EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100254/2022

Interim Relief Hearing held in person in Glasgow on 2 February 2022

Employment Judge Ian McPherson

Mr Stephen Livesey	**Claimant** **In Person**
(1) The Japanese Garden at Cowden Castle	**1st Respondent** **Represented by:** **Mr Kenneth McGuire** **Advocate** **instructed by:** **Ms Alison Forsyth** **Solicitor, Kerr Stirling LLP**
(2) Robert Grindrod	**2nd Respondent** **Represented by:** **Mr Kenneth McGuire** **Advocate** **instructed by:** **Ms Alison Forsyth** **Solicitor, Kerr Stirling LLP**
(3) Sarah Reynolds	**3rd Respondent** **Represented by:** **Mr Kenneth McGuire** **Advocate** **instructed by:** **Ms Alison Forsyth** **Solicitor, Kerr Stirling LLP**

(4) Sara Stewart — **4th Respondent**
Represented by:
Mr Kenneth McGuire
Advocate
instructed by:
Ms Alison Forsyth
Solicitor, Kerr Stirling LLP

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's application for Interim Relief, in terms of **Section 128 of the Employment Rights Act 1996**, is **refused** by the Tribunal; and the case is continued for further procedure to be determined at the Case Management Preliminary Hearing already assigned by the Tribunal for all parties to attend or be represented at on **21 March 2022** to be held, in private, before any Employment Judge sitting alone, but not Employment Judge Ian McPherson.

REASONS

Introduction

1. This case called before me on Wednesday, 2 February 2022, for an urgent Interim Relief Hearing, on the claimant's application, and as instructed by Employment Judge Muriel Robison, further to Notice of Hearing – Interim Relief, issued by the Tribunal to all 5 parties on 24 January 2022.

2. Scheduled to start at 10:00am, it did not, in fact, start until about 10:35am, as the claimant was not in attendance in time for the scheduled start, although counsel and instructing solicitor for the respondents were in attendance timeously, and when the claimant did attend, around about 10:10am, the Tribunal clerk then had to ensure all parties attending had all the necessary documents, before this Hearing could then get underway. In particular, the claimant's Bundle had to be copied by the clerk for all attending.

3. One day was set aside for this Hearing, to consider the claimant's application for interim relief and, if appropriate, to order his reinstatement or re-engagement or to grant a Continuation of Contract Order pending the hearing of his complaint of unfair dismissal.

Claim against the Respondents

4. The claimant, acting on his own behalf, presented his ET1 claim form in this case to the Tribunal, on 18 January 2022, without following ACAS early conciliation, as a claim of unfair dismissal which contains an application for interim relief is exempt from the need to notify and obtain an ACAS early conciliation certificate.

5. The claimant cited the 1st respondent, a Scottish charity, as his former employer, and 3 others, individuals associated with the employer, Mr Grindrod and Ms Reynolds, both being employees of the 1st respondent, and Ms Stewart being chair of the charity's board of trustees.

6. On 25 January 2022, the claimant emailed the Glasgow ET, and advised that at the time of submission of his ET1 claim form, he was waiting for ACAS EC reference numbers, and he provided those reference numbers to the Tribunal in that email.

7. At the request of a Legal Officer, the claimant was asked to send copies of the ACAS EC certificates, and he did so by further email to the Tribunal on 28 January 2022. The ACAS certificates produced show that, for all 4 respondents, the claimant notified ACAS on 18 January 2022, and they issued their certificates to him, under **Section 18A of the Employment Rights Act 1996**, by email, on 20 January 2022.

8. In his ET1 claim form, the claimant complained of being unfairly dismissed from his employment by the 1st respondent, on 11 January 2022, and he further complained that he is owed notice pay, holiday pay, and arrears of pay. He stated that, in the event of success with his claim, he sought an award of compensation only from the Tribunal.

9. The claimant did not seek, at section 9.1, to get his old job back (reinstatement), nor to get another job with the same employer or associated employer (re-engagement). He provided a detailed 4 page, paper apart, and stated that a schedule of loss and details of financial compensation would follow.

10. Further, the claimant stated in his ET1 claim form that his employment, as Head of Security and Maintenance, had started on 15 November 2021, and ended with his dismissal on 11 January 2022. He further stated that he worked 40 hours each week for the 1st respondent, as employer, with gross pay before tax of £1,833 monthly, and £1,541 monthly, net normal take home pay, and that he was in his employer's pension scheme. Finally, he stated that he had not got another job.

11. In section 8.1 of his ET1 claim form, the claimant described his claim as follows:

> ***"This is a claim for Interim Relief.***
>
> ***This is a claim for automatically unfair dismissal under section 103A of the Employment Rights Act 1996 suffered as a result of making a protected disclosure pursuant to the Public Interest Disclosure Act 1998.***
>
> ***This is a claim for detriment under section 47B of the Employment Rights Act 1996 suffered as a result of making a protected disclosure pursuant to the Public Interest Disclosure Act 1998.***
>
> ***This is a claim for unfair dismissal under section 100 of the Employment Rights Act 1996 suffered as a result of making a protected disclosure pursuant to the Public Interest Disclosure Act 1998."***

12. I pause here to note and record that that latter reference to a **Section 100** complaint is misdescribed by the claimant, for that statutory provision relates to health and safety cases, and not to making protected disclosures.

13. The claimant's claim was accepted by the Tribunal administration, and served on the 4 respondents by Notice of Claim issued by the Tribunal on 25 January 2022. Their ET3 response is due by **22 February 2022** at latest. A telephone conference call Case Management Preliminary Hearing has already been assigned, as per standard practice, for **21 March 2022** at 11:30am for one hour, and parties have been given dates to submit their duly completed PH Agendas – the claimant by **28 February 2022,** and the respondents by **14 March 2022**.

14. On 28 January 2022, the claimant emailed the Glasgow ET stating that he would like to call two witnesses, identified as a **Rachel McGaffney**, an employee of the 1st respondent stated by him to have been present at the claimant's dismissal, and a former employee, **Lynne Drewette**, who was said to have been the manager at the Japanese Gardens when the claimant started working there. He copied his email to Sara Stewart, trustee, as he did not know who the respondents' representative was in these Tribunal proceedings.

15. Ms Alison Forsyth, consultant solicitor with Kerr Stirling LLP, Stirling, intimated her interest, on behalf of the respondents, to the Tribunal, and the claimant, by email on 30 January 2022.

16. Following referral to me, on 1 February 2022, when I was the duty Judge, emails were sent by the Tribunal clerk to the claimant, and Ms Forsyth, solicitor for the respondents, advising that, at the Interim Relief Hearing, under **Rule 95** (of the **Employment Tribunal Rules of Procedure 2013**) the Employment Judge taking the Hearing would not hear oral evidence, but would seek to be addressed by both the claimant and the respondents' representative on the interim relief issues, and not the full claim.

Interim Relief Hearing before this Tribunal

17. This Interim Relief Hearing took place in person within a hearing room at the Glasgow Tribunal Centre. It was a public hearing, and the claimant appeared as an unrepresented, party litigant, accompanied by a Ms Margaret Cowley for moral support. At my invitation, the claimant confirmed that she was not a witness, nor was she his representative.

18. He confirmed that he was insisting upon all heads of complaint detailed in his ET1 claim form, and that he had looked at the various statutory provisions cited there, but he candidly commented that he had not really digested them. Having looked at **Section 128 of the Employment Rights Act 1996,** the claimant stated that what he sought by way of an outcome from this Tribunal was to proceed to be awarded compensation for the way he had been dismissed by the 1st respondents, and treated by the other respondents. Further, he stated that while he would like his old job back, he recognised that that could be difficult, given the way he was dealt with by the respondents.

19. The claimant provided the Tribunal with his own Bundle of Documents for use at this Hearing, and copies were provided by the Tribunal clerk for the Judge, and respondents' counsel and solicitor. It comprised 10 documents, extending over 33 pages, including his ET1 submission (document 1) and another document labelled ***"1a***" as a ***"general statement***" extending to 3 pages dated 2 February 2022, his contract of employment with the respondents as document 2, being statement of terms and conditions for Cowden Castle SCIO, extending to 8 pages, dates worked between start on 15 November 2021 and dismissal on 11 January 2022 (document 3), detailed information about whistleblowing concerns 1, 2, 3 and 4 (as document 4), his letter of 17 January 2022 emailed to Sara Stewart regarding his dismissal on 11 January 2022 (document 5), a security / maintenance handover list from Lynne Drewette (document 7), and various emails of 12, 14 and 29 November, 15, 17 and 18 December 2021 between him and other members of the charity's staff (documents 6, and 8, 9 & 10).

20. The respondents were represented by Mr Kenneth McGuire, advocate from the Scottish Bar, Westwater Stable, instructed by the respondents' solicitor, Ms Forsyth. The 2nd, 3rd and 4th respondents were not in attendance, but counsel and solicitor were in contact, during the course of this Hearing, with Ms Stewart the 1st respondent's chair, and trustee, as regards the interests of all 4 respondents, and to take instructions. Counsel advised that there was, as yet, no ET3 response prepared, but it would be submitted by the deadline of 22 February 2022.

21. The respondents had provided 3 witness statements, along with their own Bundle of Documents, with hard, paper copies for me and the claimant. All 3 witness statements were signed, and 2 of the 3 were dated : while that by Ms Stewart was signed, but not dated, it was confirmed to me that she too had signed her witness statement on 1 February 2022, as for Ms Reynolds and Mr Grindrod.

22. The respondents' Bundle comprised 5 documents, extending to 10 pages, being (1) emails between the claimant and respondents ending 14 October 2021 ; (2) email from Sarah Reynolds to the claimant dated 17 December 2021 ; (3) email from Sarah Reynolds to the claimant dated 18 December 2021, and (4) accident report relating to Rob Grindrod dated 17 December 2021. The fifth document, described in the inventory as "***Draft letter from Claimant to Respondent dated 25 January 2022"*** was misdescribed.

23. Counsel for the respondents confirmed, as I had taken from my own reading of the 5 page letter anyway, that it was a letter dated 25 January 2022, signed by Sara Stewart, chair of the charity, addressed to the claimant, and in reply to his letter of 17 January 2022 to her, being document 5 in his own Bundle of Documents.

24. Mr McGuire further explained that it was "***draft***", as although prepared and signed by Ms Stewart, it had never actually been sent to the claimant, at that date, as these Tribunal proceedings had been brought. The claimant confirmed that the first time he was aware of the terms of this letter was when

it was included in Ms Forsyth's email the previous afternoon, 1 February 2022, sending him the respondents' witness statements and documents. Further, counsel stated that the claimant's document 2 appeared to be the statement of his employment terms and conditions as issued to him by the 1st respondent at commencement of his employment.

25. As is my standard practice at all Hearings with unrepresented, party litigants, I explained the purpose of the Hearing, and the procedure to be followed, as the claimant advised me that he was representing himself, and he had no knowledge of the Tribunal's practices and procedures, albeit he did intimate, in the course of the Hearing, that he had been in contact with the whistleblowing charity ***PROTECT*** (formerly Public Concern at Work) to get some guidance on the relevant law.

26. I clarified to him that it was not for me to act as advocate, or representative, for either party, which must take its own independent advice. Specifically, I advised the claimant of the terms of the Tribunal's ***"overriding objective"*** under **Rule 2 of the Employment Tribunals Rules of Procedure 2013**, to deal with cases fairly and justly, and that, dealing with a case fairly and justly includes, so far as practicable, ensuring that the parties are on an equal footing.

27. I recognised too that the claimant is not a lawyer, and explained that the Tribunals are well-used to dealing with unrepresented claimants, and **Rule 2** seeks to achieve a level playing field in a case where, as here, the respondents are represented by Mr McGuire, a counsel with employment law knowledge and experience, and with previous experience of appearing before this Tribunal.

28. Indeed, I commented that Mr McGuire had recognised that too, as part of his "*officer of the court*" duty to the Tribunal, to assist the Tribunal to further the overriding objective and in particular for parties to co-operate generally with each other and with the Tribunal, by helpfully preparing, on his own initiative, and without the need for any judicial order or direction, and providing to the

claimant, and myself as the presiding Judge, a written note of argument for the respondents, extending to some 5 pages, with 24 paragraphs, and also providing 5 copy judgments that he intended to rely upon when making his submissions on behalf of the respondents.

29. Ms Forsyth, the respondents' solicitor, had emailed Mr McGuire's submissions, and 3 signed witness statements from each of the 2nd, 3rd and 4th respondents, and a respondents' Bundle of 5 documents, to the Tribunal, with copy sent at the same time to the claimant, at 4.30pm the previous afternoon, 1 February 2022, and the claimant confirmed, at the start of this Hearing, that he had seen them, and he was provided with paper, hard copies, at this Hearing, by the respondents.

30. When I later called upon him to make his own submissions to the Tribunal, I provided the claimant with my bench copy of ***Butterworths Employment Law Handbook***, so he could read and digest the precise terms of **Sections 128, 129 and 130 of the Employment Rights Act 1996**, relevant to this Interim Relief Hearing.

31. After preliminary discussions with both the claimant and Mr McGuire, clarifying the issues before the Tribunal, I adjourned the Hearing for half an hour, at about 10:55 am, to allow Mr McGuire and Ms Forsyth to take instructions from the respondents about the claimant's Bundle, produced that morning, and for the clerk to scan that Bundle, so Ms Forsyth might email it to her client when seeking instructions.

32. When the public Hearing resumed, at about 11:35am, Mr McGuire confirmed that the claimant's document 2 appeared to be his contract of employment terms and conditions, and that his document 5 was the letter of 17 January 2022 from the claimant to which Ms Sara Stewart had drafted the respondents' letter dated 25 January 2022, included as document 5/1 to 5/5 in the respondents' Bundle.

33. The claimant stated that he had only received the respondents' submissions, hard copy, from the clerk, at about 11:20am, and that he would speak, in his own oral submissions to the Tribunal, about his documents 1a and 4 in his Bundle, following which I stated we would hear from Mr McGuire, then a reply from the claimant.

34. As no sworn evidence was taken at this Hearing, I have not made any findings in fact.

Claimant's Submissions

35. In opening his submissions to the Tribunal, the claimant stated that he had worked 8 weeks for the 1st respondents, between 15 November 2021 and 11 January 2022, and he had been verbally dismissed by Sara Stewart, the charity's chair, and trustee, on 11 January 2022, when she had told him that he was "***over-qualified for the position".*** He believed that the real reason for his dismissal was his whistleblowing.

36. He then read from his general statement, document 1a, and that led him into his whistleblowing concerns, as detailed in his document 4. As those documents are held on the Tribunal's casefile, and parties had a hard copy at this Hearing, I do not consider it appropriate or proportionate to record their full terms here, but I do summarise matters raised there by the claimant, along with his oral clarifications at this Hearing, as follows:

    a) On appointment at Cowden Castle, starting on 15 November 2021, the claimant's line manager was Lynne Drewette. She left their employment on or about 30 November 2021, following which the deputy manager, Sarah Reynolds, became his line manager, as a trainee manager.

    b) Sara Stewart is an arts business person, residing in London, and chair of the charity's board of trustees. Rob Grindrod is the Estate Gardens manager, and he has 2 other staff, and an apprentice.

c) The claimant says that he made protected disclosures to the respondents, in December 29021 and January 2022, and he clarified that these were all oral disclosures, with no written disclosures, and made by phone calls, or face to face verbal disclosures.

d) In his letter of 17 January 2022 to Sara Stewart, produced as document 5 in his Bundle, he had written to her saying : "***It is my belief that I was dismissed for whistleblowing which is contrary to my rights under the Public Interest Disclose*** (sic) ***Act 1998 (PIDA). I raised whistleblowing concerns to Sarah Reynolds and Rob Grindrod on 6 December 2021, 20 and 21 December 2021 and 10 January 2021."*** He there provided the 13 concerns, which re-appeared later as paragraph 13 in his ET1 claim form.

e) He referred to the 13 items detailed in paragraph 13 of the particulars of claim attached to his ET1 claim form under ***"Protected disclosure***", to Sarah Reynolds (General Manager) and Rob Grindrod (Estate Head Gardener) on 6 December 2021, 20 and 21 December 2021, and 10 January 2022.

f) When cross-referring to his ET1 claim form, paragraph 13, the claimant stated initially that items 1 to 9 there were made on 6 December 2021, and items 10 to 13 were continual from the start of his employment (15 November 2021) to when things were actioned, when he went to respondents' management.

g) When asked to clarify matters, under reference to the 4 whistleblowing concerns, narrated in his document 4, the claimant stated that whistleblowing concern 1 was on 14 December 2021 ; concern 2 was between 15 November 2021 and 17 December 2021, as shown in his document 10 ; concern 3 was between 15 November 2021 and his dismissal on 11 January 2022; and concern 4 was the same period, again between 15 November 2021 and his dismissal on 11 January 2022.

h) As regards item 10, in paragraph 13 of his ET1, he then stated that he had made a mistake, and it should refer to Sara Stewart, and not Sarah Reynolds.

i) He confirmed that he had prepared his document 4 after he put in his ET1 claim form to the Employment Tribunal on 18 January 2022.

j) When the Judge asked him to use ***Kipling's six honest men***, of who, what, why, where, when and how, to detail the alleged disclosures he was seeking to rely upon, the claimant stated that he could not clarify exact dates, but he thought concern 4 was after a storm, so on 15 December 2021.

k) Under reference to his document 1a, the claimant stated that he had a belief that he had been subject to detriment by way of victimisation and automatic unfair dismissal, and that he had made protected disclosures on various dates in December 2021 and January 2022, and he was asserting statutory rights and taking health and safety actions.

l) At page 2 of his document 1a, he referred that he had been pointed, by the whistleblowing charity, ***Protect***, to Mr Justice Underhill, President of the EAT's judgment **in Ministry of Justice v Sarfraz UKEAT/0578/10**, and that it was necessary to find five things, as there listed.

m) While, at page 3 of his document 1a, the claimed had referred to a list of Acts to be relied upon, he confirmed that he was <u>not</u> making any complaint under any of the many cited provisions from the **Equality Act 2010.** He had simply copied & pasted them into his document from elsewhere, when getting advice from ***Protect***, the whistleblowing charity.

n) He referred to his document 7, being a security / maintenance handover list from Lynne Drewette, given to him on 15 November

2021, when he had first started this job, and the handwriting on her list was showing all the jobs he had to progress.

o) Further, he added, emails from the respondents had said he was doing a good job, but he felt things had broken down, after 14 December 2021, when he had blown the whistle to Sara Stewart about Rob Grindrod.

p) He stated that document 7 was proof that he did do work, and that he is not lazy. He further stated that there was no lead up to his dismissal, on 11 January 2022, and it was just Sara Stewart saying "***can I have a word in the office",*** when she then told him that they would have to let him go.

q) The claimant stated he received no letter confirming his dismissal, or reasons for it, and, but for these Tribunal proceedings, he would not now have seen their letter of 25 January 2022, document 5 in the respondents' Bundle.

r) He disputed the respondents' reliance on his performance issues being the reason for his dismissal. Under reference to his contract of employment, document 2, he relied specifically on one of the 22 bullet points listed (on page 2) of working as Head of Security & Maintenance including a duty : health and safety supervision throughout the site to guard staff, visitors and the general public. He described that duty as "***a key aspect***" of his job.

s) As regards the details of his job, the claimant confirmed, under reference to sections 6.1 and 6.2 in his ET1 claim form, that his normal hours of work were 40 hours per week, for which the 1st respondents paid him £1,833 per month gross, giving £1,541 per month net take home pay. As per his contact, document 2, he stated that he was in the employer's group pension scheme, though People's Pension.

37. It then being 12:44, and the claimant having confirmed that he had nothing further to say, I adjourned proceedings to resume, at 13:45, with Mr McGuire's submissions on behalf of the respondents. In so doing, and before I heard from Mr McGuire as the respondents' counsel, I asked the claimant to look at **Sections 129 and 130 of the Employment Rights Act 1996**, and address me on what he was inviting me to do at this Interim Relief Hearing. I let him borrow my ***Butterworths Employment Law Handbook*** for that purpose.

38. When we resumed, at 13:50, the claimant addressed me further on that specific point. Having read **Sections 129 and 130,** he stated that he had loved his job at Cowden Castle, and he was seeking an Order for Continuation of Contract, on the basis of his 40 hours per week contract, with the same pay and conditions as when employed by the 1st respondent.

Respondents' Submissions

39. The claimant's submissions having concluded, I called upon Mr McGuire to address the Tribunal. He opened by stating that the claimant's application should be refused, and he referred me to his written submissions, and the documents and witness statements lodged for the respondents, and before the Tribunal at this Hearing. He clarified that while he appeared as counsel for all 4 respondents, interim relief, if granted, could only be granted against the 1st respondent, as the claimant's former employer.

40. Mr McGuire referred me to the "***high test***" in interim relief applications, and what an applicant for interim relief needs to establish to show that they have "***a pretty good chance of succeeding"*** in the Final Hearing before the Tribunal.

41. He drew my attention to paragraphs 6, 7, 8 and 9 of his written submission, in particular, reading :

6. *A claimant must meet a high test to succeed in an application for interim relief. Section 129(1) ERA 1996 sets out the test which must be satisfied before the application is granted. It must appear to a tribunal that it is likely on determining the substantive complaint the reason for the dismissal will be the reason asserted by the employee. The test was described in Wollenberg (above) at para.25 as follows:"25.Taplin v C Shippam Ltd [1978] ICR 1068andMinistry of Justice v Sarfraz [2011] IRLR 562 are leading cases on the tests to be applied by the ET. Put shortly, an application for interim relief is a brief urgent hearing at which the Employment Judge must make a broad assessment. The question is whether the claim undersection 103A is likely to succeed. This does not simply mean more likely than not. It connotes a significantly higher degree of likelihood.* ***The Tribunal should ask itself whether the Applicant has established that he has a pretty good chance of succeeding in the final application to the Tribunal****" (my emphasis).*

7. *The Employment Appeal Tribunal (HHJ Eady QC) has recently given guidance on the findings required to be made by a tribunal in the situation where interim relief is sought pursuant to a claim for automatic unfair dismissal under s.103A ERA 1996. In the case of* ***His Highness Sheikh Khalid BinSaqr Al Qasimi v Ms T Robinson UKEAT/0283/17/JOJ [2017]****, HHJ Eady QC said:*

    12. *Where reliance is placed on a number of disclosures, it is further required that the ET is satisfied that the conditions set out insection43Bare met in respect of each such disclosure (see Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 EAT at paragraph 19), albeit that a number of communications might need to be considered together to answer the question whether a protected disclosure has been made*

(see Norbrook Laboratories (GB) Ltd v Shaw [2014] ICR 540 EAT). It is, further, a requirement in every case that the disclosure is of information and not simply the making of an allegation or statement of opinion (Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT), albeit that the distinction is not always an easy one to draw and a disclosure of information may be made alongside the making of an allegation (see Kilraine v London Borough of Wandsworth [2016] IRLR 422 EAT).

13 Moreover, as from 25 June 2013, there is a public interest requirement inserted into section 43Bby virtue of section 17 of the Enterprise and Regulatory Reform Act 2013, so that it is now provided:"(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 …""

8. The law as it stood prior to the changes in 2013 was summarised by Underhill J in the case ***of Ministry of Justice v Sarfraz UKEAT/0578/10/ZT (2011):***

"14. Thus in order to make an order undersections 128 to 129 the Judge had to have decided that it was likely that the Tribunal at the final hearing would find five things: (1) that the Claimant had made a disclosure to his employer; (2) that he believed that that disclosure tended to show one or more of the things itemised at (a) to (f)undersection 43B (1); (3) that that belief was reasonable; (4) that the disclosure was made in good faith; and (5) that the disclosure was the principal reason for his dismissal".

9. As a result of the changes made in 2013, the requirement of good faith at (4)has been removed, but there is an additional

requirement that the disclosure of information must, in the reasonable belief of the party making the disclosure, be believed to be in the public interest.

42. Continuing his oral submissions, Mr McGuire did so, where appropriate with reference to the supporting respondents' witness statements, and documents in the Bundles, and he spoke to the specific terms of his main points, as per his paragraphs 11 to 20, as follows:

The Respondent's position – reason for dismissal

*11. Reference is made to the witness statements prepared by Sara Stewart, Sarah Reynolds, and Robert Grindrod. Sara Stewart is a trustee with the Respondent (a charity) and made the decision to dismiss the Claimant. The circumstances leading to the Claimant's dismissal are set out in Sara Stewart's witness statement. In a nutshell "**The reason for the termination of the Claimant's employment was wholly related to various performance issues".***

Sara Stewart provides examples of these issues in her statement:

- *Lack of progress by the Claimant to deal with lighting options in the car park – particularly important because staff were leaving the garden in darkness and walking to their cars on an uneven road using torch light.*
- *Failure by the Claimant to produce a daily work record despite being instructed to do so.*
- *Unreasonable and significant delay by the Claimant in mending a leaky drainpipe.*
- *Failure by the Claimant to check the fabric/exterior of the building and to draw up a list of maintenance issues.*
- *Failure by the Claimant to oversee remedial work to gates on the eastern end of the woodland track.*

- *Failure by the Claimant to check the security of the boundaries of the garden timeously on his appointment.*
- *A bare minimum of work being completed by the Claimant in the course of his employment.*

12. Sara Stewart took into consideration the views of Sarah Reynolds in reaching the decision to dismiss the Claimant.

13. Sara Stewart also formed the view that there were certain members of staff who were uncomfortable in the Claimant's presence.

14. In my submission, it is clear that the Claimant was dismissed because his performance was sub-standard. The poor nature of the Claimant's performance is confirmed in all three witness statements. There is not a 'pretty good chance' that a tribunal would find that the reason (or principal reason) for the Claimant's dismissal was because he made the alleged qualifying disclosures.

15. It is noteworthy that the Claimant does not assert that any of the alleged disclosures was made to Sara Stewart (who took the decision to dismiss him). Robert Grindrod confirms in his witness statement that he has seen the list of alleged disclosures but that no such disclosures were made to him. Sarah Reynolds makes a similar point in her statement.

16. The Claimant refers to being told that the reason for his dismissal was that he was over-qualified for his position. Sara Stewart accepts that at the meeting where the Claimant was dismissed, she mentioned to him that she felt he was overqualified, but she did this as a way of 'softening the blow' of his dismissal. Were any of the alleged disclosures made to the Claimant's employer?

17. The Respondent's position – as set out in the witness statements of Sarah Reynolds and Robert Grindrod – is that the disclosures were not made. There does not appear to be any written evidence of the disclosures being made. It is submitted that there is no good reason to not accept the position as set out in the witness statements of Sarah Reynolds and Robert Grindrod.

The nature of the alleged disclosures

18. To qualify as a protected disclosure, the disclosure must be of "information" tending to show one or more of the matters specified bys.43B(1)(a)-(f) ERA 1996. In the present case, the Claimant appears to ons.43B(1)(b) – failure etc. to comply with a legal obligation. Case law has established that a disclosure of "information" is not the same as the making of an allegation but there is the possibility of overlap, see ***Kilraine v Wandsworth LBC [2018] ICR 1850.*** *To be a qualifying disclosure "it has to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)", per Sales LJ at para. 35.The circumstances in which the disclosures were allegedly made is not clear from the terms of the ET1. It is unclear whether, for example, the disclosures(if made) were in the form of allegations or whether they contained a disclosure of information as required by s.43B(1) ERA 1996. In* ***Kilraine****, Sales LJ says at para. 36 '[w]hether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case". On the basis of the information presently before the tribunal, it is far from clear that the disclosures relied upon by the Claimant are disclosures of "information".*

Reasonable belief of breach of a legal obligation

19. The Claimant says in his ET1 that in making the alleged disclosures he reasonably and genuinely believed that the Second, Third, and Fourth Respondents – but not the First Respondent – were failing to comply with health and safety legislation. It is unclear that the Claimant could have a reasonable belief that the individual Respondents – as opposed to his employer, the First Respondent – were failing personally to comply with health and safety legislation.

Belief in public interest

20. The definition of a "qualifying disclosure" requires that there be a disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest. The Claimant

asserts that he believed he was disclosing matters in the public interest, but the sufficiency of the explanation he gives for this is a matter for the tribunal.

43. In particular, in making his oral submissions, and so augmenting his written submissions, in light of the claimant's submissions to the Tribunal, and the documents in the claimant's own Bundle, that had not been available to counsel on 1 February 2022, when preparing the respondents' written submissions, Mr McGuire highlighted the following points:

a) The claimant's employment had been terminated for a number of performance issues.

b) This view was supported by the witness statements lodged by the 3 individual respondents.

c) Multiple staff had raised concerns about the claimant's performance.

d) There were detailed factual matters to be addressed, but this Hearing is a summary application, but the information provided to the Tribunal shows that a substantial case has been put forward to show the reason for the claimant's dismissal, being his performance, and nor related to any whistleblowing.

e) It is accepted by Sara Stewart that the claimant was called into a meeting on 11 January 2022, and that there was no formal invite to a meeting, nor any formal disciplinary process followed.

f) However, in terms of **Section 103A**, and what was the reason for dismissal, what is important is the reason, rather than the form of the dismissal meeting.

g) The reasons for the claimant's dismissal are as set out in Ms Stewart's letter dated 25 January 2022, and the Tribunal, at this Hearing, has no rationale not to accept that statement by Ms Stewart as being credible.

h) Referring to Sarah Reynolds' witness statement, in particular at paras 2,3, 4, 6, 8, 15, 16 and 18, counsel stated that this was not a general comment about the claimant's performance, but specific examples given to show that the claimant was not performing his role adequately.

i) While the claimant had referred to his duties, and given one example, management of health & safety was but an example of his role, and not his main role.

j) It was accepted that Ms Stewart had referred to the claimant being "***over qualified"***, but counsel explained that this was to make the claims ant feel better, and an attempt o soften the blow of ending his employment. It was maybe misguided, and maybe the meeting on 11 January 2022 should have been more formal, but that question is for determination on another day, and not at today's Hearing.

k) Ms Stewart had denied, in her witness statement, that protected disclosures had played any part in her decision to dismiss the claimant.

l) There was reference also to Mr Grindrod's witness statement, for its terms, and taking all 3 witness statements, at face value, Mr McGuire accepted that an evidential enquiry was not the purpose of this Interim Relief Hearing, and it is not for me, as the Employment Judge taking this Hearing, to resolve factual disputes between the parties.

m) Referring then to document 5 in the respondents' Bundle, counsel submitted that there was no dispute that Ms Stewart had not sent the claimant that letter dated 25 January 2022 following his dismissal by her on 11 January 2022.

n) It had been written, to be sent, in reply to the claimant's letter of 17 January 2022 to Ms Stewart, but after the ET claim was brought, and served on the respondents, it was not sent to the claimant.

o) Ms Stewart's letter made it clear that the claimant's dismissal was "***wholly related to various performance issues***", and 3 examples were mentioned. The "***over-qualified***" comment was meant to soften the blow.

p) As regards the terms of the claimant's contract with the 1st respondent as his former employer, while the email of 11 October 2021 from Lynne Drewette to the claimant (produced as respondents' document 1 / 2) referred to a three month probation period, the written statement of terms and conditions (document 2 in the claimant's Bundle) did not include that provision.

q) The offer of appointment on 11 October 2021 had given the terms as follows: 40 hours per week ; salary £22,000, 28 days holiday; pension, and laptop and mobile phone to be provided. The claimant's email in reply, on 14 October 2021, had stated that the claimant was very happy to accept those terms and conditions.

r) The emails of 17 and 18 December 2021, at documents 2 and 3 in the respondents' Bundle, were referred to in the various witness statements, and, other than the American style date recording on the emails, they were not commented upon further. The accident report, at document 4, supported the respondents' evidence about Mr Grindrod's accident.

s) Turning then to the documents in the claimant's Bundle, Mr McGuire stated that the claimant's document 4 (**whistleblowing concerns 1, 2, 3 and 4**) were either new concerns, or examples of the previous whistleblowing concerns noted in the ET1 claim form, at paragraph 13, and the claimant had indicated in his submissions to the Tribunal

that matters had changed after his call with Sara Stewart on 14 December 2021.

t) Reading from a text sent to him by Ms Stewart, counsel stated that Ms Stewart says that it was on 15 December 2021 that she had called the claimant that evening, and she had been astonished to hear that the claimant wanted to chat to her about a concern for Rob Grindrod's personal life. The discussion skirted around the subject, which seemed to be the claimant's concern that Mr Grindrod is gay. When Ms Stewart asked the claimant why Mr Grindrod's sexuality was relevant, she says the call ended.

u) Looking at the claimant's concern 1, as per his document 4 in his Bundle, where he narrated his recollection of a telephone conversation with Sara Stewart, on 14 December 2021, Mr McGuire stated that he was "***struggling to see a disclosure of information***", and even if it was said, which was not accepted, it seemed more an expression of concern, and not a disclosure, and so the claimant could not have a pretty good chance of success.

v) As regards concern 2, undated, counsel stated that Richard, the head chef, was not a member of management, and what the claimant had asked Richard to do, was to move the deep fat fryer, and the claimant had requested Sarah Reynolds to move some boxes, chairs, etc outside her office, as the claimant felt it was blocking a fire escape route.

w) Mr McGuire stated that he was struggling to see how asking people to move things was a disclosure of information, and Sarah Reynolds had said that things were removed within 2 days, and not the 2 weeks suggested by the claimant.

x) On concern 3, undated, but relating to an allegation that the health & safety policy statement was not signed and dated by Sara Stewart, Mr McGuire asked where is the disclosure of information,

as all he could see was the claimant's observation on the (unspecified) law, which may or may not be correct, but it was not a disclosure of information. Further, he added, Sarah Reynolds did not necessarily accept what was written here by the claimant, so again there is another factual dispute between the parties.

y) Finally, on concern 4, undated, but relating to the children's play area (woodland), counsel submitted that there was not enough information here to know if there was a disclosure of information, as it appeared to be an expression of concern by the claimant.

z) Again, Mr McGuire added, he was struggling to see how this concern ticked the boxes to show pretty good chance of success for the claimant. Further, there was again another factual dispute here. He queried the context of this concern, and stated that Sarah Reynolds had advised that the playground was insured, but again that was a factual matter not suitable for resolution at this Hearing.

aa) Counsel then turned his attention to the claimant's ET1 claim form, and what was narrated as the 13 alleged protected disclosures / incidents. He stated that these were denied by the respondents' witnesses, within their witness statements before the Tribunal, and looking at that paragraph 13, through the eyes of the law, even after the claimant's oral submissions that morning, Mr McGuire confessed to still being at a loss in understanding when the claimant says these disclosures were made.

bb) Until this Interim Relief Hearing, counsel submitted, there had been no allegation by the claimant that any disclosures had been made to the dismissing officer, Sara Stewart, and it was only at this Hearing that the claimant had advised that his reference in item 10 to Sarah Reynolds should be Sara Stewart. Mr McGuire submitted that item 10 was about a lack of support, but there was no disclosure there.

cc) In counsel's view, there were "***serious grey areas***", whether or not there were disclosures of information, and whether or not, if there were, they were made in the reasonable belief of the claimant that it was in the public interest. He submitted that these concerns were "***no more than observations***" by the claimant.

dd) Turning then to the claimant's document 1a, his "***general statement***", Mr McGuire noted how it referred to **Section 100(1)(a) & (b)**, and it was not clear if there was any overlap with the **Section 103A** claim, but Sarah Reynolds, Rob Grindrod and Sara Stewart, all disputed the claimant making health and safety related disclosures to them, as alleged.

44. Mr McGuire closed by referring me to paragraph 18 of his written submissions, and the **Kilraine** judgment, as reproduced above, earlier in these Reasons, before then making the points detailed in his summary of his written submissions, at paragraphs 21 to 24, and drawing my attention in particular to the **Parsons** judgment, at his paragraph 21, reading as follows:

Summary

21. The Employment Appeal Tribunal has explained why the test for granting interim relief under s.129 ERA 1996 is expressed in terms of requiring a claimant to show they have a "pretty good chance" of winning at full hearing. In ***Parsons v Airplus International Ltd UKEAT/0023/16/JOJ (2016),*** *HHJ Shanks QC stated at para.7:*

"For many years it has been understood that in applying this provision the Tribunal must ask itself whether the Claimant has established that she has a "pretty good chance" of succeeding at the substantive hearing (words first used in Taplin v Shippam Ltd [1978] IRLR 450). This interpretation is justified because if the employee satisfies the test the Tribunal must make an Order for interim relief and, if it does so, the employer is obliged to pay

the employee pending the determination of the complaint and there is no provision for re-payment in the event that she ultimately fails on the merits".

22. The high standard of "pretty good chance" of success applies to all of the required elements of there been a successful claim.

23 For the reasons stated above there are strong reasons for the tribunal to reject the Claimant's claim. In particular, there is little evidence to substantiate the assertion that the alleged disclosures were actually made(and made to the persons to whom it is said they were made) and – even if the disclosures were made as the Claimant claims – there is strong evidence that the Claimant was dismissed for performance reasons.

24 It is submitted that the test of there being a "pretty good chance" of success as not been met, and the application should be dismissed.

45. In concluding, Mr McGuire stated that the stakes are high for the employer in any Interim Relief application, which is why the applicable legal test is high. If the claimant was to be successful in his application, counsel submitted that it would be impossible to get the claimant back to working in his former, or any current role.

46. He noted how, in the ET1 claim form, the claimant had not sought reinstatement or re-engagement, and he invited the Tribunal to give weight to that factor. Further, at this Hearing, the claimant had himself indicated that it would be difficult for him to go back, and that is consistent with what is in his ET1 claim form. Also, two of his former colleagues are named by him as respondents in this claim, as is Ms Stewart as chair of the charity's trustees. That too is a factor go take into account if minded to consider a Continuation of Contract Order.

Claimant's Reply

47. Having heard counsel for the respondents, and it then being 14:43, I called upon the claimant to make his reply to Mr McGuire's submissions to the Tribunal. In inviting him to do so, I explained that it was my role as Judge to apply the relevant law, and I did not expect him, as an unrepresented, party litigant, to comment on case law as cited by Mr McGuire, but he could do so, if he so wished.

48. Having noted my comments, the claimant stated that he insisted upon his application for Interim Relief. If he was successful in this application, he stated that he still sought a Continuation of Contract Order. He then stated that he wished to dispute a few things said by Mr McGuire as counsel for the respondents, and made the following points:

a) He had said Mr Grindrod had the wrong gloves, not no gloves. His item 3, in his paragraph 13 list, refers to "***incorrect hand protection***".

b) He stated that he had put across information to the respondents

c) He recognised that there is a factual dispute about the reason for his dismissal.

d) He referred to the 2 emails produced at this Hearing saying that he was busy doing things.

e) Document 2 in the respondents' Bundle , being Sarah Reynolds' email to him on 17 December 2021 recognised that " ***I know you also have a lot on your plate…"***

f) Referencing the respondents' document 5, Ms Stewart's unsent letter of 25 January 2022, the claimant stated that while it referred to various performance issues, he says the respondents' stated reason is not the real reason.

g) He stated that the real reason is the fact that he made the disclosures to the respondents.

h) Stating that "***it's difficult, I've not done this before, to capture your thoughts***", the claimant stated that he had nothing further to say, and he concluded his reply at 14:54.

Reserved Judgment

49. The Hearing concluded at 14:57, with me thanking both parties for their attendance and contribution. I reserved judgment, and advised those present that I would issue a written judgment, with reasons, as soon as possible, but further procedure would be as already set out by the Tribunal in its correspondence of 25 January 2022, to which I referred them. Both parties confirmed that they were quite clear about what happened next, in terms of ET3 response, PH Agendas and dates for compliance, and they had nothing further to raise at this stage.

Discussion and Deliberation

50. The claimant brings an application for Interim Relief in respect of his dismissal by the 1st respondent on 11 January 2022. As he only commenced employment with them, on 15 November 2021, he does not have sufficient qualifying service to bring a claim for "***ordinary***" unfair dismissal contrary to **Section 98 of the Employment Rights Act 1996**. Instead, the claimant seeks to bring what he refers to as a claim of whistleblowing detriment under **Section 47B** of that 1996 Act, automatically unfair dismissal under **Section 103A,** wrongful dismissal, and unfair dismissal under **Section 100**, and he applies for Interim Relief in respect of his **Section 103A** claim for automatic unfair dismissal for having made protected disclosures.

51. As per his particulars of claim, as set forth on the paper apart to his ET1, the claimant asserts that he was dismissed because (1) he was bringing to the attention of the 1st respondent that he reasonably believed that the 2nd, 3rd and 4th respondents had failed / were failing / were likely to continue to fail to comply with Health and Safety legislation, and(2) the same respondents had

failed etc. to comply with a legal duty under the Health and Safety at Work Act 1974 to provide a 'safe system of work' and to 'observe a duty of care' for health, safety and welfare.

52. As regards the alleged protected disclosures relied upon by the claimant, these were as set forth in paragraphs 13 and 14 of the particulars of claim, reading as follows:

> ***Protected disclosures***
>
> *13. I made the following protected disclosures to Sarah Reynolds (General Manger) and Rob Grindrod (Estate Head Gardener) on 6 December 2021, 20 and 21December 2021 and 10 January 2022.*
>
> *1. No eye protection (safety glasses) being used by the gardeners (Rob Gridrod,* (sic) *Connor Robertson, Frazer Leighton) especially when strimming.*
>
> *2. No consistent ear protection being used by the gardeners (Rob Gridrod,* (sic) *Connor Robertson, Frazer Leighton) during the course of their work.*
>
> *3. Incorrect hand protection (gloves) being used by the gardeners (Rob Gridrod, (sic) Connor Robertson, Frazer Leighton) during the course of their work.*
>
> *4. No consistent hand protection (gloves) being used by the gardeners (Rob Gridrod,* (sic) *Connor Robertson, Frazer Leighton) during the course of their work. In the event Rob Grindrod (Estates Manager) cut his finger with an axe, requiring him to attend A&E for treatment.*
>
> *5. Rob Grindrod (Estates Manager) setting poor examples of correct HSE practice to his employees (gardeners Connor Robertson, Frazer Leighton)*

6. *Rob Grindrod (Estates Manager) allowing unsafe practices by gardeners (Connor Robertson, Frazer Leighton)*

7. *Rob Grindrod (Estates Manager) inadequate instruction, information and training on the provision and use of work equipment particularly to the apprentice gardener, Frazer Leighton.*

8. *Apprentice gardener (Frazer Leighton) being allowed to work with Bluetooth music earpieces in his ears and on.*

9. *Gardeners carrying passengers on 'farm' trailers which is a dangerous practice.*

10. *Sarah Reynolds (General Manager) lack of support in helping me to deliver and ensure the Health and Safety and Fire Safety for staff, visitors and the general public.* [Note: at this Hearing, the claimant indicated that he had made a mistake, and this item should have referred to Sara Stewart.]

11. *Sarah Reynolds (General Manager) lack of acknowledgement and disregard to her HSE responsibilities as General Manager.*

12. *Sarah Reynolds (General Manager) and Rob Grindrod, failure to recognise their Statutory Duties regarding 'health and safety' at work.*

13. *A general managerial disregard for the Fire Safety (Scotland) Regulations 2006*

The response from Rob Grindrod was along the lines of 'Everyone is busy and getting on with their jobs." "It wasn't for me to be telling him how to run his team, mind my business". I reported to Sarah Reynolds my concerns and asked her for support. She said that it was my responsibility. No action was taken and the situation continued.

When Robert Grindrod chopped his finger with an axe, requiring him to attend A&E for treatment. I again told him that he should be using the correct safety equipment and told him that the situation wasn't improving we are frequently breaking an important health and safety rule. He just walked away from me muttering angrily under his breath. And still no action was taken. When I told Sarah Reynolds that the tearoom was breaching the legislation of the Fire Safety (Scotland) Regulations 2006. She responded angrily and again told me that she had other more important issues to deal with for Sara Stewart.

14. I raised my concerns to my employer. I reasonably believed that I was raising concerns about health and safety risk to staff and a breach of a legal obligation by the First Respondent to meet industry rules. These disclosures satisfied the public interest test as a failure to meet these health and safety rules could affect any one of the staff group, workers and visitors to the gardens.

53. There was no dispute in this Hearing about the relevant law. The claimant did not address me upon the relevant law, but at page 2 of his document 1a (being his "***general statement***"), he did write that : " I ***have been pointed to the following"***, and he then referred to paragraph 15 of Mr Justice Underhill's (then EAT President) judgment in **Ministry of Justice v Sarfraz UKEAT/0578/10,** and its narration of the five points on which an applicant for Interim Relief must succeed.

54. For the purposes of this Judgment, I gratefully adopt the summary of the law relating to Interim Relief applications set out in paragraphs 10 to 23 of the Employment Appeal Tribunal judgment by His Honour Judge James Tayler in **Queensgate Investments LLP & others v Millet [2021] ICR 863**, which highlights the high-threshold test that any Interim Relief applicant has to satisfy.

55. I accept, as well-founded, Mr McGuire's statement, at paragraphs 4 and 5, of his written submission, about the general nature and procedure for an Interim Relief Hearing, and the summary nature of such a Hearing reflected in **Rule 95 of the Employment Tribunal Rules of Procedure 2013.** It was the genesis to the correspondence which the clerk to the Tribunal issued to both parties, on my instructions, on 1 February 2022, as detailed earlier in these Reasons.

56. Unfortunately, the Notice of Interim Relief Hearing issued by the Tribunal administration, by the letter dated 24 January 2022, had included a standard paragraph about witnesses stating that : "***You are responsible for making sure that any witnesses you want to call can attend the hearing and know the place, date and time of the hearing."***

57. At this Hearing, while I had 3 witness statements from the respondents, no live witness evidence was led before me by either party. The Hearing proceeded on the basis of the ET1 claim form, both parties' Bundles, and both parties' submissions, written for the respondents, via counsel, and oral submissions too from both parties.

58. In his written submissions, counsel for the respondents had stated that:

> *4. The general nature and procedure of a hearing for interim relief in terms of s.128(1) ERA 1996 was summarised by HHJ David Richardson in* ***Wollenberg v Global Gaming Ventures (Leeds) Ltd & Anor UKEAT/0053/18/DA (2018)*** *as follows at para.42:*
>
> > *"Such hearings are intended to be short. They are, as the cases make plain, intended to be broad assessments by an Employment Judge who cannot be expected to grapple with vast quantities of material. Contrary to something which Mr Halliday said to me on instructions, no great reputational importance can be invested in the outcome of an interim hearing application. It is only a preliminary view taken by an*

Employment Judge in a case which will have to be in due course the subject the detailed investigation".

5. *The summary nature of interim relief hearings is reflected in **Rule 95 of the Employment Tribunal Rules of Procedure 2013**, which provides that, unless a tribunal directs otherwise, no oral evidence at such a hearing will be heard (see also the comments of HHJ Richardson in **Wollenberg** (above) at para.24.*

59. In his written submissions, at paragraph 7, Mr McGuire referenced the judgment of (as she then was) Her Honour Judge Eady QC in **Robinson**, at paragraphs 12 and 13 of her EAT Judgment, but I think it appropriate here to look at what the learned EAT judge (now Mrs Justice Eady, the newly appointed EAT President) stated about the nature of Interim Relief proceedings, at paragraphs 59 and 60 of her judgment, reading as follows:-

" 59. I start by reminding myself of the exercise that the ET had to undertake on this application. By its nature, the application had to be determined expeditiously and on a summary basis. The ET had to do the best it could with such material as the parties had been able to deploy at short notice and to make as good an assessment as it felt able. The ET3 was only served during the course of the hearing and it is apparent that points emerged at a late stage and had to be dealt with as and when they did. The Employment Judge also had to be careful to avoid making findings that might tie the hands of the ET ultimately charged with the final determination of the merits of the points raised. His task was thus 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

had succeeded or failed given the issues raised and the test that had to be applied.

60 The nature of interim relief also informs the approach the EAT has to take. An ET is charged with this summary assessment, precisely because it is best qualified to carry out this role; an Employment Judge will have the experience of having heard many similar cases at Full Hearing and will thus be able to bring that experience to bear in determining what is likely to be the outcome of the case thus presented on a summary basis. It is right, therefore, that the EAT should be reluctant to interfere and, in my judgment, should only do so if satisfied that the ET erred in law or reached a decision that might properly be characterised as perverse or took into account an irrelevant factor or failed to have regard to the relevant."

60. On the papers at least, the claimant's case is that there were 13 protected disclosures, plus maybe 4 whistleblowing concerns, as per his document 4, which may or may not be already encapsulated within the 13 recited at paragraph 13 of his ET1 claim form and its particulars of claim. It is fair to say that, at this Hearing, when I sought to clarify matters with the claimant, as regards the protected disclosures on which he was relying, and the component parts as per **Kipling's** "**six honest men**", I found his clarifications confused, and confusing, as I think so did Mr McGuire, counsel for the respondents, given the terms of his oral submissions to me.

61. Anyway, the claimant alleges that some, or maybe all, of his alleged protected disclosures were the principal reason that he was dismissed, and that, accordingly, he was automatically unfairly dismissed in accordance with **Section 103A of the Employment Rights Act 1996**. Of course, the claimant has a number of other claims as well, but the only claim with which I am concerned for the purposes of this Interim Relief application is that under **Section 103A.** It is because the claimant is making a claim under that statutory provision that the Tribunal has the power to order Interim Relief.

62. In these circumstances, the claimant has to show it is "***likely***" that the Tribunal on determining the claim will find that the reason for dismissal was the relevant one – in this case that the claimant made a protected disclosure. "***Likely"*** has been interpreted to mean having a "***pretty good chance" of success***. A pretty good chance of success has in turn been held (in **Ministry of Justice v Sarfraz [2011] IRLR 562**) to mean "***a significantly higher degree of likelihood"*** than "***simply more likely than not***".

63. What all this means is that in order to succeed in his Interim Relief application, the claimant has to show that he has a significantly higher degree of likelihood of success at any Final Hearing in relation to each and every element of his **Section 103A** claim; and that he does so notwithstanding the fact that at the Final Hearing he, as a person with less than 2 years' qualifying service with the 1st respondent, has the burden of proving both that he made one or more protected disclosures and that at least one of them was the principal reason for dismissal.

64. Further, in order to show that he made protected disclosures, the claimant will have to, in relation to each of the alleged disclosures he says that he made to the respondents, satisfy the Tribunal that: (1) he disclosed information; (2) he believed the disclosure of information was made in the public interest; (3) that belief was objectively reasonable; (4) he believed the disclosure of information tended to show at least one of the following: a criminal offence had been, was being or was likely to be committed; a person had failed, was failing or was likely to fail to comply with any legal obligation; a miscarriage of justice had occurred, was occurring or was likely to occur; the health or safety of any individual had been, was being or was likely to be endangered; the environment had been, was being or was likely to be damaged; information tending to show any of these things had been, was being or was likely to be deliberately concealed; and that belief was objectively reasonable.

65. In addition, in assessing the claimant's likelihood of success, I bear in mind that he needs to win on everything. For example, even if he were to persuade the Tribunal at the Final Hearing that he disclosed information, that he reasonably believed the disclosure was made in the public interest, that the reason he was dismissed was that he made the disclosure, and that he believed the disclosure tended to show a failure to comply with a legal obligation, or the health or safety of any individual had been, was being or was likely to be endangered, he would lose if he did not show that his belief in what his disclosure tended to show was reasonable. I note that his chances of winning on every point are necessarily much smaller than his chances of winning on any one point.

66. My decision, made on the basis of the material put before me by the claimant and the respondents, at this Hearing, is that the claimant comes nowhere near meeting the significantly-higher-degree-of-likelihood-than-simply-more-likely-than-not test. Further, even if the claimant were certain to succeed at a Final Hearing on the question of whether he made protected disclosures, I would still refuse to grant interim relief because I think the **Section 103A** claim is most unlikely to succeed on the question of whether the reason or principal reason for dismissal was that the claimant made those disclosures.

67. On the information available to me, at this Hearing, there is assertion made by the respondents, referenced in paragraph 11 of Mr McGuire's written submissions, and supported by the respondents' witness statements, and document 5 in their Bundle, being Ms Stewart's letter dated 25 January 2022, that the reason for the claimant's dismissal was, in a nutshell, "***wholly related to various performance issues",*** and examples of these are given in Sara Stewart's witness statement, to which I was taken by Mr McGuire in the course of his oral submissions.

68. It will be recalled, from its narration earlier in these Reasons, that at paragraph 14 of his written submissions, Mr McGuire stated as follows:-

> *14. In my submission, it is clear that the Claimant was dismissed because his performance was sub-standard. The poor nature of the Claimant's performance is confirmed in all three witness statements. There is not a 'pretty good chance' that a tribunal would find that the reason (or principal reason) for the Claimant's dismissal was because he made the alleged qualifying disclosures*

69. Having considered the material available to me, I agree with counsel's submission. Looking at Ms Stewart's letter dated 25 January 2022, as placed before me in the Respondents' Bundle as document 5, the following text jumps out of its five pages:

- Page 5/1 : "***The reason for the termination of your employment was wholly related to various performance issues***", and she then goes on to detail three examples of "***Multiple staff members had raised concerns about your work ethic. I raised my own concerns to you before your dismissal."***

- Page 5/3 : "***During my last visit to the garden, I observed that a bare minimum of work had been completed in almost two months of employment. Cowden Castle SCIO is a charity and aside from setting a bad example to others, no one can get away with not fulfilling their duties. I consulted Sarah Reynolds and Rob Grindrod, both managers, to ensure that I hadn't missed something. I also invited them, as managers who worked with you on a daily basis, to contribute , to ensure my reasons portrayed an accurate picture. I chose to dismiss you face to face as a mark of respect, before leaving for London."***

- Page 5/5 : "***In addition, there were ongoing issues re: relations with staff. Certain members of staff felt uncomfortable in your presence. This was not highlighted during the meeting which led to your dismissal as one of those employees was present. However, you did ask at the time whether this was a reason for your dismissal and so must have been aware that there were***

employees who were uncomfortable around you….. Although I mentioned to you that I felt you were overqualified, this was a way of trying to soften the fact that we were terminating your employment and allowing you to leave with some dignity. However, I can assure you that the decision to dismiss was made on he basis of the above performance concerns. I am not aware of you having any health nd safety concerns and can assure you therefore that this played no part in my decision to dismiss you."

70. In relation to the 1st respondent's reason for dismissal of the claimant, on 11 January 2022, I have stopped, taken stock of the material provided to me at this Hearing, and then looked at the inherent probabilities of the two competing possibilities: either that the reason was whistleblowing, as the claimant believes; or that the reason was the claimant's performance issues, as the respondents put forward as being the real reason.

71. Having reflected carefully on these two competing possibilities, the first possibility, namely that it was the claimant's whistleblowing, finds no support in the facts as alleged or in logic, and it is expressly negated by the reasons put forward in Ms Stewart's letter dated 25 January 2022. While, as Mr McGuire conceded, the manner of his dismissal may not have been formal, the reasons advanced are consistent with what is put forward to me in the 3 witness statements provided on the respondents' behalf.

72. True, those witness statements are untested, but it is not expected that at this type of Hearing there will be a full, evidential enquiry – this is very much a summary application to be determined expeditiously, and for me, as the Judge, to do the best I can with such material as is placed before me, and make an assessment of that material.

73. There is no substantial basis for doubting the respondent's material as presented to me at this Hearing; there is nothing odd or that begs a question in what has been presented to me by them. In conclusion, I find that it is not likely that on determining the automatically unfair dismissal complaint to

which the claimant's Interim Relief application relates the Tribunal will find that the reason for the dismissal was the one specified in **Section 103A**. On what is before me, I think the claimant will in all probability lose at any Final Hearing. Accordingly, I have refused his application for Interim Relief, as I do not find it to be well-founded.

Further Procedure

74. As per the Tribunal's correspondence of 25 January 2022, there will be a telephone conference call Case Management Preliminary Hearing held at **11:30 am on Monday, 21 March 2022**, at which an Employment Judge sitting alone, and in private, with decide upon appropriate further procedure and make any necessary case management orders.

75. As I indicated at the close of this Hearing, convention is that the Judge who takes an Interim Relief Hearing does not take any further Hearings : **British Coal Corporation v McGinty [1987] ICR 912, EAT.**

Closing Remarks

76. While to date the claimant has been acting on his own behalf, as he is perfectly entitled to do, I encourage him to seek out independent and objective advice from elsewhere.

77. By way of signposting for him, because as I explained to him, I cannot act as advocate or representative for either party, each of whom should take their own independent advice, I suggest that perhaps the claimant should seek such independent and objective advice, if not representation, from a Citizens Advice Bureau, from a solicitor, or employment law consultant, or maybe a *pro bono* voluntary agency (such as the University or Strathclyde University Law Clinic) providing advice and assistance to individuals bringing Tribunal proceedings.

78. Further, guidance may be available to him from the Citizens Advice Scotland and ACAS websites. He advised me that he is already aware of the guidance and resources available via the whistleblowing charity, **PROTECT**.

79. I specifically signpost the claimant to the Law Clinic. It regularly provides student advisors who represent claimants before this Tribunal, thus addressing an otherwise unmet need for legal advice and assistance. Its website contains much useful guidance for unrepresented parties and I suggest the claimant enquire further : further information is readily available online at https://www.lawclinic.org.uk/employment-law-resources

80. I strongly encourage the claimant to seek out independent and objective advice from elsewhere, in regard to this case, in particular the whistleblowing complaints. The law in this regard is technical, and specialist advice, if not representation, is helpful to both parties and the Tribunal.

Employment Judge: Ian McPherson
Date of Judgment: 10 February 2022
Entered in register: 11 February 2022
and copied to parties