THE EMPLOYMENT TRIBUNALS

BETWEEN

Ms Tracy Robinson *Claimant*

and

His Highness Skeikh Khalid Ben Saqr Ar Qasimi *Respondent*

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON**: 30 June 2017

EMPLOYMENT JUDGE: Mr Paul Stewart

Appearances:
For Claimant: Mr David Stephenson of Counsel
For Respondent: Mr Antony Sendall of Counsel

RESERVED JUDGMENT

The Claimant's application for interim relief is granted and it is ordered that the contract between the parties shall continue until the determination or settlement of the Claimant's complaint of unfair dismissal, with payment monthly of such net sum as is appropriate after deduction of income tax and national insurance from a gross figure of £3,083.33.

REASONS

1. The Claimant had brought a claim for unfair dismissal and alleges that the principal reason for her dismissal was because she made a protected disclosure in line with section 43B(1)(b) of the Employment Rights Act 1996. By virtue of section 103A of the Act, should there be a determination that the reason (or, if more than one, the principal reason) for the dismissal is that she made a protected disclosure, then her dismissal shall be regarded as unfair.

2. The Claimant has applied for interim relief pending determination of her complaint. This is an uncommon application and therefore I will set out in full the relevant sections of the Employment Rights Act 1996 to which I have been referred:

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—

(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

(i) section … … 103A, or

(ii) …, or

(b) …

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.

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—

(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

(i) section … 103A,

(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) …

(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.

130.— Order for continuation of contract of employment.

(1) An order under section 129 for the continuation of a contract of employment is an order that the contract of employment continue in force—

(a) for the purposes of pay or any other benefit derived from the employment, seniority, pension rights and other similar matters, and

(b) for the purposes of determining for any purpose the period for which the employee has been continuously employed,

from the date of its termination (whether before or after the making of the order) until the determination or settlement of the complaint.

(2) Where the tribunal makes such an order it shall specify in the order the amount which is to be paid by the employer to the employee by way of pay in respect of each normal pay period, or part of any such period, falling between the date of dismissal and the determination or settlement of the complaint.

(3) Subject to the following provisions, the amount so specified shall be that which the employee could reasonably have been expected to earn during that period, or part, and shall be paid—

(a) in the case of a payment for any such period falling wholly or partly after the making of the order, on the normal pay day for that period, and

(b) in the case of a payment for any past period, within such time as may be specified in the order.

(4) If an amount is payable in respect only of part of a normal pay period, the amount shall be calculated by reference to the whole period and reduced proportionately.

(5) Any payment made to an employee by an employer under his contract of employment, or by way of damages for breach of that contract, in respect of a normal pay period, or part of any such period, goes towards discharging the employer's liability in respect of that period under subsection (2); and, conversely, any payment under that subsection in respect of a period goes towards discharging any liability of the employer under, or in respect of breach of, the contract of employment in respect of that period.

(6) If an employee, on or after being dismissed by his employer, receives a lump sum which, or part of which, is in lieu of wages but is not referable to any normal pay period, the tribunal shall take the payment into account in determining the amount of pay to be payable in pursuance of any such order.

(7) For the purposes of this section, the amount which an employee could reasonably have been expected to earn, his normal pay period and the normal pay day for each such period shall be determined as if he had not been dismissed.

3. I also was referred to Rule 95 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 which reads:

95. Interim relief proceedings

When a Tribunal hears an application for interim relief (or for its variation or revocation) under section 161 or section 165 of the Trade Union and Labour Relations (Consolidation) Act 1992 or under section 128 or section 131 of the Employment Rights Act 1996, rules 53 to 56 apply to the hearing and the Tribunal shall not hear oral evidence unless it directs otherwise.

4. I did not hear oral evidence.

5. The evidence before me came in the form of written statements. There were two statements of the Claimant, the first of which was signed and dated 22 June 2017 and prepared for the hearing on that date. A statement was also prepared on behalf of the Respondent for the 22 June 2017 hearing by Peter Cathcart and it is dated 21 June 2017. As a result of the adjournment of that hearing, two further witness statements were produced: for the Respondent, his son Hamad Al Qasimi produced an unsigned statement dated 28 June 2017 that led to the Claimant providing a second witness statement, dated 29 June 2017, which has been mechanically signed by her.

6. Both parties agreed that the relevant case law in terms of burden of proof and standard of proof to trigger interim relief under section 128 of the Employment Rights Act 1996 is that which is set out in *Taplin v Shippam Limited* [1978] ICR 1068: the employment tribunal must ask itself whether the application has established that the Claimant has a "pretty good chance of success" in the final application to the employment tribunal. The case of *Taplin* has been followed and applied in numerous cases including *Raja v Secretary of State for Justice* UKEAT/0364/09/CEA and *Dandpat v University of Bath* UKEAT/0408/09/LA and *London City Airport Limited v Chacko* UKEAT/0013/13/LA.

Background

7. The Claimant commenced working for the Respondent on 30 March 2007. She had come to hear of the job whilst she was ordinarily resident in Spain. A friend put her in touch with a Mr Scott Fishback who referred her to Mr Peter Cathcart, a solicitor. She met Mr Cathcart and, at their meeting, Mr Cathcart told her briefly what the role would involve and that the remuneration would amount to £34,000 per annum.

8. There was a certain amount of discussion at the time about the remuneration. The Claimant sought more money but Mr Cathcart asserted there to be no chance of her receiving a higher amount. However, according to the Claimant, he told her to remember that this is her net take-home pay. The Claimant also had further discussions with Mr Fishback and with her predecessor (Ms Caroline Driver) ahead of moving from Spain to take up her job with the Respondent on 30 March 2007.

9. On that date, the Claimant received two letters from Mr Cathcart on his law firm's headed paper. The first specified at page 35 of the bundle:

> I attach a simple letter of engagement in relation to your work for the family of His Highness Sheikh Khalid Bin Saqr Al Qasimi. Can I ask you please to sign and return one copy of the letter.

10. Both letters were dated 23 March 2007. The attached letter stated that:

> At our meeting Scott and I outlined to you your essential responsibilities. I also gave you a copy of the job description which is attached to this letter and has been prepared by Caroline Driver who has been performing this role for over two years. You will be expected to perform the various functions set out in the attached job description.

11. The letter continued:

> You will be paid a management fee for undertaking this work at the rate of £34,000 per year. You will be responsible for your own tax on that payment.
>
> There are no set hours nor is there any set place of work.

12. The letter also stated that the Claimant was entitled to recover costs and disbursements and, in respect of travel, she is told to keep a log book of her journeys and that a mileage rate will be agreed.

13. The letter specified that there to be a need for the Claimant to open a bank account from which payments can be made and that there would also be a float of £15,000 - the Claimant was to report expenditure to the Respondent and she would be reimbursed. She was also told that she would receive 4 weeks' holiday per year and there is a reference to each side terminating the contract with one month's notice.

14. The Claimant signed the letter, accepting the terms set out above, on 30 March 2007.

15. The attached job description prepared by Ms Driver specified the different duties that the Claimant would be expected to undertake, including dealing with the car and staff, visiting the property once per week, maintaining a log book for mileage, making doctors and dentists appointments, making hair appointments, paying university and college fees, sales and purchase of properties, accounts and then:-

> …be flexible! Any number of varied issues can arise which need attention either for the comfort of the children or in relation to their properties or those of their guards. Each has to be addressed satisfactorily whether this means disposing of accumulated garbage to sourcing new educational facilities etc.

16. During the period that followed, the Claimant appears to have worked satisfactorily, notwithstanding certain upheavals in the Respondent's family – the Respondent was detained (in jail or under house arrest) in the UAE in 2010, but was released in late 2010/2011 and came to the UK. The Claimant's work relationship survived a period when life was traumatic for the Respondent's family.

17. During that time, the Claimant sent what she describes as grievance letters to Mr Cathcart in October 2012 and March 2013. In January 2014, the Claimant had a meeting with Mr Cathcart against a background whereby she knew the Respondent had appointed the accountants PricewaterhouseCoopers (PwC) to deal with his tax and financial affairs. At this meeting, Mr Cathcart apparently out of the blue asking if the Claimant had any problems with HMRC. She said

that she was waiting for His Highness [the Respondent] to regularise the position and this kept being promised.

18. Later in January 2014, Mayed (a member of the Respondent's family) forwarded to the Claimant an email sent from PwC stating that HMRC would require a list of employees. He asked her to prepare a list of them – there were over thirty – and she sent this to Mayed on 7 February 2014, informing him that she had included herself on the list.

19. On 5 February 2014, the Claimant received an email from Mr Cathcart telling her PWC were expected to advise that she needed to be put on PAYE. Two days later, Mr Cathcart confirmed that PwC had now so advised.

20. On 10 February 2014, the Claimant sent an email directly to Angela Egington at PwC asking to meet to discuss her future tax status and, the Claimant says, that of other employees on the list. That is not quite the wording: the only words about her appearance on the list that are to be found in the email to Angela Egington on 10 February are:

> I will be on that list I think, maybe we need to discuss the future, would it be possible to speak to you when you are free?

21. The Claimant received a holding reply from Angela Egington, who informed her that she was working through matters with the family and would contact the Claimant as soon as she could, but further contact was never made.

22. A number of events in relation to other employees caused the Claimant on 22 May 2014 to contact a tax specialist in the firm CTM Limited for advice. The tax specialist was a retired accountant, Mr Stefan Kitchen. He prepared a dossier on which he advised about her employment status. She sent this dossier with the advice given to Mr Cathcart on 2 June 2014. In the cover lettering, the Claimant stated:-

> During the last few months, as you suggested, I have taken advice on my employment status. I have spoken at length with a friend who is a retired accountant and has interviewed me as a tax inspector would.
>
> I am extremely upset and very distressed at the outcome of the fact-finding process. The interview process was carried out over the three day period which the taxman would require. The interrogations ranged over my copious diary notes and into every aspect of my life with the family. I feel drained and ragged and put through the mill and on the verge of a nervous breakdown.
>
> I understand all the advice given to me. Please find attached the dossier from my advisor with supporting evidence.
>
> I do not believe I have ever been self-employed much as you would now have it so, and I do hope there is an easier way through the situation than presently seems possible. I am now seeking your assurance, for my own personal situation, that I will be put on a PAYE scheme with immediate effect, and that the historical position will be made good by my employer as required by law. The situation is not acceptable as it stands and I am asking you to please put it right.

> Peter, we have a good working relationship and you know how important my role has always been over the years, and the loyalty I have shown towards the family. I am sharing this correspondence with you discreetly in order to give you a chance to sort it out, as a next port of call, as you can see, must be for me to contact my tax lawyer.

23. In his letter, Mr Kitchen recorded the salient events. These did not include the fact that, according to her witness statement, the Claimant had been assured by Mr Cathcart on 30 March 2007 that the £34,000 she was to receive would be a net sum - notwithstanding the wording on the letter she signed that day to the effect she would be responsible for her own tax on the payment.

24. On the basis of the information he had gleaned from the Claimant, Mr Kitchen wrote:-

> I seek to disabuse Peter Cathcart of the notion that hounding you into a self-employed classification will work, and the notion that it could ever be in his client's best interests.

25. Mr Kitchen was of the view that the Claimant was an employee and so PAYE should have been deducted at source. The letter continued:-

> If after studying these examples Peter Cathcart and the family are still not prepared to regularise your tax status and set up the PAYE scheme retrospectively to cover your position, then your next step, after some seven days, as I stated in the recital above, must be to consult a specialist tax lawyer…

26. The letter finished by expressing the hope that:-

> …the review of the detailed and complex events of the past seven years has been accurate, and that my comments and advice have a voracity that ultimately serves both you and your Arab family well.

27. This letter resulted in solicitors engaged by the Respondent writing to the Claimant on 1 July 2014 indicating that they had been asked to look into her employment status by the Respondent following her 2 June email. The letter set out the arguments that various elements of her contract point to self-employment status and referred to the discussions that the Claimant had earlier in the year where she had discussed her position with Mr Cathcart:

> Indeed, I understand that, when Peter discussed the situation with you earlier this year, you said that you were paid "cash", suggesting that your failure to pay income tax and national insurance contributions was not an oversight or any misunderstanding as to your employment status but a deliberate act. This is supported by the fact that you received 1/12th of the gross annual management fee into your account each month by bank transfer (rather than cash) but, at no time during the period that you worked for the Al Qasimi family, did you query the lack of deductions for tax or national insurance.
>
> Peter tells me he was horrified to learn that you had not been accounting for tax in accordance with the agreement. As you say, you have worked for the Al Qasimi family for many years and it came as a disappointment and a shock to them all that you had not been accounting for tax. Clearly, the situation for you is serious and Peter was concerned that you sorted it out as soon as possible. As such, he advised you to regularise the tax position as soon as possible, which you said you would do.
>
> I understand that you had a few brief discussions with Peter in the period between the meeting at the end of January and your email of early June but never suggested that you were not addressing the situation. Indeed, we now know that you were seeking advice from your

friend, Stefan, a retired accountant, who has applied considerable energy into formulating a case that, during your engagement by the Al Qasimi's, you were in fact an employee. The intent of such an argument is to transfer the obligation for payment of your employee's income tax and national insurance contributions to Sheikh Khalid (although he would, of course, have the right to recover such tax from you).

28. The letter was written by Ms Jo Davis, an employment law solicitor at the Respondent's solicitors. The letter continued:-

I have reviewed the arguments put forward on your behalf by Stefan (please excuse my use of his forename but I don't think I have his surname) and, leaving aside the rather inflammatory rhetoric, note that he concentrates on what you tell him happened in practice rather than what the contract provides for.

29. The letter went on to argue the case that:-

…As you quite rightly point out in your schedule, having obtained the facts, we then have to stand back and look at the picture as a whole focussing on the contract rather than anything else. In my view, the conclusion from the contract is that you are self-employed. I believe Stefan reached a similar view as he reluctantly concedes your status may have changed since the inception of your relationship with the Al Qasimi family. By way of example, he states that "any putative notion of self-employment died with the onset of those responsibilities (those responsibilities being the care of five of the family's children)". Leaving aside that the fact that the "children" were, in fact, adults and would no doubt baulk at the suggestion that they required you to act in loco parentis, this implicitly acknowledges that, at the outset, the relationship may have been one of self-employment.

30. And it continued:-

In the meantime, clearly tax must be paid going forward on your earnings and, until the matter is resolved, further payments will be made less deduction of a sum equivalent to the tax and national insurance contributions that you are liable to pay to HMRC as a self-employed individual. Those monies will be placed in a separate account for your benefit so that the situation is not compounded and we urge you to account for such monies to HMRC promptly.

31. This prompted CTM Limited on behalf of the Claimant to write to Ms Davis on 9 July 2014 a 17-page letter in which their contentions were summarised thus:-

There is no contract that evidences an agreement between HH and Ms Robinson, so we must look at other factors to identify what each party believed the terms of the engagement to be.

More importantly, consideration must be given to whether, on the balance of probabilities, those terms were relayed to Ms Robinson.

The overwhelming evidence, as detailed above, points to the conclusion that HH and his legal representatives gave Ms Robinson to understand that she was to be engaged as an employee.

Indeed, that term is extensively used. Furthermore, discussions regarding her "salary", the lack of requirement upon her to invoice her services and the provision of sick pay and paid holidays all mitigate any contention that this was anything other than a contract between an employer and his employee.

Therefore, we invite you to agree that, when taken as a whole, the evidence is compelling, and it cannot be sensibly argued that Ms Robinson was technically self-employed, or that she was informed, or even believed, that she was.

32. The letter was accompanied by six tabs that covered a number of other pages.

33. Ms Davis on behalf of the Respondent wrote to HMRC on 18 July 2014, setting out that she had been asked to contact HMRC by the Respondent in respect of the Claimant. She set out the position that Mr Cathcart engaged the Claimant as a self-employed person and the contract confirmed that there were no set hours or place of work and that she was paid a management fee. She then set out that earlier in 2014 there had been a conversation, in which there was concern expressed by Mr Cathcart on finding out from the Claimant that she had never accounted for tax on the payments received. The letter went on to state that, from recent correspondence, it appeared that the Claimant did not report the position to HMRC at the time and had now secured professional advice on the matter (see fourth paragraph). It concluded:-

> We envisage that HMRC will require further information of the payments made to Ms Robinson etc., and both Mr Cathcart and this firm are instructed to assist in the provision of such information.

34. Mr Steve Bootland of the Employment Status Customer Service Team of the HMRC replied on 10 September 2014. He noted that his role was to give advice about whether a worker is engaged as an employee or someone who is self-employed. He continued:-

> An engager can ask HMRC for an opinion on the employment status of a worker. How we act on receipt of such a request is covered by the guidance in our Compliance Operational Guidance manual at COG907280. This can be viewed on the HMRC website but I attach a hard copy for your convenience.
>
> Your letter does not ask for an opinion, although I infer from the fourth paragraph of your letter that Ms Robinson disputes that she was self-employed.
>
> If you would like me to offer an opinion there is some further information I should require, in addition to that supplied in your letter and in Cathcart's letter of 23 March 2007.
>
> 1. Are there any circumstances under which Ms Robinson could have sent a substitute had she been unable or unwilling to perform the duties herself? Did this ever happen and, if so, who paid the substitute worker?
>
> 2. Could Ms Robinson have brought in someone to help her do the work which she was engaged to do? Did this ever happen and, if so, who paid the substitute worker?
>
> 3. What sorts of journeys were made by Ms Robinson for which your client paid mileage.
>
> 4. Did Ms Robinson have to provide major items of equipment which were needed to do the work? If so, what were they?

35. On 23 October 2014, CTM wrote to HMRC stating:-

> We write with regard to our client, above, the matter of an alleged non-payment of PAYE and NIC by Ms Robinson.
>
> There is a dispute between Ms Robinson and her employer regarding her employment status. We enclose correspondence between the parties that clearly demonstrates that Ms Robinson is an employee and her employers are liable for the tax."

36. They indicated that they have been in correspondence with the Respondent's solicitor who took a different view. They concluded:-

> *We would like an officer to be assigned so that we are able to remedy the situation as soon as possible.*

37. I have been shown a minute from a meeting on 9 January 2015 between the Respondent, two of his sons and Mr Cathcart that reads:-

> As for the tax position of Tracy, B P Collins have responded to the Revenue and it is now in the hands of the Revenue to decide what to do. Peter explained that it is likely to take some time for this issue to be resolved because the Revenue will want to investigate all of the bank accounts of Tracy. Bearing in mind that Tracy was passing substantial sums of money through her account, the analysis will be very complex and time consuming.

38. Another minute states that:-

> His Highness confirmed that an account had been set up to transfer the tax payments being retained in relation to Tracy. Peter confirmed that all the payments for the last year should now be put into the account and that going forward, payments should be made into the account on a monthly basis.

39. On 5 January 2015, CTM chased HMRC for a response to its letter of 23 October 2014. On 16 January 2015, HMRC indicated that its specialist complaints team would handle the matter and provide a full response. On 6 March 2015, there was a further chasing letter from CTM providing a chronology highlighting HMRC's correspondence shortcomings.

40. On 20 March 2015, an apology was proffered by HMRC and further questions were now asked by Mr Steve Bootland who had, of course, previously been in correspondence with the Respondent's solicitor.

41. This led to CTM responding on 13 April 2015 and providing a copy of the Claimant's dossier in attempting to answer the questions asked.

42. On 1 May 2015, Mr Bootland wrote on behalf of HMRC to CTM providing his observations on the basis of the information that the Claimant / CTM had provided. He did so under various headings:- personal service, control, financial risk, ability to profit by good management, responsibility for other staff and other status indicators.

43. On the third page, he summarised his conclusions, stating:-

> It is my view that Ms Roberts is engaged under a contract of service. It is my view that she is an employee of His Highness and not someone engaged in a self-employed capacity.

44. On 13 October 2015, the Claimant wrote to Mr Cathcart and referred back to their meeting in January 2014 when Mr Cathcart had asked her if she had trouble with HMRC. She told him that he had informed her that PwC should definitely put the Claimant on the PAYE scheme. She stated that, after telling her that she should go on the PAYE scheme, he had ordered her to register as self-employed. When the Claimant objected to that suggestion, he had told her to take advice about her tax status. The Claimant informed him that she had her status checked by an old accountant friend and had written with her

dossier and her accountant friend's advice, but Jo Davis's response was "obfuscation". She continued:-

> We have therefore now approached HMRC directly; HMRC have analysed my diaries, emails, accounts, statements and involvement with the family and concluded without reservation that I have always been an employee and continue to have that status; I attach a copy of the HMRC conclusion.

45. Her letter proposed resolutions for Mr Cathcart to put to the Respondent to achieve statutory compliance. These were:-

> 1. Provide a written statement of particulars of employment, pursuant to section 1 of the Employment Rights Act 1996 (ERA);
>
> 2. Send an itemised pay statement pursuant to section 8 of the ERA with each monthly payment of salary from March 2007 to date, showing how that net salary position has been calculated.
>
> 3. Include me on PAYE and show the correct income tax and National Insurance contributions deducted in arriving at my net salary each month and ensure that such deductions are promptly paid across to HMRC together with employer contributions.
>
> 4. Stop the unlawful deductions of £668.50 from my net salary per month that has been occurring each month since 2 July 2014, contrary to section 13 of the ERA.

46. She continued:

> I look to you therefore as guide, mentor and support of first call to His Highness to sort this matter out with fines, penalties and further investigations arising.
>
> I am sure you will understand that it has been difficult for me to write this grievance letter, as I have no complaints in respect of the work that I undertake. This letter will not impact upon my ability to work for His Highness and the family and I remain as committed as ever to my employment.

47. On 16 February 2016, the Claimant approached ACAS for early conciliation and a certificate was produced by ACAS on 16 March 2016 confirming that the Claimant had complied with the requirements under ETA 1996 section 18A to contact ACAS before instituting proceedings in the Employment Tribunal.

48. On 21 July 2016, the Claimant wrote directly to the Respondent in a two-page letter arguing for the Respondent to get involved and get his solicitors to regularise her contract and put her on a PAYE scheme.

49. This met with a response from one of the Respondent's sons on 17 November 2016, which stated:-

> Thank you for your email. I am aware of this email you sent in July but I am unsure why you sent it as it clearly states in your contract you are responsible for your own tax. You have been self-employed throughout your period working with the family. You know that as does everyone else."

50. The Claimant then instructed new solicitors (Geoffrey Leaver Solicitors), who, on 23 January 2016, wrote arguing that the Claimant was, and always had been, an employee of the Respondent. This letter stated that the Claimant had

asserted various statutory rights in her 13 October letter and requested that the Respondent comply with her statutory rights by:-

a) Providing a written statement of particulars of employment;

b) Providing itemised pay statements;

c) Ensuring correct PAYE deductions are made in respect of income tax and national insurance and paid to HMRC;

d) Stopping the unlawful deductions from her wages.

51. The writer asked that the letter be acknowledged within seven days and a substantive response received within 28 days.

52. This letter was addressed to Neumans LLP, a firm instructed by the Respondent. Mr Khairie Gedal, a senior co-ordinator for that firm, responded more or less immediately. Mr Gedal acknowledged that they had been brought on board to assist in the construction of a self-employed contract for the Claimant as agreed for her and that they were waiting for the Claimant to send them a list of requirements. The writer stated that:

> I am not and have never been responsible for any other negotiations or litigious discussions between the parties and so I suggest you direct your original email and the "without prejudice" letter to Mr Peter Cathcart who I am sure you are familiar with.

53. The letter was accordingly forwarded by email to Jo Davis of B P Collins cc Peter Cathcart on 1 February 2017, refuting the allegation that the Claimant had ever agreed to enter into a self-employed contract. The email concluded by confirming that they were looking forward to hearing from Jo Davis.

54. B P Collins responded on 8 February 2017, with their letter making the point that:-

> … the question of your client's employment status is hotly disputed between our respective clients and there has been no formal adjudication by HMRC on the subject. Your client's previous representatives, CTM, made entirely one-sided representations to HMRC on the basis of which HMRC gave an unbalanced and erroneous opinion. Notably, our client's representations on the matter were not forwarded to HMRC and we note that you repeated that economy of disclosure by only providing Mr Gedal with copies of correspondence that was prepared in support of your client's case.

55. The letter finished with a reference to the discussion in January 2014 and the assertion that in that discussion from the Claimant that she was paid cash and the fact that she first suggested that she was self-employed months later in June 2014.

56. Jo Davis wrote to Geoffrey Leaver LLP again on 23 March 2017, arguing over a series of points that the Claimant was self-employed. She finished by saying, with reference to the Claimant's mobile phone bill, the household tasks carried out by someone else, the congestion charges and the Claimant's mileage, that:

It therefore appears that, even if our client were not obliged to terminate your client's contract on the ground of illegality involved in continuing to engage her, her role is no longer required. Alternatively, it appears that, in addition to your client's apparent fraud on the Revenue, your client may have been fraudulently claiming petrol expenses over the course of her employment. As such, if she were an employee, she could be fairly dismissed on the grounds of redundancy or misconduct.

We note that you have sought to protect your client against any action in relation to her engagement by (re)asserting in your letter of 23 January 2017 the statutory rights originally made over 18 months ago (following which no action was taken against her). However, it is clear that the evaluation of your client's role was initiated prior to your letter. Further, it is ridiculous to suggest that our client would terminate her contract because she asserted a statutory right to (for example) an itemised pay statement.

57. There was further communication between the solicitors but, on 19 May 2017, the Respondent himself wrote a letter to the Claimant in which he said:

As you will be aware, on 23 March 2017, our solicitors responded to a letter from your (then) solicitors, Geoffrey Leaver LLP, explaining that I felt that I had little option but to terminate your contract unless you agreed to account for the tax due on the payments made to you.

Shortly after receipt of that letter, our solicitor received an email from a new solicitor instructed by you, indicating that her "provisional view" was that you were either an employee or a worker but that she had not yet read all the relevant documents and that she would send a comprehensive reply within 14 days. I therefore held off taking action.

That email was received on 28 March 2017 and since then we have heard no further from her, save an email promising a response by 28 April. However, that too has not been forthcoming.

As set out in my solicitors' letter of 23 March 2017, I cannot continue to allow you to work for me while you are failing to account for the tax due on your earnings. I have delayed taking action for some 3 years in the hope that you would sort out the situation, but you have failed to do so.

Further, it has become clear over the last few months that your responsibilities have diminished since the children have grown up such that we no longer require someone to carry out your role. In addition, you have now disparaged Mayed [one of the Respondent's sons] to one of our tenants in an entirely unacceptable and unjustified way.

As to your expense claims, I prefer not to investigate these given the other circumstances but I would point out that, if you felt that they were some form of extra salary (an assertion I do not accept), they too are liable for tax.

In the circumstances, I have no alternative but to terminate your employment with immediate effect.

Please could you arrange to return any belongings or personal information that you have relating to the family and details of any contracts remaining in your name? We will then arrange for them to be assumed by me or Mayed.

Finally, we do, of course, hold funds in an account in relation to the tax payable on your earnings since July 2014. We will release these to HMRC when we receive your instructions to do so. However, given your reluctance to accept your liability for the tax and national insurance contributions on your earnings, we are not prepared to release them to you personally.

58. This triggered a response two days later from TMP Solicitors on behalf of the Claimant, with the letter addressed to Jo Davis. This letter rehearsed the dispute / contentious issues and explained why TMP asserted that the Claimant was an employee / worker and then asserted that the Claimant had made a whistleblowing disclosure, which prefaced the making of this interim application by the Claimant in her ET1. The ET1 was received by the Employment Tribunal on 25 May 2017.

59. In the ET1, it was asserted that the Claimant made many verbal and written disclosures. The occasions of disclosure were set out in paragraph 26 of the ET1. Paragraph 27 stated that the disclosure of information related to the Respondent's breaches of legal obligation to comply with the Employment Rights Act 1996, to treat the Claimant as an employee or worker, to deduct tax and NICs at source, to pay these deductions to HMRC, to send her an itemised pay statement and to deduct monies from her wages unlawfully.

Conclusion

60. I have to be satisfied that the worker has made a qualifying disclosure and that, in the reasonable belief of the worker making the disclosure, it was made in the public interest and tends to show that the employer has failed/is likely to fail to comply with the legal obligation to which they are subject.

61. This case originally came before me on 22 June 2016. As a result of discussions, the matter was adjourned in order that further instructions could be obtained by the Respondent's legal advisers, which they had not been able to do because of the shortness of time.

62. As a result, the matter has come before me again and I have read the new material handed in today.

63. At 11.15am or thereabouts, I started to hear submissions from Mr Stephenson on behalf of the Claimant. We had a shortened adjournment for lunch over which Mr Sendall on behalf of the Respondent thought of a point that he had not previously taken.

64. The point relates to sections 128 and 129 of the ERA 1996: Mr Sendall submitted:

    a) section 128 provides the right to interim relief only to employees who have presented a complaint to the Employment Tribunal that they have been unfairly dismissed for one of the reasons specified and

    b) the fact that:

        i) section 129(3) carries with it a requirement that the employment tribunal will ask employer if they are willing to reinstate the employee and treat them as though they are not dismissed and, if not

        ii) the employment tribunal should ask the employer if they are willing to re-engage the employee in another job on no less favourable terms

than if they had not been dismissed and, if the employer does not attend or reinstatement/ re-engagement is not possible (here, Mr Sendall confirmed that he did not have instructions but had no doubt that reinstatement/re-engagement would not be possible)

iii) in such circumstances, the tribunal shall make an order for the continuation of the employee's contract of employment,

means there is an issue in the case as to whether the Claimant was an employee at all or was self-employed. If she was the latter, that fact precluded the Claimant from obtaining interim relief. And Mr Sendall argued for the latter.

65. After a short consideration, I rejected that argument. It seemed on the basis of Taplin that I was entitled to look at the allegations made in the application for interim relief pending determination of the complaint (that is, the complaint made to the Employment Tribunal). If one of the matters in issue is whether the Claimant is an employee, I could take a view as to the likelihood of the Claimant being able to show that she was an employee. That view would be within the overall assessment as to whether or not the applicant has shown she had a pretty good chance of succeeding in her claim.

66. Mr Sendall in the course of his submissions used the metaphor of something jumping out of the page to indicate how obvious a point should be for the purposes of his argument on interim relief pending determination of the complaint. However, for the summary assessment I am conducting, employment status jumps out at me out of the page.

67. I take the view that the Claimant has pretty good prospects in the final determination in showing that she was an employee, notwithstanding that she signed a document specifically stating that she was to be paid a management fee and notwithstanding that the document provided that she would be accountable to her own income tax.

68. It appears to me also to be the case that there have been disclosures on numerous occasions by the Claimant of material which alleges that the Respondent has been in breach of/ has failed to comply with a legal obligation.

69. Mr Sendall has taken the point that the Claimant faces a hurdle in that, when making the disclosure, she has to make it in the public interest. The wording of section 43B(1) states that a protected disclosure is *"an disclosure which, in the reasonable belief of the worker making the disclosure is in the public interest and tends to show one or more of the following…. That a person has failed or is likely to fail to comply with any legal obligation to which he is subject."*

70. The Respondent's breach of obligation to deduct tax at source and pay it to HMRC is one of the three allegations of breach of legal obligation that the Claimant has put forward. It does seem that I am entitled to take the view on the face of the evidence before me that she has a view that there has been a

failure to pay National Insurance and tax deducted at source and this is in fact in the public interest.

71. I do not rule that disclosure of information showing someone is failing to deduct tax or National Insurance at source is a disclosure in the public interest. However, it seems to me that it can be said that in the reasonable belief of the Claimant, this was in the public interest.

72. I take the view that the Claimant, on establishing that she has made protected disclosures, stands a pretty good chance of succeeding in the final application to the employment tribunal.

73. As to whether the protected disclosure has resulted in dismissal, Mr Sendall makes the point that the dispute had in effect been grumbling along for three years or thereabouts when the dismissal came about and that it cannot properly be said that the whistleblowing has given rise to the dismissal. However, the terms of the letter of dismissal refer to holding off of taking action upon receipt of the letter from the Claimant's solicitors of 28 March 2017 and that this letter was not followed up despite the fact that the Claimant's solicitor stated that she would reply in fourteen days. It states that the Respondent cannot continue to allow the Claimant to work for him while she continues to fail to account for tax.

74. Since July 2014, the Claimant's money has been diverted into two lots. One was paid to her and the other was put in a special account awaiting her instructions as to whether she was prepared to authorise its transfer to HMRC. It is difficult to understand why, come March and then May 2017, the continuation of that position becomes intolerable. It seems likely that the terms of that letter will be interpreted as the consequence of individual acts of disclosure and the cumulative acts of disclosure.

75. I have not said anything about the fact that the Claimant does have a problem should she win her argument that she is an employee and that her employer should have been deducting tax at source.

76. It seems that an argument that the Claimant has espoused latterly in correspondence is that in the sequence of events at the start of her employment she was assured that the sum of £34,000.00 would be paid net. I do not express any view on that assertion – I am in the position of being able to give an indication of the prospects of success of the claim (the dismissal being because of the protected disclosures) without doing so. However, if in due course the sum paid annually to her - £34,000.00 - is held to be the gross salary, necessarily some thought will have to be given as to whose responsibility it is given the amount that the Claimant has received over the years.

77. In conclusion, I think the Claimant stands a pretty good chance of success in showing that the reason for her dismissal was because she made a protected disclosure and therefore she is entitled to interim relief.

78. Section 129 of the Employment Rights Act 1996 requires me to explain to both parties what powers the Employment Tribunal may exercise and the circumstances in which it may exercise them. With both parties represented by counsel instructed by solicitors, that exercise seems somewhat unnecessary. With Mr Sendall for the Respondent indicating the Respondent to be unwilling to reinstate or re-engage the Claimant, I must make an order for the continuation of the Claimant's contract.

79. Mr Sendall reminded me that section 130(2) Employment Rights Act 1996 requires the tribunal to identify the contract that is to be continued and the amount to be paid by the Respondent. Both advocates made submissions on the amount which should be paid to the Claimant monthly during the continuation of the contract. Mr Sendall explained that the amount currently being held to the Claimant's order has been calculated on the basis of the tax that she should be paying as a self-employed person. Mr Stephenson contended that the status quo should be maintained in terms of payments to the Claimant (i.e. that her salary – now £37,000 per annum - should be paid to her gross).

80. In terms of section 130(2) Employment Right Act 1996, if the Claimant's annual salary now is £37,000 per annum, it seems to me that, pending determination of the issue about whether the amount was net or gross, it should be treated as gross and the Respondent should deduct through the PAYE system such sums for tax and N.I. as appropriate to the Claimant's tax coding. My view already expressed is that the Claimant stands a pretty good chance of establishing that the contract between the parties is a contract of employment. For the purposes of specifying the monthly payment, the payment should be based on £37,000 per annum from which the Respondent should deduct tax and N.I. as appropriate to the Claimant's tax coding.

Employment Judge Stewart
26 September 2017