EMPLOYMENT TRIBUNALS

Claimant: **Mr K Kinnear**

Respondent: **Panorama Furnishings Mart Ltd**

Heard at: Remotely by CVP **On:** 23 February 2021

Before: Employment Judge Holmes

Representatives
For the claimant: In person
For the respondent: Mr H Menon, Counsel

RESERVED JUDGMENT ON APPLICATION FOR INTERIM RELIEF

It is the judgment of the Tribunal, that the claimant's application for interim relief is refused.

REASONS

1.The Tribunal convened to hear the claimant's application for interim relief. The Code V in the header indicates that this was a CVP hearing, held because the parties agreed that the issues could be determined without the need for an in person hearing. The claimant participated in person, and Mr H Menon, counsel appeared for the respondent.

2. Whilst the Tribunal had commenced to give an oral judgment on the day of the hearing, technical difficulties resulting in the Employment Judge becoming disconnected during the announcement of that judgment, so it has been reserved and is now given. The Tribunal apologises for the delay.

3. A claim form presented to the Tribunal on 27 January 2021 the claimant brings a complaint of automatically unfair dismissal by reason of having made a protected disclosure. By a further claim form submitted on 28 January 2021 , in which the claimant also added two additional individual respondents, made an application for

interim relief, which has been listed for today , and has been contested by the respondent . There is a bundle before the Tribunal of some 155 pages. The claimant has in that bundle provided a document referred to as a "final statement" in which he answers, and comments upon , points made by the respondent in opposition to the application.

4. The application being made at when it is, of course, means that there is not ,as yet, any ET3 response before the Tribunal, and so the respondent's potential response to the claim is that which is contained in the documents which have been provided to the Tribunal for this hearing. The documents include the witness statements from Diane Wells , the office manager, and various employees of the respondent , and a document entitled "Resistance to Interim Relief Claim" prepared by Roy Rotheram, the managing director (incorrectly, but understandably spelt "Rotherham" by the claimant in his claim form) . Effectively , whilst it looks like a witness statement from him, it is not strictly one, in those terms. It does , however, set out in some detail the respondent's case in response to the claimant's claims.

5. The claimant has this morning helpfully clarified a number of matters. He appreciates that the claim for interim relief can only be, and is only being, made in respect of his employer Panorama Furnishings Mart Ltd, and not any of the individual respondents who are only respondents to the potential detriment claims. The claimant is proceeding in respect of only one protected disclosure , which he identified in the course of the hearing, and which is referred to in his claim form, effectively in the narrative. It was confirmed now to have been made on 13 January 2021. Thus it was made to the Environmental Health office of Liverpool City Council, and in the bundle of documents , at page 127 , is indeed the report that the claimant made. He relies upon has his qualifying protected disclosure.

6. As it is important to know what precisely that disclosure was , these are its terms:

"The main boss is currently self isolating because he has come into contact with someone with COVID-19. We have had 2 positive test results in our workplace. One yesterday (12/1/21)and one the day before (11/12/21) [sic]*. Because. Either of these workers had the app on their phone no one else has been told to self isolate through the app. However the majority of workers have had close contact with both these individuals on a daily basis. Our employer fails to recognise this, and expects everyone to carry on as if nothing has happened, completely disregarding the law. I have worked with this company since October 2020. They have never wore masks, socially distanced, provided PPE or hand sanitiser. They have no posters and talking about coronavirus is very taboo, as they would rather just make money. Only since we have had the positive results they have applied one of the rules, face masks, but again no other rules are in place. Those that have been in close contact with those with positive results are told to remain in work. Threatened with no pay or support If they are to go home."*

That then was the disclosure that the claimant had made, and he relies upon it as a protected disclosure, in response to which he then claims that he was dismissed on 22 January 2021 , the dismissal not being in dispute. The respondent accepts the claimant was dismissed, the reason being a company restructure, a redundancy situation , and he was dismissed that day by a document which is in

the bundle at pages 37 to 38.

7.The claimant was only employed, as he says, from the October 2020 , so he consequently lacks the two years qualifying service up to present a claim of unfair dismissal . A claim of automatic unfair dismissal, of course, for having made a protected disclosure , does not require that qualifying period of service. So his case is put , fairly and squarely , on the basis that his dismissal was because he made that protected disclosure. In terms of the legal framework upon which his claim is put, or would be if he was legally represented,(he is not presently represented, but has had some legal advice) in discussion with him the claimant accepted that , he having not made that disclosure to his employer , therefore must bring himself within section 43F of the Employment Rights Act 1996. This provides that a qualifying disclosure can be made other than to an employer if it is made to what is termed a "prescribed person". Such persons are likely to be regarded as legal persons , bodies which are prescribed from time to time by order of the Secretary of State. One such order was made in 2014 , the Public Interest Disclosure (Prescribed Persons) Order 2014, which has a schedule which sets out a number of bodies in fall into that category.

8.Mr Menon for the respondent does not take issue for today's purposes with the contention that a local authority would potentially fall within the meaning of the prescribed persons in the Schedule, and that disclosure to , in this case, the environmental health department of the local authority satisfies, or at least potentially satisfies , the requirements of section 43F.

9. So in terms of the type of disclosure, and to whom it was made , there is no issue in terms of its content. No issues will be taken either in respect of the topics covered , which allege either breach of a legal obligation, or risk to persons' health and safety. The real battleground, as it were, really is in relation to causation. Whilst the respondent does not concede the claimant will succeed in respect of all the other aspects of protected disclosure, causation is where the focus of the response is going to be.

10. In terms of the respondent's response, there is no response ET3 form as yet, but the general nature of what the respondent's response will be is well set out in the Resistance to Interim Relief document prepared by Roy Rotheram, and in the witness statements, particularly of Diane Wells, office manager, which sets out in some detail the events of December 2020 up to the claimant's dismissal at the end of January 2021. Is clear from those documents that the respondents' position is effectively twofold . Firstly they were not aware , they say, that the claimant had made any such protected disclosure, they not having been told , in terms, that he had done so. Secondly, the decision to dismiss him as potentially redundant had been considered , and indeed taken , before the claimant made the disclosure on 13 January 2021.

11. In support of that , Diane Wells' witness statement and Roy Rotheram's document both refer to discussions they had together in early January 2021 , about the 5th to the 7th, in which the potential dismissal of the claimant was discussed. So , the respondents say that as that predates the disclosure that the claimant relies upon his dismissal cannot be because of that disclosure, which played no part in the decision , which had in effect already been taken at that time.

12. The claimant's response to that is that he does not accept it, and he invites the Tribunal to examine the respondent's contention in respect of whether the respondent knew that he had made such a disclosure. Particularly he refers to an email that he sent to the respondent on 20 January 2021 (page 35 of the bundle) in which he makes reference , which he concedes himself was in a roundabout manner, to the fact that he had been in touch with the City Council and that he thereby put the respondents on notice that he was probably a whistleblower. He relies upon that as being communication to the respondent where he indicated to them that he was likely to be the whistleblower .

13. He also relies upon what he says in effect was a change in attitude on the part of the respondent towards him. It is right, and is not contested as far as the Tribunal can see that , although the claimant had started employment in October 2020, he actually resigned shortly thereafter. He retracted that resignation, that retraction was accepted, and he stayed in employment with the respondent. There was then some discussion as to his future, and indeed there was the possibility, which was discussed with him, of him being offered a quality control role.

14.There is then something of a dispute as to whether the claimant came back to the respondent about that potential role. The respondent's case is that he did not, the claimant's case being that he did. Certainly , from the claimant's perspective, he was someone the respondent wanted to keep on. The respondent was in discussions with him, and considering giving him another post.

15.In relation to a driving post, the respondent did require drivers at this time and was effectively short of drivers with the relevant CPC qualification. The claimant did not have that, but it was something that was also a possibility for him. The CPC qualification was one that he could easily acquire. In respect of any financial aspect, that would be , for the company , a relatively modest cost which he would have to repay (on a reducing scale) if he left , in any event.

16. Effectively, summarising what he says, and one can see some of this in the exchange of email correspondence, he has gone from someone whom the company wanted to keep, and was in discussion with him about finding alternative roles, to someone the company decided to get rid of. In particular he highlights the fact that he sent an email on 20 January 2021 , in which he makes reference, in a roundabout way, to contacting the Council . Discussions were taking place, but the fact that there was no response to that email for another day or more, after he chased a response , until the one he got on 22 January 2021, which was his dismissal. He invites the Tribunal to infer from that that something had happened, and the most likely thing is whether the respondent changed its mind about him because he had made this protected disclosure , and his dismissal was for that reason.

Discussion and the legal test to be applied.

17. So that summarises the positions of the claimant and the respondent. In terms of the law on this matter, the Tribunal , on an application of this nature, has to carry out a summary assessment of the claim. This is a very early stage , and the Tribunal does not on such an application consider and make findings of fact on the evidence . It is a summary exercise to consider the material available , doing the

best it can , to predict what the prospects of success of the claim in fact are. It is a broad assessment to give the Tribunal a feel, and to make a prediction about what is likely to happen at the eventual hearing before a full Tribunal.

18. To that extent the Tribunal has to consider the likelihood of success, and what exactly that means in this context has been considered in a number of cases , one of which was cited by Roy Menon for the respondent. That is ***Ministry of Justice v. Sarfraz [2011] IRLR 562*** . This was an appeal before the Employment Appeal Tribunal , in which the Tribunal had to consider an appeal in respect of an interim relief application. In the course of its judgement (given by Underhill ,J. the then President) the Tribunal had to consider the correct test for likelihood of success to be applied in these circumstances. At paras. 16 and 17 of the judgment, he says this:

"16.

The meaning of 'likely' in the context of these sections, and of the analogous provisions of earlier legislation dealing with dismissal by reason of trade union membership or activity, has been the subject of a certain amount of authority. The leading case is ***Taplin v C Shippam Ltd [1978] ICR 1068*** *(see also [1978] IRLR 450). In the judgment of the tribunal in that case Slynn J recited the self-direction by the industrial tribunal chairman as follows (taking the paragraph numbers from the IRLR report):*

'13. In his decision, the chairman of the tribunal directed himself as to the meaning of "likely" in s.78(5). He referred to a previous decision of the industrial tribunal of which he had been chairman in the case of ***Johnson v Great Clowes Discount Warehouse Ltd*** *(unreported). In that case the tribunal had drawn a distinction between "possible" (where the tribunal considered that there would be a less than 50% chance of success), "probable", which was regarded as being more likely than not, when the chance of success would be more than 50%, and "likely", where the tribunal said that this meant "that the chances have to move a degree nearer certainty than would be the case if the word 'probable' had been used". They referred to the Shorter Oxford Dictionary definition of "likely" as "seeming as if it would prove to be as stated". They concluded that the word "likely" is a degree nearer certainty than would be the case if only the word "probable" had been used.'*

On the basis of that direction the industrial tribunal had refused the application for interim relief. The applicant argued on appeal that the approach taken by the tribunal involved imposing too high a standard and that 'likely' should be treated as equivalent to 'having a reasonable prospect of success'. After setting out that submission Slynn J proceeds:

'21. Having considered all these matters which have been urged before us we are unanimously of the view that the test proposed by Roy Hands of a "reasonable prospect of success" is not one which should be adopted. The phrase can have different shades of emphasis, the lowest of which we do not think is sufficient. We do not consider that Parliament intended that an employee should be able to obtain an order under this section unless he achieved a higher degree of certainty in the mind of the tribunal than that of showing that he just had a "reasonable" prospect of success. The employee begins with a certificate from the trade union official

certifying that there appear to be reasonable grounds for supposing that the reason for his dismissal was the one alleged. We consider that the tribunal is required to be satisfied of more than that before it can appear "that it is likely" that a tribunal will find that a complainant was unfairly dismissed for one of the stated reasons.

22. On the other hand we are not persuaded that there is a dichotomy between "probable" and "likely" as expressed by the chairman of the industrial tribunal. We find it difficult to envisage something which is likely but improbable or probable but unlikely and we observe that the Oxford Dictionary definition does define "likely" as "probable". Nor do we think that it is right in a case of this kind to ask whether the applicant has proved his case on a balance of probabilities in the sense that he has established a 51% probability of succeeding in his application, as has at one stage been contended before us. Nor do we find Roy Hands' alternative suggestion of a real possibility of success to be a satisfactory approach. This again can have different shades of emphasis. It seems to us that the section requires that the employee shall establish more clearly that he is likely to succeed than that phrase is capable of suggesting on one meaning. On the other hand it is clear that the tribunal does not have to be satisfied that the applicant will succeed at the trial. It may be undesirable to find a single synonym for the word "likely" but equally, we think it is wrong to assess the degree of proof which has to be established in terms of a percentage as we have been invited to do.

23. We think that the right approach is expressed in a colloquial phrase suggested by Roy White. 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.

24. Although the chairman of the tribunal expressed the burden of proof differently from the way which we have done we do not consider that there is any real difference of emphasis. He thought that "likely" meant more than "probable" and he regarded "probable" as being "51% or more".'

The discussion in ***Taplin*** *was complicated by Slynn J having to address the unusual way in which the chairman had directed himself. A caviller might also say that 'a pretty good chance of success' is not very obviously distinguishable from the rejected formula 'a reasonable chance of success'. Nevertheless, the basic message of the judgment read as a whole is clear. In this context 'likely' does not mean simply 'more likely than not' – that is at least 51% – but connotes a significantly higher degree of likelihood. Slynn J understandably declined to express that higher degree in percentage terms, since numbers can convey a spurious impression of precision in what is inevitably an exercise depending on the tribunal's impression.*

17.

Taplin*, so understood, has been applied in a number of decisions of this tribunal. I was referred in particular to* ***Blitz v Vectone Group Holding Ltd [2010] All ER (D) 47 (Dec), Dandpat v University of Bath UKEAT/0408/09*** *and* ***Raja v Secretary of State for Justice [2010] All ER (D) 134 (Mar)****.* ***Dandpat*** *is perhaps the most significant of those three since it expressly addressed and rejected a submission that* ***Taplin*** *should be revisited following the decision of the House of*

*Lords in **SCA Packaging Ltd v Boyle [2009] IRLR 746**, and since permission to appeal was, for somewhat unusual reasons, refused by the Court of Appeal on two separate occasions – first by Arden LJ and secondly by Smith LJ. I was also referred to the decision of Lightman J in **Bank of Credit and Commerce International SA v Ali (No.3) [1999] IRLR 508**, at paragraph 54 (p.517). Lightman J made clear his understanding that the effect of Taplin was that a 'pretty good chance' meant more than merely a 51% probability, though the issue before him was not concerned with the present provisions."*

19. Thus, the threshold for prospects of success is higher than that more likely than not, (i.e higher than a 51% chance) but it is less than certainty. Somewhere, therefore, between the two lies the test to be applied, so that is the test I have to apply .

20. In doing so I take into account the documents , and the submissions made. The material is, of course is untested, because the nature of such application is that the Tribunal has to just look at the material presented , and consider this stage what is likely to happen at a final hearing. It is not of course the same as conducting a full trial .

21.From what the Tribunal has seen soon today, there are a number of issues in relation to the claimant's claim. The first factor that emerges on the papers is that there had already been some communication from environmental health to the respondent before the claimant's disclosure on 13 January 2021. From para 16 of Roy Rotheram's document by 6 January 2021 someone (and the claimant does not say he did this) had contacted the local authority to complain that the respondent was effectively still open, when it should have been shut down in lockdown. That led to Ann Downey of the local authority contacting the respondent to enquire about this, and Roy Rotheram satisfying her that the showroom was closed to the public. This is not documented, but will be the evidence that the respondent will give, and there is (but this does not appear to be in the bundle) an email of 8 January 2021 from Ann Downey (or her department) with advice as to the steps that needed to be in place.

22.The evidence of the disclosure being made, its communication to the respondent, and the response to it, is as follows. Ann Downey contacted Roy Rotheram of the respondent by email on 14 January 2021 (page 59 of the bundle) informing him that she had been informed there had been two new cases of positive Covid tests within the last few days, and of other alleged breaches of the precautions that should have been in operation. She did not in that email reveal who had informed her of this, a fact she later confirmed to the claimant. She sought sight of the relevant risk assessment and warned that she would ask the Police to call by and check the situation.

23.The response was an email from Roy Rotheram on 14 January 2021(page 58 of the bundle) , to Ann Downey, enclosing the risk assessment that she had requested, and assuring her that all necessary precautions were in place. Her response on 18 January 2021 (same page of the bundle) was to inform the respondent that she was more than happy to close down the complaint.

24.Pausing there, there is no evidence thus far that the respondent knew that it

was the claimant who had made the disclosure which led to Ann Downey's enquiry, nor any evidence that responding to it was particularly onerous, irksome or problematic. It was over by 18 January 2021. As the claimant himself says in an email to Ann Downey after his dismissal (page 126 of the bundle) he believed his dismissal was "down to" his email correspondence and the respondent "suspecting" him for informing the environmental health department.

25.Given that someone else had previously , in early January 2021, made a complaint to environmental health which led to the initial involvement of Ann Downey, it would have been logical for the respondent to assume that it was the same person who had made this complaint on this occasion. Further, there would be other potential "suspects", namely the other employees who had tested positive, or members of their families.

26.The reference to the claimant's email correspondence is to the dispute that arose between the claimant and the respondent prior to his dismissal as to his entitlement to a test and trace payment of £500 , payable to persons who had been in contact with anyone who had tested positive for Covid. This email chain is at pages 27 to 34 of the bundle, and it was in connection with his attempt to obtain this payment that the claimant had approached Ann Downey (or environmental health as a department). The respondent was of the view that the claimant was not entitled to seek this payment, whilst he was of the view that he was.

27.Thus, on this evidence , the claimant's case that the respondent knew that he had made the protected disclosure is far from compelling, it amounts , in his own words, to a suspicion that he had done so, and, there is already another possible explanation for the decision to dismissal him unrelated to any protected disclosure, namely the disagreement about his entitlement to claim a test and trace payment, and, possibly, the view that the claimant was seeking something to which he was not entitled. Whilst the claimant relies upon his email of 20 January 2021 (page35 of the bundle) as revealing to the respondent that he had whilstleblown, he himself accepts that this was in a roundabout fashion. It certainly was, as it says that he had contacted the council to "get advice", and goes on to make reference about the respondent having been in contact with environmental health. It falls far short, in the Tribunal's view , of revealing that the claimant had made any form of protected disclosure. Seeking advice is not the same giving information which tends to show something.

28. Add to that the fact the claimant had previously resigned, and then had changed his mind, making the respondent doubt his commitment, and his short service with the respondent, other non – whistleblowing reasons for dismissal also become quite plausible.

29.All that would of itself be sufficient to dispose of this application, but there is another, even more significant hurdle to the claimant's prospects of success, and that is the contention that his dismissal was decided upon before he had even made the relevant disclosure on 13 January 2021. If correct , that is fatal to the claimant's claim against the respondent employer. That will be the evidence of Roy Rotheram and Diane Wells. In support of this evidence Diane Wells will refer to an email , a "to do list" to herself date 7 January 2021, in which one of the items listed is "recruit another driver to replace Kayne", he being, of course, the claimant.

This appears to support the respondent's evidence that the decision to dismiss the claimant had ben taken well before 13 January 2021, albeit not actioned until 22 January 2021.

30.The claimant countered this evidence by suggesting that it could have been fabricated, and it would be easy for the respondent to "cover its tracks" as it were, and to produce this evidence to make it look like the decision had been taken sooner than it was.

31.It is right, of course, that this is possible, but the Tribunal is looking at likelihood, not possibility, and the claimant has to satisfy it that he has pretty good chances of success, which would mean that he would have to show that he had pretty good chances of showing that this document is, in short, an attempt to pervert the course of justice, a forgery, manufactured deliberately to present a false impression to the Tribunal, and bolster what will be false oral evidence given by Diane Wells and Roy Rotheram. The Tribunal will require compelling evidence to reach such a serious conclusion. Such matters can, doubtless be explored further, perhaps with the analysis of metadata, screenshots of emails sent and received around the same time on the relevant devices, and so on, but these are matters for a final hearing, and do not assist the claimant in discharging his burden of showing that he has pretty good chances of success. In fact, if anything, this evidence may be said to go the other way, and indicate that his prospects of success are less than good.

32.For all those reasons, the claimant has failed to show that he has pretty good prospects of success in establishing that he was unfairly dismissed for having made a protected disclosure , and this application is dismissed.

33.There are other claims , and the Tribunal has taken the opportunity to make case management orders in relation to this claim and to those, and these are contained in a separate document.

Employment Judge **Holmes**
Dated : 9 March 2021

RESERVED JUDGMENT SENT TO THE PARTIES ON

15 March 2021

FOR THE TRIBUNAL OFFICE