



EMPLOYMENT TRIBUNALS

Claimant: Miss M Kim

Respondent: Manceps Limited

Heard at: London Central by video

On: 28th September 2023

Before: E J B McKenna

Representation

Claimant: In person

Respondent: Mr E Stenson, Counsel

INTERIM RELIEF JUDGMENT: WRITTEN REASONS

1. The Claimant requested written reasons for the judgment refusing her application for interim relief. I apologise for my delay in providing these reasons due to the pressure of other judicial work.
2. By a claim form presented on 18th July 2023 the Claimant brought complaints of automatically unfair dismissal. She ticked the box to say that this was as a result of making a protected disclosure. She also indicated that she wished to apply for interim relief.
3. In deciding an interim relief application, I have to predict the likely outcome of the final hearing.
4. I had the benefit of the Claimant's Claim Form, a bundle of documents prepared by the Respondent which numbered 32 pages and included its Response, a witness statement from Mr Sarovs, Manager for the Respondent, and the Respondent's skeleton argument. I determined that it was not appropriate to hear oral evidence in considering this application. The oral submissions made by the parties are summarised where relevant in the decision and discussion section of the judgment below.
5. The Claimant was employed by the Respondent as an office administrator

from 3rd July 2023 until her employment was terminated on 13th July 2023. Although she had worked for the company previously, at the time of her dismissal the Claimant did not have two years' qualifying service to pursue an ordinary unfair dismissal claim.

6. The Claim Form says that the Claimant was dismissed by an e-mail which she considered to be vague and unclear. She further says that she was asked to sign what she terms a fake contract to support a loan application. She says that she refused and was informed one week later that she had failed her three months' probation period. She says that she was told at the time that she was dismissed for not fitting into company culture.
7. The Respondent is involved in the fashion business. The Respondent denies the claims in full and says that the Claimant was dismissed for four different aspects of poor performance which were discussed with her on three separate occasions:
 - a. poor timekeeping,
 - b. failing to follow instructions,
 - c. negative attitude towards colleagues; and
 - d. repeatedly demanding that the company pay her a season ticket loan.
8. It says that the Claimant was asked to sign a genuine document to facilitate a loan. The document was later signed by the Respondent's accountant.

Legal framework

9. "Protected disclosure" is defined in s.43A ERA 1996:

"In this Act a " protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

10. "Qualifying disclosures" are defined by section 43B ERA 1996,

43B Disclosures qualifying for protection.

(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 —

- (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,*
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,*

- (e) *that the environment has been, is being or is likely to be damaged, or*
- (f) *that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.*

11. Accordingly, there are four essential elements to a complaint of automatically unfair dismissal for having made protected disclosures:
12. First, there must be a qualifying disclosure of information. The disclosure must concern facts rather than allegation or opinion. In practice, allegations and information may be intertwined; ***Kilraine V London Borough of Wandsworth{2016} IRLR 422.***
13. Second, the Claimant must have a “reasonable belief” that the disclosures are in the public interest. Public interest is not statutorily defined.
14. Caselaw establishes that the relevant factors to consider disclosure may be in the public interest include the numbers of people whose interests are served by the disclosure, the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed, the nature of the wrongdoing and the identity of the alleged wrongdoer; ***Chesterton Global Limited (t/a Chestertons) and another v Nurmohamed (Public Concern at Work intervening) [2018] ICT 731 CA***
15. Third, the Claimant must reasonably believe that the disclosure tends to show one of the matters specified in paragraph 9 above. This means that a judgment must be made first, as to whether on the belief was reasonable and whether, objectively, on the basis of the perceived facts, there was a reasonable belief in the truth of the complaints; ***Phoenix House v Stockman [2017] ICR 84.*** There can be a qualifying disclosure even if the Claimant is wrong; ***Darnton v University of Surrey [2003] ICR 615.***
16. Finally, the sole or principal reason for the dismissal must be that the employee made the disclosure. An employee will only succeed if the tribunal is satisfied, on the evidence but the principle reason is that the employee made a protected disclosure. The principal reason is the reason that operated on the employer's mind at the time of the dismissal; ***Abernethy v Mott, Hay and Anderson [1974] ICR 323.*** This is a relatively high bar.

17. Section 128 Employment Rights Act 1996 provides:

'128. Interim relief pending determination of complaint

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 104(1) and the condition in paragraph (a) or (b) of that subsection was met, may apply to the tribunal for interim relief.*

(2) *The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).*

(3) *The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.*

(4) *The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time, and place of the hearing.*

(5) *The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so'.*

18. The question to be determined upon an application for interim relief is found in

Section 129 Employment Rights Act 1996 (ERA):

'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 104(1) and the condition in paragraph (a) or (b) of that subsection was met....”.*

19. Interim relief can therefore be ordered where the Tribunal finds that it is likely that a final hearing will decide that the reason (or principal reason) for dismissal was the Claimant having made protected disclosures contrary to s 103A ERA1996.

20. The meaning of the word likely for purposes of interim relief has been considered in several authorities. In a case concerning an interim relief application and dismissal for trade union reasons, the EAT held that the Claimant must show that they have “a pretty good chance” of succeeding; ***Taplin v Chippam [1978] ICR 1068***
21. In a protected disclosure interim relief case, the word “likely” was interpreted by Underhill P (as he then was) to connote more than a 51% chance and to require “something nearer to certainty than mere probability”; ***Ministry of Justice v Sarfraz [2011] IRLR 562***.

Discussion and decision

22. In order to succeed in her interim relief application, the Claimant must establish the necessary level of likelihood in relation to each of the four essential elements of a complaint under s.103A of the ERA 1996 outlined at paragraphs 11 to 16 above.

Qualifying disclosure

23. The Claimant said only that she refused to sign a loan document which she characterises as a “fake contract”. The Respondent notes that her Claim Form does not say that she disclosed information to the Respondent.
24. I found that it was not likely to the point of near certainty that the Claimant would establish that she had made a qualifying disclosure. She could not point to having disclosed information to the Respondent. She appears to merely have formed a view as to the propriety of the document she had been asked to sign.

Reasonable belief in wrongdoing

25. The Claimant maintained that the document which she had been asked to sign misrepresented the level of income from a particular client and said that this amounted to an illegal document to secure finance. The Respondent said that this was not correct and that it was a standard document for its overseas clients which was subsequently signed by the company’s accountant. Mr Stenson submitted that a draft contract which had not yet been put in place could not amount to wrongdoing.
26. I disagreed with him on this point noting that s.43B(1)(b) refers to a person being “likely to fail to comply with any legal obligation to which he is subject”. A draft unsigned legally dubious contract which a person intends to put in place may therefore potentially amount to wrongdoing. I thought that the Claimant’s allegation was potentially arguable.
27. I went on to find however that the Claimant had failed to show that objectively on the basis of the perceived facts that it was close to certainty that she would succeed in establishing reasonable belief on wrongdoing at a full hearing. The Respondent said that the document was a standard document for new clients and that it has now been signed by the company concerned who is one of its

clients. I also placed weight on the fact that the contract had been signed by the Respondent's accountant. This meant that it was less likely that the Claimant had a pretty good chance of establishing that she had a reasonable belief in wrongdoing concerning a document which had been signed by an individual working in a highly regulated profession.

Reasonable belief in public interest

28. The Claimant did not identify a reasonable belief that disclosing information on the alleged wrongdoing was in the public interest. The Respondent said that this was a pro-forma document. Mr Stenson submitted that the Claimant had failed to show that she had a high degree of likelihood of establishing a reasonable belief that the relevant document was likely to affect people at large or public life in general.
29. I accepted Mr Stenson's submissions on this point in holding that the Claimant did not have a "pretty good chance" of establishing that any disclosure had been in the public interest. Applying the principles in ***Chesterton Global Limited (t/a Chestertons) and another v Nurmohamed (Public Concern at Work intervening) [2018] ICT 731 CA***, I did not find that a Tribunal would find that a disclosure concerning a standard form document in a small company was in the public interest. The Claimant did not specify how this matter had a wider impact so as to afford her whistleblowing protection.

Reason for dismissal

30. It is clear from her oral submissions that the Claimant was unhappy at the four reasons given for her dismissal. She appeared particularly unhappy given her apparently previously harmonious period of employment with the Respondent.
31. She suggested that the Respondent had moved the goalposts since her last period of employment and was now less tolerant of her wish to work flexibly and to take leave. She was angry at not being informed about her duties. She was aggrieved too that the Respondent had, she believed, encouraged her to leave another employment with which she had been happy to return to its employment. She clearly rejects the reasons which have been advanced for her dismissal.
32. The Respondent submitted that it had been entitled to dismiss the Claimant for cause pointing to the dismissal letter which itemised four aspects of poor performance or behaviour which it says it raised with the Claimant on three occasions. Furthermore, it said that she had not claimed that her dismissal was linked to the alleged disclosures.
33. I agreed with the Respondent that the Claim Form does not link her dismissal to making a qualified disclosure. It states merely that the e-mail dismissing her "seems vague and unclear". There is no

positive assertion that her dismissal was due to making a disclosure.

34. Accordingly, I do not find it likely to near certainty that the Claimant will establish that protected disclosures were the sole or principal reason for her dismissal.

Conclusion

35. In these circumstances, the Claimant's application for interim relief fails.

Further preliminary hearing

36. A further preliminary hearing will be listed.

Employment Judge **B. McKenna**

Date 13th October 2023

JUDGMENT SENT TO THE PARTIES ON

03/11/2023

FOR THE TRIBUNAL OFFICE

Notes

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.

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