Case No: 2300007/23

EMPLOYMENT TRIBUNALS

Claimant: **Dr N Nwogwugwu**

Respondent: **The Langford Clinic Limited**

Heard at: **LONDON SOUTH (By video)** **On:** **22 February 2023**

Before: **E J Siddall**

Representation
Claimant: In person
Respondent: Mr A Watson

ORDER ON APPLICATION FOR INTERIM RELIEF

The decision of the tribunal is that the application for an order for interim relief under section 128 of the Employment Rights Act 1996 is refused.

REASONS

1. The claimant lodged a claim with the employment tribunal in which he asserts that he was automatically unfairly dismissed for making protected disclosures under section 103A Employment Rights Act 1996. He also alleges that he was subjected to detriments for making protected disclosures under section 47B. His claim includes a claim for interim relief under section 128 ERA.
2. I have read the bundle prepared for this hearing which includes witness statements from the claimant, Mr Phillips and others. I have also considered a skeleton argument provided on behalf of the respondent.
3. The background is as follows.
4. The claimant was engaged by the respondent as a consultant psychiatrist from 1 January 2021. He was at all times paid through a company, BPS Healthcare Limited. There is a service level agreement in the bundle which is unsigned which describes him as an independent contractor.
5. The claimant says that his status changed in August 2021 and that he became an employee from this date. There is no documentary evidence setting out any change in the arrangements at this time

although the respondent agrees that his pay increased, possibly because of a change in hours.

6. In August 2022 there was a discussion between the respondent and the claimant about whether a part-time junior doctor should be retained or not. Following these discussions, the junior doctor was kept on.
7. On 8 September 2022 there was a meeting between the claimant, Mr Phillips and Ms Ling of the respondent. The claimant says that during this meeting he made disclosures about the level of cover by doctors at the hospital.
8. On 9 September 2022 the claimant sent the respondent an analysis of the medical cover available at the hospital together with a document setting out Royal College of Psychiatrist recommendations. He asserts that this was a protected disclosure.
9. In September 2022 the respondent commenced consultation with junior doctors about the provision of out of hours cover at the hospital in particular for admissions late in the evening. On 3 October 2022 the claimant put forward a proposal as to how this issue might be resolved which involved flat rate payments to the doctors.
10. On 13 October 2022 the claimant emailed the respondent asking for feedback and stating that the current arrangements were 'not sustainable and it is not safe'.
11. The respondent replied that they could not afford what was being proposed.
12. The claimant's case is that after raising these issues, he found himself excluded from key discussions with the respondent.
13. On 1 December 2022 the respondent met with the claimant and advised him that his engagement was being terminated on three months' notice. The claimant did not work the full notice period and left his post on 6 January 2023.

The Legal Test to be applied

14. An interim relief order can be made in situations where the tribunal decides that it is 'likely' that a claimant will be able to show that he has been unfairly dismissed on one of the specified grounds. The case of **Ministry of Justice v Sarfraz [2011] IRLR 562** states that the word 'likely' does not mean 'more likely than not' (ie the civil test of the balance of probabilities) 'but connotes a significantly higher degree of likelihood'. The principles to be applied are set out clearly by the EAT in the later case of **Mihaj v Sodexho Limited UKEAT/0139/14/LA** at paragraph 16 where Mrs Justice Slade states: '*The principles of law to be applied in this appeal are clear and they were agreed by the parties. The task of an Employment Tribunal on an application for interim relief is to make a summary assessment of whether it is likely that at final hearing the Claimant will establish that the reason for his dismissal was his taking part in trade union activities. The cases of* ***Raja v SSJ*** *UKEAT/0364/09 and* ***London City Airport Ltd v Chacko*** *[2013] IRLR 610 were cited. Second, in considering whether the complaint is likely to succeed, the Employment Tribunal should ask themselves whether the final determination of the application for automatic unfair dismissal has more than a 51% probability of success or whether the Claimant has established that he has a "pretty good" chance of success. Those propositions were explained by Slynn J, as he then was, in* ***Taplin v Shippam*** *[1978] ICR 1068 at 1074D and 1074F'.*

15. The case of **London City Airport Ltd v Chacko** cited by the EAT above also gives guidance as to the way in which the tribunal should approach the evidence where it states at paragraph 23: '*The application falls to be*

considered on a summary basis. The employment judge must do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The employment judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the Employment Tribunal but whether "it appears to the tribunal" in this case the employment judge "that it is likely". To put it in my own words, what this requires is an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim'.

16. Having noted this guidance I address the question of whether it appears likely that the Claimant will be able to show that he was dismissed because he made protected disclosures.
17. To bring a claim for unfair dismissal, a claimant must demonstrate that he was an employee of the respondent. In this case it appears that the claimant was working under an agreement for services that described him as an independent contractor, responsible for his own taxes. He was also paid through a limited company without deduction of tax and NI.
18. I agree that despite this it may be possible to show that the claimant was in fact an employee. Although the claimant was paid through a company, my initial interpretation of the services agreement is that the contract was made with the claimant personally rather than with his company, albeit under the description of a contractor rather than an employee. However his witness statement currently gives very little information about the basis on which he argues that the written agreement does not reflect the true working relationship. In his submission today he argued that he was paid for days off and bank holidays. The evidence also suggests a degree of integration within the management structure of the respondent. However there is insufficient evidence in front of me to allow me to conclude that the claimant has a pretty good chance of establishing that the written agreement should be ignored and that in law he should be treated as an employee. It will be a matter for the tribunal hearing the case to hear full evidence on this and weigh up all the relevant factors before making a decision.
19. Even if that is not the case, the next matter for the claimant to establish is that he made qualifying disclosures. He points to various documents within the bundle in support of this, in particular his email and enclosed document dated 9 September 2022 and the string of emails and messages concerning the issue of out of hours cover by junior doctors. Having read the claim and the 'particulars of claim' that were submitted later I have to say that I am not completely clear about which communications he asserts to be protected disclosures. I can see that some of these are arguable for example the document produced on 9 September 2022 where he argues that cover is insufficient and the email on 13 10 22 in which he refers to the existing arrangements being 'unsustainable and unsafe'. Other documents referred to such as the email dated 3 October 2022 contain no suggestion that

anyone's safety has been put at risk or that the respondent is breaching their legal obligations. The claimant will need to be clear about which communications and when he says amount to protected disclosures, and a tribunal will need to weigh up each of these and decide if they meet the requirements of section 43(1)(b) which are very specific. I agree that the claimant has a chance of establishing that some of the disclosures qualify but I am not able to go so far as to say a 'pretty good chance' at this stage.

20. Finally the claimant would have to show that it was fairly certain that, if he had made qualifying disclosures, the reason for his dismissal was these and not the performance concerns referred to by the respondent. The claimant says that no concerns were raised until after the discussions around the junior doctor and out of hours cover had taken place. The respondent argues that they had legitimate reasons for issuing a notice of termination. There is a dispute of evidence which the tribunal at the full hearing will need to weigh up and resolve in order to reach a conclusion on what the true reason for the termination was.
21. In all the circumstances the application for interim relief is refused.

Employment Judge Siddall

Date 22 February 2023.