EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113570/2021

Interim Relief Hearing held by CVP in Dundee on 13 January 2022

Employment Judge Cowen

Mrs K Holme	**Claimant** **In person**
Signature Pub Group Ltd	**Respondent** **Represented by** **Ms Walker,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's application for interim relief is refused.

REASONS

Background

1. In this case, the claimant presented a claim to the Employment Tribunal on 2 December 2021, in which she complained that she was automatically unfairly dismissed by the respondent, and was owed both holiday and notice pay.

2. In her claim form, she indicated that she wished to claim interim relief in respect of her claim.

3. The respondent submitted an ET3 on 7 January 2022, resisting the claimant's claims and opposing her application for interim relief.

4. A hearing was listed to take place on 13 January 2022 in order to determine the interim relief application. The claimant appeared on her own behalf, and Ms Walker appeared for the respondent.

The Hearing

5. A bundle of productions was presented by the respondent. This included all the documents which the claimant had provided previously. The claimant's witness statement used page references to her bundle.

Claimant's submissions

6. The claimant made submissions in support of her application for interim relief, in which she set out the nature of her claim and that she was unfairly dismissed by the respondent for the reason, or principal reason, that she had made protected disclosures under section 103A of the Employment Rights Act 1996 (ERA).

7. The claimant identified that her protected disclosure was an email to Nic Wood on 26 November 2021 in which she asserted identified information in accordance with s43B Employment Rights Act 1996, that the respondent had failed to comply with a legal obligation, and/or had concealed their actions by;

- allowing staff to work without the required time off between shifts contrary to the Working Time Regulations ('WTR')
- under 18 year olds were being rostered to work more hours than allowed under the WTR
- that the age of a member of staff had been recorded incorrectly in order to avoid identification of a breach of the WTR

8. The claimant argued that following the making of the protected disclosure

on Friday 26 November 2021, she was called to an unannounced meeting on Monday 29 November 2021 at which she was summarily dismissed. At that meeting the claimant asserted that she was told that the reasons for her dismissal were;

- That her behaviour was appalling
- That she was a provocateur

9. The claimant argued that the reasons set out in the letter of dismissal as "misconduct, harassment and bullying behaviour towards Laura Smith" were different and were not matters which had been discussed prior to her dismissal.

10. She also asserted that the respondent had requested to meet with her to discuss performance issues and she had offered to do so on 30 November 2021. The claimant relied upon an email sent by Iain Fisher to Laura Smith and Nicola Wallace on 23 November 2021 which makes reference to starting to manage behaviour and performance formally. The claimant asserted that this indicates that it was not Iain Fisher's intention on 23 November to dismiss the claimant for her behaviour and therefore her protected disclosure on 26 November 2021 was the principal or sole reason.

11. Finally, the claimant submitted that she was not offered an appeal, but that she contacted Rory Forrest, who had, unknown to her, also participated in discussion of how to word her dismissal letter and was not therefore impartial.

12. The claimant made no submissions with regard to her financial position or the effects of the decision to dismiss her.

Respondent's submissions

13. For the respondent, Ms Walker submitted that the claimant's submissions had clarified that her only protected disclosure was on 26 November 2021. She did not admit on behalf of the respondent that the email would amount to a qualifying disclosure, but her remaining

submissions were made on the assumption that this requirement was met.

14. The respondent submitted that there was a lot going on and that the claimant was causing problems within the respondent business separately from her complaints about the WTR. Ms Walker asserted that it was these behaviours by the claimant which were the reason for her dismissal.

15. The claimant was an administration assistant who worked 10 hours per week. Ms Walker described the claimant's actions as meddling with her manager, Laura Smith's, management of the venue.

16. The respondent submitted that they had responded to the issues raised by the claimant in her earlier correspondence and that those were not qualifying disclosures.

17. With reference to the other issues, Ms Walker referred to two Senior Management Team meetings, in August and September 2021 which referenced the claimant's behaviour and that Laura Smith was asked to address this. Ms Walker described that there was a power struggle between the claimant and Laura Smith, whereby the claimant sent emails to Laura Smith's managers Nic Wood and Iain Fisher to highlight matters which the claimant believed Laura Smith was doing incorrectly. The claimant took it upon herself to suggest ways to manage the respondent's business, including suggesting that the venue be closed one day per week.

18. Ms Walker submitted that it was the claimant's attitude, behaviour and misrepresentation to both the staff and management as to the respondent's reaction to her complaints, which led to her dismissal. She referred to correspondence between the claimant and Iain Fisher in which she said that the staff were unhappy with working long hours, when staff who were subsequently interviewed said that they had no problem with their work pattern. She also referred to a whatsapp message to two supervisors saying that she had raised these issues to Nic Wood who had told her everything was ok. Ms Walker submitted that in fact Nic Wood's letter of 24 November indicated that 'there have been a few occasions where shifts have been longer than we would have liked', but that

Ms Wood was satisfied that no-one had worked above 48 hours since Charlotte Robbie had discussed the matter with Laura Smith.

19. Ms Walker also referred to the witness statements of other staff who indicated they had no problem with their working pattern and that the claimant's behaviour was causing difficulty and was seen by some as toxic and negative.

20. Ms Walker also referred to the fact that the claimant had been employed as an administration assistant to assist Laura Smith as there was a vacancy for a Deputy General Manager. When that post was filled at the end of November 2021, the need for an administrative assistant was removed. She stated that the respondent will argue that the claimant's role would be redundant in any event.

21. Finally, Ms Walker referred to the fact that the claimant had spoken about looking for other work and not being with the respondent company for much longer and believed that to be an indication that the claimant did not wish to continue her employment in any event.

22. Ms Walker then referred the Tribunal to a number of authorities, which I took into consideration in reaching my decision.

The Law

23. Section 128 ERA 1996 provides as follows, so far as is relevant:

> "(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—
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> (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 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 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."

24. Section 129 of the same Act provides as follows:

"(1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—

(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

(i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 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 specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

(2) The tribunal shall announce its findings and explain to both parties (if present)—

(a) what powers the tribunal may exercise on the application, and

(b) in what circumstances it will exercise them.

(3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

(a) to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or

(b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(4) For the purposes of subsection (3)(b) "terms and conditions not less favourable than those which would have been applicable to

him if he had not been dismissed" means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6) If the employer—

(a) states that he is willing to re-engage the employee in another job, and

(b) specifies the terms and conditions on which he is willing to do so,

the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.

(8) If the employee is not willing to accept the job on those terms and conditions—

(a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and

(b) otherwise, the tribunal shall make no order.

(9) If on the hearing of an application for interim relief the employer—

(a) fails to attend before the tribunal, or

(b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3), the tribunal shall make an order for the continuation of the employee's contract of employment."

25. In *Taplin v C. Shippam Ltd* [1978] ICR 1068, the EAT held that the word "likely" in what is now s. 129 ERA 1996 should be interpreted as follows (at p. 1074):

"…we are not persuaded that there is a dichotomy between "probable" and "likely" as expressed by the chairman of the

> industrial tribunal. We find it difficult to envisage something which is likely but improbable or probable but unlikely and we observe that the *Shorter Oxford English Dictionary* definition does define "likely" as "probable." Nor do we think that it is right in a case of this kind to ask whether the applicant has proved his case on a balance of probabilities in the sense that he has established a 51 per cent probability of succeeding in his application, as has at one stage been contended before us. Nor do we find Mr. Hand's alternative suggestion of a real possibility of success to be a satisfactory approach. This again can have different shades of emphasis. It seems to us that the section requires that the employee shall establish more clearly that he is likely to succeed than that phrase is capable of suggesting on one meaning. On the other hand it is clear that the tribunal does not have to be satisfied that the applicant will succeed at the trial. It may be undesirable to find a single synonym for the word "likely" but equally, we think it is wrong to assess the degree of proof which has to be established in terms of a percentage as we have been invited to do.
>
> We think that the right approach is expressed in a colloquial phrase suggested by Mr. White. The industrial tribunal should ask themselves whether the applicant has established that he has a "pretty good" chance of succeeding in the final application to the tribunal."

26. In *London City Airport v Chacko* [2013] IRLR 610, the EAT gave guidance as to the correct approach for an Employment Judge in assessing whether a claim has a "pretty good chance of success", at [23]:

> "In my judgment the correct starting point for this appeal is to fully appreciate the task which faces an employment judge on an application for interim relief. The application falls to be considered on a summary basis. The employment judge must do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The employment judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed

> in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant *is* ultimately likely to succeed in his or her complaint to the employment tribunal but whether 'it appears to the tribunal' in this case the employment judge 'that it is likely'. To put it in my own words, what this requires is an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim."

27. The case of *Ministry of Justice v Sarfraz* [2011] IRLR 562 gives further guidance. The EAT determined that in order to make an order for interim relief in a case involving allegations of automatically unfair dismissal under section 103A of ERA, the Tribunal must decide that it was likely that the Tribunal at the final hearing would find five things: (i) that the claimant had made a disclosure to his employer; (ii) that he believed that that disclosure tended to show one or more of the things itemised at (a) to (f) in section 43B(1) of ERA; (iii) that the belief was reasonable; (iv) that the disclosure was made in good faith (which requirement is no longer in place following the amendment of this provision); and (v) that the disclosure was the principal reason for his dismissal. In that regard, the EAT said, the word "likely" does not mean "more likely than not" (that is, at least 51% probability), but connotes a significantly higher degree of likelihood.

28. The requirement that the disclosure be made in good faith has now been removed and replaced by the requirement that the claimant reasonably believed that it was made in the public interest.

Decision

29. This is an application for interim relief under section 128 to 132 of ERA. The claimant asserts that she was automatically unfairly dismissed by the respondent on 29 November 2021 on the basis that she had made a protected disclosure to them.

30. The reason for dismissal is therefore the critical issue in this part of the case.

31. For the purposes of an interim relief application the Tribunal is required to make a decision as to the likelihood of the claimant's success at a final hearing based on the material before it in this hearing (section 129(1) of ERA).

32. The correct test is set out in the case of *Taplin v C Shippam Ltd* 1978 ICR 1068. The EAT made it clear, in that case, that the burden of proof is greater upon the claimant in an interim relief hearing than in a full hearing, and the question to be addressed by the Tribunal is whether the claimant has a "pretty good chance of success".

33. I have reminded myself that this is not a case in which I am asked to make an assessment of whether or not the claimant has reasonable prospect of success, as would be required in a strike out application, but where I requireto determine whether the high test of 'likelihood' envisaged in section 129 has been met. This high bar is there because there is a risk that a respondent could be irretrievably prejudiced if required to treat the contract as continuing until the conclusion of the hearing.

34. In my judgment, the test is not met, in this case.

35. I have reached this conclusion for the following reasons;

36. I have considered whether the claimant's chances of proving that her email on 26 November 2021 amounts to a qualifying disclosure are 'pretty good'. The claimant's email does refer to the working hours of others and of staff aged under 18 years. She specifically identifies the Working Time Regulations. She also refers to the fact that one of the staff's birthdays is incorrectly recorded on the system thus avoiding any warning.

37. Whilst I cannot be certain that the claimant will succeed, as it is not clear whether the birthday was deliberately wrongly entered, I accept that the claimant does have a significant chance of success and therefore accept for the purposes of this application only, that the claimant has a pretty good chance of successfully showing that she made a protected

disclosure within the requirements of s.43B ERA.

38. However, as I have indicated, the reason for dismissal is fundamental to the claimant's claim. There is a dispute as to the principal reason for dismissal. The claimant is convinced that she was dismissed because she made a protected disclosure. She points to the fact that prior to her disclosure the respondent was talking in terms of a continuing working relationship. Immediately after her disclosure that changed to summary dismissal. She also pointed to discussion within the respondent as to how to word her dismissal letter which she asserted amounts to trying to find lawful reasons after the fact.

39. On the other hand, the respondent points to the behaviour of the claimant on a number of occasions, being critical of her manager, misrepresenting communications between managers and staff and the claimant's misplaced view that she is representing the interests and views of her colleagues. They say that the claimant had less than two years of continuous employment and therefore they chose not to follow a full procedure. The respondent has said that whilst the dismissing manager was aware of the disclosure, it was not the principal reason for her dismissal.

40. It is not possible for me to reach any firm conclusion based on the evidence which has been shown to me today, that the claimant has a pretty good chance of success in proving the reason for her dismissal was the protected disclosure. This fundamental issue is in dispute and I have seen no evidence from Iain Fisher. A Tribunal will have to consider his evidence as well as that of the claimant before they can take a view on what was the principal reason for the dismissal in the mind of Iain Fisher.

41. In these circumstances, I am unable to find that the claimant's application for interim relief should be granted.

42. I would like to clarify that the claimant has lost nothing in terms of her right to advance her claim before the Tribunal and to proceed to a final hearing. The test for interim relief is a high one and has not been met on

this occasion.

43. Accordingly, the claimant's application for interim relief is refused.

Employment Judge:	**S Cowen**
Date of Judgment:	**30 March 2022**
Date sent to parties:	**31 March 2022**