EMPLOYMENT TRIBUNALS

Claimant: Mr K Malek

Respondent: Randstad Solutions Limited

Heard at: Watford (by CVP) **On:** 27 June 2023

Before: Employment Judge Maxwell

Appearances
For the claimant: in person
For the respondent: Mr Gorasia, Counsel

JUDGMENT

The Claimant's application for interim relief is refused.

REASONS

Application

1. This hearing was listed on short notice to determine the Claimant's application for interim relief.

Documents

2. In addition to the Claimant's claim form on the file, the parties provided me with various documents:

Claimant

2.1 a skeleton argument;

2.2 the Respondent's absence management policy;

2.3 a "Temp Assignment Details Form";

2.4 a statement the Claimant gave to Ms Easton on 21 June 2023.

Respondent

2.5 a witness statement from Ms Easton, the Respondent's Site Lead for its client, Perkins Engines, and the person who is said to have decided to terminate the Claimant's engagement

2.6 a bundle of documents running to 61 pages;

2.7 Counsel's skeleton argument and supporting authorities;

Procedure

3. I began by explaining to the Claimant that interim relief was available where the claim included certain specific kinds of complaint. The only claim it appeared he might be bringing which would allow for such an order, was a complaint of automatic unfair dismissal pursuant to section 103A of the **Employment Rights Act 1996** ("ERA").

4. I summarised the law and procedure in this regard, in particular explaining the need for me to be satisfied that any claim under section 103A had a "pretty good chance" of success. I also said I would not hear any witness evidence today or make findings of fact. The witness statement of Ms Easton was provided by the Respondent so as to inform my understanding of the case it would advance at a final hearing on the reason for dismissal.

5. I heard oral argument from both parties. The Claimant confirmed that he relied upon his email of 15 May 2023 as containing a protected disclosure.

Background

6. The Claimant started work for Perkins Engines, a client of the Respondent, in March 2022.

7. The Respondent's bundle included a document entitled "contract for services for temporary workers". The Claimant said he did not receive a copy of this. Mr Gorasia referred me to a screenshot from the Respondent's IT system, which had information about the Claimant. Another screenshot included a list of documents, one of which was "Contract for Services – RIS" and a tick against that in the "Require Acknowledgement" column. The Respondent's case is that such documents are issued electronically (i.e. not in paper form) and employees signify their agreement by clicking (i.e. they do not sign). Following Mr Gorasia's submissions, the Claimant asked to come back on a number of points. He did not, however, dispute what I was told about this digital contract document. Furthermore, the Claimant's documents included a temporary assignment document in which Perkins Engines was named as the client for a 6-month engagement. This included particulars in a section entitled "Agency Worker Regulations".

8. In her witness statement, Ms Easton states the Claimant was engaged by the Respondent as an agency worker on a contract for services on 15 March 2022 and thereafter, supplied to its client, Perkins Engines, starting on 28 March 2022.

9. The contractual document is in a typical form and had clauses saying:

9.1 it is a contract for services;

9.2 the worker is not an employee;

9.3 there is no obligation for the Respondent to offer work or for the worker to accept any such offers;

9.4 the contract was one for temporary work and there may be periods when no suitable work was available;

9.5 the Respondent would endeavour to obtain suitable assignments with its clients.

10. Ms Easton's witness statement includes references to absence from work by the Claimant and performance concerns. I have not made any findings of fact about these matters.

11. On 15 May 2023, the Claimant sent an email to a group email address used by a number of the Respondent's managers (those on-site with Perkins Engines) which included:

> **The secondary complaint is against Series 400/Track 6s management team for failing to do anything effective about JS' ongoing misconduct (which includes sabotage).**
>
> **They have apparently had "chats" with him. The fact that he hasn't changed his behavior shows that these have not been corrective or effective.**
>
> **A number of associates have asked why JS is allowed to continue unchecked. The replies have varied between "he's just plain stupid to understand", or "he has skills", as if these are valid excuses to bully, harass and discriminate against others.**
>
> **I do not feel mentally and emotionally safe at work, constantly looking over my shoulder to see if JS or one of his Polish buddies is watching me, approaching me with the intention to engage and provoke.**
>
> **This constitutes a dereliction in management's Statutory Duty of Care.**

12. The Claimant relies upon the text set out above is amounting to a protected disclosure.

13. Later on 15 May 2023, the Claimant sent an email to the Respondent saying he had developed a persistent cough from excessive dust build-up and had reported himself as absent from work.

14. The Claimant did not attend for work on 16 May 2023. He sent an email saying that he had been to see his GP, who had given him antibiotics for a chest infection and was monitoring his blood pressure. He said he had a note from his doctor and asked about submitting this. Later that day he emailed the scan of the fit note.

15. Ms Easton states there was an investigation into the Claimant's complaints but she was not involved in this.

16. An email from Andy Stones (of the client, Perkins Engines) dated 16 May 2023, was sent to various individuals including Kamila Zilova (one of the Respondent's on-site managers) and provided:

> **Kamila came to see me today to tell me Karel Malek has raised a complaint about Jakub Swierbutowski. I have completed a statement from Jakub please find attached**
>
> **Now as said in the statement Karel did come and see me Friday evening around 9pm to say he want to report Jakub for bullying him. I tried to calm him down as was very animated. During our conversation he admitted swearing but not at Jakub but what really alarmed me was he said he doesn't report his polish mates which i found quite offensive.**
>
> **With regards to Jakub he is one of my keenest employees on safety and he will challenge anyone he sees doing anything unsafe which is exactly what we want him to do.**

17. On 23 May 2023, the Claimant submitted a further fit note. This said he would be unfit for work until 22 June 2023.

18. On 1 June 2023, Ms Zilova spoke to the Claimant and told him his contract was terminated. Shortly thereafter, the Claimant sent an email in the following terms:

> **Dear Kamila**
>
> **Please confirm the conversation we had at 14h08 today.**
>
> **Randstad/ Perkins have decided to end my contract due to "long term illness".**
>
> **This despite the fact that I have fit notes from my GP for:**
>
> **1. a chest infection arising from a dirty aircon unit in the plug-in booth I was forced to work in despite reporting it's H&S hazard and effect on me to management on 12 May 2023. The unit should have been cleaned/ maintained and was not - a dereliction in the employer's statutory duty of care, and**
>
> **2. work related stress and anxiety related to discrimination and harassment also reported to management on 12 May 2023. They advised that I should make an official complaint with randstad which I did on 15 May 2023. Randstad have not yet started investigating the complaint, which also constitutes a dereliction in the employer's statutory duty of care.**
>
> **I respectfully request you to reconsider your decision, and handle the matter in an appropriate, fair and reasonable way. Thank you.**

19. Ms Easton's witness statement includes the proposition that the need of its clients for temporary workers means the Respondent is unable to keep open roles where workers are off sick and they review absences as being long-term

after 4 weeks. Ms Easton calculates the Claimant's period of absence would exceed 4 weeks. The Claimant points out that 4-week period had not actually been reached by the point his engagement was terminated.

20. Ms Easton says she made the decision to terminate the Claimant's engagement on 1 June 2023. The relevant paragraphs in her witness statement provide:

> **28. Due to the level of absences taken by the Claimant, on or around 1 June 2023, I carried out a review to identify if we could continue to engage the Claimant on the Assignment. I decided that we could not for a number of reasons:**
>
> > **(a) as at 1 June 2023, the Claimant had 3 occurrences of absences and concerns of timekeeping and lateness in the last 12 months. The Claimant would have been issued with an OTI on his return due to the level of his absence and timekeeping;**
> >
> > **(b) there were performance concerns with the Claimant and he was due to be issued with an OTI on his return to work in relation to the 3 defects which had been identified on the engines he had worked on in May 2023; and**
> >
> > **(c) there also appeared to be conduct issues due to the manner in which the Claimant communicated with Jakub on or around 12 May 2023. The Claimant was due to be issued with an OTI on his return due to the manner in which he communicated with Jakub.**
>
> **29. In light of the above, upon his return to work after his sickness absence, the Claimant would have been issued with 3 OTIs. This would have led to his Assignment being terminated in any event.**
>
> **30. I therefore made the decision to terminate the Claimant's Assignment.**

21. Ms Easton says she did not see the Claimant's email of 15 May 2023 until after his claim was issued in the employment Tribunal. The Claimant doubts this chronology. He points to the fact that Ms Easton's annual leave did not begin until 22 May 2023, some days after his email was sent. He also suggests the subsequent chronology is surprising, with Ms Easton deciding to terminate his engagement immediately upon her return to work.

Law

Interim Relief

22. Applications for interim relief are governed by sections 128 and 129 of the **Employment Rights Act 1996** ("ERA"):

> **128. 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—**

> **(i) 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.**
>
> **[…]**
>
> **129. Procedure on hearing of application and making of order.**
>
> **(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—**
>
> **(i) 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.**
>
> **[…]**

23. Guidance on the threshold for whether the Claimant is likely (within ERA section 129(1)) to succeed was provided by the EAT in **Taplin v C Shippam Ltd [1978] ICR 1068**, per Slynn J:

> **We think that the right approach is expressed in a colloquial phrase suggested by Mr. White. The industrial tribunal should ask themselves whether the applicant has established that he has a "pretty good" chance of succeeding in the final application to the tribunal.**

24. In light of **Taplin**, something more than a 51% prospect of success is necessary to establish the "pretty good chance" necessary to establish the requisite likelihood within ERA section 129(1). See also **Wollenberg v Global Gaming Ventures (Leeds) Ltd UKEAT/0053/18/DA**, per HHJ Richardson:

> **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.**

Unfair Dismissal

25. ERA section 103A provides:

> **An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.**

26. The making of a protected disclosure involves three elements.

27. Firstly, there must be a "disclosure". According to section 43B(1) of the **Employment Rights Act 1996** ("ERA") a disclosure is constituted by "any disclosure of information".

28. Secondly, the disclosure must be "qualifying" which is determined by the content of the information disclosed. Section 43B(1), as recently amended, and so far as material provides:

> **(1) 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—**
>
> **[…]**
>
> > **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**

29. Thirdly, the qualifying disclosure must be made to a specified recipient, within ERA sections 43C-H, which includes at 43C, the employer.

30. In some circumstances, disclosing information for these purposes might be distinguished from the making of an allegation; see **Cavendish Munro Professional Risks Management Limited v Geduld [2010] IRLR 38 EAT** and **Kilraine v London Borough of Wandsworth [2018] IRLR 846 CA**.

31. Whilst a belief need not necessarily be correct in order reasonably to be held, see **Babula v Waltham Forrest College [2007] IRLR 346 CA**, the test is ultimately an objective one.

32. In **Chesterton Global Limited v Nurmohamed [2017] IRLR 837 CA**, the Court addressed the correct approach to the public interest.

33. For the purposes of an automatic unfair dismissal claim, the Tribunal must be satisfied that reason or principal reason for dismissal was an inadmissible reason.

Conclusion

Likelihood of success

34. In order to succeed on a claim of unfair dismissal, the Tribunal must be satisfied the Claimant was an employee.

35. Ostensibly, the Claimant was not an employee, as there was no mutuality of obligation. The contractual documentation is consistent with him being a temporary worker provided by an agency to its client. The Claimant did indeed, work for the Respondent's client, Perkins Engines.

36. The Claimant does not appear to dispute the fact of him being recruited as a temporary worker by the Respondent and then provided to its client.

37. The Claimant said it was unfair that two people doing the same job in the same business might have different rights, dependent upon one being a direct employee and the other being an agency worker.

38. Separately, the Claimant argued that a contract might be implied. He said there was an agency to permanent conversion process, whereby a person might go from being an agency worker to a direct employee of Perkins Engines. The Claimant said Perkins Engines offered a retention bonus if various targets were achieved. He said his contract had been renewed previously and that if performance was satisfactory, then such retention was assured.

39. The difficulty with the Claimant's argument in this regard is that a contract of employment can only be implied when it is necessary to do so. The Respondent will, inevitably, argue there is no need to imply a contract as the Claimant's attendance at and work for its client is adequately explained by the express contractual provisions under which he is an agency worker. Furthermore, the employment contract he argues for by way of implication is with Perkins Engines rather than the Respondent, against whom he is proceeding in the Employment Tribunal with an unfair dismissal claim.

40. Having heard only brief argument on the point, whilst I do not say there is no prospect whatsoever of the Claimant showing he was an employee of the Respondent, I certainly cannot be satisfied he has a pretty good chance of doing this.

41. That conclusion is sufficient for me to dispose of the application today. As such, it is unnecessary for me to consider his prospects of satisfying an Employment Tribunal that the sole principal reason for the termination of his contract by the Respondent was the fact of him making a protected disclosure by email on 15 May 2023.

Case Management

42. My task was simply to make a determination of the Claimant's application for interim relief. For the reasons set out above, that required I focus on his prospects of success in an automatic unfair dismissal claim under ERA section 103A.

43. The merits of his other claims are not a matter for me to consider today. It may be possible for the Claimant to pursue claims of discrimination (**Equality Act 2010**) or protected disclosure detriment (ERA section 47B not 103A) even if he is a worker rather than an employee.

44. The Claimant's claims can be clarified in the ordinary way as part of the case management exercise. The Respondent should now enter a response to his claim.

EJ Maxwell

Date: 27 June 2023

Sent to the parties on:
24 July 2023
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For the Tribunal Office:
T Cadman
……..……..