



EMPLOYMENT TRIBUNALS

Claimant: Mr R Smith

Respondent: NV Integration

INTERIM RELIEF HEARING

Heard at London South: by CVP

On: 24 February 2021

Before: Employment Judge Truscott QC (sitting alone)

Appearances

For the claimant: In person

For the respondent: No appearance or representation

JUDGMENT on INTERIM RELIEF APPLICATION

1. The application for interim relief is refused.

REASONS

Preliminary

1. This has been a remote hearing because of emergency arrangements made following Presidential Direction because of the Covid 19 pandemic. The form of remote hearing was fully video. A face to face hearing was not held because it was not practicable and specific issues could be determined in a remote hearing.
2. This hearing was listed to determine the claimant's application for interim relief.
3. The Claimant represented himself and made oral submissions to the Tribunal.

The claim

4. Initially, the only material before the Tribunal was the ET1 lodged by the claimant. It stated that the claimant commenced employment with the respondent on 23 November 2020 and was dismissed on 6 January 2021. The claim was received by the Tribunal on 11 January 2021. There is no ACAS early conciliation certificate as the claimant has ticked the box saying he is applying for interim relief. The narrative reads:

I have an ET1 Form that ACAS told me to fill in.

Im not sure where to upload it.

2. The Tribunal was concerned at the absence of any information whatsoever about the claim. During the course of the hearing, the claimant was able to provide a claim form with the content he intended to be included in his ET1 ("the second claim"). The Tribunal decided to take the additional material into account.

3. The second claim narrates:
I was unfairly dismissed, when I raised my concerns with Health and Saftey / Covid Social Distancing Issues while working for NV Integration.
"Interim Relief"
I am claiming unfair dismissal by reason of whistleblowing and I am applying for "Interim Relief"

4. The claimant narrates the terms of an email he sent to the respondent on 6 January 2021 at 10.51 as follows:

Im writing to you after receiving citizens advice guidance.

I in no way at this stage wish to approach this subject formally but I am very serious in subject. I dont wish to raise a grievance within the work place but I am willing to go to those lengths to protect myself from harm.

Guys Im terrified coming into work using public transport and working on our sites. At this point I feel NVI cares nothing for my health or well being while working.

I havent even received a bottle of hand sanitiser or a mask for protection.

With that being said.

Its down to the employer to provide a safe working environment and the national Covid19 guidelines are as below.

letting you travel to work at quieter times of the day.

reducing how much face-to-face contact you have with the public

making sure that staff and customers stay at least 2 metres apart in your workplace

I have to say none of the above have even been brought up as a subject of conversation, never mind actually being addressed.

I have been working onsite with 20 to 30 strangers all pushing past me in hallways and corridors, All not wearing masks, All not abiding by the government guide lines.

In normal circumstances I wouldn't have an issue but these are not normal times. I implore you to help me work safely and help me to keep my life from being put at risk to get someone's TV or Stereo working.

I have to ask, If I contract Covid19 at work and it takes a hold of me and I die, Are you guys going to look after my Family and make sure they are ok? I doubt it very much.

Its now 1 in 50 who contracts the Virus, Thats one person on most sites guys.

This is not the flu, its deadly, and I just need some help to stay safe and alive.

Until the above is addressed I am very sorry but I cant come into work. I need to know I am safe while I am working, because at the moment guys I most certainly am not.

5. He also sets out the terms of the reply as follows:
On the 6th of Jan at 12:23 I recived a Zoom Meeting comfermation with Pip and Chris my CO and Manager.
Nothing was said about my Concerns but went as follows.
Our Zoom conversation took no more than 2 minutes and all that was said by you was.
"Thank you for joining this Zoom Meeting Rob."
"Look Rob, Your a short serving employee on trial."
"We are not happy with your work and have photographic evidence to prove it so we are terminating your contract with a weeks notice as per my contract."
I said "I wasn't aware you had issues with my work as no one had informed me but ok" and you do know Im not going to leave it there.
After telling me to go over my CV and take a look in the mirror you asked me for your equipment back, ie the Laptop and uniform.
I said I would put it all in a box and post it to you.
6. There is further narrative at Box 15 which is not relevant to these proceedings.
7. There was nothing from the respondent who probably had not received the ET1.

Law

Dismissal

8. It is not disputed that the claimant was dismissed and that he does not qualify for "ordinary" unfair dismissal.

Reason for dismissal

9. What is in issue is the employer's reason for dismissing the claimant. It is trite to say that the 'reason' for a dismissal is a set of facts known to the employer or a set of beliefs held by him which causes him to dismiss (**Abernethy v. Mott Hay and Anderson** [1974] ICR 323 CA per Cairns LJ; **W Devis & Sons Ltd v. Atkins** [1977] AC 931 HL). The issue is causation. In the present case, it is for the claimant to demonstrate that the predominant causative basis for the dismissal was a protected disclosure.

Disclosure

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

[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, tends to show one or more of the following—

(a)

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e)

...

[43C Disclosure to employer or other responsible person]

[(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith—

(a) to his employer, or

(b) ...

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

“Against that background, in my view the correct approach is as follows. In a whistleblower 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 character⁵), 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...”

5 Although disclosures tending to show breaches of the worker's own contract are the paradigm of disclosures of a 'private' or 'personal' character, they need not be the only kind: see the Minister's reference to disclosures 'of minor breaches of health and safety legislation ... of no interest to the wider public.'

Was the whistleblowing the reason for the dismissal?

11. Where an employee who does not have the requisite qualifying service claims to have been automatically unfairly dismissed for having made a protected disclosure, the burden of proof is on the claimant to show the reason for his dismissal.

12. 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 case of a dismissal, the EAT in **Trustees of Mama East African Women's Group v. Dobson** UKEAT/0219/05 said:

The legal principles to be applied appear to us to be as follows:-

16. A reason for dismissal is a set of facts known to the employer or at least held by it which causes it to dismiss the employee: **Abernethy v Mott Hay and Anderson** [1974] IRLR 213 (CA).

17. This calls for examination of the decision making in the mind of the dismissing officer, see the speech of Lord Nicholls in Khan at paragraph 29 which provides as follows:

“29

3) ‘by reason that’

Contrary to views sometimes stated, the third ingredient (‘by reason that’) does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the ‘operative’ cause, or the ‘effective’ cause. Sometimes it may apply a ‘but for’ approach. For the reasons I sought to explain in *Nagarajan v London Regional Transport* [1999] IRLR 572, 575-576, a causation exercise of this type is not required either by a 1(1)(a) or s.2. The phrases ‘on racial grounds’ and ‘by reason that’ denotes a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.”

13. The Employment Appeal Tribunal in **Dobson** held that the tribunal should consider the decision-making processes of the employer, or the relevant manager.

Interim relief

14. The statutory provisions concerning interim relief are:

128 Interim relief pending determination of complaint

(1) An employee who presents a complaint to an [employment tribunal]—

(a) that he has been unfairly dismissed by his employer, and

(b) that the reason (or, if more than one, the principal reason) for the dismissal is one of those specified in section 100(1)(a) and (b), [101A(d),] 102(1)[, 103 or 103A] [or in paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992], may apply to the tribunal for interim relief.

(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.

129 Procedure on hearing of application and making of order

...

(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.

...

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

...

15. Interim relief can only be granted if the tribunal thinks that the claimant is "likely" to establish at full hearing that the protected disclosure was the reason (or principal reason) for dismissal (section 129(1)). In **Ministry of Justice v Sarfraz** [2011] IRLR 262 EAT, the Employment Appeal Tribunal pointed out that section 129(1), read in conjunction with the definition of "qualifying disclosure" contained in section 43C of the ERA 1996, means that it must be likely that a tribunal will find that:

- The claimant has made a disclosure to his employer.
- 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 1996.
- The belief was reasonable.
- If made before 25 June 2013, the disclosure was made in good faith.
- The disclosure was the principal reason for the dismissal.

16. The burden of proof is on the claimant at this stage (see **Bombardier Aerospace v McConnell** [2008] IRLR 51 (NICA), at paragraph 15).

The question remains, what does 'likely' mean in these provisions? As a matter of principle, the word is capable of a range of meanings. It may be compared with the word 'probable'. 'Probable' is a flexible word, but in law it is apt to mean 'on a balance of probabilities'; that is, 'more likely than not'. 'Likely' is an even more flexible word. Depending on its context, 'likely' may mean the same as 'probable', or something more, or something less. The alternative meaning of "likely" in the Disability Discrimination Act 1995 and the Equality Act 2010 (denoting something that "could well happen" even if the probability is less than 50/50 (**Cream Holdings Ltd v Banerjee** [2005] 1 AC 253 HL at para 12; **Boyle v SCA Packaging Ltd** [2009] ICR 1056 HL). was not applicable here (see **Dandpat** above).

The question is: what does 'likely' mean in the present context? The authorities say that it imports that the claimant needs to show that he has 'a pretty good chance' of success, and 'a pretty good chance' is something more than 'on the balance of probabilities'; something more than a 51 per cent chance. In the trade union case of **Taplin v. C Shippam Ltd** [1978] ICR 1068 EAT, the Employment Appeal Tribunal formulated the test to be applied in these terms:-

"The Tribunal should ask itself whether the applicant has established that he has a 'pretty good' chance of succeeding in the final application to the Tribunal."

17. The **Taplin** test was approved in **Raja v The Secretary of State for Justice** UKEAT/0364/09 and applied by the tribunal in **Chowdhury v Ealing Hospital NHS Trust** ET/3302168/10; 3301557/10.

18. 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 (10 November 2009, unreported), 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'.

An application for leave to appeal on this point to the Court of Appeal was made in **Dandpat** and was refused by Arden LJ ([2010] EWCA Civ 305, para 17).

CONCLUSION

19. The claimant says he was dismissed because he raised health and safety issues with his employer. He was dismissed very soon after raising those issues. The respondent says that the reason for the dismissal was it was not happy with his work and it has photographic evidence to prove it.

20. Either reason might be correct although the timing of the decision does raise the suspicion that the reason the action was taken was the complaint but the Tribunal was conscious that the email communications were being considered in isolation and the context may be wider.

21. The Tribunal did not consider that it had sufficient material to determine at this stage that the claimant had a pretty good chance of succeeding at the final hearing. The application for interim relief is refused.

Employment Judge Truscott QC

Dated: 24 February 2021