EMPLOYMENT TRIBUNALS

Claimant: Igor Vaintraub

Respondent: Jusu Brothers Ltd

Heard at: by CVP from the Central London Tribunal **On: 18 March 2024**

Before: Employment Judge Woodhead

Appearances

For the Claimant: Representing himself

For the Respondent: Mr Roberts (Solicitor) with Mr Romain Mordrelle

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 Section 100 (1) (a) or (b) or Section 103A of the Employment Rights Act 1996 ("the ERA").**

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

THE ISSUES

1. The Respondent operates a restaurant which is owned by Mr Romain Mordrelle. Mr Miroslaw Zalewski was at the relevant times the General Manager at the Respondent.

2. The Claimant was employed by the Respondent as a Sous Chef from either 23 July 2023 (on the Claimant's case) or 24 July 2023 (on the Respondent's case).

3. It is agreed that the Claimant's employment came to an end on 25 January 2024 as a result of the Claimant's dismissal by the Respondent.

4. The Claimant raised a claim with the Employment Tribunal on 30 January 2024 which included an application for Interim Relief on the following grounds:

4.1 Section 100 (Health and safety cases) of the ERA

4.2 Section 103A (Protected disclosure) of the ERA (coupled with Sections 43A and 43B).

THE HEARING

5. This claim was listed for a hearing of one day.

6. I was provided with:

6.1 The Claimant's ET1

6.2 The Respondent's ET3 and grounds of resistance

6.3 A bundle prepared by the Respondent which included various documents including WhatsApp messages and email (14 pages, "**the Respondent's Bundle**")

6.4 The Respondent's skeleton arguments (four pages)

6.5 A letter from the Claimant to the Respondent dated 25 January 2024 raising his appeal against dismissal (3 pages)

6.6 The Respondent's response to the Claimant's appeal dated 1 February 2024 (1 page)

6.7 An appeal decision by Tercus HR of 26 February 2024 (6 pages)

6.8 A letter from the Claimant to the Tribunal of 8 March 2024 (16 pages referring to exhibits totalling 63 pages of amongst other things photos, emails, a sick note, rotas/temperature check sheets, and WhatsApp messages (the "**Summary of IR Application**")

6.9 An Annex A with the Claimant's medical documents.

7. The Claimant did not want me to review the Respondent Bundle or Skeleton arguments because they were submitted on Thursday 14 March 2024 rather than Wednesday 13 March 2024 (the notice of hearing having said "*If you intend to rely on any documents at the hearing, you must send copies to all other parties not later than 3 working days prior to the hearing and bring 3 copies with you.*"). I determined that the Claimant was not prejudiced by the short delay and that it was in the interests of justice for me to consider those documents.

8. The Claimant asked me to consider converting the hearing into a hearing for a final determination of the case in light of health concerns that he raised and because he said that because of his serotonin syndrome he would not live to see justice. I did not consider that it was either practicable or in the interests of justice to convert this into a final hearing of the case.

9. I gave each party the opportunity to address me verbally on the application, which they did. The Claimant confirmed that his Summary Of IR Application

contained the details of what he relied upon (including the Exhibits and Annex A) and the Respondent confirmed that the Skeleton arguments contained what the Respondent relies upon (coupled with the Respondent's Bundle).

THE LAW

10. Section 100 (Health and safety cases) ERA provides:

> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—*
>
> *(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,*
>
> *(b) being a representative of workers on matters of health and safety at work or member of a safety committee—*
>
> *(i) in accordance with arrangements established under or by virtue of any enactment, or*
>
> *(ii) by reason of being acknowledged as such by the employer, the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,*
>
> *(c) being an employee at a place where—*
>
> *(i) there was no such representative or safety committee, or*
>
> *(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,*
>
> *he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*
>
> *(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*
>
> *(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.*
>
> *(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.*

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

11. Section 103A (Protected disclosure) ERA provides:

An employee who is dismissed shall be regarded for the purposes of this Part 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.

12. Section 128 (Interim relief pending determination of complaint) ERA 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.

(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).

(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4)The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

13. Section 129 (Procedure on hearing of application and making of order) ERA provides:

(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 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.

(2) The tribunal shall announce its findings and explain to both parties (if present)—

(a) what powers the tribunal may exercise on the application, and

(b) in what circumstances it will exercise them.

(3)The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

(a) to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or

(b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(4) For the purposes of subsection (3)(b) "terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed" means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6) If the employer—

(a) states that he is willing to re-engage the employee in another job, and

(b) specifies the terms and conditions on which he is willing to do so, the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

> *(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.*
>
> *(8) If the employee is not willing to accept the job on those terms and conditions—*
>
> *(a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and*
>
> *(b) otherwise, the tribunal shall make no order.*
>
> *(9) If on the hearing of an application for interim relief the employer—*
>
> *(a) fails to attend before the tribunal, or*
>
> *(b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3), the tribunal shall make an order for the continuation of the employee's contract* of employment.

14. A disclosure being on the Respondent's mind is not sufficient to satisfy the causation test – **Eigar Securities LLP v Korshunova [2017] IRLR 115**.

15. A qualifying disclosure is the disclosure of information (**Kilraine v LB Wandworth [2018] ICR 1850**), which in the reasonable belief of the worker (a) in the public interest and (b) tends to show one or more of six things – criminal offence, failure to comply with a legal obligation; miscarriage of justice; health and safety; environmental damage, or one of the above being deliberately concealed. The Tribunal must assess whether what was said is sufficiently clear to meet those tests.

16. The Claimant must show that he had a genuine and a reasonable belief that the disclosure was in the public interest but that does not have to be his motive – **Chesterton Global Ltd v Nurmohamed [2018] ICR 7311**. Here it was held that a Tribunal will need to consider all of the circumstances but useful tools might be questions such as numbers affected, the nature of interests, the nature of wrongdoing and the identity of the alleged wrongdoer. Only once a Claimant can show one or more qualifying disclosures can they then go on to argue that the reason (or the principal reason) for any dismissal was caused by that disclosure(s).

17. Interim relief can 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. The test for interim relief applications was initially set out in the decision in the case of **Taplin v Shippam Ltd [1978] ICR 1068 EAT** which defined the word "likely" as a "pretty good chance of success". That test has been reaffirmed in a number of other cases including **Dandpat v The University of Bath and Ors UKEAT/0408/09**.

18. I also remind myself that the word "likely" in this context does not mean simply more likely than not - that is at least 51% - but connotes a significantly higher degree of likelihood - ***Ministry of Justice v Sarfraz*** **[2011] IRLR 562**.

19. The Claimant must show a pretty good chance of succeeding on each required element of his claim. In other words he must show:

    19.1 **As regards Section 100 ERA** the reason (or, if more than one, the principal reason) for his dismissal was that he was (my emphasis):

    19.1.1 designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work and that he carried out (or proposed to carry out) any such activities; or

    19.1.2 being a representative of workers on matters of health and safety at work or member of a safety committee (i) in accordance with arrangements established under or by virtue of any enactment, or (ii) by reason of being acknowledged as such by the employer, he performed (or proposed to perform) any functions as such a representative or a member of such a committee.

    19.2 **As regards Section 103A**: that there is a pretty good chance that there was a protected disclosure or disclosures as well as showing that there is a pretty good chance that the disclosure or disclosures, if any, was or were the principal reason for his dismissal.

20. The standard of proof required is greater than the balance of probability test to be applied at the main hearing. The EAT recognised in the **Dandpat** case that such a high burden of proof is necessary as the granting of such relief will prejudice a Respondent who will be obliged to treat the contract as continuing until the conclusion of the proceedings. Such a consequence should not be imposed lightly.

21. It is not enough to show that the Claimant could possibly win on the balance of probabilities. I need to be satisfied on the evidence before me that it is likely that each element of the 43B definition is likely to be met, and that the final Tribunal is likely to find that the principal reason for dismissal was the disclosure or the matters in Section 100 (1) (a) or (b) of the ERA.

22. The burden of proof is on the Claimant in this application.

23. With regard to the reason for a dismissal, in ***Abernethy v Mott Hay and Anderson*** **[1974] ICR 323** the Court of Appeal identified this as what was in the mind of the employer when it decided to dismiss the employee.

24. When making a decision on an interim relief application I do not make any formal findings of fact which are intended to be binding at any later stage of the proceedings. I am assessing, amongst other things, the likelihood of disputed facts being proven in the Claimant's favour at the final hearing. There is only limited material available to a judge on an interim relief application but my decision has to be based on whatever material is available.

ANALYSIS AND CONCLUSIONS

25. In coming to my decision, I must take an impressionistic view of the

documentary evidence before me, noting that no oral evidence has been given on oath or tested by cross examination. I have therefore carried out a summary assessment of the material before me to form a view as to whether the Claimant is likely to succeed in his claim.

26. As regards Section 100 ERA, the Respondent disputes that the Claimant was either (a) designated by the Respondent to carry out activities in connection with preventing or reducing risks to health and safety at work or that he was (b) a representative of workers on matters of health and safety at work or member of a safety committee. The Respondent says that like anyone working in a kitchen, the Claimant, was to an extent, responsible for health and safety. The Respondent says that is not sufficient under Section 100 ERA and says that:

    26.1 the Claimant has not presented evidence that he had those responsibilities;

    26.2 the Claimant was not a health and safety representative; and

    26.3 the Respondent does not have a safety committee.

27. As regards the Section 103A complaint, the Claimant referred to numerous instances where he said he raised food hygiene, health and safety and other alleged breaches of legal obligations with the Respondent (verbally and by other means such as WhatsApp). For example, he says he reported to the Respondent and his manager on 15 September 2023 an alleged dangerous practice of nuts, rice powder and fresh chilli stored for service causing an allergen contamination risk posing a very serious threat to the public health. By way of a further example the Claimant says on 21 January 2024 (shortly before his dismissal) he reported via WhatsApp missing mandatory fridge temperatures recordings for two days.

28. The Respondent does not accept that breaches said to have been reported verbally were reported verbally and says that the WhatsApp group (in respect of which I saw numerous messages) was set up to report issues and was used by the Claimant for that purpose.

29. I concluded that, it not being practical or proportionate in the circumstances to consider each alleged protected disclosure or act by the Claimant alleged to have been pursuant to Section 100 (a) or (b) of the ERA, I should take the Claimant's claim at its highest and assume that all the relevant elements of Section 100 ERA were present and that each alleged protected disclosure (as set out in the Summary of IR Application and its supporting documents had all the necessary characteristics of a protected disclosure.

30. The Respondent invited me to take into account the behaviour of the Claimant during this hearing in reaching my decision on the application. I have declined to do so. The Claimant has made clear that he is suffering from poor mental health and it would not be appropriate for me to take into account his behaviour now (which might not be how he behaved prior to his dismissal). Attending this hearing may well have been a difficult experience for the Claimant.

31. I have focused on the contemporaneous documents before me in reaching my decision. One such document is the email recording the Claimant's dismissal on 25 January 2024 which reads:

> […]
>
> Further to our meeting of 23rd January, I am writing to infoim you that your employment with Jusu Brothers Ltd is terminated with immediate effect.
>
> As discussed previously, you have repeatedly demonstrated disrespectful behaviour towards clients, members of staff, your manager and the owner. The reason for your dismissal is serious insubordination.
>
> […]

32. The Respondent says that other contemporaneous documents (particularly WhatsApp messages) show that there were questions with respect to the Claimant's conduct towards colleagues, customers and a supplier. For example the Respondent points to an argument the Claimant had with a customer on 20 November 2023 and WhatsApp messages which record Mr Zalewski saying to the Claimant "*I spoke with Mentas when the situation happens and I told him not speak anymore to you and I says same to You!! And you where the person who didint stop saying to him he's ugly face dirty*" and the Claimant replying "*I spoke to Roman. All good now… Roman spoke to me and calm me down. Thank you both for understanding*." Mr Zalewski replying "*we are here to help we are not against you*" and the Claimant responding "*Thanks really helps*".

33. The Respondent pointed out that the Claimant touches on questions with respect to his behaviour in his Summary of IR Application saying: "*I tried and work on my personal issues during my employment very hard and if pointed out any issues about my certain behaviour I tried to improve the situation and rebuild the relationships*." The Respondent says that this implies that the Claimant acknowledges that there were issues with his behaviour and that he was spoken to about those issues.

34. Whether or not the Claimant's claims are well founded will need to be determined by a Tribunal hearing the evidence after the precise nature of the claim has been clarified.

35. However, given the contemporaneous documents that I have seen, the Respondent has an arguable defence and I am not satisfied that the Claimant has met the necessary burden of proof, on causation – i.e. I do not consider that he has shown that he is likely to establish at a full hearing of the claim that either the reason (or, if more than one, the principal reason) for his dismissal was:

    35.1 Contrary to Sections 100 (1) (a) or (b) ERA; or

    35.2 Contrary to Section 103A ERA.

36. I conclude that the Claimant's application for interim relief is not well founded.

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Employment Judge Woodhead

Date 18 March 2024

Sent to the parties on:

3 April 2024

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For the Tribunals Office

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