EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Milligan	**v**	(1) Charge Master Limited; and (2) BP Plc.

Heard at: Norwich (by CVP) **On:** 3 January 2024

Before: Employment Judge Postle

Appearances
For the Claimant: In person
For both Respondents: Miss Balmer, Counsel

JUDGMENT
on
APPLICATION for INTERIM RELIEF

The Claimant's Application for Interim Relief in his claim for constructive unfair dismissal under Section 103A of the Employment Rights Act 1996 is not well founded.

REASONS

The Law

1. The Claimant made an Application for Interim Relief under s.128 of the Employment Rights Act 1996 ("ERA"), whereby:

> 128. Interim Relief pending determination of complaint
>
> (1) An employee who presents a complaint to an Employment Tribunal that he has been unfairly dismissed-
>
> (a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in-
>
> (i) Section … , … , … , or 103A ERA 1996
>
> (b) …
>
> May apply to the Tribunal for Interim Relief.

2. Section 129 of the Employment Rights Act 1996 provides,

> 129. Procedure on hearing of application and making an 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 … , … , … , or 103A

In this case, that reason being whistle blowing.

3. In deciding how to deal with such a case the Tribunal should consider whether the complaint is well founded by applying a test of whether or not the complainant has a pretty good chance of success, which is the proper meaning of likely to succeed. The Tribunal is quite entitled to take a summary approach and not delve too deeply into the underlying merits of the claim.

4. The statutory test is not whether the claim is ultimately likely to succeed, but whether it appears to the Tribunal that it is likely. This requires the Tribunal to carry out an expeditious summary assessment as to how the matter appears on the material available doing the best it can with the untested evidence advanced by each party. Thus, it involves a far less detailed scrutiny of the parties' cases than will ultimately be undertaken at a Full Hearing.

5. The statutory test does not require the Tribunal to make findings of fact, rather it must make a decision as to the likelihood of the Claimant's success at a Full Hearing of the Claimant's complaint based on the material before it.

6. The basic task is therefore to make a broad assessment on the material available to try and give the Tribunal a feel and to make a prediction about what is likely to happen at the eventual Hearing before a Full Tribunal.

7. The Employment Appeal Tribunal has expressly ruled out alternative tests such as a real possibility, or reasonable prospect of success, or a fifty one per cent or better chance of success. Therefore, the burden of proof in an Interim Relief Application is intended to be greater than that at the Full Hearing where the Tribunal would only need to be satisfied on the balance of probabilities that the Claimant has made out in his case.

Evidence for the Interim Relief Hearing

8. In this Tribunal we had the benefit of a Bundle of documents consisting of over 500 pages. We had the Claimant's Claim Form and the Particulars of

Claim, we had the Witness Statement on behalf of the Respondent of Mr Mossendew and Ms Beaumont and a Witness Statement for the Claimant. We also had written skeleton arguments on behalf of the Claimant and on behalf of the Respondent.

The Claim

9. The Claimant's case is that he was forced to resign following what he says was the making of a number of qualifying protected disclosures. As a result of making those disclosures, he suffered detrimental treatment and therefore he was forced to resign.

10. The Respondent's case is in the alternative, quite simply that it is nothing to do with any public interest disclosures and they say the reason the Claimant resigned of his own volition was due to the fact that he had been put on, in November 2023, a Performance Improvement Plan which the Claimant did not like and so he resigned.

Burden of Proof

11. The burden of proof is on the Claimant and it is true to say that that is a difficult burden. It is more than unfairness or unreasonableness, he has to show that the principal or sole reason for his resignation was the treatment meted out to him that he says occurred as a result of making a number of protected disclosures. That in itself may prove a problem because at the moment it is not entirely clear what those disclosures amount to, they are vague. It is not entirely clear when they were made, whom they were made to, whether they amounted to protected disclosures, whether they were made in the reasonable belief that they were true, or whether they were just merely the opinion of the Claimant rather than backed up by strong evidence. The other problem the Claimant may face is whether or not they were in the public interest.

12. There is an argument about the date of the first disclosure, as to whether the disclosures were made purely for self interest after the Claimant's performance had been criticised. Another problem the Claimant may face is that Mr Mossendew one of the people that interviewed and employed the Claimant, was made aware at the Claimant's interview about the Claimant's difficulties with his previous employer as a result of raising public interest disclosures and Mr Mossendew clearly marked him up for courage for that view. Therefore we may question whether Mr Mossendew is likely to have meted out any adverse treatment to the Claimant as a result of public interest disclosures when he had employed him in the first place, knowing the Claimant's history of public interest disclosure with his former employer.

13. The other problem that the Claimant may face, is causation. There was the prior disclosure to his former employer and Mr Mossendew accepts, he says and there is a dispute about this, the first alleged disclosure was made in July, he took it seriously and investigated. As that is in dispute it

will need some factual argument with Witnesses' evidence at the Full Hearing.

14. Again, turning to causation, what was the reason for the Claimant's resignation? The Respondents will argue strongly that it had nothing to do with public interest disclosure, the Claimant of course will argue to the contrary. The Respondents will be saying the reason he resigned was because of concerns about his performance over the last few months of his employment, the Claimant was put on a Formal Performance Improvement Plan and therefore that is the reason for his resignation.

Conclusions

15. Taking all these matters together, the Tribunal asks itself can one really conclude at this stage that the Claimant's case is likely to succeed? I say it is impossible to conclude at the moment that the Claimant's case has a pretty good chance of success. It is true there is a lot of complicated factual argument to be dealt with and a large number of allegations, particularly 12 alleged public interest disclosures, to be sorted out at the Full Hearing. Added to that the alleged 16 detriments as to whether they really were detriments following the public interest disclosures, needs to be determined.

16. It will require a detailed and thorough investigation by a Full Tribunal of Witness evidence, therefore at this stage it is impossible to conclude that the Claimant's case has a pretty good chance of success.

17. Therefore the Claimant's case for Interim Relief is not well founded.

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Employment Judge Postle

Date: 19 January 2024…….

Sent to the parties on: 25 January 2024
T Cadman
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For the Tribunal Office.