Case Number: 2302731/2024

EMPLOYMENT TRIBUNALS

Claimant: Mr. M. Blaize

Respondent: LNRS Data Services Limited

Heard at: London South Employment Tribunal

On: 21 January 2022

Before: Employment Judge Sudra (sitting alone)

Representation

Claimant: In-Person (unrepresented)
Respondent: Mr. S. Forshaw KC (instructed by Clyde & Co)

RESERVED JUDGMENT

1. The application for an Order for interim relief is refused.

REASONS

Introduction

1. The purposes of the Hearing was to adjudicate upon the Claimant's application for interim relief.

The Hearing

2. The Hearing was listed for three hours and both parties attended in-person (although the Hearing was originally listed as a hybrid hearing).

3. At the outset of the Hearing the Respondent clarified that its correct name was, LNRS Data Services Limited and not, LexisNexis Risk Solutions Group. The Claimant had no objections to the Respondent's name being corrected so the name of the Respondent has been amended to, 'LNRS Data Services Limited.'

Documents

4. The Tribunal had before it:

    i. A bundle consisting of 305 pages[1];
    ii. an authorities bundle consisting of 63 pages; and
    iii. a skeleton argument from the Respondent.

The Law

5. By s.94 Employment Rights Act 1996 ('ERA'), employees have, subject to certain conditions, a right not to be unfairly dismissed. By s.103A ERA, where the reason, or if more than one, the principal reason, for dismissal is that the employee made a protected disclosure within the meaning of s.43A ERA, the dismissal is automatically unfair.

6. By s.230 ERA, an employee is someone who has entered into or works under (or where the employment has ceased, worked under) a contract of employment. A contract of employment is defined as a contract of service or apprenticeship.

7. Dismissal, for the purposes of a complaint of unfair dismissal, is defined at s.95 ERA:

> *95 Circumstances in which an employee is dismissed.*
>
> *(1)For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—*
> *(a)the contract under which he is employed is terminated by the employer (whether with or without notice),*
> *(b)he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or*
> *(c)the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*

[1] Incorporating a witness statement, and supplementary witness statement, from Richard Barber and written representations from the Claimant.

8. In ***Williams v. Michelle Brown AM*** UKEAT/0044/19/OO at [9], HHJ Auerbach summarised the five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

    ‘It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.’

9. In order for a qualifying disclosure to be a protected disclosure it must be made in accordance with s.43C – 43H ERA.

10. The ‘reason’ or reasons for dismissal is/are the factor(s) operating on the decision-maker’s mind which causes him/her to take the dismissal decision (***Croydon Health Services NHS Trust v. Beatt*** [2017] ICR 1420). In some circumstances, the net could be cast wider than the person who made the decision to dismiss, such as where the facts known to, or beliefs held by, the decision-maker have been manipulated by another person (***Royal Mail Ltd v. Jhuti*** [2019] UKSC 5 and explained further in ***Kong v. Gulf International Bank (UK) Limited*** EA-2020-000357-JOJ).

Interim Relief

11. Section 128 – 130 ERA 1996 make provision for interim relief. This is a remedy for (certain types of) unfair dismissal. It is worth setting out s.128 in full and part of s.129 ERA:

    128 Interim relief pending determination of complaint.

    (1)An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—
    (a)that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—
    (i)section…. 103A…
    may apply to the tribunal for interim relief.
    (2)The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).
    (3)The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.
    (4)The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

(5)The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

129 Procedure on hearing of application and making of 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…. 103A, or
[…]

(2)The tribunal shall announce its findings and explain to both parties (if present)—
(a)what powers the tribunal may exercise on the application, and
(b)in what circumstances it will exercise them.
(3)The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—
(a)to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or
(b)if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

12. Rule 95 provides that the hearing should be conducted as a Preliminary H earing within Rules 53 to 56. The proper approach is as follows (***Parsons v. Airplus*** UKEAT/0023/16/JOJ 4 March 2016 at para [8]):

    'On hearing an application under section 128 the Employment Judge is required to make a summary assessment on the basis of the material then before her of whether the Claimant has a pretty good chance of succeeding on the relevant claim. The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself. In giving reasons for her decision, it is sufficient for the Judge to indicate the "essential gist of her reasoning": this is because the Judge is not making a final judgment and her decision will inevitably be based to an extent on impression and therefore not susceptible to detailed reasoning; and because, as far as possible, it is better not say anything which might pre-judge the final determination on the merits.'

13. Interim relief should be ordered only if it appears that it is likely that on determining the complaint the tribunal will find that the reason or principal reason for the dismissal was a proscribed ground: s.129 ERA. There is judicial guidance on the meaning of 'likely' in this context:

1.1. A “*pretty good chance of success*”: ***Taplin v. C Shippam Ltd*** [1978] IRLR 450 [23]; ***Wollenberg v. Global Gaming Ventures (Leeds) Ltd*** (UKEAT/0053/18));
1.2. “*something nearer to certainty than mere probability*”: ***Ministry of Justice v. Sarfraz*** [2011] IRLR 562 at [19];
1.3. a *“good arguable case*” is not enough: ***Parsons v. Airplus*** UKEAT/ 0023/16/JOJ 4 March 2016.

14. The hurdle which the Claimant must clear is set relatively high. There is good reason for this. As the EAT noted in ***Dandpat v. University of Bath*** UKEAT/0408/09, 10 November 2009 unreported:

> *"20. … We do in fact see good reasons of policy for setting the test comparatively high, in the way in which this Tribunal did, in the case of applications for interim relief. If relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the claimant, until the conclusion of proceedings: that is not [a] consequence that should be imposed lightly".*

15. The Tribunal cannot be criticised for concluding that matters are not sufficiently clear cut at the interim relief stage for it to have sufficient confidence in the eventual outcome to grant interim relief: ***Parsons*** at [18].

Discussions and Conclusions

16. The Respondent is a large international company who, inter alia, sells a product called XpertHR and Gapsquare. The Claimant was employed by the Respondent, as an account manager, from 11th April 2022 until the termination of his employment by reason of redundancy on 5th March 2024.

17. On 4th March 2024, the Claimant presented his ET1 claim form alleging that he had been automatically unfairly dismissed for making protected disclosures. The Claimant indicated in his ET1 that he was making an application for interim relief. The Respondent has not yet served its ET3 response or Grounds of Resistance but resists the Claimant’s claim.

18. For the purposes of this application the Claimant relies on two putative public interest disclosures ('PIDs')

    (i) A complaint about a data breach made on 18th August 2023; and

    (ii) a complaint to the Information Commissioner on 5th January 2024.

19. There is no need for the Tribunal to say anything more than it is probable that the Claimant disclosed information in at least one of his PIDs which was a protected disclosure. The Respondent (not yet having submitted its response, reserves its position in this respect).

The Respondent's Case

20. In January 2024 the Respondent restructured its sales function in order to increase efficiency and because it wanted its sales staff to focus on larger corporate clients. As a result, it was necessary to delete around 14 posts including five manager roles. Conversely, the Respondent also created 16 new roles to improve and enhance its sales function.

21. Theoretically, this meant that, subject to assessment and meeting the relevant criteria, the staff at risk of redundancy could have continued their employment in one of the 'new' roles.

22. As five account manager roles were to be deleted, 19 affected managers (including the Claimant) were placed in a redundancy selection pool. The Respondent had decided to use two selection criteria with each criterion carrying a 50 percentile weighting as part of its assessment process. The criteria were a 'Balanced Scorecard' and a 'Behaviours and Values' score. The Claimant did not score highly in either criterion and in 'Behaviours and Values,' scored the lowest possible score of 4 (1 being the highest score and 4 being the lowest).

23. The ‘Behaviours and Values’ score of 4, was arrived at by his line manager Ms. Kestler-Stapleton in November 2023 (after the first PID but before the second PID). Neither Ms. Kestler-Stapleton nor Richard Barber (reviewing manager) were aware of the Claimant’s first PID at this time. The Claimant was eventually dismissed by reason of redundancy.

<u>The Claimant’s Case</u>

24. The Claimant states he made a PID on 18th August 2023 which he was interviewed about. In November 2023 the Claimant asked the Respondent for an update on his first PID and was told that the matter was still being investigated.

25. At the beginning of December 2023 the Claimant again emailed the Respondent stating that he was soon to begin a period of annual leave and would be returning to work on 2ned January 2024. The Claimant stated that unless the Respondent provided him with their findings on the first Pid he would be making a second PID to the Information Commissioner’s Office (‘ICO’) on, 5th January 2024.

26. On 4th January 2024 the Claimant was informed that he was at risk of redundancy and subsequently he made his second PID to the ICO on 5th January 2024. On 4th February 2024 the Respondent confirmed that, following his poor performance in the assessment selection criteria, the Claimant would be made redundant and his employment would terminate on 5th March 2024.

27. The Claimant believes that his selection criteria scores were manipulated by the Respondent so that he would be selected for redundancy. The reason the Claimant says he was selected for redundance were because of the two PIDs he had made.

Conclusions

28. The Tribunal is, frankly, unable to make any meaningful assessment of the merits of the Claimant’s case that the Respondent selected his for redundancy and terminated his employment - for that reason - because had had made PIDS.

29. At [84] of the bundle the Claimant stated in an individual consultation meeting on 11th January 2024 that, '*I do not believe for a second that the company has orchestrated mass at risk exercise with 20 account managers just to get to me. I do not believe that's the case at all. What I do believe is I should be exempt from this process because there is a clear conflict of interest that is an open whistleblowing case in play, so you have other options available and one option I could put out there is that I'm put on garden leave so there's a separation between the redundancy process and this whistleblowing case*.'

30. Therefore, it appears that even the Claimant had accepted that the Respondent did not orchestrate a restructure so that they could select him for redundancy and ultimately, terminate his employment. It is also odd that whilst there were more 'new' roles than redundancies, the Claimant did not apply or demonstrate an interest in a single of those new roles.

31. It is not possible for the Tribunal to reach the conclusion on summary assessment that the Claimant reaches the higher standard of proof required for this application.

32. For these reasons the application is refused.

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Employment Judge Sudra
Date: 27 March 2024