CASE NO: **6000379/2023**

EMPLOYMENT TRIBUNALS

Claimant: Mrs N Willis-Crowther

Respondents: Drs Effingham, Edmonson & Dyer (A Partnership)

AT A PRELIMINARY HEARING

Heard at: Nottingham, in public **On:** 20 March 2023

Before: Employment Judge Clark (sitting alone)

Representation

Claimant: Mrs Willis-Crowther in person
Respondent: Ms Watson of Counsel

Judgment and reasons having been given orally at the hearing, these written reasons are provided on application under rule 62 of the 2013 rules.

REASONS

1. This is an application for interim relief. The claim alleges that a dismissal which is on 23 February 2023 was for the reason, or the principal reason, that the Claimant had made a protected qualifying disclosures.

Preliminary Matters

2. At the outset the claimant sought an order excluding the respondent's participation or documentation due to breach of case management orders which I refused.

3. To some degree, the preparation of this hearing has been unusual. These hearings are very often conducted with limited documentation which is literally being collated

on the morning of the hearing. This application has been subject to some degree of case management in that directions were given for the Respondent to file and send to the Claimant any documents relied on in relation to the application by no later than 48 hours before the hearing. It doesn't stipulate whether that was to include or exclude weekends but, strictly speaking the deadline expired at 10.00am last Saturday morning. The respondent had complied by then. Nevertheless, the claimant says that date should have been brough forward to 10 am on the Friday before. I don't accept that but, in any event, the fact remains that there is an urgency about these type of hearings that doesn't actually permit any postponement except in exceptional circumstances. The claimant asserts there is an injustice in her not getting the papers during working hours because she was not able to seek any further legal advice upon receipt of the documents late on Friday. She also says that the case law cited by the respondent today is news to her.

4. There is always a risk that a litigant in person perceives a sense of injustice. What I have to do is look at the reality of the situation and where the balance of that any true injustice might lie. One thing that stands out is that the case law that the respondent has cited is case law which the Claimant herself has to address in making the application today. Taken to the extreme, if the Respondent had done nothing to advance a position for today's hearing, that same case law is exactly what I would have to apply and would have to deal with and the Claimant would have to satisfy me of. So far as there is anything else within the documentation, I am satisfied that that is properly before me for the purposes of informing an impression and the parties both have opportunity to make their submissions on it.

5. I took the view that the parties are in a position to proceed today and it would not be just to exclude the respondent or postpone.

Clarifying the issues in the claim

6. A few points required clarification and further discussions with the parties.

7. First, the dismissal itself is said to be the outcome of the meeting of 23 February and there is no dispute that as a result of that meeting, the Claimant changed the status of her economic engagement with the Respondent from one of an employee on the pay-roll to a locum, submitting self-employed individual invoicing the respondent as a client, albeit on essentially the same financial terms. I clarify that because in a little under a week of that event, the claimant resigned. It wasn't entirely clear to me whether the dismissal that was alleged was that of a constructive dismissal, as opposed to an actual dismissal. The claimant relies on an actual dismissal that occurred on her status being changed.

8. I also needed to clarify the status of the locum position if there was said to have been a constructive dismissal. It didn't occur to me that the mere label of locum would have rendered the status any different to that of employee but the addition of the invoices would have at least pointed the direction away from employment. In any event, as that this isn't being put as a constructive unfair dismissal on 28 February or thereabouts it means we don't need to worry about that either.

9. The final point of clarification is the papers refer to automatic unfair dismissal in respect of section 100(1)(a) or (b) which are the Health and Safety representatives' protections. The Claimant's confirmed helpfully that that is not how the case is advanced. Indeed, that issue seems to have arisen simply because the Respondent addressed it as a potential alternative in its ET3 but I make clear that is not a matter before me in this application.

The Protected Disclosures.

10. Of the protected qualifying disclosures potentially identified, there may be matters occurring after the alleged dismissal on 23 February, either later that day or in the 5 days or so that followed which might be qualifying protected disclosures. The Claimant accepts that because the ultimate question is one of causation, anything that happened afterwards cannot be relied on as causing the events of the morning on 23 February. They may, however, remain relevant to evidential purposes to help understand and reach findings of fact about what was and wasn't said in those earlier matters.

11. There are 7 disclosures alleged during the earlier period. All of them are oral in the sense that they were conveyed in spoken word, at face to face meetings. Although there are 7 in number, they fall into 3 or possibly 4 themes which recur through them.

    a. One theme is in respect of a Mr Thompson's access and authorisation for access to various patients records and other information which arises in the context of GDPR and the like.

    b. The second is in respect of nurses' workload and the effect that might have on patient safety and indeed others.

    c. The third theme, if it can be a 'theme' when it arises in only one of the alleged disclosures, is in respect of clinical waste or infection control.

    d. A potential fourth theme arises from employment status. This forms part of the allegations concerning Mr Thompson and relates to the form of his engagement with the respondent and the tax liabilities and obligations, as far as he may be performing work as an employee.

12. The first occurs on 2 February 2023 when the claimant alleged she said to Dr Effingham "it was not compliant under GDPR for OD's password and log-in to be used by her husband, Mr Thompson. She also advised that it was a breach of Data Protection allowing him access to 30,000 patient records without reason".

13. That is disputed as a fact. The Respondents position on all 7 are that they are contested in fact. For some it is accepted that the themes were discussed either at the meeting or other meetings but even where the themes are discussed it is disputed that the allegations of fact as stated were put in the terms alleged. For some it is accepted, though it is not conceded for today's purposes, that if the Tribunal accepted those things were said as alleged and that the Claimant did have reasonable belief that they tended to show breach of legal obligations or the like and

were in the public interest, that there may not be any real difficulty in making out a protected qualifying disclosure. That position certainly applies for this first one on 2 February.

14. The second alleged disclosure is on 13 February. Again, the claimant spoke to Dr Edmonson about Mr Thompson and it said that she advised there was no contract of employment breaching employment law, GDPR and information governance. That is disputed largely on the same disputes of fact.

15. On 16 February, the Claimant says she raised concerns with Dr Edmonson regarding Mr Thompson and his access to system and the breaches of GDPR.

16. The fourth is on 15 February, the chronology is out of sync here in the ET1. It is said to Dr Edmonson. The Claimant advised that qualified nurses having disclosed (to her presumably) that the actions of the practice were not clinically safe, the practice staff were under extreme pressure due to staffing shortages and that she advised breach of health and safety laws.

17. The fifth occurred on 20 February where the Claimant advised Dr Effingham that the partnership were breaching GDPR, Information Governance, Employment Law and NHS data security policies. That is one allegation where it is accepted that *a* conversation took place in that vein but not the facts as stated there, and certainly not that the information reasonably tended to show that the Claimant had a reasonable belief in the public interest or the relevant failures were being committed.

18. The sixth is on 21 February and the Claimant's says that she disclosed that that Mr Thompson requested a change to the smart card to add independent prescriber. She explained that NHIS (National Health Informatics Service) and their fail-safe procedures prevented the action and that she had concerns regarding him accessing a system in her name and credentials which was a breach of data security and that he (Dr Effingham) as data controller should report the matter to the Information Commissioner Office. She says she also advised that Mr Thompson had no contract of employment, job description, pay and the staff were uneasy with him in the practice and want to know what his role is. She also makes two other points engaging with two of the other themes that I have described and one is that a nurse had told her the Practice is not safe and she quoted one nurse who said she didn't want to work at that practice any longer and put her NMC pin at risk. The workload is extreme and mistakes would be made. Advised that an infection control audit was completed in November 2022 stated that clinical waste bags are not to be stored in clinical rooms until the collection and recommendations for a lockable bin in the car park. She says she advised this was a breach of health and safety and infection control. This is one where the Respondent accepts the thrust of the facts said to have taken place during that meeting but disputes that as a matter of law those matters amount to a protected qualifying disclosure.

19. The final disclosure, the seventh, is said to occur on the 23 February, that is of course the meeting with Dr Effingham starts at 9.00am and it is said that before the conclusion of that meeting that she advised Dr Effingham of her concerns relating to Mr Thompson, that she discussed issues relating to E-Health Scope and waiting lists,

Mr Thompson's behaviour and emails and telling staff what to do. Again, that's a matter where broad topics are not going to be in dispute but the allegation of words actually spoken which tended to show the Claimant's reasonable belief in one of the relevant failures is disputed. And that theme arises largely because, as I have already said, all 7 are oral disclosures.

Analysis

20. I am going to take each issue in turn because the nature of an application under sections 128 and 129 of the Employment Rights Act 1996 is that the Claimant has to establish a likelihood of succeeding on each point in dispute. The meaning of likelihood is that she has a pretty good chance of succeeding. A pretty good chance is something much more than merely being on the balance of probabilities likely to succeed.

21. In my introduction to the parties I explained by way of illustration only how that might be thought of in percentage terms and made the point that this is not a percentage threshold and I certainly don't seek to apply a percentage threshold in any assessments I make of likelihood but it does help illustrate what is meant by the words in the statue and how the case law has interpreted it. If the balance of probabilities is more than 50%, 51% is needed to win. If absolute uncontested certainty is 100%, the meaning of pretty good chance for the likelihood required by section 129(1) was described in **Ministry of Justice v Sarfraz** by the then President of the EAT as being one which connotes a significantly higher degree of likelihood, and that it is something nearer to certainty than mere probability. So to illustrate, and only to illustrate, if the balance of probabilities is thought of as 51% and absolute uncontested certainty is 100%, the threshold is somewhere in the 76% and above range.

22. There are disputes of fact in this claim. They arise first in respect of the protected disclosures and those disputes certainly do need to be resolved. But the matrix of disputes are such that in some cases there are topics which are accepted and there are some themes which occur on more than one occasion. That means that the prospect of making a protected disclosure is easier to make out for two reasons. First the elements of a protected disclosure may be seen across more than one communication. Secondly, it also adds some evidential weight to there being some sort of discussion to it. It seems to me that whilst there could well be real issues of fact on some of these disclosures going to what was actually said which might mean that the Respondent succeeds in showing that it doesn't meet the test of a protected qualifying disclosure, there are at least two where on what is put by the Claimant and the nature of it seem to me to have a pretty good chance of being found to be a protected qualifying disclosure.

23. In particular for some of those matters on 21 February, the essence of what is said to have been said is not in dispute as opposed to the legal implications of what it amounts to. Equally there are others such as the 5th on 20 February, which would appear to be more in the nature of a broad complaint or a broad allegation as opposed to conveying information and which would seem to me to more likely to fail

than succeed.

24. Allegation 7 can be taken out of the equation today as even if that were to amount to a protected qualifying disclosure in fact and law, it occurs in the course of the meeting on 23 February which is the alleged dismissal. The reason why Dr Effingham went into that meeting was because he had already formed the view, at least somewhere in his thoughts, that the relationship was not going to continue. Whilst not impossible, it is hard to see how a disclosure in the course of that meeting could be causative of an outcome that was contemplated and part of the reason for the meeting taking place.

25. However, that does mean there are at least one if not more of the alleged disclosures which satisfy the test for today's purposes. I would also add that whilst some of the others do not satisfy the test for today's purposes, there is a possibility that the claimant will demonstrate on the balance of probabilities that other disclosures were made as well. That obviously is not the test for today's purposes but for any final hearing.

26. I then turn to the next issue which is whether there was in fact a dismissal. The contention here is not that the employment status changed or indeed that the employment ceased, there is common ground for the employment ending on 23 February and that from 24 February onwards the economic relationship continued with the claimant then taking on the role as a self-employed Locum Practice Manager for which there is no dispute the Claimant would submit invoices. The respondent says this was mutually agreed. The claimant says it was imposed on her. This is a curious and unusual feature of the case. It creates some interesting tensions in the respective cases so far as the ongoing relationship is concerned. To some degree, it undermines the Claimant's contention that the employer wanted her out. To some degree it undermines the Respondent's contentions that it did want the Claimant out for reasons unrelated to the alleged protected disclosures. Even if the termination was mutually agreed as the respondent alleges, it was clearly in the mind of the employer that the new relationship would continue only for a limited period. That much does not seem to be in dispute because one of the tasks for the Claimant in that new economic arrangement was to set about the process of recruiting a permanent new employee as a Practice Manager.

27. So, the only point of dispute on the question of dismissal is whether, as a matter of law, this wasn't a dismissal by way of termination at all, but was instead a termination by mutual agreement. In other words, that both parties went into the decision making equally informed on the options and reached an agreement that they were both content with that the employment would cease by mutual consent.

28. The claimant carries the legal burden of showing that she was in fact dismissed but the focus of this dispute really turns on the extent to which the employer can discharge an evidential burden to show the agreed termination was by mutual consent. In my judgment, there are more than enough question marks on that being made out for this issue to be something which the respondent failed to establish. Dr Effingham went into that meeting having decided that the employment relationship

had come to an end and he does so wanting the employment relationship to come to an end. I understand his evidence will be that only after the meeting commenced it didn't take that course because there was discussion about alternative employment and both parties agreed to the different course. There is a difference in nature and quality of agreement between the situation where the parties to an employment contract bring it to an end by mutual consent and the situation where one, the employee, acquiesces in what was clearly a forgone conclusion and in circumstances where the choice is the offer on the table or no work at all. It seems to me that that contention she was dismissed is one what the Claimant has a pretty good chance of showing.

29. As in all of these contentions, the fact that I conclude there is a pretty good chance of a point being established doesn't mean that, in the final analysis, that will be made out. Equally, there may be matters today on which I may not be satisfied have a pretty good chance of success but which may well succeed. The issue for today is only about the claim for interim relief which has the effect of requiring the employment relationship to continue for what may well be a substantial period of time.

30. Finally, I turn to the last element which is that of causation. There are elements in the Respondents case which throw up a number of areas of growing concern about the Claimant's employment. Each of those features in the decision making to a greater or lesser extent and each requires findings of fact. Some of those are clearer on the contemporaneous documentation before me. The claimant says that some of those reasons were misconceived. That may be so but the relevance of that issue in this case question does not engage as it might in an ordinary unfair dismissal claim, where the employer has to establish a reasonable basis for its belief. In this case it is purely a single question of whether those circumstances were genuinely believed, even if erroneously. The fact they may be misconceived retains some relevance insofar as the question may be whether the belief is so unreasonable that it actually points to a conclusion fact it was not genuinely held. In other words, that they are smoke screen for the real reasons which the claimant would say was the making of protected qualifying disclosures.

31. This issue is not unusual at all. In many whistleblowing cases the real crux of the case of automatic unfair dismissal is causation, that is whether the disclosures were the reason for dismissal or, if more than one reason, the principal reason. In this respect I am not satisfied the necessary threshold is made out for today's purposes. It is a judgment call that I have to make based on the contentions of the parties put before me and the documentation that I have been shown. I have to form an impression from those without the benefit of evidence being tested. That impression does not allow me to reach the conclusion that the claimant has a pretty good chance of establishing the causation. Having said that, it may be worth me stressing that this is against the test I have to apply today and that does not mean this is not an arguable contention. Far from it, There are elements of the challenges that the Claimant will make to the Respondent's reasonings which may well carry some prospects of setting them aside at a final hearing. They are certainly arguable and they may well get passed that balance probability point. They simply don't get past the pretty good chance point.

32. Two things that have prevented me from concluding the test of pretty good chance of success are that she has to do that in respect of all of the matters. Some of the matters do go to circumstances that might that are less contentious at least in terms of disputes of fact and secondly of course she has to satisfy me to that standard of pretty good chance, in other words it's close to certain that she will win as opposed to the balance of probabilities that she will win. That's the real issue for making an Order today and that's the real and frankly the only real issue that is in the way of her succeeding.

33. Some of the Respondent's contentions do raise fair argument about causation perhaps the central one as this is a role in which it would be expected indeed specifically required that she provide, comment and advise and give opinion upon matters she said she touched on in respect of the alleged protected disclosures. Whilst that may give her some wind in her sails so far as proving that she did make some of those protected disclosures it also takes the wind out of her sails so far as the question might reasonably be asked why an employer would dismiss for reasons of the Claimant doing something which is physically part of her job that raises the spectre of those other reasons. The spectre of it in its itself isn't enough but the fact there are those of other matters there that do require examination and findings of fact and require to go beyond the mere unreasonableness of those reasons or the mistaken belief of those reasons to extend to one of dismissing the genuine nature of those reasons is essentially why I can't order interim relief today.

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Employment Judge Clark

Date: 12 June 2023

JUDGMENT SENT TO THE PARTIES ON

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