Case Number: 1401192/2024

EMPLOYMENT TRIBUNALS

Claimant: Mr AMG Kinash

Respondent: Dal Sterling

Heard at: **Bristol (by video – VHS)** **On:** **23 May 2024**

Before: **Employment Judge Livesey**

Representation:
Claimant: In person
Respondent: Ms McGee, counsel

JUDGMENT

1. The Respondent's name is amended by consent to 'Dal-Sterling Group Ltd'.

2. A second Respondent, Dal-Sterling (UK) Ltd, is added by amendment and by consent.

3. The Claimant's application for interim relief is dismissed.

REASONS

Parties

1. The Claimant had issued his claim against 'Dal Sterling'. Several companies bore that name on the Companies House register.

2. The Claimant considered that the appropriate Respondent was Dal-Sterling Group Ltd, since that name appeared on the bottom of his offer letter. No subsequent contract of employment was ever produced.

3. The Respondent considered that the appropriate party was Dal-Sterling (UK) Ltd. Its name appeared on a number of other pieces of correspondence, including the grievance outcome letter [60-1].

4. The parties were content that both companies were joined as Respondents. Ultimately, the Tribunal will have to determine which of them was the contracting party.

Interim relief

Introduction

1. By a Claim Form dated 19 April 2024, the Claimant brought a complaint of detriment and dismissal on the grounds of public interest disclosure (whistleblowing). The claim included an application for interim relief. The effective date of his dismissal was said to have been 13 April and the application for interim relief was therefore brought in time under s. 128 (2) of the Employment Rights Act.

2. Notice of hearing was sent to the parties on 13 May. In that notice, the Claimant was required to set out the precise nature of the disclosures which were relied upon and the parties were expected to supply an agreed hearing bundle at least 24 hours before the hearing.

3. On 22 May, the Claimant sent through a witness statement and a hearing bundle. He said that the Respondent had not cooperated in the compilation of the bundle, despite his invitations for them to do so. It was clear from the material that the Claimant relied upon a disclosure in writing dated 20 February 2024.

Hearing

4. The hearing was conducted by video (VHS).

5. The Claimant relied upon the documents in his hearing bundle, references to which have been cited below in square brackets, and the contents of his witness statement. The Claimant did not give evidence and his witness statement merely formed part of the written arguments that I considered in support of his application.

6. The Respondent also produced a combined bundle which contained a number of additional documents. The Claimant received that bundle late but nevertheless accepted that, in my assessment of the likely chances of ultimate success, those documents ought to have been taken into account as well. References to pages within that combined bundle are also given in square brackets, with the prefix ‘CB’.

Relevant facts

7. According to the Claim Form, the Claimant had been employed as a Senior Contracts Manager between 4 September 2023 and 13 April 2024. He was initially based at the Respondent’s head offices in Alton, Hampshire for five weeks. He then relocated to Alabama in the United States on 9 October 2023 where he was ‘seconded’ to Arcelor Mittal, one of the Respondent’s clients.

8. On 20 February, the Claimant asserts that he made a public interest disclosure in the form of a grievance which he sent to the Respondent. It concerned the basis upon which he was working in the United States. At that stage, he had nothing more than an ESTA Visa waiver to be in the US and he considered that the work that he was undertaking was in excess of that permitted under an ESTA.

9. The Claimant alleges that he was then removed from the United States on 24 February and, on the 29th, a redundancy process was commenced which culminated in his dismissal on 13 April.

10. The documents within the bundles and the Claimant's witness statement revealed a number of important additional matters;

- The Claimant's original offer letter of 25 July 2023 referred to the possibility of him having been involved in assignments overseas [11-13];

- The Claimant said that he 'began working for' Plantwork Systems Ltd, a sister company of the Respondent, based within its Alton offices, but he continued to be paid by the Respondent (paragraph 2 of his witness statement);

- The Claimant then moved to the US and was informed that he was to have been employed full time by a US-based company, Praecipio Enterprises Ltd, from 15 January 2024 paragraph 6 of his witness statement). He was provided with a contract which he said that he did not sign or return [14-6];

- The Claimant's placement in the US had been under a 'Proposal' between the Respondent and ArcelorMittal/Nippon Steel Calvert [CB; 19-24] which, although due to expire in August 2024, was a flexible arrangement with left much of the power in the hands of the US end-users [CB; 21];

- The Respondent was notified that the US end-user had engaged a Matthew David by 8 February as the Contract Admin on the project (the Claimant's then role). It was expected that there would have been a 'transition plan' "*from Andy to Matthew, so he can assume MMR contract administration in a couple of weeks*" [CB; 25];

- In an email dated 14 February 2024 [28-9], the Claimant received legal advice which indicated that he could not undertake substantive work in the US whilst on an ESTA. That was in reply to his email of the same date [29] in which he expressed the belief that he was able to work under an ESTA if it was no longer domiciled in the UK and he was in the process of applying for a visa to work in the US;

- The Claimant's disclosure of 20 February 2024 was made to Mr Oliver at the Respondent [34-7]. It contained the following extracts;

> "*<u>Whistleblowing grievance and reservation of rights</u>*
> *Please accept this letter as a formal grievance from me regarding the incredibly dangerous and risky position the business has placed me in, as I detail below.*
> *The work I have been doing is equivalent of a full-time substantive role. I have been working for AM/NS as a Contract Administrator on the main electrical package of work. I have been a regular visitor to the site practically every business day I have been here. I am performing a full-time, substantive role…. I have raised the legality of this with you on each time you have sought to reassure me by categorically stating that need doing the Work is legal it is only in*

recent days that I have discovered that the business is making me work illegally. I make reference to Brandy Williams's email of 14 February 2014 pertaining to my Visa application to work in the US. Copies of these emails are attached.

I am extremely concerned that erroneous information has been given to Brandy as a deliberate attempt to deceive and mislead the United States Immigration Service.

The precarious situation in which I now find myself could not only jeopardise my current stay but could preclude me from returning to the US in the future. Based on the advice from Brandy, a specialist US immigration attorney, I reasonably believe that I am in serious and imminent danger of law enforcement action against me, including but not limited to a false removal from the US, costs and even imprisonment.

<u>Summary</u>

Dal Sterling is acting negligently and unlawfully by making me work in the US in breach of the ESTA guidelines…

Dal Sterling is acting negligently towards me and breaching its duty of care towards me.

Dal Sterling is in breach of sections 44 (1)(d) and 100 (1)(d) of the Employment Rights Act 1996. I have the right not to suffer a detriment or be dismissed (including constructive dismissal) for leaving work or refusing to return to work when they have a reasonable belief that they are in serious and imminent danger…

Dal Sterling will also be in breach of sections 44 (1)(e) and 100 (1)(e) of the Employment Rights Act if I am subjected to any form of detriment or dismissal for taking appropriate steps to protect myself from danger…

I wish Dal Sterling to view this email as me making a protected whistleblowing disclosure, and to investigate it under its whistleblowing policy as well as its grievance policy."

- The Respondent's reply of 21 February [38-9] was, in part, as follows;

"*As we have previously discussed, you have been in the USA pursuant to ESTA - from 6 October to 22 December 2023 (77 days in total) and from 8 January to a proposed scheduled return of 21 March (73 days in total) in accordance with ESTA. ESTA, per regulations have a very detailed scope of permissible work, which has been laid out very clearly in the email from Brandy Williams on 14 February…*

While you are currently in the US pursuant to ESTA, our long-term goal was to transition you to the non—immigrant E2 visa. However, we have no wish to place you under the undue stress you have expressed you are experiencing while in the US pursuant to ESTA, even though you are operating legally under ESTA, the correct course of action is for you to leave the USA as soon as possible and return to the UK. We will book your flight to the UK for Saturday, 24 February leaving from Atlanta International Airport…"

- There was then the redundancy process, which commenced with the letter of 27 February 2024 [54];

> "*I am writing to invite you to a consultation meeting on Thursday, 29 February at 3pm via Teams..*
> *DS is no longer in need of additional full-time resource in the US following AM/NS decision to hire direct resources. The purpose of the meeting is to;*
> - *Consider possible suitable alternative employment within the organisation*
> - *Give you the opportunity to make suggestions and raise any questions*"

- The Claimant then raised numerous complaints over what he considered to have been the 'sham' redundancy process (for example, [41-2]). He also continued to raise complaints over what had happened in the US [49];

- Confirmation of his redundancy was provided on 13 March, with the effective date of termination specified to have been 13 April [58-9];

- The Claimant's grievance was addressed on 15 March [60-1];

- His redundancy appeal was dismissed on 4 April [65].

Relevant legal principles

11. The Claimant's application for interim relief was founded upon s. 128 (1)(a) of the Employment Rights Act 1996. She bore the burden of proof in respect of the application.

12. Section 129 (1)(a)(i) was relevant;

> "*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*"

13. '*Likely*', according to the court in *Taplin-v-C Shippham Ltd* [1978] ICR 1068, meant *'a pretty good chance'* (that test having been more recently confirmed in *Dandpat-v-University of Bath* UKEAT/0408/09 and *London City Airport-v-Chacko* [2013] IRLR 610). The test required a *"significantly higher degree of likelihood"* than the balance of probabilities (Underhill J in *Ministry of Justice-v-Sarfraz* [2011] IRLR 562 and *Wollenberg-v-Global Gaming and another* UKEAT/0053/18/DA).

14. The claim was brought under s.103A and the Claimant therefore needed to show that there was a pretty good chance of him ultimately successfully demonstrating that his dismissal had been solely or principally because of his disclosure. All aspects of the claim had to meet the standard referred to above (*Hancock-v-Ter-Berg* [2020] IRLR 97 (EAT)).

Discussion and conclusions

15. The focus of my consideration of this application was in three areas;
    (i) The Claimant's employment relationship with the Respondent and the recipient of the disclosure under s. 43;
    (ii) The nature of the alleged public interest disclosure;
    (iii) Causation.

16. As to the first issue, there was a distinct lack of clarity around the identity of the Claimant's employer. In the absence of a contract of employment, it was not clear who his employer had been. The offer letter did not identify one. The Claimant had only chosen to identify Dal-Sterling Group Ltd as his employer because its name had appeared on the footer of the first page of the letter [11].

17. Further, it was not clear what the nature of the Claimant's 'secondment' was in the US. That word can be used to describe different legal situations and the existence of a contract with Praecipio [14-6] might ultimately lead to the conclusion that he became its employee whilst in the US.

18. These doubts were relevant because of the provisions of s. 43C. Was Mr Oliver, the recipient of the letter of 20 February 2024, part of his 'employer' when the disclosure was made? Doubts exist around the answer to that question.

19. As to the second issue, the Claimant asserted that the disclosure of 20 February was a public interest disclosure. In my judgment, it was likely that the letter will be found to have contained information (rather than a bare allegation) that supported allegations that certain legal obligations had been breached. It also seemed likely that the disclosure had been in the public interest for the reasons set out in paragraph 14 of the Claimant's witness statement. There was likely to have been a public interest in such businesses flouting US immigration and Visa rules.

20. Ms McGee suggested that it was unlikely that the Claimant would satisfy a tribunal that he had held a reasonable belief in the disclosure when it had been made. Having reviewed the correspondence with the US lawyer, Brandy Williams, I did not consider that to have been a strong argument [28-9].

21. There was then, finally, the issue of causation. Although there was a strong temporal proximity between the disclosure and the Claimant's dismissal, there was also some evidence which strongly indicated that he had been replaced within the US business by an internal appointment [CB; 25]. The Claimant accepted that it was 'factually correct' that an 'internal resource' had been recruited to replace him (paragraph 19 of his witness statement). As he understood it, he would then have been freed up to concentrate on other work in the US. That was not clear. But events supervened the possibility of that happening in any event because, as a result of his concerns about his Visa status, he was returned home. Having been engaged by the Respondent to service a need in the US, its position was that it had no use for him in the UK [54]. It looked for alternative work in Milan and Cyprus and was still unable to accommodate him [58].

22. This was the area of the case which caused me most concern. Although the Claimant suggested, during the hearing, that he might have been put back to good use on the Plantwork Systems project at Head Office, this did not appear to have been suggested within his witness statement.

23. Accordingly, there was a possibility that the Respondent would demonstrate that the Claimant had been dismissed for other reasons than the disclosure which he made on 20 February 2024, namely his redundancy.

24. In summary, whilst I could not say that the Claimant's claim was hopeless or weak, that was not the same as saying that it had a pretty good chance of success. There were arguments, particularly on the issues of causation and the identification of the recipient of the disclosure, which needed testing on evidence. For those reasons, the threshold test under s. 129 was not made out and the application for interim relief was dismissed.

Employment Judge Livesey

Date 23 May 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

18th June 2024

FOR THE TRIBUNAL OFFICE