Case Number: 2204906/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Ms D Sterling	**v**	(1) Genesis Research Trust
		(2) Professor Lord Winston

PRELIMINARY HEARING

Region: **London Central** **On: 11 September 2020**

Before: **Employment Judge Brown**

Appearances
For the Claimant: Mr T Walker (Counsel)
For the Respondents: Mr H Sheehan (Counsel)

JUDGMENT

The Judgment of the Tribunal is that:

1. **It is not likely that on determining the complaint to which the application relates the Tribunal will find that the reason or principal reason for the Claimant's dismissal is that specified in s103A ERA 1996.**

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

The complaints/interim relief application

1. By a claim form presented on 12 August 2020, the Claimant brought complaints of unfair dismissal, automatically unfair dismissal as a result of making a protected disclosure and of protected disclosure detriment. The claim contained an application for interim relief. This hearing was to determine that application.

2. It was agreed between the representatives that, whilst witness statements would be provided for the hearing, there would be no live evidence.

3. I had a witness statement and a supplemental witness statement from the Claimant, on the one hand and witness statements from Lord Winstone and Anthony Rosenfelder, trustee of the First Respondent, for the Respondents, on the other. There was a Bundle of documents. Page references in these reasons refer to pages in that Bundle.

4. The Claimant was employed by the First Respondent (referred to as 'the Trust') as Chief Executive Officer from August 2018 until she was dismissed by email dated 5 August 2020. If 5 August 2020 was the date of her dismissal, she did not have 2 years' service. The First Respondent is a medical charity in the reproductive health field. Lord Winston, the Second Respondent, has been Chairman of its Board of Trustees since 1988.

5. The Claimant's relevant claim for the purposes of the interim relief application is the automatic unfair dismissal claim. The Respondent contends that the Claimant was dismissed for the potentially fair reason of redundancy. The Claimant claims that the redundancy was a sham, and that she was not dismissed by reason of redundancy pursuant to s.*139 ERA,* but because of her alleged disclosure within *s.103A ERA*.

The Claimant's Case and Witness Statement

6. In summary, the Claimant says that, on 13th July 2020, she wrote to Lord Winston and all other Trustees making protected disclosures; saying that, in her view, the First Respondent and its Trustees were acting in breach of charity law and that there were serious compliance issues with the law and rules governing charities and their trustees, including conflicts of interest.

7. The Claimant contends that, 6 hours after her disclosure letter was sent on 13 July 2020, Lord Winston sent an unexpected 'strategy' paper to the Trustees, stating that he had only just prepared it. The Trustees met 25 minutes after Lord Winston's paper was submitted. No minutes were taken of that meeting. Lord Winston's paper effectively proposed the Claimant's dismissal, albeit that it described the process as restructuring the entire charity. The Trustees adopted the proposal during the unminuted meeting.

8. A week later, a very short redundancy process started. It ended soon, thereafter, in the Claimant's dismissal. A wholesale restructure has not yet happened. It is not in dispute that, at the date of the interim relief hearing, the Claimant is the only person to have been dismissed.

9. Mr Walker, for the Claimant, confirmed that the Claimant was contending that her disclosure was of information which she believed tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he is subject. The relevant legal obligation was the trustees' fiduciary duties to the First Respondent Trust.

10. The Claimant set out the matters on which she relies in more detail in her witness statement.

11. In it, she told me, that, her role as CEO of the First Respondent involved managing the work of the Trust and assisting in raising funds. She reported to the Board of Trustees.

12. In Spring 2020 the Trust was informed that it had been successful in its 2019 application to receive a very large charitable donation "the APST fund". The Claimant said that this resulted in an increase in the assets of the Trust by £2.3m, including a 10-15% annual administration fee available for use by the Trust. The

Claimant said that is was a significant gift which increased the Trust's assets to over £6M.

13. The Claimant said that, initially, the First Respondent's trustees were pleased by this APST gift news and Lord Winston described the gift as a once in a lifetime donation. The APST assets were legally transferred to the Trust in April 2020. However, at a Trustee meeting on 25 June 2020, the attitude of the Trustees towards the APST donation had changed. The Claimant said that Lord Winston mocked her for suggesting that some Trustees may need to recuse themselves from certain decisions due to conflicts of interest with Imperial College, which was their employer. The Trustees decided that an independent second legal review of the APST donation should be conducted by a new lawyer, Mr Paisner, pages [144] – [173].

14. The Claimant asserted that Trust had experienced charity law solicitors, Russell-Cooke LLP, and the Claimant had advice from them that the asset transfer was legal and appropriate. The Claimant wrote, as Chief Executive, to the proposed new solicitor, Mr Paisner, asking for his terms of reference and offering assistance with providing documents. Mr Paisner, however, told the Claimant that he was instructed by the Trustees and would not share his instructions or findings with her, page [197].

15. The Claimant said that she did not feel that the Trustees were acting in a transparent manner, nor dealing with the obvious conflict of interest arising from Lord Winston and other Trustees being involved with Imperial College at the same time as seeking to reject a bona fide charitable gift which had been legally transferred to the Trust, in favour of Imperial College.

16. The Claimant sent a formal letter to the Trustees on 13 July 2020 [207-208]. In it she set out the advice she had received about the APST funds. She said that Lord Winstone had recently told the Trust's Finance Manager Mr Gerry Turley that the Trust could not count on the ADST gift because Imperial could sue the Trust for the gift. The Claimant said that this was a different reason for the Trustees to be concerned about the gift and to insist on the review by Mr Paisner. The Claimant said that she had never been told this reason herself. The Claimant then said that, if that were the case, the trustees connected to Imperial College, and their family members would have to recuse themselves from any discussion on the matter. She continued, "This is normal charity practice. I have previously raised concerns regarding conflicts of interest with trustees and the Chair on several occasions… We aim to maintain a good relationship with Imperial College. However, GRT decision making should be independent as it is a registered charity."

17. The Claimant said that she had not been provided with Mr Paisner's instruction and that he had told her on 6 July 2020 that he had been instructed by the trustees and was answerable only to them. She said, "These recent incidents further highlighted ongoing governance issues at the Trust. This includes conflicts of interest, independence, length of tenure, infringement by Trustees into operational matters and lack of respect for diversity."

18. The Claimant said that she had told Lord Winstone that the trust needed to undertake an independent governance review urgently and had found a consultant available to do this. The Claimant stated that she believed that there was no other

option but to refer this matter to the Charities' Commission and to request their advice and intervention.

19. The Claimant said that, following her letter, the very same day she received Lord Winstone's paper for a trustee board meeting, effectively proposing her redundancy, page [212].

20. The Claimant asked that the trustee board meeting be postponed. However, on 20 July 2020, Lord Winston informed the Claimant that the scheduled trustee meeting of 13 July 2020 had gone ahead with only the Trustees present, and that the Trustees had decided to immediately switch to a 'response mode' only charity, so that the Claimant's position as the CEO of the Trust was at risk of redundancy.

21. The Claimant set out her concerns in a grievance letter to the Trustees dated 24 July 2020, specifically saying that she had "blown the whistle" and was almost immediately punished for this [225 & 226].

22. Lord Winston responded to the grievance letter in an e-mail of 31 July 2020, in which he stated that the Trustees were satisfied that her complaints were without foundation or merit. There was no independent investigation [257].

23. In her witness statement, the Claimant said that there was then a sham redundancy process. One of the Trustees, Mrs Linda Loftus, conducted a redundancy consultation meeting on 30 July 2020. Prior to the meeting, the Claimant requested documentation. The Claimant was then told that this would be discussed at the meeting [234].

24. The Claimant disputed the notes of the meeting and raised a further grievance in this regard with Prof Franks in his position as Deputy Chair of the Trust [260]. There was no response to this grievance.

25. Mrs Loftus issued the Claimant with a redundancy notification by email dated 5 August 2020 [265 – 267]. The Claimant told me that she did not receive this until 10 August 2020. In the redundancy notification, Mrs Loftus stated that the Trustees were concerned to stop activities which were not providing sufficient return

26. In the Claimant's witness statement, she said that Lord Winston had informed the Trust Finance manager, Gerry Turley, on 8th August 2020 that no other staff would be made redundant until October 2020 at the earliest.

27. Further, the Claimant said that, on 24 August 2020, the Finance manager, Gerry Turley, had told her that he had been told that the Trustees might keep the Trust Symposium Office team unit, if it could be shown to be profitable.

28. The Claimant contended that none of the circumstances surrounding her departure as CEO of the Trust were consistent with a normal redundancy process: including a) She did not have a final redundancy consultation meeting – not even by telephone - her notification of dismissal was sent by e-mail without a copy being sent in the post. b) There was no press announcement or notification to supporters and volunteers regarding the Claimant's departure, or the restructuring of the charity. c) Staff were left without a manager and senior official to approve or verify any management issues such as payments or holidays. d) The redundancy

notification stated that the Claimant was to leave the charity on the date of that letter and not serve her 3 months' notice period. e) The Claimant was not asked to undertake any handover to ensure continuity of key projects and events. f) No leaving event was organised with the staff or Trustees. g) None of the Trustees contacted the Claimant to say goodbye. h) The Trustees did not want the Claimant to visit the office to return Trust property, nor to collect her personal items left before Covid-19 without there being a Trustee in attendance in addition to senior staff. i) Trust staff were instructed not to contact the Claimant without the express wishes of the Trustees. The Office Manager Stephen Button sent the Claimant e-mails in which he stated, "I'm sorry to say that Robert Winston asked for the closure of your account last week. I'm also even sorrier to say that he has made it quite plain that I'm not able to discuss anything with you in the current situation." … "I'm not able to answer any questions unless directed by the Trustees."

29. The Claimant contended that this behaviour was clearly at odds with the contention that the Claimant was simply being made redundant as the Charity was being restructured.

30. It was not in dispute that the Claimant, on FTE earnings, was being made about £50,000 per annum more than the next most highly paid employee at the First Respondent.

The Respondents' Contentions and Evidence

31. In summary, the Respondents say that the First Respondent Trust was in dire financial circumstances, which had been ongoing for years prior to the Claimant's dismissal. The redundancy exercise was genuine and is part of an ongoing attempt to restructure the Trust to eliminate its operational deficit and to survive the financial challenges it faces. The Claimant was dismissed at the beginning of the redundancy process because she was by far the most expensive employee, her role would obviously be redundant as a result of the decision to restructure, and it was in the Trust's interests to dismiss her quickly before she had two years' qualifying service and could bring a claim for unfair dismissal.

32. The Respondents say that it is not clear what legal obligations the alleged disclosure is said to relate to. They say that the Claimant's disclosure cannot have been a qualifying disclosure as the alleged disclosure does not contain sufficient information and the Claimant could not have reasonably believed that it tended to show the Trust was in breach of any legal obligations.

33. The Respondents have not yet presented their ET3 Responses. They rely on the witness statements of Lord Winstone and Anthony Rosenfelder and the contents of contemporaneous documents.

34. In Lord Winstone's witness statement, he told me that the First Respondent Trust was established in 1978 and that its main aim is supporting medical research, which it does principally by making grants to fund post graduate research.

35. He also said that, in 2018, the Trustees of the Trust recognised that it was in some financial difficulty. In the Trust's accounts for the year ending July 2018 the Trust's expenditure was £1,629,929 but it raised only £1,043,815 [94]. The Claimant was hired, initially as a fundraiser before becoming CEO, to try to rectify this deficit.

36. The Respondents rely on the minutes of a meeting of the board of Trustees on 18 October 2018, when Antony Rosenfelder noted that the deficit was, "in the region of £550K" and stated that, "We are at a crossroads and are able to swallow the hit of the last year – we need to invest in order to grow and, if we minimize drawdown over the next 12 months, the Trust should be able to weather the situation." [63] – [69]. The Claimant attended that meeting and, in her CEO report, the first key issue she identified was, "Elimination/reduction of the operational financial deficit by increasing income from each of the charities units, combined with cost optimisation initiatives" [70].

37. The Respondents also rely on a Trustees' meeting on 12 June 2019 when Mr Rosenfelder said, "Whilst we had been unpredictably fortunate with a rise in our investment income, the trust remained in a serious financial position with a major deficit of expenditure over income. Income from the Symposium Office had gradually fallen over years, with fewer symposia. Events such as cycle rides had faced difficulties in maintaining the number of participants and were producing substantially less income than in former years. Beyond a few minor donations and the investment income, there had been no other income from fund-raising activities." Another trustee, Ms Angela Hodes, was minuted as follows, "[AH considers] that we have a matter of only a few months before things become critical. He [sic] also pointed out that we could not rely on the amount of investment income we currently receive continuing, given financial and market uncertainties."

38. The minutes of the meeting further recorded that the Trustees thought that a closer liaison with Imperial College might address the financial concerns. The minutes recorded that, "If this action were taken, we would still need to slim down our substantial overheads very soon. This would be likely to be necessary even if received a substantial gift, given that such a gift would be restricted and hypothecated. So such action would require reduction of staff and avoidance of creating new posts."

39. The Respondents rely on the Trustees Report for the period ending 31 July 2019, where it was recorded that, in that year, the Trust had raised £439,348 but expenditure was £939,170, [26].

40. The Respondents referred me to a chain of correspondence in March 2020. They highlighted that, on 18 March 2020 Claimant sent an email to Mr Rosenfelder explaining that she was, "Thinking about how to reduce GRT costs reduce event staff hours and costs where possible…" [113]. Mr Rosenfelder replied to this, stating, "I think that the summary assessment of our position provided at this morning's call is serious. There is much at stake and we have to ensure we can get through the next six months and preserve our key function for the scientists." [111]. The Claimant replied further, referring to increase in the value of property held in Twickenham and further possible reductions in overheads, [110]. Mr Rosenfelder was not encouraging in his response, stating, "It is a case of realism over hope and realism is essential if we are to conserve and expand when the time is better, it is not now… when we meet virtually, we would like to see tougher steps being proposed to cut our overheads" [109]. Lord Winston also replied to the correspondence saying, "I regret this but the trustees will need to decide much

more draconian measures if the Genesis Research [Trust] is to stay in business" [109].

41. The Respondents produced an email from Lord Winston to the Trustees on 22 March 2020 stating, "I fear we really do have to deal with a new reality which I do not is being faced in the running of the Genesis trust. I am concerned that the measures to reduce our deficit are inadequate, even allowing for the possibility of charitable support from government and help with salaries from government sources. I think that we, as trustees, do need to review each post if we are to reduce our outgoings and I hope that you will support me." [114].

42. They produced a further email from Lord Winston to the Trustees on 2 June 2020, in advance of a meeting scheduled to take place on 25 June 2020 [129]. In that email he said, "Apart from the one large legacy with its somewhat hypothecated proviso, this welcome legacy is really the only substantial income we have made in the last two years and it is clear, with the huge overheads we are spending (mainly on salaries), if we continue in this way we shall run Genesis into the ground. I think it is clear that we do need a new strategy and I hope we can discuss the various options (some of which we touched on last week) which we should consider."

43. Attached to that email was a document prepared by Mr Rosenfelder entitled, "Putting off the Evil Day" [130-131]. In that document he said, "There is a problem - we are running to stand still at best and most probably, in the absence of major new income, Genesis will contract. Our endowment growth and associated income of c 8% pa has been funding some of the overhead of £300/400k pa (including the Symposium office) while the net contribution from the Symposium has been, as per the recent Accounts, de minimis."

44. The Respondents contend that, at the time, Mr Rosenfelder was taking into account the additional income from the APST grant, but it did not change his assessment of the Trust's finances. He noted that in the absence of the APST "a revival of the existing Grants programme which is the principal commitment we have under the Trust Articles, would be an effective self-liquidation of Genesis."

45. In Mr Rosenfelder's witness statement, he told me that, "The APST gift might yield some income, but this would not suffice to support our long term stability."

46. Mr Rosenfelder's document addressed the next steps for the trust suggesting that the Trustees should agree, "whether Genesis should be a fixed period Trust subject to a periodic review or a Trust sine die". He said, "If the Trustees reach a decision along these lines, then decisions on the difficult issue of further staff reductions and retentions would follow to facilitate the move to a leaner cost base as we shrink. The above represents a shift which, reflecting the French quote, is one of 'reculer pour mieux sauter'." [130] – [131]

47. A formal Trustees' meeting was held on 25 June 2020. At that meeting Gerry Turley presented a more optimistic outlook on the Trust's finances, stating that the operational deficit for the first six months of the year, which was around £126,000 had been offset by increases in in the investment portfolio [152] and that by the second half of the year the deficit could be remedied by income from the APST

[154]. During the meeting, the Trustees raised a number of concerns about the APST gift.

48. On 6 July 2020 the Claimant wrote to Lord Winston regarding restructuring the First Respondent Trust, "If there is to be a major adjustment or change to the Trust this should be thoroughly defined in a paper, which should be prepared by management, with the input of the chair. This paper should then be circulated and reviewed at a formal Trustee meeting as per good practice." [193]

49. Lord Winston replied on 7 July saying, "You as CEO – more than anybody – are aware of the threats to the charity. However we structure any use of this current bequest which has caused both delight and concern, it clearly cannot be used to solve our basic financial position." (referring to the APST)... "It would be helpful to take up your own suggestion and for you to prepare a brief strategy document… This should be emailed to the trustees before the meet next week" [200] – [201].

50. In an email on 8 July 2020 Lord Winstone said further, "Of course, I am sure the trustees would prefer you, as CEO, to do this yourself, but if you feel you cannot manage this, I will set out some strategic options to initiate discussions by the trustees." [202].

51. In an email dated 12 July 2020, Lord Winston wrote to the Trustees, saying that "DS [the Claimant] seems to have refused to consider setting out a draft strategy documents." He attached a document, saying "This document - which I prepared today in view of absence of anything relevant from DS is the enclosed document, setting out in simple terms my assessment of the current situation and a list of five different options that trustees may wish to consider….. If you do have time, I would be truly grateful if you could spend a few minutes having a quick look. I am careful not to express my preferred option." [203].

52. The document was the document which Lord Winstone sent to the Claimant on 13 July 2020, after her email in which she set out her alleged protected disclosures.

53. In the document, Lord Winstone said, "Genesis Research Trust faces an existential crisis following the continuing Sars-Covid-2 pandemic from the beginning of this year. Clearly we, as a charity, are not alone in this respect and unfortunately many charities are facing an even bigger problem. Our difficulties were heightened by the sizable deficit in income against expenditure that we already faced at the beginning of 2020."

54. The document set out 5 options, including "Become response mode grant making charity" [206].

55. The next day, 13 July 2020, the Claimant sent her alleged protected disclosure letter to one of the Trustees. Lord Winstone sent his paper to the Claimant [207 – 208].

56. The Claimant did not attend the Trustee meeting on 13 July 2020 but sought to postpone it. The meeting proceeded in the Claimant's absence.

57. In Lord Winstone's witness statement, he said that, at the 13 July meeting, the Trustees noted that the Trust had been losing money for some time, the new CEO had failed to resolve the situation over the last two years, the Covid-19 pandemic was exacerbating the situation and the APST gift was unlikely to materially reduce the ongoing deficit. The Trustees unanimously decided to restructure the Trust into a "response only" mode. The "response only" mode is described by Lord Winstone as follows, "This means that the Trust would heavily reduce its staff, administration and expenses by cutting down on external activities and events, where possible, and having less involved fundraising and publicity drives. The trustees would rely on their own personal contacts to bring in donations."

58. The 13 July 2020 was not minuted.

59. On 20 July 2020, the Claimant was informed by Lord Winston that the Trustees anticipated making the role of CEO redundant. On 28 July, the Claimant was invited to attend a consultation meeting by Zoom on 30 July 2020, of which minutes were taken [238] – [256].

60. On 3 August 2020 Linda Loftus invited the Claimant to a further meeting on 4 August 2020; Ms Loftus told the Claimant that the outcome of the consultation process in relation to the Claimant's role would be communicated to her in the meeting on 4 August [262] – [264].

61. The Claimant asked that the meeting be rescheduled until after 6 August 2020 because she was trying to obtain legal advice and wanted to prepare fully [264]. However, on 5 August 2020 the Trust wrote to the Claimant by email, attaching a dismissal letter [265]. The dismissal letter said that the decision to make the Claimant redundant was being dismissed before the Claimant raised any concerns and that the decision to make the Claimant was not a response to her letter of 13 July 2020, page [267].

62. In Mr Rosenfelder's witness statement, he told me that, on 23 July 2020, he contacted Anne Josse of the Prism Gift Fund ("Prism"), to explore using its services to administer the Trust's ongoing activities, pages [227] – [228]. Mr Rosenfelder contends that this is intended to reduce the Trusts expenses from £369,859 pa to roughly £20,000.

63. I was told that, on 10 August 2020, Lord Winston took part in a Zoom call with all of the Trust's staff to explain the situation and that he had meetings with individual members of staff between 12 and 20 August 2020 to discuss the situation with them.

64. On 18 August 2020 Lord Winston attended a general staff meeting with the Trust's employees to provide an update on the Trust's circumstances. The notes of the meeting record the following under the heading "Trustee Update", "It currently looks as though some redundancies will have to be made during the restructure. Decisions will be made looking at the legalities, the survival and viability of the trust. The current situation is due to no fault of any current member of staff and the decisions will not be made as any reflection on their abilities or performance. It is hoped that staff will be supported until Christmas and Trustees will assist in any way they can, to help staff secure new posts." [299] – [300].

65. Lord Winstone told me in his witness statement that the Trust intends to hold formal redundancy consultation meetings in October 2020 and terminations will take place in December 2020. He expects that the Trust will be left with 3-4 employees at the end of the process.

    APST Funds

66. Anthony Rosenfelder said, in his witness statement that, in May 2020, the First Respondent had become aware that Imperial College believed they should be entitled to the use of the funds held in the APST trust. On 20 May 2020, Phillip Bennett [123] wrote to Lord Winston and the other trustees, informing us that: "I was contacted by people from the College Development team today to ask about Genesis' management of the Angela Pattman legacy. Apparently the College had been in discussions with Angela Pattman between 2016 and her death. They understand, from those discussions and from the copy of her Will that they have, that her Trust (the Angela Pattman Scholarship Fund; as they describe it) is intended to fund scholarships for undergraduate medical students at Imperial, and they are very keen to see this happen..".

67. Mr Rosenfelder said that, reviewed the underlying documents, it became apparent that the APST gift was not straightforward. In particular, the Will and letter of wishes corroborated the position that had been asserted by Imperial College. The Will indicated that: "*the income of the charity must be applied to promote the further education of students of limited means studying at the Imperial College School of Medicine…*". The letter of wishes was more specific and said: "*I would like the scholarship to support a student throughout the duration of the time studying on the 6 year MBBS programme at Imperial College*". The First Respondent Trust funded postgraduate research grants and had not been involved with undergraduate programs referred to in the letter of wishes.

68. Mr Rosenfelder said that all the trustees began to form serious concerns about the APST gift and how it had been presented. Mr Rosenfelder expressed his concerns in an email sent to Angela Hodes and Lord Winston on 21 June 2020 [42], "*This could limit our freedom in grant making and if so be a source of dispute with IC*". Mr Rosenfeld said that he felt he had been misled by Dyan Sterling and said that "*we do need to resolve the gaps with independent advice (which the Trustees in several past meeting have requested the CEO to obtain)*".

69. He drew my attention to the letter of advice obtained by the Claimant from Russell-Cooke dated 3 July 2020 which said that "*the trustee(s) of a permanent endowment fund should aim to ensure that administrative costs charged to the capital do not have the effect of eroding the value of the capital over time*" and that all such costs "*are reasonable and proportionate*" [185]. He said that, while the Claimant had told the trustees that administrative fees could be charged at 15% per annum, Russell-Cooke's advice contradicted this, *In our opinion it would be very difficult for GRT to justify deducting 13-15% from the capital of the APST every year*", [186].

70. In submissions to the Tribunal, the Respondents acknowledged that, at the relevant time, the First Respondent was considering transferring the APST funds

to Imperial College. They contended that this was because of these issues regarding appropriate use of the APST funds.

71. They drew my attention to the letter of advice obtained by the Claimant from

Legal framework

72. *Section 128 Employment Rights Act 1996* provides:

'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 104(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'.

73. The question to be considered upon an application for interim relief is set out in *s129 ERA 1996*:
'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 104(1) and the condition in paragraph (a) or (b) of that subsection was met….".

74. Interim relief can therefore be ordered where the Tribunal finds that it is likely that a final hearing will decide that the reason (or principal reason) for dismissal was the employee having made protected disclosures contrary to *s 103A ERA1996.* It is not available to an employee where the Tribunal considers their dismissal is likely to be found to have been unfair pursuant to *s105 ERA 1996. S105 ERA* is not one of the automatically unfair provisions mentioned in *ss128 & 129 ERA 1996* in respect of which interim relief is available.

75. The meaning of the word 'likely' for these purposes has been considered in several cases. In *Taplin v C Shippam Ltd* [1978] IRLR 450, [1978] ICR 1068 EAT, decided under similar provisions relating to interim relief applications in dismissal for trade union reasons, the EAT (Mr Justice Slynn) held that it must be shown that the claimant has a 'pretty good chance' of succeeding, and that that meant something more than merely on the balance of probabilities. That approach to the word 'likely' has been followed in subsequent decisions, *Dandpat v University of Bath* (2009) UKEAT/0408/09 UKEATPA/1284/09 UKEATPA/1285/09 UKEATPA/1391/09 unreported at para 20, *Ministry of Justice v Sarfraz* (2011) UKEAT/0578/10, [2011] IRLR 562 at paras 16–17 and *His Highness Sheikh Khalid Bin Saqr Al Qasimi v Robinson* UKEAT/0283/17/JOJ, unreported (Qasimi v Robinson), at paras 8–11.

76. A 'pretty good chance' of success was interpreted in the whistleblowing case of *Ministry of Justice v Sarfraz* [2011] IRLR 562, EAT, as meaning 'a significantly higher degree of likelihood than just more likely than not'. Underhill P stated in *Ministry of Justice v Sarfraz* [2011] IRLR 562 that,

    “in this context ‘likely’ does not mean simply ‘more likely than not’ – that is at least 51% - but connotes a significantly higher degree of likelihood.” (para 16).

77. There are policy reasons why the threshold should be thus. Underhill P said, in *Dandpat v The University of Bath and anor* (unrep, UKEAT/0408/09/LA),

    “If relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing and pay the claimant, until the conclusion of proceedings: that is not a consequence that should be imposed lightly.” (para 20)

78. The Claimant must show the necessary level of chance in relation to each essential element of *s103A ERA 1996* automatic unfair dismissal*,* see *Simply Smile Manor House Ltd and ors v Ter-Berg [2020] ICR 570.*

79. The Claimant must therefore show that it is likely that the Tribunal at the final hearing will find that:

    79.1. she made the disclosure(s) to the employer;
    79.2. she believed that it or they tended to show one or more of the matters itemised in the ERA 1996 s 43B(1);
    79.3. her belief in that was reasonable;
    79.4. the disclosure(s) was or were made in the public interest; and
    79.5. the disclosure(s) was or were the principal cause of the dismissal.

80. "Protected disclosure" is defined in s43A Employment Rights Act 1996: "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

81. "Qualifying disclosures" are defined by s43B ERA 1996,

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

82. The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations), *Cavendish Munro Professional Risk Management v Geldud* [2010] ICR [24] – [25]; *Kilraine v LB Wandsworth* [2016] IRLR 422. The disclosure must, considered in context, be sufficient to indicate the legal obligation in relation to which the Claimant believes that there has been or is likely to be non-compliance, *Fincham v HM Prison Service* EAT 19 December 2002, unrep; *Western Union Payment Services UK Limited v Anastasiou* EAT 21 February 2014, unrep.

83. The test for “reasonable belief” is a subjective test. The Tribunal should consider whether the belief was reasonable for the Claimant in her circumstances. What is reasonable for a lay person to believe may not be reasonable for a trained professional (see *Korashi v Abertawe Bro Morgannwg University Local Health Board* [2012] IRLR 4 at 62).

84. In determining whether the reason for the Claimant’s dismissal was her alleged disclosure, it is not sufficient for the disclosure to be “in the employer’s mind” or for it to have influenced the employer. The Tribunal must consider whether that disclosure was the “sole or principal reason” for her dismissal, *Eiger Securities LLP v Korshunova* [2017] IRLR 115).

85. Redundancy is defined in *s139 ERA 1996,*

> “ .. an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –
>
> (a) the fact that his employer has ceased or intends to cease –
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business –
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.'

86. By *s105 ERA 1996*

"**Redundancy**
(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,
(b) it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and
(c) it is shown that any of subsections [(2A) to [(7N)]3]2 applies.
……

(6A) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 103A.
…….

(9) In this Part "redundancy case" means a case where paragraphs (a) and (b) of subsection (1) of this section are satisfied."

87. The application of (equivalent Northern Irish provisions to) *ss139 & 105 ERA 1996* to interim relief was considered in *Bombardier Aerospace v McConnell and ors* [2008] IRLR 51 at 19. In that case, the Northern Irish Court of Appeal decided that it was not possible for a Claimant to obtain interim relief in a redundancy case, even when they were selected for redundancy on trade union grounds. The Claimant must show that the Respondent's redundancy process was entirely fabricated for the purposes of dismissing her, or that it was a sham, per LJ Girvan in *Bombardier* at para. 14 and Campbell LJ at para 9 - 11.

88. *Bombardier* (Campbell LJ) explains that, if an employee makes the case that, although there was redundancy, the reason why he was selected and not a fellow employee for dismissal, is that he made a protected disclosure, it does not follow that this becomes the principal reason for his dismissal though he is to be regarded as unfairly dismissed. If, in such circumstances, it could displace redundancy as the principal reason for dismissal, the employee would come within s103A ERA 1996 and be regarded as unfairly dismissed. There would be no requirement for *s105 ERA 1996* if unfair selection could become the principal reason.

89. However, if an employer decides to dismiss an employee because of a protected disclosure and creates a sham redundancy for this purpose, the principal reason for dismissal would not be redundancy and the employee would be unfairly dismissed within *s103A ERA 1996*.

90. *S105 ERA 1996* is intended to cover redundancy situations. Once it is established that there is redundancy within the meaning of *s139 ERA 1996* and that this is the

principal reason for dismissal, unfair selection may make the dismissal unfair but it does not become the principal reason for dismissal.

Discussion and Decision

91. I had to assess whether it appeared likely that a Final Hearing would find that the Claimant had succeeded in each of the elements of an automatically unfair dismissal claim under *s103A ERA 1996.*

Qualifying Disclosure

92. The Claimant contends that she disclosed information which she believed tended to show that a person had failed, was failing or was likely to fail to comply with any legal obligation to which he is subject. The relevant legal obligation was the trustees' fiduciary duties to the First Respondent Trust.

93. In the Claimant's 13 July 2020 letter, [207-208], she set out the advice had received about the APST funds. She said that she had obtained a letter from Russell Cooke addressing the concerns raised by the trustees about the APST funds. The Claimant also said that Lord Winstone had recently told the Trust's Finance Manager that the Trust could not count on the ADST gift because Imperial could sue the Trust for the gift. The Claimant said that this was a different reason for the Trustees to be concerned about the gift and to insist on the review by Mr Paisner. The Claimant said that she had never been told this reason herself. The Claimant then said that, if that were the case, the trustees connected to Imperial College, and their family members would have to recuse themselves from any discussion on the matter. She continued, "This is normal charity practice. I have previously raised concerns regarding conflicts of interest with trustees and the Chair on several occasions… We aim to maintain a good relationship with Imperial College. However, GRT decision making should be independent as it is a registered charity."

94. It appeared to me that the relevant undisputed background was that the trustees of the First Respondent were raising concerns about the appropriateness of the First Respondent receiving and administering the APST funds. Further, it appeared to me that it was not in dispute that the First Respondent was considering divesting itself of the APST funds and seeking to transfer these funds to Imperial College.

95. I considered that it was likely that a tribunal would find that the Claimant had disclosed information: that she had obtained external advice about the appropriateness of the First Respondent receiving APST funds; that she had obtained a letter from Russell Cooke, addressing trustees' concerns; that Lord Winstone had given a different reason for not accepting the funds to Gerry Turley to the reason which the Claimant herself had been given; that normal charity practice required trustees connected to Imperial college to recuse themselves from decision making on the matter; that she had raised concerns regarding conflicts of interest with the trustees and Chair on several occasions. I considered that it was likely, in the sense of a significantly higher degree of likelihood than 51%, that a Tribunal would find that these matters amounted to information and not just allegations.

96. I also considered that it was “likely” that a Tribunal would find that, in the Claimants’ reasonable belief, the information tended to show that trustees would be in breach of their fiduciary duties, unless, as she advised, they recused themselves from decision making on the matter. The trustees were, on the undisputed facts, considering removing funds from the First Respondent’s administration and transferring them to a third-party body, but in which some trustees also had interests. I considered that a Tribunal was likely to find that the Claimant reasonably believed that the information showed that the trustees were likely to fail to comply with their fiduciary duties to the First Respondent trust, when they had such a conflict of interest.

97. The Claimant said that she had raised conflicts of interest with trustees on several occasions. I considered a Tribunal was likely to find that this indicated that the Claimant believed that the trustees were not paying heed to their conflicts of interest. I considered that a Tribunal was likely to find that this showed the Claimant also had a reasonable belief that they would not, in the future, act appropriately with regard to conflicts of interest.

98. I considered that it was likely that a Tribunal would find that the Claimant had a reasonable belief that the information was disclosed in the public interest. The proper administration of funds by charitable trusts is a matter of public interest and concern. The First Respondent trust is a medical charity in the reproductive health field, which is for general public benefit.

99. I therefore assessed that there was a 'pretty good chance' that a Tribunal would find that the Clamant had made a protected disclosure in her letter of 13 July 2020.

Reason for Dismissal

100. In order for the Claimant to be entitled to interim relief, I would need to assess that is was likely that the Tribunal would find that the disclosure was the principal reason for the dismissal (rather than redundancy).

101. Following *Bombardier Aerospace v McConnell and ors* [2008] IRLR 51 at 19, I would need to find that it was likely that a Tribunal would conclude that the putative redundancy process was a sham, rather than that there was a redundancy situation, but that the Claimant, in particular, had been dismissed because she had made a protected disclosure.

102. On the material available to me, I did not consider that it was “likely” that a Tribunal would conclude that the redundancy process was a sham.

103. I considered that there was substantial documentary evidence available to a Tribunal showing that the First Respondent Trust had been in considerable financial difficulty for 2 years before the Claimant was dismissed.

104. Furthermore, there was evidence that in March 2020, 5 months before her dismissal, Lord Winstone and Anthony Rosenfelder both told the Claimant that “tougher steps” and “more draconian measures” would be necessary to address the financial problems of the Trust. These included potential staff reductions. There was evidence, from the tone of the correspondence, that Lord Winstone and

Anthony Rosenfelder strenuously disagreed with the Claimant's more optimistic assessment of finances.

105. In the light of the covid19 pandemic, I considered that a Tribunal would be relatively easily persuaded that the financial situation of the charity was not anticipated to improve in the short to medium term.

106. There was documentary evidence available to show that, in early June 2020, in advance of a trustee meeting on 25 June 2020, and before the Claimant made her protected disclosures, Lord Winstone had written to the trustees saying that, in light of large overheads, including salaries, a new strategy was needed - and that Mr Rosenfelder proposed that the trustees needed to make a decision on restructuring and that, if they did, staff reductions would arise.

107. While the Claimant contends that the First Respondent should not have rejected the APST funds, there does not appear to be any dispute that the First Respondent's trustees were raising concerns about those funds before the Claimant made her protected disclosure.

108. In addition, I considered that there was evidence from the advice of Russell-Cook, on which the Claimant herself relied, that the APST trust funds could not be significantly used for the First Respondent's administration costs - so that its deficit problems would not be solved thereby.

109. Further, I decided that a Tribunal was likely to consider that it was significant that Lord Winstone sent his proposals for restructuring to the trustees on 12 July 2020, before the Claimant made her alleged disclosure on 13 July 2020 (albeit that the Claimant only became aware of the proposals after she made her alleged disclosure). Furthermore, there was evidence to show that Lord Winston had previously asked the Claimant to prepare such a document herself more than once [201 & 202] and had told the Claimant that he would produce such a document himself if she did not do so [202], so that it was not "unexpected".

110. There is therefore substantial evidence available that, in accordance with *s139 ERA 1996,* the requirements of that business for employees to carry out work of a particular kind were expected to cease or diminish. In other words, there is substantial evidence there was a genuine redundancy situation at the First Respondent.

111. On the other hand, I did consider that a Tribunal was likely to note that the meeting of 13 July 2020 was not minuted. Minutes of other trustee meetings had been taken. A Tribunal was likely to find it striking that a meeting of this importance, when the future of the Trust was being decided, was not.

112. While there were proposals for restructuring, the decision to restructure and dismiss the Claimant was not taken until after she made her alleged disclosure. I considered that the Tribunal was likely to conclude, on the undisputed chronology, that the First Respondent dismissed the Claimant very quickly following her alleged disclosure and following an extremely brief consultation process. It was not in dispute that the Claimant was the only employee dismissed in August 2020. The Respondents have said that other dismissals are not likely to happen until the end of 2020.

113. I therefore considered that it was likely that a Tribunal would conclude that the Claimant had been "singled out" and treated differently to other employees.

114. I noted that the Respondents contended that the Claimant was dismissed quickly to avoid her reaching 2 years' service and gaining employment rights. I found it difficult to assess how persuasive an argument that was likely to be in the absence of information about other employees' length of service.

115. However, on all the material before me, I did not assess that there was 'a significantly higher degree of likelihood than just more likely than not' that the Tribunal would decide that the redundancy process was a sham. On the one hand there was substantial evidence of a genuine redundancy situation existing; on the other, there was evidence that the Claimant had been singled out and dismissed in a peremptory manner. I concluded, on all the documents available to me at this stage, that it was more likely that the Tribunal would decide that there was a genuine redundancy situation, within *s139 ERA 1996,* but that the Respondent had decided to dismiss the Claimant before it dismissed other employees, because she had made protected disclosures, within the meaning of *s105(6A) ERA 1996*.

116. Interim relief is not available to an employee where the reason, or principal reason, for dismissal is redundancy, but the employee has been selected for redundancy because they made a protected disclosure, under *s105(6A) ERA 1996*.

Final Hearing

117. The claim will be listed for a 4 day Final Hearing, with directions, and a case management Preliminary Hearing.

18 September 2020

_____

Employment Judge Brown

Sent to the parties on:

18/09/2020.

For the Tribunal: