EMPLOYMENT TRIBUNALS

Claimant: Mr C McCormack

Respondent: Adviser Services Holdings Limited

HELD AT: Manchester via CVP **ON:** 3 July 2024

BEFORE: Employment Judge Johnson
(sitting alone)

REPRESENTATION:

Claimant: In person
Respondent: Ms Joanne Twomey (counsel)

JUDGMENT

(1) The application for interim relief does not succeed.

REASONS

Introduction

1. This is the second claim presented by the claimant against the respondent during 2024, (the first claim was issued under case number 2402428/2024). It was presented on 29 May 2024 and in this case the claimant brought complaints of automatic unfair dismissal because of making a protected disclosure contrary to section 103A Employment Rights Act 1996 (ERA); 'ordinary' unfair dismissal and an application for interim relief.

2. The application for interim relief hearing was accepted by the Tribunal and listed for today.

3. The Tribunal is yet to present a response and it is currently due to be presented by 12 July 2024. However, there is an application made by the respondent seeking an extension of time to present the response and this will be dealt with following the delivery of this judgment today.

4. The respondent has already presented a response in relation to the first claim brought under case number 2402428/2024 and this is listed for a preliminary hearing case management (PHCM) on 4 November 2023 a to identify the issues and give case management orders. I have been asked to consider combining the two claims together so that both can be considered at that PHCM. This will be considered following the delivery of this judgment today.

5. The claimant has also made an application today under Rule 50(3) seeking an order that his name be anonymised using initials not related to his name. The respondent had not received notice of this application prior to this hearing beginning and this matter is subject to further case management orders so that the respondent can express a view and the Tribunal will give consideration can be given at a later date either on the papers or at another hearing.

6. In the meantime, as the judgment and reasons have been given orally, the promulgation of this decision will be delayed until such time as the question of the anonymity application is determined.

7. The claimant produced hearing bundle of some 432 pages including the proceedings in this claim, a witness statement, relevant correspondence and a diagnosis of his ADHD condition earlier this year.

8. The respondent also produced a hearing bundle of some 685 pages which in many ways was a duplication of the claimant's bundle, which also included the first claim and a witness statement from the disciplinary investigating manager Alan Sambrook, which was also updated so that bundle page references were included and this provided before the hearing began.

9. Ms Twomey also provided a skeleton argument this morning which was helpful as it summarised the law and articulated how and why the respondent challenged the claimant's application for interim relief. The claimant questioned why this document was allowed to be submitted shortly before the hearing and in explained that it was not evidence but a summary of the arguments being advanced by the respondent's representative and this assisted both the claimant and myself in understanding the respondent's position.

10. I observed that the claimant was a litigant in person and moreover, he had recently been diagnosed with ADHD. I applied the principles outlined within the overriding objective under Rule 2 of the Tribunals Rules of Procedure and the relevant chapters of the Equal Treatment Bench Book relating to unrepresented parties and neuro diverse conditions. The claimant confirmed that it would assist if he could attend the CVP hearing with his camera switched off. To ensure that there were no concerns on the part of the respondent and that the claimant was sitting alone and in a quiet space, he initially joined with his camera and then once I was satisfied that no issues arose which might prejudice the hearing, I permitted him to participate in the hearing with his camera switched off.

11. I am grateful to Ms Twomey for adopting a pragmatic approach to this issue and not objecting to this adjustment which supported the claimant and allowed him to participate effectively at the hearing today.

12. I reminded the parties that my task at this hearing was not to hear any live evidence or to make any findings of fact. It was to consider the relevant written documents and what parties told me in oral submission (by which I mean he told me why he believed his claim of automatic unfair dismissal would succeed) and then to decide whether the claimant had established that it was likely that at the final hearing the Tribunal would find in his favour on the automatic unfair dismissal complaints under section 103A of the ERA.

The claimant's case

13. 5 The claimant referred to five allegations of protected disclosures made to the respondent and/or Financial Conduct Authority (FCA):

    a) 25 October 2023

    b) 31 January 2024

    c) 8 March 2024

    d) 25 March 2024

    e) 16 April 2024.

14. The claimant confirmed that the first two allegations (a) and (b), were not his strongest allegations of protected disclosures and while he wished to retain them within the overall claim, he confirmed that for the purposes of the application for interim relief, he would only rely upon the most recent 3, namely (c), (d) and (e).

15. He noted that the alleged disclosure made on 8 March 2023, involved an email sent that day to Stuart Cresswell (director), having copied in Michael Couzens (CEO), Andy Ferns (previous investigating officer in claimant's grievance), HR main email, Graham Barnett (the claimant's line manager) and Ian Mackenzie (Mr Barnett's manager). He alleged that senior managers were behaving improperly in relation to bank sums which he believed belonged to another business and deleting client files relating to a complaint about investment valuations. It discussed other matters and did not appear to go into detail of what he was alleging.

16. The disclosure on 25 March 2024 involved an email/message being logged on the FCA website. I was only shown an acknowledgement message from the FCA and subsequent correspondence between Mr Couzens where he declined to provide details of what had been disclosed. It is understood that the details of the FCA message are still available and can be disclosed as part of later disclosure orders within these proceedings.

17. The final disclosure raised in this application took place on 16 April 2024 and arose from a discussion in a '1-2-1' meeting between the claimant and Mr Burnett. In an email sent the following day, Mr Burnett referred to an investment scheme that had been raised by the claimant and which he had alleged was a '*Ponzi scheme'* (which I understood to be a commonly used term by those

criticising financial services and referencing a form of fraud named after the 1920s businessman Charles Ponzi and which involves early investors being provided with the promised high returns by using the funds obtained from later investors). However, it was recorded that the claimant did not want to disclose anything further about his concerns because he had raised this matter with the FCA.

18. The claimant then explained that the following day on 19 April 2024, Mr Sambrook gave him notice of suspension and a number of allegations made against him in the suspension letter included reference to failing to cooperate with a management instruction relating to requests to provide evidence in support of his allegations. This process resulted in Mr Sambrook investigating the allegations and deciding on 23 May 2024, that he should be dismissed for gross misconduct.

19. The claimant argues that the additional allegations arose from Mr Couzens investigating his Linked in details on social media and identifying a personal business which was believed to be operating in competition to the respondent and contrary to the claimant's contract of employment. Essentially, he argued that Mr Couzens was building a case against the claimant which could allow the respondent to plausibly deny that dismissal was unconnected with the disclosures that had previously been made.

The respondent's case

20. Once I had confirmed that I would not be considering the first two allegations of protected disclosures at (a) and (b) following the claimant's concession, Ms Twomey addressed me upon the remaining 3 alleged protected disclosures and why the real reason for the decision to dismiss the claimant related to matters unconnected with the disclosures.

21. In terms of allegation (c), Ms Twomey argued that the information disclosed within the email dated 8 March 2024 was nothing more than a *'bare allegation'* and this was inconsistent with a valid protected disclosure because it must convey facts to the relevant person and the claimant did not do this in relation to this allegation. He could not be considered to have demonstrated a reasonable belief that the disclosure tended to show one of the reasons under section 43B(1) as he had provided *'no evidence, no information, no analysis'.*

22. In relation to allegation (d), Ms Twomey argued that the claimant had failed to articulate what information had been disclosed to the FCA on 25 March 2024 to either the respondent or the Tribunal today and it was impossible to conclude that this amounted to a protected disclosure. She noted that the FCA did not subsequently contact the respondent and this suggested that whatever had been disclosed/supplied to the FCA, did not cause them to be sufficiently concerned that a real danger arose from potential conduct within the respondent's business.

23. Ms Twomey then made submissions in relation to allegation (e) and argued that this alleged disclosure on 16 April 2024 amounted to another bare allegation with

colourful allegations of a fraud and a *'Ponzi scheme'* being mentioned, but with no facts being alleged in support.

24. The respondent's case then turned to the decision to dismiss and the question of whether the claimant was dismissed for reasons connected with his alleged protected disclosures. She made reference to Mr Sambrook's statement and discussed the allegations made against the claimant and what was the subject of the disciplinary case which gave rise to his suspension and disciplinary investigation and ultimately his dismissal.

25. She noted that the allegations in the disciplinary process which could be attributed to the alleged protected disclosures, which were the alleged failure to comply with management instructions and/or relationships with colleagues were no more than matters of misconduct. However, the allegations relating to the claimant's personal business and which were considered to have been proven by Mr Sambrook were matters of gross misconduct and the actual reason for the dismissal. While these matters of gross misconduct had arisen from Mr Couzens' search of the claimant's Linked in pages, the information that had been found amounted to matters of conduct which could reasonably be investigated in their own right. She added that Mr Sambrook was not involved with the earlier disclosures and had minimal knowledge of them, thereby ensuring his independence from those so involved within the respondent company.

Relevant Legal Framework

The law relating to interim relief generally

26. The application for interim relief was brought under section 128 of the ERA. The test for whether it succeeds or not appears in section 129(1) as follows:

'(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…103A…

27. In assessing the prospects of success, I had regard to the legal framework which applies to the substantive complaints of automatic unfair dismissal and as provided by the guidance given in *Hancock v Ter-Berg & anor* UKEAT/0138/19/BA.

28. Moreover, I noted the guidance given in *Taplin v C.Shippam Limited* [1978] ICR 1068 and that when making an order for interim relief, a Tribunal should be satisfied that the relevant complaint has a *'…pretty good chance of succeeding'.* This was revisited by Eady HHJ (as she then was), and who helpfully provided a summary explaining the challenges which a Judge is confronted by in an

application for interim relief and what is expected from the decision maker. Accordingly, I was reminded that:

a) my decision today was a summary one,

b) that I must do the best I can based upon the available materials and the short notice involved,

c) avoid findings that will bind the hands of the Tribunal at a future hearing,

d) adopt what can be described as an *'impressionistic'* approach based upon how the matter looked to me,

e) consider whether the claimant has a *'pretty good chance of succeeding',*

f) explain my conclusion in a way that provides the 'gist' and which is *'not overly formulaic'.*

Dismissal because of making a protected disclosure

29. Parts IVA of the ERA defines a protected disclosure within section 43B with subsequent sections dealing with relevant persons to whom the protected disclosure can be made.

30. The key requirements are that the claimant must have made a disclosure of information rather than a bare allegation, that he must reasonably have believed that the information tended to show one of the matters set out in section 43B(1), and that he reasonably believed that his disclosure was made in the public interest. If those requirements are met, a disclosure to an employer will qualify for protection.

31. If a protected disclosure has been made, the complaint will succeed only if the reason or principal reason for dismissal is that the employee made a protected disclosure. Where the decision is that of one person it is the sole or principal reason in her mind which matters. It is not enough for any protected disclosure to have had a material influence if it is neither the sole nor the main reason for dismissal. However, this is subject to the decision of the Supreme Court in *Royal Mail Ltd v Jhuti* [2020] 3 All E.R. 257 where at paragraph 62, it says that

' … if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason.'

Conclusions

32. Based upon the claim form, grounds of complaint, the witness statements and all of the documentary evidence available to me and what the claimant and Ms Twomey told me, I drew the following conclusions:

Dismissal because of making a protected disclosure

33. I was not satisfied that it is likely; in the sense of there being 'a pretty good chance of success' that the claimant would succeed with his claim of dismissal because of making a public interest disclosure.

34. The claimant may ultimately be able to demonstrate that some of the alleged protected disclosures satisfied the requirements of section 43B, but for the purposes of the application seeking interim relief, I am not satisfied that they provided more than bare allegations. It may be that a full consideration of the evidence at a final hearing will on balance persuade a Tribunal that there were protected disclosures under section 43B, but that require the provision of relevant witness evidence and documents and a full consideration of that evidence.

35. Additionally, in relation to the dismissal, I was concerned that while in terms of chronology and proximity to the alleged disclosures, the decision to suspend, investigate and dismiss the claimant may be sufficiently connected to satisfy the requirements of section 103A, the respondent has an arguable case that there were other reasons for the dismissal. The Tribunal may conclude at the final hearing that the decision maker was misled by senior management as to the matters under investigation and what was considered to be the primary reason for the disciplinary process and which tainted his final decision to dismiss.

36. As described in paragraph 60 of *Jhuti* above, *'…it is the court's duty to penetrate through the invention rather than to allow it to infect its own determination.'* But it is in the interests of justice that such a process takes place following the Tribunal having considered all available evidence. This is not an unequivocal case and uncertainties as to the real reason for the dismissal remain. Accordingly, this is a matter to be considered at a final hearing once all relevant documentation has been disclosed and witness evidence has been exchanged.

37. Accordingly, while I am not satisfied that all elements of a complaint of automatic unfair dismissal under section 103A are likely to succeed, this is not to say that there is not an arguable case. It is a matter which requires further case management and the provision of oral evidence.

Employment Judge Johnson

Date: 4 July 2024
(Revised: 5 November 2024 following determination of Rule 50 application)

JUDGMENT AND REASONS SENT TO THE PARTIES ON

8 November 2024

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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