EMPLOYMENT TRIBUNALS

Claimant: Mr M Broomhead

Respondent: Peninsula Legal Services Limited t/as Irwell Law (substituted for the original respondent, Peninsula Business Services Ltd t/a Irwell law)

HELD AT: Manchester via CVP **ON:** 8th September 2023

BEFORE: Employment Judge McDonald (sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Mr C Crow (Counsel)

JUDGMENT

1. Under rule 34 of the Employment Tribunal Rules 2013, Peninsula Legal Services t/a as Irwell law is substituted as the respondent to these proceedings in place of Peninsula Business Services Limited.

2. The claimant's application to postpone the interim relief hearing is refused.

3. The application for interim relief against Peninsula Legal Services Limited t/a Irwell Law fails and is dismissed.

4. For the avoidance of doubt, the application for interim relief against Peninsula Business Services Limited t/a Irwell also fails and is dismissed.

REASONS

Introduction

1. By a claim form presented on 15 August 2023, the claimant brought claims of automatically unfair dismissal because of making a protected disclosure (S103A ERA 1996 ("ERA")). The claim form included an application for interim relief. The interim relief hearing was listed for today.

2. The claimant represented himself. He is an experienced employment solicitor. The respondent was represented by Mr Crow of counsel. I had before me a bundle of documents consisting of 93 pages ("the Bundle").

3. I gave oral judgment and the claimant requested my reason in writing. I have set out those reasons and the full terms of judgment in this document.

4. My task at this hearing was not to hear any live evidence or to make any findings of fact. It was to consider the relevant written documents, witness statements and what the parties told me in oral submissions and then to decide whether it was likely that at the final hearing the Tribunal would find in his favour on the automatic unfair dismissal complaint under section 103A of the ERA.

5. No Response to the claim form has yet been received; the deadline is 21st September 2023. The Bundle included the claim form, tribunal correspondence and 4 witness statements. In addition to the claimant's witness statements there were 3 witness statements for the respondent. They were from Theo Blauciak, Robert McKellar and Katie Jackson

6. We took a break to allow me to read the documents in the Bundle. A further document was produced at my request, namely the grievance which the claimant had raised by email on 2 August 2023. I then heard submissions.

Relevant Legal Framework

7. The application for interim relief was brought under section 128 of the ERA. The test for whether it succeeds or not appears in section 129(1) as follows:

   "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…that the reason (or if more than one the principal reason) for the dismissal is [the reason] specified in…section 103A…"

8. In this context "likely" means that there is "a pretty good chance of success": **Taplin v C Shippam Ltd [1978] IRLR 450**. In **Ministry of Justice v Sarfraz [2011] IRLR 562** the Employment Appeal Tribunal said that this means "something nearer to certainty than mere probability". It is not enough if the Tribunal thinks the claimant has a better than evens chance of success.

9. In assessing the prospects of success, I had to have regard to the legal framework which applies to the substantive complaint of automatic unfair dismissal.

Dismissal because of making a protected disclosure

10. S.103A of ERA provides that a dismissal will be automatically unfair if the reason or principal reason for the dismissal is that the claimant made a protected disclosure. Parts IVA of the ERA defines a protected disclosure. The key requirements are that the claimant must have made a disclosure of information rather than a bare allegation, that he must reasonably have believed that the information tended to show one of the matters set out in section 43B(1), and that

he reasonably believed that his disclosure was made in the public interest. If those requirements are met, a disclosure to an employer will qualify for protection.

11. As I have said, the claimant's case is that his disclosure of information qualified for protection under S43B(1)(b).

12. If a protected disclosure has been made, the complaint will succeed only if the reason or principal reason for dismissal is that the employee made a protected disclosure. Where the decision is that of one person it is the sole or principal reason in her mind which matters: **Royal Mail Ltd v Jhuti [2017] EWCA Civ 1632**. It is not enough for any protected disclosure to have had a material influence if it is neither the sole nor the main reason for dismissal.

Preliminary points on jurisdiction

13. The claim was brought against the wrong respondent. The claimant agrees that he was employed By Peninsula Legal Services Limited t/a Irwell Law. That is a different legal entity from the respondent named in his claim form, Peninsula Business Services Limited. The claimant is still in time to lodge a Tribunal claim relating to his dismissal against the correct respondent. In those circumstances, there was no objection to my substituting Peninsula Legal Services Limited as the respondent to this claim using the power to do so in rule 34 of the ET Rules 2013. In this judgment, when I refer to "the respondent" I am referring to Peninsula Legal Services Limited. If I need to refer to Peninsula Business Services Ltd I will refer to it as "PBS".

14. The next question was what impact the substitution of the respondent for PBS had on my jurisdiction to deal with an interim relief application under s.128 ERA. The respondent did not accept that by substituting the respondent for PBS that meant that the application could proceed. S.128(2) says that a Tribunal shall only deal with an application if made within 7 days of the effective date of termination. I accept Mr Crow's submissions that the EAT decision in **Galilee v the Commissioner of Police of the Metropolis [2018] ICR 634** means there is no doctrine of relation back when an amendment is granted.

15. I find that the substitution of the respondent for PBS takes effect from today's date of 8 September 2023. The effective date of termination given in the claim form is 9 August 2023. The claim was not brought against the respondent until 8 September 2023. That means the claim was not brought within the relevant time limit in s.128(2) and I have no jurisdiction to deal with it. It fails against the respondent on the basis it is out of time.

16. If I am wrong about that, there is a second jurisdictional issue raised by Mr Crow. S.128(4) requires that "the employer" be given a copy of the application and notice of the hearing by the Tribunal "not later than seven days before the hearing". "The employer" in this case is agreed to be the respondent. It has not been given a copy of the application nor given notice, certainly not seen days before this hearing. The copy of the application was given and notice served on PBS, not the respondent. Even had I found that the claim against the respondent

was brought in time, I find that I would have no jurisdiction to hear the application against it because s.128(4) has not been complied with in relation to it.

17. The claimant argued that the appropriate approach was to postpone the hearing. S128(5) ERA states that I should only do so where there are special circumstances justifying my doing so. The claimant suggested that the substitution of the respondent amounted to such special circumstances. The decision whether to postpone the hearing is one which I must take not only having regard to the specific provisions of Section 128(5) but also taking into account the overriding objective in rule 2 of the ET Rules 2013. In reaching my decision I have to act fairly and justly.

18. I remind myself that the reason there is any issue over jurisdiction is that the claimant, who is an experienced employment solicitor, named the wrong employer despite knowing who the correct employer was. That is evident from the documents at pages 68-69 of the Bundle (the claimant's email signature and his SRA details). If I did postpone, then there would have to be a further hearing. That causes a clear prejudice to the respondent because of the additional cost that would involve. It would also be disproportionate given that the whole aim of the interim relief process is to be a swift, summary process. I also cannot see that a claimant wrongly naming his employer amounts to special circumstances within s.128(5) justifying an adjournment. On that basis I refused the claimant's application to postpone this hearing.

19. My decisions above mean that the claimant's application for interim relief fails on jurisdictional grounds. Mr Crow made it clear at the start of the hearing that the respondent would prefer that I set out my views on the substantive merits of the application even if I decided that I had no jurisdiction to deal with the matter. I have done so below.

The Claimant's case:

20. The claimant was employed as an Assistant Solicitor by the respondent from 1 August 2022 to 9 August 2023. The Respondent provides employment law advice.

21. The claimant's case is that he was dismissed for making a protected disclosure. The protected disclosure relied on is the claimant telling Mr Blauciak at a meeting on 2 August 2023 that another solicitor employed by the respondent had arranged with the trainee solicitor who allocated work between the respondent's fee-earners to allocate the higher paying cases to that other solicitor, leaving the other work (described by the claimant as "the rubbish") for the claimant and other fee earners. The allocation of work was important because it partly determined the billable hours and fees which each fee earner could generate. The claimant says that that conduct by the other solicitor was a breach of 1.5 of the Solicitors Regulatory Authority Code of Conduct. He says the information provided was a disclosure falling within s.43B(1)(b) of the ERA, i.e. "information tending to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject".

22. The claimant was dismissed with three months' notice at that meeting on 2 August 2023. The position was confirmed by Mr Blauciak in a letter dated 4 August 2023. As the claimant points out, that letter does not specify the effective date of termination. In the event, that notice period was terminated by an intervening summary dismissal by Mr McKeller on grounds of gross misconduct, namely insubordination and breach of confidentiality. The claimant's case is that those grounds were fabricated by Mr McKellar.

Conclusions

23. Below I set out my conclusions on the substance of the application. The requirement on an interim relief application is to carry out a summary assessment. I am not making findings of fact. My conclusions are based on the claim form, the documentary evidence available to me and the witness statements and submissions from the parties.

24. To succeed with this claim the claimant will have to show that he made the qualifying disclosure alleged in his claim form and that it met the definition of a protected disclosure in s.43B. The Tribunal will also have to be satisfied that the protected disclosure was the reason or principal reason for his dismissal, either of his dismissal with notice by Mr Blauciak at the meeting on 2 August (confirmed (albeit with confirmation of the EDT) in his letter of 4 August 2023) or by the summary dismissal by Mr McKellar on 9 August 2023 which brought that notice period to an end.

25. When it comes to whether the disclosure was a qualifying disclosure, the respondent submitted that the disclosure made was not a disclosure of information but rather a bare allegation. Case-law (e.g. **Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA**) has warned of the dangers of drawing a distinction between an allegation on the one hand and information on the other, since the former can include the latter. Given that, the respondent's submission on this point would not in itself have persuaded me that the claimant's application for interim relief should fail.

26. The main focus of Mr Crow's submissions when it came to whether there was a qualifying disclosure was the need for the claimant to satisfy the Tribunal at the final hearing that he reasonably believed the disclosure to be in the public interest. Mr Crow's submission in brief was that the claimant's real issue was that work was being allocated unfairly between the respondent's fee-earners, leading to the claimant being challenged and subjected to what was effectively a disciplinary process because his billable hours were low. Mr Crow submitted that that was not something which the claimant could reasonably believe had a public interest element.

27. The claimant argued strongly that the public interest element was present. His disclosure was about the conduct of a solicitor. The conduct of a solicitor is subject to the requirements of the SRA Code of Conduct. He submitted that the existence of a regulatory framework applying to the conduct of a solicitor establishes the public interest element when it came to a solicitor's conduct.

28. I remind myself that what the claimant will have to show is he had a genuine belief at the time the disclosure was made that the disclosure was in the public interest and that he had reasonable grounds for so believing. There is a transcript of the meeting on 2 August at which the claimant made what he relies on as the disclosure. He does not mention anything about the conduct raised being in breach of the SRA Code in that transcript. I accept the claimant would not have to give chapter and verse about the Code's provisions to satisfy the s.43B test, but it seems to me the focus in that transcript is clearly on the unfairness to the claimant and on the alleged unfair allocation of work being the explanation for his low billable hours. There is no reference to concerns about the reputation of the firm for example or to his colleagues' behaviour failing to meet the standards required of a solicitor. I accept that the claimant does not have to show that behaviour actually contravened the Code but whether the claimant genuinely believed it on reasonable grounds at the time. It seems to me that the absence in the transcript of any reference to the standards required by the Code as opposed to the claimant's complaint focussing on the unfair allocation of work between the fee earners does make it harder for the claimant to show that he genuinely believed at the time that the disclosure was in the public interest. I cannot say he has a pretty good chance of establishing that he genuinely believed the public interest element was present and that that belief was reasonable.

29. The other element of the claim which it seems to me that the claimant may face difficulty with is the requirement for the causal link between the disclosure and the dismissal. In brief, without making detailed findings of fact, the claimant's case is that he and his colleagues had had enough of the other fee earner monopolising the good claims and the claimant decided that it had got to the point where he would have to raise a grievance about it. He said he did so in his email of 2 August to Mr Blauciak. However, that email is in response to an invitation from Mr Blauciak to a meeting. That meeting was essentially a performance meeting to discuss the claimant's low billable hours and also a complaint which had been received from a client on 1 August. It is clear that there were issues with the claimant's performance about which the respondent was taking action before he made any kind of protected disclosure at the meeting on 2 August. The grievance email does not refer to any breach of the SRA Code.

30. The claimant says that even if there were issues with his performance, what triggered the decision to dismiss him at that meeting on 2 August (rather than take no or lesser disciplinary action) was his disclosure. He points to what he says was a failure to comply with the ACAS code of practice on disciplinary matters or the respondent's own disciplinary as evidence in support of his case.

31. I accept that the claimant did send that email to Mr Blauciak on 2 August asking for "the grievance procedure to be initiated" and that he did so before the meeting at which he says he made the disclosure. However, the concerns raised in the email are not the disclosure on which he bases his case, i.e. alleged non-compliance with the SRA Code. There is also no clear evidence as to whether Mr Blauciak had seen that email before they held the meeting. The transcript contents suggests he had not. Taken together I find that means that I cannot say there is a pretty good chance of the claimant establishing the causal link

between the protected disclosure (if it can be shown that he made it) and the decision to dismiss by Mr Blauciak.

32. When it comes to Mr McKeller's subsequent to summarily dismiss, the evidence is even less clear. Mr McKeller was not copied into the email grievance on 2 August. The evidence showed that he had received a complaint from a client (or rather had seen a complaint about the claimant by a client on a website) and was seeking to discuss that with the claimant. There is a live issue as to whether or not Mr McKeller in fact knew about the disclosure relied on by the claimant. That will have to be tested at the final hearing. From the information in front of me I cannot say that there is a pretty good chance of the claimant establishing that Mr McKeller knew about that disclosure or, if he did, that that was the reason or principal reason for the decision to dismiss the claimant summarily on 9 August.

33. The documents in the Bundle appear to corroborate the respondent's case that the summary dismissal was because of the claimant's conduct not any disclosure. In reaching my decision I have taken into account the claimant's submission that the failure by Mr McKeller to follow the respondent's own or the ACAS disciplinary procedure is indicative of the fact that the employer was not really dismissing for disciplinary matters. I can see there might be some force in that argument. However I can equally see force in Mr Crow's submission in response that given that the claimant had not been employed for 2 years so no right to claim ordinary unfair dismissal arose, the lack of a full disciplinary process does not lead to the conclusion that the employer was acting unlawfully. I accept Mr Crow's submission that the absence of a process certainly does not in itself enable the claimant to surmount the hurdle of showing that he has a pretty good chance of succeeding with the claim that a protected disclosure was the reason or principal reason for Mr McKeller's decision to dismiss.

34. Stepping back and looking at matters in the round what I find is that there is not the required "pretty good chance" of the claimant showing that he made a qualifying disclosure, particularly because of the public interest point. I also find that the claimant cannot show that there is a pretty good chance of his establishing the causal link between the disclosure and the dismissals. In those circumstances overall my view is that there is not a pretty good chance of the claimant succeeding with his claim of automatically unfair dismissal at the final hearing.

35. In the circumstances if I did have jurisdiction to deal with the claim I would have rejected the claim for interim relief.

Employment Judge McDonald
3 October 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON
10 October 2023

FOR THE TRIBUNAL OFFICE