Case Number: 2201632/2021

THE EMPLOYMENT TRIBUNAL

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

Mr R Limrani

Claimant

AND

Jamal Edwards Delve

Respondent

ON: **12 May 2021**

Appearances:
For the Claimant: **Ms P Proteasa, solicitor**
For the Respondents: **Mr M Difelice, solicitor**

JUDGMENT ON INTERIM RELIEF APPLICATION

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

REASONS

1. This decision was given orally on 11 May 2021. The claimant requested written reasons.

2. By a claim form presented on 10 April 2021, the claimant Mr Redouan Limrani claims interim relief as he says he was dismissed because he was a whistleblower.

The issues

3. 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.

4. The claimant also complained of whistleblowing detriment and automatically unfair dismissal under section 100(1)(c) Employment Rights Act namely that the reason for his dismissal, in a workplace where there was no safety representative or committee, he brought to his

employer's attention, matters which he believed were harmful to health and safety. He also claims detriment for the same reasons under section 44. There is no exemption from the need for an Early Conciliation Certificate and there is no right to claim interim relief in relation to the section 100(1)(c) or section 44 claim and these claims are therefore rejected. Interim relief can apply under subsections 1(a) and (b) of section 100 but not subsection 1(c) – see section 128 ERA 1996. The interim relief application only applies to the whistleblowing dismissal claim.

The hearing

5. 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.

6. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended. The claimant did not attend and neither did any member of the respondent charity. The hearing was attended by the representatives plus a further person from the claimant's solicitors.

7. The parties were able to hear what the tribunal heard. From a technical perspective there were no difficulties.

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

Witnesses and documents

9. There was a bundle of documents from the claimant of 142 pages including the index. Due to the index the pagination and the electronic pages are not the same and references below are made to the electronic page reference. Different versions of the claimant's bundle was sent due to difficulties with pagination so it was easier for the tribunal to rely on the electronic page references.

10. There was an ET3 although it was not due to be filed until 26 May 2021.

11. There was a witness statement from the claimant of 26 paragraphs and a witness statement from Ms Yara Mirdad, Chief Executive of the respondent of 21 paragraphs to which some further documents were attached. Oral evidence was not taken.

12. I had a skeleton argument from the claimant which attached two further documents, (i) the National Youth Agency Guidelines titled "*Managing youth sector activities and spaces during Covid-19"* version 5.1 published in March 2021 and (ii) a photograph of some damage to a doorframe,

said to have been taken on 10 March 2021.

13. I had a skeleton argument from the respondent.

14. The claimant produced an authorities bundle of four authorities all of which are referred to below (being ***Taplin, Sarfraz, Chesterton*** and ***Kuzel***).

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

16. All submissions and authorities referred to were fully considered, even if not expressly referred to below.

Relevant factual background.

17. The claimant worked as a Lead Youth Worker from 4 January 2021 to 5 April 2021. The respondent is a small privately funded registered charity providing services to young people in Ealing. It employs about three people. They provide drop in centres and community centres in Acton.

18. The claimant was employed subject to a six month probationary period as per clause 2.4 of his contract. His line manager was Ms Yara Mirdad, the Chief Executive and a Senior Youth Worker.

19. From mid-February 2021 the claimant was working at the Friary Youth Centre in Acton. The claimant said that the number of young people who attend the Youth Centre is between 15 to 20.

20. The claimant had a supervision meeting with Ms Mirdad on 4 March 2021, two months into his employment. Ms Mirdad's record of this meeting was attached to her witness statement. He says that Ms Mirdad told him that she was happy with his work. On the claimant's case (Particulars of Claim paragraph 3) Ms Mirdad had limited contact with him when he started in the job and she was overseas when he joined. Ms Mirdad says that some action points had been agreed with the claimant and she was concerned about his failure to meet his time lines.

21. The claimant relies upon an incident which took place on 10 March 2021 at about 6pm at the Friary Youth Centre. This was the first youth centre session which he had run for the respondent on his own, without Ms Mirdad's support. The claimant says that young people at the Youth Centre started "*playfighting",* throwing tennis bats in the air, rugby tackling and using aggressive language. He said they caused damage to the property in terms of breaking the front door. He says one of the others workers, was "*nearly hit in the face by a tennis ball*" although this was later referenced as a table tennis ball. He asked the users to leave and he closed the premises. I make no finding of fact as to what actually happened on 10 March 2021. The claimant completed an Incident

Report and reported the matter to Ms Mirdad. This was at electronic page 104 of his bundle. In that incident report he said, amongst other things:

> *At approx 8pm I felt that the Health and Safety of the young people and staff was at risk and decided to ask the boys to leave the centre due to the behaviour escalating to dangerous levels to include the following:*
>
> *Table Tennis bats being thrown around at each other*
> *More physical play fighting between three of the boys*
> *Table Tennis balls thrown 1 nearly hitting Ayaka in the face*
> *A coke can was cut and used as a weapon by Kieron and Michael as they play fight*

22. The respondent took the view that the claimant overreacted by treating the behaviour of the young people as justifying the termination of the session, bearing in mind the nature of the young people with whom they work. They had concerns that in terminating the session he placed young people out on the street and they took the view that the claimant's actions damaged his relationship with the young people and that this could affect their willingness to engage with them. The respondent said they had never previously had cause to terminate one of their sessions. They rely on open access and voluntary attendance by the young people.

23. The pleaded disclosures relied upon by the claimant were set out in paragraph 27 of his Particulars of claim as follows:

    (i) On or about February March 2021, the claimant says he raised concerns with Ms Mirdad either by video link or face to face that new people were permitted to enter the youth centre and there is no staff to deal with them. The claimant says he highlighted that staffing supervision was not sufficient and appropriate to manage the youth people's safety and also the new people's clearance could not be properly carried out.
    (ii) Throughout January to March 2021, the claimant says he raised with Ms Mirdad on several occasions by video link call (and in person when they worked together at the Friary in Acton Youth Centre) his concern that he was sent to do outreach work without being provided with an ID badge or work phone. The claimant said he explained to Ms Mirdad that, in the outreach work he needed to be able to state clearly who he is and what is he doing. He has to be able to prove this with a photo ID badge with the organisation logo and a phone number on which people can verify it.
    (iii) On or about February 2021 the claimant says he raised concerns that staff were incurring expenses in relation to their job and there is no procedure of claiming those expenses back. During submissions the claimant's solicitor said that this was no longer relied upon as a protected disclosure.

(iv) On or about February March 2021 the claimant sags he raised concerns orally with Ms Mirdad about lack of CCTV cameras at the youth centre to deter crime and also for active surveillance and safeguarding. The youth centre was also dark and in poor lighting.

(v) On or about February 2021 the claimant says he raised concerns about the respondent's practice of offering financial incentives to the youth such as cash, gifts, vouchers. This was withdrawn during the claimant's submissions.

(vi) On 10 March 2021 by completing an Incident Report form and by phone call to Ms Mirdad later in the evening, the claimant raised concerns regarding the safety of users and staff and the level of staffing at the youth centre. As the young people in the centre did not follow staff instructions, they were aggressive in language and caused damage to the property (broke entrance door and flooded the toilet), the claimant, the other staff and the young people were said to have been placed at risk.

(vii) On 15 March 2021 – the concerns raised by the claimant during a Zoom meeting with Ms Mirdad in relation to (i) new young people were permitted indoors, in breach of Government guidance, and that they could not be supervised by the staff, (ii) the respondent's practice that staff are being required to incur expenses in relation to their job and there is no procedure of claiming those expenses back; (iii) that a 'debrief' procedure should take place after every meeting with young people and especially after the incident on 10 March 2021, to ensure that all the issues that arose were dealt with and (iv) that the claimant was undermined by Ms Mirdad in addressing the unacceptable behaviour of the young people in the meeting of 12 March 2021. The claimant says he explained to Ms Mirdad that physical safety of the young person attending the youth centre and of staff was placed in jeopardy on 10 March 2021 and he needed her support in challenging the unacceptable behaviour.

(viii) On or about 17 March 2021 the claimant raised concerns about Ms Mirdad bringing a man in to the youth centre without the safety checks and DBS being carried out. The respondent said this was an architect on a short professional visit and he was accompanied by staff members who were DBS checked.

24. The claimant had a meeting with Ms Mirdad on 15 March 2021 at 11:30am. This was to review what had happened on 10 March. The claimant made a note of that meeting (his bundle page 110). It was also attached to Ms Mirdad's witness statement with her subsequent annotations in the right hand column as to whether targets had been met. In the claimant's note of that meeting he said: "*I am seriously considering my future in this organisation"* (page 111).

25. The respondent relies on referrals of young people from partner organisations such as the London Borough of Ealing. On about 24 February 2021 the respondent said an incident occurred where the claimant allegedly told two young people that information they had given

to the respondent was untrue. He allegedly said that he had been told this by a case worker at Ealing Council, who had referred the two young people to the respondent. The respondent considered this a breach of confidence which had the potential to damage their relationship with the Council.

26. The claimant was asked to attend a video catch up meeting with Ms Mirdad on 22 March 2021. He was dismissed at that meeting. He says that Ms Mirdad told him that he was not a *"good cultural fit"* as he came from a *"targeted background".* In her witness statement (paragraph 8) Ms Mirdad said that the claimant came from a local authority background "*setting and delivering mainly targeted provision, which does not involve the voluntary participation of young people".* Ms Mirdad says she took the view that the claimant found it difficult to adapt to the respondent's ways of working. She says she took the view that the claimant wanted to create much more structure in advance of sessions than they were used to providing. Ms Mirdad agrees that she told the claimant that he was not a *"good cultural fit"* for the organisation.

27. Ms Mirdad decided to terminate the claimant's employment, during his probationary period. She says she made this decision after seeking views from other members of the respondent and partner agencies (her statement paragraph 17)

28. At 16:30 on 22 March 2021 Ms Mirdad confirmed by email the termination of the claimant's employment (page 112 claimant's bundle). She did not set out a reason for dismissal, but referred to the discussion in the meeting that day at 14:30 hours. Two weeks' notice was given making the termination date 5 April 2021.

29. At 15:07 on 22 March, the claimant contacted Ms Elly Heaton-Virgo, the Chair of the Board of Trustees, to complain about his dismissal and complain about his manager Ms Mirdad (claimant's bundle page 117). She told him that the reason for his dismissal was capability. Ms Heaton-Virgo replied on 23 March 2021 saying, by reference to his contract of employment, that the claimant's dismissal was within his six month probationary period. She said that the issues he had raised came down to a "*disagreement about best practice"* and the work had been carried out within their policies as agreed by the Board. She said there was no evidence to suggest that the decision to terminate his contract was because he raised concerns about practice. She said it was "*because there were capability issues"* (page 114 claimant's bundle)*.*

30. An appeal and grievance meeting was held on 8 April 2021, the notes of which were in the claimant's bundle at page 128. The claimant did not attend because of his health. The conclusions from that meeting were stated to be as follows (pages 141-142):

"Regarding the appeal of dismissal
As regarding the appeal, EHV has not seen any evidence to show that the dismissal decision should be overturned. It's clear that YM should have provided more formal written evidence that RL was not suited to the job. However there is enough to support the dismissal due to him not meeting the expectations of the role. YM has acknowledged areas in which she could have done better. EHV has acknowledged areas where the Board are able to do more but the decision to dismiss remains unchanged.

Regarding the grievance
EVH's previous response still stands, no guidelines have been broken. There are some procedural changes that have been suggested, noted and will be addressed. There have been no major H&S or Safeguarding breaches, just some differences of opinion. YM as CEO is the ultimate decision maker as she answers to the board and was more senior to RL, therefore it is up to her how work is carried out. There is no evidence to suggest that YM is not taking H&S or Safeguarding seriously."

31. In addition to the parties' skeleton arguments, they made the following submissions orally.

The claimant's submissions

32. In relation to the first disclosure that new people were permitted to enter the youth centre and there is no staff to deal with them - the tribunal was taken to the claimant's note of the meeting of 15 March 2021 and the Grievance and Appeal meeting notes of 8 April 2021. The claimant said the respondent knew about this concern because it was raised many times. The claimant took the tribunal to the National Youth Agency Guidelines titled: "*Managing youth sector activities and spaces during Covid-19"* and page 14 of that document. The claimant had amplified on the details of this in paragraph 10 of his witness statement, in which he said he raised concerns: "*that new people were being allowed into the youth center contrary to the strict government guidance that we can only allow in the youth Centre young people who were invited or are members known to us".* It was submitted that the respondent knew about it and tried to address this concern.

33. On the second disclosure, this was that he raised his concern that he was sent to do outreach work without being provided with an ID badge or work phone. The claimant said he raised concerns in January 2021 that he was not provided with both an ID photo badge and a mobile work phone were not provided and this would jeopardize his safety and also made his outreach work more difficult. I was again taken to the notes of the Grievance and Appeal meeting of 8 April, where Ms Mirdad was said to have acknowledged this disclosure as it made reference to the claimant getting a new phone and said that they do not have ID badges

as many organisations do not.

34. On the third disclosure this was that staff were incurring expenses in relation to their job and there was no procedure of claiming those expenses back. The claimant's solicitor said that this was no longer relied upon.

35. On the fourth disclosure this was said to be about a lack of CCTV cameras at the youth centre and that there was poor lighting which put people at risk. The claimant said that this was addressed in Ms Mirdad's witness statement at paragraph 20(iv) where she said that they do not own the building and therefore they are not able to install CCTV or lights. They only use the building on a bi-weekly basis.

36. The fifth disclosure was that he said he raised concerns about the respondent's practice of offering financial incentives to the youth such as cash, gifts, vouchers. This was withdrawn during the claimant's submissions.

37. The sixth disclosure was the Incident Report form of 10 March 2021 and by phone call to Ms Mirdad later in the evening, the claimant raised concerns regarding the safety of users and staff and the level of staffing at the youth centre. As the young people in the centre did not follow staff instructions, they were aggressive in language and caused damage to the property. The incident report said that table tennis bats were thrown around, there was physical playfighting and a Coke can was cut and used as a weapon. It also stated that one of the young people had been *"banned before for theft".* The respondent does not dispute that this was a disclosure of information but says it was not a protected disclosure.

38. The seventh disclosure was that (i) new young people were permitted indoors, in breach of Government guidance, and that they could not be supervised by the staff, (ii) the respondent's practice that staff were being required to incur expenses in relation to their job and there was no procedure of claiming those expenses back; (iii) that a 'debrief' procedure should take place after every meeting with young people and especially after the incident on 10 March 2021, to ensure that all the issues that arose were dealt with and (iv) that the claimant was undermined by Ms Mirdad in addressing the unacceptable behaviour of the young people in the meeting of 12 March 2021. The claimant says he explained to Ms Mirdad that physical safety of the young person attending the youth centre and of staff was placed in jeopardy on 10 March 2021 and he needed her support in challenging the unacceptable behaviour. The claimant took me to the claimant's meeting note of 15 March 2021. It records that he said: "*We aimed to talk to the young people about their behaviour on Wednesday but this proved difficult because there was not a confidential space to do this with them and when I asked for the young people to go outside with us they did not*

respond to this well which has caused the relationship with me and the young people to be damaged as they put it I am new and I am coming in and making changes they do not like. I felt that I was undermined and that the young people were allowed to behave like this which made me feel unsafe as they were still play fighting in the youth centre throughout the session". The claimant highlighted that he said he felt unsafe and he said he was seriously considering his future in the organisation. He said he did not feel supported by his manager. The meeting note also said he said that the issues he was raising were important for the safety of young people and staff. He also says he raised an issue about it being challenging to undertake a debrief at the end of the session due to young people being in the centre and needing to be escorted home.

39. The eighth disclosure was that he said that the respondent brought a man in to the youth centre without the safety checks and DBS being carried out – this was said by the respondent to be an architect. This was in paragraph 19 of the claimant's witness statement and was said to be on our around 17 March 2021. The claimant submitted that he disclosed this to Ms Mirdad on that date. The claimant took the tribunal to the 8 April 2021 appeal and grievance notes in which this matter was addressed and the claimant says that this establishes that the disclosure was made.

40. The claimant submitted that the disclosures, (i), (ii), (iv), (vi), (vii) and (viii) showed that that the health or safety of any individual was likely to be endangered. The claimant relied upon the claimant saying in the 15 March 2021 that he felt worse than he did before and he was considering his future in the organisation and that he did not feel supported by his manager. He said he did to want his professionalism or reputation to be affected "*by any serious issues which could occur*" which the claimant said was an indirect reference to his safety. The claimant also relied upon an email dated 13 March 2021 at 08:35 from himself to Ms Mirdad in which he said *"I am really concerned, unhappy and very upset with what is happening at the Youth Centre".* The claimant accepts that he did not mention health and safety in this email but submitted that it should be read together with the meeting notes of 15 March and 8 April.

41. The claimant submitted that the he had a reasonable belief that his disclosures tended to show that the health or safety of any individual was being endangered. The claimant relied upon the 13 March email referred to above and cross referenced the incident form of 10 March. He said in the form *"I felt that the Health and Safety of the young people and staff was at risk".* The claimant said that this shows that the claimant had a reasonable belief that it was in the public interest and for the health and safety of the individuals.

42. The claimant submitted that the principal reason for the dismissal was the protected disclosures. The claimant made three points:

43. Firstly on the reason for dismissal, the claimant submitted that in paragraph 19 of her statement Ms Mirdad said he was not a "*good cultural fit"* within the organisation. In her email confirming the dismissal at 16:30 on 22 March, she gave no reason for dismissal. The claimant submitted that the respondent changed the reason from not being a good cultural shift to capability issues in Ms Heaton-Virgo's email of 23 March (set out above).

44. The claimant also referred to paragraph 18 of Ms Mirdad's witness statement where she referred to the claimant saying he thought that the young people did not like him. In paragraph 12 of her statement she referred to the sharing of confidential information which she said played a part in her decision to dismiss. The claimant submits that the respondent goes from cultural fit, to capability, breach of confidentiality and dislike of him by the young people. The claimant challenged that the true reason was capability and submitted that the reasons advanced by the respondent were not substantiated and were unproven.

45. The claimant took the tribunal to the 1:1 review form of 4 March 2021 and said that Ms Mirdad changed the document from the version attached to her witness statement, for example an action point to be completed on 12 March showed in the second version that it was "*not completed".* The claimant said that by the date of the meeting on 4 March, the respondent would not have known it was not completed and there should have been a separate document. Therefore, lack of capability was not proven and the document was changed retrospectively. In addition in Ms Mirdad's statement stated that one of the reasons for dismissal was that the claimant said that he thought the young people did not like him, but this was not substantiated. The same applied to the breach of confidence issue.

46. Secondly the claimant submits that the reason for the dismissal was the protected disclosures and that the key to this was in paragraph 8 of Ms Mirdad's statement where she refers to the claimant not adapting from a local authority background. She said: *"Creating too much structure before the start of each session does not allow for our service to be youth-led and to address their needs."* The claimant submitted that his disclosures showed he wanted a rule based environment for the protection of the young people and this was rejected by the respondent saying that he was not a "*cultural fit*" and this showed a causal link between his disclosures and his dismissal.

47. The third point was that the real reason for dismissal was the disclosures and that the tribunal was invited to draw an inference that the true reason for the dismissal was the disclosures.

48. I asked the claimant to say why the disclosures were made in the public interest. The claimant said it is true that the claimant was concerned for

his own safety but he was also concerned about the safety of the young people and for other staff who could be hurt when objects were thrown around. In relation to the architect's visit the claimant submits it was in the public interest because it could be a risk to the young people if he was not DBS checked.

The respondent's submissions

49. The respondent said that disclosures (i) to (v) were not disclosures of information – disclosures (iii) and (v) were withdrawn in any event.

50. On (vi) to (viii) the respondent accepted that there was a disclosure of information but did not accept that they were protected disclosures.

51. The respondent said in relation to the burden of proof, it is on the claimant on an interim relief application to meet the test and if the tribunal is satisfied that the respondent has a good defence, then he will not have met that test.

52. The respondent accepts that verbal disclosures can be protected disclosures but there must be more than broad expressions of concern, with dates and details. For disclosures (i), (ii) and (iv) they were said to be "*vague allegations"* because the detail is not given. On disclosure (i) the respondent did not refer to a specific occasion on which there were a specific number of young people and a specific number of staff and on disclosure (ii) and (iv) these were broad expressions of concerns.

53. On disclosures (vi), (vii) and (viii) the respondent said on (vi) it referred to the Incident Report form – one was about staffing levels and the other was about the behaviour of the young people on 10 March. In relation to staffing levels, there was no reference in the Incident report to the level of staffing. The respondent accepted that there is reference to the behaviour of the young people.

54. The respondent said that this took us to whether it was objectively reasonable for the claimant to believe that the matters he disclosed for himself, another supervisor and the young people had a risk to their health and safety.

55. On disclosure (i) relating to their being no staff to deal with the young people, this was addressed in paragraph 20 of Ms Mirdad's statement. She accepted that there were occasions where the young people brought friends with them. The respondent says that they addressed that by speaking to the young people in front of other members of staff and asking them not to do that. In the claimant's meeting note of 15 March 2021, the note shows that he heard Ms Mirdad say this to young people. The respondent submits that if they were dealing with this, it was not reasonable for the claimant to take the view that the young people were being endangered.

56. On disclosure (ii) was a disclosure about a lack of a phone and an ID badge. The respondent's evidence was that the claimant did not have to go out alone, he went with individuals from partner organisations who had phones and ID badges. He was with other identifiable people so the respondent submits that it was not a reasonable belief that his disclosure tended to show health and safety was at risk because he did not have a name badge.

57. On disclosure (iv) about CCTV and lights, the respondent submits that ultimately, some regard has to be had to the nature of where they were working, not all youth centres have CCTV, particularly the outreach centres which the respondent uses in what the respondent described as "*deprived communities".* The fact that it does not have CCTV does not of itself result in a risk to the health and safety of the claimant, supervisors or young people; many facilities do not have CCTV so it was not a reasonable belief.

58. In relation disclosure (vi) the respondent submitted that the claimant overreacted to some young people playfighting. The disclosure that a table tennis ball was thrown, it was submitted that this is very light and it did not hit anyone. It did not on the respondent's submission, disclose anything that disclosed a serious risk. Ms Mirdad says she had 2 conversations with the claimant that evening and spoke to the young people and this should not lead the claimant to have a concern about health and safety.

59. On disclosure (vii) there were four parts to it: (i) new young people were permitted indoors, in breach of Government guidance, and that they could not be supervised by the staff – the respondent repeated the submission that there was not a reasonable belief in what the disclosure tended to show (ii) the respondent's practice that staff are being required to incur expenses in relation to their job and there is no procedure of claiming those expenses back – this was withdrawn, (iii) that a 'debrief' procedure should take place after every meeting with young people and especially after the incident on 10 March 2021, to ensure that all the issues that arose were dealt with and the respondent said that they were dealing with it so it could not give rise to a reasonable belief that the disclosure showed the matters relied upon and (iv) that the claimant was undermined by Ms Mirdad in addressing the unacceptable behaviour of the young people in the meeting of 12 March 2021. It was not clear to the respondent how Ms Mirdad allegedly "*undermining"* him was a disclosure that tended to show a danger to health and safety.

60. The respondent submitted on disclosure (viii) the fact of the visitor not being DBS checked did not give rise to a reasonable belief that his disclosure tended to show that health and safety was endangered.

61. On the public interest test the respondent accepts that given it is an outreach charity engaging with young people, who are themselves members of the public and that their health and safety is important. The claimant had to have reasonable grounds for believing that his disclosures identified health and safety risks.

62. The claimant has to show that the disclosures caused the dismissal and the respondent submits that Ms Mirdad puts forward plausible reasons for dismissal. The key reason was said to be the relationship that the claimant had with the young people which was said to be critical to his job. It is an organisation that relies on young people engaging with it on a voluntary basis. They have to trust those employed by the respondent and Ms Mirdad's view was that this was not the case with the claimant. On her evidence, the claimant had told her that he thought that the young people did not like him.

63. Ms Mirdad also relied on her own observations as on her evidence the 10 March 2021 session was the first the claimant had worked on without her support (her statement paragraph 14).

64. In addition there was feedback from the young people herself, Ms Mirdad's statement paragraph 15, where they expressed a dislike of the claimant. The respondent submits that this was the key reason.

65. The respondent said there was also the breach of confidence issue, where the claimant was alleged to have passed on information he obtained from Ealing Council.

66. Ms Mirdad also refers to the 1:1 review of 4 March 2021 which had also played on her mind. In relation to the document being changed, the Appeal minutes of 8 April 2021 confirmed that Ms Mirdad completed the 1:1 review document retrospectively.

67. The claimant was within his probationary period so the respondent was reviewing his suitability for the role. Ms Mirdad's evidence, (statement paragraph 17) was that she sought feedback from others on or around 28 January 2021, 23 February 2021, 4 March 2021 and 9 March 2021, including from Ealing Council and from the respondent's Chair.

68. The respondent relies on the claimant's own views about how his probation was going, and his meeting note of 15 March, where he said he was "*seriously considering his future with the organisation*".

69. The respondent submitted that this was a good sound basis for an employer to decide that the employee was not suitable. It is accepted that this is not what was said by Ms Mirdad in the dismissal meeting by video call. It is submitted that the fact that she did not tell the claimant

is not fatal. She told him that he was "*not a good cultural fit".* The respondent submitted that this kind of language was a "*cover all*" for all sorts of reasons, but should not lead the tribunal to conclude that what was hidden behind that phrase was that the claimant had made disclosures. The respondent submits that the claimant did not adapt well to their open door, voluntary access system.

70. The respondent therefore submits that the evidence presents hurdles for the claimant and he does not cross the line of a claim that is likely to succeed.

The claimant's reply

71. With regard to the submissions that the disclosures not giving enough information, it was submitted that he should only give enough information and not exhaustive information. The claimant genuinely raised his concerns.

72. On the reasonableness of the belief, the claimant submitted that he was the person sent to do outreach and he was put at risk and he felt this. In relation to the incident on 10 March 2021, it was the claimant and staff who were put at risk and it was a subjective risk.

73. It was submitted that the claimant did not accept that the young people did not like him and that his job was not be liked by them, but to safeguard them. On the breach of confidence issue, on the claimant's evidence, statement paragraph 12, he says there was no breach of confidence and there was no misconduct.

74. On the claimant stating that he was considering his future with the organisation, it was submitted that what the claimant meant by this was that he did not feel safe in the organisation.

The law

75. Section 128 of the Employment Rights Act 1996 sets out the circumstances in which a claimant may claim interim relief. The section provides that an employee who presents a complaint of unfair dismissal where the reason or principal reason for the dismissal is one of those set out in (i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A ERA 1996 or (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or section 104F ERA may apply for interim relief.

76. If it appears to the tribunal that it is 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 in section 103A, the tribunal shall announce its findings and explain to both parties

what powers the tribunal may exercise on the application, and in what circumstances it will exercise them.

77. 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*".

78. 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'*

79. 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. 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.

80. 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.*

81. 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.

82. 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."*

83. 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.

84. 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.

85. 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.

86. 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>

87. 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.

88. 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.'*
>
> *(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*
>
> *(e) that the environment has been, is being or is likely to be endangered,*
>
> *(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.*

89. 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.

90. 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.

91. The Court of Appeal in ***Kuzel v Roche Products Ltd 2008 IRLR 530*** dealt with the burden of proof in a whistleblowing dismissal case. The claimant cited paragraphs 30 and 56-60 of this decision. At paragraph 30 Mummery LJ set out and approved an analysis of the burden of proof, first by setting out a series of questions and then answering them –

> *"(1) Has the claimant shown that there is a real issue as to whether the reason put forward by the respondent, some other substantial reason, was not the true reason?*
>
> *(2) If so, has the employer proved his reason for dismissal?*

(3) If not, has the employer disproved the s.103A reason advanced by the claimant?

(4) If not, dismissal is for the s.103A reason.

In answering those questions it follows:

(a) that failure by the respondent to prove the potentially fair reason relied on does not automatically result in a finding of unfair dismissal under s.103A;

(b) however, rejection of the employer's reason coupled with the claimant having raised a prima facie case that the reason is a s.103A reason entitles the tribunal to infer that the s.103A reason is the true reason for the dismissal, but

(c) it remains open to the respondent to satisfy the tribunal that the making of the protected disclosures was not the reason or principal reason for dismissal, even if the real reason as found by the tribunal is not that advanced by the respondent;

(d) it is not at any stage for the employee (with qualifying service) to prove the s.103A reason.

92. ***Kuzel*** is a case where the claimant had the requisite qualifying service for an "ordinary" as opposed to an automatically unfair dismissal claim.

93. 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.

94. 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.

95. 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.

96. The CA 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.

97. 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.

Conclusions on interim relief application

98. 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*". This test has been clarified and refined and is comparatively high, following ***Dandpat*** and ***Sarfraz*** (above)***.*** The claimant has to show <u>more</u> than it is more likely than not that he will succeed. It has to be more than probability and connotes something nearer to certainty.

99. The claimant relies on section 43B(1)(d) of the Employment Rights Act that his disclosures tended to show that the health or safety of any individual had been, was being or was likely to be endangered. He submits that his disclosures tended to show that the health and safety of himself, other staff and the young people were endangered.

100. It is necessary to identify the main points about which the tribunal must be satisfied before the claimant can succeed. It is also necessary to consider the nature of the dispute in relation to each matter and the likelihood of the issue being decided in the claimant's favour.

101. Firstly, there must be a disclosure of information. The respondent submits that broad allegations of wrongdoing or expressions of concern do not necessarily amount to a disclosure of information and submits the matters relied upon in paragraph 27 of the Particulars of Claim do not go far enough in terms of setting out how the information was disclosed, the words used and what was the information disclosed. During this hearing out of the eight disclosures relied upon, numbers (iii) and (v) were withdrawn.

102. On disclosures (vi) to (viii) the respondent accepted that there was a disclosure of information but did not accept that they were protected disclosures. As disclosure (vii) was subdivided and I agreed with the respondent's submission that there was no reference to staffing levels in the Incident Report form of 10 March 2021.

103. For disclosures (i), (ii) and (iv) I consider that enough information was given for the claimant to show that he has a pretty good chance of success in showing that he made a disclosure of information.

104. Secondly, the disclosure must be protected and to decide this it is necessary to look at the thought processes of the claimant at the time when the disclosure was made. Did it, in his reasonable belief, tend to show that the health or safety of any individual had been, was being or was likely to be endangered. Following ***Babula*** and as the claimant submitted, this is his subjective belief which may be reasonable even if wrong. I consider that on disclosure (i) his disclosure that there were not enough staff to deal with those in the youth centre, the claimant has a pretty good chance of success in showing that this tended to show the matters in set out section 43B(1)(d). Staff and service-user ratios are likely to have been designed with safety in mind. In saying this, I make no findings about the actual staffing levels at the Centre or whether they were in accordance with Government guidance.

105. On disclosure (ii) I find that the claimant will have more difficulty in showing that a disclosure of information that he was going out without an ID badge or phone, tended to show in his reasonable belief that his or anyone else's health and safety was being endangered. I find that he does not have a pretty good chance of showing this.

106. Similarly on disclosure (iv) I find that the claimant may have some difficulty in showing that a disclosure about lack of CCTV or poor lighting, tended to show in his reasonable belief that his or anyone else's health and safety was actually being endangered. Many facilities across the country do not have CCTV. It is to be welcomed where it can be afforded but the claimant has to make the link between the lack of the CCTV or the lighting, with an endangerment to health and safety. Whilst I am not saying that he will not be able to establish this, I cannot say that he has a pretty good chance of success in establishing it.

107. On disclosure (vi) the incident report form of 10 March 2021, I find that the claimant does have a pretty good chance of success in showing that this tended to show in his reasonable belief that his, staff members or young people's health and safety was being endangered by the activities of the young people on that date, particularly in relation to the disclosure that the Coke can had been cut to be used as a weapon and the disclosure of violent behaviour causing damage to the door.

108. On disclosure (vii) I find that the claimant does not have a pretty good chance of success in showing that this tended to show in his reasonable belief that his, staff members or young people's health and safety was being endangered in relation to debriefing procedures or being personally undermined by his line manager. Point (ii) within disclosure (vii) was no longer relied upon. I find that the claimant disclosure that young people were permitted indoors in breach of Government guidance, my finding is the same as on disclosure (i) above.

109. In relation to disclosure (viii), the claimant needs to show that his disclosure that a visiting architect was not DBS checked, tended to show in his reasonable belief that his or someone else's health and safety was being endangered. The tribunal hearing the case will need to hear evidence from the claimant about his understanding of who needed to be DBS checked in the first place and what he reasonably believed the risks to be. I find that he does not have a pretty good chance of success on this point.

110. Thirdly, he must also show that the disclosures were in the public interest. The claimant submits that those affected were the young people who used the services provided by the respondent and those employed by the respondent which included himself. The respondent accepted in submissions that it is an outreach charity engaging with young people, who are themselves members of the public and that their health and safety is important. Where the disclosures are about the young people who use the respondent's services, I find that the claimant has a pretty good chance of success in meeting the public interest test. On disclosure (ii) about his lack of a phone or an ID badge, it is hard to see that this relates to anyone else other than himself and the same in relation to sub paragraph (iv) of disclosure (vii) where he relies on saying that he felt undermined by his manager. Where the disclosure do not relate to the service users, I find that the claimant does not have a pretty good chance of success, to satisfy the relevant test, that the disclosure was in the public interest.

111. Fourthly, is the question of causation, that one or more of the disclosures must be the sole or principal reason for the dismissal. It is for the final tribunal to decide, as a question of fact, what was the reason for dismissal. The reason for dismissal is disputed. I must ask if it appears to me likely that the final tribunal will find that the principal reason for dismissal was one or more of the disclosures.

112. The claimant has to show the tribunal that he had a pretty good chance of success in satisfying the tribunal that he made protected disclosures and that one or more of those disclosures was causative of his dismissal.

113. So far as the burden of proof is concerned, the claimant in submissions invited the tribunal, without the need to make findings of fact, to "*draw inferences*" that the reason for the dismissal was one more of the protected disclosures. This is not the test on an interim relief application. It is not possible to draw inferences without making findings of fact and this hearing is an assessment on the papers, of the claimant's prospects of success. I decline to draw inferences in such circumstances.

114. Also, in this case the claimant does not have qualifying service for an ordinary unfair dismissal claim. He had only 2.5 months service when he was told that he was dismissed. Where a claimant in a section 103A claim does not have the qualifying service, it is for him to show at trial the reason for dismissal (see the passage quoted above from ***Kuzel*** at paragraph 30, subparagraph (d)), the important point being that this claimant lacks qualifying service.

115. The claimant relied upon the respondent giving changing or multiple reasons for dismissal, from the lack of a "*cultural fit*", capability, breach of confidentiality and dislike of him by the young people. The respondent also generally relied upon the claimant not being considered suitable while in his probationary period. Ms Mirdad refers to the 10 March 2021 incident as being the only time when the respondent has had to close a session and this was the first time the claimant had worked without Ms Mirdad's supervision. The claimant submits that given the changing nature of the reasons, the tribunal should infer that the reason was because of any disclosures found to be protected disclosures.

116. On the issue of multiple reasons for dismissal, the Court of Appeal in ***Kuzel*** at paragraph 59 said *"… it is not correct to say, either as a matter of law or logic, that the ET* must *find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so*". At paragraph 60 they said: "*It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side*." Therefore just because different reasons were given does not mean that the tribunal must decide that it is the reason given by the claimant. The reason found by the tribunal, as envisaged in ***Kuzel***, could even be different from the reasons advanced by the parties. The respondent submitted that talking about the lack of a "*cultural fit"* could sometimes be used as a "*cover all"* for a number of reasons leading an employer to consider the employee unsuitable.

117. On my finding the claimant does not show that he meets the

comparatively high test described in ***Dandpat*** of showing that he has a pretty good chance of success in showing a causal link between his disclosures and his dismissal. The tribunal hearing this case will need to make findings of fact as to the matters described in Ms Mirdad's witness statement as to her concerns about the claimant's suitability for the role and her perception that he found it difficult to make the transition from a structured local authority environme to the open door voluntary engagement practices used by the respondent as a small charitable organisation.

118. I am unable to find on what is before me that the claimant has a pretty good chance of success such as to merit interim relief. The claimant does not meet the test, described in ***Dandpat*** as comparatively high or in ***Sarfraz*** as nearer to certainty than probability.

119. In these circumstances the application for interim relief fails.

_____

Employment Judge Elliott
Date: 12 May 2021

Sent to the parties on: 13/05/2021
_____ for the Tribunals