EMPLOYMENT TRIBUNALS

Claimant: Mr M Sheikh

Respondent: Arrivia Europe Ltd

RECORD OF A PRELIMINARY HEARING

Heard at: Watford Employment Tribunal (via CVP) **On: 24 April 2025**

Before: Employment Judge Tuck KC

Appearances
For the claimant: Mr Nadem, counsel
For the respondent: Ms R Senior, counsel

JUDGMENT

The application for deposit orders fails and is dismissed.

Reasons

1. By an ET1 presented on 2 August 2024 following a period of early conciliation between 4 June and 16 July 2024, the claimant presents complaints of unfair dismissal (it is not disputed he had 7 years of service), for detriments for making a protected disclosure and for automatically unfair dismissal for making a protected disclosure.

2. The protected disclosure relied upon by the claimant is this: in a telephone conversation on 27 February 2024 with Travis Markel, the Respondent's Chief Experience Officer, the claimant said that his manager, had, when she was a sales supervisor, made "spiff payments" to agents. That she had overpaid expenses to agents, then received a proportion of those sums back. As set out in the ET3 at paragraphs 33 and 34, it is admitted that this was said during the phone call.

3. The detriment which the claimant relies upon is the disciplinary process which he now understands was started on 1 March 2024, and went on until his dismissal on 9 April 2024. The Claimant says making this disclosure was for the principal reason for his dismissal.

Application

4. The Respondent had indicated in its ET3 an intention to apply for a strike out or alternative for deposit orders in relation to the protected disclosure claims. Ms Senior today pursued only an application for deposits.

5. Rule 40 of ET Rules 2024 allows an ET to make a deposit order if there is "little reasonable prospect of success". Applications are made in relation to two aspects of the case, one on the detriment claim, and one on the automatic unfair dismissal claim. Ms Senior submitted that the claimant has little reasonable prospect of establishing that he made a protected disclosure, or that this was causative of the initiation of the disciplinary procedure or dismissal.

Causation:

6. In November 2023 issues were raised at an exit interview by a member of staff, about the Claimant. In an email dated 1 March 2024 it is noted that the claimant received a verbal warning after that exit interview. That email of 1 March also states that Purvesh Otamchand had told the writer, Mr English, he had been given information by the Claimant. It goes on to state "I confronted Mo during his annual review, and he was surprised /shocked as to how I knew he had been speaking to Purvesh about company matters. He admitted that he had been, and I told him the severity of giving company information to a former competitor". Ms Senior was unaware of the date of that annual review.

7. In his investigation meeting on 22 March 2024 the Claimant admitted to telephoning Mr Otamchand in order to allow him to listen in to a "floor meeting", and when asked about "conduct unbecoming of a leader" told the investigator his response is recorded as admitting that he had put things in writing "to vent". Ms Senior also drew my attention to the allegation that the claimant asked an agent for his password - though his recorded response states he did not use that password having realised he ought not to have asked for it. She also highlighted that in response to an allegation of unprofessional or rude behaviour the claimant is noted to have sought to justify the language used as a result of being passionate about the business. Ms Senior did not know what the language in question was or when it was said to have taken place, while she referred to the matters set out in the exit interview of November 2023, she had stated that he had already received a verbal warning for those matters. Finally, Ms Senior took me to the disciplinary note which recorded the claimant as being "remorseful" and saying he apologised and accepted the consequences.

8. Ms Senior's submissions as to causation were that the claimant has:

    a. Little reasonable prospect of establishing that the principal reason for dismissal was primarily because of any protected disclosure

    b. Little reasonable prospect of showing the protected disclosure was a material influence on the decision to start disciplinary.

Protected Disclosure

9. The alleged disclosure is that on 27 February 2024 the Claimant told Travis Markel, the Chief Experience Officer, that his manager, had been "spiffing agents" – overpaying them expenses and receiving a portion of that in return,

when she had been a sales supervisor. Ms Senior said this was third hand information – it was the passing on of unsubstantiated allegations on the basis of gossip.

10. Her submission is that there is little reasonable prospect of the claimant showing that in his reasonable belief this is a disclosure in the public interest. The test is ***Chesterton Global Ltd v Nurmohamed*** [2018] ICR 731. She said this was a private dispute and also cited ***Morgan v Royal Mencap Society*** [2016] IRLR 428.

11. Ms Senior also submitted that there was little prospect of establishing this was a disclosure of information as opposed to an allegation.

Response to the application

12. Mr Nadem for the Claimant noted that until yesterday the Respondent wanted to make a strike out application, and it was correct to abandon that as this was a credible whistleblowing claim.

13. On 27 February 2024 there as a call lasting for 58 minutes. The matters raised are admitted to include the matters in the ET3 at paragraph 34, which include "spiff payments" to enable monetary gains to the claimant's manager. Mr Nadem accepted that detailed particulars as to when or to whom these were made, were not given.

14. Mr Nadem pointed to the claimant being noted as a high performer in his annual review which had taken place on February 6th 2024; by which date the Respondent knew that the claimant had been speaking to Purvesh. The Respondent has not been specific as to what information it is alleged was disclosed to Purvesh which led to his dismissal.

15. As to conduct relied upon, the Respondent relies on shouting across a room which is alleged to be unprofessional is not such as to justify dismissal. As for "inappropriate use of banter", this was the subject of an apology but did not justify dismissal, but should have been a sanction short of dismissal. The apology was generic as the "banter" was not specifically set out. The reliance on the claimant's use of whatsapp was of note as it was an average of just 12 minutes per day. As for the claimant's request for a password, this was in the context of sharing training material. This was an employee with 7 years service.

16. Mr Nadem submitted that the exchange relied upon as a protected disclosure took place on 27 February 2024. The Respondent had been aware before this date of the claimant's contact with Purvesh but it was not until after this, that on 1 March 2024 there was an instruction to investigate him. In dealing with this as part of his grievance, the respondent relied on a previously completed 'revenue integrity audit'. He says there was no real investigation, rather it was swept aside.

17. Both parties asked that a decision be taken in principle as to whether a deposit should be made first, before going on to consider means if an order was to be made.

Law

18. I shared the cases in this section with the parties and invited further submissions from them as to the applicable principles.

19. Rule 40 of the 2024 Rules of Procedure provides that a claim or part of it may be the subject of a deposit if it has little reasonable prospect of success. Simler J in ***Hemdan v Ishmail*** [2017] IRLR 228 said that "the purpose of such an order is to identify at an early stage claims with little prospect of success and to discourage the pursuit of those claims by requiring a sum to be paid and by creating a risk of costs ultimately if the claim fails".

20. It is a lower bar than the test for strike out, and I can evaluate matters upon which the respondent bears the burden of proof if appropriate. I should have regard not only to purely legal issues, but also the likelihood of being able to establish the facts essential to the case. As Elias J stated in ***Van Rensburg v Royal Borough of Kingston -upon- Thames*** [2007] All ER (D) 187, I must have "a proper basis for doubting the likelihood of the party being able to establish the facts essential to the claim" in considering a deposit application.

21. The ***Amber v West Yorkshire Fire and Rescue Service*** [2025] ICR 228 confirmed that the guidance in ***Cox v Adecco***, [2021] ICR 130 applies as much to a consideration of making a deposit order as it does where consideration is given to striking out a clam. The EAT in Cox gave the following guidance as to strike out applications:

> "(1) No-one gains by truly hopeless cases being pursued to a hearing;
>
> (2) Strike out is not prohibited in discrimination or whistleblowing cases; but especial care must be taken in such cases as it is very rarely appropriate;
>
> (3) If the question of whether a claim has reasonable prospect of success turns on factual issues that are disputed, it is highly unlikely that strike out will be appropriate;
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> (4) The Claimant's case must ordinarily be taken at its highest;
>
> (5) It is necessary to consider, in reasonable detail, what the claims and issues are. Put bluntly, you can't decide whether a claim has reasonable prospects of success if you don't know what it is;
>
> (6) This does not necessarily require the agreement of a formal list of issues, although that may assist greatly, but does require a fair assessment of the claims and issues on the basis of the pleadings and any other documents in which the claimant seeks to set out the claim;
>
> (7) In the case of a litigant in person, the claim should not be ascertained only by requiring the claimant to explain it while under the stresses of a hearing; reasonable care must be taken to read the pleadings (including additional information) and any key documents in which the claimant sets out the case. When pushed by a judge to explain the claim, a litigant in person may become like a rabbit in the headlights and fail to explain the case they have set out in writing;
>
> (8) Respondents, particularly if legally represented, in accordance with their duties to assist the tribunal to comply with the overriding objective and not to take procedural advantage of litigants in person, should assist the tribunal to identify the documents in which the claim is set out, even if it may not be explicitly pleaded in a manner that would be expected of a lawyer;

(9) If the claim would have reasonable prospects of success had it been properly pleaded, consideration should be given to the possibility of an amendment, subject to the usual test of balancing the justice of permitting or refusing the amendment, taking account of the relevant circumstances."

22. Ms Senior submitted that I need not take the claimant's case at its highest, however Beard J in ***Amber*** held that "a case advanced ought to be taken at its highest, which required the judge to test the factual account and examine the case against basic logic, internal consistency or any contradiction in the contemporaneous documentary evidence; that what was in issue was whether the application had a realistic, as opposed to merely fanciful, prospect of success, with "realistic" meaning "it could be the case" and not being a substantial hurdle to cross". Ms Senior referred in to paragraph 28 of **Amber** which I read.

23. As to the relevant provisions in the substantive claim, the Employment Rights Act 1996 includes:

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,

24. Whether "information" is disclosed as opposed to an allegation being made was the subject of guidance from the Court of Appeal in ***Kilraine v Wandsworth LBC*** [2018] ICR 1850. This makes clear there is no rigid dichotomy between an "allegation" and "information"; the question is one of fact as to whether the communication contains enough factual content and specificity.

25. As to the requirement of a disclosure being, in the reasonable belief of the worker, "in the public interest" the Court of Appeal in ***Chesterton Global Ltd v Nurmohamed*** [2018] ICR 731 held that a tribunal must ask whether at the time of making the disclosure, the worker believed that it was in the public interest and whether, if so, that belief was reasonable. This does not have to be the motivation of the person making the disclosure, and it is a matter for the tribunal to apply the statute as a matter of education impression.

47B.— Protected disclosures.
(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

…

26. The parties agreed that the causation test for this is whether the protected disclosure materially influenced the detriment.

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.

27. The causation test is more onerous to show an automatically unfair dismissal where the protected disclosure must be the sole or principal reason.

Conclusions.

28. There are three legal and factual matters put into issue by this application:
    a. Whether there claimant has little reasonable prosect of establishing a "protected disclosure"
        i. Disclosure of information?
        ii. In the public interest?
    b. Causation.

Information

29. As to whether the claimant disclosed "information", the essential element of the exchange on 27 February 2024 appears not to be in dispute. The ET3 notes what the claimant said about the application of "spiffing" – and it is not disputed that this would amount to a criminal offence of fraud and/or theft.

30. Ms Senior says it was simply the passing on of gossip which the claimant had known about for some time. This appears to me, to go to the motivation of the claimant in sharing this information at this time, which does not determine whether or not the communication amounts to the provision of "information".

31. Mr Nadem accepted that the claimant had not given particulars as to when the "spiffing" was said to have happened (save that it was historic when the manager had been a sales supervisor), how much was involved or who the agents in question were.

32. It is clear that there is no clear dichotomy between what is an allegation and what is the provision of "information". (Kilraine). The analysis of the nature and quality of 'information', in my opinion, is best determined by a tribunal when it has heard evidence from both parties to the conversation. I do not consider that the claimant's pleaded case can be said to have "little prospect of success". As I explained orally, this is not to say he is likely to succeed on the matter – but that its determination is properly for a tribunal.

Public Interest

33. As to whether the disclosure was, in the claimant's reasonable belief, in the "public interest", this has generally been considered to be a fairly low bar for a claimant. This is not a case in which the information is said to give rise to the breach of a duty towards him personally – he alleges a criminal offence in effect.

34. In my view this again should be a matter left to the tribunal hearing all the evidence. It cannot be said that there is no realistic case on this point.

Causation

35. I bear in mind the two different causation tests for the two causes of action under consideration.

36. While the Respondent says that it has reasons for dismissal relating to the conduct of the Claimant, much of which was admitted, on first glance the chronology appears to be is on the side of the claimant. The Respondent highlighted the claimant's conduct towards colleagues and his breach of confidentiality, both of which are capable of amounting to gross misconduct depending on exactly what the conduct consists of. The Respondent knew in

November 2023 of complaints about the claimant's alleged conduct towards colleagues – which may relate to the "banter" element of the misconduct relied upon – and gave a verbal warning for that. It seems that the Respondent knew about the claimant passing information to someone who was no longer an employee when his appraisal had taken place, seemingly on 6 February 2024. It is not clear to me on the basis of the limited documents to which I was taken as to why a disciplinary investigation was commenced on or around 1 March – in very short order after the conversation of 27 February 2024. The claimant points to his long service (7 years) and contends that the matters for which he was investigated were not sufficiently serious to amount to gross misconduct.

37. I consider both the detriment and automatically unfair dismissal claims cannot be said to have little reasonable prospect of success. There is clearly a factual narrative which needs to be explored as to exactly what the conduct of the claimant, relied upon by the respondent, consisted of – more than the generic descriptions currently before me. This will be done as part of the claim for ordinary unfair dismissal, and will permit a full and proper analysis of the "PIDA" claims.

38. Accordingly the applications are dismissed.

APPROVED BY

Employment Judge TUCK KC

On 24 April 2025.

Sent to the parties
28 May 2025

For the Tribunal