EMPLOYMENT TRIBUNALS

Claimant: Ms S Messi

Respondent: Casterbridge Tours Limited

London Central: by CVP in public as an Open Preliminary Hearing on 23 April 2024

Before: Employment Judge Nicolle

Representation:

Claimant: In person
Respondent: Ms G Leadbetter, of counsel.

RULING

1. The application for interim relief under section 128 of the Employment Rights Act 1996 (the ERA) fails and is dismissed.

2. Oral reasons were given to the parties on 23 April 2024. The Claimant requested written reasons.

Reasons

<u>These reasons</u>

3. The written reasons are somewhat longer than the oral judgment given with a view to the Claimant fully understanding the basis upon which her application failed. This is particularly the case given the content of her email of 15:35 on 23 April 2024 when she said that I had not referred to all of her case law authorities and written submissions. The reason for not doing so was that I did not consider that they were germane to the issue I had to determine namely whether it was likely that a tribunal would find that she made a protected disclosure and that it was the reason or principal reason for her dismissal.

<u>Background</u>

4. This is an application brought for interim relief following the Claimant's dismissal ostensibly on the grounds of redundancy on 29 February 2024. The Claimant made some initial points and applications. I permitted her to have an accompanying representative to take notes on her behalf. However, I declined her application for a fully constituted tribunal panel explaining that this would not be normal and interim relief applications are almost inferably heard by a judge sitting alone. Further, I rejected her application pursuant to s.95 of the ERA to be able to cross examine the Respondent's witness. I explained that this would be wholly outside the normal scope of an interim relief application which involves a determination as to the likelihood of a claim succeeding based on the documents and the parties' submissions.

5. I was provided with significant documents in advance to include a skeleton argument from the Respondent, case law authorities referred to within that skeleton argument, a plethora of documents sent by the Claimant, which set out her legal arguments and the evidence upon which she sought to rely, a witness statement from Jessica Morris, International Human Resources Business Partner at WorldStrides, which is the parent company of the Respondent, (Ms Morris) and a bundle of documents comprising 417 pages. Of that total 165 pages related directly to the claimant's employment with the respondent and the remainder comprising of decisions from other tribunal applications made by the Claimant over the previous six years. I did not read these decisions. They had been included within the bundle by the Respondent as evidence of the Claimant's proclivity to pursue what they contend were unsuccessful tribunal applications.

<u>The Claimant's submissions</u>

6. The Claimant was given the opportunity to make submissions. She argues that her redundancy was a sham and she should be granted interim relief pursuant to s.128 of the ERA 1996. She relies on a protected disclosure she says was made in a telephone call with Ms Morris at 2pm on 29 February 2024. Ms Morris disputes that such a call took place This related to an ongoing issue the Claimant had regarding the basis upon which she was entitled to receive payment for sickness absences and holiday and there had been an ongoing dialogue on this issue.

7. At approximately 4pm that afternoon the Claimant was called to a meeting at which she was advised that her position was redundant. The Claimant says that her redundancy was a sham. She disputes the Respondent's evidence that 63 people worldwide were affected. Her evidence being initially that she was the only person who was affected but then clarified that there were five or six other individuals including herself who were made redundant at this time. She nevertheless says that her own dismissal was a sham and the real reason was that she had made a protected disclosure that the Respondent had breached her statutory rights to holiday and sick pay. She contends that the Respondent fabricated evidence of her poor performance.

8. I read and took account of the case law authorities the Claimant referred to in her submissions. This included the judgment of His Honour Judge James Taylor in Cox v Adecco and Others UK EAT /0339/19/AT and the Supreme Court's Judgment in Royal Mail Group Limited v Jhuti [2019] UK SC 55. In respect of Cox v Adecco I was satisfied that I knew what the Claimant's case was before I decided whether it had a reasonable prospect of success. In respect of Jhuti I accepted that the real reason for her dismissal was likely to have been redundancy based on the chronology and documentary record. Therefore I did not consider that this was a case where the real reason was hidden from the decision maker behind an invented reason.

The Respondent's submissions

9. The Respondent produced evidence of a genuine redundancy situation. They refer to various organisational structure charts. The Respondent accepts they do not show all of the 63 redundancies but just those which were within the Finance Department, approximately six from a total of 63. They say there is no one carrying out the Claimant's role of Accounts Payable Clerk in the UK with those now carrying out her role being based in the US.

10. The decision to identify the Claimant's role as being at risk of redundancy was made substantially in advance of her alleged protected disclosure which they dispute the existence of for various reasons.

11. Ms Leadbetter says this is not a marginal case, that the redundancy process predated the allege protected disclosure. The Claimant contends that April Martin, the Claimant's Line Manager (Ms Martin) had predetermined the situation from 4 January 2024. Ms Leadbetter says that this would be wholly inconsistent with the Claimant's case of a protected disclosure on 29 February 2024 being the causative reason for her dismissal later that day. He says performance concerns were already being discussed, there was contemporaneous evidence of a redundancy process, that the public interest is not engaged in the Claimant's alleged protected disclosure but rather this was a case of the Claimant raising concerns regarding her own situation which had in any event been resolved.

Relevant facts and chronology

12. The Claimant was employed as an Accounts Payable Clerk from 3 July 2023 until her dismissal. Ms Morris says that Ms Martin had started having issues with her performance from as early as 24 August 2023 and that the termination of the Claimant's employment was being considered from a relatively early stage. She says that the restructuring in the Finance Team was ultimately the responsibility of Maureen Boisvert, SVP of Accounting and Financial Operations (Ms Boisvert) whose target was to make a $1.1 million of cost savings.

13. In an email from Ms Martin on 24 August 2023 she said: "Hi there we are having issues with my new AP employee [referring to the Claimant], do you have time to chat today".

14. On 5 February 2024 in an email from Ms Martin to Ms Boisvert she said: "This BCG Org Redesign could be a good opportunity to of service (might be a slight typo) Ms Messi the AP Clerk in the UK is who I'm referrer believe she would be in agreeance (again probably a typo). She has not been reliable, not been efficient for many months, my

understanding is that she has 7+ days for sickness and yet to provide a doctors note. Ms Boisvert replied: “I actually already discussed this with Charity and emailed April this am”.

15. And then on 8 January 2024 an email from Ms Boisvert to Lee Nicholas, copied to others, identifying a cost saving of the Claimant’s salary of just over $59,000. The Respondent says this is clear evidence that the Claimant’s inclusion within the proposed redundancy process had been articulated at a relatively early stage.

16. On 7 February 2024 an email from Ms Martin said: “This is really bad. She starts late, [referring to the Claimant], does the bear minimum and does not communicate with the team at all. She completes small tasks first thing and then does nothing else for the remainder of the day for Worldstrides. She is on task with saying good morning, taking lunch, goodbye for the evening as if she has been working all day”.

17. At 1103 on 29 February 2024 there was an email exchange between the Claimant and Ms Martin. Ms Martin advises the Claimant that she had been told by Mohsina that sick time was credited back to her on the 24 February payroll. The Claimant responded: “Okay thanks I will check my pay slip, thanks for getting back to me and confirming. The Claimant says that she called Ms Morris at 2pm as there was still an outstanding issue. Ms Morris disputes that such a call was made. The Claimant says the sum had not yet been credited but when I questioned her on this she said it was not until after her redundancy was advised at about 4.30pm that she received and checked her pay slip to see that the omission still existed. She stays there was still uncertainty. She says that she was concerned that others could be affected and therefore that the public interest was engaged as the Respondent was not complying with its obligations to pay correct contractual and statutory sick and holiday pay in the UK.

18. The Claimant attended a short meeting and her position was made redundant as confirmed in a letter dated 29 February 2024 which states: “I am writing to confirm that we have taken the decision to terminate your employment for reasons of redundancy”.

19. What then happened in terms of garden leave need not concern as the only issue I need to address for the purposes of the interim relief application is what the reason or principal reason was for the Claimant’s dismissal. Was it redundancy as the Respondent asserts or was redundancy a sham and the real reason was the protected disclosure as the Claimant argues.

The Law

20. I have to apply the relevant law for an interim relief application. The relevant sections of the ERA are sections 43B, 103A, 128 and 129.

<u>43B Disclosures qualifying for protection.</u>

(1) In this Part a “ qualifying disclosure ” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a)that a criminal offence has been committed, is being committed or is likely to be committed,

(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d)that the health or safety of any individual has been, is being or is likely to be endangered,

(e)that the environment has been, is being or is likely to be damaged, or

(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2)For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3)A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

103A Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

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 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or

(ii)paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b)that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met,

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.

S 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 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or

(ii)paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b)that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

(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.

(4)For the purposes of subsection (3)(b) “terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed” means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5)If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6)If the employer—

(a)states that he is willing to re-engage the employee in another job, and

(b)specifies the terms and conditions on which he is willing to do so,

the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

(7)If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.

(8)If the employee is not willing to accept the job on those terms and conditions—

(a)where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and

(b)otherwise, the tribunal shall make no order.

(9)If on the hearing of an application for interim relief the employer—

(a)fails to attend before the tribunal, or

(b)states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3),

the tribunal shall make an order for the continuation of the employee's contract of employment.

A qualifying protected disclosure

21. In s.43B what is being relied on by the Claimant as a qualifying disclosure is that a person has failed is failing or is likely to fail to comply with any legal obligation to which he is subject.

22. A qualifying disclosure must be made in circumstances prescribed by other sections of the ERA, including, under Section 43C, to the worker's employer.

23. In Kilraine v Wandsworth LBC [2018] ICR 1850 the Court of Appeal clarified that "allegation" and "disclosure of information" are not mutually exclusive categories. What matters is the wording of the statute; some "information" must be "disclosed" and that requires that the communication have sufficient "specific factual contents".

24. Whether a particular disclosure of information, "tends to show" a breach of a legal obligation in the absence of any reference to a legal obligation will be a question of fact in each case.

25. What does matter is that the Claimant has a reasonable belief that the information disclosed tends to show one or more of the matters in S43B (1). In Kraus v Penna Plc [2004] IRLR 260 at para 24 the Employment Appeal Tribunal held that "likely" in this context means "more probable than not".

26. In the light of Babula v Waltham Forest College [2007] EWCA Civ 174, [2007] ICR 1026 what is necessary is that the tribunal first ascertain what the claimant subjectively believed. The tribunal must then consider whether that belief was objectively reasonable, i.e. whether a reasonable person in the claimant's position would have believed that all of the element of S43B (1) were satisfied i.e. that the disclosure was in the public interest, and that the information disclosed tended to show that someone had failed, was failing or was likely to fail with the relevant legal obligation. The Court of Appeal emphasised that it does not matter whether the claimant is right or not, or even whether the legal obligation exists or not.

27. The reasonableness of the worker's belief is determined on the basis of information known to the worker at the time the disclosure is made: Darnton v University of Surrey [2003] ICR 615.

28. It is necessary that the disclosure was in the "public interest". The Court of Appeal in Chesterton Global and another v Nurmohamed [2017] EWCA Civ 979 [2018] ICR 731 set out relevant criteria against which to assess the existence of the public interest to include:

- the numbers in the group whose interest the disclosure served;
- the nature of the interest affected and the extent to which they are affected by the wrongdoing disclosed;
- the nature of the wrongdoing disclosed; and
- the identity of the alleged wrongdoer.

29. It is possible to aggregate separate incidents to amount to a composite disclosure: see Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 340 EAT.

The threshold for interim relief under section 128 of the ERA

30. The case law is clear. In Taplin v C Shippam Limited [1978] ICR 1068 the EAT stated that "likely" in this context means something more than a reasonable prospect of success and something more than a 51% prospect of success. The EAT approved the expression adopted by the tribunal at first instance namely that there should be a pretty good chance of success.

31. in Ministry of Justice v Sarfraz UK EAT/0578/2010 Underhill J in the EAT cited Taplin stating that the essential point that emerged from it was that "likely connotes something nearer to certainty than mere probability".

Discussion and conclusions

32. Consideration of whether it is likely that the Tribunal will find the reason or principal reason for the dismissal was that the Claimant made a protected disclosure involves two elements being, is it likely that the Tribunal will find that she made a protected disclosure and secondly is it likely that the Tribunal will find that her doing so was the reason or principal reason for her dismissal.

33. I have to decide whether it is likely in the sense discussed above that a tribunal will find that the reason for the Claimant's dismissal was not a redundancy situation but the fact that she had made the disclosure relied on, namely that in a telephone call with Ms Morris at about 2pm on 29 February 2024. I have to approach this task by looking at the various elements of what is required to demonstrate a protected disclosure and then ultimately what the reasonable principal reason for her dismissal was.

Did the Claimant make a protected disclosure?

34. As to whether there was a protected disclosure it is important to emphasis that at this stage I am simply applying a threshold of likelihood of the claim succeeding. I am not making a definitive judgment on these points as that would be a matter for a full hearing with the tribunal having heard all the evidence.

35. As to whether the Claimant made the alleged disclosure to her employer there is a dichotomy in the evidence. The Claimant asserts that she did, the Respondent asserts that she did not. I find that the likelihood threshold has not been met in respect of whether an alleged disclosure was made. There is clearly uncertainty. The Claimant's position directly contradicts the evidence of Ms Morris. Further, there is doubt as to whether the email exchange which is exhibited between the Claimant and Ms Morris and Ms Martin at about 11am on 29 February 2024 would have resulted in the Claimant then telephoning Ms Morris at 2pm. The issue appeared to have been largely resolved at 11am. The Claimant says that she did not receive the payslip with the continuation of the oversight until 4.30pm. As such it is not clear that there was any reason at 2pm for the Claimant to make a call to Ms Morris. There is clearly doubt and as such the level of likelihood has not been met.

36. As to whether actually made, was likely to constitute a protected disclosure I do not consider that the threshold likelihood has not been met. This is not a definitive decision at this stage but there must be significant uncertainty as to whether at 2pm the Claimant was making a disclosure that she believed to show a breach of a legal obligation given the earlier communications.

37. As to whether the Claimant's belief was reasonable that dove tails with the conclusions given above. There must at least be doubt and as such it does not meet the likelihood threshold.

38. As to whether the public interest was engaged there is considerable doubt as to whether that test would be met. This is a case which would arguably go beyond Chesterton in terms of what the public interest amounts to. In effect there are at least grounds to surmise that the Claimant's concern was a personal one in relation to what payments she would receive for holiday and sick pay. Whilst it may have had broader applications with other employees similarly affected in the UK that is not necessarily in itself sufficient for a public interest engagement. Again this element of the case is not at

the level of persuasiveness that it would be appropriate to say it fulfilled the Taplin and Sarfraz likelihood threshold.

What was the reason or the principal reason for dismissal?

39. I accept that the Respondent's evidence that a genuine redundancy situation existed. The Claimant acknowledges that there were five or six redundancies. The Respondent says that the remainder of a global total of 63 were outside the Finance Department.

40. I find that there is very significant evidence that a redundancy process had been in play from at least early January 2024 and the Claimant's name had been specifically earmarked as potentially at risk of redundancy from 8 January 2024.

41. I accept that there was a true redundancy situation. It is not necessary for me to say whether there were 63 redundancies but clearly there were redundancies. It was not the Claimant alone and as such the likelihood threshold for saying that the principal reason for her dismissal was that she had made a protected disclosure is not met and in my opinion falls far short of that necessary threshold. Further, whilst the Claimant says that I was not provided with evidence that 63 people were made redundant that was not something I needed to reach my conclusion. The Claimant acknowledged that five or six employees were made redundant and the Respondent's position was that the organisational charts were confined to the Finance Department and the total of 63 redundancies was worldwide figure.

42. There had also been, and it is evidenced from Ms Martin as early as August 2023, concerns regarding the Claimant's performance. Whilst performance is not put forward as the reason for redundancy it would in itself provide legitimacy for her inclusion in a redundancy process. That would not necessarily be consistent with a fair redundancy dismissal but that is not the issue I need to determine. The only issue I need to determine is what the reason or principal reason was for dismissal. Whether it would have been a fair reason had it been an ordinary unfair dismissal claim is not the issue. The issue is what was the reason or principal reason for her dismissal. The Claimant says it was the protected disclosure and the Respondent says the Claimant was redundant and that her poor performance meant that the redundancy situation was a convenient opportunity for her job/position to be deleted.

43. Whilst the Claimant contended that evidence regarding her performance was fabricated by Ms Martin and Ms Morris since 25 August 2023 I did not consider the question of performance needed to be assessed in detail. The only issue I needed to determine was whether it was likely that the Claimant would succeed in demonstrating that she had made a protected disclosure and that it was the reason or principal reason for her dismissal. Given that I found that a genuine redundancy was likely to have existed and that the Claimant was unlikely to succeed in demonstrating that she had made a protected disclosure and that it was the reasonable principal reason for her dismissal, the question as to whether her performance was deficient from 25 August 2023 onwards was not of any significant relevance to that decision.

44. As such it was not necessary for me to consider whether a fair redundancy procedure was followed. It may well be that the Claimant's individual redundancy was unfair but that is not the issue I have to address.

45. The only protected disclosure relied on by the Claimant was her alleged telephone conversation with Ms Morris at 2pm on 29 February 2024. Therefore it was not necessary to consider whether the evidence she provided to the EHRC on 28 February 2024 constituted a protected disclosure. In any event for the reasons set out the claim would not have succeeded even if it had given the finding I made that redundancy was likely to have been the reason or principal reason for dismissal.

Final conclusion

46. So in conclusion the Claimant's application for interim relief under s.28 of the ERA fails and is dismissed. Given my findings it was not necessary for me to make enquiries pursuant to S129 of the ERA as to whether the Respondent would have been willing to reinstate or re-engage the Claimant.

Employment Judge Nicolle

29 April 2024

Sent to the parties on:

16 May 2024

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For the Tribunal:

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