disclosure(s) was or were the principal cause of the dismissal.

21. 'Protected disclosure' is defined in s43A ERA 1996 as a qualifying disclosure (as defined by s.43B) which is made by a worker in accordance with any of the sections 43C to 43H.

22. 'Qualifying disclosures' are defined by s.43B ERA 1996 as meaning 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 matters set out in s.43B(1) ERA 1996.

23. The disclosure must be a disclosure of information, of facts rather than opinion or allegation (**Kilraine v LB Wandsworth [2016] IRLR 422**) and the test for 'reasonable belief' is a subjective test.

24. Further, and in addition, in this constructive dismissal case, the Claimant has the additional hurdle of demonstrating that he has a 'pretty good chance' of showing that he was constructively dismissed, which will require the Claimant to show that the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent and that the treatment was related to the disclosure(s). In addition, the Claimant would need to demonstrate that he resigned in response to the breach and did not affirm the contract before resigning.

Decision

25. I was not persuaded that today the Claimant has demonstrated that it is likely that he will succeed at the full hearing of his automatic unfair dismissal complaint - I did not consider that it could be said that the Claimant had a 'pretty good chance of success' at full hearing (**Taplin**). In reaching this conclusion, I considered how the matter appeared to me on a broad assessment of the material available and not making any findings of fact.

26. Fundamentally, I was not persuaded that the Claimant was able to demonstrate that he was likely to succeed in his claim (in the sense had a 'pretty good chance of succeeding) that he had made any disclosure of information at all, whether to his employer under s.43C ERA 1996, or in the circumstances relied on today, under s.43G ERA 1996, to enable him to bring a claim of automatic unfair dismissal.

27. Some time had been spent at the outset of the Claimant's submissions, for the Claimant's representative to clarify the disclosures relied on by the Claimant. This had been far from clear from the reading of the Claimant's ET1s.

28. She confirmed that the disclosures relied on by the Claimant for the purposes of his automatic unfair dismissal claim were as follows:

    a. Three disclosures made not by the Claimant, but by Angela Mison set out in an email to Marie Hawtin (Exec PA to the officers of the University) on 10 October 2022:

        i. That the level of dissatisfaction and stress being experienced by cyber-security staff was such that Ms Mison would be surprised if there were not a staffing crisis in the short term. Newport and Treforest staff were compared to each other, are told that they are not good enough, that they should be happy to have jobs and are lucky that the cyber department was not closed (s.43B(1)(b) – breach of legal obligation - Health and Safety at Work Act);
        ii. That a potential ghost employee, who was reputedly in Pakistan due to flooding but had been reportedly teaching in Wrexham and was now associated with further university, was still on the email system and had recently been removed from 'Blackboard' with management request to say nothing about it (s.43B(1)(a) – criminal offence-fraud);
        iii. That interns, having carried out the removal from a secure facility in Treforest to an insecure facility reputedly in Newport of a server that was subject to chain of custody requirements, had been instructed to take care not to be seen by anyone (s.43B(1)(a) – criminal offence - s.51 Criminal Justice and Public Order Act 1994 and/or Part 2 Serious Crime Act 2007)

    b. A fourth disclosure, again made not by the Claimant but by Ms Mison, in an email on 21 October 2022 to Ceri Dixon, Paul Davies and Ben Calvert, that there was a breach in the chain of custody relating to servers used for forensic investigations which had a direct impact on the credibility and reputation of the university; that on return of the servers to Treforest, an attempt at cover-up seeking the agreement of the member of staff whose work was affected, was made (s.4sB(1)(f) – concealment).

29. In Evidence Item No 6, a document presumably created for the purpose of this hearing and headed 'Background to disclosures', those two emails from Ms Mison had been referred to and copies were included in Evidence Item No 2. A copy was also at [61] and [64]. In that document, it was also stated that *'On Gareth Davies' behalf, Angela Milson assumed she had made the public interest disclosure to' Ben Calvert, (Vice Chancellor).* That document also indicated that it had been assumed that as Paul Davies (Dean Faculty Computing) and Ceri Dixon (Interim Head of HR) had been assigned to address the contents of the disclosure, they too had notice of the disclosure.

30. Ms Mison confirmed that the Claimant did not rely on any disclosure he had personally made for the purposes of his automatic unfair dismissal claim. In

particular any disclosure made by the Claimant on 16 December 2022 [73], was not relied on in any submissions today and no copy was included in the Claimant's bundle, at least not such that my attention was drawn to it.

31. Although no evidence was provided during the hearing by way of witness statement, Ms Mison submitted that the Claimant had asked her to make disclosures on his behalf due to his existing and continuing fear of retaliation. It was accepted by Ms Mison that at no time did she indicate to the Respondent that she had made the disclosures on behalf of the Claimant. It was also accepted by her that the Claimant had not been referred to or named in these emails.

32. S.43B(1) and s.103A ERA 1996 refer to the worker and employee respectively having made the disclosure. Whilst the Claimant may argue at a full hearing for a purposive construction of the legislation in favour of giving him protection in circumstances where the disclosures relied on by him were not made by him, such a conclusion will require a fact-sensitive enquiry as to whether Ms Mison's disclosures (if indeed they amount to protected disclosures) could be regarded as having been made by the Claimant as well.

33. On the basis alone I consider that the Claimant is not at this stage able to demonstrate that he is likely to show that he made any disclosure that was protected and therefore it follows he is not able to demonstrate that any automatic unfair dismissal claim is likely to succeed and his application for interim relief is dismissed.

34. Whilst my decision is made on that basis, for completeness I would also add the following:

    a. Even if I was persuaded that the Claimant was protected by Ms Mison's disclosures and that such disclosures were qualifying, it was far from clear how the Claimant claimed that any qualifying disclosures were protected, the Claimant not relying on s.43C ERA 1996 i.e. to the employer, but the circumstances set out in s.43G ERA 1996;

    b. Despite taking the Claimant's representative through the provisions of that sub-section, and asking her to clarify if she was now asserting that any disclosures were protected as they had been made to her as opposed to the Claimant's employer, she was not able to identify or articulate how any disclosures that either she had made on behalf of the Claimant, or indeed the Claimant made to her, fell within that sub-section;

    c. Again, even if the Claimant was in some way able to establish that he had a 'pretty good chance' of relying on any disclosures made by Ms Mison (if they were qualifying), he failed to establish today that he was likely to succeed in establishing a constructive dismissal and/or in any event a causal link between any protected disclosures and his constructive dismissal. Whilst Ms Mison spoke at some length of the

detriments that she submits the Claimant was subjected to because of the disclosures she made on his behalf, including but not limited to his suspension and subsequent disciplinary process, the capability process and academic dispute, it was evident that the suggestion from the Claimant that there was some form of '*coming together and closing of ranks by management and the executive'*, which was accepted by the Claimant as sounding unbelievable, could only be established after testing the evidence of both parties.

35. On any of these further grounds, the Claimant would fail to meet the likelihood of success threshold.

36. This is a broad brush assessment and the position may change at a final hearing when all of the evidence is tested in cross-examination but I need to make a summary assessment at this preliminary hearing and having done so, consider that the Claimant has failed to meet the threshold for the granting of interim relief and on that basis the application for interim relief is refused.

Employment Judge Brace
Date: 31 May 2023

JUDGMENT SENT TO THE PARTIES ON 6 June 2023

FOR THE TRIBUNAL OFFICE Mr N Roche

Public access to employment tribunal decisions
Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.