EMPLOYMENT TRIBUNALS

Claimant: **Mr D Farrell**

Respondent: **Shaw Trust Limited (1)**
Mr Christopher Luck (2)

Heard by: **CVP** **On: 18 & 30 March 2021 (Reserved)**

Before: **Employment Judge Britton**

Representation :

Claimant: In person

Respondent: Mr D Northall (Counsel)

RESERVED JUDGMENT

It does not appear to the Tribunal that it is likely that on determining the complaint to which the application relates that it will find that the claimant has been unfairly dismissed by virtue of Section 103A of the Employment Rights Act 1996. The claimant's Interim Relief application is refused.

REASONS

Background

1. By his Claim Form presented on 27 January 2021 the claimant asserted that he had been dismissed for what might broadly be described as "whistleblowing". The claimant alleges that this was the reason or principal reason for his dismissal and that his dismissal was therefore automatically unfair. Pending resolution of his unfair dismissal claim, the claimant has applied for interim relief pursuant to Section 128 of the Employment Rights Act 1996 ("ERA 1996"). Although there are two named respondents, this application can only be made against the First Respondent as they were the claimant's employer (hereinafter "the respondent").

2. On the face of the Claim Form, the relevant disclosure on which the claimant appears to rely was made on 18 March 2020 by an anonymous email from

the claimant to an anonymous email account maintained by the respondent for the purpose of facilitating anonymous disclosures of this type.

3. The issue to be determined is whether I am satisfied that "it is likely that on determining the complaint" the Tribunal will find that the reason or the principal reason for dismissal is the prohibited reason under Section 103A ERA 1996 which the claimant has asserted. In determining that issue, I have been provided with an agreed bundle running to 393 pages, 2 audio recordings, a skeleton argument from the respondent's representative and witness statements made by the following on behalf of the respondent:

   Sharon Barton – HR Business Partner Manager
   Jennifer Dillon – Head of Work and Health Program
   Jenny Woodrow – Director of Job Entry Targeted Support

4. The application for interim relief was heard by CVP and it was set down for a full one day hearing. The full day was required largely due to the fact that there were difficulties with the CVP connection. Although both parties made lengthy oral submissions and, as indicated, I was furnished with a large bundle of documentation, no oral evidence was called.

Relevant Law

5. Sections 128-132 ERA 1996 set out the procedure for an application for interim relief. Section 128(1) provides that:-

   "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(d), 102(1), 103 or **103A**, or
   (ii) –
   (b) –

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).

6. As to the ground on which interim relief may be granted, Section 129(1) ERA states as follows:-

   (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(d), 102(1), 103 or **103A**, or
(ii) –

(b) –

7. Section 129 ERA also deals with the position that arises if the Tribunal is satisfied that it appears likely that on determining the complaint the Tribunal will find that the reason (or if more than one the principal reason) for the dismissal is one of those specified, as set out above, and for the purpose of this claim, the primary remedy is either reinstatement or re-engagement. If the employer is unwilling to reinstate or reengage the employee pending the hearing of the unfair dismissal claim, the Tribunal shall make an Order for the continuation of the employee's Contract of Employment.

8. The burden of proof is on the claimant to satisfy the Tribunal that it is "likely" he was dismissed for an automatically unfair reason: Bombardier Aerospace v McConnell [2008] IRLR 51.

9. The test that a Tribunal is required to apply when determining an application for interim relief is whether "it is likely that on determining the complaint" the Tribunal will find that the reason or the principal reason for dismissal was the reason which the employee has asserted. It is not sufficient that the employee is able to establish that "it is likely" that they were otherwise unfairly dismissed, ie. for other reasons. In this case, the respondent contends that the reason or principal reason for dismissal was conduct, which is not a prohibited reason, and if that appears to be the real reason the application for interim relief will fail.

10. The correct approach to be applied to the meaning of "it is likely" has been resolved by case law. It is not sufficient for the employee to show that, on the balance of probabilities, he or she is going to win at the subsequent unfair dismissal hearing. It was held in Taplin v C Shippam Limited [1978] ICR 1068 that the appropriate test is higher than simply establishing that the balance is somewhat more in favour of the employee's prospect of success. It must, on the authority of Taplin, be established that the employee can demonstrate a pretty good chance of success.

11. The EAT endorsed the Taplin approach in Dandpat v University of Bath [2009] UKEAT/0408/009.

12. For the interim application to succeed, the claim that the claimant was dismissed for an automatically unfair reason under Section 103A ERA must therefore stand "a pretty good chance of success" or, alternatively, as referred to by the EAT in Derby Daily Telegraph v Foss [1991] UKEAT/631/921 it is necessary for the claimant to establish that his case looks like "a potential winner".

13. As identified by the respondent's representative within his skeleton argument, the threshold of "likely" in the context of an interim relief application is set comparatively high. Set out within this skeleton argument is the extract from the EAT judgment in Dandpat, in response to the assertion that interim relief applications rarely succeed because the legislation as interpreted is set too high, as follows:-

"Taplin had been recognised as good law for 30 years. We see nothing in the experience of the intervening period to suggest that it should be reconsidered. On ordinary principles, we should be guided by it unless we are satisfied that it is plainly wrong. That is very far from being the case. We do in fact see good reasons of policy for setting the test comparatively high, in the way in which this Tribunal did in the case of applications for interim relief. 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 the proceedings: that is not a consequence that should be imposed lightly".

14. As stated by the EAT in Ministry of Justice v Sarfraz [2011] IRLR 562 for an application for interim relief to be granted, it must appear to be likely that a Tribunal will find that: -

- The claimant has made a disclosure to their employer;
- They believed that the disclosure tended to show one or more of the matters set out at (a)-(f), Section 43B ERA 1996;
- The belief was reasonable;
- The claimant believed the disclosure to be in the public interest;
- The disclosure was the principal reason for the dismissal.

15. The respondent plainly does not concede that the reason or principal reason for the claimant's dismissal was his protected disclosure. In order to determine the true reason for the claimant's dismissal, it is going to be necessary to make determinations in relation to disputed facts. It is not the role of an Employment Judge to make findings of fact when considering an application for interim relief. However, it is necessary for me to weigh the evidence available to me in order to make an assessment as to whether it appears that the claimant would be likely to succeed in his unfair dismissal claim on the basis that his dismissal was for a prohibited reason.

16. In London City Airport Limited v Chacko [2013] IRLR 610 the EAT stated as follows:-

"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".

17. In London City Transport Limited the EAT went on to hold that what is required is an expeditious summary assessment as to how the matter looks to the Employment Judge on the material available and stated that this "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".

Factual Background as it appears from the material available

18. The claimant was first employed by the respondent between June 2008 and December 2009 when his employment ended by reason of his resignation. Shortly prior to the claimant's resignation, he had been suspended pending an investigation into an allegation of fraud.

19. The claimant was re-employed by the respondent into the role of Support Manager with effect from 28 October 2019. A CV for the claimant that had been provided to the respondent, on or about 22 August 2019, in support of his application for employment did not state that he had previously been employed by the respondent.

20. The claimant sent an anonymous email to the respondent's CEO (the second respondent) on 18 March 2020. It stated that the claimant was exercising his right to raise a protected disclosure and went on to state the following:-

"I would like to disclose that I have evidence of the following:

1. Criminal activity (fraud) that has been committed by senior leadership.
2. Senior leadership deliberately putting the health and safety of its delegates and employees at risk during the current COVID-19 period by failing to follow government guidelines.
3. Senior leadership are bullying Support Managers to achieve unrealistic targets with the threat to manage them out of the business even though the targets set are virtually impossible to achieve.

My reason for raising this protected disclosure is to allow the business to investigate and take action where it is deemed necessary. I believe this to be in the public interest and I have a legal obligation to report criminal activity and the failings to follow government guidelines that put the public health and safety at risk."

21. The matters raised within the claimant's email dated 18 March 2020 were investigated by Anthony Pearce, the respondent's Head of Safeguarding, under their Whistleblowing Policy, with the support of Sharon Barton. As part of the investigation, the claimant met with Mr Pearce on 11 May 2020.

22. By email sent to the claimant on 31 July 2020 he was informed by Mr Pearce that the activities undertaken on 13 February about which he had been concerned were part of an agreed programme and that his investigation found no evidence of fraud. The claimant was also informed by this email that Mr Pearce had been unable to find any evidence that Senior Leadership had deliberately put the health and safety of delegates and employees at risk or that the duty of care owed to the claimant was not being taken seriously.

23. The claimant was not entirely satisfied with the feedback that he received from Mr Pearce and entered into further correspondence with him that was initiated by email sent on 3 August 2020 in order to express his concerns about the investigation and its conclusions. The claimant wanted to meet with Mr Pearce again in relation to his disclosures, but his request was declined, as Mr Pearce did not consider it appropriate or necessary to do so.

24. By email sent on 26 November 2020 to Tori Matthews (Deputy Area Manager), the claimant attached a letter to be forwarded to "HR". Ms Matthews duly forwarded the claimant's letter to "HR" in the form of Kath Keating (HR Business Partner) who in turn forwarded it to Ms Barton on 26 November 2020. Amongst other things the claimant's letter, which was headed "formal grievance" reiterated the gist of the concerns that had been set out within the anonymous email that he had sent on 18 March 2020. Also on 26 November 2020 Ms Barton forwarded the claimant's grievance to Mark Earl, Chief People Officer, within which she stated "As I am unaware who raised the whistleblowing issue, I wanted to run this past you in case it's the same person as I don't want to repeat an investigation if the individual is trying to instigate another via other means ie. grievance!".

25. As a result of an investigation conducted by Ms Barton (which appears to have been prompted by Mr Earl), it came to be suspected by Ms Barton that the claimant had deliberately not declared that he had previously worked for the respondent when making an application for employment in August 2019.

26. The claimant was suspended pending further investigation by Amy Hordley, the Claimant's Line Manager, supported by Ms Barton, on 7 December 2020, which was confirmed to the claimant in writing by letter dated 7 December 2020, that was signed by Ms Barton. The allegations related to the claimant's conduct, namely, the alleged willful omission of information and the provision of false information to gain employment.

27. The allegations against the claimant were investigated by Ms Barton and she prepared a formal report dated 13 December 2020. Ms Barton considered that the allegations constituted gross misconduct and it was her recommendation that the matter be escalated to a disciplinary hearing. The claimant was invited to attend a disciplinary hearing by letter dated 15 December 2020. The respondent intended that the disciplinary hearing would be chaired by Laura Burrough, Regional Operations Manager, which HR support from Ms Barton. In response to objections received from the claimant, regarding their suitability, due to the previous involvement of Ms Barton and the fact that Ms Burrough had been implicated in alleged wrong doing by the claimant's email dated 18 March 2020, the disciplinary hearing was re-arranged.

28. The claimant's disciplinary hearing was held on 6 January 2021. It was chaired by Jennifer Dillon and HR Support was provided by Rachael Goodson. The main arguments relied upon by the claimant were that:

    a) he had told the interviewers at the time that he had previously worked for the respondent and that this was supported by a covert recording of that particular part of the conversation between him and the interviewers;
    b) although the original CV/application made was incorrect and had omitted to include his previous employment by the respondent, this was an error by his recruiter and he had not been aware of the error and;
    c) that the claimant had sent the respondent an updated CV which did include his previous employment with the respondent and that this

CV had been sent to the respondent's Head Office prior to his interview.

29. The claimant provided Ms Dillon with the recording and supporting evidence following the disciplinary hearing. Ultimately, Ms Dillon upheld the misconduct allegations and decided to dismiss the claimant without notice for gross misconduct. This was confirmed to the claimant in writing by letter dated 21 January 2021. The rationale for Ms Dillon's decision to dismiss the claimant was that she had not been satisfied with his explanation for omitting the information regarding his prior employment by the respondent from his application form and CV and in Ms Dillon's opinion the claimant's comment regarding his prior employment had not been heard by the interviewers. It was also believed by Ms Dillon that the updated CV that the claimant had allegedly forwarded to the respondent had almost certainly been created subsequent to his interview because it had contained a reference to him having worked on a Work and Health Programme contract, that had not existed at the time that the claimant made his application and that the claimant's CV appeared to reference and describe his job role as "Support Manager" for the respondent, rather than his previous role according to his CV.

30. The grievance that the claimant had raised by letter dated 26 November 2020 was then the subject of a fact-finding grievance meeting on 16 February 2021. The grievance was heard by Yolande Mitchell, Regional Operations Manager, and also in attendance was Kath Keating (HR Business Partner) as note taker. When questioned by the claimant, Ms Keating informed the claimant that the grievance had been taken away from her by Ms Barton and Ms Mitchell confirmed to the claimant that the meeting on 16 February 2021 was the first stage of the grievance process and that there had not been any prior formal or informal questioning or interviews regarding the claimant's grievance. The claimant stated that there had been an inconsistency within the emails that he received from Ms Barton which he alleged had said on more than one occasion that his grievance was being investigated, that the investigation had been completed and that he was going to receive an outcome. It is my understanding that at the time of the Interim Relief hearing the claimant's grievance was still to be concluded.

31. The claimant appealed against his dismissal and an appeal hearing was held on 17 February 2021. It was heard by Jenny Woodrow. The claimant's appeal was unsuccessful and this was confirmed to the claimant following the hearing, in writing by letter dated 11 March 2021.

Submissions

Claimant's submission

32. The claimant contended that he had made protected disclosures on 18 March 2020 and that these disclosures had been repeated, and therefore the subject of a second disclosure, within the grievance letter that he had attached to his email to Ms Matthews on 26 November 2020.

33. It is the claimant's case that the disclosures that he allegedly made on 18 March 2020 and 26 November 2020 were both qualifying disclosures in that he had disclosed information which tended to show that a criminal offence

had been, was being or was likely to be committed and that the respondent had failed, was failing or was likely to fail to comply with a legal obligation and/or the health and safety of any individual had been, was being or was likely to be endangered. The claimant contends that he had a reasonable belief that the information that he had disclosed had been true and that to make the disclosures had been in the public interest.

34. It is the claimant's contention that the connection between his dismissal and his alleged protected disclosures is evidenced by the following:-

i. Having made the protected disclosures;
ii. His expression of dissatisfaction with the outcome of the investigation into his disclosures by email dated 3 August 2020;
iii. The refusal of Mr Pearce to meet with the claimant again to discuss his disclosures following Mr Pearce's investigation;
iv. The decision of Ms Keating, who was the HR Business Partner directly responsible for the claimant to forward his grievance to Ms Barton;
v. The investigation that Ms Barton carried out to establish his identity and her decision to involve Mark Earl because she did not want to re-investigate, even though, the claimant contends, that she would have been obliged to investigate if the anonymous whistleblower in March 2020 had not been the same person who had raised the grievance.
vi. The message from Ms Barton to Mr Earl which included the word "bingo", when reporting that she had confirmed the claimant has being the individual who had previously resigned in December 2009;
vii. Ms Barton removing the grievance from Ms Keating and putting it on hold;
viii. Ms Barton misleading the claimant regarding the progress of his grievance;
ix. The involvement of Ms Barton in the previous investigation of his anonymous whistleblowing complaint, in conjunction with Mr Pearce, her involvement and decision to park his grievance, her initial fact finding in relation to the disciplinary allegation, the decision to suspend the claimant and the preparation of the formal investigation report in connection with the disciplinary allegations that proceeded to a hearing.
x. That he had no motive for deliberately omitting to refer to his previous employment by the respondent within his application form/CV because the respondent had accepted his resignation in 2009 on the basis that there would be no further action because all allegations were to be dropped;
xi. The speed with which Ms Barton had proceeded to a formal disciplinary hearing, without interviewing him as part of her investigation in accordance with company policy;
xii. Both decision makers, Ms Dillon and Ms Woodrow were aware of his grievance and protected disclosures.
xiii. The respondent obstructed his attempts to obtain copies of his interview notes;
xiv. Neither of the original interviewers were questioned as part of the investigation or during the disciplinary hearing and nor was the screening company contacted as part of the investigation.
xv. The decision makers inexplicably chose to ignore the claimant's covert recording;
xvi. The claimant's explanations at the disciplinary hearing and appeal were ignored and/or given insufficient weight (the claimant appealed the

decision to dismiss primarily on the ground that the decision had been biased and had not taken account of the evidence);

xvii. In contrast to the speed with which the disciplinary action was taken, the claimant's grievance that had been raised on 26 November 2020 had been delayed and put on hold, despite the fact the claimant chased Ms Barton for progress.

35. In summary, the claimant's contention was that the connection between his protected disclosures and his dismissal was made out by putting together with broad sequence of events that I have set out above which he says cumulatively point to the conclusion that the real reason for his dismissal was his protected disclosures, rather than the alleged misconduct.

Respondent's Submission

36. I will not set out the respondent's submission in detail, because it is a matter of record and I have had regard to it. It was supplemented by the respondent's representative orally during the hearing in a number of respects, most notably, the following:

i. The claimant's submission was criticised on the basis that it amounted to no more than an extended narrative of the claimant's complaints and concerns that did not draw any connection from those matters between the claimant's protected disclosure and his dismissal;

ii. That the complaint must be considered at the Interim Relief hearing solely in relation to the matters set out within the existing ET1 Claim Form and, therefore, on that basis, the only disclosure that the claimant may rely upon is the one allegedly made on 18 March 2020. It was asserted that the grievance on 26 November 2020 had not been pleaded as an alleged protected disclosure;

iii. That any complaints that the claimant may have with regards to the fairness of the disciplinary procedure did not amount to enough to suggest that the respondent had an alternative motive for the claimant's dismissal, rather than the misconduct relied upon;

iv. That whilst it could be argued that the grievance raised by the claimant on 26 November 2020 had indirectly set in course the chain of events which had lead to his dismissal by reason of misconduct, this did not constitute evidence that the reason or principal reason for the claimant's dismissal was a protected disclosure;

v. The decision makers, namely, Ms Dillon and Ms Woodrow, were both impartial and there was no evidence to suggest that either were aware of the claimant's alleged protected disclosure or that they had been manipulated in some way by Ms Barton or anyone else;

vi. The respondent had fully and dutifully investigated the respondent's alleged disclosure in March 2020 and as a result of the investigation they had been able to exonerate all those implicated by the claimant in alleged wrong-doing. As a consequence, the claimant's alleged protected disclosure did not provide the respondent with any motive to dismiss;

vii. The alleged protected disclosure insofar as it related to a health and safety failing did not amount to a disclosure of information and had been a bare allegation, without an assertion of any facts. It was also contended that this allegation had not been made in the public interest because it had concerned the respondent's self contained workplace;

viii. There had been sufficient evidence at the disciplinary and appeal hearings for the decision makers to reach the conclusions that they had, with regards to the veracity of the allegations against the claimant and the lack of a credible explanation;

ix. At no stage had the respondent accepted that the recording provided by the claimant had been authentic;

x. The claimant's dismissal followed 10 months after the alleged protected disclosure, by which time the claimant had passed his probation. If the respondent had wanted to victimise the claimant for having made the protected disclosure, then it would have done so much sooner.

xi. The explanation for the respondent's delay in dealing with the claimant's grievance was the simple fact that the grievance and the matters that were the subject of the disciplinary action were unconnected. This meant that it made sense from the respondent's point of view to deal with the disciplinary action ahead of the potentially more time consuming grievance investigation process.

37. In summary, therefore, the respondent's representative submitted that the claimant had not been able to show any demonstrative link between his alleged protected disclosure and his dismissal. Therefore, his case did not "look like a winner" and that the application should therefore fail.

Conclusions

38. For the purpose of this ancillary relief application I accept that the claimant has only pleaded one alleged protected disclosure which he contends was made by email on 18 March 2020. In my assessment, the claimant does appear to have disclosed information qualifying for protection within the meaning of Section 43B of the Employment Rights Act 1996. On the basis of the information available to me, it appears that the Claimant reasonably believed the information disclosed tended to show the relevant failures that he asserted. It also appears on the information available that the scope and ramifications of the alleged failures that were the subject of the claimant's alleged disclosure were matters that the claimant reasonably believed were in the public interest. In my assessment, therefore, it is likely, in the sense that the claimant has a pretty good chance, that the claimant will establish at a full hearing that he made a protected disclosure on 18 March 2020.

39. Notwithstanding that I have concluded that the Claimant is likely to establish that he made a protected disclosure, it seems to me that the real issue in this case is one of causation. It is for the claimant to demonstrate that there is evidence from which it appears that he is likely to be able to establish that the reason for the dismissal was the making of the protected disclosure, as opposed to something else.

40. It seems to me that one of the claimant's strongest points is the context of timing. In other words, the fact that his suspension followed swiftly after the receipt of his grievance on 26 November 2020. However, his grievance was not the protected disclosure. The protected disclosure had been made some months previously. Moreover, it has not been the respondent's case that the suspension so soon after the claimant's grievance was purely a coincidence. The respondent acknowledges that there is a connection between the claimant's grievance and the fact that the claimant was then subsequently suspended and dismissed. The respondent have explained

that the claimant's grievance was the catalyst for the chain of events which lead to Ms Barton discovering that he had previously been employed by the respondent, which in turn lead to his suspension and the subsequent disciplinary action. This explanation appears to have merit and may well be accepted by the Tribunal at the full hearing.

41. A further point that I have considered that could potentially support the claimant's case is the apparent disparity between the expedition with which the disciplinary investigation and procedures were addressed, as compared to the much less prompt response to the claimant's grievance. It appears to me that this suggests that the respondent viewed the subject matter of the claimant's grievance and the subject matter of his disciplinary investigation to be two entirely separate matters, which enabled them to progress one more quickly than the other. It appears to me to be the case that the Tribunal at the full hearing may well be persuaded by the respondent that the only reason why the disciplinary investigation was progressed more quickly was purely down to the fact that its subject matter was relatively straightforward and if it cumulated in the claimant's dismissal, this would obviate the need for them to address his grievance or at least address it timeously. Of itself, this point therefore does not have sufficient weight to lead me to the conclusion that the claimant's claim appears likely to succeed.

42. The claimant's criticisms of the procedure followed by the respondent, and, in particular, the involvement of Ms Barton may or may not have some slight bearing upon the general fairness of the process followed by the respondent. However, it does not appear to me that there were any significant failings on the part of the respondent which give the appearance that the real reason for the claimant's dismissal was the fact that he had made a protected disclosure rather than the misconduct upon which the respondent relies.

43. It is not apparent from the information available that either Ms Dillon or Ms Woodrow were aware of the protected disclosures, never mind influenced by the existence of them or manipulated by a third party. The evidence of both decision makers as appears from their witness statements which will be given under oath to the Tribunal in due course, appears to be that they were both impartial, unaware of any protected disclosures and were not manipulated in any way. In order to succeed with his claim, the claimant would have to persuade a Tribunal that one or both decision makers had been manipulated and/or had not acted in good faith. This is not currently the claimant's pleaded case. In order to succeed with his claim, the claimant is going to have to successfully establish at the final hearing that there had been a conspiracy between Ms Barton, and/or others, as well as the Dismissing and Appeals Manager, to bring about a "sham" misconduct dismissal. I cannot say that the documentation available and the submissions that I have heard have persuaded me that it appears that the claimant is likely to succeed in this task.

44. On the basis of the information available to me, it appears that the claimant's claim for interim relief is largely based upon speculation arising out of the fact that his perception has been that the investigation into the matters that he raised within the email that he sent on 18 March 2020 has not been sufficiently robust and that following on from his grievance, which was

raised at least in part to press the respondent with regards to this dissatisfaction, there has been a sequence of events that has lead to his dismissal. However, the factors that support the claimant's case are, on the face of it, circumstantial at best and the claimant's assertion that the reason for his dismissal was the protected disclosure appears to be speculation. There is no obvious tangible evidence in support that I can identify within the information that I have seen.

45. On the other hand, there are a number of matters which appear to demonstrate that the respondent had a genuine and reasonable belief in the claimant's misconduct which they relied upon as the reason for dismissal.

46. The claimant was dismissed for gross misconduct, ie. the wilful omission of information or provision of false information to gain employment, which was identified as an act of gross misconduct in the respondent's disciplinary policy.

47. It is also the case that on the apparent facts as demonstrated by the available documentation, the claimant did fail to include within his initial application/CV for employment in 2019 the fact that he had previously been employed by the respondent. It is certainly arguable, in my view, that the respondent's decision to reject the claimant's explanation for the omission was reasonable on the basis that it was implausible that a Recruitment Agency would provide incorrect information without the claimant's knowledge.

48. There also appears to me to be evidence that would support the respondent's contention that the claimant formed a reasonable belief based on reasonable grounds that the claimant had purported to provide a CV that he had allegedly posted to the respondent prior to his interview which had not in fact existed in that form as of August 2019. Having seen the second, corrected CV produced by the claimant, it does state that the claimant's position was "Support Manager" and provides details of a role within the profile section, when the claimant did not hold that job role or perform those duties at the time when he has purported to have posted the corrected CV to the respondent.

49. It was apparent to me from the documentation that the claimant's original CV had described the claimant as a "Key Account Manager" with Travis Perkins, which was consistent with his most recent role, even though at the time of his application to the respondent the claimant had in fact been unemployed.

50. Moreover, whilst the claimant is able to point to an audio recording of what he alleges is part of his interview, wherein he appears to make brief mention of having been previously employed by the respondent, I accept that it is the respondent's case that this recording may not be authentic and that it is the respondent's contention that the clarity of the recording is such that it was arguably open to the decision makers to discount it. The determination of these questions will no doubt be a matter that the Tribunal dealing with the full hearing will address with great care and detailed findings will be made with the benefit of hearing oral evidence and cross examination.

51. At this preliminary stage, based upon the information I have available, I cannot reach a conclusion that the evidence, even taking into account the recording upon which the claimant relies, is such that the claimant has a pretty good chance of succeeding.

52. For the reasons set out above, the claimant's application for Interim Relief fails.

Employment Judge Britton
Date: 31.03.2021