EMPLOYMENT TRIBUNALS

Claimant: **Mrs Joanne Asselman**

Respondent: **(R1) Highways England**
(R2) Jason Bedford
(R3) Martin Ritchie
(R4) KPMG
(R5) Vanessa Howlison
(R6) Ian Maddock

Heard at: Birmingham **On: 14 October 2019**

Before: Employment Judge Dean

Representation
Claimant: in person
First Respondent: Mr Allsop, of counsel

JUDGMENT

The Claimant's application for interim relief in respect of a claim presented to the Tribunal on 28 September 2019 for interim relief does not succeed.

REASONS

Background

1. By way of background in this case, a claim form was presented to the Employment Tribunal on the 28 September 2019. The Claimant brought complaints of automatically unfair dismissal pursuant to Section 103A of the Employment Rights Act 1996 ("ERA") for having made protected disclosures, detriment pursuant to Section 47B of the Employment Rights Act (protected disclosures) and for unlawful discrimination because of the protected characteristics of her sex, disability and age and breach of contract. The Claimant had referred her complaints to ACAS to undergo early conciliation procedure having notified ACAS of her intention to make a complaint on the 30 August 2019 and a Certificate having been issued by ACAS on the 26 September 2019.

2. The application contained an application for interim relief and this Hearing has been listed to consider that application for interim relief.

3. The Application which I am required to consider is a complaint that follows an earlier application to the Employment Tribunal under Case Reference number 1305876/2019 against the first Respondent and a number of other respondents which, like this was a complaint that the Claimant had been subject to detrimental treatment having made protected disclosures and that in addition, the Claimant had been subject to unlawful discrimination because of the protected characteristic of disability, for direct discrimination in respect of perceived disability in breach of Section 13 of the Equality Act and for indirect discrimination in respect of her disability in breach of Section 19 of the Equality Act. In addition, the Claimant makes complaints of unlawful discrimination because of protected characteristic of her age and also of her sex. The current complaint includes in addition to the complaints of detriment and unlawful discrimination a complaint that the claimant has been automatically unfairly dismissed for the reason or if more than one the principal reason being that she had made a protected disclosure.

4. At the commencement of the Hearing, it became apparent from the Claimant's comments that the application which had been served on the Respondents had been a document that accompanied an email sent by the Claimant, 30 September 2019 which stated it was the amended attachment to be taken as the final attachment to the Claimant's application including interim relief. Regrettably, the Originating Application form ET1 that the Claimant explained had been presented electronically on 28 September on at least two occasions had not been associated with the subsequent attachment detailing the grounds of her application. Subsequent enquires of the administration during the course of the hearing confirmed that the claimants Claim form was presented to the Tribunal in duplicate on Saturday 28 September 2019 and had not yet been vetted by the administration nor been associated with the subsequently received amended attachment. The first Respondent who are the subject of the Interim Relief application confirmed that, having had notice of the substance of the Claimant's Interim Relief application, they were content for me to continue to hear the application. Employment Judge Gaskell had caused the documentation comprising the grounds of the application [220-264] to be served on the Respondents and notice of an Interim Relief Hearing was sent to the Claimant and to the first Respondent the employer in respect of whom the interim relief was sought.

5. Before detailing the written evidence and submissions before me, I set out a little of the background against which the Interim Relief Hearing was held.

6. Prior to the start of the Tribunal Hearing on Monday 14 October 2019 at 9.45am an unscheduled fire alarm was sounded within the building and there followed a full evacuation of the building. The start of the Hearing was therefore delayed until 11.05am and at the Claimant's request, in order that she could organise her papers in the Tribunal hearing room, the start of the hearing, was delayed further until 11.20am.

7. At the start of the Hearing of the application, in light of the Claimant's expressed wish, in her application [250] that all hearings of her

complaints in the Tribunal should be heard in private I sought to clarify the nature of this hearing and the limitation of the issue which was to consider only the prospects of the claimants allegation that the reason or principle reason for her dismissal by the First Respondent was because she had made a protected disclosure. In light of the direction I made on the limitation of the issues the Claimant confirmed that issues relating to her perceived or actual disability being not relevant to the interim application, she did not seek for this Hearing to be conducted in private nor for there to be any restricting or reporting orders made.

8. The documents that were submitted for me to consider are substantial. The Respondent submitted a lever arch file extending over some 304 pages which were indexed and paginated, that bundle of documents having been served on the Claimant and received by her. The notice of the interim relief application having been served on the parties on the 2 October 2019, the Respondents are not yet required to enter a response to the 42-page grounds of application, indeed the form ET1 has not yet been served upon the respondents although the grounds of the application have been served on the first respondent in respect of whom this Interim Application is made. I have been provided with a witness statement from Mr Martin Ritchie who is the Enterprise and Resource Planning ("ERP") Director of the Respondent organisation. I have read Mr Ritchie's witness statement. Although I have heard evidence neither from him nor from the Claimant, I have considered Mr Ritchie's statement to be the reason asserted by the Respondents for their treatment of the Claimant in respect of the matters about which the Claimant asserts led to the termination of her contract of employment with the Respondent.

9. I have read the documents within the Respondent's bundle that Mr Ritchie has referred me to and I have had the benefit of a skeleton argument on behalf of the first Respondent for the purposes of the Interim Relief Hearing.

10. The Claimant has attended with her own documentation, a lever arch file of which had been served on the Respondent. The Claimant has

attended in person. Although she is a litigant in person the claimant is not unfamiliar with the process of an Employment Tribunal and indeed proceedings in EAT and the Court of Appeal, in previous litigation to which she has referred, I am grateful to the claimant for bringing to my attention a number of authorities to which I have been referred. The Claimant has attended with her own sets of documentation, they include A1 a full lever arch file of documentation which Mr Alsop indicates extends over 823 pages of unindexed and unpaginated documentation. In addition and, in an effort she hopes to assist me, the Claimant has produced a further 3 folios of documentation which I describe as A2, approximately a further 130 pages, which are additional documents to the lever arch file, A3 described as core documents extending over approximately 121 pages, A4 a further 224 documents which the Claimant describes as being documents in relation to the disclosures, although not all of them and only the key disclosure documents and R5 a document described as "dates as requested by Tony Malone on 4 October 2019", a document of 5 pages. None of the claimant's loose leaf and unsecured document pages were paginated, except where they were documents or email exchanges that were internally paginated. I explained to the parties that given the nature of an interim application I would refer to the pleadings such as were available and to the additional documents to which I was specifically referred. I asked the claimant to paginate her documents in a way in which I might be able to locate the documents she wished to refer me to during an adjournment that I would allow for the purpose and unfortunately, claimant informed me that she could not paginate her bundle.

11. Mr Alsop indicated that he would, to the extent the Claimant referred to those specific documents within her own paginated bundle, try to identify where those same documents may be found in the paginated respondent's lever arch file. In these reasons I have identified documents by reference to the respondent's page numbers if available otherwise the description and location of the documents in the claimant's bundles are of necessity by narrative.

12. The Claimant's application is that having made what she asserts to be protected disclosures, the Respondent treated her detrimentally because of having made protected disclosures qualifying for protection under Section 43b of the Employment Rights Act 1996. As a consequence of subsequent actions upon the part of the Respondent, the Claimant asserts that she has been dismissed by the Respondent on the 25 September 2019 and that her dismissal was an automatically unfair dismissal in breach of the provisions of Section 103A of the Employment Rights Act 1996. The claimant claims for Interim Relief having been unfairly dismissed "for the reason or, if more than one, the principle reason) for the dismissal is that the employee having made a protected disclosure".

13. The Claimant outlined in brief the basis of her second application under Case Number 1307484/2019. In brief she says that on the 25 September 2019, she received an email from Rachel Davis in which she confirmed that the role of ERP Strategy Implementation Manager, which the Claimant believed was her role, had been recruited and at that point the Claimant considered that the Respondents were in breach of her contract and that her employment had been terminated on that date the 25 September 2019.

14. The Claimant asserted that her complaint is that the job advertised by the Respondents for an ERP Strategy Implementation Manager [272-274] at Grade 8 is in effect the job that she was in practice undertaking since July 2018 until the 2 April 2019, and arguably until the 3 May 2019 when she was then assigned to project work.

15. Having identified to both parties, the single issue that I will be required to determine in considering the application for initial relief, Mr Ritchie was released from the Tribunal Hearing as he was not required to give evidence at the Hearing, his witness statement to be taken as the in-principal reasons why the Respondents resist the Claimant's application for interim relief.

16. In preparation for the start of the Hearing, I had had an opportunity to read Mr Ritchie's statement together with the Respondent's written submissions and had had a limited opportunity to read the detail of the Claimant's lengthy grounds of the Interim Relief application [42 pages]. I confirmed that it was my intention to read the detail of the Claimant's application form and the Authorities to which she referred in folio A4, and I would read all of those documents in detail during an extended early lunch adjournment. It was agreed I would hear arguments in submissions in the afternoon. The Claimant confirmed that she had prepared a plan of the arguments that she wished to put and anticipated that she would require between 30 and 40 minutes to make those arguments.

17. On reconvening after the lunchtime adjournment, the Claimant once again apologised for her inability to paginate the documents which she had copied, explaining that she has a condition such that she is unable to paginate the bundle of papers. I reminded both parties that I would refer only to the documents to which I am taken by them and that it was necessary for the Claimant to identify where within the unpaginated documents she wished me to read in order that I could identify as best I could those documents that she wished me to consider.

18. Following the lunchtime adjournment, the Claimant indicated that she would need longer than the 40 minutes that she had previously estimated and confirmed in answer to my enquiries that she hoped she would be able to complete her submission within 1 hour. I indicated that although usually I would hope to give an ex tempore decision on an Interim Relief application and my reasons for it, if on this occasion time did not permit I would hear from both parties their submissions in argument and would reserve my decision. In the event the claimant made oral submissions that extended over 1 hour 45 minutes and Mr Alsop indicated that he would condense his oral submissions to supplement his written submissions on which he would rely.

19. Before it was possible to consider the arguments put and reach my decision on the application for interim relief on 15 October, the Claimant

submitted a detailed email including her expression to a number of concerns and sent an email for my urgent attention on the 15 October 2019, setting out a number of concerns and making further representations. The email was copied to the Respondent's representative and the Respondent has been given an opportunity to respond to the additional representations made by the Claimant. My decision on the application for interim relief has been concluded with the benefit of the representations of all the parties.

The Issues

20. The complaint in respect of which an interim application is brought, is that under the procedure of Section 129 of the Employment Rights Act 1996 which provides: -

"*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 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.

21. The Claimant asserts that she has brought a claim pursuant to Section 103A ERA 1996 and the Claimant makes an application for interim relief pursuant to Section 128(1)(A)(i) ERA 1996:

"***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 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."

22. In essence, the issues to be considered are whether it appears that it is likely that on determination of the complaint to which the application relates the Tribunal will find: -

i. that the Claimant been dismissed?

ii. the reason for the dismissal, (or if more than one, the principal reason for the dismissal) was that the employer made a protected disclosure as described at Section 43B of ERA 1996? In particular that it is likely the Tribunal at the final hearing would find:

a) That the Claimant had made a disclosure to her employer;

b) That she believes that the disclosure tended to show one or more of the things itemised at (a)-(f) under Section 43B (1);

c) That that belief was reasonable;

(iv) That the disclosure was made in the public interest;

(v) That the disclosure was the principle reason for her dismissal.

The Legal Principles

23. In considering an application or interim relief, I am required to undertake a predictive exercise as to the likely outcome of the full-Hearing. In undertaking that exercise, I seek to avoid making determinations of factual issues as if mine is a final determination of the matter. In the circumstances, the application stands on the pleadings, documentary evidence and the submissions and arguments of the parties. Having regard to the provisions of Rule 95 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 in considering an Interim Relief application *"the Tribunal shall not hear oral evidence unless it directs otherwise".* This is not a case in which I consider it appropriate to hear oral evidence for either party. For the reasons I explained to the Claimant, the Respondent having had insufficient notice to require them to present a response to the claim form ET1, the written witness statement of Mr Martin Ritchie is taken as the Respondent's explanation for the circumstances that led to the Claimant's relevant complaint. Mr Ritchie has been released as he was not required to give oral evidence and his statement has not been subject to cross-examination or questioning, his account is taken as the respondent's explanation for their acts and omissions. I take the case of the claimant in respect of Interim Relief as set out in her claim form and the respondent's response is the account detailed in Mr Ritchie's statement.

24. The leading cases on the test to be applied by an Employment Tribunal hearing an application for interim relief are those of Taplin -v- C. Shippam Limited [1978] ICR1068 and the Ministry of Justice -v- Sarfraz [2011] IRLR 562. An application for interim relief is for a brief urgent Hearing which is to make a broad assessment of the application and in particular the question whether the Claimant under Section 103A is likely

to succeed. In the case of Sarfraz, Mr Justice Underhill – President at the Employment Tribunal gave the following guidance at paragraph 14:-

> *"Thus, in order to make an Order under Sections 128-129 the Judge had to have decided that it was likely that the Tribunal at the final hearing would find five things:*
>
> *(i) That the Claimant had made a disclosure to his employer;*
>
> *(ii) That he believes that the disclosure tended to show one or more of the things itemised at (a)-(f) under Section 43B (1);*
>
> *(iii) That that belief was reasonable;*
>
> *(iv) That the disclosure was made in good faith;*
>
> *(v) That the disclosure was the principle reason for his dismissal*."

25. Further guidance is given by the EAT in London City Airport Limited -v- Chacko [2013] IRLR610 in which Mr Recorder Luba QC provided further guidance upon the approach to be taken and in particular the correct approach to be applied to the meaning of "it is likely". He confirmed that following the authority of Taplin it must "be established that the employee can demonstrate a pretty good chance of success". The conclusions reached by Mr Recorder Luba QC reaffirms the exercise of judgment that an Employment Judge at the interim application hearing is required to undertake at paragraph 23 he explains:

> "23. *In my judgment the correct starting point for this appeal is to fully appreciate the task which faces an employment judge on an application for interim relief. The application falls to be considered on a summary basis. The employment judge must do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The Employment Judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the Employment Tribunal but whether "it appears to the tribunal" in this case the employment judge "that it is likely". To put it in my own words, what this requires is an expeditious summary assessment by the first instance*

employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim."

26. The Claimant who is a litigant in person, though not unfamiliar with the process of Employment Tribunal Hearings and indeed of the Appeal courts, has in her subsequent email representations to me, expressed concern that she had not been afforded sufficient time to develop her arguments or to question the statement produced by Ms. Ritchie in cross-examination in the hearing of her application. I gave my explanation of the process and the summary nature of it to the claimant at the hearing and again in these reasons for the determination, I hope that on reflection the Claimant will better understand more clearly the nature and constraints of an interim relief application and hearing.

27. Mr Alsop for the Respondent has reminded me that in any case in which an automatically and unfair dismissal is alleged under Section 103A ERA 1996, that where the employer does not have the requisite qualifying service, the onus is on him to establish the inadmissible reason or principle reason for his dismissal, referring me to the leading authority of Smith -v- Hayle Town Council [1978]IRLR 413 followed by Ross -v- Eddie Stobart Limited [2013]IRLR 209.

28. In considering whether or not it is likely that at a Final Hearing a Tribunal will find that the principal reason for the dismissal was on the grounds of whistle-blowing, without making binding Findings of Fact, an initial assessment must be made of whether, if a breach of a legal obligation is asserted by the Claimant, to have found the Section 103A application. The source of the obligation which the Claimant believes applies, should be identified and capable of verification by reference to statute or regulation. In Blackvey Ventures Limited (t/a Chemistree) -v- Gahir [2014] IRLR416 HHJ Serota QC commended the approach to be taken

by Employment Tribunals in considering claims by employees for victimisation for having made protected disclosures: -

> *"1. Each disclosure should be identified by reference to-date and content.*
>
> *2. The alleged failure or likely failure to comply with illegal obligation, or matter giving rise to the Health & Safety of an individual having been or likely to by endangered or as the case may be should be identified.*
>
> *3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.*
>
> *4. Each failure or likely failure should be separately identified.*
>
> *5. Save in obvious cases if a breach or illegal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to Statute or Regulation."*

Mrs Justice Slade DBE in Eiger Securities LLP -v- Korshunova [2017] IRLR 115 @ paragraph 46 confirmed that the identification of the source of the legal obligation "*does not have to be detailed or precise but it must be more than a belief that certain actions are wrong."* Actions may be considered to be wrong because are immoral, undesirable or in breach of guidance without being in breach of a legal obligation.

29. Mrs Justice Slade DBE later drew the distinction between a legal obligation as opposed to a moral or lesser obligation which a Claimant may consider to have been broken which does not amount to a qualifying disclosure.

30. The claim giving rise to this interim relief application was presented to the Tribunal on 28 September 2019 it in turn refers to the fact that the Claimant had already presented an earlier complaint to the Tribunal Case Number: 1305876/2019 in which the claimant asserts she has been subject to unlawful discrimination because of the protected characteristics of sex, age and disability and that having made

disclosures qualifying for protection she had been caused by the Respondents to suffer detriment. In this, her second complaint, the detailed grounds of the complaint having been served on the Respondent the claimant refers in large part to the history of the first complaint and asserts that in light of what the Claimant says were protected disclosures, she had brought proceedings in the Tribunal which of themselves amount to a disclosure of information which tends to show that the Respondent is failing or is likely to fail to comply with any legal obligation to which it is subject.

31. In bringing a complaint of automatic unfair dismissal under the auspices of Section 103A, the Claimant, who has less than 2 years continuous employment with the Respondent, must first establish that she has been dismissed by the Respondent. The Claimant asserts that her dismissal by the Respondent occurred on the 25 September 2019. It is the Claimant's case in basic terms that although she was employed by the Respondent as a Solution Architect – Oracle Platforms, pay band 7, she had been acting up following allocation to her of the duties undertaken by Eric Smith who headed up the People Finance and Procurement Service ("PFP"). The Claimant undertook that role whilst the team leader Eric Smith was on long term leave and for whom there was no succession plan in place.

32. The Respondent's account is that on Mr Ritchie's appointment as ERP Director on the 17 June 2019, in light of Mr Smith's long term sickness absence and other absences of staff on long-term sick leave and a failure to recruit in critical technical roles, he sought to develop a strategy for the future of the ERP Service post 2022. In light of the forthcoming retirement of Mr Smith, Mr Smith's existing role no longer was required and Mr Ritchie wrote a job description for an "ERP Strategy Implementation Manager" [R272-274] which the Respondent asserts was to replace Mr Smith's vacancy and to change the remit of the role with greater focus on strategy and change. The role was identified as being a larger one than previously undertaken by Mr Smith and it justified an increased pay band/increased salary to address the need pay a higher salary to attract in the recruitment market a specialist and papers

were submitted by Mr Ritchie to the Resourcing and Reward Executive Panel on 12 July 2019 for their approval for the new position [280-282].

33. The job vacancy was posted on the 24 July 2019 at 8.14am. The Claimant wrote an email in response to Mr Ritchie on the 25 July at 13.25 [A3] email exchange page 6 of 10. In summary terms, the Claimant asserted that the job advertised was one she considered to be that which she was already undertaking and she confirmed:

> *"ordinarily I would have applied for this role and been extremely well placed, to have got this, I believe. However, giving your repeated refusal to let me work in your team and your refusal to give me access to the system… so I sadly was not able to trust what you are saying in this regard and your detrimental treatment of me, I strongly believe - then we both know you would not even consider me."*

The Claimant's pleaded assertion is that as a woman, Mr Ritchie's conduct was found by her to have been " *highly offensive*" and that it was:

> *"clear by several events that you are causing detriment (by refusing to give me access to my rights to the Oracle system) for me whistleblowing – and you are aware of my serious concerns*."

The Claimant asserted that she considered Mr Ritchie was discriminating against her on the grounds of her sex (including victimisation) and causing her to suffer a detriment for whistleblowing and stated her intention to draw all of those matters to the attention of the Employment Tribunal.

34. It is the Claimant's assertion that the new job of ERP Strategy Implementation Manager was advertised and three hours after the job was advertised, she was notified that she was no longer reporting to Mr Ritchie, but instead her objectives were changed to having a remit to do with Oracle or HR or Finance. In her submissions the Claimant asserts that, having been employed as a Solution Architect but no longer having anything to do with her expertise in Oracle that her contract had been breached. Whilst the Claimant acknowledges that her contract entitles

the Respondent to ask her to do other jobs as a Solution Architect, her assertion is that she was redeployed to another project work, not reporting to Mr Ritchie on the 24 July 2019.

35. Notwithstanding the statements contained in her email, to Mr Ritchie of the 25 July 2019, the Claimant did not then resign from her employment or assert that the Respondent, despite her assertion then, that the Respondent were causing her detriment for whistleblowing and discriminating against her on the grounds of her sex.

36. Notwithstanding the Claimant's earlier expressed intention not to apply for the job, the Claimant did do so and was unsuccessful in her application. In response to her request for feedback as to why she had been unsuccessful on 19 August 2019 Mr Ritchie responded by email [R284] identifying that in respect of one of the core skills she had scored well, but that in two of the core skills set, she had not.

37. On the 25 September 2019, the Claimant wrote to Elaine Billington in response to an email she had received from Rachel Davis a HR Senior Caseworker the previous day [A3 emails commencing 25 September 2019 at 17.36. @Page 7 of 7 (commencing 16:42 going forward to 26 September at 17:36)] which confirmed that the ERP Strategy Implementation Manager had been recruited to. The Claimant having asked for confirmation whether she had been automatically and unfairly dismissed by the company, Miss Davis had confirmed that the Claimant had not been dismissed, that she remained an employee and there had been no suggestion from the company that her employment was ending. Notwithstanding the fact that as early as the 19 August 2019, the Claimant had been aware that she had not been successful at the sift stage of the recruitment process, the Claimant wrote a letter to Elaine Billington on the 25 September 2019 at 19.37 [R228] with the subject line:

> *"I believe I have been automatically unfairly dismissed by Highways England for raising serious public interest disclosure acts to Highways England".*

On 26 September at 17:36 the claimant in her email to Elaine Billington informed her:

> *"I am not resigning from the Company. The Company has Automatically Unfairly Dismissed me …… I have advised yourselves that I intend to honour the 12 weeks period*."

38. In considering the first limb necessary to qualify for a successful Section 103A complaint, I consider whether it is pretty likely that the Respondents decision to recruit a grade 8 position of ERP Strategy Implementation Manager was a repudiatory breach of the Claimant's contract of employment. The Claimant has had difficulty understanding that in the absence of an actual termination of contract by the Respondent, the resignation on notice that she gave on the 25 September 2019 may be considered in certain circumstances to be a constructive dismissal which may nonetheless be an automatically unfair dismissal. A constructive dismissal is one being described in Section 95(1)(C) of the Employment Rights Act 1996:

> "*the employer terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

39. In this case, to succeed, the Claimant will have to show that her role was that for which the position of "ERP Strategy Implementation Manager" was one she in fact exercised. The Respondent asserts that the role was a new role, was different in terms of the remit [R267-283], its content and grade from the Claimant's contractual role of Solution Architect [A3 email sequence commencing 26 July 2019] and Mr Ritchie's witness statement, paragraphs 13-14.

40. The Respondent asserts that the Claimant's position within the organisation continues to exist and she continues to fulfil that role having tendered her resignation with 12 weeks contractual notice. On the claimants own account in argument she has accepted that she has not been acting up in the role undertaken by Mr Smith since 2 Aril 2019 since when she has been undertaking project work since 3 May 2019. Absent

an express dismissal by the employer, it is for the Claimant to establish that she has resigned in circumstances where she was entitled to terminate her contract of employment without notice by reason of the employer's conduct.

41. The Court of Appeal in Kaur -v- Leeds Teaching Hospitals NHS Trust [2018] IRLR 841 paragraph 55 restate the elements of constructive dismissal which are well established, where in the Court of Appeal, Lord Justice Underhill identified the five questions that a Tribunal ought sufficiently to ask of itself: -

> *"55. I am concerned that the foregoing paragraphs may make the law in this area seem complicated and full of traps for the unwary. I do not believe that that is so. In the normal case where an employee claims to have been constructively dismissed it is sufficient for a tribunal to ask itself the following questions:*
>
> *(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation ?*
>
> *(2) Has he or she affirmed the contract since that act ?*
>
> *(3) If not, was that act (or omission) by itself a repudiatory breach of contract ?*
>
> *(4) If not, was it nevertheless a part (applying the approach explained in Omilaju) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term ? (If it was, there is no need for any separate consideration of a possible previous affirmation, for the reason given at the end of para. 45 above.)*
>
> *(5) Did the employee resign in response (or partly in response) to that breach ?*
>
> *None of those questions is conceptually problematic, though of course answering them in the circumstances of a particular case may not be easy."*

42. It will be for the Tribunal hearing all of the evidence in this case to determine those questions, however, the Claimant was aware with effect from the 25 July 2019 that the post was of ERP Strategy Implementation Manager had been posted, was aware that she had not qualified for

interview following a sift on the 14 August 2019 and was later informed of the confirmation of the appointment on 25 September 2019.

43. The Tribunal hearing evidence will have to determine whether the claimant can identify whether the Claimant can establish that the creation of the role of ERP Strategy Implementation Manager was an act of repudiatory breach of contract and if not, whether it was nevertheless part of a course of conduct comprising of several acts or omissions which together amounted to a breach of the term and whether the Claimant resigned in response to that breach or whether she affirmed her contract.

44. The factual matrix in this case is far from clear on a summary consideration of whether the Respondent's act amounts to a repudiatory breach of contract and was one which was done because the Claimant had made a protected disclosure contrary to Section 103A of the Employment Rights Act or for unrelated reasons as asserted by the Respondent as articulated in the statement of Mr Ritchie. On a summary consideration I am not able to conclude that the claimant has been able to demonstrate that it is likely that the Tribunal at a final hearing will conclude that the claimant was dismissed by the respondent.

45. In addition, the Tribunal will have to establish whether or not the Claimant had made a protected disclosure(s) and because of such protected disclosure(s), the decision to dismiss the claimant had been taken.

46. Mr Ritchie's witness statement explains that he first contemplated the need for a new position of ERP Strategy Implementation Manager in early June 2019 and the decision to create a redesigned job position of ERP Strategy Implementation Manager was first canvassed on the 25 June 2018 [R278] with a proposed job description that lead to a draft paper to be prepared on the 1 July 2019 [R275] that was presented to the Resourcing and Reward Executive Panel on the 12 July 2019 [R280-281]. The claimant asserts that the creation of this new role was done principally because of the Claimant having made protected disclosures

and the conflict of accounts raises significant evidential issues that will require determination before a Tribunal hearing all of the evidence.

47. I turn finally to the Claimant's assertion that she has made protected disclosures.

48. The Claimant asserts she had articulated a number of public interest disclosure concerns on several occasions which she identified in the documents which she attached as the detail of her complaints. In her second application [R220-262] at 246-249 the Claimant refers to her belief that her public interest disclosure concerns related to three main areas including:- 1) financial accounts: a serious concern, 2) Health & Safety – "they have often not followed basic Health & Safety – even a backstreet shop in Liverpool would have more robust procedures, I believe," and 3) Data Protection referring in substantial part to grievances that the Claimant had raised and disclosure of sensitive personal information.

49. In her submissions, the Claimant has referred me a list of a number of whistleblowing disclosures that she made[A4 the 11-page document at the start of the loosely paginated sheaf of documents at pages 1-11], the first document as a table described as "public interest disclosures" (-some) at Highways England (and KPMG). The Claimant was employed by the Respondent as a Solution Architect on pay band 7 and included within the role of a Solution Architect and the key competencies includes business risk management [A3 third document, email and attachments 26 July 2019 11.43 page-5 of 9]. The document which is a helpful summary of some 47 occasions in which the Claimant refers to the date, headings and detail setting out the gist of matters the "disclosure" made.

50. To the extent that the Claimant has articulated what she describes as protected disclosures, they are summarised within her claim including an application for interim relief [R247-249] and are set out in the table prepared by the Claimant A4 [pages 1-11]. Mr Ritchie's account, if it is accepted, is that his creation of the new role was first contemplated by him on the 1 June 2019 and for the claimant to succeed the decision to

create the new role at the start of June would have had to been part of a plan to dismiss the Claimant and those disclosures would have had to predate that decision. Having considered the documentation produced by the Claimant, she has referred to a number of:

> "*concerns regarding Health & Safety, transparency and the lack thereof*"

and the risk of fraud and a potential coverup. The Ritchie witness statement includes an acknowledgment that the company was already aware of a number of matters for concern and exposure to risk in their systems that were being addressed and that the concerns raised by the claimant were matters to which the respondent was already alert and were taking steps to address. As a Solution Architect, the Claimant is no doubt alert to the analysis of risk as opposed to being matters tending to show one or more of the things itemised under s43B of the Employment Rights Act.

51. On the necessary summary consideration of the documentary evidence that has been brought to my attention, the Claimant has not particularised any breach of any actual legal obligation as opposed to the lesser industry standards and moral standards to which the Respondent might adhere, nor does the Claimant particularise any alleged breach of Health & Safety.

52. The Claimant does of course refer specifically to breach of legal obligations required and she refers to breach of the Equality Act in her later emails to Mr Ritchie that post-date the conception of the newly configured role of ERP Strategy Implementation Manager.

53. Having considered the authorities to which my attention has been drawn, and having considered the documentation and representations that have been made, I am unable to conclude that the Claimant has a "pretty good chance" of establishing that she was dismissed and dismissed contrary to Section 103A ERA 1996. To succeed in the application the Claimant must have a pretty good chance of satisfying the burden of proof at the Final Hearing, such that on my consideration of the interim relief application, I am not able to conclude that the Claimant has

demonstrated 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 principle reason for the dismissal was one of those specified in Section 103A). From the summary assessment that I have made based upon the documents to which I have been referred and the argument before me the claimant has not satisfied the standard of consideration to succeed in her application for Interim Relief. The Interim relief application does not succeed.

Employment Judge Dean
27 October 201**9**