EMPLOYMENT TRIBUNALS

Claimant: Mr G Jones

Respondent: Development Bank of Wales

Heard at: **Cardiff** **On:** **17 January 2024**

Before: **Employment Judge S Moore**

Representation
Claimant: In person
Respondent: Mr Bheemah, Counsel

JUDGMENT ON INTERIM RELEF APPLICATION

The claimant's application for interim relief pursuant to section 128 of the Employment Rights Act 1996 fails.

REASONS

Background and Introduction

1. The Claimant was employed by the Respondent as a Senior Investment Executive. He commenced his employment on 3 January 2023.

2. The ET1 was presented on 6 December 2023. On 29 November 2023 the Claimant was summarily dismissed. The reason provided was poor performance. The Claimant brings claims of whistleblowing detriments (S47B ERA 1996) and automatic unfair dismissal (S103A ERA). He sought interim relief. On 8 January 2024 the application was acknowledged and a hearing was listed in person on 17 January 2024. The parties were directed to file separate bundles limited to a maximum of 50 pages each.

3. The claim has not yet been formally served and as such the ET3 and Response have not yet filed. There have been no orders for disclosure made or complied with.

4. It was accepted by the Respondent and the Tribunal that the Claimant had complied with the necessary formalities for the application.

5. The Claimant seeks a continuation order in accordance with section 129 ERA.

6. The following adjustments were agreed an implemented at the hearing. Regular breaks were taken. The Claimant was permitted to stand and walk around during the hearing and whilst addressing the Tribunal.

7. No oral evidence was heard, as is the default position in interim relief hearings (rule 95 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules").

8. Mr Bheemah submitted that the Claimant's position paper was a de facto witness statement and I should not attach any weight to it as the Respondent had not been permitted to adduce any evidence.

9. I treated the position paper as that and did not treat the contents as witness evidence. At a hearing of this nature, litigants in person must be allowed to present their positions in a written paper. Mr Bheemah had prepared a skeleton argument.

<u>The Law</u>

10. Section 128 ERA reads as follows:

(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and –
(i) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in – (i) … s.103A may apply to the tribunal for interim relief"

Section 129 ERA states:

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 … s.103A.

11. The leading authority is **Taplin v Shippam Ltd [1978] IRLR 450.** This provides that the test for 'likely' in S129 is whether the claimant has "a pretty good chance" of success. In the case of **Ministry of Justice v Sarfaz [2011] IRLR 650** the EAT held that the judge hearing an interim relief application has to decide that it was likely that the employment tribunal at the final hearing would find five things: (i) that the claimant had made a disclosure to his employer; (ii) that he believed that that disclosure tended to show one or more of the things itemised at (a)–(f) under s.43B(1) of the 1996 Act; (iii) that that belief was reasonable; (iv) that the disclosure was

made in good faith; and (v) that the disclosure was the principal reason for his dismissal. In that regard, the word "likely" does not mean "more likely than not" (that is at least 51% probability) but connotes a significantly higher degree of likelihood.

Conclusions

12. Nothing I say in the following sections shall be taken as findings of fact. I make the following observations based on the information before me in order to reach my conclusion, based on my broad assessment of the claim.

13. Mr Jones commenced employment with the Respondent on 3 January 2023 as a Senior Investment Executive. Around that time, or in January or early February 2023, a company sought funding from the Respondent and the Claimant says that his Line Manager, Mr Bakewell communicated to the Claimant his concerns over the CEO ("the CEO") of that company in regard to issues he had had with him in the past. An email was sent to the CEO on 3 February 2023 rejecting their application for an investment citing a reason of lack of co-investment.

14. It appears from the documents thereafter the CEO contacted Mr Bakewell and asked to meet him for coffee and a meeting subsequently took place.

15. It appears then the CEO's company proposal, was then reintroduced to the Respondent and there followed an exchange of emails from Mr Bakewell which did not reflect the Claimant's account of what Mr Bakewell had told him about his concerns about the CEO the month before. The CEO's character was vouched for by Mr Bakewell which the claimant says contradicted what he had been told previously. Mr Bakewell told Mr Bowman that the Claimant had attended a number of meetings with the CEO. The Claimant quickly rebutted this and made it clear about his concerns and said that he did not want to be involved in the project. Thereafter the Claimant says that he spoke to another investor, who had raised concerns about the CEO and that he also had reported this to Mr Bowman.

16. The Claimant says that he passed his probation with flying colours and there were no issues raised with him at that stage; this would have been around June or July time 2023.

17. On or around 17 July 2023 the Claimant says that he had a meeting with Mr Bowman and it is at this meeting that he says he made his protected disclosure, which is set out in his claim in some detail at paragraph 22. The protected disclosure relied upon is oral.

18. The Claimant in summary that he told Mr Bowman that he believed Mr Bakewell had taken a bribe from the CEO. He says that he felt very uncomfortable in raising this issue but it was his duty to do so.

19. There was no evidence before me that that this disclosure was subsequently confirmed in writing or raised again by the Claimant to Mr Bowman, although the Claimant has told me that he made a full note of what he said at that meeting in his lab book and further that this was also witnessed by a colleague, Dr Jones .

20. Mr Bowman has subsequently denied that any such report was made to him at all at this meeting. Therefore, the Tribunal will have to determine whether the disclosure was made by hearing evidence from the individuals who were present and consider the surrounding documents. On this basis therefore I have concluded that I am unable to say it is **likely** the claim shall succeed due to the conflict of evidence regarding whether the disclosure was made. The claim is certainly arguable and if it is supported by a witness and contemporaneous documents then this may be persuasive, but I am unable to say it is likely there will be a finding that a qualifying disclosure was made on that day.

21. There is a dispute between the parties about a meeting Mr Bowman says took place on 20 October 2023. The Claimant accepts there was a meeting on this date but disputes entirely the notes of that meeting produced in the bundle today. Again this is a significant issue between the parties because the respondent may seek to rely on these notes to say that concerns had been raised about the Claimant's performance before the subsequent dismissal. It is unclear whether this note is said to have been shared with the Claimant.

22. After the meeting on 20 October 2023 the Claimant subsequently prepared what is called a PMR document, which is effectively his review of how he is doing in terms of his performance. This was created on 29 October 2023 and it would appear that Mr Bowman had receipt of this document by 3 November 2023 because there is an email in the bundle between himself and HR commenting that the Claimant's PMR document was a stark difference between the PMR discussion.

23. By 3 November 2023 there were potentially internal discussions going on about the claimant considering Mr Bowman's email to HR of that date.

24. Around this time also the Claimant had been working on an investment potential and had submitted a PM document to his senior manager which required signing off, regarding an investment of £500,000. The claimant was expecting this to be signed off by Mr Gray and asked him to do so on 15 November 2023.

25. Mr Gray did not sign off this document and the Claimant had to chase Mr Gray on a number of occasions to the point where on 24 November 2023 he escalated the fact that Mr Gray was not signing off this document to Mr Bowman and suggested that it should be escalated. The Claimant says Mr Gray deliberately held off form signing the document as it did not reflect a planned forthcoming dismissal for poor performance.

26. Also on this day Mr Bowman cancelled a one-to-one meeting he had with the Claimant at short notice. It would appear that Mr Gray did sign off the PM document on or around 28 November 2023.

27. On 28 November 2023 the Claimant was in meetings. Without any pre warning, a calendar invite was sent to him requiring him to attend a capability and conduct meeting on 29 November at 9.30am. This appointment was sent around lunchtime on 28 November and the Claimant

did not see it until later. The Claimant says he tried to contact Mr Bowman repeatedly as it came as a complete shock to him but was unable to make contact.

28. On 29 November 2023, the Claimant attended this meeting via Teams. The notes of this meeting are disputed, the Respondent says that the notes say, and support the contention, that he only raised the whistleblowing or protected disclosure after he was told he was terminated. Again these are all matters that will need to be examined at a full trial but it is common ground that the Claimant was dismissed at this meeting and the Claimant says that when he mentioned he had raised issues of the bribe with Mr Bowman earlier, that Mr Bowman had a violent outburst which would have been he says witnessed by the HR professional at that meeting.

29. The Claimant thereafter appealed on 4 December 2023. There was a detailed letter of appeal challenging in quite some detail why the Claimant said he could not have been deemed to be a poor performer. He gave a lot of detail and he also alleged that he had been dismissed for whistleblowing and/or for reasons relating to health issues that he had at that time.

30. Thereafter there was some communication from the Respondent about the appeal arrangements which arguably were confusing because they suggested that there was going to be some sort of investigation rather than appeal and certainly the first email communication from the Respondent said that the focus of the meeting they had arranged would be on the whistleblowing. There were a number of exchanges thereafter which the Respondent did subsequently qualify that the appeal meeting would cover the Claimant's appeal and the whistleblowing.

31. Eventually after three meetings had been arranged the Claimant informed the Respondent that he wanted to bring a third party into the Appeal Hearing. He also requested that it be conducted by a different person as the individual charged with hearing the appeal was not independent having close relationships with both Mr Bakewell and Mr Bowman. This does not appear to have been addressed by the Respondent, they simply responded to say they considered the matter was closed on the basis the Claimant had not attended three meetings that they previously arranged.

32. Thereafter I had sight of investigation meeting between the appeal manager and Mr Bowman on 9 January 2024. The notes record that Mr Bowman denied that there was any whistleblowing made to him about Mr Bakewell prior to 29 November 2023. He was adamant that the first time he heard about the whistleblowing was at that meeting. He agreed that the Claimant had "raised concerns" when he was asked to take it on in the May and therefore Mr Bowman says he took on the diligence with this particular company. He says that the Respondent was looking to do a deal but that this had been withdrawn after further due diligence. The situation with exactly what happened with the investment in the CEO's company is unclear as there were documents that suggested it was going ahead. This is potentially relevant in respect of the timing of the claimant's dismissal as he says he was dismissed to prevent further questions being asked about the investment once it was confirmed.

33. The appeal report is dated 10 January 2024. There is no detail of anyone else being spoken to before the report was concluded. The report is purportedly an outcome of the appeal by the Claimant albeit it is stated that as the claimant would not attend meetings, he has taken no further investigation. It does appear from the report that he did not look into the granular detail of what the Claimant has said in his appeal about his performance and he appears to have accepted what Mr Bowman has told him the day before in regards to the alleged whistleblowing finding this to be sufficient to conclude there was nothing to see there.

34. On 11 January 2024 Mr Gray was asked by HR what the Claimant should have been achieving, or what someone in the Claimant's role should have been achieving. There may well be other evidence of how it was assessed before the claimant was dismissed for poor performance but why these questions were being asked after the dismissal will need to be addressed by the respondent.

35. Considering each question in turn now I set out why I have concluded the application must be refused. The claimant has, in my judgment an arguable case but he has not met the threshold required that it is "likely" he will succeed.

36. Has the claimant had made a disclosure to his employer?

- There is a significant dispute of evidence between the parties regarding the actual disclosure relied upon. For this reason alone, whilst it is arguable, it cannot be said to be likely, in the same way as if the disclosure had been in writing. Evidence will need to be heard at the main hearing.

37. Is it likely the claimant can show that he believed that that disclosure tended to show one or more of the things itemised at (a)–(f) under s.43B(1) of the 1996 Act?

- Again, I have regard to the dispute about the disclosure being ever made. If it is found to have been made there will be issues as to why, given it was such a serious matter the claimant did not pursue the allegations prior to his dismissal meeting. The claimant says he will give evidence to explain why he did not.

38. Is it likely that belief was reasonable and the disclosure made in good faith?

- It seems likely that if the claimant believed that staff were taking bribes he would be able to establish this point.

39. Is it likely the claimant can show that the disclosure was the principal reason for his dismissal?

- This is a question that can only be determined after hearing all of the evidence at a hearing.

Employment Judge S Moore

Date: 31 January 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON 5 February 2024

FOR THE TRIBUNAL OFFICE Mr N Roche

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.

Public access to employment tribunal decisions
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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/