EMPLOYMENT TRIBUNALS

Heard at: Croydon (by video) **On:** 1 February 2024

Claimant: Mr Arun Swaminathan

Respondent: (1) Pay Perform Limited & (2) Christopher Mason

Before: Employment Judge Fowell

Representation:

Claimant Nathanial Caiden of counsel, instructed by Doyle Clayton Solicitors

Respondent Dale Martin KC, instructed by Withers LLP

JUDGMENT ON A PRELIMINARY ISSUE

1. The application for interim relief is refused.
2. The three claims, 2305132/2023, 2306519/2023 and 2300015/2024 shall be heard together.
3. The time for submitting a response to the claims is extended to 22 February 2023,
4. The claims will proceed to a further preliminary hearing on 14 March 2024.

REASONS

Introduction

1. Despite being successful in defending the application for interim relief last Thursday the respondent has requested these written reasons. As usual, some editing has taken place to avoid repetition and unnecessary detail, and these reasons stand as the final version.
2. Mr Swaminathan was one of the founders of the respondent company and until last year he was a director and significant shareholder. He also worked full-time in the business as Chief Risk Officer and Head of Operations on a salary of £190,000 per year. Mr Mason, the second respondent, is the company's CEO.

Relations between the two men appear to have broken down in 2023 and Mr Swaminathan resigned as a director. He remained a shareholder however and did not resign from his employment. Subsequently he was sent home, then raised a grievance about his exclusion from the business and was, ultimately, dismissed on 27 December 2023. The company say that this was for "some other substantial reason", i.e. the breakdown in working relationships.

3. The reason for that breakdown is the main issue in the case. Mr Swaminathan says that it was because he blew the whistle about money laundering, or the risk of money-laundering. The concern arose in the company's Indian arm, a separate company called Pay Perform India Private Ltd or PPIPL. The respondent says that they did not dismiss him because of concerns about India but because of the way in which he raised them, and what they regarded as his increasingly erratic behaviour.

4. Mr Swaminathan has brought lodged three claim forms in short succession. The first was on 25 September 23, the next on 24 November and the final one on 2 January 2024, shortly after his dismissal. This last claim is for unfair dismissal, including automatically unfair dismissal as a whistleblower under section 103A Employment Rights Act 1996. In such cases, by virtue of section 128, there is a right to make an application for interim relief, i.e. for an order that his contract should continue in place until the final hearing of his claim.

The appropriate test and approach

5. In **Al Qasimi v Robinson** EAT 0283/17 the correct approach was summarised by Her Honour Judge Eady QC as follows:

> 'By its nature, the application had to be determined expeditiously and on a summary basis. The [tribunal] had to do the best it could with such material as the parties had been able to deploy at short notice and to make as good an assessment as it felt able. The employment judge also had to be careful to avoid making findings that might tie the hands of the [tribunal] ultimately charged with the final determination of the merits of the points raised. His task was thus **very much an impressionistic one**: to form a view as to how the matter looked, as to whether the claimant had a pretty good chance and was likely to make out her case, and to explain the conclusion reached on that basis; not in an over-formulistic way but giving the essential gist of his reasoning, sufficient to let the parties know why the application had succeeded or failed given the issues raised and the test that had to be applied.' [Emphasis added]

6. This test of a 'pretty good chance' derives from **Taplin v C, Shippam Limited** [1978] ICR 1068. It has been considered more recently by the Employment Appeal Tribunal in **Ministry of Justice v Sarfraz** 2011 IRLR 562, EAT. There, Mr Justice Underhill commented that this form of words was not very obviously distinguishable from the formula 'a reasonable chance of success', which was rejected in that case. In his view, the message to be taken from **Taplin** was that 'likely' does not mean simply 'more likely than not' but connotes a significantly

higher degree of likelihood, i.e. 'something nearer to certainty than mere probability'.

The evidence presented

7. Although this hearing was extended from three hours to one day, the volume of evidence presented on each side was such that only an impressionistic assessment can be attempted. The claimant's bundle was of 246 pages and the respondent's 433 pages. I also had skeletons arguments of over 20 pages on each side and substantial bundles of authorities. Then there were witness statements from Mr Swaminathan, Mr Mason and from Ms Sandra Porter whose HR consultancy supports the respondent. Rule 95 of the Employment Tribunal Rules of Procedure provides that in such cases oral evidence is not presented unless the judge so directs, and that is consistent with the broad-brush assessment which has to be made. In any event, time limits prevented any such evidence.

8. By agreement, Mr Martin KC outlined his case first so that he could highlight the perceived weaknesses in the claim and Mr Caiden then had the opportunity to address those concerns. I shall set out what appear to be the main features of the case before setting out my views on the prospects of success. Once again, these are not findings, they are a first impression, and may well be contradicted by subsequent evidence and a more considered analysis.

The essential facts

9. The respondent company is in financial services, more particularly in financial technology. They specialise in large-scale financial transactions in different currencies, including crypto currencies. As such it is part of the heavily regulated financial services sector. The trading name is Orbital and there are a number of companies in the Orbital group. It was established in 2018 by Mr Swaminathan, Mr Mason and three others and by 2023 had expanded to employ about 110 staff.

10. In 2021 they set up PPIPL with about 40 staff. The respondent describes it as a back-office function which doesn't deal directly with clients but it provides access to platforms or accounts which can be used by clients.

11. On 9 February 2023 the Indian Enforcement Department (ED) raided the Indian office. This followed an online scam involving an app called HPZ Token, the details of which were too complex to explore, but it seems that through a number of partner agencies and accounts, proceeds of crime found their way into accounts held by Orbital. It is not suggested that they were in any way involved or implicated in any money laundering but two days later, the local director, Vijay Raghavan, was taken in for questioning. He was later released. However, their bank accounts were frozen and they were temporarily unable to pay staff. Subsequently the ED issued them with a 'show cause' notice alleging that criminal acts had been committed. Then, on 28 March 2023, Mr Mason was summoned

to India for questioning. He declined to attend, but all this was obviously a matter of serious concern to the directors in the UK.

12. Mr Swaminathan is originally from India and he seems to have taken the lead in responding to these events. In his view, the best solution was to close down the Indian operation and move the staff to Gibraltar or recruit new staff there. On 5 April he sent a message to the others to say that he was on the verge of kicking off this process.

13. This was not however his only concern at the time. A few days earlier, on 30 March, he had emailed the board with some proposals for the future. He wanted all of the co-founders to step down, including himself, and the company to transition to new management. He said he would prefer to work as a software developer within the business. He raised this again on 4 May, emailing the board to say that he was keen to step down by August that year. This was followed on 8 May by a proposal for a rotation of the CEO post and the wish to work instead as a software developer.

14. Mr Mason appears to have become increasingly concerned that Mr Swaminathan was overreacting to the situation in India. His position, set out on 19 May, was that closing down their office not been properly costed, and that the risks and benefits of pulling out had not been properly weighed. No further action had been taken by the authorities in India and it was not clear what, if anything, would result. Mr Mason was concerned that Mr Swaminathan had taken over handling this situation directly and was not in step with the crisis management team set up by the Board. And in particular he was concerned that Mr Swaminathan was making excessive disclosure of what may be confidential client information to the authorities there. He felt that a more measured approach was called for.

15. Mr Swaminathan wrote back on 21 May 2023 at length, describing Mr Mason at one point as '1. Impulsive 2. Insensitive, 3. Irrational, 4. Arrogant, 5. Reckless', adding that this was the last straw and that Mr Mason was a loose cannon.

16. This document contains the first disclosures. Mr Caiden identified five passages which disclosed information but the gist was that PPIPL was at serious risk of further enforcement action and being found guilty of criminal conduct unless they pulled out of the Indian market. Given that this was the first disclosure, it follows that no detriment had been applied to Mr Swaminathan by that point and this was only a few days before his resignation as a director.

17. There was an emolient response from Mr Mason on 22 May seeking a resolution. (In fact all of the communications from Mr Mason appear composed and reasonable) However, on 23 May Mr Swaminathan submitted his resignation from the Board. In that lengthy resignation letter he set out more general concerns about the business, pointed out that he had voluntarily offered to step down from his executive and management roles by the end of August and made clear that he did not want to be a director of a business where Mr Mason was the CEO.

18. It may not at first have been clear to Mr Mason from that letter that Mr Swaminathan was continuing as an employee - he was stepping down as a director and indicating that he would be departing shortly from the business, but that departure appears to be no more than a matter of timing. It is also a stinging response and makes his unhappiness with Mr Mason very clear.

19. Mr Mason did not immediately accept this resignation. Again he replied in emollient terms, opening with the words:

> "We have worked together for a very long time. We've been through some remarkable times these past few years. I have always admired your calm, your pragmatism, your sensitivity and compassion and your loyalty. Whilst I must admit I don't recognise the Aaron in the last few weeks of correspondence I do understand that stress apparently has taken its toll …"

20. He went on to say that he forgave the personal attacks on him, but that as Mr Swaminathan was a senior executive and a shareholder he still expected him (in summary) to act professionally. He also took issue with many of the proposals which Mr Swaminathan had been making, including remarkably large severance payments for members of staff in India.

21. I do not interpret the remark about forgiving personal attacks as a waiver of them, it was simply an attempt to defuse tensions and leave things on a friendly footing. However, things did not improve. His resignation was accepted on 21 June. After that Mr Swaminathan was unable to login to his work account. He then wrote to the Board accusing them of pushing him out and tried to withdraw his resignation. These communications show clear signs of stress.

22. Following his resignation letter Mr Swaminathan sent a succession of further communications containing disclosures or alleged disclosures, including a post in the group chat stating that the company was a sitting duck and circulating a press release stating that the ED had carried out raids on 25 foreign online companies. Later in June he wrote to the directors recommending a delay in taking on new clients and that the matter should be referred to the risk committee. Then he raised his grievance, followed by further details, which are the final disclosures. I do not propose to examine these disclosures minutely.

23. The grievance, on 5 July, was about being forced out and as an existing employee that was dealt with by the company in accordance with their grievance policy. An investigation was carried out into his concerns and into the India situation. There was a concern on his part that that report was not made available to him until the day of the grievance hearing, which was put back until 6 December. We did not have much time to look at the minutes of that grievance hearing but the point was made that he may have been disclosing information inappropriately. It was suggested to him that that was possibly a disciplinary matter. Somewhat remarkably, Mr Swaminathan responded that he should be invited to a disciplinary meeting and that he wanted the opportunity to clear his name. Given his request, it seems that a date was set for a disciplinary hearing. He then asked to postpone this on 18 December and in the meantime, having reflected on matters, Mr Mason

decided (he says) that things could not go on like this, that the relationship had broken down, and that Mr Swaminathan should be dismissed for 'some other substantial reason'. That was done by letter on 27 December without any further process or discussion.

Impressions

24. Against that background, Mr Caiden submitted that Mr Swaminathan has a pretty good chance of success in all the essential elements of his whistleblowing claim: he had disclosed information; it was information which in his reasonable belief tended to show criminal acts or breaches of legal obligations; that disclosure was in the public interest and his dismissal was the principal reason for having made such disclosures. Those points are obviously challenged but the main focus of the respondent's case for the purposes of this hearing was the causation issue, whether there was a pretty good chance of showing that the reason for the dismissal was the disclosures or the manner in which they were made, or some other reason.

25. This is an argument which is often raised in such cases and the main leading case is now in **Kong v Gulf International Bank (UK) Ltd** [2022] EWCA Civ 941. The key question is whether the manner in which the complaints are raised is genuinely separable from the complaint itself, or perhaps more broadly if there was another feature of the case which is genuinely separable from the complaint.

26. This is a difficult question to answer without hearing evidence, and I find myself in very much the same territory as the judge in **Parsons v. Airplus International Ltd** UKEAT/0023/16. That was also a claim involving whistleblowing in which the employment judge was presented with the same collection of issues and was criticised by the disappointed claimant for failing to work through each of those issues in turn. The view of the Employment Appeal Tribunal was that this was not necessary, given the broad brush approach required, and it was sufficient that the focus had been placed on causation. In that case the employment judge had looked at various factors in the case, such as the timing and manner of the dismissal, the reasons given and so forth, none of which gave any clear indication of the likely outcome. She concluded that a full merits tribunal would need to weigh everything up. Unfortunately, for very similar reasons, that is the position in which I find myself.

27. Mr Caiden urged me not to adopt a position that there was simply too much information to sift through in the time available, but that is not the same as concluding that the reason for dismissal is a matter for evidence, and for inferences to be drawn from facts established. There is in my view certainly an evidential basis here for the respondents to argue that it was the manner of raising the allegations which led to the dismissal. Mr Swaminathan's communications are very far from respectful towards Mr Mason, and also somewhat erratic, particularly

when he refers, for example to the risk of his wife leaving him within the week and being unable to return to India ever again if they carried on operating there.

28. Then there is the fact that he had been looking to step down from the business for some time and seemed to want his co-directors to do so in tandem with him. He seems to have been agitating for that outcome for some time, and that proposal relates to his dissatisfaction with Mr Mason as CEO.

29. But the most significant feature seems to me his resignation as a director, a very significant step for such a senior manager, particularly for one of the founders and shareholders. It immediately raised very difficult HR issues as to how to manage things from then on. What, for example, would his remuneration would be? Would be is it feasible for him to carry on as a software developer, with a large shareholding, perhaps reporting to more senior members of staff with no such stake in the business. It was mainly from this point that Ms Porter was involved in trying to reach a harmonious conclusion and to deal with these issues. However, despite indicating that he wanted to step down from his current role, he rejected her offer to work as a software developer. It certainly seems that a conversation needed to be had with him following his resignation about his future in the company and it is not altogether surprising that he was essentially placed on garden leave while these issues were resolved. Nor is it surprising that his access to the company's systems was then suspended or removed. Since he then raised a grievance, the company was duty bound to go through a grievance process with him, although that extended the somewhat difficult period of garden leave. Relations continued on this strained basis for several further months. This was followed by concerns about the extent of his disclosures to the ED, the possibility of disciplinary allegations and the prospect of dismissal on grounds of misconduct.

30. One can sympathise with Mr Mason and his fellow directors at that stage. It must have been difficult to know how best to proceed. After so long in business together were they really to dismiss Mr Swaminathan on disciplinary grounds? If not dismissal, how would things be resolved? They were aware that he wasn't happy and had wanted to leave for some time. In those circumstances it certainly seems to me arguable that the operative reason for the dismissal was the breakdown in the working relations.

31. Equally, on examination of all of the evidence, it may be that his dissatisfaction with the company and with Mr Mason was part and parcel of Mr Mason's handling of the situation in India, his failure to appreciate the seriousness of things there, and that Mr Mason found his disclosures about it frustrating and unacceptable. All that remains to be seen. However I cannot conclude, on that broad-brush assessment, that the test of a pretty good chance is met.

32. For completeness, I do not have the same level of concern about the other aspects of the whistleblowing claim. These are serious concerns about criminal conduct, Mr Swaminathan was charged with responsibility for risk and it will be difficult to dispute that some at least of his various complaints amounted to protected

disclosures. Once again, it is mainly the causation issue which is of concern and needs to be resolved by evidence at the final hearing

33. Accordingly the application for interim relief is refused.

Employment Judge Fowell

Date 9 February 2024