THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

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

BETWEEN:

Claimant	**Mr S Malik**
	and
Respondent	**Home Office**
ON:	**27 February 2020**

APPEARANCES:

For the Claimant:	**In Person**
For the Respondent:	**Ms Bunting, Counsel**

JUDGMENT having been sent to the parties on 17 March 2020 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

1. Following his dismissal on 27 January 2020, the Claimant made an application to the Employment Tribunal on 28 January 2020. An interim relief application hearing was duly listed for 25 February 2020.

2. However, on the 25 February 2020 the Respondent did not attend. As this was an interim relief application, the Tribunal was unable to proceed. The Tribunal contacted the Respondent who contended that it had not received the ET1, although the tribunal ascertained that the documentation was served on the Respondent at the correct address.

3. Despite the inconvenience to the Claimant, the matter was relisted yesterday (26 February 2020) for today (27 February 2020) and the hearing proceeded.

4. Under Rule 95 of the Employment Tribunal Rules, a Tribunal does not hear oral evidence in an application for interim relief unless they make a positive decision to do so. In light of complex law, and the history of this matter, it was deemed not appropriate to hear oral evidence.

5. In respect of documents, the Tribunal had sight of a small bundle from the Respondent and further a bundle from the Claimant. It was ascertained during the hearing that the claimant's bundle had not been previously made available to the Respondent and it was therefore provided to the respondent during the hearing.

The Claims

6. The application for interim relief is made in respect of a complaint of unfair dismissal under Section 103A Employment Rights Act 1996, that is, dismissal because of a public interest disclosure (a so-called whistleblowing dismissal).

The Issues

7. The Claimant made his application for interim relief and indicated his intention to do so on the ET1. His claim in respect of Section 103A had two elements.

    a. The claimant's primary case was that he had made a protected public interest disclosure on 10 May 2019 by way of an email and affidavit to the Head of Asylum Operations, primarily about conduct within part of the Asylum Unit. He had also sent later submissions raising similar issues. This disclosure was the reason for his dismissal.

    b. Further and in the alternative, if the tribunal accepted the respondent's case as to its reason for dismissal, which was that the respondent believed that the Claimant, despite his denials, had spoken to the press. Such a dismissal would be protected under Section 103A because the disclosure to the press came within Section 43G and thus was a public interest disclosure, even if the Claimant was not the person who made that disclosure.

8. The Tribunal had sight of the ET1 but, as is common with interim relief applications, no ET3, and the Tribunal accordingly had to establish the

Respondent's case based on the contemporaneous documents before it and Counsel's statements, to the extent that he had instructions.

The Facts

9. The background to the complaint is as follows. The employer is a very large Government department which, amongst other matters, is tasked with making decisions on asylum applications. The Claimant started work on 23 March 2018 as an Executive Officer and an asylum decision maker. The Claimant's account was that he had made a number of historical disclosures to management about the conduct (or misconduct) of the asylum team. He was then dismissed on the grounds that he was challenging the Respondent's practices. This dismissal was overturned on appeal and he returned to work.

10. I now turn to the events that are material to the claim. In about April 2019, a number of articles appeared in the Guardian national newspaper alleging malpractice within the asylum unit. The Claimant believed that he was held responsible for this by his colleagues. On 10 May 2019 he made putative disclosures by email to the Director of Asylum Operations. In this email he stated that he was going to provide these disclosures to the press and named the Guardian newspaper.

11. The Claimant was suspended the next day. The respondent determined that he did not come within its whistle-blowing policy.

12. A further article appeared in the Guardian newspaper in July which was very similar in contents to the concerns that the claimant had raised. These concerns were reasonably specific and related, for instance, to the interaction of the respondent's duties to the potential victims of trafficking and its duties and rights under the EU Dublin III Regulation (which established the criteria and mechanisms for determining the Member State responsible for examining an application for international protection). The respondent then investigated the Claimant as a possible source of the leak to the newspaper. The Respondent dismissed the claimant stating that the reason for dismissal was because it believed that he had gone to the press with allegations in breach of the Civil Service Code.

13. The Claimant denied at all times, and continued to deny before the Tribunal, that he was the source of the leak to the Guardian newspaper.

The Relevant Law

14. The relevant law is found at sections 43B and 103A of the Employment Rights Act 1996 as follows: –

43B Disclosures qualifying for protection.

(1)In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a)that a criminal offence has been committed, is being committed or is likely to be committed,

(b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c)that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d)that the health or safety of any individual has been, is being or is likely to be endangered,

(e)that the environment has been, is being or is likely to be damaged, or

(f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

(2) of any other country or territory.…

(3)A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4)…

(5)In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)

103A Protected disclosure.

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure

Applying the Law to the Facts

15. According to the Employment Appeal Tribunal in the case of *Taplin v* C *Shippam Limited 1978* [*ICR 1068]*, a Claimant must establish that he has a 'pretty good chance of success' at the full hearing to succeed in an application for interim relief. According to the EAT in *Wollenberg v Global Gaming Ventures (Leeds) Ltd & Anor UKEAT/0053/18/DA*, this means a significantly higher degree of likelihood than were the Tribunal simply required to determine at this preliminary stage whether it was more likely than not that the claim would succeed.

16. According to case law, by their very nature, interim relief applications have to be determined expeditiously and on a summary basis. A Tribunal must do the best it can with such materials as the parties have been able to provide at short notice and to make as good an assessment as it feels all able. The Tribunal has to be careful to avoid making findings that might tie the hands of the Tribunal ultimately tasked with the final determination of the merits of the case. A Tribunal's task is an impressionistic one – does the Claimant have a pretty good chance / were they likely to make out their case. Further, the Tribunal must explain the conclusion reached

on that basis, not in an overly formulistic way but giving the essential gist of its reasoning sufficient to let the parties know why the application had succeeded or failed, given the issues raised and the test that had to be applied.

17. Accordingly, the Tribunal firstly considered whether the Claimant had a pretty good chance of establishing that his email 10 May was a protected disclosure. In the view of the Tribunal, he does have a pretty good chance of establishing this for the following reasons.

18. The email and accompanying affidavit contain considerable information in respect of alleged security breaches under Data Protection legislation. The email covered the precise operation of the Third Country Unit in respect of Dublin 3 removals, for instance, a failure to ensure removal. This very likely to constitute "information" for the purposes of section 43B(1).

19. Further, in the view of the Tribunal, the claimant has a pretty good chance of establishing that, in his reasonable belief, the disclosure tended to show the respondent was failing to comply with its legal obligation. The respondent is subject to legal obligations as to how it deals with asylum applications and the Claimant, as an asylum decision maker, is likely to know what these are, better than most.

20. Further, in view of the Tribunal the claimant has a pretty good chance of establishing that in his reasonable belief the disclosures were in the public interest. The claimant's allegations included examples of the respondent failing to comply, for instance with the Dublin 3 Regulation. In the view of the tribunal, the claimant is very likely to be able to show that he reasonably believed that the lawfulness and propriety of the processing of applications for asylum by the respondent was a matter which came within the public interest.

21. Finally, the putative disclosure was made to the claimant's employer.

22. Accordingly, the claimant has a pretty good chance of establishing that he made a public interest disclosure.

23. The next issue was whether the claimant has a good chance of establishing that the reason for the dismissal was because of any such public interest disclosure.

24. The claimant contended that the disclosure was the reason for the dismissal because the email and affidavit started the chain of events which led to the dismissal. In effect, but for his email, he would not have been dismissed. The claimant may be able to establish this, but the

appropriate question for the tribunal is not a "but for" test. What the Claimant has to establish is that the disclosure is the reason for dismissal. The respondent's case, as it was understood at the hearing, is that the email was not the reason for dismissal; the reason for dismissal was the respondent's belief that the Claimant had leaked information in that he had spoken to the Guardian newspaper.

25. In determining the Claimant's chances of succeeding on causation, it is relevant to consider the respondent's case as to why its stated reason for dismissal was genuine. The Respondent, according to the documents before the Tribunal, had investigated the matter. It had spoken to witnesses, including those that worked with the claimant.

26. The respondent obtained a statement from a colleague, who stated that he had been was contacted by a journalist from the Guardian. This colleague gave reasons why he believed that it was the Claimant who had given the journalist the colleague's number including that the Claimant had asked him (the colleague) to speak to the journalist.

27. Further, a different colleague stated that the Claimant had been very vocal about the issues which were included in the newspaper articles. Additionally, the Claimant had sent an email on 1 May referring in, to some extent, positive terms to the person who had leaked the material in the April Guardian article. Finally, the Claimant had informed Ms Laing, the Head of Asylum Operations, in his email of 10 May that he had decided to contact the Guardian newspaper.

28. It is not that the Claimant needs to have a pretty good chance of establishing that he did not speak to the newspaper. To succeed application for interim relief, he needs to have a pretty good chance of establishing that the Respondent's stated reason for the dismissal is untrue and that its real reason was, in effect, its reaction to the email on the 10 May.

29. Based on the above analysis, I did not find that there is a pretty good chance that the Tribunal will find that the reason for dismissal is the putative disclosure, as opposed to the respondent's belief (for which, on the evidence before me, the respondent may have reasonable grounds) that the claimant had spoken to the newspaper.

30. I go on to consider the alternative case, in the event that the Tribunal finds that the Respondent's stated reason for dismissal was true; the respondent genuinely (if mistakenly, on the Claimant's case) believed that the Claimant has spoken to the newspaper.

31. For the Claimant to succeed in this application for interim relief, he would have to have a pretty good chance of establishing that the person who spoke to the newspaper had made a disclosure which met the requirements of Section 43G. To meet the requirements of section 43G, the worker who makes a disclosure must (in addition to the other requirements for a public interest disclosure) reasonably believe that it is substantially true, and must not make the disclosure for personal gain, and must either reasonably believe that they would be subject to a detriment if they were to make the disclosure internally, or that internal disclosure would endanger the evidence or that they have previously disclosed the information to the employer.

32. I do not find that there is a pretty good chance of obtaining evidence going to any of these matters because the Claimant does not know the identity of the person who spoke to the newspaper. Further, the identity of the person who made the disclosure is a relevant factor in determining the reasonableness or otherwise of any disclosure.

33. Accordingly, I find that the Claimant does not have a pretty good chance of establishing that any disclosure to the newspaper met the requirements of with Section 43G. Further, should the Claimant establish this, it is at best unclear if Section 103A protects a person who is dismissed because it is mistakenly thought that he made a protected disclosure which was, in fact, made by someone else.

34. The Tribunal reminded itself that the Employment Appeal Tribunal has pointed it out that it is not appropriate at the interim relief stage to resolve any conflicts in the authorities or to reach a final view on the law of causation in the context of protected disclosures.

35. Accordingly, the Tribunal finds that this matter is not appropriate for interim relief and, therefore, the application must be dismissed.

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Employment Judge Nash

Date: 1 April 2020