EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
AZ	**v**	**BY**

Heard at: Watford
On: 24 February 2023
Before: Employment Judge George (by CVP)

Appearances

For the Claimant: Ms T Barrett, solicitor
For the Respondent: Mr H Menon, counsel

JUDGMENT having been sent to the parties on 1 March 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant's representative requested written reasons for my judgment on the interim relief application which was heard on 24 February 2023. The judgment had originally been sent to the parties on 1 March 2023 but was corrected to remove the case management orders and re-sent on 2 March 2023. Although the request for written reasons was made in time, on 9 March 2023, through administrative error, it was not referred to me until 8 May 2024. The dictated reasons were sent for typing the same day and the draft returned to me on 16 May 2024, when I was on judicial training. I am perfecting them on the first opportunity after that.

2. I would like to take the opportunity to apologise to the parties for the delay in sending these reasons. We have not met the standards we aspire to in relation to the time taken to produce these reasons.

3. The claimant started working at the respondent hospital on 23 March 2015 as an agency worker and his continuous employment started on 29 March 2016. It ended with dismissal with effect on 23 June 2022. His job title was that of an IT Support Officer operating at Band 5.

4. This claim, case number 2204457/2022, is the third of four claims that the claimant has brought. The first two concerning events arising during the course of his employment and this one and a fourth claim, 2204457/2022

arise out of his dismissal. In these reasons I shall refer to this claim as claim 3, Case No: 2204457/2022 is claim 4 and, if necessary, the two 2021 claims as claims 1 and claim 2 respectively.

5. This claim was presented on 30 June 2022 and complains only of automatic unfair dismissal on grounds of protected disclosure because it also contains a valid interim relief application that was made in time.

6. I was initially surprised to see that the interim relief hearing was taking place so long after the presentation of the claim but the claim was presented in London Central and there was a delay when it was transferred to the South East Region. There were also special circumstances which justify the postponement under s.128(5) of the Employment Rights Act because, ordinarily, a postponement of an interim relief application hearing cannot be entertained.

7. I do not need, for the purposes of the reasons for my decision on the interim relief application, to set out detailed information about the special circumstances save to say that they concern the very significant mental health problems that the claimant has that form the basis of a disability discrimination claims both in claim 4 and in claims 1 and 2 (see paragraph 7 of the particulars in claim 4). I have taken into account the explanation that is given about those conditions, even though it is not necessary to record itXXX, not least because it is relied on on the claimant's behalf by Ms Barrett to explain some difficulties that he has in giving clear recollection about disclosures of information that he says he made orally over the course of a period of a little more than two years.

8. The claimant was available to attend the hearing and give instructions to Ms Barrett but she asked that he not be required to be present in the hearing as an adjustment necessitated by his condition. This was agreed to.

The law

9. The law in this area is now reasonably well established. In such cases the power on the employment tribunal to make an interim relief order and the procedure to be followed is set out in ss.128 to 132 Employment Rights Act 1996 (hereafter referred to as the ERA). The question that I need to consider is whether it is likely that the claimant would establish at a final hearing that the reason, or principal reason, for his dismissal was one referred to in s.128(1)(a) ERA. Those include where it is alleged that the dismissal was automatically unfair for the reason set out in s.103A ERA – where the reason or principal reason for the dismissal was a protected disclosure.

10. In this context, the word 'likely' has been interpreted to mean that the claimant has a "pretty good chance of success": Taplin v C Shippam Ltd [1978] ICR 1068. The consequence of a successful application for interim relief is that the tribunal has to ask the employer if they are willing to reinstate or reengage the claimant and, if they are not, shall make an order for the continuation of the employee's contract of employment pending final hearing. The consequences explain why the bar is set relatively high. The starting point

has to be words of the statute but I remind myself that the has is also been described as being "something nearer to certainty than mere probability": Ministry of Justice v Sarfraz [2011] IRLR 562.

11. It is necessary for me to consider each element of the claim and to decide whether it is likely that the claimant will prove each element necessary to succeed in an automatic unfair dismissal claim for the reason or principle reason of a protected disclosure.

12. The structure of the protection against dismissal by reason of protected disclosures provides that a disclosure is protected if it is a qualifying disclosure within the meaning of s.43B ERA and is made by the claimant in one of the circumstances provided for in s.43C ERA.

13. Section 43B(1), as amended with effect from 25 June 2013, reads as follows,

> "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."

14. The structure of s.43B(1) therefore means that the tribunal has to ask itself whether the worker subjectively believes that the disclosure of information, if any, is in the public interest and then, separately, whether it is reasonable for the worker to hold that belief. Similarly, I need to ask myself whether the worker genuinely believes that the information, if any, tends to show that one of the subsections is engaged and then whether it is reasonable for them to believe that.

15. Section 103A, so far as is relevant, provides that:

> "An employee who is dismissed shall be regarded … 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"

16. The procedure for these applications is set out in Rule 95 Employment Tribunals Rules of Procedure 2013.

Discussion and Conclusions

17. This has been a preliminary hearing taking place in public by CVP. I have had available to me a signed statement from the claimant and also a witness statement in defence of the application from the Deputy Chief Digital Officer (whom I shall refer to as the DCDO), who made the decision to dismiss the claimant. Since my decision on the interim relief application, Employment Judge Laidler has made order anonymising the names of the claimant and respondent for reasons she explains in her judgment. I have taken the decision to use the titles of any other relevant employees of the Trust, rather than their names, in order that these reasons should not undermine that restricted reporting order.

18. I have had the benefit of an electronic file of documents running to 160 pages and page numbers in these reasons refer to that file. Mr Mennen provided a skeleton argument and copies 4 authorities (which is referred to as RSKA where necessary) but as is appropriate in these cases, I have heard argument on the basis of the statements and the documentary evidence and no oral evidence. A minor typographical error in para.2 of the claimant's statement was corrected to replace "discouraged me" with "was an attempt to discourage me"; this had been how both I and Mr Menon had understood that paragraph in any event.

19. The disclosures that are relied on for the purposes of this claim, for claim 3, are summarised in paragraph 18 of the grounds of claim (page 19) which states "The Claimant submits that his complaints set out above from February 2020 to April 2022 amount to protected disclosures". Details of those complaints appear in paragraphs 7 to 13 of the particulars. The relevant wrongdoing that is relied on to give the alleged disclosures the quality of protection under s.43B ERA, is that they are said to raise health and safety concerns - disclosures of information which in the reasonable and genuine belief that the claimant tended to show that the health and safety of an individual had been endangered, was being endangered or was likely to be endangered (s.43B(1)(d) ERA).

20. Ms Barrett for the claimant explained that the reference to complaints from February 2020 onwards is to oral communications that the claimant says were made throughout the grievance process which started in that month. However, she candidly explained that the claimant is not able to pinpoint with particular clarity the oral communications made. The relevant paragraphs of the particulars in the present claim (paragraphs 7 & 8) do not pinpoint particular communications or information. I note that some more information is provided in claim 4. The rider to that claim form starts at page 147.

21. For the purposes of this interim relief application, the claimant's argument has focussed on two written communications which are extensively quoted within the grounds of complaint rather than on earlier alleged communications which are not particularised. In particular, he relies upon an email of 20 April 2022

to the Chair of the Trust and another to the Chair (copied to a wide circulation list) dated 29 April 2022 .

22. Claim 1 and 2 are disability discrimination claims and do not include protected disclosure complaints.

23. The claim on dismissal was articulated at the hearing before me in the following way: were it not for the written disclosures the claimant would not have been dismissed when he was dismissed or in the way he was dismissed. That is why I say there is a particular focus on those written disclosures.

24. However, to understand the context of that argument it is necessary to go a little bit further back than the communications of 20 April 2022. It is common ground that the respondent trust had attempted a redeployment process involving the claimant which ended in March 2022. Details are set out in the DCDO's witness statement. The chronology of it does not seem to be disputed in any material way although the claimant strongly argues that it was an unlawful redeployment process that was undertaken against his will.

25. Following the end of the redeployment period on 13 April 2022, the DCDO wrote to the claimant (page 98), inviting him to meet on 28 April 2022 to discuss the end of the redeployment process. In that letter he warned the claimant that it was very likely that scheduling a hearing "to consider the sustainability of your future employment" would be discussed at the meeting on 28 April. The claimant was informed that he could bring a trade union or workplace companion to the meeting.

26. The first written communication relied on by the claimant is the email to the Chair of the Trust dated 20 April. Extensive extracts from that that are in the grounds of claim.

27. Neither the claimant nor his trade union representative attended the meeting on 28 April 2022. One possible inference from the DCDO's evidence in his paragraph 32 is that it was on that unexplained non-attendance that he felt he had no option but to invite the claimant to a formal hearing. That is a matter that will have to be gone in to in cross-examination in due course.

28. The claimant argues strongly that as the 29 April 2022 (page 103) was copied to the DCDO it can therefore be regarded as having come to his attention. It is also pointed out that that email of 29 April 2022 forwarded to the first email of 20 April to the addressees of the second email. It is on that basis that the claimant argues that the DCDO had actual knowledge of these written communications. The DCDO in his witness statement denies that he had knowledge of these written communications. When he was asked to comment on the appearance of his name and email address in the "cc" field of the 29 April 2022, suggested that a possible explanation was cyber security restrictions in the Trust which meant that some external communications are blocked. The claimant countered that by saying that the individual to whom the email was directly addressed, the Chair of the Trust, responded to it on 11 May. Again, this seems to me to be a matter that is necessary to resolve on evidence and is not capable of quick or easy resolution today.

29. The claimant was invited to a hearing at which his continued employment was to be discussed by an invitation letter of 23 May that is at page 127. The meeting was originally intended to take place on 8 June 2022 but it was rescheduled to 15 June. The claimant and his trade union representative did not attend.

30. The decision was taken to dismiss and, as I have already said, the dismissal letter was dated 23 June 2022 (page 132). Although the letter is dated 23 June it states (three paragraphs up from the bottom on page 133) that the termination of employment date is Wednesday 15 June 2022. The claimant argues that there is no explanation as to why it took eight days for the DCDO to write the letter notifying the claimant that his employment had ended. It is now common ground that the claimant can, as a matter of law, only be dismissed when the communication was made to him, on 23 June 2022. The claimant argues that inferences could be drawn about the DCDO's state of mind and the reasons for his decision from the inclusion of this date of 15 June in the letter.

31. The claimant also points to there being a detailed management statement of case in respect of the original hearing (page 120) which is dated 8 June 2022. He argues that this postdates the emails that he relies on as protected disclosures, and asks why it took so long to write a letter when the bulk of it was drawn from the statement of case that was already in existence at the time of the meeting. The point is also raised, based on that statement of case, that the DCDO, who wrote the management statement of case and then conducted the hearing, states that he sees no other alternative but to dismiss the claimant (point 6.1 on page 124). It is argued that that is strong evidence of predetermination which, it is argued, is not only highly relevant to the question of whether the claimant was unfairly dismissed but relevant also to whether inferences could be drawn that the DCDO was in fact motivated by the principal reason of alleged protected disclosures, rather than an alleged breakdown in employment relationships.

32. Following the presentation of this claim the claimant conciliated between 14 and 29 September 2022 in what became claim 4 and that was presented on 29 October. The respondents have entered in a combined response to both claims although it appears they have not been formally consolidated as yet.

33. One of the matters that the claimant will need to establish in order to succeed and show that he had made a protected disclosure was that it was made in the circumstances set out in s.43C ERA. In this case, it seems clear that the communication was made to his employer in accordance with the whistleblowing policy, and no point is presently taken on behalf of the respondent that the disclosure of information, if a qualifying disclosure, would not be protected. At this stage, the claimant has to show that it is likely that he will succeed at a final hearing in his argument that he was protected as a whistle-blower. The elements of this require him to show firstly, that there was a communication of information; secondly, that in his genuine and reasonable belief the information tended to show the wrongdoing in s.43B(1)(d); and next that, in his genuine and reasonable belief, it was in the public interest to make the disclosure.

34. Broadly speaking, the relevant information in the emails falls into three categories. By that, I mean where the emails are relevant to the alleged protected disclosure claim because it is fair to say that the communications cover more ground than simply these three categories.

    34.1 The first is said to be a communication of information that tended to show that the IT Helpdesk was under resourced which led to the provision of a service to clinicians and nursing staff that was so sub-par that patients lives were being put at risk and certainly that patient care was being put at risk;

    34.2 Next the claimant states in the emails that this lack of resource and training meant that all employees on the IT Helpdesk, himself included but not limited to himself, were exposed to excessive stress - which was damaging to their health - and to the risk of verbal abuse by the medical staff who were trying to use the service;

    34.3 Finally, he says that he is communicating information that there had not been a stress risk assessment of this situation carried out despite it being an obligation and despite there being the need flagged up to the respondent.

35. I am satisfied that it is likely that the claimant will show that information was communicated by him notwithstanding the fact that these emails cover broader ground. It may well be that the claimant will show, at final hearing, that he previously made specific oral statements that communicated essentially the same information. However, the evidence before me today has not been sufficiently detailed or particularised to support a conclusion that the claimant has shown that he is likely to prove that earlier communications were protected disclosures.

36. Reading the claimant's witness statement, I accept at face value that it was his genuine belief that the information tended to show that health and safety was at risk the way alleged. The respondent argued that there was a hurdle in this element of the claim because he would have to show a reasonable belief on the basis of what is set out in the emails. That seems to me to be an unacceptable limitation on the breadth of the law in this area – he may need to show that he genuinely and reasonably believed the information to show the relevant wrongdoing but I do not see why he should be limited to reliance on the information in the communication alone to show that his belief was reasonable. If he genuinely and reasonably believed the information to be true, that means he is likely to be able show his belief that health and safety was endangered was a reasonable belief to have based on that information.

37. The health and safety of the public (as patients receiving medical care in the hospital) and of the employees who would, it seems to me, potentially be affected in the way alleged by the claimant and therefore I am satisfied that he is likely to show that the information in those written emails tended to show the type of wrongdoing that is alleged.

38. When it comes to whether there is a genuine and reasonable belief in the disclosure being in the public interest, it seems to me that the claimant has done enough at this stage to show that it is likely that he would show that the lack of access to a reliable IT Helpdesk impacts on the medical staff's ability to treat patients and adversely affects patient care. Similarly, he has shown that there are likely to be sufficient numbers of staff on the IT Helpdesk that they themselves are likely to be regarded as a section of the public. I accept that the claimant has shown that this is likely to be about more than the claimant's personal interest; I accept the argument that if the IT staff are working under stress that is likely to mean that the public were affected by the lack of provision of the service by them. I stress that this is not a final adjudication on the point but, in my view, there is a pretty good chance that those communications were protected disclosures.

39. However that is only half of the story with a protected disclosure automatic unfair dismissal claim. The claimant then has to satisfy me that he has got a pretty good case that the reason, or principal reason, for dismissal was the protected disclosure.

40. As I say, there is a dispute about whether the DCDO had actual knowledge of the emails that the claimant relies on. The claimant says that the email of 29 April - and with it that of 20 April - was copied to the DCDO and that the response from the Chair of the Trust to the direct email suggests that the server was not rejecting Yahoo emails. He also points to an exchange between the trade union representative, referred to in the grounds of claim in claim 4 (page 152 paragraphs 30 and 31), in early June where it is said that there is direct evidence from the union representative that he alerted the DCDO directly to the fact that the claimant asserted he was a whistleblower. I have also been taken an email from the claimant dated 26 May 2022 (page 130); it is argued that, by that email, the HR function in the Trust knew that the claimant himself was aware of the right to claim the interim relief. Conversely, the DCDO has signed a witness statement indicating that he did not receive that email and when he has been shown the email with his address in the cc field he gave the explanation that I have already referred to.

41. Based on all of the matters that the claimant has relied on, including the communication with the trade union representative, it seems to me that it is likely that the DCDO was aware that the claimant considered himself to be a whistleblower but less likely that the claimant can show specific knowledge of the emails that are relied on.

42. I am also invited to draw inferences, as I have indicated, from the wording of the dismissal letter. I will not repeat the inferences contended for. It seems to me that these matters amount to scope for cross-examination. The arguments do not strongly point to deliberate action done with the knowledge of the claimant's right to claim interim relief or to an intention to obstruct any such application by a dismissing officer conscious that he was dismissing because the claimant made disclosures and aware that any interim relief application was strong and likely to succeed. Again, these matters are scope

for cross-examination rather than factors which strongly points to the claimant having a pretty good case.

43. The respondent argues that there are conflicting reasons pleaded for dismissal when comparing claim 3 and claim 4. Claim 4 additionally claims that dismissal was an act of direct disability discrimination or, alternatively, discrimination for a reason arising in consequence of disability. They argue that the way the alternative complaints are articulated goes beyond, if I can put it this way, two halves that can be fitted together.

44. In a discrimination complaint the unlawful reason for discrimination or the "something arising" only has to be a material factor in the reasons for the act complained of; it has to be a more than trivial factor. The respondent argues that the way that that claim is articulated in the present case is not capable of sitting with an argument that the protected disclosure was the principal reason for dismissal. That is an interesting argument but there is scope at this stage for the claimant to argue both points. The existence of apparently credible alternative reasons for dismissal which are unrelated to a protected disclosure does somewhat weaken the argument that the claimant is likely to show that the principal reason is the protected disclosure but I put it no higher than that.

45. The matter that I think weighs most strongly in my mind is that the redeployment process was underway well before the alleged disclosures. The process was moving to a decision on the claimant's future employment before his emails of 20 and 29 April 2022. It was structured and followed a chronology that does not, on the face of it, appear to have been varied in any significant or unexpected way. That chronology does not suggest any unexpected action by the DCDO which might lead to an inference that his decision making process was affected by the emails of 20 and 29 April.

46. I am referring, in particular, to the invitation of 13 April 2022 (page 98) which predates the written emails that are the only ones that the claimant is "likely" to be able to show were protected disclosures. It is apparent on the face of that document that the writer has in mind that dismissal is a possible outcome, not of the meeting to which the claimant is being invited but at the hearing that is likely to be arranged following it.

47. That meeting of 28 April did not take place because the claimant was not present and there is a possible inference that the decision was taken to invite him to the hearing which dismissal could be considered when he did not attend on 28 April. That is prior to the date when the claimant says that the DCDO had knowledge of the communications. I am not making any findings that that was or was not the case but I am assessing whether this picture leads me ultimately to be persuaded by the claimant that he has a pretty good case of succeeding in showing that the DCDO's principal reason for dismissing was not, as the respondents allege, that they had come to the employment relationship had come to the end of the road because trust and confidence was undermined. They argue that this amounts to the potentially fair "some other substantial reason" within the meaning of s.94 ERA.

48. The claimant argues premeditation and points to the DCDO undertaking an investigation and then proposing to conduct the meeting and hearing. In fact, this potentially weakens the argument that it was the emails that were the trigger. Superficially, if one focusses on the end of this chronology, as the particulars of claim do, one can see the argument for a protected disclosure dismissal but the earlier paperwork shows a better than fairly arguable case that dismissal was at the end of a process and for the reasons described by the respondent. There is not, as I say, an escalation of the chronology or anything that points strongly to the listing of the hearing that ultimately took place on 15 June being anything other than part of a process that was already in train at the point when the written disclosures were made.

49. For these reasons I do not consider it likely that the claimant will show that the reason, or principal reason, for his dismissal was any protected disclosure that he may have made.

_____
Employment Judge George

Date: …22 May 2024……..

Sent to the parties on: 22 May 2024

For the Tribunal Office

Recording and Transcription
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/