EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Nicki-James Shepherd	AND	IQ Healthtech Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth ON 3 January 2024

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: Mr R Holland of Counsel
For the Respondent: Mr A MacPhail of Counsel

JUDGMENT

The judgment of the tribunal is that the claimant's application for interim relief is dismissed.

RESERVED REASONS

1. In this case the claimant Mr Nicki-James Shepherd claims that he has been unfairly dismissed, and that the principal reason for this was because he had made a protected disclosure. This judgment deals with the claimant's application for interim relief. The respondent contends that the reason for the dismissal was redundancy. It opposes the interim relief application.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform. A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents to which I was referred are in the claimant's statement and bundle of 22 pages, and the respondent's bundle of 132 pages, the contents of which I have recorded.
3. I have heard from Mr Holland on behalf of the claimant, and I have heard from Mr MacPhail on behalf of the respondent. I have considered the parties' pleadings and other relevant documentary evidence. This includes the claimant's particulars of claim, and written witness statements from Ms Liz Blake and Dr Tamas Hickish which have been filed on

behalf of the respondent. I have not made any findings of fact because this is not required by the statutory test.

4. A summary of the general background is as follows. The claimant Mr Nicki-James Shepherd suffers from cerebral palsy and uses a wheelchair. He was employed by the respondent as an IT Engineer from 3 July 2023 until 8 December 2023. He worked night shifts, and his role involved answering IT queries from medical professionals. Certain priority tickets required input from specialist personnel throughout the night. The claimant says he had general concerns about the consequential updating of prescriptions (including prescriptions relating to chemotherapy) by people who might have been suffering from fatigue, and that this posed a public risk to health and safety. The claimant says that he raised these concerns with his managers, and that on 5 December 2023 he sent an email to the Health and Safety Executive (HSE) explaining what he perceived to be this serious threat to the general public. The claimant says that he copied this email to a manager of the respondent, namely Mr Lawrenson. The claimant was dismissed with immediate effect on 8 December 2023.
5. The respondent's position is as follows. It says that the respondent's business was suffering significant financial difficulties, and that during November 2023 it held a number of Senior Leadership Team meetings. These meetings discussed inter alia the need to take immediate steps to protect the respondent's financial position, including making redundancies. In total the respondent made seven employees redundant. Five of these, including the claimant, did not have two years' service and statutory protection against general unfair dismissal and were all dismissed without a consultation process and with immediate effect. Two other employees were dismissed by reason of redundancy following a more detailed consultation process.
6. The respondent denies that the claimant made any protected public interest disclosures. In particular, Mr Lawrenson denies having received a copy of the email to the HSE. In any event Ms Blake and Dr Hickish, who made the decision to terminate the employment of the claimant and the other employees, had no knowledge of the email to the HSE, or any other disclosures.
7. The claimant's position is rather vague as to whether he relies on one or more protected public interest disclosures which he asserts caused his dismissal. He clearly relies on the disclosure to the HSE (which the respondent denies knowing anything about). It is not clear whether he relies on any other claimed disclosures to his managers, and if he does do so, then these have not been set out with any clarity.
8. The respondent denies that any such complaints or disclosures were made. The respondent asserts that the position is no more complicated than this, namely that the respondent was in significant financial difficulty and needed to make a number of redundancies, and the claimant's employment was terminated by reason of redundancy. It was done so summarily without any detailed procedure simply because the claimant, along with four other employees in the same position, did not enjoy statutory protection against general unfair dismissal. The respondent denies that the claimant made any protected disclosures, but more particularly denies that the making of any one or more protected public interest disclosures was the reason, or if more than one the principal reason, for the claimant's dismissal.
9. Having set out the above, I now apply the law.
10. Under section 43A of the Employment Rights Act 1996 ("the Act"), a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that 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, or is likely to be deliberately concealed.

11. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person.
12. Under Section 43F(1) of the Act a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker – (a) makes the disclosure in good faith to a person prescribed by an order made by the Secretary of State for the purposes of this section, and (b) reasonably believes – (i) that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and (ii) that the information disclosed, and any allegation contained in it, are substantially true. Under the Public Interest Disclosure (Prescribed Persons) Order 1999 the Schedule of prescribed persons includes the Health & Safety Executive ("the HSE").
13. Under section 48(2) of the Act, on a complaint to an employment tribunal it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
14. Under section 103A of the Act, an employee is to 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.
15. Under section 128 of the Act: (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(d), 102(1) 103 or 103A, … may apply to the tribunal for interim relief.
16. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
17. I have considered the cases of London City Airport Ltd v Chacko [2013] IRLR 610 EAT; Ryb v Nomura International plc ET 3202174/09; Taplin v C Shippam Ltd [1978] ICR 1068 EAT; Ministry of Justice v Sarfraz [2017] EAT and Dandpat v University of Bath and anor EAT 0408/09; Smith v Hayle Town Council [1978] ICR 996CA; Ross v Eddie Stobart Ltd EAT 0068/13; and McConnell and Anor v Bombadier Aerospace/Short Brothers Plc (No 2) [2009] IRLR 201 NICA.
18. The role of the Employment Tribunal in considering an application for interim relief requires the tribunal to carry out an "expeditious summary assessment" as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party. This necessarily involves a far less detailed scrutiny of the parties' cases than will ultimately be undertaken at the full hearing – see London City Airport Ltd v Chacko. The statutory test does not require the tribunal to make any findings of fact – see Ryb v Nomura International plc. It must make a decision as to the likelihood of the claimant's success at a full hearing of the unfair dismissal complaint based on the material before it, which will usually consist of the parties' pleadings, the witness statements and any other relevant documentary evidence. The basic task and function is to make "a broad assessment on the material available to try to give the tribunal a feel and to make a prediction about what is likely to happen at the eventual hearing before a full tribunal."
19. When considering the "likelihood" of the claimant succeeding at tribunal, the correct test to be applied is whether he or she has a "pretty good chance of success" at the full hearing – see Taplin v C Shippam Ltd. The EAT confirmed that the burden of proof in an interim relief application was intended to be greater than that at the full hearing (where the tribunal need only be satisfied on the "balance of probabilities" that the claimant has made out his or her case being the "51% or better" test). For interim relief applications the EAT ruled out alternative tests such as a "real possibility" or "reasonable prospect" of success, or "a 51% or better chance of success".
20. This approach has been endorsed by the EAT in Dandpat v University of Bath and anor and in Chacko. More recently in Ministry of Justice v Sarfraz the EAT held that "likely" was

nearer to certainty than mere probability - Underhill J as he then was stated in paragraph 16: “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.”

21. It was also held in Dandpat at paragraph 20 that: “Interim relief is a draconian measure. It runs contrary to the general principle that there be no compulsion in personal service. It is not a consequence that should be imposed likely.”
22. Where a claimant has less than the unfair dismissal statutory qualifying period of two years’ service, at the final hearing the burden of proof will be on the claimant not only as regards the protected disclosures relied upon, but also in respect of the reason for dismissal (see Smith and Ross).
23. Applying McConnell, if the claimant’s dismissal occurred within the context of a genuine redundancy situation, then no interim relief can be granted. Interim relief is only available if a protected disclosure is the reason or principal reason for the dismissal. It is not available if a protected disclosure is the reason or principal reason for the relevant individual being selected for redundancy.
24. In my judgment the claimant faces a number of significant difficulties with regard to this application for interim relief. These are as follows: (i) the claimant had less than two years’ continuous service and the burden of proof is on the claimant to prove at a full hearing of his unfair dismissal claim that the reason, or if more than one the principal reason, for his dismissal, was because he made one or more protected public interest disclosures; (ii) the claimant’s claim is a little confused as to exactly what protected public interest disclosures are relied upon; (iii) the claimant clearly relies on the disclosure to the HSE dated 5 December 2022, but the respondent denies that it had received or knew about that disclosure, which could not therefore have been the reason for the claimant’s dismissal; (iv) if the claimant relies on earlier disclosures as well, these have not been set out with any clarity, and are disputed by the respondent as well; (v) it is clear from the relevant documents that the respondent was in financial difficulty and had been considering redundancies amongst its employees as a necessary step to save money; (vii) seven employees (including the claimant) were then made redundant; (viii) five of these seven employees (including the claimant) were dismissed summarily, simply because they had less than two years’ service and did not enjoy statutory protection against general unfair dismissal; (ix) it is clear that the reason for the claimant’s dismissal was redundancy; and (x) even if (which the respondent strongly denies) the claimant’s selection for redundancy was caused by the making of any protected public interest disclosures, applying McConnell, if the claimant’s dismissal occurred within the context of a genuine redundancy situation, then no interim relief can be granted.
25. In light of these difficulties in my judgment it cannot be said that the claimant has a “pretty good chance of success” in succeeding with this unfair dismissal claim at a full hearing. Applying Sarfraz, the test of whether the claimant is “likely” to succeed at the hearing must be nearer to certainty than mere probability. That is not the case in the circumstances, and accordingly I dismiss the claimant’s application for interim relief.
26. Further case management orders have now been made today in connection with the claimant’s ongoing claim.

Employment Judge N J Roper
Date: 3 January 2024

Judgment sent to Parties: 5 January 2024

For the Tribunal Office

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