EMPLOYMENT TRIBUNALS

Claimant: **Ms Zarifis**

Respondent: **Lets Deel Ltd**

Heard at: **London South, by CVP** **On: 9 June 2023**

Before: **Employment Judge Rice-Birchall**

Representation
Claimant: Mr Humphreys, counsel
Respondent: Mr Boyd, counsel

RESERVED JUDGMENT ON INTERIM RELIEF APPLICATION

The claimant's application for interim relief pursuant to section 128 of the Employment Rights Act 1996 fails.

REASONS

Background

1. This was a hearing to hear the claimant's application for interim relief pursuant to section 128 of the Employment Rights Act 1996 (ERA), which relates to the claimant's claim of automatic unfair dismissal under section 103A ERA.

2. The Tribunal had the benefit of a bundle of documents from each of the claimant and the respondent and witness statements from the claimant, and from Ms Rosadiuk, Global Mobility Manager, and Ms Sutherlin, Director of Global Mobility, of the respondent, though the statements were read only and no oral evidence was heard, as is the default position in interim relief hearings (rule 95 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the ET Regs).

The parties

3. The claimant was employed by the respondent as a Senior Mobility Specialist. She commenced her employment on 21 February 2022 and resigned her employment with effect from 24 April 2023.

4. The claimant submitted a claim to the Tribunal, received on 28 April 2023, raising complaints of automatic unfair (constructive) dismissal on the basis that she made protected disclosures under section 103A ERA; ordinary unfair (constructive) dismissal; and detriment on the basis that she made protected disclosures under section 47B ERA. In her claim form she also applied for interim relief.

5. The ET3 and Grounds of Resistance have not yet been filed and there have been no orders for disclosure made or complied with.

6. It was accepted by the respondent and the Tribunal that the claimant had complied with the necessary formalities for the application.

7. The claimant seeks a continuation order in accordance with section 129 ERA.

The issues

8. For the claimant to succeed at final hearing on her claim under section 103 ERA, the Tribunal will have to find each of the following:
    a. That the claimant made the alleged disclosure relied on;
    b. That it amounted to a protected disclosure within the meaning of section 43A ERA;
    c. That the respondent was in repudiatory breach of contract (relying on the implied term of trust and confidence);
    d. That the reason, or principal reason for the respondent's actions was the claimant having made the protected disclosure(s) relied on;
    e. That the claimant resigned in response to the repudiatory breach; and
    f. That the claimant did not affirm the contract or waive any breach in the intervening period.

9. For the application of interim relief to succeed, the Tribunal needs to be satisfied, as regards each of the limbs of the claimant's claim as set out above, that it is likely that, at the final hearing, the Tribunal will find in the claimant's favour and that her claim will succeed.

The applicable law

10. Section 128 ERA reads as follows:

    (1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and –
    (i) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in – (i) … s.103A

    may apply to the tribunal for interim relief"

11. Section 129 ERA states:

    (1) 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 … s.103A.

12. A complete statement of the law applicable to applications for interim relief can be found in the case of *Mr A Wollengberg v Global Gaming Ventures (Leeds) Limited, Mr A W Herd* [2018, UKEAT/0053/18/DA] at paragraphs 24-27:

> 24. Section 103A of the ERA provides that if the sole or principal reason for a dismissal is that the employee made a protected disclosure, the dismissal should be regarded as unfair. Section 128 makes provision for an application for interim relief, which will keep the contract of employment in force for limited purposes until determination of the claim of unfair dismissal. Section 129(1) sets out the test which must be satisfied before the application is granted. It must appear to the ET that it is likely that on determining the substantive complaint the reason for dismissal will indeed be the reason alleged by the employee. The application must be made urgently and the ET must determine the application as soon as practicable after it is received; see section 128(3)-(5) . The ET will not hear oral evidence unless it makes a positive decision to do so; see Rule 95 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("ET Rules").
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> 25. *Taplin v C Shippam Ltd* [1978] ICR 1068 and *Ministry of Justice v Sarfraz* [2011] IRLR 562 are leading cases on the tests to be applied by the ET. Put shortly, an application for interim relief is a brief urgent hearing at which the Employment Judge must make a broad assessment. The question is whether the claim under section 103A is likely to succeed. This does not simply mean more likely than not. It connotes a significantly higher degree of likelihood. 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.
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> 26. Reasons must of course be given for the decision on an application for interim relief; see Rule 62 of the ET Rules. As to reasons generally, the requirement is that reasons should enable the parties to see why they have won or lost and should enable an appellate court to see that the law has been correctly understood and applied. The nature and extent of the reasoning required will depend on the issues. Thus, Rule 62(4) provides that the reasons given for any decision shall be "*proportionate to the significance of the issue and for decisions other than judgments may be very short*".
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> 27. The requirement to give reasons in the context of an application for interim relief has been considered by the EAT in *Dandpat v University of Bath* UKEAT/0408/09, *Parsons v Airplus International Ltd* UKEAT/0023/16 and *Al Qasimi v Robinson* UKEAT/0283/17. The learning from those decisions was helpfully summarised by Her Honour Judge Eady QC in *Al Qasimi* in paragraph 59:

> "59. I start by reminding myself of the exercise that the ET had to undertake on this application. By its nature, the application had to be determined expeditiously and on a summary basis. The ET had to do the best it could with such material as the parties had been able to deploy at short notice and to make as good an assessment as it felt able. The ET3 was only served during the course of the hearing and it is apparent that points emerged at a late stage and had to be dealt with as and when they did. The Employment Judge also had to be careful to avoid making findings that might tie the hands of the ET ultimately charged with the final determination of the merits of the points raised. His task was thus very much an impressionistic one: to form a view as to how the matter looked, as to whether the Claimant had a pretty good chance and was likely to make out her case, and to explain the conclusion reached on that basis; not in an over-formulistic way but giving the essential gist of his reasoning, sufficient to let the parties know why the application had succeeded or failed given the issues raised and the test that had to be applied."

13. The EAT in *Robinson* stated that it must be shown that the claimant has a "pretty good chance of succeeding", not merely that they could possibly win. It is this test that is to be applied rather than the balance of probabilities. This sets a relatively high bar for the claimant.

14. Further, the test of "likely to succeed" will apply to all elements required to establish the claimant's s103 ERA claim: *Hancock v Ter-Berg and Another* [2020] IRLR 97 (paras 35-38).

15. Most recently, Cavanagh J in *Steer v Stormsure* [2021]ICR 808, stated, at para 31: " The net effect of these provisions, therefore, is that a claim for interim relief, if successful, does not mean in practice that the tribunal will require the employer to permit the claimant to carry on working pending the determination or settlement of his or her claim. It is not the equivalent of a mandatory injunction or specific performance of the obligation to provide work. Rather, it means that the claimant will continue to receive his/her salary and other benefits in the period up to determination of claim or settlement. This is a valuable benefit, because it can take a number of months before a claim is finally determined….It means that the claimant has a financial cushion whilst s/he is waiting for his/her claim to be heard."

<u>Section 103A ERA</u>

16. A protected disclosure is a qualifying disclosure made in accordance with any of s43C-H ERA, typically to the claimant's employer.

17. Section 43B ERA states that a qualifying disclosure is: " …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: - (a) that a criminal offence has been committed, is being committed, or is likely to be committed; (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,…"

18. The disclosure of information must have identified to the employer the breach of legal obligation concerned: *Fincham v HM Prison Service* UKEAT/0991/01. This need not be in strict legal language. If the breach is obvious the test is met: *Bolton School v Evans* [2006] IRLR 500.

19. Section 103A requires a finding that: "…the reason (or if more than one the principal reason) for the dismissal is that the employee has made a protected disclosure. This is a question of fact for the Tribunal. In this case, as a claim of constructive unfair dismissal, rather than a situation in which the claimant has been dismissed, it must be the reason, or the principal reason for any repudiatory breach.

20. This is because, where an employee claims that she was constructively dismissed contrary to section 103A, it is not strictly possible for the Tribunal to examine the employer's reason for dismissal, because the decision that triggers the dismissal is the employee's resignation. Instead, the question for consideration is whether the protected disclosure was the principal reason that the employer committed the fundamental breach of the employee's contract of employment that precipitated the resignation.

Constructive unfair dismissal

21. The Tribunal was referred to *Kaur v Leeds Teaching Hospitals NHS Trust* [2018]EWCA 978 in which it states, at paragraph 55: " In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions: (1) What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered his or her resignation? (2) Has he or she affirmed the contract since that act? (3) If not, was that act (or omission) by itself a repudiatory breach of contract? (4) If not, was it nevertheless a part (applying the approach explained in *Omilaju)* of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the Malik term? (5) Did the employee resign in response, or partly in response, to that breach?

22. There is no fixed period after which an employee is deemed to have affirmed an employer's breach. A reasonable period is allowed for an employee to decide whether to resign in response to a repudiatory breach by the employer and will depend on all the circumstances.

Conclusions

23. Based on its broad assessment of the claim, the Tribunal has determined that the claimant's section 103 ERA claim is not "likely" to succeed and does not reach the high threshold required by section 129 ERA.

Protected disclosures

1. The alleged protected disclosures concerned the respondent's "employee of record" model, which the claimant alleges was prohibited under Home Office rules for sponsoring skilled workers.

2. The claimant's claim form sets out seven alleged protected disclosures, and her witness statement before this Tribunal appeared to refer to additional alleged protected disclosures which did not appear in the pleadings. However, in the claimant's written and oral submissions and witness statement for the purposes of this interim relief hearing, the claimant's focus was on the alleged protected disclosure contained in the risk report made by the claimant on 13 April 2013 (and on the respondent's alleged actions between 17-19 April 2023).

3. The submission of the risk ticket by the claimant on 13 April 2021 is likely to amount to a protected disclosure as it identifies that the claimant considers that the EOR model is prohibited and addresses the potential consequences of non-compliance including revocation of the respondent's license, fines and criminal consequences for an authorizing officer.

4. The Tribunal considers that it is likely that the Tribunal determining the complaint at the final hearing will find that the claimant made a disclosure that was protected within the meaning of section 43A ERA.

Repudiatory breach of contract

5. The claimant relies on a number of alleged breaches of her contract of employment, namely of the implied term of trust and confidence. However, during the claimant's written and oral submissions and witness statement for the purposes of the interim relief hearing, the claimant's focus was on the alleged "final straw", which was an alleged request, by Ms Sutherlin, for the claimant to act as authorizing officer, and Ms Sutherlin's alleged comments upon the claimant's refusal of that role to the effect that her refusal of that role would have a significant impact on her career progression within the respondent.

6. There were other alleged breaches which took place in the period 17-19 April 2023 together with the fact that the claimant's alleged protected disclosures had not been dealt with over long period of time. However, the conversation referred to above was the one relied upon for the purpose of this hearing.

7. The witness statements of the claimant and Ms Sutherlin indicate that there is a dispute as to what was said in the relevant exchanges.

8. In support of her position, the claimant says, first, that, on 19 April 2023, the claimant had a conversation with a Ms Weron, a former colleague. The exchange took place on What's App, a transcript of which appears in the Bundle. The transcript indicates that the claimant is discussing with Ms Weron her conversation with Ms Sutherlin, and that the claimant is recounting to Ms Weron that she was asked to be the authorizing officer, and that, when she told Ms Sutherlin that she was not comfortable to take the role on because of her immigration status and because of potential criminal convictions, Ms Sutherlin indicated that, if the claimant wanted to be a team lead, "this is going to be like a huge, this is a huge marker, baby, basically."

9. Second, the claimant points out that her resignation letter states that she is given: “no choice but to resign from [her] role after being asked to serve as Deel’s new authorizing officer ..in the UK and being told that this could be a determining factor for [her] to progress into a Team Lead role. The letter continues: “The expectation that I would/could/should take this on is an unreasonable expectation and it also requires me to do something unlawful.”

10. The claimant submits that these are two contemporaneous accounts which support the claimant’s account of what was said. The claimant submits that the existence of these documents dramatically shifts the position from a conflict of witness evidence with nothing more to one whether there are positive and compelling reasons to prefer the claimant’s account, rendering it “likely” that the claimant will succeed on this point at final hearing.

11. The Tribunal disagrees and does not find that it can be said that it is likely that the claimant will succeed on this point at the final hearing.

12. The account of Ms Sutherlin is very different. Accordingly, there is a conflict of witness evidence. Her account is supported by her response to the claimant’s letter of resignation. That response contradicts the claimant’s position, and, significantly, refutes the claimant’s allegations either that the role of authorizing officer was a determining factor for her to be promoted to the team leader role or that she would be retaliated against for deciding against taking the role. It also explains that performance issues, which were raised with the claimant prior to the raising of the risk ticket, were the reason she had not been promoted to the team leader role recently.

13. As regards the alleged conversation with Ms Weron, it is simply one side of a conversation that is recorded so, without more evidence to provide context, the Tribunal considers that it has little evidential weight. It is not a recording of the conversation with Ms Sutherlin but a recording of the claimant recounting her interpretation of that conversation. It is difficult to understand therefore, why the alleged comment of Ms Sutherlin is in quotations and is set out as if they are the actual words spoken by Ms Sutherlin. This needs further enquiry and context. In any event, those words are not reflected in the claimant’s witness statement or claim form or indeed in her letter of resignation in which the claimant says that she was told that taking the authorizing officer role would be a determining factor to progress to a team lead role.

14. On the basis of such a significant dispute over the evidence, and a plausible explanation from the respondent for what was said over the claimant’s promotion prospects, it is not possible to conclude that the claimant’s version of events is likely to succeed at the final hearing. This is a matter which requires live evidence to resolve.

15. As the Tribunal has concluded that it is not likely that the claimant would succeed as regards the content of the conversation, it follows that she is not likely to be successful in her argument that the respondent was in repudiatory breach of contract.

Is the claimant likely to be able to show that protected disclosure(s) was/were the principal reason for the repudiatory conduct?

16. Again, as the Tribunal has concluded that it is not likely that the claimant would succeed as regards the content of the conversation, it follows that she is not likely to be successful in her argument that the protected disclosures were the principal reason for the repudiatory conduct.

17. In addition, and significantly, there were performance issues which had been discussed with the claimant the day before the risk ticket, which the respondent stated in the response to the claimant's resignation letter were the reason for her not being promoted.

18. The Tribunal does not consider that it is likely that the claimant was offered the role of authorizing officer because she raised a protected disclosure. As the respondent says, she was one of its employees who was qualified to do that role and they needed a person to fulfil the role as the previous authorizing officer had left. In the end, the role was given to someone else. It is likely therefore that the claimant was offered the role because the role needed filling and she met the criteria rather than because she made the protected disclosure.

19. Further, the resignation letter specifically states: "If I do not take on the Authorising Officer role, I believe that now or in the future, I will be retaliated against". That is entirely speculative.

20. It is not therefore likely that the claimant would succeed in establishing that the principal reason for the treatment complained of was the raising of the risk ticket.

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Employment Judge Rice-Birchall
Date: 19 June 2023