EMPLOYMENT TRIBUNALS

Claimant: **Mr Mehmet Burak Ozkeles**

Respondent: **HSBC Bank Plc**

Heard at: **East London Hearing Centre**

On: **7 June 2023**

Before: **Employment Judge Eleena Misra KC**

Representation
Claimant: Mr. Paul Gilroy KC
Respondent: Ms. Diya Sen Gupta KC

RESERVED JUDGMENT

The Claimant's application for interim relief under section 128 Employment Rights Act 1996 ('**ERA**') in relation to his claim for automatic unfair dismissal contrary to section 103A ERA fails and is dismissed.

REASONS

The Application

1. The Claimant presented an ET1 on 21 March 2023. In that ET1 he applied for interim relief which application he further pursued in correspondence with the Employment Tribunal. The application was made in time the Claimant's employment having been terminated with effect from 14 March 2023.

2. The Claimant makes various claims including a claim for automatic unfair dismissal contrary to section 103A ERA and his application for interim relief under section 128-129 ERA relates to this matter.

3. The Respondent was served with the Claimant's ET1 and application; the deadline for submitting its ET3 has not yet passed and (understandably) no ET3 has been presented to date.

4. On 7 June 2023, at the hearing of the application, Counsel for the Claimant sought to amend the ET1 in the terms set out in the amended Further and Better Particulars of which notice was given to the Respondent. Counsel for the Respondent confirmed there was no objection to the amendment and, having regard to the nature of the amendment and the Respondent's position, as well as the overriding objective and the fact that the Respondent is yet to submit its ET3, I granted the amendment in such terms.

Documents

5. The documents I had before me in determining the application were as follows:

i. Agreed bundle of documents running to 352 pages in total.

ii. The Claimant's witness statement.

iii. The Claimant's skeleton argument and 4 authorities.

iv. The Claimant's amended Further & Better Particulars (in substitution for those appearing in the bundle).

v. A copy of a Final Notice issued by the Financial Conduct Authority (FCA) against another entity (Metro Bank Plc) provided by the Claimant as an example of a substantial penalty issued for a regulatory breach by the FCA.

vi. The Respondent's witness statement (Mrs. Alexis Meissner).

vii. The Respondent's skeleton argument together with a bundle of 21 authorities (representing most of those relied on by both parties).

viii. The Respondent's Chronology.

Procedure

6. It was common ground that I was not required to conduct a mini-trial and that my task was to conduct a summary or review type assessment of the materials available to me in reaching my decision, consistent with the approach suggested in Raja v SS for Justice UKEAT/0364/09/CEA which I canvassed with both leading Counsel at the outset of the hearing:

> *25. What a Tribunal has to do in an application for interim relief is to examine the material put before it, listen to submissions and decide whether at the final hearing on the merits "that it is likely that" that Tribunal will find that the reason or reasons for the dismissal is one or more of those listed in section 129(1).*

7. As such, the witnesses did not give oral evidence and it was not tested in cross-examination, consistent with the purpose of sections 128-129 ERA and the authorities as to the Tribunal's proper function in determining such applications.

8. The parties helpfully provided me with suggested pre-reading which I undertook before hearing submissions and asking questions arising from my review of the documents. I made it clear that I would only read those documents drawn to my attention, it being disproportionate, in all the circumstances, to read a 352-page bundle in its entirety. I paid careful attention to the two witness statements in particular and the documents cross-referred in those and the two skeleton arguments.

Background

9. Insofar as is material to the application and having regard to the approach I have adopted which is set out further below, and specifically that I am not required at this stage to make any, let alone any binding, findings of fact, the salient factual background appeared from the materials before me to be as follows.

10. The Claimant worked for the Respondent from 2017 to 14 March 2023 when he was summarily dismissed for gross misconduct by the Respondent. The Claimant contends that he was an employee for such time as gives him sufficient continuity of service to pursue a claim of ordinary unfair dismissal and is pursuing such a claim in tandem with the claim under section 103A ERA.

11. At the time of his dismissal, which is an agreed fact, the Claimant held the senior (Managing Director or 'MD' level) and highly paid (circa £300K base salary) position of Libraries Architect which required him to work with Information Technology ('IT'), Trading, Quants, and Traded Risk (or WMRT). The Claimant's role meant that he worked with coding, statistics, data streams / flows and individuals both junior and senior to him across different departments. In the Further and Better Particulars, it is said that the Claimant was responsible for the Fundamental Review of the Trading Book which is a requirement arising from the Basel Committee on Banking Supervision and in particular its Standards for Minimum Capital Requirements for Market Risk.

12. The Claimant reported to Ms. Christiane Lindenschmidt, the Respondent's Chief Digital and Data Officer, MSS. They had a good working relationship.

13. The Respondent is regulated by the Prudential Regulation Authority (PRA) and is obliged to make accurate reports as to its risk position so as to ensure that its underlying capital is adequate. Much of the regime to which I was referred derives from steps taken at international and national level in the wake of the 2008 global financial crash. In particular, my attention was drawn to the Basel III framework (or Basel Accord as it is sometimes referred to) which is structured around three 'pillars'.

14. It appeared to me to be uncontroversial that regulatory requirements imposed by the PRA are important and meant to be taken seriously by banking institutions and that the Respondent accepted that as part of its Pillar III obligations it should ensure that its market reporting was accurate so as to enable proper scrutiny of factors ultimately going to the question of the bank's risk exposure and capital adequacy. The Respondent is a major player in the global market.

15. The Claimant relies on 10 putative qualifying and protected disclosures between 29 September 2021 and 8 February 2023 which he says that he made as follows:

16. On 29 September 2021 (p.68) in an email to a number of recipients including **Ms. Anca Antonov**, who was until around late October 2022 the Respondent's Head of Strategic MSS Risk Programmes and a peer of the Claimant's, that there was an issue with index decomposition which would affect data outputs and suggested ways in which he / his team would seek to fix the problem.

17. On 24 March 2022 (p.79), in an email to **Ms. Julie Zysman** who was another peer of the Claimant's within the same line management and worked for the Respondent as its Head of Quants, Fixed Income Currencies and Commodities known as FICC, that it was an operational risk to have a quants library which "kills itself and sends UNKNOWN errors to its callers whenever this happens".

18. On 26 May 2022 (p.86), in a message on some form of electronic platform, the Claimant said that "All VaR/IRC figures are wrong or incomplete and Anca knows about this (e.g., index decomposition)" and referred to having spoken to her about this (above which message she appears to say "sorry about this").

19. On 18 July 2022 (p.97), in an email to **Mr. Ttoffi Paraskevi** (Head of FX Cash, EM Rates and GDM) within FICC, and others, that he was worried about analytics systems being used and suggested using software called Surface as much as possible in relation to bond calculations.

20. On 26 September 2022 (p.118), the Claimant prepared a slide which was distributed to a number of people within the business, which he said demonstrated "chaos".

21. On 5 October 2022 (p.120), in an email sent to Anca Antonov, Charlie Chamberlain (whom the Claimant described as having worked in GFX Options before moving to a role in regulatory delivery) and others, the Claimant referred to "massive operational risk" in changing various systems at the same time and referred again to index decomposition issues and other data flow / computation errors as he perceived them to be.

22. On 6 October 2022 (p.121), at a meeting with his line manager at which he took notes, the index decomposition and allied issues were raised with her and that he had already raised them with Mr. Charlie Chamberlain and how it gave rise to risk.

23. On 12 October 2022 (p.126), in a responsive email to Ms. Annabel Eastwick and other analysts, that there was a mismatch in numbers and data was either missing or incorrect in GRDS and dummy / matured bonds, but this had been corrected on Surface.

24. On 31 January 2023 (p.141, paragraph 72 WS Claimant) in a telephone call to Mr. Mehmet Mazi (Global Head of Trading) that there was incorrect capital reporting. Mr. Mazi is said to have been supportive of the Claimant and to have acknowledged him as a whistle-blower.

25. On 8 February 2023 (p.214), in a report via the Respondent's Ethics online reporting system that he had been the subject of malicious rumours and targeted by eleven individuals who had made allegations against him which were proceeding to a hearing as to which he also had concerns.

26. The focus of the first nine disclosures which the Claimant contends he made under section 43B(1)(b) and (f) ERA relate to Basel III generally and focus on Pillar III though they may touch on other regulatory areas as well. The last disclosure is said to relate to an allegation that he was being subjected to detriment having made protected disclosures.

27. The Claimant appears from the documents and his statement to have had a clear idea of the system architecture which he thought was optimal to produce accurate data flows and reports. He stated why he did not think other ideas were optimal such as what he describes as Anca Antonov's decision to "lift and shift a legacy system a.k.a. SPEAR" (paragraphs 38 and 39 WS Claimant). On a summary review, the documents I have seen convey the impression that the Claimant was unhappy with the systems in operation (or how they were being used), had concerns about operational risk but thought he could resolve the problems if allowed to proceed as he thought best.

28. There were no contemporaneous documents shown to me which demonstrated the Claimant being criticised or prevented from raising his concerns or proposing fixes.

29. Ms. Antonov left the Respondent in around mid-October 2022. Before she left, from paragraphs 47 and 48 of the Claimant's statement, it appears that she agreed some form of regulatory application needed to be made in respect of incorrect reporting "across all metrics: VaR/IRC/RWA", but there was disagreement as to the timing of this and I did not see any evidence as to what happened thereafter especially after she left, when she was replaced by another employee by the name of Ms. Sarah Brahmi Tremel.

30. On 1 June 2022, the Respondent received three complaints about the Claimant. The first appeared in the bundle (p.91A) and was a complaint made to Anca Antonov who appears to have passed it to Human Resources (HR). The second and third do not appear in the bundle but are recorded by HR in a separate document within the bundle (p.227-228).

31. The Respondent's HR team decided to escalate the complaints to its HSBC Confidential process which is managed by the whistleblowing team but is not confined to whistleblowing. The Respondent's counsel's instructions were that this was due to the complainant's fear of retaliation as it meant all of the complainants' names could be anonymised. As a result the Claimant was never and has never been told of the identity of the complainants or the witnesses in the disciplinary investigation into his conduct which then ensued, though he has guessed at the identity of the individuals referred to as reporters 1 to 3, whose involvement, he says, serve no purpose other than to refer to the complaints or concerns purported to be those of other members of staff.

32. As such I am unaware of the identity of the complainants and witnesses though it is clear from the documents relating to the interviews carried out by members of HR between August and September 2022 (p.100A-B, p.102A-F,

p.104A, p.107A-D and p.118A-B), and in October and November 2022 (p.127, p.131A-F, 131M-O, 134A-E, 135M-P and 135Q-R) that there were numerous concerns expressed about the Claimant's conduct.

33. This led to an investigation report which was itself reviewed by someone else under the Respondent's 'quality assurance' process to check the investigation was properly conducted. It was decided that the allegations were sufficiently serious to proceed to a disciplinary hearing to which the Claimant was invited on 26 January 2023 and in advance of which he was given some documents (p.140XX-YY).

34. The Claimant did not have any blemish on his disciplinary record at this time and had not been subject to any performance management or capability processes in the past.

35. Mrs. Meissner was invited to chair the disciplinary and was the disciplinary officer. She had never met or worked with the Claimant before and was also unaware of the identities of the complainants and witnesses whose names had been redacted or anonymised. She did not work in the same department as the Claimant; her role is Global Co-Head of Platform Sales.

36. A disciplinary hearing took place on 2 February 2023, the final notes of which appear at (p.173A-J). The Claimant provided further materials to Mrs. Meissner and comments on the notes of the disciplinary.

37. By a letter dated 14 March 2023 (p.218-223), the Respondent dismissed the Claimant summarily for gross misconduct on the basis of Mrs. Meissner upholding allegations 1 and 2 but not 3.

38. The Claimant's appeal against dismissal is yet to be determined.

39. The Claimant's case was that there were three employees who had conspired against him by encouraging others to complain, because he had made protected disclosures: Ms. Anca Antonov, Ms. Julie Zysman and Mr. Ttoffi Paraskevi. See in particular paragraph 68 of the Claimant's statement in this context.

40. The Claimant was unable to point to any evidence linking them to any of the underlying complaints made save that p.91A was addressed to Ms. Antonov. The Claimant pointed to the third party email at p.162 to the effect that Ms. Antonov had sought to persuade another employee, Mr. Amrish Agrawal, to make a complaint against the Claimant. Mr. Agarwal was not someone to whom the Claimant had made any disclosure which he contends was protected. There was no reference to protected disclosures or regulatory concerns in this email.

41. He also raised the possibility that some unknown person in senior management, possibly Mr. Mehmet Mazi, had influenced Mrs. Meissner in her decision to dismiss given the gap of time between the disciplinary hearing and dismissal letter. There was no evidence of this in the Claimant's statement or any document and the hypothesis was presented (on instructions) only when I sought to query how the case was put in this regard as it was not clear to me.

42. Mrs. Meissner's statement was unequivocal that the decision to dismiss was hers alone, that she was unaware that the Claimant's had made protected disclosures (or considered that he had been subjected to unfair treatment by others because of having done so) at the time of her decision to dismiss, which she contends was made purely on the basis of the evidence before her and her view that notwithstanding any mitigating factors, the Claimant was essentially senior enough to know better and had acted fundamentally against the core values of the Respondent.

Submissions

43. I received clear, focused and helpful written skeleton arguments from both leading Counsel and heard oral submissions from both sides as well.

44. I have taken those submissions fully into account, noting the very limited disagreement as to the law, and noting the particular points of emphasis made by each side.

45. In particular, Mr. Gilroy KC urged me to not to take an overly detailed look or focus on the minutiae of PRA / Basel III regulatory regime in operation, to pay careful attention to the documents which the Claimant provided after the disciplinary hearing and to parse the terms of the dismissal letter which he said provided little warrant for summarily dismissing a senior and niche banker with a clean record to date. He suggested this may well be a Royal Mail Group Ltd v Jhuti [2020] ICR 731, SC, case in which there was a hidden reason for the dismissal i.e., that conduct was a veneer for the real reason which was that there had been a conspiracy by three MDs to instigate complaints against the Claimant which then resulted in an investigation and ultimately his dismissal, or senior management had for some reason decided he must be dismissed and sanctioned Mrs. Meissner's dismissal decision.

46. Ms. Sen Gupta KC focused on reminding me of the proper circumstances in which I could make an order for interim relief, the lack of information enabling me to do that in view of the high threshold in law, and in particular urged me not to go behind the clear explanations supplied by Mrs. Meissner as the dismissing officer as to what operated on her mind at the time i.e. the reason or principal reason for the dismissal which was conduct. Her position on Jhuti was that there was no one in the hierarchy of responsibility above the Claimant who, on his case, had engineered his dismissal and the present case was not on all fours with Jhuti but in fact fundamentally different. Mr Gilroy KC considered that a wider interpretation of the Supreme Court's decision was necessary so as to avoid a formalistic interpretation that ignored the purpose of the protective legislation.

47. I have not repeated all of the submissions made here but have noted and borne them clearly in mind whilst focusing on my task which is to undertake a summary assessment.

Law

48. The legal principles which apply were common ground.

49. Sections 128-129 ERA provide:

Interim relief pending determination of complaint.

(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—

section 100(1)(a) and (b), 101A(1)(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.

(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).

(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

Procedure on hearing of application and making of order.

(2) 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—

(a) 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

(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.

(Emphasis supplied)

50. In assessing whether the Claimant is entitled to relief under sections 128-129 ERA I must decide whether it appears to me, at this early stage, on the materials I have, that the Claimant has a pretty good chance of succeeding in his s.103A ERA claim at a final hearing, which includes as to each of the constituent parts of that claim, as accepted by the Claimant in paragraph 16 of Mr Gilroy KC's skeleton argument. See: Taplin v C Shippam Ltd [1978] ICR 1068, EAT, followed in Dandpat v University of Bath UKEAT/0408/09 and London City Airport v Chacko [2013] IRLR 61, EAT.

51. The Claimant relies on sections 43B(1)(a) and (f) ERA in respect of his claim (as to which I note the use of the word "likely" in the statutory language). I was reminded of the Court of Appeal decision in Kilraine v LB Wandsworth [2018] ICR 1850 as to what amounts to a disclosure of information within the statutory language. A disclosure needs to have sufficient factual content and specificity as to be able to be deemed to be capable of showing one of the matters listed in section 43B(1) ERA. I am entitled however to have regard to the relevant context in determining sufficiency, which may include other communications and industry or sector specific common knowledge and nothing in Kilraine or any other authority to which I have been taken suggests otherwise.

52. It is trite law that in order to have the requisite reasonable belief provided for in the statute, it is not necessary for the Claimant to be right or correct in what he believes: Babula v Waltham Forest College [2007] ICR 1026. However, the belief must be subjectively genuinely held and objectively reasonable: Chesterton Global Ltd v Nurmohamed [2018] ICR 731, CA. The Chesterton decision is also a clear reminder of the proper approach to be taken to the public interest element of the wording in s.43B(1) ERA.

53. Section 103A ERA provides that a dismissal is automatically unfair if the reason of principal reason is that the Claimant has made a protected disclosure. This a different legal test on causation to that applied to claims for detriment under section 47B ERA in which the well-known "material influence" or Fecitt test is apposite.

54. Whilst not reciting the legal submissions of the parties and having noted their agreement on the core legal principles to be applied to a claim under s.103A ERA which I must bear in mind while determining the application under s.128 ERA, I have decided the application with those principles in mind.

55. As the parties' disagreement on the law focused on the correct interpretation of Jhuti, I would add that I prefer the Respondent's interpretation that the ratio of the Supreme Court on hidden or invented or manipulated reasons for dismissal is confined to situations in which someone in the hierarchy of responsibility above the claimant engineers the inevitable dismissal, see paragraph 60 per Lord Wilson in particular, but it makes little difference to my decision below. It is open to the Claimant to argue at a later time that Jhuti should not be construed in what he argues is a narrow or overly formalistic way, or that even if Jhuti is so confined, on its facts, the wider principle remains at large.

Decision

56. I am not prepared to say at this stage that the Claimant has a pretty good chance of establishing that each of the 10 disclosures upon which he relies are protected disclosures though within that summary assessment I accept he may have better prospects in some regards (e.g. public interest and genuineness of belief) than others (the specificity of the information and / or objective element of reasonableness in the belief held).

57. However, the Respondent focused its submissions on the issues with causation in respect of which I have concluded that the Claimant does not have a pretty good chance of succeeding at final determination which is fatal to his application.

58. It is for the Claimant to show that he meets the threshold for interim relief. I find that he has not done so.

59. Particular points I have weighed up in my summary assessment are:

60. There is little if any evidence of hostility on the part of any of the three MDs referred to in response to any disclosure made by the Claimant. The assertion that they conspired to prompt complaints is a case based on speculation and inference at this stage.

61. I note that the index complaints were on 1 June 2022 prior to the majority of the disclosures relied on having been made. The process that then ensued was subject to the checks and balances of numerous HR professionals, none of whom are said to have been part of a conspiracy to get rid of the Claimant.

62. The investigation did on the face of it reveal numerous inter-personnel concerns about the Claimant which were treated as matters of conduct.

63. Mrs. Meissner had no prior dealings with the Claimant before the disciplinary hearing on 2 February 2023 and her clear evidence at this stage is that her decision was not influenced by anything other than the materials before her, her assessment of the gravity of the conduct by a senior professional and mitigating factors.

64. Evidence of any conspiracy involving multiple people including numerous witnesses was tenuous at best e.g. timing and the perceived value of the Claimant to the organisation and dissection of the dismissal letter. The evidence is not close to demonstrating a hidden reason / manipulation case under Jhuti whether or not the hierarchical position of the individuals in question is taken into account and noting that one of the main protagonists referred to, Ms. Antonov, left in October 2022 having agreed there should be a regulatory application to deal with errors in reporting.

65. The case that someone, possibly Mr. Mazi, directed Mrs. Meissner to dismiss the Claimant because he had made protected disclosures is entirely supposition at this stage.

66. Mrs. Meissner's evidence is yet to be tested (as is the case with all of the evidence at the final hearing), but I reject the contention that she has materially misled anyone in paragraph 30 of her witness statement and that the rest of what she says therefore lacks any credibility or is undermined as a result. In particular, p.173 (notes of the disciplinary hearing) must be read in light of what the Claimant says at p.170 when asked why so many witnesses had spoken negatively about his behaviour, when he does not refer to protected disclosures at all. What he appears to be saying is that he considered there were operational risks and if he had been allowed to make the production changes he wanted to make then he could have reduced those risks for the bank and that he escalated the matter. He refers to orchestration of matters to reduce his credibility which he may have intended as a reference of some sort to having made protected disclosures, but it is far from clear that this is what he was saying.

67. Even if the Claimant is proven to be right that in further materials he sent to Mrs. Meissner prior to the dismissal referred to his having made protected disclosures, there is no evidence before me at this stage to suggest let alone to the "pretty good chance" threshold that Mrs. Meissner was motivated by this material to dismiss him.

68. Therefore, even if the Claimant establishes that he made some or all of the protected disclosures relied on, the case on causation does not have a pretty good chance of succeeding on its determination at a final hearing and I decline to grant an order for interim relief in the circumstances.

Employment Judge E Misra KC
Dated: 9 June 2023