EMPLOYMENT TRIBUNALS

Claimant: **Mr Sebastian Stoleriu**

Respondent: **Sirane Ltd**

Heard at: **Birmingham** **On:** **9 June 2023**
By CVP

Before: **Employment Judge Gilroy KC**

Representation

Claimant: In person
Respondent: Mr Alan Stanworth, Group HR Manager

JUDGMENT

The Claimant's application for interim relief is dismissed.

REASONS

Introduction

1. The Respondent manufactures food packaging, medical and healthcare related products from premises situated in Telford.

2. The Claimant was, until his summary dismissal on 25 May 2023, employed by the Respondent in the role of Team Leader. He commenced employment with the Respondent on 1 March 2020. He therefore had sufficient continuous service as of the termination of his employment to claim unfair dismissal, a claim he now pursues in these proceedings. He also claims automatically unfair dismissal contrary to s.103A of the Employment Rights Act 1996, "ERA" (dismissal by reason of whistleblowing). The matter came before the Tribunal on 9 June 2023 for the purposes of the determination of the Claimant's application for interim relief in respect of the claim of automatic unfair dismissal.

Background

3. The Tribunal was grateful to both parties for their assistance at the hearing of the Claimant's application. The Claimant was able to navigate a particularly difficult set of legal issues and did so notwithstanding that English is not his first language (he is Romanian). On the Respondent's side, Mr Alan Stanworth, Group HR Manager, was not aware until some

time after 10 am on the day of the hearing of this application that it was taking place. Having been contacted by the Tribunal he indicated that he was nevertheless content to deal with the matter, notwithstanding that he had been unable to prepare properly.

4. The claim form is an important document. It sets out the basis of the Claimant's claims in the following terms:

"What led to my unfair dismissal started on 12/04/2023. I got to work and I was getting ready for the shift but couldn't find overalls. I went into another section where I worked as a Team Leader and have access to a computer, I sent an email to Ian Shingler (leading manager) and tagged most of the management including HR. He replied, "can I ask which process are we not following regarding personal hygiene regulations?" From here on, it's just a long pointless chain of emails where I had to literally explain basic regulations that can be found in the employee handbook to a leading manager and he kept avoiding my concerns. His last email at 10.56 pm on 12/04/2023 was rather a question instead of instructions. Also in this chain of emails he did say at some point "you and your colleagues can go home, but as this will be your decision, you may not get paid for this time". A week later, I was being ignored so on 19/04/2023 I sent an email in which I exposed serious wrongdoings like: - When Ian Shingler was trying to have a disciplinary talk with me and completely failed to control his emotions and aggressively stood up in my face a palm away raising his voice at me. There are witnesses for this: Production Manager Lukasz Piotrowski, and a colleague that used to work as a cell leader Aaron Hancox. - When I went to the head of HR Alan Stanworth and told him about this matter and he started laughing in my face and told me "well, you know how Ian is" and never did anything or contacted me back about it. First x ? day 20/04/2023, Ian Shingler and Lukasz Piotrowski were waiting for me and told me that I have been suspended, fully paid, I should not get in contact with any employees and not come back into work until asked to. Never mentioning the reasons of my suspension they stormed out of the building. When I went for the Disciplinary Hearing on 25/05/2023 with Andy Stamp, I was presented with 4 unsubstantiated accusations. - The person deciding this matter, Andy Stamp, failed to sustain any of the accusations. The decision was wrongly taken without any proof. They have dismissed me for gross misconduct on 25/05/2023 and I have already sent an appeal against this. All I did was raise some issues that me and my colleagues had at the time and they would rather get rid of me than the problems within the company. So I would like to apply for interim relief while this matter is sorted".

5. When the hearing of the interim relief application began, apart from some correspondence between the Tribunal and the parties, the only document before the Tribunal was the Claimant's claim form. During the course of the hearing, several further documents were provided as follows:

   (a) an e-mail string from Friday 11 November 2022, essentially between the Claimant (albeit he used the *"Kits Teamleaders"* e-mail address) and Mr Shingler on the subject of "Fulfilment" (ie fulfilment of production orders);

(b) a further e-mail chain, this time from Wednesday 12 April 2023, again the same protagonists were involved, this time the subject matter of the discussion being: *"URGENT!!! No disposable garments"*;

(c) an e-mail sent by the Claimant, again from the *"Teamleaders"* e-mail address to Mr Shingler and others under the subject heading: *"???????"* (a reflection back by the Claimant on various matters of dispute including a dispute concerning holiday requests and matters of that nature), and

(d) *"WR024"*: an internal document produced by the Respondent (paragraph 11 below refers).

6. After discussion with the parties, it transpired that the Claimant was in fact relying upon two matters which he said were protected disclosures. Upon closer analysis, the Claimant confirmed that for the purposes of his application for interim relief he relied on one single protected disclosure, (Protected Disclosure (2)). Reference is made to paragraphs 25 to 31 below.

7. It is instructive to consider the e-mail exchange that took place between the parties on 12 April 2023 under the heading *"URGENT!!! No disposable garments"*. This exchange began at 7.33 pm on the evening of 12 April 2023. The Claimant was saying to management that he and his colleagues could not get ready to go to work *"because they had no more disposable garments. And even so, we were still told to go in and carry out our jobs on the machines like nothing is wrong".* He continued: *"So we'd like to know, whenever we stop respecting the Personal Hygiene Regulations?!?! How is this possible? Do you really expect people to go into the production area, operate the machines and pack the finished product for a customer with no PPE on?!?! Do WE have to remind YOU that we do FOOD PACKAGING MATERIALS?!?! We'd like an immediate response with what you're going to do about this situation please".*

8. The Claimant's reference to the *"Personal Hygiene Regulations"* was not a reference to any statutory provisions, it was, I was told by Mr Stanworth, without dissent by the Claimant, a reference to a document produced by the British Retail Consortium ("BRC") which provides guidance on such matters and classifies criticism in relation to non-compliance with what essentially amount to recommendations as to best practice under three headings, namely: *"Minor"*, *"Major"*, and *"Critical"*. Mr Stanworth indicated, again without dissent by the Claimant, that the matters which were the subject of the exchange on 12 April 2023 would have qualified for *"two Minors"*, and a participant to the scheme would have to attract 40 *"Minors"* before their certification with the BRC would come under challenge.

9. The Tribunal noted that in the e-mail sent by the Claimant at 7.33 pm on 12 April 2023, his concern was the need for the relevant equipment given that he and his colleagues were engaged in food packaging materials, in other words, the concern expressed, certainly in this first e-mail of the relevant exchange, was not with regard to health and safety, but with regard to the quality of the products that the Claimant and his colleagues were producing.

10. In the same exchange of e-mails, Mr Shingler stated at 8.10 pm: "*The PPE you wear as overalls are not required for health & safety for running machines"*, stating later in the same e-mail: *"The reason for the overalls and hairnets are to reduce the risk of contamination to the product. However, this is a recommendation within the standards you referred to, within the same standard it also says that we are able to make decisions due to unforeseen circumstances beyond our control which this is for tonight".* This was a reference to the fact that there was a shortage of product in terms of PPE availability in the Telford region on the day in question and I am told that this was a temporary issue and it was being resolved. If, however, the Claimant otherwise satisfied the requirements for the purposes of his application for interim relief, the fact that this was a temporary situation would not assist the Respondent as far as the Claimant's present application is concerned. I simply mention the issue for the sake of completeness.

11. The dialogue on 12 April 2023 continued with the Claimant inviting Mr Shingler to read *"WR024 related to the Personal Hygiene Regulations"*. I was provided with a copy of *"WR024"*. It is an internal document produced by the Respondent. Again, it does not amount to a set of statutory regulations, and further, the quotation given by the Claimant in his e-mail at 8.22 pm as to what WR024 states is in fact incorrect. What WR024 does say is *"Safety equipment including safety shoes must be worn where provided by the company or (in the case of agency staff) by the agency. Employees have the option to purchase their own safety shoes, but the rule above will still apply and are not to be worn off site. All staff must wear approved clothing. Face masks must be worn in accordance with company guidelines. Disposable clothing should be replaced when damaged, soiled, or weekly - whichever is the sooner"*.

12. There was argument before me as to what the purpose of the overalls was. The Claimant maintained that they were required purely for health and safety reasons, and he further maintained that the legal obligation that he was referring to in making Protected Disclosure (2) (see paragraphs 27 to 30 below) was a health and safety obligation. The Claimant referred to the fact that the production process involved the handling and exposure to dangerous substances such as acetone, hot wax and hot glue. Mr Stanworth for the Respondent disagreed. He said that the Claimant was in fact referring to adhesive lamination, and that gauntlets, rubber gloves and eye protection together with breathing masks are (and were) provided in this context, and that the overalls are not (and were not) provided for health and safety purposes. Essentially, his perspective was that adopted by Mr Shingler in the e-mail exchange of 12 April 2023.

13. Returning for a moment to that exchange, in an e-mail sent at 8.27 pm on 12 April 2023, the Claimant referred to pages 41 and 42 of the Respondent's Employee Handbook which, he maintained, were relevant to the issue at hand, namely health and safety and the wearing of overalls at the location with which the Tribunal was concerned. In my judgment, pages 41 and 42 of the Respondent's Employee Handbook do not support the Claimant's case on this issue (albeit there is a general reference in the

context of "housekeeping" to safety and appearance, and the need for work and rest areas to be kept clean and tidy at all times, and there is also a reference to the need for employees to co-operate with the production and maintenance of a "good housekeeping policy").

14. There is a further feature which was a matter of argument between the parties. Mr Stanworth maintained that in fact the section the Claimant was working on, on the evening in question, used none of the substances the Claimant maintained before me were reasons why overalls would be needed for personal protection from a health and safety point of view (see paragraph 12 above). In response to this point, the Claimant stated that he was not assigned to any particular tasks. There is obviously an issue between the parties as to whether or not the overalls were provided in any sense by reference to health and safety, as opposed to product quality.

15. I was provided with a copy of the letter dated 25 May 2023 confirming the Claimant's dismissal. This referred to a disciplinary hearing which had been held that morning and stated that a decision had been made to terminate the Claimant's employment with immediate effect on the grounds of gross misconduct. The grounds were (essentially) leaving his station unattended for an entire shift without informing his Team Leader of his actions or whereabouts, failing to follow reasonable instructions from his manager, and aggressive and disruptive behaviour to managers and others within the business. The latter allegation was a reference, in particular, to the tone of the Claimant's e-mails in the e-mail exchange of 12 April 2023. Poor attendance and timekeeping was an allegation which was not upheld. A rationale was given in respect of each of the matters that were upheld in the letter of dismissal.

16. The Claimant attended an appeal hearing on 1 June 2023, and by letter dated 7 June 2023, he was informed that his appeal had been dismissed. I do not see it as being necessary for the purposes of this application to go into detail as to the various points taken and responded to for the purposes of the Claimant's appeal against dismissal.

The legal framework

17. The power to grant interim relief is contained within s.128 of the ERA, which provides that such an application must be brought within 7 days of the effective date of termination of employment. The Claimant complied with that requirement. The application must be heard as soon as practicable. In order to grant the application, the Tribunal must be satisfied that it is "likely" that on the substantive determination of the complaint to which the application relates, applying the relevant words of s.129 of the ERA, the Tribunal will find that the reason (or if more than one the principal reason) is the reason specified in s.103A of the ERA.

18. The term "likely" connotes a "pretty good chance of success". It has been confirmed in the case law that the Tribunal's function at the interim relief stage is to consider the application on a summary basis, doing the best it can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The Tribunal

then makes as good an assessment as it is promptly able on the material before it. This is an expeditious summary procedure. I am expressly enjoined not to delve into the detail and make findings of fact, or subject the evidence to detailed scrutiny, that is a matter for the final hearing. It is not my function to decide the substantive issues, and I am not expected to grapple with vast quantities of material. It is generally not the norm for the parties to give oral evidence at the hearing of an application for interim relief. By definition, that would defeat the purpose of the summary nature of an interim application, and no oral evidence was heard at the hearing of the present application.

19. I clarified with the parties at the beginning of the hearing that they were both clear that in order for the Claimant to succeed in his application for interim relief, he would need to demonstrate "a pretty good chance" of establishing the following: (i) that he had made the disclosure(s) to his employer; (ii) that he believed that those disclosures tended to show one or more of the matters itemised in s.43B(i) of the ERA; (iii) that his belief was reasonable; (iv) that the disclosure or disclosures was or were made in the public interest, and (v) that the disclosure or disclosures was or were the principle cause of dismissal.

20. In order to establish what amounts in law to a protected disclosure, consideration must be given to ss.43A and 43B of the ERA. Under the former provision it is provided that a protected disclosure means a qualifying disclosure as defined by s.43B which is made by a worker in accordance with any of ss.43C to 43H.

21. *"Qualifying disclosures"* are defined by s.43B as follows:

"(i) 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 -"

There then follow 6 separate matters that could qualify as qualifying disclosures in s.43B(i). Only two of those are potentially engaged in this case, namely *"(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject"*, and *"(d) that the health or safety of any individual has been, is being or is likely to be endangered"*.

22. The disclosure must be a disclosure of information, of facts rather than an expression of opinion or the making of an allegation, although it may disclose both information and opinions/allegations, and it is possible that an allegation may contain information, whether expressly or impliedly. The disclosure has to have sufficient factual content and specificity such as is capable of tending show one of the relevant matters referred to at s.43B(i).

23. There is no rigid distinction between allegations and disclosures of information. In terms of reasonableness of belief, whilst an employee claiming the protection of s.43B(i) must have a reasonable belief that the information that he is disclosing tends to show one or more of matters in that statutory provision, there is no requirement that he must demonstrate

that his belief is factually correct. The belief may be reasonable even if it transpires that it is wrong. Whether the belief was reasonably held is a matter for the Tribunal to determine. The test for reasonable belief is a two stage test, namely (a) did the Claimant have a subjective genuine belief (i) that the disclosure tended to show one of the matters set out in s.43B(i), and (ii) that was it in the public interest, and (b), if so, did the Claimant have objectively reasonable grounds for so believing in both such cases. I cannot elide the two stages, they have to be addressed separately.

24. There is authority to explain how it is determined whether something is in the public interest. This can be affected by the numbers in the group whose interests are served by the disclosure, the nature of the interests affected, the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer. All of these matters are well settled in the relevant case law. "Public interest" is not, however, defined in the legislation. A disclosure does not have to be either wholly in the public interest or made wholly from self-interest. It can be both, and this does not prevent a Tribunal from finding on the facts that it was actually only one of those. There is also authority for the proposition that an approach to public interest which depends purely on whether one or more persons' interests were served by the disclosure would be simplistic and require the making of artificial distinctions. Whether disclosure is in the public interest depends on the character of the interest served by it rather than simply on the number of people having that interest.

The protected disclosures contended for by the Claimant

25. After considerable discussion and analysis of Section 8.2 of the claim form in this matter, it was established that there were two protected disclosures contended for by the Claimant, as follows[1]:

Protected Disclosure (1)

26. The Claimant approaching Mr Stanworth in relation to the way in which (he maintained) he had been spoken to by Mr Shingler, the information being provided by the Claimant being that when he spoke to Mr Stanworth about this, the latter started laughing in his face and told him *"well, you know how Ian is"* and failed to take any action in relation to the matters the Claimant had raised. This was following an alleged incident where Mr Shingler was said to have been aggressive to the Claimant, standing up in his face, a palm away from him, raising his voice. On examination, it was stated by the Claimant this occurred in November 2022, that is to say both the incident with Mr Shingler and the subsequent incident with Mr Stanworth.

Protected Disclosure (2)

27. The second protected disclosure contended for was the Claimant's disclosure that overalls were not available on 12 April 2023. It is the

[1] Where reference is made in this judgment to "Protected Disclosure (1)" and "Protected Disclosure (2)", the use of such terminology is for ease of reference only. It will be a matter for the Tribunal conducting the main hearing to determine whether Protected Disclosure (1) and/or Protected Disclosure (2) actually held that status.

Claimant's case that in making Protected Disclosure (2), he was providing in relation to the breach of health and safety. For the avoidance of doubt, whether a failure to provide overalls meant that the Respondent was or might be in breach of a legal obligation to manufacture products to a particular quality standard is of no relevance for the purposes of the present application.

28. The Personal Protective Equipment at Work Regulations 1992 as amended ("the PPE Regulations") form part of the general law (as opposed to any guidance or guidelines provided by, for example, the BRC).

29. Regulation 2 of the PPE Regulations provides as follows:

"Interpretation

2. - (i) In these Regulations, unless the context otherwise requires, "Personal Protective Equipment" means all equipment (including clothing affording protection against the weather) which is intended to be worn or held by a person at work and which protects him against one of more risks to his health or safety, and any addition or accessory designed to meet that objective". (Emphasis added).

30. Regulation 4 provides:

"Provision of Personal Protective Equipment":

4. - (i) Every employer shall ensure that suitable Personal Protective Equipment is provided to his employees who may be exposed to a risk to their health & safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective". (Emphasis again added).

31. On discussion with the Claimant, the following matters were clarified:

31.1. In relation to Protected Disclosure (1), the Claimant conceded that he would be unable, at this interim stage, to establish that this disclosure was made in the public interest.

31.2. it was established that insofar as he relied upon "breach of a legal obligation" for the purposes of Protected Disclosure (2), he was relying upon the PPE Regulations.

Accordingly, the application for interim relief proceeded on the basis that it was Protected Disclosure (2) alone which formed the basis of the application.

Conclusion

32. Taking account of all of the above, I have to consider the test of "likelihood of success" by reference to Protected Disclosure (2) in the context of each of the 5 separate matters referred to at paragraph 19 above. Having

considered the evidence and argument presented at the hearing of the application for interim relief, I concluded aa follows:

(i) I am satisfied it is likely that the Claimant will establish at the main Tribunal hearing that he made Protected Disclosure (2).

(ii) I am not satisfied that it is likely that the Claimant will establish that he believed that Protected Disclosure (2) tended to show either (a) that the Respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject in relation to health and safety, or (b) that the health or safety of any individual had been, was being or was likely to be endangered. In my judgment, at this interim stage, there is sufficient argument (and the likelihood of evidence) on both sides to suggest that he did not have that reasonable belief because of the information I have been given as to the nature of the clothing he was referring to (ie the overalls) and the reason why he was making his request, namely whether they were supplied for health and safety reasons or whether they were supplied for the purposes of ensuring the quality and standard of the products that the Claimant and his colleagues were manufacturing. That is a matter which will have to be determined by the Tribunal hearing the main complaint. I cannot say, at this stage, that it is likely the Claimant's argument on this issue will prevail.

(iii) Is it likely that at the final hearing the Claimant will establish that his belief was reasonable? Again, for similar reasons as those which apply to issue (ii) above, I am not satisfied that he has established that it is likely that at the main hearing he will succeed on that aspect. In my judgment, if the Claimant is asserting that he had a reasonable belief (in relation to Protected Disclosure (2)) that the overalls were required for health and safety reasons, there is clear evidence to the contrary, namely that he was requesting them for reasons relating to the quality and standard of the products he and his colleagues were manufacturing.

(iv) Had I been with the Claimant on the likelihood test with regard to factors (ii) and (iii), I would have found in his favour on the likelihood test in relation to factor (iv) (public interest), but because I am not satisfied in relation to factors (ii) and (iii), I am unable to say he succeeds on the likelihood test in relation to factor (iv).

(v) Is it likely that at the main hearing it will be determined that Protected Disclosure (2) was the principal cause of the Claimant's dismissal? As is the position with regard to factor (iv), if I was with the Claimant on all of the matters so far (ie. factors (i) to (iv)), I would have said that he satisfies the threshold of likelihood in relation to factor (v), but the fact that I find that he fails the likelihood test on other factors means that I am unable to say that he is likely to succeed on factor (v).

33. Accordingly, I find that the Claimant has not established that he has "a pretty good chance" of succeeding in his substantive claim of automatic

unfair dismissal, and it is for that reason that the application for interim relief fails.

Employment Judge Gilroy KC
20 June 2023

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.