EMPLOYMENT TRIBUNALS

Claimant: **Mr. H Moune Nkeng**

Respondent: **Barclays Execution Services Limited**

Heard at: **East London Hearing Centre**

On: **8 December 2023**

Before: **Employment Judge Misra KC**

Representation

Claimant: in person
Respondent: Ms. Claire McCann of Counsel

JUDGMENT having been sent to the parties on **14 December 2023** and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant made an application for interim relief pursuant to sections 128-129 Employment Rights Act 1996 ('ERA 1996') when he issued his claim in case number 3202025/2023 (which I understand to be the fifth claim he has brought against his employer, Barclays Execution Services Ltd amongst other respondents connected to his employer).

2. The Claimant represented himself before me and Ms McCann of Cloisters Chambers represented the Respondents. I was grateful to the parties for the documents which were pulled together in a necessarily short time frame for the hearing at a time when the Respondents had not filed ET3 forms which were not yet due for submission. I was particularly grateful to the Claimant for producing a witness statement including a table of the disclosures on which he relies and Ms McCann of counsel for her extremely helpful submissions and bundle of authorities, as well as Ms Sarah Devlin who produced an appropriately focused witness statement as the decision-maker in respect of the Claimant's dismissal.

3. For completeness the documents I had before me were:

   i. The Tribunal file for this case;

   ii. The Claimant's application to amend his claim to include claims under s.100 and s.104 ERA 1996;

   iii. The Claimant's witness statement of 51 pages;

   iv. The Claimant's bundle of 800+ pages which I was unable to read in full but asked the Claimant to flag key documents to me which I paid close attention to;

   v. The Claimant's submissions;

   vi. The Respondent's hearing bundle which contained core documents relevant to the issues and which I again did not read in full but focused on documents referred to in witness evidence and submissions;

   vii. The witness statement of Sarah Devlin for the Respondent; and

   viii. The Respondent's counsel's written submissions and authorities bundle.

4. The claim was presented to the Tribunal on 2.11.2023 which was within 7 days of the Claimant's dismissal on 1.11.23 by the First Respondent which is the only relevant respondent for the purpose of this application (as no such application may be made against an individual respondent for obvious reasons). The application is made in time and it is resisted by the First Respondent ('Barclays').

5. The Claimant relies in his claim on a number of alleged protected disclosures which he says are in some way linked to his dismissal by Ms Sarah Devlin on behalf of Barclays; his claim is brought under s.103A ERA 1996 and I bear in mind that in order to succeed at a full hearing it will be necessary for the Claimant to prove that he made protected and qualifying disclosures and if so that additionally the sole or principal reason for his dismissal was the making of one or more of the disclosures.

6. It was common ground that I was not required to conduct a mini-trial and that my task was to conduct a summary or review type assessment of the materials available to me in reaching my decision, consistent with the approach suggested in Raja v SS for Justice UKEAT/0364/09/CEA:-

   25. What a Tribunal has to do in an application for interim relief is to examine the material put before it, listen to submissions and decide whether at the final hearing on the merits "that it is likely that" that Tribunal will find that the reason or reasons for the dismissal is one or more of those listed in section 129(1).

7. As such, the witnesses did not give oral evidence and it was not tested in cross-examination, consistent with the purpose of sections 128-129 ERA

1996 and the authorities as to the Tribunal's proper function in determining such applications.

8. Through discussion with the Claimant it became apparent that he relies on s.100(1)(c)ERA 1996 in respect of an application to amend his claim for unfair dismissal, which is not a sub-section that is amenable to an application for interim relief at all. Therefore I did not determine the outstanding applications to amend the claim and they will be dealt with another time by the Tribunal.

9. Accordingly I heard from both parties after taking some further time to read key documents on the s.103A ERA 1996 claim for automatic unfair dismissal in the context of the application for interim relief.

10. In assessing whether the Claimant was entitled to relief under sections 128-129 ERA 1996 the Tribunal must decide whether it appears, at this early stage, on the materials presented, that the Claimant has a pretty good chance of succeeding in his s.103A ERA 1996 claim at a final hearing, which includes as to each of the constituent parts of that claim. See: Taplin v C Shippam Ltd [1978] ICR 1068, EAT, followed in Dandpat v University of Bath UKEAT/0408/09 and London City Airport v Chacko [2013] IRLR 61, EAT.

11. I confirmed with the Claimant that for the purpose of his application before me he relies on the table of disclosures contained in his submission emailed to the Tribunal shortly before the hearing started.

12. The Claimant contends that he made qualifying and protected disclosures as follows:

    i. On 30 August 2018 to HR and the Head of Non Traded in Model Risk Management in a cultural focus group meeting;

    ii. On 15 August 2020 to all the respondents in respect case number 3202090/2020 in his particulars of claim that the cross asset team in Mr Kim's team was against the principle of effective validation which was in his belief in breach of Regulation SR-11-7;

    iii. On 14 April 2023 to all those participating in the hearing of the Claimant's first batch of consolidated claims in the Tribunal the same as in (ii);

    iv. On 19 April 2023 to all respondents and their representatives and the Tribunal as above in his written closing submissions at pp.629 to 650 of the Claimant's bundle, especially pp. 631 to 633 the same as in (ii);

    v. Between 11 April 2023 to 19 June 2023 during the course of Tribunal proceedings to hear his claims in writing to all respondents and the Tribunal in his particulars of claim and closing submissions in respect of the issues identified in the agreed list.

13. It appeared to the Tribunal that the Claimant withdrew his complaints related to the making of protected disclosures in his second claim such that they will not be adjudicated upon, but the Tribunal has not yet promulgated its judgment in respect of the other extant claims which it has heard (though it may be a in a position to do so early next year according to the parties).

14. The Claimant confirmed that he did not rely on grievances raised in July and September this year as protected disclosures though he did suggest they had influenced the decision to dismiss him.

15. As well as the language of the statute itself, I reminded myself of the Court of Appeal's decision in Kilraine v LB Wandsworth [2018] ICR 1850 as to what amounts to a disclosure of information within the statutory language. A disclosure needs to have sufficient factual content and specificity as to be able to be deemed to be capable of showing one of the matters listed in section 43B(1) ERA 1996. I am entitled however to have regard to the relevant context in determining sufficiency, which may include other communications and industry or sector specific common knowledge and nothing in Kilraine or any other authority to which I have been taken suggests otherwise.

16. It is trite law that in order to have the requisite reasonable belief provided for in the statute, it is not necessary for the Claimant to be right or correct in what he believes: Babula v Waltham Forest College [2007] ICR 1026. However, the belief must be subjectively genuinely held and objectively reasonable: Chesterton Global Ltd v Nurmohamed [2018] ICR 731, CA. The Chesterton decision is also a clear reminder of the proper approach to be taken to the public interest element of the wording in s.43B(1) ERA 1996.

17. The disclosures which the Claimant says he made were in the context of financial services regulation, which is a highly technical area with distinctions sometimes to be drawn between guidance, best practice and rules, which can differ between types of institution. It is perhaps not surprising that this will have occupied some of the time in the substantial 33 day Tribunal hearing this year in respect of which I have had no involvement whatsoever.

18. On my summary assessment looking at the key documents in the time I have had, I cannot say that the Claimant has a pretty good chance of succeeding in establishing that he made qualifying and protected disclosures, particularly in the unusual context of having made them, he says, in the ordinary course of litigation by issuing or serving a claim and giving evidence in the Tribunal.

19. However, even if I were to take the Claimant's case on having made the protected disclosures that he says he made to his employer (amongst others) at its absolute highest, I am far from satisfied that the Claimant has a pretty good chance to succeeding on causation i.e., of proving that Ms Devlin whom he accepts was the person who decided to dismiss him did so for the sole or principal reason that he had made such disclosures contrary to s.103A ERA 1996. The pretty good chance test applies to each and every element of the claim and so this would be fatal to an application for interim relief in any event.

20. I considered all of the arguments and submissions made, for which I was very grateful, and summarise the key reasons for my conclusion in this regard as follows:

i. Ms Devlin did not work in the Claimant's team, did not know him and was not involved in any workstreams in common with the Claimant or those about whom he had made complaint when she was asked to investigate a potential breakdown in working relationships in March 2023;

ii. The disclosures which the Claimant relies on pre-date Ms Devlin's involvement by some distance and the disclosures said to have been made were a repetition or clarification of disclosures well before the hearing started and not new ones as the Claimant confirmed to me himself;

iii. Ms Devlin was not involved in the Tribunal proceedings in 2023 as a respondent, witness or observer and aside from knowing of their existence as a substantial piece of litigation says in her statement she says she was in fact oblivious to what transpired and was not ever given copies of the claims or submissions which the Claimant refers to;

iv. The Claimant when asked by me how he linked the disclosures to Ms Devlin's decision could only say that he surmised that at a meeting with ER, which he had not attended and was not privy to, Ms Devlin must have been given information about all of his disclosures;

v. The Claimant accepted he had raised 27 or so grievances by the date of his dismissal and did not seek to contradict that he did not attend mediation meetings offered to him, though he said he had his reasons for declining which supports that there were inter-personnel issues in the workplace requiring attention;

vi. The Claimant did not assert he had made protected disclosures in his appeal against dismissal at all, which appeal is not yet determined as I understand it;

vii. While the Claimant did not accept this entirely, there was evidence in the documents that others perceived there to be dysfunctionality in working relationships;

viii. The reasons given in the dismissal letter are plausible albeit I accepted they remain to be tested in due course; the letter however presented a credible and consistent alternative account to that presented by the Claimant as to the reason for dismissal;

ix. That the Claimant points to his grievances of July and September 2023 being linked to his dismissal points away from his disclosures being the sole or principal reason for it;

x. There was no evidence by way of what one might call "a smoking gun" at this stage to show that Ms Devlin was in any way motivated by any

protected disclosure alleged by the Claimant in this claim or any other claim and Ms Devlin accepted through counsel that she had seen four documents (letters of grievance which the Claimant wrote to others) as part of a pack of information to enable her to investigate matters, but gave these little weight and I note they were written some years before;

xi. In respect of a fourth claim which names Ms Devlin as a respondent the Claimant did not include this in his table of disclosures but her evidence was that she was not aware of this claim at the time she decided to dismiss the Claimant in September 2023 (after which she finessed the letter which went out on 31 October 2023). It is not unusual for a letter of dismissal to be reviewed by legal personnel in house or externally and I do not find the tone or contents of the letter to be unusual or suspicious which was the Claimant's main submission in this regard.

xii. Insofar as the Respondent was concerned that the Claimant was insisting on working only in payoffs and the Claimant was concerned he was being asked to work outside his area of experience or competence, that may well be a factual issue for a Tribunal to resolve in the future, but I am not in a position to say that this was the sole or main reason for the dismissal noting this is a different test to s.47B ERA 1996 which only requires a material influence.

21. So the Claimant does not therefore meet the threshold to be granted interim relief and I dismiss the application.

22. I have not made any binding findings of fact and it remains for the Tribunal which hears this claim to reach its own findings and conclusions independently of my summary assessment at this early stage. That also applies to the application to amend the claim which is not determined by me today. Likewise my decision today has no bearing on the decision the Tribunal will reach after the 33 day hearing earlier this year, which I state for clarity especially for the Claimant.

Employment Judge E Misra KC

15 December 2023