



EMPLOYMENT TRIBUNALS

Claimant
Mr P O'Sullivan

v

Respondent
Metroline Travel Ltd

Heard at: Watford (in public by video) **On:** 4 March 2021

Before: Employment Judge Quill (sitting alone)

Appearances:

For the Claimant: Mr D Ibekwe, union representative

For the Respondents: Mr A Solomon QC

This was a remote which has been consented not objected to by the parties. The form of remote hearing was V: Video. A face to face hearing was not held because it was not practicable. The documents that I was referred to are in a bundle of 63 pages from the Claimant and 165 pages from the Respondent and a written statement from the Respondent, the contents of which I have recorded. The order made is described below.

JUDGMENT

1. The application for interim relief is refused.
2. The Respondent's application for costs is refused.

REASONS

1. Both decisions, with reasons, were given orally on 4 March and written reasons were requested. These are those reasons.
2. The Claimant made an application for interim relief based on an allegation that the claimant's dismissal was contrary to s.103A of the Employment Rights Act. The dismissal was on 3 February 2021 and the procedural requirements for making an interim relief application were met.
3. I had a bundle today of 165 pages from the respondent and also a bundle of 63 pages prepared by the claimant. There was some overlap and neither side objected to my looking at the other side's bundle. I also had a written statement in the name of the dismissing officer, Ms May. No oral evidence was taken. I had a document which was 14 pages of written submissions from the respondent and a

referral to 15 authorities and I had 11 pages of written submissions from the claimant with a referral to 5 authorities.

4. At around 10am when we first started Mr Ibekwe, the claimant's representative, was unable to join the video hearing. Ultimately this did not delay things. I was able to use the time immediately after 10am to complete my pre-reading and then when we got underway at 11am. With the consent of the claimant and both representatives, Mr Ibekwe joined the hearing by audio means only, in other words he phoned in to the video hearing room but his image was not present on screen. I was able to hear oral arguments from each side.
5. The statutory test which I must apply is the one that is set out in s.129(1) of the Employment Rights Act 1996.
 - (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 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—
 - (i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or
 - (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or
 - (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.
6. In other words I must decide if it appears to me that it is likely that on determining the complaints to which the application relates the tribunal will find that the reason, (or - if more than one - the principal reason), for the dismissal is one of those specified in sub-paragraph 1(a). That includes s.103A of the Employment Rights Act 1996, which is the only such reason relevant to this application.

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.
7. S.103A of the Employment Rights Act refers to the fact that an employee who is dismissed shall be regarded for the purposes of Part X 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.
8. When making a decision on an interim relief application, I do not make any formal findings of fact which are intended to be binding at any later stage of the proceedings. I am assessing - amongst other things - the likelihood of disputed facts being proved in the claimant's favour at the final hearing. There is only limited material available to a judge making a decision on an interim relief application but my decision has to be based on whatever material is available to me.
9. When considering the likelihood of the claimant ultimately succeeding on the application the correct test to be applied is whether the claimant has a "pretty good chance" of success at the full hearing. This is the test first set out in Taplin v C Shipham Ltd [1978] ICR 1068. As numerous appellate decisions have stated (for

example Ministry of Justice v Sarfraz [2011] IRLR 562 and Wollenberg Global Gaming Ventures (Leeds) Ltd [2018] 4 WLUK 14; the latter of which is as recent as 2018), the test that was set out in 1978 in Taplin remains the appropriate one. The test does not simply mean “more likely than not”; it denotes in a significantly higher degree of likelihood. I do not accept the respondent’s argument that the test which I should apply is that interim relief should only be awarded in cases where it is obvious from the start that the claimant is practically certain to win. In the circumstances of this particular case, and based on the material that I have considered, I do not propose to say anything more about the respondent’s Human Rights Act argument other than that I am satisfied that the test set out in the existing case law is such that I can reach an appropriate decision and I do not think it is proportionate for me to say any more than that.

10. For the claimant to succeed in his interim relief application, it is necessary for him to show that there is a pretty good chance of succeeding on each required element of the s.103A claim. In other words that he has to show there is a pretty good chance that the final tribunal will decide that there was a protected disclosure, as well as showing that there is a pretty good chance that the disclosure, if any, was the principal reason for his dismissal.
11. There are three requirements that need to be satisfied and for the definition of protected disclosure in s.43A of the Employment Rights Act to be met. There needs to be a disclosure within the meaning of the Act; that disclosure has to be a qualifying disclosure; and it must be made by the worker in a manner that is set out at sections 43C through to 43H.
 - (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,
 - (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
 - (d) that the health or safety of any individual has been, is being or is likely to be endangered,
 - (e) that the environment has been, is being or is likely to be damaged, or
 - (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.
12. The disclosure must contain information and there must be sufficient information in the disclosure if it is to qualify under s.43B(1).
13. The word “likely” means something different in this context in comparison to s.129, for example in Kraus v Penna, the Employment Appeal Tribunal considered what “likely to” meant in s.43B and a reasonable belief by a worker that an employer could breach (in that case) a legal obligation would not necessarily be sufficient if the worker did not believe that the information contained in the disclosure tended to show that a breach was more probable than not. The employee’s actual subjective belief must be analysed by the tribunal in order to decide if the subjective belief was reasonable.

14. In relation to the public interest part of the criteria, as per Chesterton Global Ltd v Nurmohamed [2017] I.R.L.R. 837, the question for the tribunal is whether the worker believed - at the time he was making it - that the disclosure was in the public interest and whether that belief was reasonable. While the worker must have a genuine and reasonable belief that the disclosure of the information is in the public interest, this does not have to be the worker's motivation for making the disclosure.
15. If the claimant is unable to show that he has a pretty good chance of proving that he made the alleged disclosure, then interim relief should not be granted: proving that "the employee who is dismissed" is the employee who made the disclosure is an essential ingredient of a s.103A claim. Likewise, if the claimant is unable to show that he has a pretty good chance of showing that the disclosure was made in accordance with any of s.43C through to s.43H then interim relief should not be granted.
16. If the final tribunal decides that the reason or the principal reason for the claimant's dismissal was something other than a protected disclosure then the claim for breach of s.103A fails even if the dismissal was for a reason that is different to the one put forward by the employer and even if the dismissal was unreasonable or was in breach of the Equality Act or a breach of one of the other sections of the Employment Rights Act, see for example Kuzel v Roche Products Ltd [2008] ICR 799.
17. Evidence that the employer has acted in a high handed or unreasonable or peremptory fashion or has deliberately turned a blind eye to evidence that the employee was not guilty of wrongdoing are not necessarily sufficient. Their only relevance would be if they supported an inference that the employer's purported reason was not the true reason for the dismissal. As per the well-known case of Abernethy v Mott, Hay, Anderson, the reason for the dismissal of an employee is the set of facts known to the employer or the set of beliefs held by the employer which caused the employer to dismiss the employee. That is subject - in protected disclosure cases - to the Supreme Court decision in Royal Mail Group Ltd v Jhuti [2019] UKSC 55; where the real reason for the dismissal is hidden from the decision maker behind an invented reason, it is the tribunal's duty to look behind the invented reason. If an investigator or senior manager wants to get rid of the employee and they trick or deceive the dismissing officer into deciding that the employee had committed misconduct, then the reason which the investigator or the senior manager had for wanting to get rid of the employee can potentially be attributed to the employer as the dismissal reason for s.103A.
18. Turning now to the facts of this case. The respondent is a bus company and the claimant was employed as a driver. The respondent's purported reasons for the dismissal are contained in the dismissal letter of 3 February 2021 which is at page 153 of the respondent's bundle. The dismissal reasons allegedly relate to conduct on 11 January 2021. The conduct relied on was handing out leaflets outside the garage. It is said to be misconduct for two reasons: firstly, that the claimant was damaging the company by spreading inaccurate information; secondly, that the claimant was seeking to instigate a mass walkout of staff from the garage.

19. On the claimant's side, there is no dispute that he was outside the garage on the day in question or that he was handing out the leaflets. The leaflets were in the bundle and therefore - at the final hearing - it appears likely that there will be no dispute about what the leaflets actually said. However, the claimant does not allege that his S.103A claim could succeed by way of an argument that his actions in handing out the leaflets should, in itself, be found to be the making of a protected disclosure. Instead his argument - as far as it is relevant to the interim relief application, at least - is that the real reason for his dismissal is not what he did on 11 January 2021, but rather that he made three protected disclosures on 24 September 2020. The three disclosures are described in paragraph 2.1.1(a) of the particulars of complaint and are numbered with Roman numerals. I will call them PD1, PD2 and PD3 respectively following that numbering. I will take them in reverse order.

20. The third one, at PD3 as per the particulars claim states: "Communication from London Bus Drivers Rank and File Committee dated 24 September 2020 seeking relevant information(s) from the respondent and UNITE about its Covid risk assessments."
 - a. I cannot say based on the material before me that the claimant has a pretty good chance of showing that PD3 was made or that, if it was made, then it was made by the claimant.
 - b. If it is supposed to be a written document and it is not in the bundle and if it was supposed to be an oral disclosure then no details about which people were involved in the discussion and have been supplied.
 - c. Even on its face, PD3 refers to a request for information rather than a disclosure of information.

21. I was told by the claimant's representative that PD2 ("formal complaint addressed to the Respondent dated 24 September 2020") is a document in the supplementary bundle at pages 171-173.
 - a. The claimant does not have a pretty good chance of showing that the documents at pages 171-173 matched the description in the particulars of claim at paragraph 2.1.1(a)(ii).
 - b. The third page of the document at 171-173 is just some header information about when the email was forwarded on 2 March 2021. Included on the first page is some header information from 9 February 2021. The header information does not show it being sent to the respondent at all, on any date, and nor does any other information. There is a partial header for "Original Message" showing the email address from which it was sent on 24 September 2020, but not the recipient email address(es).
 - c. No header information at all shows to whom it was sent to on 24 September 2020, and the forwardings in February and March 2021 are after the date of the dismissal, and to Mr John Neckles, who is not alleged to be an agent of the Respondent.
 - d. The text of the document itself implies (by use of the word "ATTENTION" at the top of the text) that it was sent to two people within Transport for London (TFL) and also the Deputy Mayor for Transport.
 - e. None of those people appear to be mentioned in the respondent's disclosure policy and so the claimant does not have a pretty good chance of showing that those people fall within s.43C of the Employment Rights Act. It also

- seems to me that the claimant does not have a pretty good chance of showing that these are proscribed persons in accordance with s.43F and the Public Interest Disclosure (Prescribed Persons) Order 2014.
- f. Therefore it seems to me that as well as having to prove that he did make this disclosure the claimant would also have to prove that it fell either within s.43G or s.43H if it is to be a protected disclosure.
 - g. On the face of the document there is nothing to say that the claimant is the person (or one of the persons) who wrote it or sent it.
22. I am turning now to what I am calling PD1, described in the claim as follows: *his notification made to Stephen Harris on the 24th September 2020 (the Respondent's Managing Director), TFL, ComfortDelGro and copied to Unite officials John Murphy and Peter Kavanagh concerning an apparent failure to either facilitate a 'Covid' risk assessment or to publish such assessment for the peace of mind of relevant employees / individuals (as the case may be);*
23. I am told that the document, which appears at pages 168 and 169 of the claimant's supplementary bundle, and pages 22 and 23 of the respondent bundle, is what is relied on by the claimant. [Although it is argued by the claimant that page 170 of his bundle is also part of the same document, I do not find that the claimant would have a pretty good chance of proving that. In any case I do not think it is particularly relevant, being simply header information from dates after the dismissal].
- a. The document matches the description in the particulars of claim, at least to the extent that it was sent to Stephen Harris and copied to certain other people.
 - b. The claimant is likely to be able to prove this document was received by the respondent on 24 September 2020.
 - c. The document contains information.
 - d. An objective reading of the document is that it does seem to clearly suggest that the health or safety of individuals has been, is being or is likely to be endangered.
 - e. I am satisfied that there is a pretty good chance that the final tribunal will decide that the author or authors of this document reasonably believed that the disclosure tended to show that a danger to health and safety.
 - f. I am also satisfied there is a pretty good chance that the final tribunal would decide that the author or authors of this document reasonably believed that the disclosure was made in the public interest.
24. The document describes itself as an open letter which has been drafted, it says, by "*Cricklewood garage members of the London Bus Drivers Rank and File Safety Committee*". In the notes of the disciplinary meeting (for example, at page 107), Ms May asks the claimant if he is a member of London Bus Drivers Rank and File Committee. The exact title of the committee referred to is not exactly the same as on the document but I do not think that that minor difference in description matters for present purposes. Being a member of either/both groups would not necessarily make him the author/sender of the 24 September letter.
25. The claimant says to Ms May that he is a member of that committee and in addition the leaflets which the claimant was handing out on 11 January were headed "London Bus Rank and File Committee". I therefore think that the claimant has a

pretty good chance of showing that he was indeed a member of the organisation (and/or committee if it was a committee).

26. I think there is a pretty good chance that the tribunal will decide that anyone who read the documents which are at page 168 and 169 of the bundle and perhaps 171 and 172 as well and who was in the possession of the information that the claimant claimed to be a member of the committee might well infer that the claimant was one of the authors of the document. Further findings and analysis would still be required - of course - in order to decide whether the claimant was actually the maker of a protected disclosure in all the circumstances. That would include evidence about what role the claimant played in deciding that the letter be sent to the respondent. I do not think it is necessary for me to speculate too much about what findings might be made about that or what evidence might be given about it.
27. Ms May's position is that she did not know about any of the 24 September 2020 documents (including, in particular the document sent to Mr Harris), until after the dismissal and after this litigation commenced. There was no evidence presented to me that Ms Mays knew about the document that was sent (or allegedly sent) to TFL and the Deputy Mayor until she listened to the arguments in the hearing today.
28. For the claimant to succeed in his s.103A claim, the final tribunal would have to be decide one of the following:
 - a. Either that the purported investigation, and the dismissal itself, were all part of an elaborate charade and Ms May had wanted to dismiss the claimant all along because of the communications of 24 September 2020, but she and the investigator, Mr Kopczynski, (and perhaps others), got together to use the claimant's actions of 11 January as a sham excuse to dismiss him.
 - b. Or, alternatively, that the investigator, Mr Kopczynski, genuinely carried out his duties in good faith and he recommended disciplinary action for the events of 11 January but Ms May decided opportunistically of her own accord to dismiss the claimant, not because of the events of 11 January 2021 but instead because of the communications of 24 September 2020.
 - c. Or, alternatively, as per the Jhuti point, that the investigator, Mr Kopczynski, and/or some other unknown individuals within the respondent, actually tricked Ms May in some way. In other words, they fooled her into dismissing the claimant with Ms May thinking that the reason that she was dismissing the claimant was because of the events of 11 January 2021 but actually the other people who had tricked her into this course of action had really been motivated by the fact that they wanted to get rid of the claimant because of the communications of 24 September 2020.

I do not think that the claimant has a pretty good chance of persuading the final tribunal that any of those alternatives is what happened. For one thing there was no evidence presented to me that would persuade me of any of those things and I would say, based on what I saw, that the claimant has significantly less than 50% chance of persuading a tribunal that any of those alternative courses of action is what really happened.

29. There is also a logical problem. It is not obvious to me - and I do not think it would be obvious to the final tribunal - why Ms May, or any of the respondent's other

employees, would, in fact, be more concerned about an email that had been allegedly sent by the claimant on 24 September 2020 rather than the claimant's actual actions on 11 January 2021 which were immediately before the investigation and subsequent dismissal.

30. There is another point which I think it is appropriate to mention, because it is a point that the respondent has highlighted; however, it is less important than those mentioned above. The claimant has mentioned other claims in his particulars of complaint: dismissal for assertion of statutory rights; dismissal contrary to either s.100(i)(c) or 100(i)(d) of the Employment Rights Act; that his dismissal was direct discrimination because of disability (based on the disability of a family member). If the claimant is to succeed on any of those other complaints at the final hearing then that will also count against an argument that he should succeed in proving that the principal reason for his dismissal was the 24 September 2020 emails.
31. So that concludes my reasons for refusing interim relief in this case.
32. In relation to costs, the Respondent made an application under rule 76.
 - (1) *A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that— ...*
 - (b) *any claim or response had no reasonable prospect of success ..*
33. The Respondent gets that far. It has persuaded me that the interim relief application had no reasonable prospects of success. As discussed above, to succeed, the Claimant would have had to show that there was a “pretty good chance” of either succeeding in a Jhuti type argument (that someone else – because of a disclosure made by the Claimant - tricked Ms May into dismissing the Claimant), or that there was a “pretty good chance” of showing that Ms May knew about the alleged disclosures (and knew that the Claimant made them, and that she dismissed him for that reason). He would also have to show that he had a pretty good chance of showing that the disclosures were “protected”.
34. At the interim relief hearing, the Claimant failed to put forward evidence: that Ms May knew about the communications alleged to be protected disclosures or that a person who did know about them influenced her decision to dismiss the Claimant. Although the Claimant alleges that the real reason for his dismissal was not his conduct on 11 January 2021 (and that will be an issue for the full merits hearing to decide), at the interim relief hearing, there was no evidence produced to suggest that the Respondent had trumped up charges against him: ie that someone had falsely claimed to view the events of 11 January 2021 as serious enough to dismiss despite really holding a different opinion.
35. There was also no evidence that between 24 September 2020 and 11 January 2021, the Respondent had conducted any sort of campaign against the authors (or the persons whom it believed to be the authors) of the 24 September emails, or that the Claimant had been treated worse by the Respondent after 24 September 2020 than he was before. Obviously, the lack of such evidence would not be fatal to the s103A claim at the final hearing, but had there been such evidence, the

Claimant could have at least argued that a connection between 24 September 2020 communications and his later dismissal could be inferred.

36. The Claimant also failed to show that he was the author of the 24 September 2020 communications, but I do note that there was no witness evidence today, and he was – as mentioned above – questioned by Ms May about his membership of the rank and file committee.
37. Turning to the exercise of my discretion because the rules say that I “shall” consider whether or not to make a costs order but it is still a matter of judicial discretion.
38. I note for completeness that the claimant is, it would appear, very genuine in his beliefs that the respondent is guilty of some sort of wrongdoing and in his opinion that there has been some sort of failure to protect the health and safety of staff. However, the apparent genuineness of his beliefs about that topic is not relevant to the issue of whether he had reasonable prospects of showing that he is likely to show that he was dismissed for making a protected disclosure and so, for that reason, I do not think it is relevant to the decision about whether to make a costs order in relation to the failure of his interim relief application.
39. Costs are the exception rather than the rule. That does not mean that costs orders are never made; they are, in fact, made and they are made in appropriate cases. However, it is still the case that even when the respondent overcomes the hurdle of showing that there are potential grounds to make a costs order, it does not automatically follow that such an order should be made.
40. I am not going to exercise my discretion to award costs in this case. I have taken into account the fact that the claimant has had the benefit of assistance from Mr Neckles and Mr Ibekwe. It is reasonable for me to infer - and I do infer - that the Claimant was receiving advice from individuals who thought that he did have a chance of success and whose opinions he relied on.
41. The application was not a fanciful one, and it was not a disruptive attack on the respondent in my opinion. The nature of an Interim Relief Application is that a claimant has to make a prompt decision – and has to make it within seven days of the dismissal – about whether to seek the relief. The dismissal was 3 February 2021 and today is 4 March. There has not been a long time for the claimant - I accept it is not zero time - to really assess his options and to decide for himself whether or not he was going to be successful today. Potentially, if somebody had sat down with the claimant and given him advice and had full knowledge of the facts of the case and the evidence in the case then it may well be that such a person might have advised the claimant that it was not a good idea to go ahead with this particular application and that he might face the application (that he has indeed faced) for costs. However, the claimant did not have that in mind. He was not aware that his claim had no reasonable prospects of success and/or that he might be ordered to pay the Respondent’s costs. Furthermore, the fact that the Claimant has failed today – at a hearing without orders for disclosure or witness

evidence – does not necessarily imply that he cannot succeed on the merits at the final hearing. For those reasons, I am not going to exercise my discretion and make an order.

42. The second matter that the respondent has asked me to consider is to specifically certify that the application was “totally without merit”. I am not going to do that. I have taken into account the fact that there is a power for the High Court to make orders restricting claims (or particular claims) against particular respondents (or generally) by particular people. I also accept that it is appropriate for the Employment Tribunal to assist the High Court by - in an appropriate case - stating specifically that a claim or an application was totally without merit.
43. However, I do not think that this is an appropriate case for me to make such a statement. It has not been suggested to me that the claimant has made numerous previous complaints against the respondent or numerous previous complaints against any respondent for that matter. The nature of an interim relief application is that I make a decision without hearing oral evidence, and looking at only a limited selection of documents, and the decision is an assessment about what another tribunal is likely to decide in due course, based on fuller material.
44. I have said that the threshold as per rule 76(1)(b) was met. However, it does not automatically follow that the application was “totally without merit”, which is a higher threshold. I am not persuaded that the threshold was met in this case and, in any event, I am not going to run the risk of making a statement that potentially impacts the claim as it proceeds from now on. As far as I am aware, the claim will be the subject of a response by the respondent, a review under Rule 26, and further Case Management Orders. Potentially, the claim will ultimately result in a final hearing at which evidence will be heard by both sides. If, at the end of that litigation, the respondent thinks it is appropriate to ask for a certification that the claim was “totally without merit”, then it can do so at that stage.

Employment Judge Quill

Dated: 25 May 2021

Sent to the parties on:

8/6/2021

For the Tribunal

N Gotecha