EMPLOYMENT TRIBUNALS

Claimant: Mr. J Joseph

Respondent: Wincaton Group Limited

Heard at: London South, by video

On: 25 June 2024

Before: Employment Judge Cawthray

Representation

Claimant: In person, not legally qualified, assisted by Ms. Slater, Consultant Support Advocate, as Mackenzie Friend

Respondent: Ms. Kight, Counsel

JUDGMENT

The Claimant's application for interim relief under section 128 of the Employment Rights Act 1996 is refused. **REASONS**

Introduction and Background

1. The Claimant made an application for Interim Relief made under section128 of the Employment Rights Act 1996 ("ERA"), pending the determination of his claim for automatic unfair dismissal for having made protected disclosures brought under section103A ERA.

2. By a claim form presented on 14 May 2024, the Claimant claims that he was automatically unfairly dismissed by the Respondent for making protected disclosures pursuant to section 103A of the Employment Rights Act (the "ERA").

3. This application for interim relief was presented in the ET1 dated 14 May2024. The Claimant, within the ET1, states the effective date of termination was 29 April 2024. An application for interim relief must be made within 7 days immediately following the effective date of termination. The Tribunal has no jurisdiction to extend time. The claim was initially rejected.

4. However, the claim was accepted following a request for reconsideration. Explained this to the parties at the outset of the hearing. At a

reconsideration hearing, on 4 June 2024, Employment Judge Burge determined:

> *"At the hearing you gave evidence, which was accepted by the Judge, that you did not have knowledge of your dismissal and did not open the letter of dismissal until 7 May 2024. You submitted your claim on 14 May 2024. The Judge decided to revoke the decision to reject your claim as it was presented within the 7 days required for a claim including an application for interim relief and your claim has now been accepted."*

5. In addition to the ET1 form, the Claimant's Details of Claim run to 4 pages.

6. The Respondent has until 18 July 2024 to submit a response.

Procedure

7. The Claimant provided various documents prior to this hearing. This morning he provided a 19 page document labelled as a witness statement that also contained additional documents.

8. The Respondent provided a written skeleton argument, a bundle of 120 pages and a witness statement for Mr. Paul Brodie.

9. At the outset of the hearing, I discussed with the parties whether any reasonable adjustments were required for the hearing today, and other than regular breaks, which were taken, none were required.

10. I did not hear oral evidence, in accordance with Rule 95 of the Employment Tribunal Rules, but I read the statements and the documents to which I was referenced.

11. Both parties gave oral submissions.

12. I considered the basis of the interim relief application upon the claim as currently presented and as set out in the ET1.

The Issues

13. I explained at the outset of the hearing, and before the parties gave submissions, that for the Claimant's application of interim relief to succeed, I need to be satisfied, as regards each of the limbs of the Claimant's claim, that it is likely that, at the final hearing, the Tribunal will find in the Claimant's favour and that his claim will succeed.

14. For the Claimant to succeed at final hearing in his claim under section103A ERA, the Tribunal will have to find each of the following:

    a) That the claimant made the alleged disclosure/s relied on.
    b) That it/they amounted to a protected disclosure within the meaning of section 43A ERA;

c) That the reason, or principal reason for dismissal was the claimant having made the protected disclosure(s) relied on.

The Law

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013

Interim relief proceedings

95. *When a Tribunal hears an application for interim relief (or for its variation or revocation) under section 161 or section 165 of the Trade Union and Labour Relations (Consolidation) Act 1992 or under section 128 or section 131 of the Employment Rights Act 1996, rules 53 to 56 apply to the hearing and the Tribunal shall not hear oral evidence unless it directs otherwise.*

Interim relief

15. The statutory provisions concerning interim relief are set out in the Employment Rights Act 1996 as follows:

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.

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.

16. An application for interim relief will be granted where, on hearing the application, it appears to the Tribunal that it is likely that on determining the complaint to which the application relates, a tribunal will find that the reason for dismissal is the one specified (s.129(1) ERA). The meaning of the word "likely" in section 129(1) has been considered in a number of authorities.

17. In order to determine 'whether it is likely' the claimant will succeed at a full hearing, the EAT said *in London City Airport v Chacko* 2013 IRLR 610, that this requires the Tribunal to carry out an 'expeditious summary assessment' as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party. This will involve a less detailed scrutiny than would happen at a final hearing. My task is to assess how the matter appears to me, and Rule 95 states the tribunal shall not hear oral evidence unless it directs otherwise. I am also to avoid making findings of fact that could cause difficulty to a tribunal hearing the final hearing of the case.

18. 'Likelihood' has been interpreted to mean 'a pretty good chance of success' at the full hearing. In *Taplin v CC Shippam Ltd* [1978] ICR 1068 the EAT set out that it meant a "*higher degree of certainty in the mind of the tribunal than that of showing that he just had a "reasonable" prospect of success*". It went on to suggest that the tribunal "*should ask themselves whether the applicant has established that he has a "pretty good" chance of succeeding in the final application to the tribunal*".

19. In *Ministry of Justice v Sarfraz* [2011] IRLR 562 the EAT stated "*In this context "likely" does not mean simply "more likely than not" – that is at least 51% - but connotes a significantly higher degree of likelihood*".

20. The burden of proof was intended to be greater than that at a full hearing, where the Tribunal only needs to be satisfied on the balance of probabilities that the claimant has made out his case - or 51% or better. A pretty good chance is something nearer to certainty than mere probability.

21. The Employment Appeal Tribunal reaffirmed the proposition that a claimant for interim relief must demonstrate a 'pretty good chance' of success at trial, the Employment Appeal Tribunal remarked in *Dandpat v University of Bath* UKEAT/0408/09, at para 20.:

    "We do in fact see good reasons of policy for setting the test comparatively high in the case of applications for interim relief. If relief is granted the [employer] is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the [employee], until the conclusion of proceedings: that is not consequence that should be imposed lightly".

22. The likely to succeed test applies to all elements of the claim (*Hancock v Ter-Berg* UKEAT/0138/19). In a claim of automatic unfair dismissal under section 103A ERA, this means satisfying the test in respect of all the elements relating to protected disclosures in part IVA ERA.

23. Claimants in complicated, long running disputes can obtain interim relief, itis not just for simple cases (*Raja v Secretary of State for Justice* EAT 0364/09).

Automatic unfair dismissal

24. The statutory provisions are contained in the Employment Rights Act 1996:

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.

43A Meaning of "protected disclosure.

In this Act a "protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection.

(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.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C Disclosure to employer or another responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure -

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

25. Under section 103A, a dismissal is automatically unfair if "the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure". Whether the dismissal flows from the

disclosure is a question of causation. In the present case, it is for the Claimant to show that the predominant causative basis for his dismissal was for making protected disclosures.

26. Section 43B ERA defines a qualifying disclosure as any disclosure of information which is made in the public interest and which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs a-f.

27. For an application for interim relief to be successful, a Tribunal needs to be satisfied on the evidence before it that it is likely that each element of the s.43B definition is likely to be met and that the final Tribunal is likely to find that the principal reason for dismissal was the disclosure.

28. In *Chesterton Global Ltd. and Anr. v Nurmohamed* [2017] IRLR 832 CA, Lord Justice Underhill said, at para 37:

> *(1) "... In a whistle-blower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s.43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…"*

29. In *Kong v. Gulf International Bank (UK) Ltd* [2022] WCA Civ 941 the Court of Appeal upheld the decision that it was not incorrect for a Tribunal to find that the claimant's dismissing managers were not motivated by the protected disclosure but by the view that they took of the claimant's conduct which they considered to be an unacceptable personal attack and reflective of a wider problem with her interpersonal skills.

Summary/Claimant's case/Conclusions

30. I make no findings of fact, but it is helpful to set out a brief summary of the Claimant's case and what the Respondents say about it.

31. I reiterate that I have heard no oral evidence and I do not seek to make findings of fact, but to set out my expeditious summary assessment, doing the best I can with the untested evidence advanced by each party.

32. The Claimant alleges that he has made 7 protected disclosures. The alleged disclosures took place between 21 December 2022 and 11 February 2024.

33. Ms. Slater, on behalf of the Claimant, confirmed the alleged protected disclosures relied upon. I have sought to summarise the alleged disclosures in date order and outline form below, in terms of the date, form and who they were made to. It is understood the part of section 43B seemingly relied upon is that the health or safety of any individual has been, is being or is likely to be endangered, and is noted that the Claimant says he made disclosures in his capacity as a health and safety representative.

    21 December 2022 – The Claimant says this was an email to Alan Porter, but it has not been provided to the Tribunal.

    8 March 2023 – email to Alan Porter and Bogdan Ciochina

1 June 2023 – email to Alan Porter

2 August 2023 – email to Alan Porter and Bogdan Ciochina

11 August 2023 – email to Alan Porter, Bogdan Ciochina and Darrell Courtman

28 January 2024 - The Claimant says this was an email to Alan Porter, but it has not been provided to the Tribunal.

11 February 2024 - email to Abdi Abdullah, Alan Porter and Paul Mitchell.

34. Based on the pleadings and documents, it seems that the Claimant obtained a fit note stating that he was not fit for work on 19 April 2024. The fit note expired on 15 May 2024. The Claimant sent this on 19 April 2024 to Bogdan Ciochina and Frederick Wade. It appears to be accepted that Frederick Wade was on paternity leave at the time.

35. On 23 April 2024 the Respondent sent the Claimant a letter which stated:

"I write regarding your ongoing absence from work, which commenced on Saturday 20th April 2024. You have not informed us of your intentions. We have tried contacting you several times by phone and have not been successful. As such your absence is currently deemed as unauthorised.

Please contact the absence line on 07896938267 by no later than 17:00pm on Monday, 29th April 2024. Should we not receive any contact, we will have no alternative but to conclude that you have resigned your position and will process your termination of employment by means of resignation."

36. In a letter dated 1 May 2024 the Respondent notifies the Claimant that he has been dismissed. The letter states:

"I write regarding your failure to contact Thameside Distribution centre, in relation to absence "AWOL" by Monday, 29th April 2024 by 17:00pm, as mentioned in the letter which is included, as a result of no contact from yourself and emergency contact number, we have taken your no contact as a sign you have resigned your position and have been processed as a leaver with termination of employment from Monday 29th April 2024."

37. The Claimant says that his dismissal was because he made one or more protected disclosure. The Respondent says the Claimant's employment was terminated because he was considered to have been absent from work without authorisation, and that the dismissing officer, Mr. Brodie, was not aware that the Claimant had submitted a fit note.

38. The Claimant suggests the reason given by the Respondent was not genuine and was used as an excuse to dismiss him as they considered him a thorn in the Respondent's side.

39. The issue for me to determine was whether the Claimant's automatic unfair dismissal claim was likely to succeed at the substantive hearing. I considered both parties submissions in full in reaching my conclusions, and the specific documents to which I was referred.

40. I deal first with determining whether it is likely that the Claimant will show that he made protected disclosures as defined by s.43 ERA and then go on to consider whether it is likely that he will show that he was dismissed for making those protected disclosures.

41. A copy of five out of the seven alleged disclosures have been provided, two have not.

42. It is not clear whether all of the alleged protected disclosures contain a conveyance of information, indeed particularly in relation to the written disclosures that have not been provided, evidence on this will be required. Indeed, in regard to the alleged disclosures on 1 June 2023, 2 August 2023 and 11 August 2023, it appears that the Claimant is primarily making suggestions, rather than conveying information regarding wrongdoing.

43. At this stage, it is unclear whether any or all of the disclosures were made in the public interest, but I note the disclosures generally relate to health and safety related matters. Further, it is not clear whether or not the Claimant had the reasonable belief that all or any of the alleged disclosures tended to show one or more of the matters set out in subparagraphs a-f of 43B, although the ET1 references breaches of health and safety in a generic way.

44. It seems that the alleged disclosure on 8 May 2023, may meet the threshold, but in relation to all of the alleged disclosures this is a matter to be properly tested with evidence at the final hearing.

45. My expeditious summary assessment is that I cannot reasonably conclude that it is "likely" that any or all of the alleged disclosures will meet the test. They may meet the test, or they may not, which is not sufficient to be grant interim relief.

46. Further, there is a dispute about whether or not the reason, or principal reason, for dismissal was because the Claimant made protected disclosures. The letter of termination says that the reason for the Claimant's termination was him being treated as having resigned due to lack of contact from the Claimant.

"I write regarding your failure to contact Thameside Distribution centre, in relations to absence "AWOL" by Monday, 29th April 2024 by 17:00pm, as mentioned in the letter which is included, as a result of no contact from yourself and emergency contact number, we have taken your no contact as a sign you have resigned your position and have been processed as a leaver with termination of employment from Monday 29th April 2024."

47. There is a dispute of fact on whether or not Mr. Brodie, as the dismissing officer, was aware that the Claimant had submitted a fit note on 19 April 2024 to Bogdan Ciochina and Frederick Wade and/or whether there were other motives. This is a matter that will need to be determined upon hearing the evidence at a full hearing.

48. Further, in relation to the evidence provided regarding the alleged written disclosures, these do not appear to have been sent to Mr. Brodie. It is submitted that Mr. Brodie has no knowledge of the alleged protected disclosures, and therefore they cannot have been the reason or principal reason for dismissal. Again, findings of fact will need to be made at a final hearing after proper consideration of all the evidence.

49. It is noted that most of the alleged protected disclosures took place in2022 and 2023, some significant time before the termination of employment. Further, in relation to the more recent alleged disclosures on 28 January 2024 and 11 February 2024, at present, it is difficult to see any causative link between these and the termination, which appears to have been prompted by the Claimant's sickness absence and Mr. Brodie's response to the absence.

50. Undertaking an expeditious summary assessment based on the untested evidence available to me, I conclude that the Claimant might show that it was the disclosures that caused his dismissal or, equally, the Respondent might show that it was the Claimant's absence and Mr. Brodie's belief that his absence was unauthorised that led to termination of employment. Either reason might be correct. Not having heard any evidence, it cannot be said, at this stage of the proceedings, that it is near to certain or that the Claimant has a pretty good chance of success on this element of his claim. There is a reasonable (but as yet untested) explanation by the Respondents.

51. The application for interim relief is therefore refused.

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Employment Judge G Cawthray

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Date 25 June 2024

JUDGMENT & REASONS SENT TO THE PARTIES

ON

1st July 2024

FOR THE TRIBUNAL OFFICE

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