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## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104098/2020 (A)

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Held on 27 August 2020  
(By Telephone Conference Call)

Employment Judge: P O'Donnell

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**Mr William Mukuma**

**Claimant**  
**Represented by:**  
**Ms Meechan -**  
**Solicitor**

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**Care Concern Group Limited**

**Respondent**  
**Represented by:**  
**Mr McPhail -**  
**Counsel**

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Claimant's application for interim relief is refused.

### REASONS

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#### Introduction

1. The hearing was held remotely by way of telephone on 27 August 2020 in order to determine the Claimant's application for interim relief under s128 of the

Employment Rights Act 1996 arising from his claim for unfair dismissal under S103A of the Act.

Documents

2. Given the nature of the hearing, the Tribunal did not hear evidence. It was  
5 provided with a bundle of documents by the Respondent as well as a statement  
from Jacqueline Wilson of the Respondent. The Claimant also provided a  
bundle of documents.

Claimants submissions

3. The Claimants agent made the following submissions.
- 10 4. The Claimant makes an application for interim relief and makes claims for  
unfair dismissal under s103A and s104(4)(e) (in relation to an alleged breach  
of Regulations 4 & 6 of the Transfer of Undertakings (Protection of  
Employment) Regulations 2006 ("TUPE")) of the 1996 Act.
- 15 5. The Respondent denies that a TUPE transfer took place and it was submitted  
that they are trying to defeat TUPE in buying the business in which the  
Claimant worked by way of share acquisition. Reference was made to the  
cases of *Guvera Ltd v Butler & ors* UKEAT/0265/16 and *Celtec Ltd v Astley*  
[2005] ICR 1409.
6. The Claimant's agent set out the following timeline:-
  - 20 a. It was submitted that the relevant transfer took place sometime  
between 20 April 2020 and 1 May 2020.
  - b. The Respondent acquired 100% of the share capital of the company  
who employed the Claimant at the time, Morrison Community Care  
(Duntocher) Propco Ltd ("Morrison").
  - 25 c. Reference was made to an email exchange at p108 of the  
Respondent's bundle which it was submitted showed that the  
Respondent took operational control of the business from the get-go.

- d. Reference was also made to pp58-60 of the Claimant's bundle.
  - e. The purchase of the share capital took place on 28 February 2020.
  - f. A statutory notification was sent to the relevant regulator at this time which stated that the Respondent had obtained the whole entity, specifically that it had "acquired complete on-going operation".
  - g. Reliance was placed on the cases of *Celtec*, *Guvera* and *Spijkers* (EU Case 24/85).
  - h. It was submitted that the Respondent stepped into the shoes of Morrison; the undertaking was the share purchase and the economic entity was the operation of the care home in which the Claimant worked.
  - i. It was submitted that all of this shows that there was a TUPE transfer.
7. Reference was again made to R108 and the following matters addressed:-
- a. James Webb is a manager with the Respondent.
  - b. There is a reference to the Care Inspectorate.
  - c. Mr Johal is a director of the Respondent.
  - d. They discuss, in the email exchange, the current manager (that is, the Claimant) of the home and replacing him. It was submitted that this showed operational control.
  - e. A change of manager requires notification in a regulated environment.
  - f. They discuss a new manager who was appointed but did not last long as he resigned in July.
  - g. It was suggested that they were sensitive to this issue.

h. The Claimant had objected to these changes and he was forced to become deputy manager. This issue is the subject of a separate claim to the Employment Tribunal.

- 5 8. The Claimant was in regular contact with the relevant regulator who knew the Claimant had been the manager and knew he was forced to become deputy manager.
9. The new manager, Phil McDonald, resigned on 14 July 2020 and his last day at work was 15 July as he went on sick leave for the remainder of his employment.
- 10 10. On 16 July, the Claimant was appointed as manager. He was given the keys to the home by an employee of the Respondent and told "you're in charge".
11. On 17 July, Jacqui Weston of the Respondent attended the home and called a staff meeting at which she said the Claimant was manager. She informed the Care Inspectorate of the change of manager by way of a telephone call on the  
15 same day.
12. On 20 July, the Claimant sent the Care Inspectorate a statutory notification regarding the death of a resident. He noticed that he had used the wrong form and so sent the correct form. He phoned the Care Inspectorate and spoke to a Marjorie Bain to explain what had happened. During this call, Ms Bain asked  
20 the Claimant about the departure of Mr McDonald and the Claimant being appointed as manager. She asked questions about the change which the Claimant answered.
13. Ms Bain asked the Claimant to remind Ms Weston to send a written notification of the change of manager. The Claimant informed Ms Weston of his  
25 conversation with Ms Bain and, specifically, that Ms Bain had asked for written notification of the change of manager.
14. On 21 July 2020, Ms Weston and another employee escorted the Claimant from the premises and dismissed him. It was submitted that the reason for

dismissal was that the Respondent did not want the Claimant "yakking" to the Regulator.

15. The Claimant had been a registered nurse, care home manager and clinical lead for 30 years. He had no disciplinary record and a spotless career.
- 5 16. It was submitted that the reason for dismissal was what was in the mind of the employer at the relevant time. It was impossible that the Claimant was dismissed for poor performance and he was not under absence management. In asserting that this was a reorganisation then the Respondent was saying that dismissal was because of an economic, technical or organisational reason  
10 but according to them they are not involved in the operation of the care home.
17. It was submitted that the application should be allowed in these circumstances and that the Claimant was seeking the status quo that he continue in paid employment with the Respondent.
18. The Tribunal sought clarification from the Claimant's agent in relation to a  
15 number of matters, in particular, relating to what the alleged protected disclosure was said to be and how it is said to be the main or principal reason for the Claimant's dismissal.
19. First, the Tribunal asked for confirmation of what the protected disclosure was said to be. It was submitted that the disclosure took place during the  
20 Claimant's discussion with Marjorie Bain on 20 July and that the information disclosed was the reasons for the change of manager.
20. Second, the Tribunal sought clarification of which sub-paragraph(s) in s43B(1 ) of the 1996 Act which this disclosure of information was said to fall. It was said that the disclosure fell within s43B(1)(b) that a person has failed, is failing  
25 or likely to fail to comply with a legal obligation.
21. Following on from the clarification, the Tribunal asked for an explanation why it was said that the information disclosed to Marjorie Bain on 20 July was said to fall within the description of a protected disclosure in s43B(1)(b).
22. In response, the following submissions were made by the Claimant's agent:-

- a. A change in manager is not just a change of name. The fact that another change of manager was made in a short space of time was likely to lead to the regulator speaking to the operator.
- b. It was about why the Claimant had gone from deputy to manager.
- 5 c. Ms Bain was asking the Claimant what would happen.
- d. The Claimant did not know why there had been a change.
- e. The Respondent wanted to give their own reasons why changes had been made. The Claimant was uncertain if the Respondent would give the true reasons and may give false or misleading information.
- 10 f. The Claimant was not happy and was concerned he would become the fall person.
- g. The care home had not been inspected yet and the Respondent did not want conversations between the Claimant and the Care Inspectorate.
- 15 h. The Claimant was no privy to the reasons why Mr McDonald had resigned.
23. Finally, the Tribunal sought clarification as to the basis on which the Claimant said that the Respondent knew of his disclosure. It was said that this was because the Care Inspectorate asked the Claimant to tell Ms Weston to make the statutory notification of the change of manager and that the phone call was not sufficient Ms Weston knew the Claimant was having contact with the Care Inspectorate and she wanted to eliminate any chance of the Claimant revealing things. The Respondent already had issues with the Care Inspectorate and did not want unwelcome attention.
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- 25 24. In response to issues raised in the Respondent's submissions, the Claimant's agent commented as follows.

25. First, she submitted that any disclosure would be in the public interest given that it involved the sudden departure of the manager of a care home. Care homes were of public interest in the current climate. There were two other care homes decanting residents to the home in which the Claimant worked and the Respondent would not want any issues at this home.
26. Second, TUPE requires a change in the identity of the employer. There was a multi test as to the identity of the employer and a myriad of factors were involved. It was submitted that the Respondent had stepped into the shoes of Morrisons and had full operational control of the entity.
27. Third, the Respondent's annual return to Companies House in September 2018 lists 11 limited companies or LLPs which were said to be subsidiary undertakings of the Respondent, 100% owned by the Respondent and all involved in the running of care homes. The returns state that the group employs 708 people and it was submitted that the group was the employer of the people who worked in the care homes. It was submitted that Morrison (under its new name of Kingsacre) would have been added to this list of subsidiaries in the next return. The transfer has all the indication of a TUPE transfer.
28. The Respondent had the power to hire Mr McDonald and to fire the Claimant. The Care Inspectorate sees the Respondent as responsible for the home.

Respondent's submissions

29. The Respondent's agent made the following submissions.
30. The claim of unfair dismissal under s104 of the 1996 Act was not relevant to the application for interim relief.
31. Reference was made to *Ministry of Justice v Sarfraz* [2011] IRLR 562 and in particular paragraphs 16 and 19 which set out the test to be applied in any application for interim relief in determining whether it is "likely" that the Claimant will be able to succeed at the final hearing. Specifically, that this was not 51% and was a significantly higher degree of likelihood.

32. It was submitted that the Claimant had to show that he was likely to succeed in relation to the following elements of his claim; that he had made a protected disclosure; that this was the principal reason for his dismissal; that the Respondent was his employer.
- 5 33. In relation to the issue of whether the Claimant had made a protected disclosure, reference was made to p54 of the Respondent's bundle which was part of the ET 1 and the first paragraph of that page. This makes reference to a "*protected discussion with the Care Commission*". It is the Claimant's position that this was a discussion of the reasons why he was now the manager  
10 having been the deputy but the submissions made on behalf of the Claimant was that he did not know why. It was submitted that it is difficult to see how the Claimant could have made a disclosure of information about the reasons for the change if he did not know those reasons.
34. It was further submitted that it cannot be understood what legal obligations  
15 were not being complied with in these circumstances.
35. Reference was made to Ms Weston's statement and, in particular, paragraph 17 where Ms Weston sets out that she contacted Ms Bain to find out what had been said in the discussion with the Claimant and Ms Bain made no reference to the reasons for the change of manager.
- 20 36. It was submitted that all that was available to the Tribunal from the Claimant were the submissions made at the present hearing. There was no evidence such as a statement or draft statement.
37. It was submitted that p54 suggests that the Claimant was called by the Care Inspectorate but the submissions made today suggest that he called them.
- 25 38. There was a question as to whether what was said by the Claimant in the conversation on 20 July was information in the sense required for there to be a protected disclosure.



39. It was submitted that there had been no explanation of how the public interest element of the test was satisfied nor was there any explanation why the Claimant believed the relevant elements of the test were satisfied.
40. The Claimant could only be saying that disclosure was made in circumstances which amounted to a disclosure made to "some other responsible person" in terms of s43C(1)(b)(ii).
41. It was submitted that there is a high threshold for the Claimant to meet to establish that he is likely to show that there had been a protected disclosure and, based on what is available to the Tribunal, he is unlikely to meet this test.
42. Turning to the reason for dismissal, it was submitted that the Claimant suggests that the Respondent had some problem with him answering questions about the change of manager but it was not clear why the Respondent would have such a problem. There was no motive for this.
43. Reference was made to p111 of the Respondent's bundle which was the letter of dismissal. It outlined that a new manager had been appointed when Mr McDonald resigned and that this manager, Tom Johnston, took the view that three managers were not needed and the post of deputy manager was not required.
44. There may be a question as to why Mr McDonald was appointed in the first place and reference was made to pp108-110 of the Respondent's bundle. It was submitted that there was a lack of confidence in the Claimant.
45. Reference was again made to Ms Weston's statement in terms of her and Mr Johnston taking the view that they did not need heavy management.
46. It was submitted that there was no indication of anything to do with the Care Inspectorate, the alleged disclosure or the conversation of 20 July being a factor in these decisions. In fact, Ms Weston was not aware of the conversation of 20 July at the relevant time.
47. In relation to the conversation between the Claimant and Ms Weston prior to his dismissal, reference was again made to the ET1 at p54 where it was said

that there was no mention of a discussion between the Claimant and Ms Johnston. Further, it was submitted that the second last paragraph of p54 sets out the reason why the Claimant believed he had been dismissed which makes no reference to any alleged protected disclosure and, rather, that he believed the reason to be the Employment Tribunal proceedings he had raised in relation to alleged breaches of the TUPE Regulations.

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48. It was submitted that there was no indication that the Respondent had any protected disclosure in mind at the time of dismissal and no indication that, even if the Claimant had mentioned it, this would have caused Ms Weston to dismiss him.

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49. Finally, in relation to the identity of the employer, it was pointed out that there had been two previous ET1s submitted by the Claimant and the ET3s in response to both of these claims pointed out that the present Respondent was not the employer. It was submitted that there is clearly doubt as to the correct Respondent and so it is puzzling that the Claimant has put his eggs all in one basket.

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50. It was submitted that the incorrect entity cannot re-instate someone who they did not employ.

51. Reference was made to p60 of the Respondent's bundle which was the Claimant's contract of employment and it was pointed out that this was clearly with Morrison.

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52. There had been a share transfer and the sale agreement was at p88. It was pointed out that the shares were purchased by Tails Care Ltd and not the Respondent. There is a complicated company structure by the Respondent is not Talis Care Ltd.

53. It was possible for there to be a TUPE transfer arising from a share purchase but that the Claimant has to show it is likely that he would establish this and that the Respondent was his employer at dismissal.

54. The Respondent's agent asked the Tribunal to read Ms Weston's statement in full.

55. Reference was again made to *Safraz* as authority for the proposition that the Claimant has to show that he is likely to succeed in every aspect of the case which in this case means the issues of whether there had been a protected disclosure, causation and the identity of the employer. It was submitted that the Claimant was unable to do so.

#### Relevant Law

56. Section 128 of the Employment Rights Act 1996 provides that:-

- 10           (1) *An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—*
- (a) *that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—*
- (i) *section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or*  
15               *103A, or*
- (ii) *paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or*
- (b) *that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one*  
20               *specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met, may apply to the tribunal for interim relief.*

57. In order to succeed in an application for interim relief, the claimant must show that it is "likely" that the complaint of unfair dismissal will succeed. The question of what is meant by "likely" has been addressed by a number of authorities which have said that it means "a pretty good chance of success" which means more than just the balance of probabilities (*Taplin v C Shippam Ltd* [1978] IRLR 450) and that it involves a "significantly higher degree of

likelihood” than more likely than not (*Ministry of Justice v Sarfraz* [2011] IRLR 562).

58. The Tribunal needs to take account of all matters that would require to be determined at the final hearing of the unfair dismissal claim although it does not require to conclusively resolve those matters before deciding on the application for interim relief (*Hancock v Ter-Berg* [2020] IRLR 97).

59. Where the main or principal reason for dismissal is that the Claimant made a protected disclosure then the dismissal will be unfair under s103A of the 1996 Act. This is one of the categories of “automatic” unfair dismissal where the reason for dismissal alone renders it unfair.

60. A “protected disclosure” is defined in s43A of the 1996 Act as being a qualifying disclosure as defined in s43B made by the worker in accordance with any of ss43C-H.

61. Section 43B states:-

(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) *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 damaged, or*

(f) *that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.*

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62. The Transfer of Undertakings (Protection of Employment) Regulations 2006 apply where there is a relevant transfer, as defined in Regulation 3, from one employer to another. The effect of the Regulations is to transfer those employees working in the undertaking being transferred from the transferor employer to the transferee.

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63. Where a business is purchased by way of a transfer of shares then TUPE does not apply because there is no change in the identity of the employer (*Henry v London General Transport Services Ltd* [2001] IRLR 132) and this is the case even where the use of share purchase is being done to avoid the effects of TUPE (*Brookes v Borough Care Services* [1998] IRLR 636). However, this is not the end of the matter and there can be cases where a business is bought by way of share purchase where the facts point to there being a relevant transfer from one employer to another (*Millam v Print Factory (London) 1991 Ltd* [2007] IRLR 526; *Jackson Lloyd Ltd and Mears Group pic v Smith* UKEAT/0127/13).

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#### Decision

64. The Tribunal reminded itself that, in terms of the application before it today, the relevant claim was that under s103A of the 1996 Act as this was what gave the Claimant the right to make the application under s128.

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65. The Tribunal also reminded itself that the question to be asked was whether it was "likely", on the material available to the Tribunal, the Claimant would succeed in his claim under s103A. The Tribunal was not making any conclusive findings of fact or law in relation to that claim.

- 5 66. The Tribunal agreed with the submission from the Respondent's agent that it was required to consider whether the Claimant was likely to succeed on all the issues to be determined at the final hearing in relation to the s103A claim. This included not just the question of whether the main or principal reason for the Claimant's dismissal was that he made a protected disclosure but also the question as to the correct identity of the Claimant's employer at the time of his dismissal and whether a protected disclosure had been made.
- 10 67. Starting with the question of the identity of the employer, the Tribunal noted that the Claimant's contract of employment was with Morrison and that the Claimant did not seek to argue that he had, at any time, agreed another contract with the Respondent.
- 15 68. Rather, the Claimant sought to argue that he became an employee of the Respondent because there had been a relevant transfer from Morrison to the Respondent in terms of the TUPE Regulations which transferred his employment from Morrison to the Respondent. The question, therefore, arises as to whether the Claimant is likely to succeed in showing that there was such a transfer.
- 20 69. The Tribunal noted that the purchase of the shares in Morrison was made by a third legal entity, Talis Care Ltd. There was no suggestion from the Respondent that Talis was wholly unconnected to the Respondent and that it was not one of the group of subsidiary companies owned and operated by the Respondent.
- 25 70. On the face of it, the purchase of the shares in Morrison by Talis does not amount to a relevant transfer to Talis, let alone to the Respondent who was not involved in that purchase based on the decision in *Henry*.
- 30 71. There was an assertion made on behalf of the Claimant that share purchase was used as the means to acquire Morrison in order to circumvent TUPE. There was no material provided to the Tribunal which supported this assertion and, in any event, the case of *Brookes* confirms that this would not bring the purchase into the scope of the Regulations.

72. However, the Tribunal had to consider whether the material provided to it indicated that, regardless of how matters appeared, there was a likelihood that the Claimant would show that there was a relevant transfer.
73. The Claimant placed reliance statements made around the time of the purchase that the Respondent had acquired the whole entity of Morrison and had taken operational control of it. However, these statements can equally relate to a share purchase where the Respondent is now the owner of Morrison in terms of being the sole shareholder as much as they would if they had acquired the care home business from Morrison.
74. Further, there was nothing in the material provided to the Tribunal that indicated that the Respondent was acting in any way inconsistently with being the owner (or ultimate owner through a subsidiary) of Morrison. If the share purchase had been made by a natural person (as opposed to a legal person such as a limited company) then there would be nothing surprising at that new owner making decisions to hire and fire staff such as the Respondent made in this case (albeit that it acted through its officer and employees as legal persons such as limited companies have to do).
75. For these reasons, the Tribunal considered that there was nothing in the material available to it that satisfied the Tribunal that the Claimant was likely to show that there had been a relevant transfer from Morrison to the Respondent in terms of TUPE. On the face of it, there was a share purchase of the shares in the company which employed the Claimant and the authorities are clear that this, in itself, does not amount to a relevant transfer. Further, there was no material which satisfied the Tribunal that the Claimant was likely to show that, despite appearances, there had, in fact, been a relevant transfer.
76. In these circumstances, the Tribunal did not consider that it was likely that the Claimant would show that he was employed by the Respondent at the time of his dismissal.
77. This alone would be enough to dispose of the application; if the claim is brought against a Respondent who was not the Claimant's employer then a claim of

unfair dismissal is not likely to succeed. However, for the sake of completeness, the Tribunal has gone on to address the other issues.

5 78. It is axiomatic that a claim that an employee has been dismissed for making a protected disclosure cannot succeed if no such disclosure was made. The Claimant, therefore, has to persuade this Tribunal that he is likely to show that he did make a protected disclosure.

10 79. The Claimant avers that the disclosure was made during the discussion with Ms Bain on 20 July and, specifically, that he disclosed the reasons why he had moved from being deputy to being manager. The Tribunal is troubled by the fact that it was asserted in submissions by the Claimant's agent that the Claimant did not know these reasons. This raises the question of how the Claimant could have disclosed information to Ms Bain when that information was not in his knowledge.

15 80. Further, it is entirely unclear to the Tribunal as to the basis on which the Claimant says that this amounts to a disclosure that someone (presumably the Respondent, although that was not specifically said on behalf of the Claimant) was failing to, had failed to or was likely to fail to comply with a legal obligation. The Tribunal specifically asked the Claimant's representative for clarification of this but, even then, it was still not clear how the information allegedly disclosed  
20 fell into this description. Indeed, it was not even clear to the Tribunal what legal obligation was not being complied with.

81. In these circumstances, based on the material before it, the Tribunal did not consider that it was satisfied that the Claimant was likely to be able to show that he had made a protected disclosure.

25 82. Finally, there is the question of whether the Claimant is likely to show that he was dismissed because he made a protected disclosure (assuming that he first proves that such a disclosure was made).

30 83. The Tribunal does note that, as pointed out by the Respondent's agent, the Claimant's ET1 in the paper apart asserts that he believed that he was dismissed for raising his earlier Tribunal claim relating to alleged breaches of



TUPE. It is the case that the ET 1 form does states that claims were being brought under ss103A and 104 of the 1996 Act but the fuller narrative in the paper apart only asserts a reason which falls within s104.

- 5 84. In submissions made at the hearing, it was asserted on behalf of the Claimant that he was dismissed because the Respondent did not want him speaking directly to the Care Inspectorate. On the face of it, this does not relate to any particular disclosure of information made to the Care Inspectorate but is an assertion that he was dismissed to stop him speaking to that body at all. It is not entirely clear how it is said that dismissing the Claimant would achieve that end when the Respondent would have less control of the Claimant once he no longer worked for them but that it not relevant to the issues in consideration at this hearing.
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- 15 85. It was asserted in submissions that Ms Weston became aware of the alleged disclosures made to Ms Bain about the reasons for the change in management in his subsequent discussion with her in which he passed on Ms Bain's request for a written notification of the change of manager. However, it was not clear to the Tribunal how passing on this request gave Ms Weston the knowledge of the alleged disclosures; it was not said on behalf of the Claimant that he expressly told Ms Weston about that part of his discussion with Ms Bain.
- 20 86. There is also other material in relation to the reason for dismissal and, in particular, it is the Respondent's case that there is a reason wholly unrelated to any alleged disclosure, namely, that the new manager Mr Johnston had come to the view that the post of deputy manager was not required.
- 25 87. There is obviously a dispute between the parties as to the reason for dismissal which requires to be resolved at the final hearing. The Tribunal reminded itself that it was not its purpose today to resolve that dispute (especially given that no evidence is led at interim relief hearings) and that the question is whether the Claimant is likely to show that he was dismissed for making a protected disclosure.

5 88. Given the confusion within the Claimant's own case as to the reason for dismissal and the lack of any material that tended to show that the decision-maker was aware of the alleged disclosure when deciding to dismiss the Claimant, the Tribunal considers that it is not likely that the Claimant would succeed in showing that the main or principal reason for his dismissal was the fact that he made a protected disclosure.

10 89. For all these reasons, the Tribunal has concluded that it is not likely that the Claimant will succeed in his claim under s103A of the 1996 Act and so the application for interim relief is refused.

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Employment Judge: Peter O'Donnell  
Date of Judgment: 04 September 2020  
Entered in register: 08 September 2020  
15 and copied to parties

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