Case No: 2413688/2023

EMPLOYMENT TRIBUNALS

Claimant: Mr Andrew Rawlins Catterall

Respondent: Royal London Mutual Insurance Society

Heard at: Liverpool **On:** 29 January 2024

Before: Employment Judge Aspinall

Representation
Claimant: In person
Respondent: Mr Brown, Counsel

JUDGMENT with REASONS

The claimant's application for interim relief under section 128 Employment Rights Act 1996 fails for the reasons set out below.

Reasons

Background

1. By a Claim Form dated 25 December 2023 the claimant made a complaint of automatically unfair dismissal (protected disclosure) and sought interim relief. The complaint was made within 7 days of the effective date of termination and was listed for this hearing on notice to the parties.

The List of Issues

2. There was a sole issue for determination today.

> ***Is it likely*** that on determining the complaint to which the application relates the Tribunal will find that the reason or if more than one the principal reason for the dismissal is that the claimant made a protected disclosure or disclosures? That is to say has the applicant established that he has a ***pretty good chance*** of succeeding in that final hearing?

Relevant Law

3. Section 128 Employment Rights Act 1996 sets out the availability of interim relief.

> **128 Interim relief pending determination of complaint**
>
> **(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and**
>
> **(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—**
>
> **(i) section …….103 or 103A, or]**
>
> **…. may apply to the Tribunal for interim relief.**
>
> **(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).**
>
> **(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.**
>
> **(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.**
>
> **(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.**

4. Section 129 addresses the procedure for hearing an application and making of order:

> **(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 …….103 or 103A,**
>
> **…**
>
> **(2) The tribunal shall announce its findings and explain to both parties (if present)—**
>
> **(a) what powers the tribunal may exercise on the application, and**
>
> **(b) in what circumstances it will exercise them.**
>
> **(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.**
>
> **(4) For the purposes of subsection (3)(b) "terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed" means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.**
>
> **(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.**
>
> **(6) If the employer—**
>
> **(a) states that he is willing to re-engage the employee in another job, and**
>
> **(b) specifies the terms and conditions on which he is willing to do so, the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.**
>
> **(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.**
>
> **(8) If the employee is not willing to accept the job on those terms and conditions—**
>
> **(a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and**
>
> **(b) otherwise, the tribunal shall make no order.**
>
> **(9) If on the hearing of an application for interim relief the employer—**
>
> **(a) fails to attend before the tribunal, or**
>
> **(b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3),**
>
> **the tribunal shall make an order for the continuation of the employee's contract of employment.**

5. The burden of proof lies with the applicant. The test in section 129, *likely,* in this context requires a higher standard than the balance of probabilities. In Taplin v Shippam Limited [1978] ICR 1068 likely was said to mean "a pretty good chance of succeeding" in the final complaint for the proscribed reason.

6. Rule 95 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 sets out that the tribunal hearing an application for interim relief shall not hear oral evidence unless it directs otherwise. The Tribunal also had regard to Rule 41 in relation to its ability to regulate its own procedure and Rule 2 to act fairly and justly.

The Hearing

Reasonable adjustments

7. The claimant identifies as someone with autism and ADHD. The claimant

requested additional time to respond to any questions and it was agreed that he may control his own pace of submission and response and seek clarification or a break at any point.

8. The claimant was asked how his autism and ADHD may affect him at the hearing and what support the Tribunal might offer. The Tribunal referred the claimant to the Equal Treatment Bench Book and worked with him to identify ways in which it could assist him as a litigant in person with autism and ADHD. It was agreed that if the claimant began to provide more detail than was necessary (ranging) the Tribunal would first listen and wait and then support him by inviting him to explain the impact of the points he was making on whether or not the Tribunal should grant interim relief, and assisting him to refocus on the question or relevant point for determination today.

9. The claimant requested that he be provided with a transcript of the CVP recording of the hearing, his reason for this being so that it would make it easier for him when making any application for reconsideration or appeal. The Tribunal explained that neither an audio recording nor a transcript is routinely provided and that accommodating an anticipated reconsideration or appeal would not be likely to be considered a reasonable adjustment. The Tribunal offered to provide written reasons for today's decision and the claimant accepted that offer in satisfaction of his request for a transcript by way of reasonable adjustment. The respondent had no objection to the Tribunal providing full written reasons for its decision. The respondent did not need any adjustments.

10. At the invitation of the Tribunal the respondent's solicitors, potential witnesses and observers turned off their cameras.

Opening submission of prejudice

11. The claimant submitted at the outset of the hearing that the respondent had not complied with directions from the Tribunal to send its documents and witness statements to him. He said that this was prejudicing him. He did not wish to make an application for postponement. He had seen the documents and witness statements on Thursday 25 January 2024.

12. The Tribunal was concerned, in this expedited process, to apply Rule 2 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 to ensure that it dealt with the case fairly and justly so far as is practicable.

13. It accepted the respondent's submission that it had sent some documents on Wednesday and statements on Thursday and had sent a consolidated bundle of documents on Thursday. The claimant had not opened that bundle until he opened it during the course of the hearing so that we could all refer to the same bundle and page numbers. The claimant was content to use that bundle and to proceed.

14. The Tribunal considered that the claimant, having made this expedited application on 25 December had had adequate time including at least three full days Friday, Saturday and Sunday on which to read and prepare and was not prejudiced in any way by any delay in compliance by the respondent.

Documents

15. There was a consolidated bundle of documents of 303 pages, together with the supplementary bundle of witness statements containing witness statement from the claimant, one from Mr Chris Miller for the respondent and one from Ms Sarah Bould for the respondent.

16. The respondent had sent a Skeleton Argument before the hearing. The claimant had time, whilst the Tribunal was addressing technology issues and joining the hearing late at 10.37, to read that Skeleton. There was a further adjournment for the Tribunal to read during which time the claimant could again look at the Skeleton Argument.

Scope of the hearing

17. At the outset of the hearing the respondent helpfully indicated that for the purposes of the interim relief application it would assume that the alleged disclosures qualified as protected disclosures. It reserved its position entirely in relation to the disclosures in its ET3 Response which is to follow and at final hearing. The claimant was grateful for this early indication to focus his submissions on what he described as the causation point, that is to say the reason for dismissal.

18. The Tribunal explained the potential outcomes of the hearing, including an order for reinstatement, reengagement or if not agreed, an order for the continuation of the claimant's contract. Everyone understood that would mean the claimant would continue to be paid, would not work and that at final hearing even if the respondent succeeded it would not be able to recover that pay.

Procedure at the hearing

19. The procedure at hearing was agreed as follows in accordance with rule 95 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013:

- The Tribunal would proceed by way of submission only and notwithstanding the provision of witness statements would not hear oral evidence.

- The Tribunal would perform an expeditious summary assessment on the material available. The Tribunal would not look at all the documents but would focus on those to which it was referred by the parties in their submissions.

- The claimant would go first making his application and would be allowed approximately one hour to put his case.

- The respondent would have approximately one hour in which to respond to the claimant's case to oppose the application.

- At the suggestion of the respondent the claimant would have a final right to respond to the opposition for around 15 minutes.

- The Tribunal would then adjourn to reach a decision.

- It was agreed that the decision would be given by oral judgement and that due to the late start caused by technology issues the Tribunal would sit late and the parties were happy to remain until 4.15pm for judgment to be delivered.

20. That procedure was typed into the chat box on the video platform so that everyone could see it. It was agreed.

Short background context

21. The Tribunal makes no findings of fact, having heard no oral evidence but records the following background to the application.

22. The claimant was employed by the respondent from 22 May 2023 until 18 December 2023 as Data Privacy Lead. From July 2023 until late September 2023 the claimant raised concerns and made complaints about matters which may amount to qualifying protected disclosures. One of those concerns was that the Data Protection Officer Mr Jason Wyatt held conflicting roles. In July 2023, unbeknown to the claimant at that time, the respondent's Mr Miller spoke to a colleague Mr Ricky McKinney about a restructure of the team in which the claimant's role sat. Mr Miller was concerned that there was duplication between the functions be performed by that team, the data privacy team, which sat within the Enablement division, and functions performed by a team reporting directly to the Data Protection Officer (Mr Wyatt), which sat within the Compliance and Risk division.

23. Over the course of the summer and following meetings with other colleagues Mr Miller's plan for restructure was finalised. The plan was put in writing by 11 September 2023 and subsequently contained within the report to the General Executive Committee in October 2023 compiled by Mr Miller and Mr Wyatt. The plan meant that the post of the claimant's line manager and the post of the claimant would be made redundant. The claimant's four team members' posts, with job descriptions as data privacy consultants, would transfer to the group Data Protection division. The restructure created two new opportunities one as Head of Data Governance and one as Head of Data Management.

24. The claimant's post was redundant. The claimant had individual consultation meetings and was made redundant with an effective date of termination of 18 December 2023.

25. The claimant was not included in a pool with colleague Alistair Barter, whom he says acquired duties previously performed by the claimant, and was not invited to apply or interview for the new Head of Data Governance role. The claimant's line manager Ms Marshall was also made redundant, applied for and interviewed for the Head of Data Governance role but was unsuccessful.

26. Following termination of employment the claimant raised that he had not been invited to interview for a data role within the Secretariat and had not been given information he needed to be able to appeal. His internal appeal is still within time.

Applying the Law to the Facts

27. The claimant's overarching submission is that the restructure was a sham exercise designed to remove him because he had raised concerns (including about Mr Wyatt) which he later, in September, described as whistleblowing complaints.

28. The claimant has not established that it is likely that on determining the complaint the reason for dismissal will be found to be because he made protected disclosures. He has not established that he has a ***pretty good chance*** of succeeding in that final hearing. He has not been able to refer to any evidence of any causal link between his dismissal and his disclosures other than their contemporaneity. His case rests on his assertion that Mr Miller was motivated to remove him because of his disclosures.

29. The Tribunal finds it implausible that Mr Miller would engineer a restructure in order to remove the claimant because:

29.1 The restructure impacted on others: The restructure impacted on the claimant, his line manager, the four data privacy consultants team members, the role held by Mr Alistair Barter and potentially the roles of those in the team below the data protection officer. Whilst it is not for the tribunal at this stage to identify the pool of people who may be affected by redundancy, the Tribunal finds it wholly implausible that Mr Miller would undertake a restructure with such implications for a number of roles in order to remove the claimant.

29.2 The respondent says Mr Miller did not know the claimant was a whistleblower when he decided to restructure: The respondent submitted that Mr Miller, when making his decision to restructure, did not know that the claimant was a whistleblower. It is clear from documentation that Mr Miller was copied into correspondences which contain content that the claimant subsequently has come to rely on as amounting to protected disclosures. However, the Tribunal accepts the respondent's submission that the content of those correspondences related to the subject matter of the claimant's job. He was there to point out data breaches and work with the respondent to find solutions. They were not out of the ordinary communications for a data privacy lead. It was only after Mr Miller's written restructure plan, 11 September 2023, that the claimant described those concerns as disclosures and sought protection for himself as a whistleblower invoking the respondent's whistleblowing policy, at the end of September 2023

29.3 The response to the concerns was warm: The responses from the claimant's colleagues to those correspondences appears, at first sight, to be welcoming of the concerns raised and to demonstrate openness to

including the claimant in previous proposed solutions and finding new solutions particularly in relation to the point about the Data Protection Officer's role and any conflict.

29.4 Mr Miller was not the sole decision maker on restructure. He had been discussing plans with colleagues as early as July 2023 and possibly before any potential disclosures were made, though it has not been possible (due to the lack of clarity in the claimant's complaint as to the dates on which he made disclosures) to confidently say that the restructure plans preceded any disclosures at this stage. Further, the claimant's case would require him to show that Mr Miller enlisted the support of Mr Wyatt in preparing the report for GEC. No doubt multiple other colleagues and HR support will have been involved in the preparation of the restructure and redundancy exercise. In order to succeed the claimant would have to show that the Mr Miller was influencing all of those decision makers, whether overtly or covertly to make him redundant.

29.5 The claimant was not the only person made redundant: The Tribunal also had regard to the fact that Ms Jolie Marshall was made redundant. The claimant has not said that she was a whistleblower. It is implausible that the respondent's Mr Miller would contrive a restructure that not only removed the claimant but also a senior colleague Ms Marshall because he was motivated by the claimant's protected disclosures. The claimant said that Ms Marshall had not delivered on her projects. The respondent disputes that suggestion.

30. For all of the above reasons the claimant has not shown that it is likely, in the sense of him having a pretty good chance of succeeding, that he can establish that the reason for his dismissal was that he had made protected disclosures.

31. The claimant made the following submissions:

- That Jolene Marshall failed to deliver on her projects (by way of explanation of her as collateral damage in the sham redundancy to remove him)
- That Sarah Bould *deliberately* left out of her witness statement for this hearing, so as to mislead the Tribunal, content about an exchange of correspondence between 19 and 25 January 2024 on the issue of whether the claimant could appeal or not.
- That Alistair Barter hasn't objected to Jason Wyatt continuing as DPO because he and others are afraid of Mr Wyatt.
- That JW and CM conspired together to promote the restructure to GEC, deliberately misleading senior colleagues so as to remove the claimant.

32. These submissions were wholly unsubstantiated at this summary assessment stage. The Tribunal encourages the claimant to make his appeal even

if he feels he has incomplete information and to include within the appeal the request for that information and a right to make further comment when he has seen it.

33. The claimant in closing submission compared his own position to that of Mr Bates of The Post Office miscarriage of justice matter and the doctors around nurse Lucy Letby in the criminal trial. The Tribunal encourages him to focus on his own case and going forward to prepare for a case management hearing by putting together a concise list of his protected disclosures setting out for each the date on which he says it was made, the form of the communication (verbal, email etc.) to whom it was made, the content of the disclosure (both information and allegation) and the part of Section 43B(1) he relies on. The claimant was an experienced litigant in person having made multiple applications for interim relief in the past against other employers. He has legal qualifications and is a detail person and understood what was required of him in relation to making a concise list of his disclosures.

Position as to costs

34. The respondent flagged its intention to seek its costs of today's hearing and wished the Tribunal to record that it reserves the right to raise costs later in the process.

Conclusion

35. The interim relief application has failed. The response is due by 8 February 2023 and the matter will then proceed to a case management hearing in the usual way.

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Employment Judge Aspinall

Date: 29 January 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

Date: 8 January 2024

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/