# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
|---|---|---|
| M Payne | **v** | ONNEC Group UK Limited |

# INTERIM RELIEF APPLICATION

**Region:** **London Central** **On: 9 May 2023**

**Before:** **Employment Judge Akhtar**

**Appearances**

**For the Claimant:** In Person
**For the Respondents:** Ms Yve Montaz, (Advocate)

# JUDGMENT

**The Judgment of the Tribunal is that:**

1. **The Claimant's application for interim relief is refused and the claim is dismissed.**

# REASONS

**The complaints/interim relief application**

1. By a claim form presented on 23 March 2023, the Claimant brought complaints of unfair dismissal, automatically unfair dismissal as a result of making a protected disclosure and of protected disclosure detriment. The claim was accepted in part, namely the complaints relating to unfair dismissal and interim relief. This hearing was to determine the interim relief application.

2. In determining an application or interim relief, I must carry out a predictive exercise as to the likely outcome of the final hearing. In undertaking that exercise, I have avoided making determinations of factual issues. The application stands on the pleadings, documentary evidence and the submissions and arguments of the parties. Rule 95 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 states that in considering an Interim Relief application "the Tribunal shall not hear oral evidence unless it directs otherwise". I decided this is not a case in which I considered it appropriate to hear oral evidence.

3. The Respondent has prepared a 93 page bundle of documents and produced witness statements from Sharon Butler, HR Director and David Westwood, Pre-Sales Director, and the Claimant's Line Manager. The Respondent has also produced a 3 page skeleton argument. The Claimant has prepared a 57 page bundle, a witness statement, transcript and 2 x audio recordings of the redundancy consultation meeting.

4. The Claimant was employed by the Respondent as a Bid Architect from 28 June 2022 until his employment was terminated on 17 March 2023. At the time of his dismissal the Claimant did not have 2 years' service. The Respondent is a company that provides information technology services.

5. The Claimant's relevant claim for the purposes of the interim relief application is the automatic unfair dismissal claim. The Respondent has not yet presented an ET3 response, however it contends that the Claimant was dismissed for the potentially fair reason of redundancy. The Claimant claims that the redundancy was a sham, and that he was not dismissed by reason of redundancy pursuant to s.*139 ERA,* but because of his alleged disclosures within *s.103A ERA*.

**Legal framework**

6. ***Section 128 Employment Rights Act 1996*** **provides:**

'128. Interim relief pending determination of complaint
(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) 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 104(1) and the condition in paragraph (a) or (b) of that subsection was met, 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).
(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.
(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time, and place of the hearing.
(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so'.

7. The question to be considered upon an application for interim relief is set out in ***Section 129 Employment Rights Act 1996*****:**

   '129. Procedure on hearing of application and making of order

   (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 104(1) and the condition in paragraph (a) or (b) of that subsection was met….".

8. Interim relief can therefore be ordered where the Tribunal finds that it is likely that a final hearing will decide that the reason (or principal reason) for dismissal was the employee having made protected disclosures contrary to *s 103A ERA1996.* It is not available to an employee where the Tribunal considers their dismissal is likely to be found to have been unfair pursuant to *s105 ERA 1996. S105 ERA* is not one of the automatically unfair provisions mentioned in *ss128 & 129 ERA 1996* in respect of which interim relief is available*.*

9. The meaning of the word 'likely' for these purposes has been considered in several cases. In ***Taplin v C Shippam Ltd [1978] IRLR 450, [1978] ICR 1068 EAT***, decided under similar provisions relating to interim relief applications in dismissal for trade union reasons, that it must be shown that the claimant has a 'pretty good chance' of succeeding, and that that meant something more than merely on the balance of probabilities. That approach to the word 'likely' has been followed in subsequent decisions, *Dandpat v University of Bath* (2009) UKEAT/0408/09 UKEATPA/1284/09 UKEATPA/1285/09 UKEATPA/1391/09 unreported at para 20, *Ministry of Justice v Sarfraz* (2011) UKEAT/0578/10, [2011] IRLR 562 at paras 16–17 and *His Highness Sheikh Khalid Bin Saqr Al Qasimi v Robinson* UKEAT/0283/17/JOJ, unreported (Qasimi v Robinson), at paras 8–11.

10. In ***London City Airport Limited -v Chacko [2013] IRLR610,*** Mr Recorder Luba QC provided further guidance upon the approach to be taken and in particular the correct approach to be applied to the meaning of "it is likely". At paragraph 23 he explains: *"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.'*

11. A 'pretty good chance' of success was interpreted in the whistleblowing case of ***Ministry of Justice v Sarfraz [2011] IRLR 562, EAT****,* as meaning 'a significantly

higher degree of likelihood than just more likely than not'. In this case, Underhill P 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.” (para 16).

12. There are policy reasons why the threshold should be thus. Underhill P said, in ***Dandpat v The University of Bath and anor (unrep, UKEAT/0408/09/LA)***,

“If relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing and pay the claimant, until the conclusion of proceedings: that is not a consequence that should be imposed lightly.” (para 20)

13. The Claimant must show the necessary level of chance in relation to each essential element of *s103A ERA 1996* automatic unfair dismissal, see ***Simply Smile Manor House Ltd and ors v Ter-Berg [2020] ICR 570.***

14. The Claimant must therefore show that it is likely that the Tribunal at the final hearing will find that:

14.1. she made the disclosure(s) to the employer;
14.2. she believed that it or they tended to show one or more of the matters itemised in the ERA 1996 s 43B(1);
14.3. her belief in that was reasonable;
14.4. the disclosure(s) was or were made in the public interest; and
14.5. the disclosure(s) was or were the principal cause of the dismissal.

15. *"Protected disclosure*" is defined in s43A Employment Rights Act 1996: "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."

16. *"Qualifying disclosures"* are defined by s43B ERA 1996,

"43B Disclosures qualifying for protection
(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—
…
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…".

17. The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations), ***Cavendish Munro Professional Risk Management v Geldud*** **[2010] ICR [24] – [25];** ***Kilraine v LB Wandsworth*** **[2016] IRLR 422**. The disclosure must, considered in context, be sufficient to indicate the legal obligation in relation to which the Claimant believes that there has been or is likely to be non-compliance, ***Fincham v HM Prison Service EAT 19 December 2002, unrep; Western Union Payment Services UK Limited v Anastasiou EAT 21 February 2014, unrep.***

18. The test for “reasonable belief” is a subjective test. The Tribunal should consider whether the belief was reasonable for the Claimant in her circumstances. What is reasonable for a lay person to believe may not be reasonable for a trained

professional ***(see Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4 at 62)***.

19. In determining whether the reason for the Claimant's dismissal was her alleged disclosure, it is not sufficient for the disclosure to be "in the employer's mind" or for it to have influenced the employer. The Tribunal must consider whether that disclosure was the "sole or principal reason" for her dismissal, ***Eiger Securities LLP v Korshunova [2017] IRLR 115).***

20. Redundancy is defined in ***s139 Employment Rights Act 1996***,

" .. an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) the fact that his employer has ceased or intends to cease –

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business –

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.'

21. By ***section 105 Employment Rights Act 1996***

"**Redundancy**
(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if—
(a) the reason (or, if more than one, the principal reason) for the dismissal is that the employee was redundant,
(b) it is shown that the circumstances constituting the redundancy applied equally to one or more other employees in the same undertaking who held positions similar to that held by the employee and who have not been dismissed by the employer, and
(c) it is shown that any of subsections [ (2A) to [(7N)]3]2 applies.
……

(6A) This subsection applies if the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was that specified in section 103A.
…….

(9) In this Part "redundancy case" means a case where paragraphs (a) and (b) of subsection (1) of this section are satisfied."

22. The application of (equivalent Northern Irish provisions to) *ss139 & 105 ERA 1996* to interim relief was considered in ***Bombardier Aerospace v McConnell and ors [2008] IRLR 51***. In that case, the Northern Irish Court of Appeal decided that it was not possible for a Claimant to obtain interim relief in a redundancy case, even when they were selected for redundancy on trade union grounds. The Claimant must show that the Respondent's redundancy process was entirely fabricated for the purposes of dismissing her, or that it was a sham, per LJ Girvan in *Bombardier* at para. 14 and Campbell LJ at para 9 - 11.

23. *Bombardier* (Campbell LJ) explains that, if an employee makes the case that, although there was redundancy, the reason why he was selected and not a fellow employee for dismissal, is that he made a protected disclosure, it does not follow that this becomes the principal reason for his dismissal though he is to be regarded as unfairly dismissed. If, in such circumstances, it could displace redundancy as the principal reason for dismissal, the employee would come within s103A ERA 1996 and be regarded as unfairly dismissed. There would be no requirement for *s105 ERA 1996* if unfair selection could become the principal reason.

24. However, if an employer decides to dismiss an employee because of a protected disclosure and creates a sham redundancy for this purpose, the principal reason for dismissal would not be redundancy and the employee would be unfairly dismissed within *s103A ERA 1996*.

25. *S105 ERA 1996* is intended to cover redundancy situations. Once it is established that there is redundancy within the meaning of *s139 ERA 1996* and that this is the principal reason for dismissal, unfair selection may make the dismissal unfair but it does not become the principal reason for dismissal.

## Discussion and Decision

26. I had to assess whether it appeared likely that a Tribunal at a final hearing would find that the Claimant had succeeded in each of the elements of an automatically unfair dismissal claim under *s103A ERA 1996.*

## Qualifying Disclosure

27. The Claimant contends that he disclosed information which he believed tended to show, 'possibly' a breach of contract and what he described as 'a concealment of information.'

28. In his submissions today, the Claimant clarified that on 3 separate occasions he made the same disclosure to the Respondent, the dates of these disclosures are, 8th December 2022, 19th January 2023 and 25th January 2023. I will not go through each of the disclosures separately, save to say that the Claimant submitted that he made the same oral disclosure on all 3 occasions to various senior managers and executives of the Respondent employer, this included the Claimant's Head of Department, Director of Pre-Sales, Chief Growth Officer and the Chief Executive Officer.

29. The disclosure the Claimant states he made, relates to what he describes as a concealment of information and collusion with the stakeholder building company in a deal with a client company, 'GSK' Commercial. He states that there was collusion between the Respondent and the building company through agreeing to improperly furnish costs to the end client, cost consultant and other stakeholders via the deliberate concealment of compoundable discounts, which in this case concealed a 10% discount.

30. On the basis of his oral submissions detailed above, I considered that it was likely that a tribunal would find that the Claimant had disclosed information. I considered that it was likely, in the sense of a significantly higher degree of likelihood than 51%, that a Tribunal would find that these matters amounted to information and not just allegations.

**Reasonable belief**

31. In his oral submissions before me, the Claimant stated that he was not qualified to comment upon whether the disclosure was criminal or in breach of a legal obligation, however, he described the information he had disclosed as unethical and 'possibly' a breach of contract. In light of this uncertainty, I find the Claimant was unable to evidence that he held a reasonable belief that his disclosure tended to show one or more of the matters listed in the ERA 1996 s43B(1).

32. I therefore decided that I could not say that there was a "pretty good chance" that, a Tribunal would decide that the Claimant believed that the disclosure tended to show that one or more of the matters listed in S.43 of the ERA. As all the criteria for a protected disclosure would need to be satisfied, I could not say that there was a "pretty good chance" that a final hearing would decide that the Claimant had made a protected disclosure.

33. If I am wrong about that, I went on to consider whether the disclosure(s) was or were the principal cause of the dismissal.

**Reason for Dismissal**

34. In order for the Claimant to be entitled to interim relief, I would need to assess that it was likely that the Tribunal at a final hearing would find that the disclosure was the principal reason for the dismissal (rather than redundancy).

35. Following *Bombardier Aerospace v McConnell and ors* [2008] IRLR 51 at 19, I would need to find that it was likely that a Tribunal would conclude that the redundancy process was a sham, rather than that there was a redundancy situation, but that the Claimant, in particular, had been dismissed because he had made a protected disclosure.

36. On the material available to me, I did not consider that it was "likely" that a Tribunal would conclude that the redundancy process was a sham. I reached this conclusion based on the Respondents evidence that there had been a downturn in responding to multi-faceted bids leading to the Claimants role effectively being surplus to requirement. Significantly, the Claimant accepted in his oral submissions that the role he was recruited for was never "really available or undertaken by him."

37. Interim relief is not available to an employee where the reason, or principal reason, for dismissal is redundancy, but the employee has been selected for redundancy because they made a protected disclosure, under *s105(6A) ERA 1996*.

**Further Hearings**

38. The claim will be listed for a case management Preliminary Hearing.

**Employment Judge Akhtar**

14 June 2023

Sent to the parties on:

05/07/2023

For the Tribunal: