EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MR J OYUKE	**AND**	**HAZLEWOODS LLP (R1)** **HAZLEWOODS MANAGEMENT SERVICES LLP (R2)** **MR JOHN LUCAS (R3)** **MS KATY MCMINN (R4)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 14TH JUNE 2024
(VIA VHS VIDEO)

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MR M ISLAM- CHOUDHURY (COUNSEL)**

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's application for interim relief pursuant s128 Employment Rights Act 1996 is dismissed.

Reasons

1. By a claim form submitted on 20th May 2024, arising from the claimant's dismissal on 14th May 2024 (the effective date of termination being the15th May 2024), the claimant brings a number of claims including a claim for automatic unfair dismissal (S103A ERA 1996) asserting that the reason (or principal reason) for his dismissal was that he had made public interest disclosures within the meaning of s43B ERA 1996.

2. The application before me today is for an order for interim relief in the making of a continuation of a contract of employment order (s129 ERA 1996). The respondent resists the application on the basis that it is not "likely" (within the meaning of s129) that the tribunal which determines the complaint will make a finding that the claimant was automatically unfairly dismissed pursuant to s103A ERA 1996.

3. Hearing - I have read the bundles of documents for the hearing, the witness statements of the claimant and Ms McMinn for the respondent, and the written submissions of both parties.

4. Whilst I have taken the contents of the witness statements into account for the purposes of reaching my conclusions I have not heard any oral evidence, and am making no findings as to the contents of the statements, the accuracy or reliability those contents, or the credibility or reliability of the witnesses themselves. Rule 95 (ET Rules 2013) provides that the tribunal shall not hear oral evidence unless it directs otherwise, and the directions for the hearing provided that no evidence would be heard. This reflects the fact that the tribunal is not at the preliminary stage making findings of fact, but making a summary determination of the likelihood of success on the basis of the information before it. The tribunal's task is to make a summary assessment of the written material before it and determine whether it is "likely" (see below) that the claimant will succeed in his claim for automatic unfair dismissal, and if so whether it is appropriate to grant interim relief in the form of a continuation of contract order. Accordingly the "facts" as set out below are not findings of fact but a recitation of the events as described by the parties in the pleadings, documents and witness statements which I have taken into account in coming to my conclusions . I have not heard any evidence and am not making or purporting to make any finding of fact binding on any future tribunal.

5. Respondents / Employment History – Neither R3/R4 are relevant to this application as neither were the claimant's employer. The position of R1/R2 is that R1 is an accountancy firm, and R2 is a management company which employs the staff who work for R1. The claimant was employed as a Business Analyst in the Corporate Finance Team from 24th February 2020 until 15th May 2024 when he was dismissed purportedly by reason of redundancy. The respondents assert that the claimant's former employer was R2, and that if any order for interim relief is made it should be against R2, and not any of the other respondents.

6. Public Interest Disclosures - In his ET1 The claimant alleges that he has made nine public interest disclosures; and in his submissions eight, which appear no longer to include the redundancy appeal. However, it has been clarified that he still relies on all nine (set out below in chronological order):

   i) 8/2/23 (confirmed in writing on 14/3/23) - The claimant lodged a formal grievance;

   ii) 24/3/23 – The claimant made a Subject Access Request;

   iii) 30/5/23 – The claimant lodged his first ET claim (1403647/23) against R1/R2;

   iv) 22/6/23 – The claimant complained to the ICO);

   v) 11/9/23 – The claimant complained to ICAEW;

   vi) 19/9/23 – The claimant complained to EHRC;

   vii) 21/9/23 – The claimant lodged a second grievance;

   viii) 10/11/23 – Redundancy Appeal;

   ix) 24/12/23 – The claimant complained to the Secretary of State for Justice / Lord Chancellor Alex Chalk M.P.

7. The claimant contends that these contained information tending to show breaches of legal obligations, miscarriages of justice, health and safety dangers, and the deliberate concealment of information relating to them. They necessarily, therefore fall within a number of categories of qualifying disclosure within s43B ERA 1996 (see further discussion below).

8. Redundancy – The claimant was purportedly dismissed by reason of redundancy. The respondents contend that the issue of the claimant's job role was first raised with him in February 2023; and that on 29th August 2023 the respondent produced a business case for the potential redundancy of the Business Analyst role. On 4th September 2023 the formal redundancy process commenced. This was paused as the claimant raised a second grievance about the redundancy process itself. This was investigated and not upheld, with the outcome provided on 11th November 2023. The claimant was off sick from October 2023 and the redundancy process re-commenced in March 2024. Ms McMinn (R4), an external HR Consultant was appointed to determine it. She concluded on 14th May 2024 that the claimant be dismissed by reason of redundancy.

Law

9. The law is correctly set out in the respondent's skeleton argument and is not in dispute.

10. "Likely" - The tribunal can only make one of the orders set out in section 129 if it holds that it is "likely" that the tribunal which determines the complaint will find (in this case) that the reason or principal reason fell within s103A. "Likely" in the context of s129 means that there is "a good chance" that the tribunal will find in the claimant's favour; and a good chance means something more than the balance of probabilities, indeed a significantly higher likelihood (*Ministry of Justice v Sarfraz [2011] IRLR 562 per Underhill P*). That test applies to all aspects of the claimant's claim that may be in issue.

11. The respondent submits that there are two fundamental aspects of the claim which are in dispute, and that on the information before the tribunal there is not a good chance that the final tribunal will find in the claimant's favour in respect of either of them. They are:

i) Protected Disclosures – The respondent submits that on an assessment of the existing documentary evidence the claimant is unlikely to establish that he has made any protected disclosure.

ii) Reason or principal reason for dismissal-The respondent submits that the reason for the termination of the claimant's engagement is clearly set out in writing; is supported by documentary evidence; and that there is nothing, at least at present, to indicate that the reason given was not the true reason.

Protected Disclosures

12. In response to the direction from the tribunal the claimant has set out the protected disclosures relied on. It can be briefly summarised as set out below.

13. He submits that on14th February 2024 he submitted a grievance alleging race and disability discrimination, harassment and victimisation.

14. His Subject Access Request alleged breaches of the Data Protection Act 2018 and the GDPR; and his complaint to the ICO he alleged noncompliance with his own SAR and the misuse of client data

15. In his ET1 for his first claim he alleged direct race and disability discrimination, harassment and victimisation.

16. His complaint to the ICAEW in September 2023 included allegations of regulatory breaches.

17. The second grievance made assertions that the redundancy process was a sham..

18. The disclosure to EHRC alleged breaches of the Equality Act.

19. The complaint to the MOJ via the Lord Chancellor complained of unlawful business practices and victimisation of the claimant.

20. These are disclosures made to his employer and external bodies including prescribed persons within the ERA 1996. They disclose information tending to show breaches of legal obligations owed under the Equality Act 2010,the Data Protection Act 2018 and GDPR; and miscarriages of justice , the endangerment of health and safety; and the deliberate concealment of information.

21. He contends that he had a reasonable belief that the information tended to show those breaches, and that they were made in the public interest. The basis of the latter is essentially that there is a public interest in ensuring that anti-discrimination legislation is upheld, and in protecting whistleblowers; and that they revealed professional misconduct in an accountancy firm with implications for market confidence and the public reputation of the profession more widely.

22. Respondent's Position – The respondent submits that the claimant's disclosures are not "likely" to be held to be public interest disclosures. It asserts that a number do not in fact disclose any information, such as the SAR request and ICO and EHRC disclosures, in respect of which the claimant has only disclosed the responses and not the complaints themselves. The ET1 was lodged for personal gain and is not therefore a qualifying disclosure within a43(1)(g) ERA 1996.

23. In my judgment, it is not necessary for me to analyse those contentions in detail and distinguish, as there is a further contention which is common to all of the alleged disclosures, which is in my judgment fundamental to the respondent's submissions as to the issue of whether it is likely that the claimant will establish that the disclosures were protected disclosures. The respondent submits that it is at very least arguable, that they all relate to private disputes between the claimant and his colleagues and managers. In reality they do not affect any wider cohort of people whether within or outside the respondent companies and are entirely personal to him. The submission as set out in the skeleton argument is :

"Made in the Public Interest

20. This involves a two stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest, then (ii) if so, did he or she have reasonable grounds for so believing?

21. The leading authority on the issue of what amounts to a disclosure in the public interest is Chesterton Global Ltd & Anor v Nurmohamed & Anor (Rev 1) [2017] EWCA Civ 979 (10 July 2017) (bailii.org). In that case the Court of Appeal held (in a case where the disclosure affected commission payments for 100 employees) that the issue was not whether the disclosure was, *per se*, in the public interest but whether the worker had a reasonable belief that the disclosure was being made in the public interest. Further, it was not necessary to show that a disclosure was of interest to the public as a whole, as opposed to a section of it. In a case of mixed interests, it is for the tribunal to rule as a matter of fact as to whether there

was sufficient public interest to qualify under the legislation. As Underhill LJ held in paras 27 to 30:

> *"27. First … [t]he tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable.*
>
> *28. Second, and hardly moving much further from the obvious, element (b) in that exercise requires the tribunal to recognise, as in the case of any other reasonableness review, that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured. … All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking - that is indeed often difficult to avoid - but only that that view is not as such determinative.*
>
> *29. Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. ..: all that matters is that his (subjective) belief was (objectively) reasonable.*
>
> *30. Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation - the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."*
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> *31. Finally by way of preliminary, although this appeal gives rise to a particular question which I address below, I do not think there is much value in trying to provide any general gloss on the phrase "in the public interest". Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression. … The relevant context here is the legislative history*

> *explained at paras. 10-13 above. That clearly establishes that the essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest.* (my emphasis).

22. In essence, the matter is a question of fact for the Tribunal.

Conclusions

24. I bear in mind that in order to engage the question of whether the reason or principal reason for the dismissal was the fact of the claimant having made protected disclosure(s) he need only succeed in respect of one of them. Equally I am satisfied that it is "likely" (as defined above) that at least one of the disclosures, and in all likelihood the first grievance, which is the first relied on, did disclose information which in his reasonable belief tended to show a breach of legal obligations owed to him under the Equality Act 2010. Therefore, leaving aside the issue of the public interest element, it appears to me "likely" that the claimant will satisfy the other elements of the statutory test in respect of at least one, and possibly many more, of the disclosures.

25. However, in my judgment the respondent is correct that there is a genuine issue as to whether the claimant a) genuinely believed that the disclosures were in the public interest, and b) if so whether that belief was reasonable.

26. In my judgment the respondent is correct in its assertion that in essence all of the complaints relate to allegations relating to the treatment of the claimant by one or more of the respondents. There are no other individuals involved, or even potentially involved, and it follows in my view that the issue of whether the claimant had a genuine and reasonable belief that any disclosures were made in the public interest is a live one. It is not my task to determine whether he will succeed or fail on those contentions on the balance of probabilities, but whether on the basis of the information before me the higher standard applicable to interim relief applications has been reached. Whilst it is obviously possible that the claimant will succeed in this argument, I am not satisfied that at this stage it is possible to hold that it is "likely" (as defined above).

Redundancy

27. The second issue is the factual question of whether any disclosure was the reason or principal reason for his dismissal. I will assume for the purposes of this part of the application that the claimant will in fact succeed in demonstrating that he had made one or more protected disclosures.

28. There are obviously a number of factual conclusions that the final tribunal could reach. Firstly it could hold that any disclosure(s) were the reason for dismissal, as

asserted by the claimant. Secondly it could hold that the disclosures played no part and that the decision was solely determined by considerations relating to redundancy, as asserted by the respondent. Thirdly it could conclude that there were mixed motives including both considerations of redundancy and the disclosures, in which case it would have to determine the principal reason.

29. The respondent submits broadly and fundamentally that this case revolves around numerous issues of fact which can only be resolved at the final tribunal, and it is simply not possible at this early and provisional stage to form any view as to which party's evidence is more or less likely to be believed or accepted. This is in and of itself sufficient to dispose of the application.

30. In particular the respondent points to the fact that the claimant's case relies on a Jhutti v Royal Mail style analysis and factual matrix. The claimant does not appear to dispute that Ms McMinn made the final decision to dismiss him, indeed he relies on it as a procedural error in the dismissal. His case is that his dismissal was orchestrated by Mr Lucas. The meeting of 6th February was not a meeting, as the respondent asserts, to discuss the possibility of the removal his role as it was no longer viable, but a meeting to demote him. He then submitted his grievances and first ET1. The document of 29th August 2023 which purportedly contains the rationale for the redundancy of his role, was in fact retribution for his having made the disclosures; and Ms McMinn was subsequently brought in to provide a veneer of independence and objectivity to a decision that had been pre-determined many months earlier. She was either a party to this, or an unwitting dupe of the respondent. Mr Islam-Choudhury accepts that at a final hearing it is possible that the tribunal will make such findings, but submits that it is impossible to conclude for today's purposes that it is likely that it will do so, as it involves so many separate findings of fact and inferences being drawn from those findings.

31. Both parties have made specific submissions as to the evidence which are as set out in summary below.

32. The claimant submits that it is apparent that there is a direct causal link between the disclosures and the decision to dismiss him:

i) Firstly there is the coincidence of timing; in that whatever the status of the discussion on 6th February 2023 the formal redundancy process did not begin until after he made a number of the earlier disclosures;

ii) Secondly the dismissal occurred only two weeks before a preliminary hearing in the first tribunal claim and was therefore clearly linked to it and designed to derail the proceedings;

iii) The respondent decided to continue with the redundancy process despite requests to pause it for medical reasons, and when he was unfit to participate, which suggests that it was predetermined and that the respondent was not interested in any genuine consultation;

iv) The redundancy was obviously a sham/contrivance. In support of this he contends that as is accepted by the respondent in the first tribunal proceedings, that he was no longer at the point of his dismissal Business Analyst, but a Corporate Finance Executive. Even if the position of Business Analyst was genuinely redundant , which he does not accept, it could not have resulted in his dismissal as he was no longer employed in the role;

v) As is set out above, every stage of the process was "choreographed by Mr Lucas" and was part of a pattern of retaliatory conduct for his having made the disclosures.

33. He therefore contends that the evidence is overwhelming that he was not and could not genuinely have been dismissed for redundancy, and that the obvious, natural and true inference is that he was dismissed because he had made the protected disclosures.

34. The respondents do not accept this. They point to the following facts:

i) In a meeting on 6th February between the claimant and James Morter, which on any analysis is prior to any of the disclosures relied on in these proceedings (for completeness sake in his oral submissions the claimant referred to allegations of race discrimination that he made to Mr Morter in May 2022 but they do not form part, at least present, of these proceedings),there was discussion of whether exploring opportunities in new sectors may now be a fruitless strategy because "..we just cannot service such opportunities, and this may impact your role", resulting in the claimant being told his role may no longer be viable in the meeting.

ii) Thus the question of the claimant's role going forward was already in issue and had been raised with him prior to any disclosure. It follows that from the 6th February 2023 the claimant was aware that his job was at risk, albeit that no final decision had been made.

iii) On 4th September 2023 the claimant was notified that his role was at risk and an explanation was set out in the letter which mirrored that set out in the earlier meeting.

iv) The claimant asked a number of detailed questions all of which were answered fully.

v) When the claimant lodged a grievance in respect of the redundancy process the respondent appointed an independent external HR investigator at the claimant's request to determine it, and paused the redundancy selection process until it was concluded;

vi) The reasons for rejecting the grievance are detailed and comprehensive;

vii) The redundancy process when resumed was also dealt with by Ms McMinn an external HR consultant;

viii) The reasons she gave for concluding that the role was redundant are entirely clear and she has given a witness statement attesting to the truth of her evidence.

35. The respondent accepts that that evidence may be rejected, as the claimant contends it should be, but it is equally possible that it will be accepted. For today's purposes the respondent submits that there is an entirely consistent pattern of reasoning relating to the fact of the claimant's role going forward no longer being required, from a point before his first disclosure until his dismissal. Whilst the claimant asserts that these documents should not be taken at face value, and will at the final hearing submit that they should not be accepted, for today's purposes they provide a consistent and contemporaneous body of documentary evidence supporting the respondent's position. There is nothing before the tribunal today which could lead it to hold that it is likely that the evidence will be rejected.

36. In essence the respondent submits that this is an entirely standard tribunal claim which will turn on the findings and conclusions of the tribunal that hears the claims; and that it is not possible at this stage, given the fundamental disputes of fact, to make any finding as to the likelihood of success of either party, and certainly not that it is "likely" that the claimant will succeed in the claim for automatic unfair dismissal.

37. In my judgment this is correct and it follows that for both reasons this is not a case in which it is appropriate to make an order for interim relief.

Directions

38. Claim No: 1403647/23 – The claimant has another claim which has been the subject of a recent preliminary hearing, and which is listed for a further case management hearing on 30th July 2024.

39. By that point the ET3 will have been received in respect of this claim and it has been agreed that this claim will also be considered at that TCMPH.

EMPLOYMENT JUDGE

Dated: 14th June 2024

Original Judgment sent to the parties on 11 July 2024

Amended Judgment sent to the parties on 19 July 2024