



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

MRS FATIHA ALAOUI

CALABRIO UK LIMITED

Heard at: London Central, by CVP

On: 15 December, 2023

Before: Employment Judge: O Segal KC

Representations

For the Claimant: In person

For the Respondent: Mr R Dennis, counsel

JUDGMENT

The claim for interim relief is dismissed.

REASONS

Introduction

1. This hearing was listed to determine the application of the Claimant (C) for interim relief pursuant to s. 128 ERA 1996.
2. C, who is qualified to practise as an *avocat* in France, was employed by the Respondent (R) as a Senior Contracts Attorney until her dismissal on 9 November 2023, when she was dismissed ostensibly by reason of redundancy.
3. I heard evidence from C and read a statement by her headed “Interim relief order request to the Employment Tribunal – Matter of facts”. I read signed statements on behalf of R from Ms Susan Grassel (Director, Legal and C’s Line Manager) (SG), who is qualified to practise under United States law, and Mr Todd Laddusaw (CFO, and Ms Grassel’s Line Manager) (TL). I had a bundle of documents from R, together with an email string provided separately by both parties to the tribunal which R maintained attracted in part legal advice privilege. I had a grievance outcome letter provided by C.
4. For completeness, I note that during the adjournment of a little under an hour following evidence and submissions and before I gave judgment, C (re-)emailed a few documents which she had already emailed to the tribunal but which I indicated had not been passed on to me before the hearing. I did read those documents before reaching my decision and giving judgment, but did not consider them material to the issues I had to determine today.

The law

5. Section 129(1) provides that:

(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— 2 (i) section ... 103A ...

6. Section 103A ERA provides that:

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.

7. In this context, it is established that “likely” means “a significantly higher degree of likelihood [than 50%]”: **Ministry of Justice v Sarfraz** [2011] IRLR 562.

8. Section 43B(1) ERA provides that:

(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, ...

9. R placed reliance on **Kraus v Penna plc** [2004] IRLR 260, in which Cox J held that:

24. We accept Mr Nawbatt's submission that we should interpret the word 'likely' in s.43B(1)(b) ... as requiring more than a possibility, or a risk, that an employer (or 'other person') might fail to comply with a relevant legal obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable or more probable than not that the employer will fail to comply with the relevant legal obligation. Mr Kraus's advice to Mr Bolton that Syltone 'could' breach employment legislation cannot in our judgment be a qualifying disclosure within s.43B(1)(b)

10. Section 43B(1) is subject to 43B(4), which provides that:

A disclosure of information in respect of which a claim to legal professional privilege ... could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.”

11. It is, as I understand it, common ground that legal advice privilege attaches to communications made in confidence between lawyers and their clients for the purpose of giving or obtaining legal advice, including in-house lawyers. That includes those lawyers licensed to practise in foreign jurisdictions.

Discussion

12. C claims to have made protected disclosures in June and August 2023. However, since I find that the decision to dismiss C had been made towards the end of June 2023, some time before any alleged disclosure(s) in August, I focus on those disclosures said to have been made in June.
13. R had done work for a Russian client and there was consideration given to how payment could be made and received for that work in the context of sanctions having been applied in respect of money coming from Russia into inter alia EU and US banks.
14. R was content that I should look at – and the parties make submissions by reference to – the relevant email string, despite R not waiving any privilege that attached to those emails. They show:-
 - 14.1. R trying to arrange for payment from the Russian client via a UAE bank, in respect of which C was asked by SG to draft a letter to be sent from R to the client;
 - 14.2. C expressing a concern, both on 7 June and more fully on 15 June, about the proposed course of action from the perspective of the sanctions in place against receiving funds from Russia;
 - 14.3. SG noting that concern and asking the internal accountant, Ms Alexandra Behnam (AB), whether she had already had the proposed transaction verified as lawful or whether external legal advice should be obtained;
 - 14.4. C, SG and AB agreeing to speak about the issue the following week.
15. As to those communications, I find that:-
 - 15.1. It is doubtful that C, in the first email I referred to, was being asked to provide legal advice – but I do not decide that point.
 - 15.2. C was probably ‘disclosing information’ in her two emails.

- 15.3. However, it was not information which tended to show that R was likely to commit a criminal offence/likely to fail to comply with a legal obligation. On the contrary, at that point the position was that C was providing information/advice on the assumption that it would be taken into account in ensuring that R did not commit such an offence/fail to comply with any legal obligation.
16. C's evidence is that, in one or more conversations thereafter, SG and AB told her that R had in the past processed similar transactions to the one now proposed and that C should not therefore be concerned about this one, to which C's response was that she "refused" and told them "we can't do this". Her evidence was that she repeated the essence of what she had set out in the two emails, more robustly, and did so in her capacity "as in-house counsel, as part of the legal department".
17. That evidence had not been clearly presaged by C and was not addressed in R's witness statements. It was not admitted by R to be accurate. In the circumstances, it would be problematic to determine that it was 'likely' in the material sense that a tribunal at trial would accept C's evidence about those conversation(s) as accurate – however, for the various reasons set out below, I consider that I do not need to determine that point.
18. In all events:-
- 18.1. C's 'refusal' to assist in the proposed transaction cannot constitute the disclosure of information for the purpose of s. 43B.
- 18.2. In so far as she confirmed her earlier statements about the illegality of such (past) transactions, it could be said – though I reach no concluded view – that she was disclosing information which in her reasonable belief was in the public interest and tended to show that a criminal offence had been committed/a person had failed to comply with a legal obligation.
- 18.3. However, if so it seems to me that it is not likely that C would persuade a tribunal at trial that the exemption in s. 43B(4) would not apply. Put another way, I consider it likely that at trial a tribunal would find that any such 'information' was provided to C in the course of obtaining legal advice and that she 'disclosed' it in circumstances where a claim for legal professional privilege

could be maintained, given her status and the capacity in which she was then acting.

19. I turn to the reason for the C's dismissal.
20. It seems to me un-likely that a tribunal at trial would find that the main reason for that dismissal was because of any information disclosed by C in relation to the proposed or to any previous similar transactions.
21. I say so, in summary, for the following reasons:-
 - 21.1. It is clear from contemporaneous documents that SG was, based on feedback from clients and colleagues, concerned about C's performance for some weeks before June 2023 and was moving towards instituting a capability process and perhaps dismissal.
 - 21.2. There is nothing in the contemporaneous documents indicating that R had any concerns about any information disclosed by C in relation to the proposed or to any previous similar transactions.
 - 21.3. The contemporaneous documents relating to the eventual decision to dismiss set out clearly that the reasons related to perceived concerns about C's performance (and, latterly, the potential cost saving to be achieved from absorbing her work amongst existing employees).
 - 21.4. SG and TL provided sworn evidence that their only reasons for C's dismissal related to SG's concerns about C's performance and the potential cost saving to be achieved from making C redundant.
 - 21.5. C provided no evidence, nor even an argument why it should be inferred that the main reason for her dismissal was the information disclosed by her in relation to the proposed or to any previous similar transactions – save that she disputed that any supposed concerns about her performance were warranted, or even genuine.
 - 21.6. Moreover, when I asked C why she had been dismissed, her answer was that there were “numerous reasons”, including pressure ‘from Sweden’ because of her

refusal to go along with the proposed transaction and her exposure of unlawful activity, racist attitudes of senior management in Sweden, and R's knowledge of surgery that C was shortly due to undergo to address a medical condition. It is thus not clear, even on C's case, that the main reason for her dismissal was any protected disclosure(s).

22. For the above reasons, I do not consider it likely that at trial a tribunal would find that the main reason for C's dismissal was the fact of her having made any protected disclosure(s).

Oliver Segal KC

Employment Judge

15 December, 2023

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

15/12/2023