EMPLOYMENT TRIBUNALS

Claimant: Z

Respondent: Grow Software Limited

PRELIMINARY HEARING

Heard at: London Central **On:** 10 May 2019

Before: Employment Judge Wisby

Appearances
For the Claimant: In person
For the Respondent: Ms Darwin

JUDGMENT

The claimant's application for interim relief is refused

REASONS

Law

1. Section 128 Employment Rights Act 1996 ("ERA") provides that in certain circumstances a claimant may apply for interim relief.

2. Section 129(1) ERA states:

> 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—
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> (i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or
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> (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or
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> (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.

3. The test therefore under section 129(1) ERA that must be applied in this case in determining the application for interim relief is whether it is "likely", upon final determination, the claimant will be found to have been unfairly dismissed contrary to section 103A ERA.

4. In relation to the meaning of "likely", in Taplin v C Shippam Ltd [1978] IRLR 450 the EAT considered the right approach was that the tribunal should ask itself whether the applicant had established that he had a "pretty good chance" of succeeding in the final application to the tribunal.

5. In Ministry of Justice v Sarfraz [2011] IRLR 562 the EAT held that the term "likely" does not mean "more likely than not" (that is, at least 51% probability), but connotes a significantly higher degree of likelihood.

6. In Ministry of Justice v Sarfraz the EAT pointed out that section 129(1), read in conjunction with the definition of "qualifying disclosure" contained in section 43B of the ERA, means that it must be likely that a tribunal will find that:
    a. The claimant has made a disclosure to his employer.
    b. He believed that the disclosure tended to show one or more of the matters itemised at (a) to (f) under section 43B of the ERA.
    c. The belief was reasonable.
    d. If made before 25 June 2013, the disclosure was made in good faith. If made after 25 June 2013, the worker believed the disclosure to be in the public interest.
    e. The disclosure was the principal reason for the dismissal.

Material considered

7. The tribunal considered the claimant's ET1 and amended particulars of claim, written and oral submissions by both parties, both parties also provided a chronology and a bundle of documentation. The respondent had not submitted its grounds of defence so these were not considered. Oral evidence was not taken. A written statement from the claimant, and written statements for the respondent from Kit Binnie, Dermot Madden and Sivash Mahdavi were also considered.

8. Using the material referred to above the tribunal undertook a summary assessment as to whether the claimant would be "likely" to succeed at the final hearing, applying the standards as set out in the law section above. For the avoidance of doubt the tribunal has not made a summary determination of the claim.

Reasons for refusal

9. For the avoidance of doubt the tribunal has not made findings of fact that would bind any future employment tribunal. As is the usual process when considering an interim relief application the information provided to the tribunal has not been tested in the way that would happen at a full liability hearing. From the material considered it appears to the tribunal that:

10. The claimant was employed from 15 May 2015 to 4 April 2019 as a senior software engineer. The respondent's position is that the claimant was good at his job.

11. The respondent is a small employer (approximately 9 employees) operating within the 3D printing industry.

12. On 15 March 2017 (according to paragraph 9 of the claimant's statement) the respondent's CTO informally disciplined the claimant about his conduct. The claimant states however that details of his alleged poor conduct were not given to him.

13. On 27 March 2017, the claimant alleges he made a protected disclosure **("PD1**"), in that in the staff quarterly review the claimant wrote: "*Office space most the time is good, but open office layout often makes it difficult to focus, desks are not entirely ergonomic, and my personal location makes it a bit difficult for some people to pass throug*h". In answer to the written question: Do you have issues with the team which you'd like to discuss? The claimant wrote, "*Nothing Serious*". The next question was "If so, how can we improve those issues?" To which the claimant responded: "*Draft company HR policy to clarify employee conduct*". The claimant states in his witness statement that he later verbally discussed these matters in the quarterly review meeting, expressing concern about back and arm issues, not being able to use chairs comfortably in combination with the desks, and that there was no adjustment to have arms in a comfortable position below the table when typing. The claimant says the CTO thanked him for raising the issue but did not do anything about it and that he refused to draft an HR policy due to the size of the company.

14. The respondent's position is that there was a budget in place for each individual to identify and buy specific equipment for themselves, such as for example, noise cancelling headphones, equipment to create a standing desk etc.

15. On 20 October 2017 the claimant sent a female employee text messages that are alleged to be inappropriate. It does not appear to be suggested that these text messages were raised with senior management at that time.

16. On 6 August 2018, the claimant alleges he made a further protected disclosure ("**PD2**")**.** The claimant's position is that after being diagnosed with RSI in his wrist he explained to the CTO that he expected the company to perform an ergonomic assessment. The claimant's position is that although he was mainly concerned with his own health, he explained that the office as a whole had not had an ergonomic assessment. The respondent's position is that the claimant said the company should get an ergonomic assessment of everyone's desks and that a brief discussion took place; that the CTO agreed in principle and said that in the first place people should run through an online guide to ergonomic self-assessment and if anyone had a particular problem they should speak to the CTO.

17. The respondent's position is that shortly before 24 September 2019 concerns about the claimant's behaviour were brought to Mr Mahdavi's attention by a male employee, who had been concerned about what a female employee had

told him.

18. On 24 September 2018 it appears from printed text messages that Mr Mahdavi contacted the female employee in question to ask about the alleged inappropriate messages and behaviour. Copies of some allegedly inappropriate messages appear to have been provided by that employee to Mr Mahdavi on the same day. The printed text messages indicate the following messages were sent by the claimant, amongst others: "*I know. We promised to suck each others dicks if we go to a gay bar and he did not come…" "Of course no Homo, just for like friends*". To which the female employee replied: "*Are you okay? This is really inappropriate to say. Not cool*". The claimant submitted he had misunderstood the relationship and later apologised.

19. On 27 September 2018 the claimant alleges he made his third protected disclosure ("**PD3**") by email to the CTO. In that email the claimant states that he is happy that they are writing some documentation for the web team process but he sets out that he is not clearly expressing the concerns that he has, such as the documentation is done in a rush, they are training people who are not qualified, and they are performing training on live systems. The CTO responds on email the same day stating he understands and largely agrees with the claimant's points, that email goes on to give a wider explanation and sets the goal for the next week. The claimant's position, set out in his witness statement, is that there was also a wider verbal conversation in which he set out that when dealing with medical and aerospace applications, as the company's target customers are, certain statutory standards must be followed, as otherwise the company might risk legal liability and cause risk to public heath and safety.

20. The respondent states it took employee relations advice from the Head of HR at a sister company regarding the allegations of inappropriate behaviour, the company not having a suitable in house HR function to advise.

21. On 3 October 2018 the claimant appears to have been invited to a meeting the following day (4 October 2018), at which the claimant was suspended pending the outcome of the respondent's investigations into allegations that the claimant "demonstrated inappropriate and harassing behaviours towards a colleague in the workplace" The claimant was advised that if proven, the allegations may constitute gross misconduct.

22. Statements were taken from four different individuals setting out alleged inappropriate behaviour by the claimant, including touching that made an employee uncomfortable over time, inappropriate comments and actions; these statements were provided to the claimant. The earliest allegations appear to from 2015. The allegations the claimant faced arose from alleged behaviour towards more than one person.

23. The claimant was invited to attend a disciplinary hearing on 12 October 2018. That hearing was postponed for various reasons including requests for postponements by the claimant, the process dealing with the claimant's grievance and the claimant's ill-health.

24. On 17 October 2018 the claimant alleges he made a protected disclosure, via the formal grievance he lodged **("PD4**"). In that written grievance the claimant raises various issues about the disciplinary process that was being applied to him. He also states in the grievance he raised the issue of non ergonomic desks in the quarterly review sheets, that the company didn't make reasonable adjustments for him and that in his view the company is liable for his illness and disability. On 14 November 2018 the claimant in additional documentation provided by email in connection with the grievance stated Health and Safety DSE regulations were not respected and set out when an employer needed to carry out an assessment.

25. On 20 March 2019, the claimant alleges he made a protected disclosure via a grievance to the CEO regarding the lack of an ergonomic assessment, that he had developed RSI and that there had been a failure to make reasonable adjustments **("PD5")**.

26. The claimant was summarily dismissed on 4 April 2019 after the respondent decided that it had become necessary to proceed with the disciplinary hearing in the claimant's absence. The disciplinary proceedings appear to have become protracted and securing the claimant's attendance appears not to be possible at that time. The respondent instead relied upon the claimant's written responses to the allegations. The respondent upheld allegations of sexual harassment and that was the stated reason for dismissal.

27. The claimant submitted an ET1 on 10 April 2019. The claimant's complaint being that he was unfairly dismissed. The claimant sought interim relief under section 128 ERA 1996 on the basis that the reason or principal reason for his dismissal was that he made one or more protected disclosures.

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Discussion and conclusion

28. As set out above 'likely' means that the claimant has a pretty good chance of success not merely that he could possibly succeed in his claim, it requires a significantly higher degree of likelihood than 51%. The tribunal is required to carry out a summary assessment based on the material available doing its best with untested evidence.

29. Having carried out that assessment, the tribunal finds that it cannot be said at this stage that the claimant has a pretty good chance of success. Clearly there are several areas of dispute and evidence needs to be tested.

30. Only PD1 And PD2 are alleged to have occurred prior to the date on which it appears that sexual harassment concerns were raised with Mr Mahdavi. The allegations of sexual harassment, which are made by more than one individual, span a period of time prior to the first and second alleged protected disclosures having been made.

31. In relation to PD1 and PD2 it cannot be said at this stage that it is likely that a tribunal will find that:
    a. The claimant has made a disclosure to his employer.

b. He believed that the disclosure tended to show one or more of the matters itemised at (a) to (f) under section 43B of the ERA.
c. The belief was reasonable.
d. The claimant believed the disclosure to be in the public interest.
e. The disclosure was the principal reason for the dismissal.

The tribunal in particular has considered the extent of the statement in the written quarterly review that 'desks are not entirely ergonomic', although it appreciates evidence about verbal discussions has not been tested. Additionally the tribunal has considered the respondent's position that they considered the claimant was good at his job, that it did not object to the principle of ergonomic assessments being carried out, they suggested a self assessment as a first step and that there was a budget in place for individuals to buy equipment for themselves.

32. PD3 is alleged to have taken place prior to the suspension and scheduled disciplinary hearing but after the allegations that the claimant was told may amount to gross misconduct had been raised with Mr Mahdavi. The tribunal notes the respondent's written response to the email relied on by the claimant in respect of PD3, in which they state they largely agree with the claimant's points, from the email correspondence there does not seem to be a particular dispute between the parties on the subject.

33. PD4 and PD5 are alleged to take place after the claimant was invited to a disciplinary hearing at which matters that the respondent said could amount to gross misconduct were to be considered. Chronologically therefore the disciplinary hearing invite could not have been prompted by them.

34. The tribunal is not at this stage making findings of fact that will bind any future employment tribunal. Cases have been heard in the past where matters that would not otherwise have led to dismissal, have been used as a reason for dismissal, hiding the true reason. Evidence has not been tested and it is not for the tribunal to determine what actually happened at this stage. The allegations of sexual harassment appear to derive from more than one person, they are serious allegations that in the normal course of events could, if found to be genuine and upheld by an employer, amount to acts of gross misconduct. Depending on matters such as mitigating circumstances those acts of gross misconduct could result in an employer making the decision to dismiss summarily.

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Employment Judge Wisby

Date: 15 May 2019

JUDGMENT and SUMMARY SENT to the PARTIES ON

17 May 2019

FOR THE TRIBUNAL OFFICE