EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr K Sawrey	v	Cosworth Ltd

Heard at: Watford (in public; by video) **On:** 23 February 2023

Before: Employment Judge Quill (sitting alone)

Appearances:
For the Claimant: In person
For the Respondents: Mr M Plgerstorfer KC

.

JUDGMENT

1. The application for interim relief is refused.

2. The Claimant concedes that he was not dismissed on 2 February 2023

3. I allow the section 103A claim to continue on the basis of an allegation that the reason for the dismissal on 16 February 2023 (or, if more than one, the principal reason) was that the Claimant made a protected disclosure

4. I make no other decision on possible amendment of the claim.

5. I allow the Respondent until 23 March 2023 to file an amended response.

6. There will be a private hearing for case management purposes, held by telephone, on 24 May 2023 at 10am.

REASONS

Introduction

1. The Claimant made an application for interim relief based on an allegation that the claimant's dismissal was contrary to s.103A of the Employment Rights Act.

2. I gave my decision and the reasons orally, and written reasons were requested. These are they.

The hearing and the evidence

3. I had the documents in the tribunal file, and documents attached to emails which the parties had sent in (the details of which I read out to the parties).

4. In addition, I had a bundle of 230 pages (including index) from the Respondent, and a skeleton argument and authorities bundle.

5. The Respondent had also provided some signed witness statements, though no evidence on oath was taken.

6. The hearing was conducted entirely remotely by video. For several minutes at the outset, there were some technical difficulties. However, they resolved themselves, and throughout the remainder of the hearing myself, the Claimant and the Respondent's representative could all hear each other easily.

7. During the hearing, I discussed the Claimant's position with him and sought clarification from him, and he made his submissions in support of his application.

The law

8. The statutory test which I must apply is the one that is set out in s.129(1) of the Employment Rights Act 1996.

> (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.

9. In other words I must decide if it appears to me that it is likely that on determining the complaints to which the application relates the tribunal will find that the reason, (or - if more than one - the principal reason), for the dismissal is one of those specified in sub-paragraph 1(a). That includes s.103A of the Employment Rights Act 1996, which is the only such reason relevant to this application.

> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

10. S.103A of the Employment Rights Act refers to the fact that an employee who is dismissed shall be regarded for the purposes of Part X as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure.

11. When making a decision on an interim relief application, I do not make any formal findings of fact which are intended to be binding at any later stage of the proceedings. I am assessing - amongst other things - the likelihood of disputed facts being proved in the claimant's favour at the final hearing. There is only limited material available to a judge making a decision on an interim relief application but my decision has to be based on whatever material is available to me.

12. When considering the likelihood of the claimant ultimately succeeding on the application the correct test to be applied is whether the claimant has a "pretty good chance" of success at the full hearing. This is the test first set out in Taplin v C Shipham Ltd [1978] ICR 1068. As numerous appellate decisions have stated (for example Ministry of Justice v Sarfraz [2011] IRLR 562 and Wollenberg Global Gaming Ventures (Leeds) Ltd [2018] 4 WLUK 14; the latter of which is as recent as 2018), the test that was set out in 1978 in Taplin remains the appropriate one. The test does not simply mean "more likely than not"; it denotes in a significantly higher degree of likelihood.

13. For the claimant to succeed in his interim relief application, it is necessary for him to show that there is a pretty good chance of succeeding on each required element of the s.103A claim. In other words that he has to show there is a pretty good chance that the final tribunal will decide that there actually was a protected disclosure, as well as showing that there is a pretty good chance that the disclosure, if any, was the principal reason for his dismissal.

14. There are three requirements that need to be satisfied and for the definition of protected disclosure in s.43A of the Employment Rights Act to be met. There needs to be a disclosure within the meaning of the Act; that disclosure has to be a qualifying disclosure; and it must be made by the worker in a manner that is set out at sections 43C through to 43H.

15. The disclosure must contain information and there must be sufficient information in the disclosure if it is to qualify under s.43B(1).

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
> (e) that the environment has been, is being or is likely to be damaged, or
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

16. In terms of whether the employee thought that the disclosed information tended to show one of those things, the employee's actual subjective belief must be analysed

by the tribunal both to decide what, in fact, the employee did believe and also to decide if the subjective belief was reasonable.

17. In relation to the public interest part of the criteria, as per Chesterton Global Ltd v Nurmohamed [2017] I.R.L.R. 837, the question for the tribunal is whether the worker believed - at the time he was making it - that the disclosure was in the public interest and whether that belief was reasonable. While the worker must have a genuine and reasonable belief that the disclosure of the information is in the public interest, this does not have to be the worker's motivation for making the disclosure.

18. If the claimant is unable to show that he has a pretty good chance of showing that the disclosure was made in accordance with any of s.43C through to s.43H then interim relief should not be granted. (Although, for the purposes of this application, the Respondent did not seek to dispute this part of the requirement.)

19. It is for the Respondent to prove what its reason was for dismissing the employee. However, if the final tribunal decides that the reason or the principal reason for the claimant's dismissal was something other than a protected disclosure then the claim for breach of s.103A fails even if the dismissal was for a reason that is different to the one put forward by the employer see for example Kuzel v Roche Products Ltd [2008] ICR 799.

20. Evidence that the employer has acted in a high handed or unreasonable or peremptory fashion or has deliberately turned a blind eye to evidence that the employee was not guilty of wrongdoing are not necessarily sufficient. Their only relevance would be if they supported an inference that the employer's purported reason was not the true reason for the dismissal. As per the well-known case of Abernethy v Mott, Hay, Anderson, the reason for the dismissal of an employee is the set of facts known to the employer or the set of beliefs held by the employer which caused the employer to dismiss the employee. That is subject - in protected disclosure cases - to the Supreme Court decision in Royal Mail Group Ltd v Jhuti [2019] UKSC 55; where the real reason for the dismissal is hidden from the decision maker behind an invented reason, it is the tribunal's duty to look behind the invented reason. If an investigator or senior manager wants to get rid of the employee and they trick or deceive the dismissing officer into deciding that the employee had committed misconduct, then the reason which the investigator or the senior manager had for wanting to get rid of the employee can potentially be attributed to the employer as the dismissal reason for s.103A.

21. Barley and Others v Amey Roadstone Corporation Ltd EAT 472/76 *i*s authority for proposition that a claim which includes a claim for interim relief can be amended before a decision on the interim relief application is made, and even where the application to amend is after the 7 day deadline for presentation of the claim imposed by (what is now) section 128 of the Employment Rights Act 1996.

22. Section 128(2) reads:

> (2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).

23. Thus the section does not prohibit an interim relief application which is made prior to the effective date of termination.

24. When a judge has to consider a request for an amendment, whether made by a claimant or a respondent, it is a matter to which judicial discretion applies. The judge must take into account all relevant factors and ignore all irrelevant factors.

25. The ultimate test that the judge must perform is to decide whether the balance of injustice and hardship is in favour of allowing the amendment or of refusing it. Allowing an amendment for a claimant will almost certainly have at least some degree of injustice and hardship to the respondent. Whereas refusing to allow an amendment to the claim is almost certainly going to have some degree of injustice and hardship to the claimant.

26. So looking at all the relevant facts and circumstances is necessary before weighing up the relative injustice and hardship and making the appropriate decision.

27. Selkent Bus Company Ltd v Moore EAT/151/96 set out some of the matters which a judge should take into account. As was emphasised in Vaughan v Modality UKEAT/0147/20/BA, Selkent must always be considered, but Selkent did not purport to set down a mere checklist that would supply the judge with the outcome, and nor did it contain an exhaustive list of the factors that might be relevant.

28. As per Selkent, it is always important for the judge to consider the nature of the amendment application, time limit issues and the manner of the application and the timing and manner of the application itself. However, it is important to bear in mind that doing so is merely part of the overall process. Furthermore, the relative importance of those factors to the overall decision will vary depending on the actual circumstances

The parties' submissions and my analysis of the alleged disclosures

29. In this case, the Claimant presented a claim on 8 February 2023.

30. This followed Early Conciliation Certificate issued on 7 February 2023.

31. The claim sought interim relief, citing the appropriate legislation in Box 8.1 and assertion that there was an unfair dismissal contrary to 103A. The dismissal date was alleged to be 2 February 2023.

32. Pausing there, it was clear from the comments made to me orally today, and the documents supplied, that – for the assertion of dismissal by the Respondent on 2 February 2023 - the Claimant was relying on one word in a letter emailed to him on that date, which the Respondent said was a typo. The letter as a whole stated he was being given a final written warning and should report the following day for work. Further, in email exchanges the same day, the Respondent told the Claimant it was a typo and sent him a revised letter with that word removed,

changing the time frame stated for appeal from "within five working days of receiving this notice of dismissal" to "within five working days of receiving this notice of the outcome".

33. The Claimant mentioned in correspondence to the Respondent (both before and after 2 February 2023) that it construed some of their treatment of him as being (amongst other things) attempts to make him resign. He told me that he did not resign.

34. Going back to the procedure, the original claim form was accepted and a hearing for interim relief ordered.

35. In the meantime, the Claimant had submitted further documents. The tribunal file does not confirm the date, but I have no reason to doubt the Claimant's comments that it was done on 9 February. These documents were another claim form (ET1) with more information, as well as several attachments. In totality, the 9 February documents referred to more alleged protected disclosures than the 8 February claim form (the one that had been accepted); though there might be room for debate about whether the 9 February items alleged that the detriments and dismissal were because of those other alleged protected disclosures.

36. A notice of hearing dated 15 February 2023 was sent to parties.

37. It was the Respondent's case throughout this hearing that, at the time notice of hearing was sent, the Claimant was still employed. During the hearing today, the Respondent submitted that the Claimant was dismissed, but not until 16 February 2023. Further, its case was that the dismissal decision was taken by Ms Parjapati. Group Marketing Manager, and for the reasons stated in her letter.

38. So not – according to the Respondent - a dismissal by Darren Cargill, Supply Chain Manager, who was the author of the 2 February letter.

39. During the hearing today, the Claimant conceded that he had not been dismissed on 2 February, and sought permission to amend his claim to rely instead on a dismissal by the letter of 16 February. That was 7 days ago.

40. The Respondent asserts that the dismissal was for unauthorised absence. The dismissal letter referred to, and took account of, the final written warning. The final written warning stated that the Claimant had been on unauthorised absence since 12 January and his pay had stopped since then. It instructed him to report for work the following day 3 February, which the Claimant had not done. [On the Claimant's case, his pay had stopped with effect from 3 January, rather than 12 January.]

41. In the contemporaneous correspondence, the Claimant asserted that he regarded the 2 February letter as a termination letter. He said that – amongst other occasions – in response to the letter inviting him to the disciplinary hearing on 13

February (which, on the Respondent's case, took place in his absence, and led to the 16 February 2023 dismissal).

42. In the hearing today, the Claimant argues that the dismissal is because of protected disclosure. Part of that argument is that he says that even if his absence was the reason for the dismissal (which he does not necessarily concede), the reasons for his absence include (a) that the Respondent has not addressed the issues that he has raised and (b) the workplace is not safe, partly because of failure to address the issues that he has raised.

43. In today's hearing, the Claimant has referred to four alleged protected disclosures, which he has labelled (a) to (d). It seems to me that (b) to (d) are clearly set out in the claim form, but (a) less so. For today's purposes, I have proceeded on the assumption that no amendment application for item (a) is required, and I have heard submissions about it in any event.

a. On 15/08/2022 a conversation with Jaspal Roopra, in which the Claimant alleges he pointed out that the Respondent was storing unlocked waste barrels, containing hazardous materials including waste from the plasma machines, in an unsheltered, outdoors location. He claims to have asserted it was a Health and Safety Risk and to have pointed out the hazard warnings on the containers.

b. On 17/08/2022, he contacted Catherine O'Connor by email and told her he wished to be considered a whistle-blower due to the Respondent exposing the workforce as well as the local population and environment to harmful substances. This included the alleged dumping of plasma machine waste (believed to carry Chromium IV) in and around the embankment of the River Nene as well as the perimeter of the Respondent's premises. He says he believed this was Environmental Damage and a Health and Safety Risk.

c. On 30/08/2022, email to Nick Greenway stating that Catherine O'Connor had falsified a document in the Claimant's name during the minutes from their meeting held 23/08/2022. (He referred to Miscarriage of Justice)

d. On 03/10/2022, email to Bruce Wood stating that Nick Greenway had withheld test results pertaining to the protected disclosures as well as details of log entries concerning the date of exposure to the hazardous substances, which also formed part of the Claimant's grievance. He says he also believed the Respondent had disregarded the integrity of their test results by using data from locations not relevant to the protected disclosure, and not taking samples from the areas concerned, and believed this to be both a Cover Up and Failure to Comply with a Legal Obligation.

44. Three of the four alleged protected disclosures are said to be in writing. Of those three, I only have two, and so will deal with those first.

45. Disclosure Item b was sent 17 August 2022 14:47. The Claimant has a pretty good chance of demonstrating that it was a qualifying disclosure under paragraphs

43B(1)(b) and/or (d) and/or (e). Even though some of the bullet points might be too general to qualify in their own right (ie they simply state that the Respondent is breaching an obligation, as opposed to mentioning any factual assertions of what the Respondent has done that breaches the obligation in question), However, some of the comments made do contain sufficient specific information. For example:

a. The final bullet point reads: "Failure to contain substances known to contain carcinogens regulated under COSHH regulations within the business premesis, likely causing pollution to environment in the surrounding area to the company. Visible pollution found in small particle outside business premesis within close proximity to a major water body (river Nene)"

b. And, towards the end of the email, there is a passage which reads: "On Friday 5/08/2022 during working on the plasma lining equipment I was exposed to large quantities of the said carcinogens covered above, the substance covering my clothing, skin in various areas and face. During working underneath an area of the equipment which is not regularly serviced dust was disturbed. During the afternoon and following evening I developed an extremely sore skin, nose and throat, which I believe lead to a severe case of acute sinusitis"

46. Disclosure item d was an email sent 3 October 2022 at 02:23. The email alleges "covering tracks and trying to avoid liability" in relation to the specific matters the Claimant has raised. Although less clear cut than item b, the Claimant has a pretty good chance of showing that this is specific enough as tending to show that the disclosure qualifies under Section 43B(1)(f).

47. It is harder to make a decision re Disclosure item c as have not seen the email in question. In this interim relief hearing, the Claimant alleges that he has said, in email on 30 August to Mr Greenway, that Ms OConnor deliberately sought to cover up the fact that he (the claimant) was not wearing a mask on a particular occasion by falsifying a document to say that he had been. This is a matter he has referred to elsewhere (in general terms); for example, the email to Mr Greenway on 5 September 2022 at 01:36. The Claimant has a pretty good chance of showing that the contents of the written disclosure, as described to me orally, were specific enough as tending to show that the disclosure qualifies under Section 43B(1)(f).

48. For Disclosure item a, there is a pretty good chance of the Claimant being able to persuade the Tribunal that he did inform Mr Joopra on 15 August, of issues which were said to be breaches of legal obligation, and/or endangering health or safety, and/or risked likely damage the environment. Amongst other things, he suggests that he pointed out – orally and by gesture – that there were dangerous chemicals which were not properly being stored, and risked becoming airborne and/or polluting the river. He claims to have pointed out that they were potentially carcinogenic. Although the alleged disclosure(s) were oral, and it may come down to one person's word against another if there is a dispute over a sufficiently relevant aspect of the conversation, the Claimant sent his email of 17 August (item b) two days later. The Claimant has a pretty good chance of showing that the contents of what he communicated to Mr Joopra were as he has alleged, and that there was

sufficient information to be a qualifying disclosure under paragraphs 43B(1)(b) and/or (d) and/or (e).

49. The Claimant has a pretty good chance of showing that these were communications which he believed did tend to show breaches of legal obligations, and/or that health or safety was endangered and/or that the environment was likely to be damaged and, in some cases (items c and D) that relevant information was being concealed, or was likely to be concealed.

50. The Claimant has a pretty good chance of showing that these were disclosures which he believed were in the public interest and that such a belief was reasonable.

51. I do not, of course, make any binding decisions today that these actually were (or were not) protected disclosures. However, overall, the Claimant has a pretty good chance of showing that one, some or all of these four items were protected disclosures. Item b seems to be the strongest. Since all four are interconnected ("a" being raising matters orally; "b" being raising a grievance which referred back to "a"; "c" and "d" being complaints about things done or not done during the grievance process arising from "a" / "b") it may not matter if he does not succeed on all four items, so long as he succeeds on at least one.

Amendment

52. The timing of the proposed amendment is that it was made shortly before 1pm in the hearing. After a preliminary discussion at 10am, then my pre-reading, the submissions had got underway at 11.15am. The Claimant had gone first, and then Mr Pilgerstorfer KC (who had also provided a written skeleton, which the Claimant had received, and which I had read) made his submissions on the Respondent's behalf. The Claimant then responded. During his initial submissions, the Claimant had been adamant that the letter of 2 February 2023 was a dismissal (and that he was neither relying on any other communication from the Respondent as being a dismissal, nor claiming to have resigned). It was in his response to the Respondent's submissions that he made clear that he would like to concede that he had not been dismissed on 2 February (or any other date prior to 16 February 2023) and would instead like to make an application to amend, to allege that the dismissal was indeed on 16 February 2023 (as the Respondent had asserted) and that this dismissal was unfair because of section 103A of the Employment Rights Act 1996. He also wished to amend his interim relief application on the same basis.

53. We broke for lunch, and I heard the Respondent's objections at 2pm.

54. I had made clear at 10am that the Claimant's 9 February documents did not (at present) form part of the claim and that the Claimant would have to make an application to amend if he wanted those added. There was no such application from the Claimant, and (therefore) no response to such an application from the Respondent.

55. Thus the application was made orally. However, I was satisfied that it was simple enough that it could be dealt with on that basis and a written application was not required. If granted permission to amend, I would not be giving carte blanche to the Claimant to submit a written amendment at a later date; I would simply be converting the section 103A claim to be that (i) the event which terminated his employment was the letter of 16 February 2023 from the Respondent, signed by Ms Prajapati (the Respondent's bundle pages 221 to 223); (ii) the effective date of termination was therefore 16 February 2023 (or later) and not before; (iii) that dismissal (as opposed to the one previously alleged to have occurred on 2 February 2023) was by reason of the protected disclosures mentioned above.

56. The timing of the application was such that it caused significant disadvantage to the Respondent in relation to the interim relief hearing because (i) a different person alleged to be the decision-maker and (ii) the events of 3 February to 16 February would potentially be relevant to the claim and the Respondent's defence. By making the application so late (in the sense that it was just before I would have otherwise started deliberating on the interim relief application), the Respondent had little, if any, opportunity to take detailed instructions. (Just the lunch break). The disadvantage caused by Ms Prajapati rather than Mr Cargill being the decision-maker has to analysed taking into account that that was the Respondent's case anyway, regardless of the Claimant's application to amend. However, had the Claimant made his application earlier, then there would have been no need for the Respondent to focus on why sections 111(2)(a) and 111(3) of the Employment Rights Act 1996 should lead to the conclusion that his claim did not have a pretty good chance of success, and they could, instead, have spent more time on addressing why (in the Respondent's opinion) the interim relief application should be dismissed based on the events of 3 February to 16 February and the contents of the letter [which (as a result of the Claimant's late concession) was the dismissal letter], and the 13 February hearing which is alleged to have preceded that letter.

57. The timing of the application to amend was such that it would not cause significant disadvantage to the Respondent in terms of the litigation as a whole. The detriment complaints were (a) not affected by the application and (b) not relevant to the interim relief hearing. A detriment claim is mentioned in the claim form and (subject to any future case management decisions which may need to address whether such a claim is actually described in sufficient detail to go forward) would still survive today's hearing in any event, given that the claim form was presented with an appropriate Early Conciliation Certificate number included. Further, even if, as a result of the Claimant's concession that he had not been dismissed (or given notice) at the time the claim form was presented, the unfair dismissal claim had been struck out entirely by me today (as opposed to my simply making a decision on interim relief), the Claimant would have the opportunity to seek to present a new unfair dismissal claim by way of presenting a new claim form. He would also have been in time (provided he did it today, 23 February 2023) to make a fresh application for interim relief. Thus, in terms of the future progress of the litigation after today, granting the amendment application was not likely to mean that extra documents or extra witnesses would be required for the final hearing (at least on the assumption that refusing the amendment application would simply

lead to the Claimant's presenting a new claim form, which was an option available to him according to the Respondent's objections to the amendment application).

58. Overall, I decided that the balance of injustice and hardship was in favour of granting the amendment to the existing claim and dealing with the interim relief application today. It would not be beneficial to either side, or in accordance with the over-riding objective, for the Claimant to simply present a new claim form, and new interim relief application, later today, and have a further hearing in due course.

Interim Relief Decision

59. The Claimant does not have a pretty good chance of showing that his disclosures were the reason for his dismissal.

60. At the final hearing, there will likely be – broadly speaking - two competing theories

    a. The Respondent's case will be that the dismissal reason was his absence and/or the fact that his absence was unauthorised and/or that the Claimant had refused, and was continuing to refuse, to attend work

    b. The Claimant's case will be that either Ms Prajapati dismissed him because she was personally motivated to exit him from the company because of the protected disclosures. AND/OR the Claimant's case can be that another employee either tricked Ms Prajapati into dismissing the Claimant (by deceiving her into thinking that the true facts were different to what they actually were) or else instructed her to dismiss the Claimant, and in either case, that that other person (presumably a senior employee, or group of senior employees) did so because of the protected disclosures.

61. The Claimant has mentioned the theory that if he was dismissed because of his absence, then he will be able to persuade the tribunal that his absence was justifiable because of the concerns he had raised (and/or that the workplace was not safe). However, that is not a theory which points to a pretty good chance of a claim under s103A succeeding.

62. It is not impossible that the Claimant will succeed at a final hearing. However, the test for me today is not that his application fails only if he has little reasonable prospects. Nor is the test that the application succeeds if he has at least 51% chance of success at the final hearing; the bar is much higher than that.

63. There is nothing inherently implausible or suspicious about dismissing an employee who has repeatedly refused to attend work. There is not information before me that would help me to decide that, had the Claimant continued to attend work, he would have been dismissed anyway (for some other purported reason).

64. There is, however, contemporaneous documentation which, on its face, gave the Claimant warning about the possible consequences of failing to attend work. On the Claimant's own case, the Respondent had ceased paying him, and he was

aware that – whether he agreed or not – the Respondent was treating the absence as being unauthorised and misconduct.

65. The Claimant mentioned orally that he had communicated with HSE and the Environment Agency. Such communications are not alleged to be protected disclosures in the 8 February 2023 claim form (and indeed, they are not mentioned at all in that document). However, the Claimant's position is that the Respondent is fully aware that he has done so, and that is a subject which has been discussed between him and the Respondent, including on 2 February 2023. Even taking account of the implication that the Claimant's case will be that the Respondent had become motivated (or more highly motivated) to dismiss the Claimant because of alleged disclosures "a" and/or "b" and/or "c" and/or "d" once it discovered that the Claimant had also contacted outside agencies (about the same subject matter), the Claimant has not persuaded me that there is a pretty good chance of the Respondent's purported dismissal reason being rejected by the tribunal which hears the case.

66. The test under section 103A is not whether the employer acted reasonably; in other words, the test is not that set out in section 98 for dismissals where the employee had two years service. Furthermore, the test under section 103A is not whether any of the other so-called "automatic unfair dismissal" sections in Part X might be applicable. The test is specifically whether or not the dismissal reason was that the Claimant had made one or more protected disclosures.

67. My judgment is that the Claimant does not have a pretty good chance of being successful in that argument at the final hearing, and the interim relief application fails.

Case Management

68. Having given my reasons, and having made clear that I was making no decision one way or the other on whether the Claimant had permission for the claim to be amended so that the Claimant's documents sent to the Tribunal on 9 February (or any of them) should be treated as part of the claim, I asked the Claimant if he intended to make an application to amend his claim based on those documents. He said that he did not.

69. On that basis, I informed the parties that the claim as it stands is therefore that contained in the 8 February claim form "ET1", which was a standalone document, which had no accompanying documents when it was presented. That form can be identified because it has "date received: 08/02/2023" in top right corner, and has paragraphs numbered 1 to 12 in Box 8.2, and items b, c, d listed in Box 15, with Box 15 being a single page which ends

> "… *I believed this to be both a Cover Up and Failure to Comply with a Legal Obligation.*
> *Please be aware I require additional room to provide this info."*

70. So the other ET1 form (which has “date received” blank, paragraphs 1 to 15 in Box 8.2, with that paragraph numbering continuing over 3 pages of Box 15, up to paragraph 34) is not part of the claim, and nor are the other items, such as those described as “Particulars of Claim”, “Incident History” (3 pages of bullet points) or the spreadsheet referring to income.

71. The only amendment to the 8 February claim form is that the claim now proceeds as a s103A claim relying on dismissal date 16 February 2023. The Respondent has permission to file an amended response by 22 March 2023 to deal with the clarified and amended claim. (The Respondent’s existing document had assumed that all of the documents forwarded to it formed part of the claim.)

72. There will be a case management hearing on 24 May 2023 (at 10am by telephone) which will make appropriate orders for the conduct of the litigation, and identifying the details of the detriment claim which is mentioned in the claim form, but which is not necessarily clearly particularised.

_____

Employment Judge Quill

Dated: 24 February 2023

Sent to the parties on:

2/3/2023

For the Tribunal: NG