Case Number: 2207338/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**
BETWEEN:

Mr S Buckingham

Claimant

AND

(1) Mobile Streams plc

Respondent

ON: **16 December 2020**

Appearances:
For the Claimant: **Ms R Kennedy, counsel**
For the Respondent: **Ms D Grennan, counsel**

RESERVED JUDGMENT ON INTERIM RELIEF APPLICATION

The judgment of the tribunal is that the application for interim relief fails.

REASONS

1. By a claim form presented on 6 May 2020, the claimant Mr Simon Buckingham claims interim relief as he says he was dismissed because he was a whistle-blower.

The issues

2. The issue for this hearing was whether to award interim relief by making an order for the continuation of the claimant's contract of employment under sections 128 and 129 of the Employment Rights Act 1996.

3. There is also a territorial jurisdiction argument as the claimant lived and worked in Florida. The parties were in agreement that the territorial jurisdiction argument was not for determination today in itself, but came into consideration for the chances of success under section 128 ERA as jurisdiction will need to be established.

The hearing

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way.

5. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. No members of the public attended.

6. The parties were able to hear what the tribunal heard. From a technical perspective there were no difficulties of any substance.

7. The participants were told that is was an offence to record the proceedings.

8. No witness evidence was taken (see Rule 95).

9. Counsel and solicitors were present on the CVP hearing, but neither the claimant nor any officer of the respondent appeared on the CVP hearing.

Witness statements and documents

10. There was an electronic bundle of documents of 270 pages. Page references are to the electronic page number.

11. There were two witness statements from the claimant and three witness statements from the respondent from (i) Mr Mark Epstein, Acting CEO, (ii) Mr Nigel Burton, the respondent's Chair and (iii) Mr Charles Goodfellow a Non-Executive Director. Evidence was not heard. Mr Burton's statement was 3 paragraphs in length. He confirmed the evidence of Mr Epstein to the extent that it was within his own knowledge. Mr Goodfellow's statement was 4 paragraphs in length. He also confirmed the evidence of Mr Epstein to the extent that it was within his own knowledge.

12. I had skeleton arguments and authorities from both sides to which counsel spoke. All submissions and authorities were fully considered, whether or not expressly referred to below.

13. The parties were aware of Rule 95 of the Employment Tribunal Rules of Procedure 2013, set out below.

14. The delay in hearing this matter appears to be that it was not processed during the lockdown and the parties received a letter on 27 November 2020 regarding this and a short case management hearing was held on 4 December 2020 before Employment Judge Glennie. This hearing itself did not start until 11:30am and the parties were in agreement that the

tribunal would need to reserve judgment.

Relevant factual background.

15. The claimant is a former founder of the respondent company. He founded the original Mobile Streams business in 1999 when he was in the UK. He was the CEO of the respondent for a number of years.

16. At the date of termination of employment he was in a different role of Vice President of Business Operations having stepped down from his directorship. He was dismissed on 9 April 2020 with notice. The ET1 was presented on 6 May 2020. It is accepted by the respondent that the claimant was given one month's notice so that the employment terminated on 8 May 2020. It is therefore agreed that the claim is within time for an interim relief application.

17. The proceedings were not served until 27 November 2020 and the ET3 was due by 25 December 2020 (Christmas Day) and had not yet been filed. The respondent sought an extension of time until 8 January 2021 although hoped this would not be needed. I granted this to 6 January 2021 upon hearing from the claimant.

18. The respondent is a gaming business; it sells games that can be played on mobile phones in the UK and in other jurisdictions. It is an AIM listed company (Alternative Investment Market) on the London Stock Exchange. Information about the respondent is released through the Regulatory News Service "RNS" which is a regulatory information service approved by the Financial Conduct Authority. RNS information is available to the public. It is not in dispute that being an AIM listed company means that additional procedures and protocols must be followed and that any dealings in the respondent's shares are highly regulated.

19. The claimant was employed by the respondent in January 2006 as Chief Executive. On 5 December 2019 he entered into a new employment contract having stepped down from the Board and resigned his Directorship as from 6 December 2019. He became Vice President of Business Operations. His role was to manage the respondent's existing legacy games business and relationships.

20. By way of background, on 22 November 2019 the respondent entered into a Services Agreement with a company called Krunchdata Ltd, known as "Krunch". The claimant was involved in negotiating the contract at a time when he was CEO of the respondent. The Services Agreement dated 22 November 2019 was in the bundle at page 122 to page 142 and was signed by the claimant.

21. On 6 November 2019 there was a Stock Exchange announcement related to this which said:

> *"Subject only to the finalisation of formal legal documentation, the Company has agreed to a licence with Krunch on a revenue share basis; specifically, in the initial 12 months the Company will retain all incremental revenue generated by its partnership with Krunch whilst paying Krunch the standard client set-up fees recharged at cost and thereafter on an agreed split of revenue basis."*

22. Both parties accept that this short announcement could not be expected to convey all the detailed terms of the Services Agreement which runs to roughly 20 pages. The Agreement contained provisions for charges being made by Krunch for providing services, for example as set out in Schedule 1 to the Agreement (page 140) and Schedule 3 (page 142).

23. On 1 April 2020 the claimant saw that there had been three payments to Krunch. The payments were for £4,000, £3,500, and £4,500. The Chief Executive of the respondent and of Krunch at that time was Mr Mark Epstein. The claimant could see no good reason for these payments. He says that the respondent Board should have been informed of the payments made to a related party and that the audit committee would have to approve the payments. The payments were not mentioned at a Board meeting on 31 March 2020 and the claimant said he "*strongly suspected*" that the payments had not been approved (statement paragraph 8).

24. The disclosure relied upon it is in an email dated Thursday 9 April 2020 at 2:47pm Florida time sent by the claimant to Mr James Biddle and Mr Roland Cornish, the respondent's nominated advisers (NOMADs) for Stock Exchange purposes, and copying Mr Peter Greensmith, from the respondent's auditors. It is not disputed by the claimant that Mr Biddle, Mr Cornish and Mr Greensmith are not part of the respondent and the claimant does not rely on a disclosure to a "prescribed person". It is not in dispute that the time of the email of 2:47pm is Florida time. This was 7:47pm UK time taking account of the five hour time difference. It was in the electronic bundle at electronic page 231. What is relied upon is as follows:

> *"I was surprised and concerned to see payments totally 12,000 GBP going to Krunch from Mobile Streams. See the company's bank account statement attached. I am not aware of any reason for this payment to be paid for either salaries or services rendered.*
> *I spoke to Peter Tomlinson as independent NED and this payment was not apparently discussed or approved at the recent board meeting call as a related party transaction as he was not aware of it.*
> *I am concerned that the shareholders are investing under the impression that Krunch is waving charges for 12 months and directors and managers are being paid in shares. And yet this cash payment is being made despite the promise to conserve cash or as the recent RNS stated. 12k GBP is of course a lot of money for a company with 43k GBP in its main bank account.*

> *Separately, I was surprised to see the receipt of just 42k GBP which is I assume the net proceeds of the 78k GBP firm placing— I was concerned as to where the rest of the funds went if these are indeed the placing proceeds.*
> *I know you are ultimately responsible as NOMAD to ensure the actions of the company correlate with its shareholder statements so please look into this.*
> *Regards*
> *Simon*

25. The claimant contacted Mr Biddle and Mr Cornish because they were responsible the NOMADs. They act as regulators for AIM companies and I was told that they can be fined by the Stock Exchange if they fail adequately to maintain standards.

26. The claimant's case is that shareholders had been led to believe that Krunch was not a drain on the respondent's cash flow; it was vital that all payments be accounted for and that the way the payments had been made in three separate sums seemed strange to him as he did not understand why a lump sum of £12,000 was not made. He took steps to see whether the payments related to a new client as setup fees. He discovered that the respondent had not been transferring data to Krunch in any significant way. This was based on an email at electronic page 232 from Mr Shane Gosling, an IT contractor, to the claimant timed at 4:51pm on 9 April 2020. This email was received by the claimant after his disclosure was made. It was submitted on his behalf that there may have been an earlier telephone conversation with Mr Gosling but there was no evidence of this for the purposes of this hearing.

27. The dismissal email was on 9 April 2020 was sent at 4:53pm Florida time and 9:53pm UK time from the CEO Mr Epstein. It said:

> *I'm writing to inform you that regrettably we have decided to terminate your employment with Mobile Streams. Please take this email is your one months notice. Your employment with Mobile Streams will end on 8 May 2020.*
> *During your notice you will be required to assist the company when needed.*

28. The parties agree that the dismissal email came 2 hours after the disclosure email.

29. The claimant relies, in support of his contention that his role was due to continue, upon minutes of a Board Meeting held on 31 March 2020, nine days before his disclosure at which it is stated at point 7 (bundle page 226):

> ***Simon's role going forward:*** *ME continues to remain in close contact with SB and the Board*

> *hopes to see Simon's ability to source content flourish*

30. The respondent relied upon a Board Minute about four weeks earlier on 2 March 2020 which said in relation to the claimant (page 185):

> *The Board discussed whether or not to prolong Simon's contract as his 3 month probation comes to an end March 4th, after which he would have to have 3 months' notice; although no vote was taken, the Board was generally of a view that Simon's contribution is questionable to date; NB and ME to call Simon to discuss termination;*

31. The tribunal was also taken to an earlier email dated 2 December 2019 from the Chairman Mr Burton to Mr Epstein, Mr Goodfellow and Mr Biddle saying of a number of Directors "*all feel we have no alternative but to sack Simon."* (page 153)*.*

32. Mr Epstein said in his witness statement that the decision to dismiss the claimant was taken a few days before 9 April 2020. That date was Maundy Thursday, the day before the Easter Bank holiday. After the 31 March 2020 Board Meeting Mr Epstein tried to get hold of the claimant. They arranged a call for Wednesday 8 April 2020 but this had to be cancelled as the claimant had a bereavement. Mr Epstein tried to reach the claimant in the early evening UK time of 9 April (prior to the disclosure email) and his evidence will be that the conversation did not go well and became heated. He says that he gave up on communicating the dismissal and decided to send the dismissal email. He believes that the claimant's disclosure email was a "set up" and the claimant was laying the foundations for this claim (his statement paragraph 55). His Co Directors Mr Burton and Mr Goodfellow confirm in their witness statements that the decision to dismiss was made before the disclosure email. The respondent does not dispute that the making of this decision to dismiss is not recorded in writing.

33. For the disclosures relied upon, the claimant pleads in his ET1 that he relies upon section 43B(1)(a) and (b) ERA 1996. He says that his disclosure in his reasonable belief intended to show that a criminal offence was being always likely to be committed as he believed that Mr Epstein might be defrauding the respondent, and/or that the respondent had failed was failing always likely to fail to comply with legal obligations to which it was subject by misleading its stockholders and hiding payments from the respondent's NOMADs. He said he believed that the respondent might be acting in breach of its regulatory obligations and/or that Mr Epstein might be attempting to conceal fraud and/or the respondent's failure to comply with the regulatory obligations. Concealment falls under sub-section (1)(f).

<u>The territorial jurisdiction issue</u>

34. There is a dispute as to territorial jurisdiction. It is not in dispute that the claimant at the time of dismissal was living and working in Florida. It is not in dispute that the claimant was paid through a US subsidiary company, on the US payroll, paying taxes in the US and that he was paid in dollars into a US bank account in Florida. In his witness statements the claimant gives an address in Florida. The claimant gave a New York address in his contract of employment in January 2006.

35. It is also not in dispute that the claimant is British and that the respondent is a UK Company listed on the London Stock Exchange. The claimant's contract of employment as at the date of dismissal was in the bundle at electronic page 158 in which he gave a Florida address. At clause 5.1 it gave the claimant's place of work as an address in Florida or such other places as the company shall from time to time identify and notify to him. He could be required to work in other countries including the UK.

36. His remuneration was stated in pounds subject to statutory deductions. Reference was made to HMRC (clause 7.3). Although this is what was stated in the contract, it was agreed that the claimant was paid in dollars and taxed in the US. The contract states that the governing law is English law and it purported to give jurisdiction to the English courts (clause 25) as did his previous contract of January 2006 (clause 18). It was not in dispute that the claimant has been resident and working in the US since January 2006. His place of work in that contract (clause 3.3) was given as the place of work in "*America*" of Mobile Streams Inc.

The law

37. Section 128 of the Employment Rights Act 1996 sets out the circumstances in which a claimant may claim interim relief. This is described here as relevant to this case. An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and that the reason (or if more than one the principal reason) for the dismissal is one of those specified in section 103A of that Act may apply to the tribunal for interim relief.

38. The test for an application for interim relief is set out in the leading case of ***Taplin v C Shippam Ltd 1978 IRLR 450 EAT***, which arose in the original context in which interim relief was originally enacted, namely dismissal for trade union reasons. The case remains good law. The test for "*likely*" in section 129 means "*does the claimant have a 'pretty good chance' of success*".

39. In ***Dandpat v University of Bath EAT/0408/09*** the EAT reaffirmed the test that the claimant must demonstrate a 'pretty good chance' of success at trial, saying (at paragraph 20):

> *'We do in fact see good reasons of policy for setting the test comparatively high … in the case of applications for interim*

> *relief. If relief is granted the [employer] is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the [employee], until the conclusion of proceedings: that is not consequence that should be imposed lightly'*

40. In ***Ministry of Justice v Sarfraz EAT/0578/10*** the then President, Underhill P said at paragraph 19 (in relation to the ***Taplin*** test) that "likely" connotes something nearer to certainty than probability. It does not mean simply more likely than not. Richardson J in ***Wollenburg v Global Gaming Ventures (Leeds) Ltd EAT/0052/18*** (penultimate paragraph) said that such hearings are intended to be short, with broad assessments by the Employment Judge who cannot be expected to grapple with vast quantities of material.

41. The principles were reviewed and summarised by the Employment Appeal Tribunal in ***London City Airport Ltd v Chackro 2013 IRLR 610***:

> *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.*

42. In the context of a whistleblowing claim, the law was reviewed by the EAT (Eady J) in ***His Highness Sheikh Bin Sadr al Qasimi v Robinson EAT/0283/17***. The claimant must show that level of chance in relation to the elements of the claim that:

    a. she made the disclosure(s) to the employer;
    b. she believed that it or they tended to show one or more of the matters itemised in section 43B(1)
    c. her belief in that was reasonable
    d. the disclosure was made in the public interest; and
    e. the disclosure was the principal cause of the dismissal.

43. These are matters of fact for the tribunal and at interim relief stage the task of the tribunal is only to make a summary assessment of the strength of the case. Eady J said of the tribunal's task (judgment paragraph 59) that it was "*very much an impressionistic one: to form a view as to how the matter looked, as to whether the claimant had a pretty good chance and was likely to make out her case, and to explain the conclusion reached on that basis; not in an over formulistic way but giving the essential gist of his reasoning sufficient to let the parties know why the application has succeeded or failed giving the issues raised and the test to be applied."*

44. Rule 95 of the Employment Tribunal Rules Procedure 2013 provides that when a tribunal hears an application for interim relief, it shall not hear oral evidence unless it directs otherwise.

45. If the claimant succeeds the tribunal shall ask the employer whether it is willing pending the determination or settlement of the complaint to reinstate or re-engage the employee in another job on terms and conditions not less favourable than those which would have applied had he not been dismissed. If the employer is willing to reinstate the tribunal makes in order to that effect. If the employer is willing to re-engage and specifies the terms and conditions, the tribunal shall ask the employee whether he is willing to accept the job.

46. If the employee is not willing to accept re-engagement on those terms and conditions where the tribunal is of the opinion that the refusal is reasonable it shall make an order for the continuation of his contract and otherwise the tribunal shall make no water.

47. If on the hearing of the application for interim relief the employer fails to attend or states that it is unwilling to reinstate or re-engage the tribunal shall make an order for the continuation of the contract.

<u>The whistleblowing authorities</u>

48. Under section 48A of the Employment Rights Act 1996, a "protected disclosure" is defined as a "qualifying disclosure" which is disclosed in accordance with sections 43C to 43H of that Act.

49. Section 43B(1) of the Employment Rights Act 1996 defines a qualifying disclosure:

> *(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) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.'……*
>
> *(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.*

50. Under section 43C qualifying disclosure is made if the worker makes the disclosure to his employer, or where the worker reasonably believes that the relevant failure relates solely or mainly to any other matter for which a person other than his employer has legal responsibility, to that other person. Section 43C(2) provides that a worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated as making the qualifying disclosure to his employer.

51. Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. It is possible an allegation may contain information, whether expressly or impliedly. In ***Kilraine v London Borough of Wandsworth 2018 ICR 185*** the CA said that in order for a statement or disclosure to be a qualifying disclosure, it had to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) - (of section 43B). There is no rigid distinction between allegations and disclosures of information.

52. In terms of the reasonableness of the belief, the Court of Appeal in ***Babula v Waltham Forest College 2007 ICR 1026*** said that whilst an employee claiming the protection of section 43B(1) must have a reasonable belief that the information he/she is disclosing, tends to show one or more of the matters in that section, there is no requirement to demonstrate that the belief is factually correct. The belief may be reasonable even if it turns out to be wrong. Whether the belief was reasonably held is a matter for the tribunal to determine.

53. The leading authority on the public interest test is ***Chesterton Global Ltd v Nurmohamed 2018 ICR 731.*** The worker's belief that the disclosure was made in the public interest must be objectively reasonable. The words "*in the public interest"* were introduced in 2013 to prevent a worker from relying on a breach of his or her own contract of employment where the breach is of a personal nature and there are no wider public interest implications.

54. In ***Chesterton*** whilst the employee was found to be most concerned about himself (in relation to bonus payments) the tribunal was satisfied that he did have other office managers in mind and concluded that a section of the public was affected. Potentially about 100 senior managers were affected by the matters disclosed. The claimant believed that his employer was exaggerating expenses to depress profits and thus

reducing commission payments in total by about £2-3million.

55. The Court of Appeal (CA) held that the mere fact something is in the worker's private interests does not prevent it also being in the public interest. It will be heavily fact-dependent. Underhill LJ noted four relevant factors:

- The numbers in the group whose interests the disclosure served
- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
- The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people
- The identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest although this should not be taken too far.

56. The Court of Appeal also sounded a note of caution (paragraph 36) that the public interest test did not lend itself to absolute rules. The broad intent behind the amendment to the law in July 2013 introducing the public interest test, is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved.

57. It is for the tribunal to rule as a question of fact on whether there was a sufficient public interest to qualify under the legislation. The term "public interest" has not been defined in the legislation. In ***Parsons v Airplus International Ltd EAT/0111/17*** the EAT pointed out that in law a disclosure does not have to be either wholly in the public interest or wholly from self-interest. It could be both and this does not prevent a tribunal from finding on the facts that it was actually only one of those.

<u>The law on territorial jurisdiction</u>

58. The overarching test is whether the connection between the claimant's employment and Britain and British employment law is "*sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim*": ***Ravat v Halliburton Manufacturing and Services Ltd 2012 ICR 389*** per Lord Hope at paragraph 28.

59. The leading case on the territorial jurisdiction is the decision of the House of Lords in the combined cases of ***Lawson v Serco Ltd, Botham v Ministry of Defence*** and ***Crofts v Veta Ltd 2006 IRLR 289***. This case made clear that the unfair dismissal jurisdiction does not have worldwide

application and the court has to give effect to its implied territorial limitation. Lord Hoffman, giving the only reasoned decision, said that the principles involve "*giving effect to what Parliament may reasonably be supposed to have intended and attributing to Parliament a rational scheme*". The application of section 94 for unfair dismissal depended upon "*whether the employee was working in Great Britain at the time of his dismissal".*

60. Two specific categories of employee were identified in ***Lawson v Serco*** as being peripatetic and expatriate employees. The parties agree that in this case the claimant is a peripatetic employee. The examples given in ***Lawson*** of peripatetic employees were "*such as airline pilots, international management consultants, salesmen and so on*". In that category Lord Hoffman said that the place where the employee is based and where he ordinarily works should be treated for the purposes of the statute as his place of employment. If that place is Great Britain then the employment tribunal has jurisdiction to hear the claim.

61. At paragraph 37 of **Lawson v Serco,** Lord Hoffman said:

> *Many companies based in Great Britain also carry on business in other countries and employment in those businesses will not attract British law merely on account of British ownership. The fact that the employee also happens to be British or even that he was recruited in Britain, so that the relationship was "rooted and forged" in this country, should not in itself be sufficient to take the case out of the general rule that the place of employment is decisive. Something more is necessary.'*

62. Where it cannot be said that a claimant was "working in Great Britain" at the time of her dismissal, a comparative exercises is in some cases appropriate. In ***Duncombe v Secretary of State for Children, Schools and Families No 2 2011 ICR 1312 (SC).*** In her judgment Lady Hale said:

> *"It is therefore clear that the right will only exceptionally cover employees who are working or based abroad. The principle appears to be that the employment must have much stronger connections both with Great Britain and British employment law than with any other system of law."*

63. The claimant in ***Ravat*** was held to have a closer employment connection with Great Britain than with any other country enabling him to bring an unfair dismissal claim. Relevant factors included the employer's base in Great Britain, that he lived in Great Britain, the rotational system that treated him as a commuter and that he had the benefits for which he would have been eligible had he worked in the UK.

64. In ***Bates van Winkelhof v Clyde & Co LLP 2013 ICR 883*** the claimant

worked principally in Tanzania but spent part of her time in the respondent's London office (78 days in the last year of work). The Court of Appeal held that, in a case where the claimant lived and/or worked for at least part of the time in Great Britain, it was unnecessary to carry out a comparative exercise in which the factors pointing towards a connection with Great Britain were compared with the factors pointing in favour of another jurisdiction, and that all that was required for the employment tribunal to assume jurisdiction was that it should be satisfied that the claimant's connection with Great Britain was sufficiently strong to enable it to be said that Parliament would have regarded it as appropriate for the tribunal to deal with the claim.

Conclusions on interim relief application

65. The task for the tribunal on an interim relief application is to make a summary assessment of the strength of the case as to whether the claim is "likely" to succeed. The ***Taplin*** test remains good law: "*does the claimant have a pretty good chance of success*". The test is comparatively high, following ***Dandpat*** and ***Sarfraz.*** The claimant has to show more than it is more likely than not that he will succeed. It has to be more than probability and connotes something nearer to certainty.

66. It is necessary to identify the main points about which the tribunal must be satisfied before the claimant can succeed. He must show that that the tribunal has territorial jurisdiction to hear this claim; that he made qualifying and protected disclosure and that he genuinely believed that this tended to show one or more of the matters set out in section 43B(1) ERA, in this case a criminal offence; breach of a legal obligation; and/or deliberate concealment of either of those two matters. He must also that the disclosure was made in the public interest. He must also show causation; that that the disclosure was the reason, or if more than one, the principal reason, for his dismissal.

67. On territorial jurisdiction, both parties took the tribunal to the relevant case law. There are factors pointing both ways. It is notable that the claimant lived and worked and was based in the United States and that this had been the case since January 2006, so for just over fourteen years by the date of termination of employment. He was paid in dollars into a US bank account and taxed in the US. Pointing in the opposite direction are the factors that he is British; the respondent is a UK listed company and the contract is expressed to be subject to English law – although that provision in the contract is by no means decisive in itself. The claimant submits that the work he did was for the respondent's benefit in England and that it did not matter where he worked as the work was done online.

68. There are clearly factors pointing in both directions. It is by no means clear that the claimant will establish territorial jurisdiction. This will need to be heard at a preliminary hearing. The claimant has not shown that

he has a pretty good chance of success in establishing that the tribunal has jurisdiction to hear his claim so on that issue alone, the application for interim relief fails.

69. If I am wrong about this and given the submissions made by the parties on the other aspects of the case, I have gone on to consider the claimant's chances of success on the claim itself. In doing so, I have not gone into each and every point upon which the parties made submissions. First of all I have aimed to avoid making findings of fact which might compromise a full merits hearing when the witness evidence is heard and tested and I am also mindful of the comments of the EAT in both ***Wollenburg*** and ***Robinson*** (above) as to the task of the tribunal.

70. I have considered whether the claimant has a pretty good chance of showing that he made a qualifying disclosure. For purposes of this hearing only, the respondent did not take the point on whether there was a disclosure of information. It can be taken for the purposes of this hearing that there was a disclosure of information.

71. The respondent acknowledges that the claimant's motivation in making the disclosure is not part of the test. He has to show that he had a genuine and reasonable belief that his disclosure was in the public interest and tended to show one of the categories he relies upon in section 43B(1) being (a) (b) or (f).

72. Without it amounting to a finding of fact, I am of the view that the claimant has a pretty good chance of success on the public interest test in the light of the case law. This is a publicly listed company on the London Stock Exchange where the public announcements might affect investors and shareholders.

73. I was taken to the claimant's pleaded case in his ET1 at paragraph 17 where he said that he believed that Mr Epstein of the respondent "might be defrauding the respondent"; that the respondent "might be acting in breach of its regulatory obligations" and/or that Mr Epstein "might be attempting to conceal" these matters. The use of the word "might" in the pleaded case, potentially connotes something less than a reasonable belief that these matters had been done or were likely to be done. In his witness statement at paragraph 8, he spoke of "strongly suspecting" that the payments to which his disclosure related, had not been approved by the Board. There is an argument that this is not the same as a reasonable belief in the matters set out in section 43B(1).

74. In terms of the wording of the disclosure, the respondent submits that the claimant was fully aware of the terms of the Service Agreement between the respondent and Krunch; he was the CEO and a signatory and as such he was aware that the Agreement contained provisions for charges beyond those mentioned in the short Stock Exchange announcement of

6 November 2019. The respondent seeks to challenge the reasonableness of any belief that shareholders or the public were being misled because of the breadth of the contractual provisions. It is also relevant that at the time of his disclosure, the claimant was no longer a Director or shareholder as he had stepped down from the Board about four months earlier. I take the view that the reasonableness of the claimant's belief requires testing in evidence and I cannot say that the claimant has a pretty good chance of success sufficient to meet the test for interim relief.

75. There is also an issue as to whether the disclosure was protected under section 43C. It is not in dispute that the disclosure was not made to the employer. The claimant relies upon section 43C(1)(b)(ii) and (2) in that the NOMADs had legal responsibility as did Mr Greensmith who was copied on the email as he is an AIM broker. The parties were not aware of any case law on this issue. I consider that the claimant has a pretty good chance of showing that the disclosure was protected given the quasi regulatory function of the NOMADs but this point remains in issue for the full merits hearing.

76. The final matter upon which I have considered the claimant's chances of success is that of causation. He has to show that the disclosure was the reason or principal reason for his dismissal. The respondent concedes that claimant has the coincidence of timing, the dismissal coming within 2 hours of his disclosure. In that context it is necessary to consider what was taking place at the time.

77. There are conflicting Board Minutes, on 2 March contemplating the termination of the claimant's employment and on 31 March, painting a more positive picture. Mr Epstein will give evidence that prior to the disclosure, he was trying to reach the claimant to convey a decision that had been made earlier in the week. All three Directors' witness statements confirm that the decision to dismiss was made earlier in the week leading up to 9 April 2020. Each of them will need to be found to be untruthful in this respect for the claimant to succeed. The disclosure email was not sent to the respondent.

78. There is documentary evidence that will need to be tested, that the recipients of the email (the NOMADs) did not act upon it until 10 April 2020 sending it to Mr Burton at about 7pm on 10 April 2020. There is therefore an issue as to whether Mr Epstein had knowledge of the disclosure when he sent the dismissal email. In relation to timing, it requires one of the NOMADs or Mr Greensmith to have acted upon the disclosure email on the evening of Maundy Thursday by notifying the respondent, just before the Good Friday Bank Holiday and that the decision to dismiss was thereafter made and communicated, within a 2 hour timescale. The respondent also pursues an argument that the claimant used the disclosure with a view to preparing the way for this

claim.

79. These matters require detailed findings of fact. I am unable to say the claimant has a pretty good chance of success in establishing causation.

80. For the above reasons I am unable to find on what is before me that the claimant has a pretty good chance of success such as to meet the test for interim relief. The claimant has a prospect of success, as does the respondent. The claimant does not meet the test, described in ***Dandpat*** as comparatively high or in ***Sarfraz*** as nearer to certainty than probability. In these circumstances the application for interim relief fails.

81. I expressed my thanks to both counsel for their very helpful submissions and the high standard of preparation on the case.

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Employment Judge Elliott
Date: 17 December 2020

Sent to the parties on: 17/12/2020 .
_____ for the Tribunals