Case Number: 1404027/2018

EMPLOYMENT TRIBUNALS

SITTING AT: **SOUTHAMPTON**

BEFORE: **EMPLOYMENT JUDGE EMERTON (sitting alone)**

BETWEEN: **Mr M Iftikhar**

Claimant

AND

Dorset County Hospital NHS Foundation Trust

Respondent

ON: **11 December 2018**

APPEARANCES:

For the claimant: **Miss C Ngo-Pondi (Trade Union National Officer)**
For the respondent: **Mr S Gorton QC (Counsel)**

JUDGMENT having been sent to the parties on 19 December 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Summary of the case

1. This was an application for interim relief in a case involving a consultant surgeon who was dismissed by his employing NHS Trust, the reason given being "some other substantial reason", namely a breakdown of working relationships. It would appear to be common ground that the claimant had indeed fallen out with his colleagues. The application is based upon automatically unfair dismissal for making a protected disclosure under section 103A of the Employment Rights Act 1996. The respondent robustly resists the claim, disputes that there were protected disclosures or that there was automatically unfair dismissal, and argues that there is no basis for interim relief.

2. The tribunal found that it not was not likely that the automatically unfair dismissal claim would succeed, and in consequence refused the interim relief application under section 129 of the Act.

Background to the hearing

3. By a claim form presented on 20 November 2018, the claimant brought claims of detriment for making a protected disclosure, "ordinary" unfair dismissal, and (relevant to the application for interim relief) a claim of automatically unfair dismissal under section 103A of the Employment Rights Act 1996. The claim included an application for interim relief under sections 128 and 129 of the Employment Rights Act 1996.

4. The application for interim relief had been made in accordance with section 128(1) & (2). A one-day interim relief hearing was listed, in accordance with section 128(3) & (4).

5. The parties had agreed a bundle of over 260 pages, and the claimant also provided a witness statement and a cast list.

The hearing

6. The parties were represented, as set out above, at the interim relief hearing on 11 December 2018. Miss Ngo-Pondi, for the claimant, also handed up a skeleton argument, and copies of supporting case law. Mr Gorton also provided written submissions and supporting case law.

7. At the beginning of the hearing the timings were canvassed, and it was agreed that (under rule 95 of the 2013 Rules of Procedure) this was a case that did not require oral evidence. It was agreed that the tribunal should determine the application on the papers, subject to oral submissions. The tribunal took into account those documents to which it was referred, including the claimant's detailed witness statement of some 21 pages.

8. The tribunal adjourned to complete its reading of those papers identified by both parties as being relevant and essential reading. It then heard oral submissions in support of the application from Miss Ngo-Pondi, followed by oral submissions from Mr Gorton QC on behalf of the respondent. Miss Ngo-Pondi was given the opportunity to reply but did not wish to do so. A summary of the submissions appears below.

9. Having adjourned to consider its conclusions, an oral judgment with full oral reasons was delivered to the parties on the afternoon of 11 December 2018.

10. The application having been refused, and the parties having agreed no case management directions were needed at this stage (save for an agreed extension of time for the respondent to present a response) the hearing then concluded at that point.

11. The parties were reminded that a written judgment would be sent to the parties shortly, and were given the usual explanation that they would have 14 days from the date that the judgment was be sent to the parties to request written reasons, and that any written reasons would be a pubic document, accessible to all persons via the internet. The judge cautioned the parties about too hastily requesting written reasons, especially in a case where the respondent would argue that the claims were of little merit, and

the claimant might not, on mature reflection, wish to have an initial analysis of the whistle-blowing claim set out in detail in writing.

12. The claimant did, in fact, request written reasons by email, before the judgment was sent to the parties.

The issues

13. It is not in dispute that the claims include a claim for which an application may be made for interim relief, and that the claimant complied with the necessary formalities.

14. In the circumstances, the sole issue for the tribunal to determine, under Section 129(1) of the Employment Rights Act 1996, is whether, "*it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find that the reason (or if more than one the principal reason) for the dismissal is automatically unfair under Section 103A of the Act*". The tribunal was referred to case law relating to the question of what amounts to "likely".

The law

15. The statutory test us referred to above. The case law relevant to this statutory test is referred to below, both in the summary of the parties' submissions, and in the tribunal's conclusions.

16. It should be noted that the tribunal needed to take into account the statutory provisions relating to what amounted to protected disclosures, set out at Sections 43A – 43F of the Employment Rights Act 1996. The tribunal also needed to take into account the provisions relating to automatically unfair dismissal for making protected disclosure under Section 103A. the tribunal noted that the claimant had more than two years' qualifying employment and that the burden of proof would be on the respondent to prove that the reason for dismissal was a potentially fair reason, rather than for making a protected disclosure.

The parties' submissions

17. What appears below is not intended to be a comprehensive summary of the parties' submissions, set out in writing and made orally, but a broad overview of the salient points. The Judge confirms that he has taken into account the parties' submissions and the documentary evidence provided, in reaching his conclusions.

18. The claimant's original application was combined, in a slightly unclear way, within his particulars of claim. Clearly, much of the text in the 19 pages attached to his claim form related to matters which are not subject to the application for interim relief.

19. This initial application referred to six disclosures, said to amount to protected disclosures, and referred to the claimant's subsequent dismissal. The respondent's case was that the dismissal (under section 98(1)(b) of the 1996 Act) was for some other substantial reason, namely a breakdown of working relationships. The interim relief application in the claim form was

surprisingly brief as to why the dismissal was said to be automatically unfair, and why the respondent's stated reason for dismissal was incorrect. The application amounted to little more than a bold assertion that this was not the real reason, and that the real reason was making an unspecified protected disclosure. There was no specific challenge to the reasoning applied by the members of the panel which dismissed the claimant.

20. Miss Ngo-Pondi's skeleton argument of seven pages was structured as follows. It set out a brief introduction and a summary of the law, and made the assertion (paragraph 11) that the tribunal "*must focus on whether the claimant made the disclosures and not about whether or not the alleged protected disclosures were actually protected disclosures*". *[The respondent disputes the validity of this argument]*. It pointed out, correctly, that if the tribunal found that it was likely that the claimant was dismissed principally because of the alleged protected disclosures, then that was enough for the tribunal to make an order for interim relief. In applying the law to the facts, Miss Ngo-Pondi submitted that the claimant *had* made protected disclosures, and suggested that the true reason for the respondent's treatment of the claimant could be seen by differences in the treatment of him before and after his disclosures to the GMC and NHS Counter-Fraud. Various background matters, predating the dismissal hearing, are referred to, and the claimant refers to various detriments he had suffered (albeit not strictly part of the application for interim relief). The submissions conclude, albeit without setting out any coherent reasoning, that the disclosures made were qualifying disclosures, and that the respondent could not disprove the Section 103A reason for dismissal which had been advanced by the claimant. [*Miss Ngo-Pondi did not make any specific submissions in relation to what the claimant alleges was in the mind of the dismissing panel, or how they reached their conclusion as to the dismissal, although the reasons for dismissal had been set out in a detailed letter at the time*.]

21. Having had the opportunity to read Mr Gorton's skeleton argument in advance, Miss Ngo-Pondi, in her oral submissions, relied upon her written skeleton argument, expanded some of its points, and replied to the respondent's written submissions. She asserted that although the respondent relied upon "*breakdown of relationships*" as a true reason for dismissal, the details of that breakdown were not provided to the claimant before the final disciplinary hearing. She submitted that although there had been a breakdown of relationship before the claimant whistle-blew to the GMC (about financial and procedural irregularities in the Trust), it was only after this disclosure that the respondent began to take detrimental actions, leading to dismissal. After the disclosure, the claimant was told he would be disciplined, he was arrested on various spurious charges, and the Chief Executive made a decision to dismiss the claimant, *prior* to the matter being referred to a panel. Miss Ngo-Pondi later changed her case to accepting that the Chief Executive did *not* in fact make the decision to dismiss, although she appeared to be proceeding on the basis that in reality that was his view.

22. Miss Ngo-Pondi explained that there had been several disclosures, albeit the claimant relied specifically on three protected disclosures for his Section 103A automatically unfair dismissal claim, namely his disclosures in late 2013 to the then CEO Patricia Miller, to NHS Counter-Fraud in late 2015, and to the GMC on 21 September 2015. She suggested that this was

plainly whistle-blowing within the scope of Section 43B of the Employment Rights Act 1996. She suggested that these disclosures, contrary to submissions from the respondent, were in the knowledge of the panel which dismissed the claimant. In answer to a question from the judge, she explained that the dismissing panel were aware of the substance of the disclosures made, because the claimant had referred to his grievance, and that his grievance contained a summary of the matters he had disclosed. She asserted that the grievance was before the panel, and indeed they had referred to it in their deliberations. Miss Ngo-Pondi did not, however, provide the tribunal with a copy of the grievance. [*Having been referred to the dismissal letter, the judge noted that the letter did not make any express reference to specific disclosures now relied upon. The judge noted that the claimant had not attended the dismissal hearing, and had relied on written submissions at the time*].

23. Mr Gorton's submissions summarised the general background, and suggested there was no merit in the claimant's application for interim relief. The submissions set out the law at some length, which will be referred to below as applicable, but the essence of the submissions (paragraph 7 of the written submissions) is as follows:

24. Firstly, the available evidence "*unquestionably points to a breakdown in relations between the claimant and his consultant colleagues, of some vintage*". The reviews/investigations made it clear that the reason the claimant was placed before a panel, was because of that breakdown in relations, and the belief that those relations were beyond repair, and this was the reason the respondent had dismissed the claimant. He submitted that the evidence produced by the claimant was "*defuse, vague and unfocussed thus coming nowhere near the proper threshold for making such an application, let alone the application succeeding*".

25. The second substantive point was a matter that the claimant had not addressed, namely that the respondent had acted through a panel of individuals, including an independent Medical Director from another Trust, against whom the claimant has made no allegation. He referred to the case law, and this was a point to which the claimant has not satisfactorily replied. In essence, this argument is that on this basis alone the interim review application must fail: the claimant has not presented any coherent case that the decision makers who dismissed the claimant were motivated by anything other than the reasons which they had stated. Although the claimant had made a case about the outcome being predetermined, the focus should be on the decision to dismiss, and there were no "*Iago*" pleadings made by the claimant.

26. The third substantive point is that under the *MOJ v Sarfraz* guidance, the claimant must prove a likelihood of success in respect of his assertion that he made protected disclosures. The respondent will dispute that the claimant made any protected disclosures falling within the statutory definition, and at the interim relief hearing there was simply no evidence that these were protected disclosures that the panel had knowledge of. The respondent's case is that there is no evidence before the tribunal suggesting that the decision to dismiss was motivated by the fact that the claimant had made protected disclosures, especially noting that he did not attend the panel hearing, and his written statement of case presented to the

panel did *not* contain those disclosures, and no case was advanced to the panel based on alleged protected disclosures.

27. Finally, the claimant's application should in any event fail on the question of the alleged protected disclosures, there being significant areas of dispute as to whether the claimant had a reasonable belief, in the context of infighting within the Obstetrics and Gynaecology department. There is nothing from the claimant suggesting that he would succeed in showing that any disclosure was in the public interest, and that he reasonably believed that to be the case. The claimant had not adduced any evidence setting out what precise legal obligation was engaged by his disclosures, and had been breached. In respect of the letter to the GMC, there was no evidence from the claimant as to how this would engage Section 43F of the Employment Rights Act 1996. Much of the claimant's case was cut-and-pasting assertions which fell short of what was required. The respondent invited the tribunal to dismiss the application for interim relief.

28. In his oral submissions, Mr Gorton confirmed that he relied upon his skeleton argument. In summary, he suggested that the application for interim relief was fundamentally misconceived. The claimant had not put his case on the correct footing for section 103A interim relief, and had made no suggestion that the dismissal panel were motivated by the claimant's protected disclosures, as he had set out at paragraph 7.5 of his skeleton argument. He drew attention to the claimant's statement of a case in his appeal against dismissal (page 47 of the bundle) which confirmed that the claimant accepted that the Trust believed the situation to be serious and that relationships had broken down. He made four main points in his oral submissions:

29. Firstly, the claimant having accepted there was a breakdown in in relationships, this undermined his case in respect of section 103A, and the claimant was still not saying that the panel was motivated by the claimant's disclosures. The *Jhuti* point remained: there was simply no basic argument that the panel was influenced by disclosures. The second main point, as set out at paragraph 7.8 of the skeleton argument, was that the claimant had not provided the tribunal with any evidence that the dismissal panel had knowledge of the claimant's protected disclosures. Reference was made to grievances, but that evidence had not been supplied. The third point, paragraph 7.9 of the skeleton, related to the protected disclosures. The respondent did not concede that the claimant made any qualifying or protected disclosures. Mr Gorton drew the tribunal's attention to evidence in the bundle, which he suggested showed that the claimant did not personally believe that he was making disclosures, or that it was in the public interest. For example, the alleged disclosure to the GMC was very much centred on the claimant's dispute with his colleagues, rather than being genuinely any sort of disclosure in the public interest. The claimant had still not set out the legal obligations said to have been breached, in extremely generic assertions. The particular disclosure to the GMC relied upon (section 43F) was extremely weak, and the claimant had not shown that it fell within the relevant section. The fourth point related to the breakdown in relationships, namely the stated reason for the "some other substantial reason" dismissal. As the claimant *did* accept that there had been a breakdown in relationships, his interim relief case was misconceived. The more so as it was clear from the evidence that the various letters signed by the claimant's

colleagues explaining that they could no longer work with him, pre-dated the letter to the GMC. Indeed, the claimant's colleagues had referred the claimant to the GMC, before he made counter-allegations about them to the GMC. There had been various internal reviews to look at working relationships, and ultimately the respondent concluded that was not sustainable. It was overwhelmingly clear that there had been a breakdown in relationships, and that the panel dismissed the claimant for this reason.

30. It should be noted that the tribunal was provided with copies of the following cases:

31. The claimant provided copies of the following cases:

- *Taplin v Shipham Ltd [1978] WL57362*
- *Possons v Air Plus International Ltd UKEAT/0023/16/JOJ 4 March 2016*
- *Kuzel v Roche Products Ltd [2008] EWCA Civ 380*
- *Ministry of Justice v Sarfraz UKEAT/0578/10/Z2 7 February 2011*

32. The respondent provided the following cases:

- *Saqr Al Qasimi v Robinson UKEAT/0283/17/JOJ*
- *Royal Mail Group Ltd v Jhuti [2017] EWCA Civ 1632*

33. The tribunal has also considered other recent case law applying the interim relief tests, such as *Wollenberg v Global Gaming Ventures (Leeds) Ltd UKEAT/0053/18/DA*.

The evidence

34. The tribunal has been careful not to make findings of fact which would tie the hands of any subsequent tribunal, and has kept its summary of the evidence as brief as practicable, consistent with the need to provide reasons. That said, the claimant has chosen to make an interim relief application, requiring the tribunal to take account of the available evidence, and has in effect asked the tribunal to give an assessment of what view should be taken of that evidence.

35. The tribunal was presented with a very large bundle, of which only the small minority of documents were referred to, whilst other documents were mentioned as relevant which the tribunal was not shown. The tribunal has no intention of seeking to provide a compendious summary of that evidence. However, in order to understand the context of the applications, it is appropriate to set out a brief chronology of the relevant matters relied upon. The tribunal was provided with a helpful chronology by the respondent, and there was no suggestion from the claimant that this was inaccurate. The tribunal accepts that it is a useful starting point to which the relevant events can be related. The tribunal has also taken into account the

less contentious facts, summarised by the parties in their written submissions.

36. The claimant was employed by the respondent NHS Trust from 1 April 1994, and is a Consultant Obstetrician and Gynaecologist. He spent a term of approximately four years as Clinical Director for the O&G Department, from May 2012 until February 2016. From late 2013 onwards, he made a number of alleged protected disclosures within the Trust and externally, including as to a colleague receiving payments for extra work which had not been undertaken. It would not appear to be in dispute that, from 2014 onwards, there were problems in the claimant's relationship with colleagues.

37. The claimant complained about colleagues, and colleagues complained about the claimant. Colleagues referred the claimant to the GMC, and on occasions the claimant made what he described as protected disclosures about others, including a letter to the GMC in September 2015, and complaints to NHS Counter Fraud. There were various matters referred to in the pleadings, including an investigation into whistleblowing in early summer 2016, further alleged detriments and disclosures, and a finding in the summer of 2017 that there had been a breakdown in relations within the department.

38. Further investigation, known as the "Edgecumbe Investigation," commenced in the summer of 2017. In the Autumn a report was circulated. A further report, "the Boniface report," was commissioned in early 2018, and from early February 2018 the claimant was excluded, pending the conclusion of investigations.

39. A report was made in May 2018, and a panel hearing to consider the claimant's future was convened, and postponed, and the claimant raised a grievance raising various matters.

40. On 27 September 2018, the claimant was finally informed of a panel hearing on 2 December 2018, and although he provided statements of case to the panel he did not attend. The claimant was represented by Miss C Ngo-Pondi, in person. The panel included the Medical Director from another NHS Trust, and a Consultant from another department of the respondent hospital. The panel heard from various witnesses. It decided to dismiss the claimant.

41. The dismissal letter of 12 November 2018 set out, at some length, the reasoning of the panel in relation to the dismissal. This included a comment, in respect of the claimant making complaints to the GMC, and it confirmed that the panel concluded that the breakdown of the functioning in the O&G team, and specifically in relation to the claimant's presence in the clinical team, was serious in its nature, likely to impact patient care and safety, and that action was required to address this. They came to the conclusion that there were no steps which could be taken short of the termination of the claimant's employment. He was dismissed with pay in lieu of notice. It was explained to him, in the letter, that his ongoing grievance would continue to be investigated, in line with the Trust's grievance policy.

42. Only limited documents were placed before the tribunal, which the tribunal has taken into account. Many of the primary facts are evidently not in dispute, or are not matters where the evidential disputes were placed before the tribunal. The tribunal has taken into account the contents of the claimant's 21-page witness statement, albeit it found the contents to be somewhat unfocussed, with only very unclear passing references to the disclosures, and only brief mention of the dismissal.

The tribunal's conclusions

43. The statutory test has been referred to above.

44. Applying case law such as *Taplin v Shippam Ltd*, and *Ministry of Justice v Sarfraz*, recently applied in *Wollenberg v Global Gaming Ventures*, the question is "*whether a claim under section 103A is likely to succeed. This does not simply mean more likely than not. It connotes a significantly higher degree of likelihood. The tribunal should ask itself whether the applicant has established that he has a pretty good chance of succeeding in the final application to the tribunal*". The reference to the "final application" is a reference to the hearing of the claim, at the final hearing before the Employment Tribunal.

45. In delivering judgment, the tribunal was alert to the need to avoid, as far as possible, making findings of fact which might tie the hands of the Employment Tribunal ultimately charged with the final determination of the merits of the points raised (or indeed any subsequent strike out or deposit order applications). The tribunal's task, at this early stage in proceedings, under the umbrella of section 129, is in essence to form a view as to how the matter looks. In other words, as to whether the claimant had a "*pretty good chance,*" and was likely to make out his case.

46. The tribunal took into account the case law referred to. It is important to remember that the tribunal is not deciding whether the case does or does not succeed on its merits, but is applying this preliminary statutory test in order to determine whether the claimant qualified for interim relief, as set out at sections 128 and 129 of the Employment Rights Act 1996. The context is that this jurisdiction relates solely to the claimant's claim of automatically unfair jurisdiction of section 103A of the Employment Rights Act 1996, where the guidance *Kuzel v Roche Products Ltd* sets out the approach to burden and standard of proof which would be taken at the final hearing.

47. This is a case where the respondent NHS Trust had recently dismissed the claimant, with a panel comprising a number of people including an independent Medical Director from another NHS Trust, and that panel made the decision to dismiss the claimant with pay in lieu of notice, in what was described (echoing the words section 98(1)(a)) as "some other substantial reason," specifically a breakdown of in the relationship between the claimant and colleagues. Indeed, the respondent drew to the tribunal's attention the fact that the claimant himself, was not disputing that relationships had indeed broken down. That, in itself, does not undermine the possibility that the reason may have been making a protected disclosure, but does rather suggest that the panel's starting point was a realistic one.

48. A further factor in this case is as follows: Not only is the tribunal tasked with considering the likelihood that the section 103A claim would succeed, but the respondent disputes whether section 103A can even be engaged, because it disputes that there were qualifying or protected disclosures falling within the statutory definition. That is a matter which the tribunal should plainly also consider. Notwithstanding any legitimate claim there may be as to a procedurally or substantively unfair dismissal, if the claimant did not make a protected disclosure, or indeed if there was a disclosure but it did not cause the dismissal (to the required standard of proof) then a claim of automatically unfair dismissal would be incapable of succeeding.

49. The claimant has submitted that it would not be right, in a consideration of interim relief, to consider whether any disclosures were protected disclosures. That is an argument without merit. It is clearly a relevant factor. The tribunal agreed with the respondent that if it is a live matter which is in dispute, it is a matter which should be considered. It would be wholly flawed logic to conclude that a claim for automatically unfair dismissal could be likely to succeed, even if there was no protected disclosure. It is not clear why Miss Ngo-Pondi spent so much of the tribunal's time trying to deflect it from considering what was plainly a relevant issue, and refused to engage with an issue which was plainly relevant and which the respondent suggests would provide a complete defence; this does not give me great confidence as to the coherency of the claimant's case overall.

50. The issue of whether there were protected disclosures (and if so, what and when they were) is sufficiently fundamental to the case that it appears to me it would be quite wrong to make the assumption that if there were disclosures of some sort, they should therefore necessarily be treated as if they fell within the statutory definition of a protected disclosure. This is not to dispose of the matter finally, one way or the other, but needs to be considered in the context of the statutory test for interim relief.

51. The respondent having made it quite clear that no concessions are made in respect of whether any of the matters relied upon amount to protected disclosures, the tribunal has considered, albeit with limited evidence available, the context of those disclosures.

52. Six disclosures are relied upon, although it was made clear at the interim relief hearing that there are in fact three disclosures relied upon in the context of the dismissal. These are: (1) disclosures to NHS Counter Fraud, (2) to the Chief Executive Officer and (3) a disclosure in September 2015 to the GMC.

53. The tribunal was told that the claimant only made a reference to the GMC after he had been notified that colleagues had referred him to the GMC. This was plainly the context of his own letter to the GMC. The tribunal was taken to the wording of the claimant's GMC "disclosure", which is a document contained within the bundle. The claimant sets out in writing the matters which he wished to raise with the GMC, albeit in response to his having already been referred to the GMC by the colleagues that he had fallen out with some time previously. The respondent correctly makes the point that it is not simply a question of disclosing "something," but the statutory test to which the respondent is putting the claimant to strict proof

relies on a number of evidential levels. It needs to fall within one of the types of information specified at section 43B(1)(a)-(f) of the Act, and there must be sufficient that the tribunal can be satisfied that it does indeed fall within one of those categories (or that the claimant reasonably believed that it did). There is also the test of the claimant's "reasonable belief", not only as to the disclosure of information tending to show one of the specified categories, but also that it "is made in the public interest" (section 43B(1)).

54. Insofar as the GMC disclosure is concerned, the respondent's argument has some force, that this is not really about disclosures which the claimant reasonably believed were in the public interest. To the contrary, there are cogent reasons for concluding that the claimant's communication to the GMC is very much in consequence of his being unable to maintain sensible working relationships with his colleagues, and then wishing to air his personal views as retaliation against those who had already made allegations against him. That may or may not be the correct conclusion, but it is a perfectly logical conclusion to draw from the context, and the claimant has been unable to put forward a coherent case as to how he can show that this information falls within the definition of a qualifying disclosure under section 43B(1). Furthermore, although the claimant relies upon "legal obligations" (section 43B(1)(b)), Mr Gorton rightly points out that the claimant has not adduced evidence at this preliminary hearing indicating what the precise legal obligations are and why the claimant believed that the respondent was in breach. Similarly, there are additional requirements under section 43F, which are in dispute, and the tribunal agrees with Mr Gorton that Miss Ngo-Pondi has not addressed these points.

55. Similar issues arise in respect of the other disclosures relied upon. It is not enough for the claimant merely to assert that these were protected disclosures. The respondent has disputed the point, and the claimant has not called sufficient evidence, or addressed the point with any coherency, such that the tribunal is able to ascertain precisely why these should be treated as protected disclosures. It is unreasonable conduct of proceedings, when the claimant has required the tribunal to arrange an interim relief hearing at short notice, and required the respondent to attend, for Miss Ngo-Pondi simply to ask the tribunal to ignore this point, and to assume that the claimant has a strong case, effectively because the claimant believes it to be so.

56. In essence, the claimant appears to take the view that if he asserts that something is so, and that he believes that his former employers are in the wrong, the tribunal should therefore agree with him. Not only is that not the way that litigation works, which requires both sides to be given the opportunity to set out their respective cases, but it is an extremely fragile basis for constructing an argument as to why the claimant should be entitled to the considerable financial benefit of interim relief.

57. The tribunal is certainly not prepared to make any assumptions. It may be that at the final hearing, the claimant is able to satisfy the tribunal that all the protected disclosures relied upon do indeed amount to protected disclosures. However, what the claimant had placed before the tribunal at the interim relief hearing is insubstantial and unconvincing. The claimant has not provided sufficient for the tribunal to have any real confidence that he will be able to show that the disclosures relied upon are in fact protected

disclosures. Full consideration of the evidence may lead to a conclusion that the evidence satisfies the claimant's case, but at this stage tribunal is unable to find, on a balance of probabilities, that the claimant made protected disclosures. But, of course, that it is not the test: it must be ***likely*** that the automatically unfair dismissal succeeds. On the very limited and rather muddled information provided to the tribunal, arising out of this necessary preliminary point as to protected acts alone, the tribunal cannot conclude that the claimant would be likely to succeed. If there is no likelihood of there being a protected act, the question of there being automatically unfair dismissal does not arise.

58. For that reason alone, the tribunal considers that the claimant cannot reach the standard required of showing that he is eligible for interim relief.

59. The tribunal has, however, gone on to consider, in the alternative, the other arguments, and whether if it is likely that the automatically unfair dismissal claim would succeed, if there *had* been protected disclosures (which is the approach which Miss Ngo-Pondi invites the tribunal to take).

60. Although the respondent has not taken the points in this order, it appears to the tribunal to be logical to consider the points in the order of whether there were protected disclosures (see above), the dismissal panel's knowledge of the disclosures, and the actual reason for dismissal.

61. On the question of the panel's knowledge, and any impact on the reasoning of the dismissing panel, it is plainly fundamental to any automatically unfair dismissal said to be *because* of a protected disclosure (or if more than one the principal reason), the decision-maker or decision-makers were aware of the relevant information (or understood the matters before them to amount to a protected disclosure), and that it affected their decision-making. This is a case where the claimant has made a number of assertions, but his case as set out at the interim relief preliminary hearing is extremely vague in nature. Surprisingly, the claimant does not even expressly challenge the conclusions of the dismissal panel. The dismissing panel have set out their reasons in a letter which refers to the breakdown of relationships, which the claimant seems to accept. No knowledge of any protected disclosure is set out in the dismissal letter.

62. The claimant is now seeking to argue, although this is in dispute, that the reason that relationships broke down (or at least the reason they broke down to the extent they did, or the reason that the respondent pursued a particular line) was because of whistleblowing. But these are very generic assertions, and there is no specific assertion, even in the appeal against dismissal (to which the tribunal was taken) suggesting that these were factors acting on the minds of the dismissing panel. Although the claimant asserts that his grievance was raised before the panel, no copy has been supplied, and the tribunal simply has no clear evidence suggesting that the material before the panel referred to specific whistleblowing allegations within the statutory definition of protected disclosure, which would or might have acted on the minds of the panel.

63. The tribunal therefore agrees with the respondent that the material supplied at this preliminary hearing simply does not support the rather vague case now advanced, that the reason for dismissal was affected by the panel

being in some way influenced by knowledge of the claimant having made protected disclosures. Although there may be or may not be a chain of causation between any disclosures (if they fell within the statutory definition) and the sequence of events ending up with the claimant being considered for dismissal, it is simply too remote for the tribunal to be able to conclude that it is likely that a causal link with the dismissal could be established. That means that the tribunal cannot find that it is "likely" that the automatically unfair dismissal claim would succeed. That is a second reason for refusing the application.

64. The third matter, closely linked to the second point, is that the claimant appears to be asserting (albeit with no great coherency) that there was some sort of corporate decision to dismiss the claimant, because he was a whistle-blower. The undisputed evidence, however, is that the decision whether or not to dismiss was delegated to a panel appointed to decide the claimant's case, and that this a very senior independent member. It was this panel that decided to dismiss the claimant, and their reasoning was set out in detail in a letter. There appears to be a rather incoherent suggestion, later withdrawn, that the Chief Executive Officer decided to dismiss. The reality appears to be that although management decided to put the case before the panel, the decision to dismiss was squarely taken by this panel, albeit taking into account the material before it

65. The tribunal has taken into account the case law in ***Kuzel***, and that drawn to its attention by the respondent, including ***Royal Mail Group v Jhuti.*** The tribunal accepts that it is the mental processes of the dismissing panel that would have to be scrutinised. No doubt oral evidence would be given in due course, but the starting point is that the panel's analysis and conclusions are set out in the dismissal letter. There is nothing in that letter which appears to be illogical, unfair or otherwise objectionable. The claimant, who plainly sees the central issue in the automatically unfair dismissal claim as being to challenge that basis for the decision, and has even applied for an interim relief hearing to deal with the point, has simply not come up with material undermining it. It may well be that he was dissatisfied with the HR department, that he was dissatisfied with the Chief Executive, and that he had plainly fallen out with most of his colleagues in the hospital where he worked. But it does not logically follow that this therefore means that the panel appointed to make a decision as to whether or not to terminate the claimant's appointment, dismissed him because he made a protected disclosure. Having asked for interim relief, the claimant has not really produced anything to back up why he believes that his claim is likely to succeed.

66. The tribunal notes that there was considerable internal investigation into the claimant (and his relationship, or lack of relationship, with his colleagues), and that on the face of it the dismissal panel appeared to have been supplied with relevant material entitling them to conclude that there had been a breakdown in relationships (which the claimant appears to accept), with insufficient evidence suggesting knowledge of protected disclosures, or any belief as to the relevance of disclosures if there was knowledge. There is nothing suggesting any wish by the panel to dismiss the claimant because he was a whistle-blower. On the face of it, an independent panel made a reasoned decision and that decision is plausibly set out in a detailed dismissal letter. Taking a step back and viewing the case

objectively, the tribunal would characterise the material provided as indicating the following: the dismissing panel, in the case they set out in their letter, were evidently faced with an NHS Trust trying to provide healthcare services to members the public, but being hampered in doing so by a senior and experienced consultant who did not appear to be on speaking terms with his colleagues, and who had fallen out with many others within the trust. That explanation is coherent and logical, and it does not need any finding of a causal link with any protected disclosure. The claimant has not established, at this preliminary hearing, that is likely that an Employment Tribunal would at the final hearing find that in fact the claimant was automatically unfairly dismissed for making a protected disclosure.

67. The tribunal does not know what rabbits may be pulled out of the claimant's hat in preparing for the final determination of the claim, but if there are rabbits, they have remained firmly hidden in the claimant's hat at the interim relief preliminary hearing. The claimant's case on automatically unfair dismissal, as revealed to the tribunal by Miss Ngo-Pondi, fell very far below the standard of suggesting that it was likely that his claim would succeed.

68. In all the circumstances, the claimant's case does not meet the statutory criteria for an award of interim relief under section 129 of the Employment Rights Act 1996.

69. The application for interim relief fails.

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Employment Judge Emerton

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Date 30 May 2019