THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Venkateswaralu	**v**	Syntel Europe Ltd

Heard at: London Central **On**: 8 June 2017

Before: Employment Judge Baty

Representation:

Claimant: Mr R Dennis (Counsel)
Respondent: Ms A Carse (Counsel)

JUDGMENT

1. **The Claimant's application for interim relief succeeds.**

2. **The Respondent having stated that it is unwilling to reinstate or re-engage the Claimant, an order for the continuation of the Claimant's contract of employment is made. The terms of that order were agreed between the judge and the representatives and were set out in the judgment sent to the parties on 9 June 2017.**

REASONS

The Application

1. By a claim form presented to the Employment Tribunal on 10 May 2017, the Claimant brought complaints of unfair dismissal, automatically unfair dismissal pursuant to Section 103A Employment Rights Act 1996 ("ERA") (protected disclosures), detriment pursuant to Section 47B ERA (protected disclosures) and for a failure to allow the Claimant to be accompanied.

2. The claim also contained an application for interim relief. Today's hearing was listed to consider that application.

Evidence and Submissions

3. Witness statements were provided to the Hearing from the following:-

   For the Claimant:

   The Claimant himself; and

   Mr Charles Henderson, formerly the Claimant's line manager at the Respondent.

   For the Respondent:

   Mr Daniel Moore, the Chief Administrative Officer, General Counsel and Secretary of the Respondent.

4. Although the Claimant and Mr Henderson (pursuant to a witness order) were present at the hearing, the representatives agreed that, whilst the statements were all signed and should be read by me, none of the witnesses would be called or cross examined.

5. An agreed bundle of documents was provided to the hearing. Furthermore, although the date for service of the response form was still roughly a week away, the Respondent had provided a draft response form.

6. Furthermore, each of the representatives provided skeleton arguments.

7. The representatives agreed that I should read in advance the draft response, the three witness statements, their skeleton arguments and certain documents that I was referred to in a list provided by Ms Carse. They agreed it was not necessary for me to read documents in the bundle referred to in the witness statements (given the bulk of reading that there was) and that, if it was necessary, they would take me to those documents in their submissions. I agreed to proceed on that basis.

8. The representatives also agreed that they would have roughly half an hour to add oral submissions to their skeleton arguments and the hearing similarly proceeded on that basis.

9. I read in advance all of the documents requested and then the representatives made their submissions.

10. It was agreed at the start of the hearing that, as the interim relief application was in relation to the Section 103A, the issue for me was to determine whether it was likely that that complaint alone would succeed (notwithstanding that there were other complaints brought in the claim).

Furthermore, Ms Carse stated that she was not focusing on whether or not the alleged protected disclosures in the claim were indeed protected disclosures, but focusing on the "reason why" aspect of Section 103A and whether or not it was likely that the Tribunal would find at a main hearing that the Claimant was dismissed or principally dismissed, because of making the alleged disclosures. She accepted therefore that, if I were to find that it was likely that, on determining the Section 103A complaint, the Tribunal would find that the reason or principal reason for dismissal was the making of those disclosures (regardless of whether or not they were protected disclosures) then for the purposes of this application the Claimant's application for interim relief would succeed.

11. After the representatives had made their oral submissions, I adjourned to consider my decision and, when the parties returned, gave that decision to them orally at the hearing. Ms Carse then requested written reasons for the decision.

The Law

12. There was no dispute between the parties about the legal principles which applied in relation to determining whether to make an order for interim relief.

13. Section 129 of the ERA provides that, where that section applies, the Tribunal shall, in the circumstances prescribed by that section, make an order for reinstatement, re-engagement or continuation of an employee's contract of employment. Section 129 (1) states that:-

> "(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 complaints 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 …"

14. Section 103A ERA states that:-

> "An employee who was 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."

15. When considering the "likelihood" of the Claimant succeeding at Tribunal, the correct test to be applied is whether he or she has a "pretty good chance of success" at the full hearing (Taplin v Shippam Ltd [1978] ICR 1068). In that case, the EAT expressly ruled out alternative tests such a "real possibility" or "reasonable prospect" of success or a 51% or better chance of success. According to the EAT, the burden of proof in an interim relief application was intended to be greater than that at the full hearing, where the Tribunal need

only to be satisfied on the "balance of probabilities" that the Claimant has made out his or her case (i.e. the 51% or better test). The Taplin test has been consistently applied by the tribunals.

16. I was also referred to the recent case of Parsons v Airplus International Ltd (unreported UKEAT/0023/16/JOJ, 4 March 2016), in which HHJ Shanks held that:-

> "7 … for many years it has been understood that in applying this provision the Tribunal must ask itself whether the Claimant has established that she has a "pretty good chance" of succeeding at the substantive hearing …
>
> 8 On hearing an application under section 128, the Employment Judge is required to make a summary assessment on the basis of the material then before her of whether the Claimant has a pretty good chance of succeeding on the relevant claim. The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself. In giving reasons for her decision, it is sufficient for the Judge to indicate the "essential gist of her reasoning"; this is because the Judge is not making a final judgment and her decision will inevitably be based to an extent on impression and therefore not susceptible to detailed reasoning; and because, as far as possible, it is better not to say anything which might pre-judge the final determination on the merits."

17. Ms Carse also drew my attention to paragraph 18 of Parsons:-

> "Ground 2 complains (in effect) that the Judge failed to decide the case on the material she had and was wrong to say that matters were not clear cut or needed to be weighed. As I have said above, in my summary of the law, it is not for the Judge to decide the case but to assess the chances of the Claimant succeeding. That is exactly what the Judge did; she cannot possibly be criticised for saying that matters were not sufficiently clear cut at that stage for her to have sufficient confidence in the eventual outcome to grant interim relief."

18. Sections 43A-C ERA define what constitutes a "protected disclosure". The relevant parts of those sections state:-

> **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,

…

(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.

19. As in this case each of the Claimant's alleged disclosures were made to his employer in accordance with Section 43C ERA, the only issue for the Tribunal in relation to whether the disclosures were protected disclosures will be to determine whether they fell within the definition of "qualifying disclosure" in Section 43B ERA.

20. In addition, in carrying out the summary assessment required, the burden of proof provisions in relation to Section 103A complaints which were set out in the case of Kuzel v Roche Products Ltd [2008] EWCA Civ 380 (CA) are relevant and I was directed in particular by the representatives to paragraph 30 of that judgment. There the Court of Appeal approved the approach to the burden of proof set out by the EAT as being as follows:-

"1. Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent, some other substantial reason, was not the true reason?

2. If so, has the employer proved his reason for dismissal?

3. If not, has the employer disproved the Section 103A reason advanced by the Claimant?

4. If not, dismissal is for the Section 103A reason."

The same paragraph goes on to note that:

"it is not at any stage for the employee (with qualifying service) to prove the Section 103A reason."

Summary Assessment

21. I turn therefore to my summary assessment, based on the material before me, of the likelihood of the Claimant succeeding at Tribunal in his Section 103A complaint. For the avoidance of doubt, I am not making any findings of fact but what is set out below are my observations based on the evidence before me for the purposes of this summary assessment.

22. The Claimant's case in relation to the Section 103A complaint is that he made various protected disclosures and, because he did so, was then subjected to a Performance Improvement Plan ("PIP") on 24 January 2017 and then subsequently dismissed on 3 May 2017. The Respondent's case is

that it put the Claimant on the PIP and dismissed him for performance reasons.

Protected Disclosures

23. As noted, Ms Carse conceded that this interim relief hearing was about the "reason why" element of Section 103A and not about whether or not the alleged protected disclosures were actually protected disclosures and, although she did not concede that the alleged disclosures were protected disclosures, she conceded that, if I were to find that it was likely that the Claimant was dismissed because of or principally because of the alleged protected disclosures, that was enough for me to make an order for interim relief.

24. In any case, I have been taken to numerous of the alleged protected disclosures. The first set of these to which I was taken were in the period from 5 September 2016 to 12 December 2016. These were mainly in email form and concerned serious allegations of sexual harassment, visa and tax offences, fraud and financial crime. On the face of the documents there appears to be a pretty good chance of them being found to be protected disclosures given that the contents of the disclosures (because they are in writing and not verbal disclosures) are not disputed; they appear to show the Claimant raising serious concerns which could be, amongst other things, criminal offences or breaches of legal obligations which are in the public interest; and they are made to his employer.

25. Secondly, there are further alleged protected disclosures between 24 January 2017 and the Claimant's dismissal on 3 May 2017. These cover allegations relating to sexual harassment, visa issues and fraud, and non compliance with HMRC. Again, most of them are in writing so it is not disputable as to what the content of the disclosure is (as may be the case with an alleged oral disclosure) and therefore easier to make a summary assessment of the likelihood of an Employment Tribunal finding that they were in fact protected disclosures. Having reviewed them and looked through them, on the face of them, I consider that the Claimant will have more than a pretty good chance of establishing that they are protected disclosures.

PIP

26. In terms of the PIP, on the back of which the dismissal purportedly followed, there are a number of factors relevant to whether the Claimant has a pretty good chance of establishing that he was put on a PIP because of the alleged protected disclosures:-

    1. Timing. Shortly after the last of the first tranche of protected disclosures, Mr Ben Andradi told the Claimant that he had decided to put him on a PIP. The Claimant had no previously disciplinary record in

a career with the Respondent dating back to 2006. The Respondent maintains that there were informal discussions between the Claimant and Mr Andradi before this but the Claimant, who produced a witness statement for this hearing, denies this and Mr Andradi, the man who (the Respondent accepts) decided to put the Claimant on the PIP and later to dismiss him, did not (strikingly) produce a witness statement for this hearing or attend. (The witness statement provided by Mr Moore, whom the Respondent does not suggest was the decision maker in relation to the PIP and the dismissal, was only secondary evidence in relation to Mr Andradi's motivations).

2. The evidence before me seems to indicate that the Claimant was in fact a good performer. Ms Carse says that whether the Claimant was a good performer or not is disputed, but the Respondent has not provided any evidence of this in terms of sales figures (the Claimant's job was in sales) or evidence from Mr Andradi. By contrast, the Claimant produced before me detailed sales figures which, if correct, would appear to indicate that he was a very high performer. Furthermore, Mr Moore appears to accept in his witness statement that the Claimant had strong sales figures but then argues in that statement that performance in relation to the Claimant in this sales role was about other things over and beyond merely the sales figures and that the sales figures produced by the Claimant do not demonstrate those other things. However, given the Claimant is a salesman, it would seem very unusual if sales figures were not an important element of his performance. Ms Carse also submitted that, where there was a dispute over the evidence, such as in the case of the issues about the Claimant's performance, I should not (because there is a dispute) take any of this evidence into account in my assessment. However, that is not in accordance with the guidance quoted in my summary of the law above; I am making a summary assessment and can take into account whatever relevant evidence is before me, without making any findings of fact.

3. Mr Henderson, who was the Claimant's line manager at all material times, conducted the Claimant's appraisal on the same day as the PIP (24 January 2017) and concluded in that appraisal that his performance was satisfactory. He also gave evidence out of his direct experience of at least one other individual at the Respondent whose performance was worse than the Claimant's and who was not put on a PIP and anecdotal evidence that there were others who were not such good performers as the Claimant and were not put on a PIP.

4. Crucially, Mr Henderson's evidence is that he did not think there was a problem with the Claimant's performance and that putting him on a PIP was unfair. It is highly unusual to have a situation where the Claimant's own line manager is giving evidence that the purported performance reasons given by the Respondent were not reflected in reality. This is

powerful evidence which goes to the likelihood of the Tribunal finding that performance was not the real reason for the PIP.

5. By contrast, Mr Andradi, who was the man who decided to put the Claimant on the PIP, did not give a statement to the Tribunal to say why he put the Claimant on a PIP.

27. For all these reasons, therefore, I consider that there is a pretty good chance that a Tribunal would conclude that the Claimant was not put on the PIP for performance reasons (which goes to the heart of the first part of the burden of proof test in Kuzel and the second part of that test).

Protected Disclosures

28. In relation to the third part of that test in Kuzel and whether the employer is likely to disprove the Section 103A reason advanced by the Claimant, I make the following observations:-

1. There is little evidence before me that, when the Claimant made his first tranche of alleged protected disclosures that the Respondent carried out any investigation into them.

2. The alleged protected disclosures raised serious matters against a lot of the Respondent's managers, which could potentially turn them against the Claimant such as to try and remove him from the business.

3. 13 objectives were set in the PIP and many of these were set over a very short period of time in the first quarter of 2017. If the Respondent was genuinely seeking to improve the Claimant's performance, as is the purpose of a PIP, this is a very short period of time for improvement (particularly in the context of someone with 13 years service); if the PIP were genuine, it is likely that the period would be longer.

4. It seems surprising that an employee with such long service should be given such a short timetable in respect of many of the objectives.

29. Therefore, in relation to the third element of the Kuzel burden of proof, I consider that there is a pretty good chance that the Tribunal will find that the Respondent has not disproved the Section 103A reasons advanced by the Claimant.

Dismissal

30. In relation to the Claimant's subsequent dismissal, the reasons set out above also apply here. In addition, I would observe the following:-

1. The Claimant achieved 10 of the 13 objectives set for him in the PIP before he was dismissed. It is very surprising that an employer would dismiss an employee with many years of service and no disciplinary record, only 3 months from the start of the PIP, in the circumstances of his having achieved the majority of the objectives.

2. The Claimant's evidence is that, of the three "unmet" objectives, some where unrealistic and one was actually achieved. This evidence is disputed by the Respondent. However, no evidence was given by Mr Andradi, the man who took the decision to dismiss the Claimant, arguably due to his performance, and the documents to which I was taken in the evidence before me where Mr Andradi addresses the Claimant's objections in relation to these three objectives (i.e. the dismissal letter of 3 May 2017) give reasons which are brief and unconvincing; this is in contrast to the Claimant's evidence in relation to these three objectives which, as before me, was more extensive and was far more plausible.

3. Mr Henderson's feedback to the Claimant was in fact that he was making progress in relation to the PIP.

4. The Claimant was invited at very short notice to the meeting at which he was dismissed.

5. It appears that Mr Henderson was not consulted about the decision to dismiss the Claimant; when Mr Andradi told Mr Henderson that the Claimant was dismissed, he did not even mention performance as a reason to Mr Henderson; and Mr Henderson's view, as set out at paragraph 39 of his witness statement is that:-

   "In my opinion, there was insufficient evidence on which to dismiss [the Claimant] and insufficient time allowed for him to "improve". The only conclusion that I can reach from the purported rationale for his dismissal, the lack of any time frame under the PIP and the manner in which this process had been carried out, was that the process was a contrivance."

6. Again, Mr Andradi gave no statement of evidence which is before me and yet he was the person who took the decision to dismiss the Claimant.

7. The Claimant was dismissed summarily being paid in lieu of notice. If this was a performance dismissal, it appears unnecessary for the Respondent to have done this rather than to have simply given him notice to terminate his employment or, at the least, the option to work his notice or take a PILON payment.

31. In the light of the above, and taking into account the burden of proof provisions in Kuzel, I consider that there is a pretty good chance of:-

1. The Claimant showing that there is a real issue as to whether the reason (performance) put forward by the Respondent was not the true reason for dismissal.

2. The Respondent not proving that performance was the reason for dismissal.

3. The Respondent not disproving the Section 103A reason advanced by the Claimant; and

4. The dismissal therefore being for the Section 103A reason and the complaint therefore succeeding.

32. Finally, I deal with a few other submissions made by Ms Carse:-

1. Ms Carse referred me to an 8 December 2016 email at page 151 of the bundle from Mr Andradi which refers briefly to two people whom he wants to put on a PIP and she cites this as evidence of him genuinely having performance concerns about the Claimant. However, this email is likely to be irrelevant. Firstly, it post dates many of the alleged protected disclosures so it does not preclude Mr Andradi taking the action in relation to the Claimant because of those protected disclosures. Secondly, it is quite possible that Mr Andradi genuinely considered the other individual to be a poor performer who genuinely needed to be put on a PIP but not the Claimant and simply dealt with the two in the same email.

2. The fact that Mr Henderson handed in his resignation to the Respondent (albeit he is still currently working at the Respondent) is irrelevant. It is still a highly unusual and significant feature of this case that the Claimant's own line manager, in the context of an alleged performance dismissal, is giving evidence that he did not think that there was anything wrong with the Claimant's performance and that the dismissal was contrived. Ms Carse has noted that Mr Henderson does not state in his witness statement that he thinks the real reason for dismissal was the Claimant's protected disclosures. However, particularly in the light of the burden of proof provisions in *Kuzel*, that is not necessary; the very fact that he casts such doubt on performance being the reason for dismissal is highly relevant to the first two stages of the burden of proof and, thereafter, it is for the Respondent to disprove the Claimant's Section 103A reason. In any case, it would not be surprising if Mr Henderson did not comment on the impact of the protected disclosures as he may or may not have been aware of them; that, however, does not detract from the relevance of his evidence in casting doubt on the performance reason for dismissal put forward by the Respondent.

3. Again, Ms Carse submitted that I should not be making any findings of fact. However, contrary to this submission, I have, firstly, not made any findings of fact and have simply made observations on the evidence before me. Secondly, even if some of the evidence is disputed, that does not stop me from making a summary assessment which I am required to do on the basis of the evidence before me; indeed that is what, in accordance with the guidance set out in my summary of the law, I am expected to do.

33. In summary, therefore, it follows that, as I consider that the Claimant has a "pretty good chance" of succeeding in his Section 103A complaint, I should make an order for interim relief.

Continuation of Contract Order

34. I then explained the Tribunal's powers in relation to the orders that can be made.

35. Ms Carse stated that the Respondent was unwilling to reinstate or reengage the Claimant. Therefore, in accordance with the statute, I was obliged to make an order for the continuation of the Claimant's contract.

36. We went through the various elements of the Claimant's remuneration and the terms of the continuation of contract order were then agreed between the representatives and me. That order is set out in the judgment (to which these reasons relate) sent to the parties on 9 June 2017.

Case Management

37. It was then agreed that there should be a two hour Preliminary Hearing for the purposes of case management, and this was fixed for 7 July 2017 at 2pm, and that I should make an order that the parties liaise and produce in advance of that hearing an agreed list of the legal and factual issues of the claim and an agreed proposed list of case management orders for use at that hearing.

Employment Judge Baty
17 July 2017