Case Number: 2200190/2021

THE EMPLOYMENT TRIBUNAL

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

Mr E Ukwu

Claimant

AND

ICG FMC Ltd

Respondent

ON: **28 January 2021**

Appearances:
For the Claimant: **In person**
For the Respondent: **Mr G Mansfield, one of Her Majesty's counsel**
Ms C Davies, junior counsel

RESERVED JUDGMENT ON INTERIM RELIEF APPLICATION

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

REASONS

1. By a claim form on 12 January 2021 the claimant Mr Elekwachi Ukwu brings claims for unfair dismissal for whistleblowing, whistleblowing detriment and age discrimination. The claims other than for unfair dismissal for whistleblowing were rejected due to lack of an Early Conciliation Certificate. The date of dismissal was 5 January 2021. The ET3 had not been filed by the date of this hearing.

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.

The hearing

3. 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.

4. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. One member of the public attended.

5. The parties were able to hear what the tribunal heard. From a technical perspective there were some difficulties with the claimant's screen freezing or him losing his sound. Every time this happened we stopped the proceedings and waited for him to log off and log on again which fixed the problem. I told the parties at the outset that if they missed something, to let everyone know so that it could be said again. At each time the claimant had to log off and on again we waited in silence for him to become reconnected and recapped where we had left off.

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

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

Witness statements and documents

8. There was an electronic bundle of documents in three volumes running to just under 900 pages. There was a respondent's authorities bundle and an inter parties correspondence bundle. I reminded the parties that is not possible at a one day hearing to review all the documents and the task of the tribunal at an interim relief hearing. Case law referred to below makes it clear that these hearings are intended to be short, with broad assessments by the Employment Judge who cannot be expected to grapple with vast quantities of material. It is intended only as a summary assessment of the strength of the case.

9. I read during the hearing at the claimant's request, his Memorandum relied upon as a protected disclosure of 26 March 2014, bundle page 614, a transcript of a meeting pages 629-676 titled "*meeting with Toby and Peter*" dated 1 April 2014 provided by the claimant and executive summary of a third party investigation report prepared by Willkie Farr & Gallagher (UK) LLP pages 678-681 and a what he described as a "summation" to that document at page 718, headed "*Lessons Learned*".

10. After a half hour break to read those documents the claimant said that there were more documents that he wished me to read and they were pages 721-748 of the third party report and page 754 of that report. Page

754 included a heading "*Comments from [the claimant] to this report".* I expressed my reservations about the value of reading a third party report as what I considered mattered was the disclosures the claimant made and not what a third party thought about those disclosures. Both parties were in agreement that the reason the claimant wanted to rely on this was because the investigator's reaction to his disclosures supported his case that the information tended to show a breach of a legal obligation or the commission of a criminal offence and I read the pages in question.

11. There was a three part audio recording of a telephone conversation between the claimant and his manager Mr Lewis on 5 January 2021 and a separate recording of a call between them on 10 December 2020. These were covert recordings made by the claimant of which Mr Lewis had no knowledge.

12. There was a witness statement from the claimant of 94 paragraphs and two from Mr Andrew Lewis of the respondent. The first had 108 paragraphs, but was much longer due to subdivided paragraphs and the second ran to 33 paragraphs. The respondent said that the second statement was produced because the claimant disclosed the four covert audio recordings The claimant objected to Mr Lewis's second statement.

13. Statements were exchanged as ordered on 25 January 2021. The claimant saw the second statement as Mr Lewis attempting "*to extricate himself from the false statements he made in his first witness statement*" and said it was giving the respondent "*a second bite of the cherry".*

14. The claimant said he had not originally intended to rely on the recordings at this stage (the interim relief hearing) and it was only when he read the first witness statement that he felt the conversations were "*mischaracterised*". After reading the first statement, he considered that he needed to disclose the transcripts of the recordings.

15. My decision was as follows: It is not sworn witness evidence. The recordings were covert. The claimant had the benefit of the recordings when he prepared his statement. Mr Lewis did not. It appeared to Mr Lewis that some of his recollection of the 10 December 2020 call was inaccurate and he wished to correct this with the second statement. The second statement was served on the evening of 26 January 2021 so very shortly after the original exchange of statements. During his response to this application the claimant did not say that he had not had time to consider it. (For the sake of accuracy I record that during the claimant's substantive submissions in the afternoon of this hearing, he said that he had only glossed over the second statement). The claimant can make submissions at this hearing about any difference in the accounts given by Mr Lewis and he will have the opportunity to cross-examine him on any discrepancies at the full hearing. I gave leave to the respondent to admit the second statement.

16. There were written submissions from both sides to which the parties spoke. All submissions and authorities were fully considered, whether or not expressly referred to below.

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

Relevant factual background.

18. The claimant worked for the respondent as Assistant Company Secretary. He was appointed on a fixed term contract. His dates of service were from 6 January 2020 to 5 January 2021. In his role the claimant provided support to the Company Secretary and General Counsel Mr Andrew Lewis.

19. The claimant is a dual qualified solicitor, in England and Nigeria. He has worked as a company secretary since 2002 and specialises in corporate law. He has worked for several quoted companies including Afren plc, Burberry Group plc, J Sainsbury plc, KAZ Minerals plc, Tritax BigBox REIT plc and Tritax Eurobox plc. He has also worked for the Financial Conduct Authority (FCA).

20. In these proceedings he relies upon having made protected disclosures to a previous employer, Afren plc. He brought a whistleblowing claim in this tribunal in case number 2400107/2016. There was no finding in those proceedings that the claimant made protected disclosures. Those proceedings were struck out by Employment Judge Glennie in March 2019.

21. His case in relation to his disclosures is as follows:

22. He says that on 26th March 2014 after making a verbal disclosure to the Chairman of the Board of Directors of Afren plc and the Board of Directors at a Board meeting held on 19 March 2014, he submitted a Memorandum to the Chairman of Board titled 'Breaches of the Listing Rules' (page 614). He says he alleged breaches of the Premium Listing Rules and Disclosure and Transparency Rules in respect of several transactions including:

    a. a forward sale agreement between Afren and another company worth an aggregate amount of $100m
    b. a variation of a joint operating agreement between Afren and that company, worth an aggregate amount of $300m and
    c. a resolution agreement between Afren and a different company involving a settlement payment of $100m.

23. He said that the Memorandum outlined the breach of the Listing Principles, Significant Transaction Rules and the Disclosure and Transparency Rules. He said he disclosed that the company was likely

to breach the duty to act in the interests of its creditors under section 172 (3) of the Companies Act and duty to avoid conflicts of interests.

24. His evidence is that there was an investigation and two directors of Afren were dismissed in October 2014. Two senior officers of the company were convicted and imprisoned in in 2018.

25. The claimant was also concerned that on or about 25 February 2020 he was notified by the FCA of a data breach that identified him as a whistleblower.

The Credence background checks

26. In the course of the recruitment process the claimant provided the respondent's background checking agent Credence with details of his former employers so that the respondent could conduct background checks on him. The Credence check dated 17 March 2020 was thorough and was in the bundle starting at page 48. At page 849 there was a Credence document showing the details of the checks they make and page 868 showed the headline results of an internet search on his name. Page 880 made reference to Afren. The Credence check which covered all of the claimant's previous employment in the UK, found nothing adverse about him.

27. The claimant relies upon the fact that there is information about him in the public domain identifying him as a whistleblower including Employment Tribunal Judgments which are published online. The claimant also takes the view that his line manager and the dismissing officer Mr Lewis, must have read the Credence Screening check and must have been negatively influenced by it, despite it showing nothing adverse about the claimant. Mr Lewis's evidence will be that he did not see it until these proceedings were ongoing. I saw no documentary evidence showing that Mr Lewis has seen it, such as an email sending him a copy.

28. What is material is that very shortly after Credence check was produced, the claimant passed his probationary period, letter dated 30 March 2020 (page 68) from Ms Hannah Sims, whom I was told was an HR Business Partner, but in the letter is described as an Associate Director of HR.

29. The claimant pointed to an email exchange between Mr Lewis and Ms Sim on 17 March 2020 at page 173 in which Ms Sim said that she had "*another matter*" she wanted to discuss with Mr Lewis about the claimant and he replied ""*Another matter"….doesn't sound good*". Although the claimant reads this as being about his whistleblowing past, it could have been about anything and will require cross-examination on what exactly this "other matter" was all about. On the face of it, the link to any whistleblowing activity is not there.

30. Mr Lewis made the decision to pass the claimant's probation, but flagged up with Ms Sims that he had some concerns about the claimant's performance. I saw an email dated 23 March from Ms Sims to Mr Lewis saying *"[The claimant's] probation ends on 5th April….I assume based on our conversation that you are happy to pass his probation but with the caveats that you need to discuss some performance elements with him?"* Mr Lewis replied *"Yes, that's a fair conclusion and I will do".* (pages 194-195).

31. In relation to knowledge of his whistleblowing the claimant also relies on being identified in a Sunday Times article on 26 July 2015 as the person who escalated issues to the Board of Directors of Afren. He says there was widespread media attention and he believes that he has been "*exposed*" to "*whistleblowing stigma*" (ET1 Grounds of Complaint paragraph 46). He was also named in an online blog in September 2017 as a whistleblower who "*promises to tell all in London Tribunal on Monday*".

32. In March 2020 with the onset of the pandemic the claimant sought and was given permission to work from home. The claimant said that he became unwell with coronavirus between April and June 20020. He was not hospitalised.

33. The claimant moved house to Scotland in August 2020. He says there was some issue with his internet and he was unable to contact Mr Lewis for a couple of days. He also experienced other IT difficulties.

<u>The phone conversation on 18 November 2020</u>

34. It is not in dispute that on 18 November 2020 the claimant was told by Mr Lewis by telephone that his fixed term contract would not be renewed when it expired on 5 January 2021. The claimant said it was a very short conversation, around a minute in length, but I make no finding of fact as to its duration. There is no record of this conversation, whether contemporaneous note, audio recording or transcript. It was not a call which the claimant covertly recorded as he did with two other material telephone conversations with Mr Lewis.

35. The claimant reported his dismissal to the FCA because he said he had been told to inform them if he was victimised for whistleblowing. Again I make no finding of fact as to what the FCA told the claimant in this respect.

36. Mr Lewis, with the assistance of Ms Sims, prepared a bullet point note by email dated 10 November 2020 titled "*Script for Elekwachi – any comments*". This was his preparation for the conversation on 18 November in which he was going to inform the claimant that his contract would not be renewed. Both parties correctly accept that that non-

renewal of a fixed term contract is a dismissal.

37. The note is in stages, firstly what Mr Lewis planned to say about not renewing the contract, secondly what to say "*if pushed on why*", thirdly "*only to say if really pushed and he brings it up first"* and fourthly *"only to say if asked".* Without hearing oral evidence I decline to make any findings of fact as to exactly what was said during that conversation, other than to say that if the claimant's position on the length of that call is correct, it seems unlikely that Mr Lewis would have got past the first stage of what he planned to say. The note sets out in the second stage that the claimant's work is good but he is often very slow and has to be chased. It also said that the claimant did not seem to have the ability to focus on more than one thing at once, that his communications were poor and that he was frequently unavailable. It also said in the fourth stage that they did intend to replace him with someone more hands on or proactive and possibly a little more junior. The claimant says that he was told that his contract was not being renewed for "*budgetary reasons*" and that Mr Lewis complimented him on his "*excellent performance*". The words "*budgetary reasons*" do not appear in Mr Lewis's preparation note of 10 November.

38. The claimant discovered that the respondent was recruiting to fill his position. It is not in dispute that the respondent was recruiting to fill the position. They say that they were looking for someone more junior to fill the role who could be more hands on.

39. The claimant was given Notice of Termination of Contract dated 4 December 2020 (page 69). It did not set out a reason for termination.

<u>The 10 December 2020 telephone conversation</u>

40. A telephone conversation took place between the claimant and Mr Lewis on 10 December 2020. There is no dispute that the telephone conversation took place. The claimant recorded it. Mr Lewis did not know he was being recorded. Mr Lewis told the claimant that they were looking for someone more junior to fill the role. Mr Lewis denies that this was a change of reason because he denies telling the claimant that the termination was due to budgetary reasons. He said he told the claimant the reason was in connection with looking at budgets and staffing needs for 2021. Mr Lewis denies praising the claimant's work without qualification. During that call, Mr Lewis told the claimant that he was looking for someone more junior who could get into the detail and progress things. Mr Lewis's evidence will be that the reason for termination of the claimant's employment was poor performance.

41. On about 11 December 2020 the claimant says he was placed on garden leave. There is a dispute between the parties as to how this came about. The clamant says he was placed on garden leave and Mr Lewis relied

on an email of 11 December 2020 in which he said: "*As I haven't heard anything in response to [his email of 11 December] I am assuming that you are choosing to take garden leave for the remainder of your employment. As such, we will commence the garden leave from close of business on 23 December… I wish you all the best for the future and please do let me know if you need anything further"* – bundle page 600.

The 5 January 2021 telephone conversation

42. The claimant made a lengthy telephone call to Mr Lewis on 5 January 2021, which was the termination date. This was produced to the tribunal in a three part recording which I heard. The recordings were disclosed to the respondent on Tuesday 26 January 2021. In the time available Mr Lewis was not able to say whether the recordings were complete or accurate. He noted, as did the tribunal, that in paragraph 87 of the claimant's witness statement he says he recorded "*most of*" the call and Mr Lewis does not know what part of the conversation was not recorded or what might have been removed. The 5 January 2021 recording is in three parts so evidence is likely to be required about what may have been left out.

43. The claimant did the vast majority of the talking in this recording. The claimant complained that he had been told that he was being dismissed for budgetary reasons which he considered a redundancy situation, but found out they planned to recruit someone else, that it was because of his performance, or his absence. He told Mr Lewis that he believed it was because of his past whistleblowing. During this call he told Mr Lewis of his right to bring proceedings and an interim relief application. The recording and the transcript show that Mr Lewis denied knowing about the claimant's past whistleblowing actions.

44. Mr Lewis's evidence at the full hearing will be that he had no knowledge of any whistleblowing issues until the claimant raised them with him in the 5 January telephone conversation and therefore this played no part in his decision not to renew or extend the claimant's fixed term contract. He will say that he has never been contacted by Afren and did not know about the FCA data breach or the claimant's past ET proceedings against Afren. He admits that he was told in March 2020 that the claimant had brought claims against two former employers. He says he did not ask any more about it as he did not consider it relevant to the claimant's employment and the claimant passed his probationary period.

45. The claimant relied on paragraphs 9(b), 36 and 37 of Mr Lewis's witness statement in this respect. These paragraphs are set out as follows:

> *9(b) As explained in paragraphs 36 and 37 below, in mid-March 2020 I was informed by a colleague that the Claimant had brought a claim against two of his former employers. I did not ask for any further details about who these employers were or what the claims were about as I did not consider it relevant to the Claimant's*

employment with ICG. Shortly after this, I decided the Claimant had passed his probationary period and informed him of this.

36. On 17 March 2020 I received an email from Hannah Sims in which she stated that she needed to catch up with me on a matter relating to the Claimant.... When I spoke to Hannah by phone, she explained to me that she had become aware that the Claimant had brought a claim against two of his former employers. Prior to this, I had not been aware that the Claimant had brought any proceedings against any of his former employers.

37. I was not aware of the details of these proceedings, including what type of claims the Claimant had brought or who they were against, and I do not recall ever looking at any documents relating to the proceedings. I didn't ask Hannah for more information about the claims as I did not need to know. When I spoke to Hannah about this briefly, we agreed that the fact that the Claimant may have brought claims against his former employers was not relevant to his employment with ICG.

46. In the bundle at page 173 was an email exchange between Ms Sims in HR and Mr Sullivan, a Reward Manager, with links to two ET decisions in proceedings between the claimant and two previous employers – namely Ultra Electronics and Burberry. Mr Lewis was not, on the face of it, a recipient of this email. The claimant considers that this email fixes Mr Lewis with knowledge of his whistleblowing activities. There are two matters in relation to this – firstly Mr Lewis denies that he looked into this and no evidence has been produced for example to show that Mr Lewis received these links. Secondly, even if he did, the links show for Ultra Electronics a Judgment declining the claimant's application for a Judge in Watford ET to recuse himself and for Burberry it is a Dismissal on Withdrawal which discloses nothing at all about the nature of the proceedings. Even if Mr Lewis had investigated the links in the email between Mr Sullivan and Ms Sims, it would not have shown him anything about a whistleblowing claim.

47. The claimant believes that as soon as the respondent found out that he made past protected disclosures, they looked for ways to get rid of him and that they used purported poor performance and his absence due to illness as the reason. The claimant's position on why the respondent waited a full year before terminating his employment was that it would have been too obvious to do this any earlier and they had to wait until the end of the fixed term contract so as not to arouse suspicion.

48. Mr Lewis will say that the reason he dismissed the claimant was because of poor performance throughout his employment. His evidence will be that the claimant delivered very little work and the work he did produce was often delayed and that the claimant lacked the ability to multitask. His evidence will be that the claimant's communication skills were poor and he would often fail to produce updates on progress, he would need to be chased and was frequently uncontactable.

49. Mr Lewis set out at length, from paragraph 23 page 26 of his statement to paragraph 64 at page 56 of his statement, his concerns about what he considered the claimant's poor performance. This was linked to documentary evidence in the bundle. I make no findings of fact about

the claimant's performance during his employment.

50. On the issue of complimenting the claimant on his work, Mr Lewis admits that he complimented the work that the claimant actually delivered but he will say that whilst the work done was good, there was not enough of it and it was done too slowly.

51. The telephone call between the claimant and Mr Lewis on the termination date of 5 January 2021 was at the claimant's instigation. It formed a 3 part recording which I heard.

52. In that call the claimant is heard asking Mr Lewis when he became aware that the claimant was a whistleblower and made protected disclosures. Mr Lewis replied "*I didn't know that"* and continued to deny it. The claimant says he did not expect Mr Lewis to admit to it. During that call Mr Lewis told the claimant that he work he did was good but that there were concerns about his response times and ability to multitask. He also told the claimant "*The more day to day stuff is not right for you*" and that the respondent had to do "*a lot of chasing down*". He told the claimant this was not his strength and he was "*not particularly quick*".

53. Although the claimant said he was told by Mr Lewis that his work was excellent, this did not appear in the recording as words spoken by Mr Lewis.

54. Mr Lewis sent himself an email as a record of the 5 January call, which was at page 604, dated 6 January 2021. It was consistent with the call in that it recorded that Mr Lewis said he did not know about the claimant's whistleblowing.

The law

55. 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.

56. 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*".

57. 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'*

58. 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.

59. 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.*

60. 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.

61. 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."*

62. 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.

63. 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.

64. 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.

65. 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>

66. 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.

67. 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.

68. 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.

69. 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.

70. The leading authority on the public interest test is ***Chesterton Global Ltd v Nurmohamed 2018 ICR 731 CA.*** 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.

71. 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.

72. 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.

73. As the claimant did not have two years' service with the respondent the burden is on him to establish the reason for dismissal - ***Ross v Eddie Stobart Ltd EAT/0068/13.***

74. Both parties relied in their submissions on the decision of the EAT in ***BP plc v Elstone Ltd 2010 ICR 879***. This is a case in which protected disclosures were made to a previous employer and the EAT held that there was no express requirement that the worker be in any particular employment. The EAT also said that a claimant is likely to face a particularly difficult challenge in showing that those disclosures are the reason for dismissal: obiter comments made by Langstaff J at paragraph 35:

> "Thus the vision of an employer being concerned about whether he should employ workers because they might have been whistle-blowers and he might thereafter be accused by them of taking action against him for that reason is unreal. A claimant for an order under the public interest disclosure provisions has to persuade a tribunal that action was taken against him on the ground that he made such a disclosure. This is a causation point. It is difficult to see any reason why an employer who was totally removed from the subject of a disclosure should wish to take action because of it. It must be well appreciated that in such a case tribunals are so unlikely to find that the disclosure is the cause of the treatment which the employee/worker finds adverse that it is not worth pursuing the allegation (and it may be costly to do so). If, to the contrary, there is a tenable argument that the adverse treatment is causally linked to the disclosure this is highly likely to be because the employer has some interest in it, or it is (as in the examples given above) "uncomfortably close to home". Yet it is precisely this sort of causal link which it is the policy of the Act to recognise as a sufficient reason for giving statutory protection to the worker concerned."

Conclusions on interim relief application

75. 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 has been clarified and refined and is comparatively high, following ***Dandpat*** and

Sarfraz (above)***.*** 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.

76. It is necessary to identify the main points about which the tribunal must be satisfied before the claimant can succeed.

77. The claimant must show that he was a whistleblower, that he made protected disclosures as defined in the Employment Rights Act 1996. The respondent accepts as a matter of principle that the claimant can rely on disclosure to a previous employer. During this hearing the claimant relied on disclosures that he made to his previous employer Afren and not to anyone else.

78. Although the claimant has brought whistleblowing proceedings against Afren there is no finding in those proceedings that he made protected disclosures. Those proceedings were struck out. The respondent does not admit that the claimant made protected disclosures; the disclosures were not made to this respondent. However, the respondent accepted in submissions that there is an arguable case that the claimant made protected disclosures to Afren as his then employer.

79. My decision based on the Memorandum of 26 March 2014, the fact that this was a publicly listed company where the interests of shareholders were likely to have been affected and the wording of that Memorandum is that the claimant has a pretty good chance of success in establishing that he made protected disclosures to Afren both as to a breach of a legal obligation and the commission of a criminal offence (section 43B(1)(a) and (b) ERA 1996) and that he has a pretty good chance of success on the public interest test and the necessary belief that he had to hold at the time.

80. 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. I have aimed to avoid as far as possible 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.

81. To succeed in this case, the claimant must show that the dismissing officer, who on the face of it was Mr Lewis, had knowledge of the claimant's whistleblowing activities. This is denied by Mr Lewis.

82. The claimant said in oral submissions that the credibility of Mr Lewis was central to this case. Credibility is not a matter I can assess in the absence of evidence which is tested cross examination. That the claimant does not believe Mr Lewis when he says he did not have knowledge of his whistleblowing, is not enough to show that he has a pretty good chance

of establishing that Mr Lewis did have that knowledge. The claimant will need to prove that Mr Lewis is being untruthful.

83. The claimant has a belief that Mr Lewis must have searched his name, must have found out he was a whistleblower and must have dismissed him because of that. It is a belief that is difficult to pin into what positively appeared in the documents before the tribunal. The claimant also suggested that Mr Lewis might not have been the decision maker on his dismissal, it might have been someone else who must have had that knowledge. But he made no suggestion as to who that person might have been. If it is said to be someone else, the tribunal is likely to need evidence from that person.

84. The claimant relies on a letter from the respondent's solicitors dated 8 January 2021 which said on the third page that the decision not to extend his contract was made by Mr Lewis with Ms Sims providing HR support. The claimant accepted that Ms Sims did not have the seniority to make the decision to dismiss. What Ms Sims might have told Mr Lewis about the claimant is not something I could form a view on, based on what was before me and needs to be a matter for cross-examination at trial.

85. The claimant's case is that the two Employment Tribunal Judgment links in Ms Sims email correspondence of 17 March 2020 was such that it gave Mr Lewis knowledge of him as a whistleblower. The difficulty was that he has not shown at this hearing any mechanism by which those links were sent to Mr Lewis. Even if Mr Lewis saw those links, which was denied, there is nothing in those two judgments to indicate that the claimant was a whistleblower. The claimant said to this tribunal, "*you can search my name and these whistleblowing matters will come up*" but this does not assist with showing that this is precisely what Mr Lewis did. Mr Lewis says he did not.

86. Just because information is in the public domain does not mean that an individual in question knows about it. The claimant's view of what Mr Lewis "must have done" is not enough. I find that the claimant does not have a pretty good chance of success, meaning more likely than not and connoting something nearer to certainty, of showing that Mr Lewis had knowledge of his past disclosures.

87. Moving on from there, the burden is on the claimant to show the reason for dismissal and this is very much in dispute. The claimant relies on being told different things, that he was told it was "*budgetary*", but he was being replaced and that he had been told that his work was "*excellent*".

88. Mr Lewis denies telling the claimant that the reason was budgetary and whilst he accepts that he told the claimant that the work he actually performed was good; he says there was not enough of it and it had to be chased continually. Mr Lewis gave a number of documented examples

in his witness statement of performance concerns. His 10 November 2020 "script" for his telephone conversation with the claimant on 18 November 2020 speaks of performance concerns. Performance concerns were noted in March 2020 but they were not at that time enough to warrant failing the claimant's probation. The discrepancies in what was said during conversations and the telephone calls is a matter that will need to be tested in evidence at the hearing.

89. The claimant's view is that knowledge of his past whistleblowing, which will need to be proven and the reason for dismissal, are one and the same. I do not agree and can do no better than to adopt the obiter comments of Langstaff J at paragraph 35 of ***Elstone*** set out above. Langstaff J described the vision of an employer being concerned about whether to employ workers because they might have been whistle-blowers and they might later be accused of taking action against him for that reason as "*unreal*". He said it was difficult to see any reason why an employer who was totally removed from the subject of a disclosure, should wish to take action because of it. In submissions the respondent highlighted that the claimant had not explained why his past disclosures to Afren mattered to this respondent.

90. In ***Elstone*** the obiter comments were qualified by saying that detriment or dismissal might happen if the new employer had some interest in the past disclosures or if it was "*uncomfortably close to home*". Mr Mansfield for the respondent submitted that not only was it not "*close to home*" it was "*not even in the same city*". The claimant did not provide the tribunal with any reason why the respondent would be so concerned about the disclosures he made to Afren that they would wish to terminate his employment or why, if on his case, they had knowledge of his disclosures after the Credence checks, they went on to confirm him in employment at the end of his probation when they had the opportunity to terminate. The claimant's only reason was that they could not dismiss him too soon because it might look suspicious. I found this argument unconvincing for the purposes of this hearing. Plus, employers with a professional HR team are very likely to know about the statutory protections given to whistleblowers.

91. To the extent that the claimant relies on the respondent's failure to follow a performance procedure, I read little into this in a case where he has less than 2 years' service and does not have the section 94 / section 98 right not to be unfairly dismissed. It is not unusual for employees with less than 2 years' service to be dismissed without a procedure and what matters in a section 103A case is the reason for the dismissal and not the process that was followed. The burden is on the claimant to prove the reason, when he does not have the qualifying service.

92. 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 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.

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Employment Judge Elliott
Date: 29 January 2021

Sent to the parties on: 29/1/21 : : .
_____ for the Tribunals