EMPLOYMENT TRIBUNALS

Claimant: Mr J Murphy

Respondents:
1. Altruistic Care Ltd
2. Jiji Saju
3. Trudy Riely
4. Alyshba Jivraj Bata
5. Jaya Amaresh

HELD AT: Manchester **ON:** 3 May 2024

BEFORE: Employment Judge Slater
(sitting alone)

REPRESENTATION:

Claimant: Mr A Hawas, Lay Representative
Respondent: Mr D Bunting, Counsel

JUDGMENT having been sent to the parties on 14 May 2024 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

Introduction

1. This was an application for interim relief based on the claimant's complaint of section 103A Employment Rights Act 1996 unfair dismissal i.e. protected disclosure or whistleblowing unfair dismissal.

2. The hearing was conducted by video conference.

3. The claimant met the procedural requirements of making his application within seven days of the end of his employment.

4. The test, in accordance with section 129 of the Employment Rights Act 1996, is that interim relief will only be granted if it appears to the Tribunal that it is likely that,

on determining the section 103A complaint, the Tribunal at the final hearing will find that the reason or principal reason for the dismissal is that the claimant made protected disclosures.

5. In accordance with the case law, this is a high bar to overcome. The test is whether the claimant had a pretty good chance of success at the full hearing. This is a significantly higher threshold than whether the claimant has a better than evens chance of succeeding in his complaint.

6. The bar for success in an interim relief application is set so high because the implications of an interim relief order are very serious. An order would mean that the employer has to continue to employ and pay the claimant until the outcome of the final hearing and, if the claimant did not succeed at the final hearing, he would not have to repay the pay he had received from his dismissal until that hearing.

7. A decision not to grant an interim relief order is not an indication as to whether or not, after hearing all the evidence, the Tribunal at the final hearing will conclude that the claimant made protected disclosures and that the reason or principal reason for dismissal was that he made protected disclosures. It is entirely possible that someone who fails in an interim relief application may succeed in their claim at a final hearing.

8. An application for interim relief has to be determined expeditiously and on a summary basis. The Tribunal does not hear evidence unless the Judge makes a positive decision to do so. I decided not to hear evidence, although I have looked at various information provided by the parties.

9. I have to consider whether the claimant has a pretty good chance of success at the final hearing in succeeding in every element necessary for success in this complaint. This is whether the claimant had a pretty good chance of success in the Tribunal concluding that he did make protected disclosures and that the making of these disclosures was the reason or principal reason for his dismissal.

The s.103A claim

10. I spent some time clarifying with the claimant the protected disclosures he relies on, based on what he wrote in the claim form. Mr Hawas suggested that the claimant might be applying to amend his claim to add further disclosures. However, I took the view that I had to decide the interim relief application on the basis of what the claimant had written in his claim form. Whether the claimant makes and succeeds in an application to amend his claim is a matter for another day.

11. The claimant is a nurse and was Deputy Manager of a nursing home specialising in end of life care. He was dismissed on 8 April 2024.

12. Because this is an application for interim relief which the Tribunal has listed as soon as possible, the date for the respondent to present a response has not yet been reached. I do not, therefore, have the respondent's formal grounds for resisting the claim.

13. The alleged protected disclosures the claimant relies upon in his claim form, as clarified in discussion at this hearing, are as follows:

(1) PD1. The first alleged protected disclosure was an online submission to the Nursing and Midwifery Council (of which the claimant was not able to keep a copy) on 12 January 2024. The claimant explained that the information he disclosed was about a discharge officer from a hospital (a nurse with the same qualifications as him who I will describe as PM) not telling him what the safeguarding concern was about a patient who was to be discharged from hospital to the respondent's nursing home which was said to prevent the patient returning to his previous home. The claimant says that this information which he disclosed tended to show that the health or safety of an individual had been, was being or was likely to be endangered.

(2) PD2. The second alleged protected disclosure or group of disclosures were online submissions to the Solicitors Regulatory Authority, the Legal Ombudsman and the Information Commissioners Office on 3 April 2024. Again, the claimant was not able to keep a copy of these because of the online nature of the submission. The claimant explained that these related to a solicitor (who I will call GW) who was to be appointed by the respondent to deal with the claimant's disciplinary investigation. The claimant said that the information disclosed was that GW was working as the owner or director of a business which no longer existed and that the respondent had sent the claimant's personal details to GW using GW's NHS email address (GW being a non-Executive Director of an NHS Trust). The claimant says this information tended to show a criminal offence had been, was being or was likely to be committed; a person had failed, was failing or was likely to fail to comply with any legal obligation and/or information tending to show that any of the other things had been, was being or was likely to be deliberately concealed.

(3) PD3. The third alleged disclosure is an email dated 4 April 2024 from the claimant to Alyshba Jivraj (a director of the respondent). This email appears at page 67 using the electronic numbering of the respondent's bundle. The information in this email was about GW. The claimant says this information tended to show a criminal offence had been, was being or was likely to be committed; a person had failed, was failing or was likely to fail to comply with any legal obligation and/or that information tending to show any of these things had been, was being or was likely to be deliberately concealed.

The Law

14. The law relating to protected disclosures is contained in the Employment Rights Act 1996. Section 43B defines disclosures which qualify for protection, saying that:

> "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 of the preceding paragraphs has been or is likely to be deliberately concealed."

15. To be a protected disclosure the qualifying disclosure has to have been made either to the employer (that is section 43C) or to another person falling within the definitions of sections 43D through to 43G in the Employment Rights Act 1996.

16. Section 43F is the other part of the definition which I am concerned with in this particular case. This talks about prescribed persons. The section says that a qualifying disclosure is made in accordance with the section if the worker makes the disclosure to a person prescribed by an order made by the Secretary of State for the purposes of that section and reasonably believes that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and that the information disclosed and any allegation contained in it are substantially true. There is secondary legislation which sets out a list of people who are prescribed persons for those purposes.

17. Section 103A of the Employment Rights Act 1996 says that 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.

18. Section 128 Employment Rights Act 1996 allows an employee bringing a complaint of unfair dismissal relying on s.103A Employment Rights Act 1996 to make an application for interim relief provided the claim is presented within 7 days following the effective date of termination.

19. Section 129 Employment Rights Act 1996 provides:

"(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 if one of those specified in –

(i) Section…..103A, or

(ii) ……."

20. In **Taplin v C Shippam Ltd 1978 ICR 1068**, the EAT said the correct test to apply when considering whether or not it is likely that the Tribunal will find that the reason or principal reason for dismissal is one of those reasons where interim relief can be granted was whether the claimant has a "pretty good chance of success" at the full hearing.

21. In **Wollenberg v Global Gaming Ventures (Leeds) Ltd EAT 0053/18,** the EAT said this is a significantly higher threshold than merely "more likely than not" that the claim would succeed.

Conclusions

22. I now look at whether the claimant has a pretty good chance of success in the Tribunal at the final hearing finding he made one or more of the alleged protected disclosures.

23. PD1. This was a disclosure the claimant says he made in April 2024 to the Nursing and Midwifery Council. Since the claimant does not have a copy of the information he disclosed, the Tribunal will be reliant on the claimant's recollection in deciding what the information was that he did disclose. The claimant explained that the information he disclosed was about a discharge officer from a hospital (PM, a nurse with the same qualifications as him) not telling him what the safeguarding concern was about a patient who was to be discharged from hospital to the respondent's nursing home which was said to prevent the patient returning to his previous home. The claimant has not explained the basis of his beliefs that the information he disclosed tended to show that the health and safety of an individual was likely to be endangered and that the disclosure was made in the public interest. Even if the Tribunal finds that he disclosed the information he has told me that he disclosed and concludes that the claimant honestly believed that this information tended to show that the health and safety of an individual was likely to be endangered, I do not feel able to conclude that the claimant has a pretty good chance of the Tribunal concluding that this belief was reasonable and that he reasonably believed that the disclosure was made in the public interest. For this reason, I conclude that the claimant does not have a pretty good chance of success in the argument that he made a protected disclosure by his disclosure to the NMC on 12 April 2024.

24. PD2. The claimant says he made online submissions to the Solicitors Regulatory Authority, the Legal Ombudsman and the Information Commissioners Office on 3 April 2024. The claimant explained that these related to a solicitor, GW, who was to be appointed by the respondent to deal with the claimant's disciplinary investigation. The claimant said that the information disclosed was that GW was working as the owner or director of a business which no longer existed and that the respondent had sent the claimant's personal details to GW using GW's NHS email address (GW being a non-Executive Director of an NHS Trust). The claimant says this information tended to show a criminal offence had been, was being or was likely to be committed; a person had failed, was failing or was likely to fail to comply with any legal obligation and/or information tending to show that any of the other things had been, was being or was likely to be deliberately concealed. The bodies to whom the disclosure was made, other than the SRA, are prescribed persons. Since the claimant does not have a copy of the information he disclosed, again the Tribunal will be reliant

on his recollection in deciding what the information was that he disclosed. Even if the Tribunal finds he disclosed the information he has told me he disclosed and concludes that the claimant honestly believed that this information tended to show a criminal offence/breach of a legal obligation and/or likely concealment of any of these things, I do not feel able to conclude that the claimant has a pretty good chance of the Tribunal concluding that this belief was reasonable. I remain unclear from the information before me what criminal offences etc the claimant believed had been committed and was tended to be shown by the information he disclosed. I am also not persuaded that he has a pretty good chance of the Tribunal at the final hearing concluding that the claimant reasonably believed his disclosures about GW were in the public interest. The concerns appear to relate more to the claimant's own situation than anything affecting a wider group. For these reasons I conclude that the claimant does not have a pretty good chance of success in the argument that he made a protected disclosure by his disclosure to the various prescribed persons on 3 April 2024.

25. PD3. The third alleged disclosure is an email dated 4 April 2024 from the claimant to Alyshba Jivraj (a director of the respondent). The third alleged protected disclosure was made to the claimant's employer, and I have been able to read the email dated 30 April 2024 (p.67). The email raises concerns about GW, who was to conduct a disciplinary hearing on the respondent's behalf. Concerns expressed included that FW was a director and owner of a company which had been dissolved twice; that he was an "interrogation lawyer"; and that the case had been referred to GW using GW's NHS email address. The claimant says the information in this email tended to show a criminal offence had been, was being or was likely to be committed; a person had failed, was failing or was likely to fail to comply with any legal obligation and/or that information tending to show any of these things had been, was being or was likely to be deliberately concealed. I have not been persuaded (from what is written in the claim form or from the further explanation provided by the claimant and Mr Hawas today) that, if the claimant did honestly believe that what he wrote in that email tended to show a criminal offence/breach of a legal obligation or likely concealment of any of those things, that he has a pretty good chance of the Tribunal at the final hearing concluding that this belief was reasonable. As with the second alleged protected disclosure, I remain unclear from the information what criminal offences etc. the claimant believes that the information he disclosed tended to show. I am also not persuaded that he has a pretty good chance of the Tribunal at the final hearing concluding that he reasonably believed that his disclosures about GW were in the public interest. As noted in relation to the second alleged protected disclosure, these concerns appear to relate more to the claimant's own situation than anything affecting a wider group. For these reasons I conclude that the claimant does not have a pretty good chance of success in the argument that he made a protected disclosure by his disclosure to his employer on 4 April 2024.

26. Because of these conclusions about protected disclosures, the application for interim relief must fail. However, for completeness I will also deal with the causation point. This is whether the claimant has a pretty good chance of succeeding in the argument that the reason or principal reason for dismissal was the making of protected disclosures.

27. If the Tribunal at the final hearing does find that the claimant made protected disclosures, the Tribunal will need to consider whether or not the reason or principal

reason for dismissal was the making of protected disclosures. This is likely to be an exercise which requires careful consideration of the evidence, both documentary and witness evidence, which casts light on why the respondent dismissed the claimant. I do not consider this to be a matter which is clearcut on the information the parties have been able to put before me on what has to be a summary assessment on the basis of limited information. The respondent points to disciplinary issues prior to the first alleged protected disclosure. The claimant raises various issues about the integrity of the investigation and dismissal process and decisions. I cannot conclude where (as here) evidence needs to be carefully considered and evaluated that the claimant has a pretty good chance of success that the Tribunal will decide that the reason or principal reason for dismissal was that the claimant made protected disclosures.

28. For this reason, even if I had concluded that the claimant had a pretty good chance in establishing that he made protected disclosures, I would have concluded that the application for interim relief must fail.

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Employment Judge Slater

Date: 22 May 2024

REASONS SENT TO THE PARTIES ON

5 June 2024

FOR THE TRIBUNAL OFFICE