EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mrs Marzena Tuszowska	**v**	**Jarmark Erdington Ltd**

PRELIMINARY HEARING

Heard at: **Midlands West Employment Tribunal**

(in person)

On: **17th October 2024**

Before: **Employment Judge Gidney**

Appearances

For the Claimant: Mrs Marzena Tuszowska (In person)

For the Respondents: Mr Daniel Szkwarek (Company Director)

Polish Interpreter: Ms Anna Cipiaszuk (interpreting for both parties)

JUDGMENT

The Judgment of the Tribunal is that:

1. **It is not 'likely' that on determining the complaint to which the application relates the Tribunal will find that the reason or principal reason for the Claimant's dismissal is that specified in s103A Employment Rights Act 1996 ('ERA') namely a dismissal for making a public interest disclosure.**

2. **Interim relief is therefore not appropriate in this case.**

Reasons

Introduction

1. The Respondent is a grocery business and the Claimant was employed as a Shop Assistant in its meat section until her dismissal, effective on 19th July 2024 after written notice given on 5th July 2024. On 11th July 2024 the Claimant presented a Claim Form, claiming unfair dismissal, naming Daniel Szkwarek as her employer. It was confirmed by reference to the Claimant's contract of employment, and with her agreement, that her employer was as stated in her contract, Jarmark Erdington Ltd, and that Mr Szkwarek was its managing director. By consent the name of the Respondent was changed to Jarmark Erdington Ltd.

2. The Claimant ticked the box to indicate that she had not obtained an ACAS certificate because her claim included an application for interim relief and the box to indicate that she was making a whistleblowing claim. The Claim Form was issued within 7 days of the notice of dismissal. This hearing was listed to determine whether the Claimant's application for Interim Relief should succeed.

3. Both parties were assisted by Ms Anna Cipiaszuk who provided Polish interpretation to both. Mrs Tuszowska had no understanding of written or spoken English and was wholly reliant on Ms Cipiaszuk. Mr Szkwarek had a good working knowledge of spoken and written English and only relied on Ms Cipiaszuk for unusual or legal expressions. The Tribunal wishes to express its gratitude to Ms Cipiaszuk for the invaluable interpretation services that she provided.

4. On exploring what claims the Claimant had intended, she told me that she had not fully understood her ET1 Claim Form when she completed it, and did not know what the boxes '*I am making a whistle blowing claim*' and '*My claim*

consists of a complaint of unfair dismissal which contains an application for interim relief' meant when she ticked them. Further she told me that she still did not understand what they meant.

5. This suggests that, having not complied with the ACAS Early Conciliation process, the Claimant randomly chose the explanation line for that failure that she was making an application for interim relief and then, by coincidence, ticked the box to confirm that she was making a whistleblowing claim and by further coincidence issued her Claim Form within the necessary 7 days. Thus it seems unlikely that she had no understanding of the Interim Relief process. It is more likely that she had some assistance in completing the ET1 Claim Form from someone who did understand more of the process.

6. Some assistance on this unusual point was provided by considering the description of the intended Claim in box 8.1 and box 8.2 of the Claim Form. In box 8.1 the Claimant wrote that she wanted a severance payment for unfair dismissal. Her description of her Claim in box 8.2 made no reference to having made a public interest disclosure or having '*blown the whistle*' or '*whistleblowing*'. It did make the assertion that a colleague, Justyna, was an illegal worker, with no papers, but it does not say or assert that she blew the whistle on that to anybody or made any disclosure about it to anybody.

7. By its ET3 Grounds of Resistance (which had been filed despite this being an Interim Relief hearing) the Respondent asserted that during the 2nd quarter of 2024 the Claimant's supervisor had reported problems about the Claimant to senior management, relating to her work ethic and behaviour, not performing duties, ignoring instructions, leaving early and arriving late, arguing with co-workers and smoking without her supervisor's permission. This, the Respondent asserts, was a reason for dismissal that had nothing whatsoever to do with any possible disclosure. It also made the point that the Claim Form contained no details of the any disclosure.

Findings of Fact

8. Against that background the Claimant took the Oath and gave evidence. She had not prepared a witness statement, but she did respond to questions that I put to her to explore and clarify what she was claiming. Accordingly, I have made the following findings of fact, on the balance of probabilities:

8.1. The Claimant started work at Jarmark Erdington Ltd, a grocery, in the role of shop assistant in the Respondent's meat section, on 26th September 2022. She felt that a colleague, Justyna, had talked about her behind her back and that her supervisor, Krystof, had accused her of stealing meat and would not let her go outside to smoke.

8.2. In answer to my question whether she had ever raised a grievance or made a complaint, or reported anything, the Claimant told me, and accordingly I find, that in mid-June 2024 she told Patrycja, the store boss, that Krystof had said he was watching her on the store CCTV all the time because he thought she was stealing meat. The Claimant was assured by Patrycja that she would speak to Daniel Szkwarek, the managing director about the Claimant's concern. Patrycja subsequently told her that Daniel said he would keep an eye on Krystof. The Claimant agreed that it was ok for a supervisor to view CCTV to ensure that staff were not stealing from the store.

8.3. On 3rd July 2024 the Claimant was signed off for 1 month by her doctor for stress at work, until 2nd August 2024. She said the behaviour of Justyna and Krystof as the reasons why she had become stressed. The Claimant said she gave the Fitnote to Wioleta on 3rd July 2024 before heading home.

8.4. On 5th July 2024 the Claimant received a letter terminating her employment, effective on 19th July 2024. The letter did not provide a

reason for the termination. Accordingly, as at her effective date of termination on 19th July 2024 the Claimant had accrued 22 months and 1 weeks' service as the Respondent's employee. She did not accrue the 24 months' service necessary an unfair dismissal claim pursuant to s98(4) **ERA**.

9. Having set out the relevant facts in this case, it is now necessary to consider the relevant law, as follows:

The Legal framework

10. The starting point for the legal analysis are the relevant provisions (for this Claim) of s128 **ERA** which provides:

> *'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 that the reason (or if more than one the principal reason) for the dismissal is … specified in s103A, may apply to the tribunal for interim relief.'*

11. The question to be considered upon an application for interim relief is set out in s129 **ERA**:

> *'129. Procedure on hearing of 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 that the reason (or if more than one the principal reason) for the dismissal is … specified in s103A, …."*

12. Interim relief can therefore be ordered where the Tribunal finds that it is likely that a final hearing will decide that the reason (or principal reason) for dismissal was the employee having made protected disclosures contrary to s103A **ERA**. The meaning of the word 'likely' for these purposes has been considered in several cases.

13. In **Taplin v C Shippam Ltd** [1978] IRLR 450 EAT, decided under similar provisions relating to interim relief applications in dismissal for trade union reasons, Mr Justice Slynn held that it must be shown that the Claimant has a 'pretty good chance' of succeeding, and that that meant something more than merely on the balance of probabilities.

14. That approach to the word 'likely' has been followed in subsequent decisions, **Dandpat v University of Bath** (2009) UKEAT/0408/09 at para 20, **Ministry of Justice v Sarfraz** [2011] IRLR 562 at paras 16–17 and **His Highness Sheikh Khalid Bin Saqr Al Qasimi v Robinson** UKEAT/0283/17/JOJ, at paras 8–11.

15. A 'pretty good chance' of success was interpreted in **Sarfraz** as meaning '*a significantly higher degree of likelihood than just more likely than not*'. Underhill P stated that, '*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*' (para 16) and or '*something nearer to certainty than mere probability*' (para 19).

16. There are policy reasons why the threshold should be thus. Underhill P said, in **Dandpat** '*If relief is granted the Respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing and pay the claimant, until the conclusion of proceedings: that is not a consequence that should be imposed lightly*' (para 20).

17. The Claimant must show the necessary level of chance in relation to each essential element of s103A **ERA** automatic unfair dismissal, see **Simply Smile Manor House Ltd and ors v Ter-Berg** [2020] ICR 570. This means that the Claimant must therefore show that it is likely that the Tribunal at the final hearing will find each of the following:

    17.1. she disclosed information to the appropriate entity;
    17.2. she believed that the information tended to show one or more of the matters itemised in the ERA 1996 s 43B(1);

17.3. she believed the disclosure(s) was or were made in the public interest

17.4. her belief in both these matters was reasonable; and

17.5. the disclosure(s) was or were the principal cause of the dismissal.

18. 'Protected disclosure' is defined in s43A **ERA**: '*In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H*.'

19. 'Qualifying disclosures' are defined by s43B **ERA**, as follows:

> *"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.".*

20. The disclosure must be a disclosure of information, of facts rather than opinion or allegation **Cavendish Munro Professional Risk Management v Geldud** [2010] ICR 24. The disclosure must, considered in context, be sufficient to indicate the legal obligation in relation to which the Claimant believes that there has been or is likely to be non-compliance. 'Legal' must be given its natural meaning. A belief that an employer's actions were morally or professionally wrong, or contrary to its own procedures, may very well not be sufficient, **Eiger Securities LLP v. Korshunova** [2017] IRLR 115, EAT, per Slade J: '*Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation*'.

21. The test for "reasonable belief" is a two-stage test, **Chesterton Global Ltd v Nurmohamed** [2017] IRLR 837, at para 29. The two stages are: (a) Did the Claimant have a subjective genuine belief that the disclosure (i) tended to show one of the matters set out in s.43B(1) ERA, and (ii) was in the public interest? If so, (b) Did the Claimant have objectively reasonable grounds for so believing in both such cases?

22. In determining whether the reason for the Claimant's dismissal was her alleged disclosure, it is not sufficient for the disclosure to be "in the employer's mind" or for it to have influenced the employer. The Tribunal must consider whether that disclosure was the "sole or principal reason" for her dismissal, **Eiger**.

23. Underhill LJ said, in **Chesterton** that the meaning of '*in the public interest*' was not defined by Parliament. However, the essential distinction to be drawn was "between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest". Underhill LJ also explained at paras [36] and [37]:

> *'[36] the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers…*
>
> *[37] "…where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case".*

24. The protected disclosure must be the sole or principal reason for the dismissal.

Conclusions

25. The are a number of matters to consider.

26. Does the Claim Form assert that a qualifying disclosure was made? Aside from the 'tick box', it does not. It does refer to an employee that the Claimant asserts was an illegal worker, but there is no suggestion that the Claimant complained about that, or 'blew the whistle' on that employee's illegal status. Despite being given the chance to expand on this matter, the Claimant made no further reference to it. In evidence that Claimant referred to a complaint that she made about her supervisor, who had told her he was watching her on the store's CCTV as he suspected her of stealing from the store's meat section. However she did not suggest that this complaint met any of the qualifying conditions set out in s43B(1)(a-f) **ERA** and she did agree that it was appropriate for a store supervisor to monitor CCTV in order to prevent theft. Whilst I do think it likely that the Claimant disclosed information that she believed to be true, it is not likely that a Tribunal will conclude that that complaint was in the public interest. I cannot conclude that it is likely that a Tribunal will conclude that a qualifying disclosure was identified in the Claim Form or was made during the Claimant's employment.

27. Even if the Claimant was able to establish that she made a qualifying disclosure, it is not likely that this was the reason or principal reason for her dismissal. The complaint was made in mid-June, and on the Claimant's own evidence was resolved by the managing director stating he would keep an eye on the supervisor concerned.

28. In its ET3 response the Respondent has given a wide range of reasons why it terminated the Claimant's employment, said to be relating to her work ethic and behaviour, not performing duties, ignoring instructions, leaving early and arriving late, arguing with co-workers and smoking without her supervisor's permission. I did not hear any evidence on these points from the Respondent and the letter of termination did not provide a reason. This is not uncommon for employees that have not accrued qualifying service for an unfair dismissal claim. It is clear however that the Respondent, at trial, will rely on the Claimant's conduct for the

reason it dismissed her. This will need to be tested at trial. As a potentially fair reason is being relied on, which has nothing whatsoever to do with any disclosure made, I cannot conclude today that it is likely that a Tribunal will find that the Claimant's dismissal was because she made a qualifying disclosure.

29. Accordingly the Claimant's application for interim relief is refused.

30. In this hearing my task was to determine whether it was likely that a qualifying protected disclosure was made. I have found that it cannot be said that it was likely. Upon examination it appeared that the contrary was the case: it was likely that no qualifying disclosure was made. If this was found to be the case, the Claimant's remaining claim of unfair dismissal pursuant to s98(4) would be at risk because (i) the ACAS early conciliation process was not followed and (ii) the Claimant did not have the qualifying service to bring such a claim.

31. That issue could not be determined within the scope of the hearing today. Accordingly I have listed a public preliminary hearing to determine whether the Claimant's claim should be struck out. The directions necessary to determine this have been sent to the parties by way of a separate Case Management Order.

18th October 2024

Employment Judge Gidney