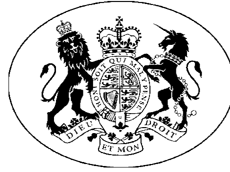

EMPLOYMENT TRIBUNALS

Claimant: Ms S Messi

Respondent: Precise Media Monitoring Limited (T/A Onclusive)

Heard at: **London Central (remotely by CVP)**
On: 21 February 2023

Before: Employment Judge Heath

Representation
Claimant: In person
Respondent: Mr P Howarth (Solicitor)

JUDGMENT

The claimant's application for interim relief under section 128 Employment Rights Act 1996 fails and is dismissed.

REASONS

Introduction and background

1. The claimant makes an application for interim relief pending the determination of her complaint of automatically unfair dismissal under section 103A Employment Rights Act 1996 ("ERA").

2. She started the ACAS Early Conciliation process on 23 December 2022 and received a certificate on 11 January 2023. Also on 11 January 2023 the claimant presented a complaint to the tribunal (2200243/2023) alleging discrimination on grounds of race, disability and sex, and claiming arrears of pay and other payments. She said she also had claims of whistleblowing by raising concerns of discrimination, harassment and equal pay to the Equality and Human Rights Commission ("EHRC") and Information Commissioner's Office ("ICO"). She ticked the relevant box to indicate that her employment was continuing.

3. On 20 January 2023 the claimant presented another complaint to the tribunal (2200391/2023) in which she made a complaint of unfair dismissal and made an application for interim relief. She ticked the relevant box

suggesting her employment was continuing, however, she also ticked the box saying she had been unfairly dismissed. Her claims are set out fairly briefly at section 8 of her ET1. She said she made "*protected disclosure in good faith, in the public interest raising concerns of wrongdoing, employer breaking the law, criminal offence, fraud, covering their wrongdoing, miscarriage of justice, and as a result my employment was terminated and all access disabled with no policies followed as per ACAS code of conduct on grievance and disciplinary*".

Procedure

4. The respondent provided a bundle of 175 pages which included both respondent's and claimant's documents. Before the hearing the claimant sent a number of emails to the tribunal attaching further documents which she said were relevant, and which she alleged the respondent had deliberately omitted from the bundle.

5. At the start of the hearing, I clarified with the parties which documents were being relied on, and the claimant confirmed that, in addition to the bundle, she relied on:

    a. An email exchange with a Ms McDermott on 26 July 2022 about salary;

    b. An email to the respondent dated 26 January 2023 about pension enrolment;

    c. An offer letter dated 15 July 2022 (similar to page 65 of the bundle but bearing a different date);

    d. An email from a Ms Melly;

    e. Emails and messages from a Mr Smeeke;

    f. An email dated 27 January 2023 to Ms Parmar (HR) about tax issues;

    g. An appeal decision dated 9 February 2023 (actually in the bundle at page 130).

6. Both parties and the tribunal had copies of the above documents.

7. The claimant also told me that she wanted to play recordings of covertly recorded telephone calls, audio files of which she had sent to various recipients on 20 January 2023 (see below). She also had covertly recorded conversations of her informal chat with an HR professional employed by the respondent which, she said, did not correspond with the notes of the meeting (I assume at page 88-92 of the bundle). The claimant said that there were seven audio files of around 10 minutes each.

8. Mr Howarth did not dispute that the claimant had made recordings, and pointed out that sending the files had formed the subject matter of

disciplinary proceedings against the claimant. The recordings were sent to various people on 20 January 2023, the day of the suspension which the claimant asserts was a dismissal and the day she made her claim for interim relief, and he could not see how the content of the recordings could be relevant. He also pointed to the issue of proportionality. At least 70 minutes of audio recordings would take up a disproportionate amount of the hearing. He pointed out that the focus of the hearing was the likelihood of the tribunal determining at a final hearing that the claimant had been dismissed for having made protected disclosures, and that there was nothing to suggest that the contents of the files would be relevant to that issue.

9. I did not allow the files to be played at the hearing. The claimant had placed a substantial amount of written material before the tribunal concerning what she said amounted to protected disclosures and about the alleged dismissal on 20 January 2023. I also note that she engaged in substantial correspondence with the tribunal before the hearing in which she flagged up material that was not in the bundle which she said needed to be considered by the hearing. There was no reference in that correspondence to the contents of the recordings as being relevant (at least none that was brought to my attention). The first time she indicated that she wished to play the recordings was at the hearing itself. Setting up provision to play the files and then playing over an hour's material was a disproportionate amount of time to devote to material which the claimant was unable to show was relevant or necessary to dispose of the issues.

10. However, I made it clear to the claimant that if it appeared to me during the course of the hearing that the recordings ought to be to be played, I would reconsider my decision. Nothing that arose during the course of the hearing persuaded me that a reconsideration of my decision was necessary, and the recordings were not played.

11. During the course of the hearing the claimant emailed further documents to the tribunal which reached me after the parties had finished their submissions. These included a copy of the respondent's disciplinary procedure.

12. The claimant made oral submissions and drew various documents to my attention. Mr Howarth made submissions and also drew my attention to certain documents. The claimant replied to Mr Howarth's submissions. I took time to deliberate, and gave the parties an oral decision after lunch. The claimant requested written reasons.

The law

Interim relief

13. The relevant provisions of the ERA are as follows:

> ***Section 128(1****)* *An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—*

> *(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—*
>
> *(i) … 103A…*
>
> *may apply to the tribunal for interim relief.*
>
> *(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).*

14. Section 129 provides:

> *(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 … 103A*

15. Section 129 goes on to set out the consequences it appearing to the tribunal that it is likely that the tribunal on determining the complaint finding that the dismissal was automatically unfair (amongst other things not relevant to the current application).

16. The meaning of the word "likely" in section 129(1) ERA has been considered in number of authorities. In *Taplin v CC Shippam Ltd* [1978] ICR 1068 the EAT set out that it meant a "*higher degree of certainty in the mind of the tribunal than that of showing that he just had a "reasonable" prospect of success*". It went on to suggest that the 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*".

17. In *Ministry of Justice v Sarfraz* [2011] IRLR 562 the EAT stated "*In this context "likely" does not mean simply "more likely than not" – that is at least 51% - but connotes a significantly higher degree of likelihood*".

18. The likely to succeed test applies to all elements of the claim (*Hancock v Ter-Berg* UKEAT/0138/19). In a claim of automatic unfair dismissal under section 103A ERA, this means satisfying the test in respect of all the elements relating to protected disclosures in part IVA ERA.

19. The tribunal is to carry out an "expeditious summary assessment" of the material put before it, doing as best it can with the untested evidence advanced by each party. This will necessarily entail a less detailed scrutiny than would happen at final hearing. My task is to assess how the

matter appears to me, and Rule 95 Employment Tribunals Rules of Procedure 2013 states that the tribunal shall not hear oral evidence unless it directs otherwise. I am also to avoid making findings of fact that could cause difficulty to a tribunal hearing the final hearing of this matter (*Raja v Secretary of State for Justice* UKEAT/0364, *Dandpat v The University of Bath* UKEAT/0408/09/LA and *London City Airport v Chacko* [2013] IRLR 610, *Al Qasimi v Robinson* EAT/0283/17).

Automatic unfair dismissal

20. Section 43A ERA provides that "*In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H*".

21. Section 43B ERA provides:

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

22. In *Chesterton v Nurmohamed* [2017] IRL 837 the Court of Appeal set out factors to be considered by a tribunal in deciding whether a disclosure was made in the public interest. They are the numbers whose interests the disclosure serve; the nature of the interests affects; the nature of wrongdoing disclosed; the identity of the alleged wrongdoer. Where a disclosure raises questions of a personal character, the question of whether it is reasonable to regard it as being in the public interest is to be answered by considering all of the circumstances of the case.

23. Section 103A ERA provides that "*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".

The application

The claimant's case

24. The claimant's case is that she was dismissed on 20 January 2023. Her case is that the respondent purported to suspend her, but in actual fact dismissed her, as all access to IT and email was disabled and access to the building and other systems were denied. Her claim is that she was dismissed because she had made a number of protected disclosures.

25. As set out earlier, the claimant's claim for automatic unfair dismissal is set out minimally in her ET1. In one of many emails to the tribunal, dated 17 February 2023, the claimant expanded. She said she had made protected disclosures to the respondent and other external bodies since 23 December 2022. She said that she provided evidence of her employer:

    a. Breaching legal obligations on equality and diversity in the workplace, in terms of men getting paid more than women (email to EHRC on 20 January 2023, email to HR 16 December 2022 also alleging pay disparity because of race);

    b. Breaching legal obligations on pension duties to the pension regulator (24 January 2023)

    c. Failing to comply with data protection legislation in that her personal information was shared widely (email to ICO 13 January 2023);

    d. Committing fraud, in that an employee got health insurance paid by her expenses (sent to the legal ombudsman);

    e. Deliberately concealing information tending to show wrongdoing

    f. Not carrying out risk assessments in relation to stress in the workplace and failed to provide a safe environment free from retaliation, harassment, victimisation.

26. In oral submissions the claimant also relied on an email of 16 December 2022 in which she alleged pay disparity because of her sex and race. A meeting was held on 10 January 2023 during which she expanded on these.

27. On 10 January 2023 she also emailed a number of people within the respondent, cc'd to the ICO about her mobile telephone number appearing to be disclosed in one of the respondent's systems.

28. On 18 January 2023 the claimant emailed a whistleblowing charity, Protect, cc'd to a number of colleagues to say that she was making protected disclosures in good faith that the respondent had committed criminal offences by allowing harassment at work, concealing evidence by

deleting it, tolerating victimisation and harassment, breaching legal obligations relating to health and safety and data protection and committing fraud. No detail was provided.

29. The claimant says that the respondent dismissed her in a dismissal "disguised as a suspension" communicated to her by email from Ms Parmar on 20 January 2023.

30. I must consider whether the claimant is likely to succeed at the final hearing in respect of all elements of her claim for automatic unfair dismissal for having blown the whistle.

The narrative of events

31. I reiterate that I have heard no oral evidence and I do not seek to make findings of fact, but to set out my impression of events on how it appears to me from the documents and pleadings placed before me by the parties. On an expeditious summary assessment of these documents, the following appeared to be the case.

32. The claimant was offered employment with the respondent as an Accounts Payable Executive for a fixed term period of six months commencing 25 July 2022 to end on 31 January 2023.

33. I repeat from other parts of this decision that on 16 December 2022 the claimant emailed Ms Parmar with concerns that she was being paid less than colleagues and this was because of her race and sex.

34. The claimant went off sick from 23 December 2022 until 9 January 2023.

35. On 23 December 2022 she began Early Conciliation with ACAS.

36. On 10 January 2023 she had a meeting with Ms Parmar in which she discussed her concerns. She also discussed the extension to her fixed term contract, the promise of a role, concerns about a colleague called Mark and an allegation that a colleague had made a remark with racist undertones.

37. On 10 January 2023 the claimant emailed certain of the respondent staff asking for her mobile phone number to be removed from part of the system which could be seen by others. She cc'd this to the ICO.

38. On 11 January 2023 the claimant presented her first claim to the tribunal.

39. On 13 January 2023 Ms Parmar emailed the claimant with responses to the matters raised in the 10 January meeting. The claimant responded that she did not agree, and that the tribunal would decide the issues.

40. On 18 January 2023 the claimant emailed Protect and some of the respondent staff, as set out above.

41. On 20 January 2023 at 10:33 AM a colleague emailed the claimant to say that she was resigning, and that the claimant had made the short time she had spent working with the respondent uncomfortable and very unhappy. The claimant responded that this was malicious, dishonest and vexatious and that she would be taking legal action.

42. At some point before 12.38 pm on 20 January 2023 (when the claimant tentatively accepted it) Ms Parmar sent an invitation to the claimant to a meeting titled "Fixed Term Contract – Proposed Termination" to take place on 24 January 2023. From 12.37pm onwards it appears that the claimant sent three emails to virtually the entire internal global email list of the respondent, and to various external agencies including regulators and national news outlets. Attached to these emails were audio files of telephone conversations the claimant had had with members of the respondent's staff whom she had covertly recorded without their permission.

43. The claimant was sent an email by Ms Parmar on 20 January 2023 at 2:04 PM suspending her and suspending her access to various systems. The reason given was the emails attaching audio files that had been sent to much of the respondent's business. Suspending access to systems was said to ensure the safeguarding of colleagues and to prevent further escalation. It was expressly set out in this email that "*the suspension is with pay and you remain in employment with the company*". She was told to be available for meetings.

44. The claimant told Ms Parmar that she needed a five day extension to arrange for a representative or companion to attend the meeting with her scheduled for 24 January 2023. On 24 January 2023 Ms Parmar granted this and proposed a meeting on 31 January 2023, indicating that the meeting could proceed in the claimant's absence if she did not attend. The claimant replied later that day to say "*We both know that you have already terminated my employment and disguise it as suspension*". She said her trade union representative would not be available until February and that if the meeting went ahead she would take legal action.

45. The meeting went ahead in the claimant's absence, and the claimant was emailed a letter dated 2 February 2023 from Mr Ahamed. The letter sets out that the meeting to which the claimant had been invited had taken place on 31 January 2023. The letter set out three reasons for the termination of the claimant's employment:

    a. The planned transfer of work overseas, which meant that the work carried out by claimant would be carried out in Rabat.

    b. The claimant emailing nearly the entire population of the business and various external third parties (including three news channels) attaching private telephone conversations with a colleague taken without their consent;

c. Sending out numerous emails with the primary purpose of causing maximum disruption leading to complaints from existing employers about the claimant's behaviour.

46. Mr Ahamed described the conduct as gross misconduct and conduct which resulted in a complete breakdown in trust and confidence.

47. The claimant appealed Mr Ahamed's decision. The appeal was dismissed by Mr Clay, and his decision was communicated to the claimant in a letter dated 9 February 2023.

Conclusions

48. It does not appear to me that the claimant is likely to succeed in establishing that her dismissal took place on 20 January 2023. The terms of the suspension email made clear that employment is continuing. The suspension followed swiftly on an act which the respondent was to characterise as gross misconduct. Without making any findings of fact in this regard, it also appears to me that the claimant is not likely to show that the subsequent date, 31 January 2023, was <u>not</u> the EDT. This is the expiry date of the fixed term contract (albeit there had clearly been discussion about extension) and this was the date of the meeting to discuss the "Proposed Termination" of the contract.

49. If this is the case, then the tribunal shall not entertain an application for interim relief as the application has not been presented in accordance with section 128(2) ERA. It appears to have been presented some 11 days before the EDT. I am conscious, however, that the parties are not agreed on the effective date of termination, and that I have not heard oral evidence or made findings of fact. I have therefore gone on to consider the application as if it had been validly presented.

50. Mr Howarth has submitted that the various elements of Part IVA ERA are not made out. He submits that it is difficult to discern what the claimant's case on a protected disclosures actually is. He also submits that when one views the claimant's email complaint of 16 December 2022, the minutes of the meeting of 10 January 2023 and the documentation relied on by the claimant, her claims are of a private rather than public interest nature.

51. I have found it difficult to address this matter in a way that avoids making inconvenient findings of fact for a future tribunal. I am also conscious that my impression of the case may not be one that a tribunal dealing with the matter at a final hearing will share. However, the on a summary assessment of the relevant material there appears to be little if any public interest in the complaints that the claimant raises. She appears to be pursuing her own grievances in respect of how she herself has been treated as regards to pay, data protection. The claimant relies on a disclosure of information about pension contributions being paid. But this allegation was made on 26 January 2023, after the date she says she was dismissed, and concerns her own situation. Additionally, she relies on a disclosure that the HR professional dealing with her case claimed BUPA

subscriptions through expenses. Again, this post-dated what she relies on as her dismissal.

52. I have formed my impressions on the issue of public interest both by focussing on the documentation and by standing back and looking at things in the round. It appears to me that it is not likely that a tribunal at the final hearing will find that the claimant had a reasonable belief that any disclosures were made in the public interest.

53. The final matter is the reason for dismissal.

54. It appears to me on the available documentation and pleadings that it is not likely that the tribunal will find that the reason for the claimant's dismissal was for having made protected disclosures.

55. The transfer of work overseas is something that had been alluded to (though not spelled out) in the meeting of 10 January 2023, when Ms Palmer had talked about budgets not having been signed off across all areas of the business. This was in a section of the meeting headed "extension to current fixed term contract". It is also to be pointed out that the claimant had been engaged on a fixed term contract expiring on 31 January 2023 anyway.

56. The claimant admitted during the course of the hearing that she had recorded conversations with colleagues without their knowledge or consent. She circulated this material virtually across the whole of the business and to external agencies. The respondent's disciplinary policy gives a non-exhaustive list of examples of gross misconduct. This includes "*Breach of information confidential/sensitive to the company, its clients and/or personnel*", "*Conduct which disrupts the efficient working of the company or is detrimental to its staff or clients*", and "*Serious breach of confidence*".

57. Within the bundle, and also in material provided by the claimant, there is documentation that appears to suggest that the way the claimant conducted herself within employment caused substantial distress to colleagues, and in one case (a different individual to the one mentioned in paragraph 41 above) apparently causing levels of stress which led them to resign on health grounds.

58. It does not appear to me that a tribunal is likely to determine that the claimant was dismissed for protected disclosures rather than for what appear to be well evidenced examples of what could amount to gross misconduct or conduct that had the effect of damaging or destroying mutual trust and confidence.

59. For all these reasons the claimant's application for interim relief fails and is dismissed.

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Employment Judge **Heath**

21 February 2023________________________
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

07/03/2023

....
FOR THE TRIBUNAL OFFICE