



EMPLOYMENT TRIBUNALS

Claimant

Mr Mark Bailey

v

Respondent

MI Transport Limited

Heard at: Bury St Edmunds (by CVP)

On: 05 January 2022

Before: Employment Judge Laidler

Appearances

For the Claimant: In person.

For the Respondent: Ms H Hogben (Counsel).

JUDGMENT ON APPLICATION FOR INTERIM RELIEF

It is not likely that on a determination of the complaint the tribunal will find that the reason or if more than one the principal reason for the dismissal of the claimant are those specified in s.129 of the Employment Rights Act 1996 and in particular that the claimant had made and was dismissed for making a protected disclosure.

REASONS

1. The ET1 in this matter was received on 29 November 2021. The claimant ticked the box that he did not need to have invoked ACAS early conciliation as he was claiming interim relief. It transpired at this hearing that the claimant did not really have much understanding of the nature of that application and there was discussion with him at the outset as to exactly which provisions he was relying upon.
2. Section 128 of the Employment Rights Act 1996 is the provision which grants the tribunal the power to grant interim relief pending determination of complaints and sub-section 1 of that section provides:

“(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 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,

may apply to the tribunal for interim relief.”

3. The relevant statutory provisions which are referred to are s.100(a) and (b) they relate to health & safety representatives and it was clarified that the claimant does not seek to argue that he was such and those sections do not therefore apply.
4. The other sections refer to working time cases and trustees of occupational health pension schemes and again they do not appear to apply to the circumstances in this case.
5. The only section therefore that seemed relevant was that the claimant is arguing he was dismissed for having made a protected disclosure contrary to the provisions of s.103A and that has been the basis on which this hearing has proceeded. The tribunal therefore has to consider the provisions of s43B:

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, 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.

6. The statutory test is set out in s.129 and the tribunal must determine whether it is likely that at the full hearing the tribunal will find that the claimant was dismissed for that reason.
7. The tribunal has not heard evidence at this hearing as it would not be appropriate to do so but has had submissions on behalf of the claimant and the respondent and has considered the pleaded cases of both parties together with a few documents that have been produced.
8. In the ET1 the claimant refers to being called into the office 'for a chat' after dropping his van off the day before for repairs. He then refers to the respondent having seen posts he made on social media and being sacked on the spot. He then refers to knowing it was within his rights to refuse to drive an unsafe van and telling his friend that the van was unsafe but "this is reason being given for terminating my employment". Later in the ET1 form the claimant refers to it being a private conversation and nothing to do with work. Therefore, it seemed in the ET1 that the claimant was relying on this post on social media as some form of protected disclosure. The post was seen at page 38 of the bundle. In it the claimant refers to there being no heating in the van and problems with the rear brakes and it being overloaded.
9. The tribunal has concluded that it is highly unlikely that this would be found to be a protected disclosure within the meaning of the Employment Rights Act. It does not appear to be the disclosure of information but more importantly it is not to one of the protected categories of person and certainly does not come within the provisions of s.43G.
10. The other disclosure which can be discerned from the pleaded case of the claimant is that he disclosed to Matt (whose full name is not known to him) faults with his vehicle.
11. Again, it is not likely the claimant will establish he was disclosing information within the meaning of s.43B or that in his reasonable belief it tended to show one of the stated categories of conduct by the respondent. It is clear from the authorities that there must be sufficient factual content to be capable of tending to show one of the matters listed in s43B(1) (a) – (f). A request for a vehicle to be looked at for repairs is unlikely to come within that legal definition.
12. Connected to the issue of whether 'information' was disclosed within the meaning of the statute is whether the claimant had a reasonable belief that it tended to show one of the six relevant failures set out in s43B. The tribunal saw reports from MTM Fleet Maintenance Limited. The first is dated 9 November 2021 stating that the front and rear brakes had been

checked and were operative and legal. The second is a report of 22 November 2021 that having checked the heating in the van it was found to be working as expected. It would therefore be difficult for the claimant to establish that he had a reasonable belief that any of the matters referred to in the statutory provisions were being breached by the respondent.

13. There are other crucial requirements to being able to bring an unfair dismissal complaint. The claimant will need to establish that he was an employee as the right is only given to employees. The respondent has produced the agreement signed by the claimant in which he confirmed he was self-employed and understood he would not always be given work and that he could work elsewhere. The claimant confirmed at this hearing he had previously worked through his own company. The claimant worked for one week in August and then there was a gap until he re-started in October.
14. Further the claimant will need to establish that there was in law a dismissal. The contemporaneous notes of the last meeting appear to show the claimant walked out stating he did not want to work there and that the meeting had been called because the respondent wanted to discuss with the claimant his attitude and behaviours.
15. The previously decided cases have stated that 'likely' within s129 ERA means a pretty good chance of success and the claimant must reach that in relation to each and every element of the claim including whether or not he was an employee. For all these reasons this tribunal has concluded that it is not likely that on a final determination of his complaints the tribunal will find that the reason (or if more than one the principal reason) for the dismissal was that the claimant had made a protected disclosure.
16. Having reached this decision there will be listed a one day Open Preliminary Hearing to determine whether the claimant was an employee as if he is not then this matter will not proceed any further. Further case management orders are set out in a separate document.

Employment Judge Laidler

Date: 13 January 2022

Sent to the parties on: 21 January 2022

For the Tribunal Office