Case Number: 6006193/2024

EMPLOYMENT TRIBUNALS

Claimant | **Respondent**

Mr S Albrighton v **Fortem Solutions Limited**

Heard at: Midlands West **On: 23 August 2024**

Before: Employment Judge Bansal

Representation:

Claimant: **In person**
Respondent: **Mr A MacPhail (Counsel)**

RESERVED JUDGMENT ON APPLICATION FOR INTERIM RELIEF

The claimant's application for interim relief is dismissed.

REASONS

Introduction

1. This hearing was listed to determine the claimant's application for interim relief and, if appropriate, to order the claimant's re-instatement or re-engagement or grant a continuation of contract order pending the hearing of the complaint of automatic unfair dismissal.

2. The claimant was employed by the respondent as a Plasterer/Multiskilled from 13 February 2024 to 16 July 2024. The claimant presented a Claim Form to the Tribunal on 19th July 2024, which is within 7 days of the effective date of termination of the claimant's employment. The claim was accepted as a complaint of automatic unfair dismissal for making protected disclosures pursuant to s103A Employment Rights Act 1996. Therefore, the claimant did not need an ACAS early conciliation certificate.

Hearing

3. The claimant represented himself, and the respondent was represented by Mr MacPhail of Counsel.

4. The respondent presented a bundle of documents of 167 pages, and witness statements of employees, Mr Cameron Dean, Mr Daniel Dean, Mrs Pauline Chatt, and Ms Sarah Costello. Mr MacPhail, also presented written submissions and copies of the relevant case law, namely *Taplin v C Shippam Ltd (1978) ICR 1068*, *MoJ v Sarfraz UKEAT/0578/10/ZT*; *Smith v Hayle Town Council (1978) ICR 996, CA,* and *Ross v Eddie Stobart Ltd EAT 0068/13*.

5. The claimant produced a 15 page bundle of documents headed “Claimant’s Disclosure”, which contained a 4 page statement with supporting documents and a transcript of two covert recordings he made of conversations held with Mr C Dean and Mr D Dean.

6. At the start of the hearing I explained to the claimant the purpose of this hearing namely that I will assess the prospects of his “whistleblowing” unfair dismissal complaint, for the purposes of granting, or not, the interim relief sought. I also clarified that I will not be deciding the merits of his claim or making findings of fact. I also explained the procedure to be followed. I then adjourned the hearing for some 45 minutes to undertake my reading of the documents and statements provided.

7. I first heard from the claimant and sought clarification of his complaint as pleaded. I then heard representations from Mr MacPhail. Following this I reserved my decision on the basis the claimant indicated he will want written reasons.

The Law

Interim relief

8. Section 128(1) of the Employment Rights Act 1996 (“ERA 1996”) provides that an employee who presents a complaint of unfair dismissal, and alleges that the reason for his dismissal is the making of a protected disclosure under section 103A of the Employment Rights Act, may apply to the Tribunal for interim relief. The claimant's application in this case has been brought in time, pursuant to section 128(2) ERA 1996.

9. The procedure on hearing an application for interim relief is set out in section 129 ERA 1996, namely that interim relief shall be granted where it appears to the Tribunal it is likely that, on determining the complaint of unfair dismissal, the Tribunal will find that the reason or principal reason for the dismissal was that the claimant made a protected disclosure and so was unfairly dismissed for doing so.

10. The task for the Tribunal is to make a broad assessment of the case on the basis of the material available to it at the interim relief hearing, and to consider what is

likely to be the result at the final hearing of the claimant's claim. *(London City Airport Ltd v Chack (2013) IRLR 610 EAT*. The statutory test does not require the Tribunal to make any findings of fact. *(Ryb v Nomura International Plc EAT 3202174/2009)*.

11. The leading case of *Taplin v C Shippam Limited [1978] IRLR 450* held that "likely" in section 129 ERA 1996 does not mean simply "more likely than not". The test is one of likelihood of success; that is to say whether the claim has more than reasonable prospects of success, or a "pretty good chance" of success at a final hearing.

12. In the case of *Ministry of Justice v Sarfraz [2011] IRLR 562* the Employment Appeal Tribunal confirmed that the word "likely" in section 129 ERA does not simply mean "more likely than not", it connotes a significantly higher degree of likelihood, something nearer to certainty than mere probability. The test is therefore set comparatively high.

13. To succeed with an interim relief application, therefore, the burden of showing there is a "pretty good chance of success" is on the claimant, who must show that he has a good case for saying his dismissal was because of a protected disclosure on the basis that there are more than reasonable prospects of succeeding with that contention.

Whistle-blowing dismissal

14. Section 103A ERA 1996 provides that an employee who is dismissed shall be regarded 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 as defined in section 43A ERA 1996.

15. A disclosure which qualifies as a "protected disclosure" is a disclosure of information to the employer or to a prescribed person which, in the reasonable belief of the worker is in the public interest and tends to show one or more matters set out in section 43B(1) ERA 1996.

16. The disclosure must be of information, that is to say of facts but not mere opinion or allegations. *(Kilraine v LB Wandsworth (2016) IRLR 422)*. In *Cavendish Munro Professional Risks Management Ltd v Geduld (2010)* ICR 325, Slade J stressed that the protection extends to disclosures of information, but not to mere allegations. Disclosing information means conveying facts.

17. The Claimant must therefore show that it is likely that the Tribunal at the final hearing will find that:
    a. He made the disclosure(s) to the employer (or in accordance with any of the sections 43C – 43H ERA 1996);
    b. He believed that it or they tended to show one or more of the factors listed in s.43B(1) ERA 1996;

c. His belief in that was reasonable;
d. The disclosure(s) was or were made in the public interest; and
e. The disclosure(s) was or were the principal cause of the dismissal.

The Application

18. On reading the Claim Form it appears the claimant's case is that he made protected disclosures to the respondent in relation to asbestos in a property, and being provided with incorrect PPE which damaged his eyesight. In his representations he added a further alleged disclosure made to the respondent's HR person about being bullied. As the Claim Form lacked sufficient details about these alleged disclosures I asked the claimant to provide more information and to be specific about each disclosure so that I had a full understanding. He replied as follows.

    (i) In relation to the asbestos disclosure, he explained because of concerns about his health and well-being, sometime in mid-April 2024, he consulted the work planner Simmy, and asked him if there was any traces or issue about asbestos in a property he was to work at. The claimant claims Simmy told him, "it will be on the database somewhere, just crack on." At a toolbox meeting held on or about 23 April 2024 he shared his conversation with Simmy with others including the supervisors Cameron Dean and Daniel Dean. On the following day he was called to a meeting with the supervisors, and was told they did not like the way he had "*chucked Simmy under the bus*".

    (ii) In relation to the PPE disclosure, this related to his bringing to the attention of Catherine Tate, (around mid-June 2024), who is in charge of the PPE for the respondent that he had been provided with the wrong PPE face mask for use, when spraying a mould chemical. He explained that he enquired with Catherine Tate, if there were any suitable filters for the mask as the vapours from the mould spray were getting in through the mask. Catherine Tate agreed to contact the supplier. He said he became unwell and had to take a week off from work.

    (ii) The third disclosure relied upon, which the claimant alluded to in this hearing related to his contacting the HR Dept, soon after his meeting with Cameron and Dan Dean in April 2024. He explained he told the HR person, (whose name he did not note) of how he was being treated by both Cameron and Dan Dean; how he was feeling and he felt he was being bullied. He said he spoke to the HR person in confidence and was to confirm his issues in writing which he did not do.

19. I observed the claimant used the word "being a whistleblower" loosely. From my discussion I am not satisfied he understood what he had to show to establish that his alleged disclosures were protected disclosures. However the claimant firmly believed that he was dismissed because in raised the three disclosures relied upon.

20. In his submissions, Mr MacPhail highlighted ongoing issues with the claimant's performance. The claimant was subject to regular performance reviews which are documented. These reviews were extended to give the claimant an opportunity to improve during his probationary period. I noted in a text message exchange between the claimant and Dan, on 24 May 2024, the claimant acknowledged the issue with his performance. He states, *" .. I look forward to progressing further with the team and all I want is for you to be happy with my work. I look forward to acting on all of the above, have a great weekend Dan. Once again thanks for being open with me."*

21. Mr MacPhail also referred to a conduct issue with the claimant. The incident being that on 13 June 2024 the claimant made inappropriate and offensive comments to a colleague Miss Costello. Mr MacPhail submitted that in discussions the claimant did not deny the alleged incident and explained his behaviour as. In summary, the respondent's grounds for terminating the claimant's employment was related to his performance and conduct, which is documented, and had nothing to do with the alleged disclosures.

Conclusion

22. I am not persuaded the claimant has demonstrated that it is likely he will succeed at the full hearing of his unfair dismissal complaint. I do not consider that it could be said the claimant has a 'pretty good chance of success' at a full hearing.

23. In reaching this conclusion, I considered how the matter appears to me on a broad assessment of the material available and not making any findings of fact. Fundamentally, I am not persuaded the claimant, at this stage, has been able to demonstrate that the three disclosures relied upon amount to disclosures of information at all, and are therefore qualifying disclosures. Also it was far from clear how the claimant claimed that these qualifying disclosures are protected disclosures as defined in s43A ERA 1996 and 43C-H. It therefore follows that he is not likely to demonstrate that the claim for unfair dismissal claim is likely to succeed.

24. Even if the claimant was able to establish that he had a "pretty good chance" of relying on any of the disclosures (if they were qualifying) he has failed to show that he likely to establish a causal link between the protected disclosures and his dismissal against the background of his conduct and on-going performance issues.

25. I accept that this is a broad brush assessment and the position may change at a final hearing when all of the evidence is tested in cross-examination but I need to make a summary assessment. I have done so based on the information before me, and I conclude the claimant is unlikely to establish that the reason or the principal reason for his dismissal was because of the protected disclosures or to

the extent or with the degree of certainty required to succeed with an interim relief application. Accordingly, this application is refused and therefore dismissed.

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Employment Judge Bansal
Date: 27 August 2024

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