



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms T Szucs

**Respondent:** Surrey County Council

**Heard at:** London South (by video)

**On:** 14 July 2023

**Before:** Employment Judge Cawthray

## Representation

Claimant: In person, not legally qualified

Respondent: Mr Howells, Counsel

# RESERVED JUDGMENT

The Claimant's application for interim relief under section 128 of the Employment Rights Act 1996 is refused.

# REASONS

## Introduction and Background

1. The Claimant made an application for Interim Relief made under section 128 of the Employment Rights Act 1996 ("ERA"), pending the determination of her claim for automatic unfair dismissal for having made protected disclosures brought under section 103A ERA.
2. By a claim form presented on 11 May 2023, the Claimant claims that she was automatically unfairly dismissed by the Respondent for making protected disclosures pursuant to section 103A of the Employment Rights Act (the "ERA").
3. This application for interim relief was presented within seven days of the effective date of termination which was 4 May 2023.

4. In addition to the ET1 form, the Claimant's grounds of complaint run to 6 pages.
5. The Respondent has until 27 July 2023 to submit a response.

### **Procedure**

6. The Claimant provided a bundle of 175 pages. At 8.22pm on 13 July 2023, the Claimant emailed the Tribunal and the Respondent a copy of her bundle of documents, containing 47 pages. Mr. Howells was only provided with a copy at 9.00am this morning, and had not seen the documents within it previously (although some were seemingly in the Respondent's possession). The parties had been directed to provide documents three days before the hearing. Both the Claimant and Mr. Howells made submissions regarding the position in relation to the Claimant's documents. I considered that it was not in the Overriding Objective to position postpone the hearing today, noting it was a hearing to consider the Claimant's application for interim relief, and that I would attach weight as I considered appropriate to any documents that I was directed to in the Claimant's bundle in consideration of the submissions made by both parties.
7. At the outset of the hearing I discussed with the parties whether any reasonable adjustments were required for the hearing today. The Claimant explained that she would need regular breaks, and that as she was finding the situation stressful may need patience and to ask questions to clarify matters. English is not the Claimant's first language, but she confirmed she did not require an interpreter.
8. I did not hear oral evidence, in accordance with Rule 95 of the Employment Tribunal Rules.
9. Both parties gave clear oral submissions, and during the course of the hearing the Claimant also emailed a copy of her skeleton argument.
10. During the course of submissions, it appeared that the Claimant may seek to amend her claim. I considered the basis of the interim relief application upon the claim as currently presented and as set out in the ET1.

### **The Issues**

11. I explained at the outset of the hearing, and before the parties gave submissions, that for the Claimant's application of interim relief to succeed, I need to be satisfied, as regards each of the limbs of the claimant's claim, that it is likely that, at the final hearing, the Tribunal will find in the claimant's favour and that her claim will succeed.
12. For the claimant to succeed at final hearing on her claim under section 103 ERA, the Tribunal will have to find each of the following:
  - a) That the claimant made the alleged disclosure/s relied on;

- b) That it/they amounted to a protected disclosure within the meaning of section 43A ERA;
- c) That the reason, or principal reason for dismissal was the claimant having made the protected disclosure(s) relied on.

## The Law

### Interim relief

13. The statutory provisions concerning interim relief are set out in the Employment Rights Act 1996 as follows:

#### **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 104F(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.*

#### **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 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.*

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

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

*(b) in what circumstances it will exercise them.*

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

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

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

*(4) For the purposes of subsection (3)(b) “terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed” means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.*

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

*(6) If the employer—*

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

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

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

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

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

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

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

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

(a) *fails to attend before the tribunal, or*

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

14. An application for interim relief will be granted where, on hearing the application, it appears to the Tribunal that it is likely that on determining the complaint to which the application relates, a tribunal will find that the reason for dismissal is the one specified (s.129(1) ERA). The meaning of the word "likely" in section 129(1) has been considered in a number of authorities.

15. In order to determine 'whether it is likely' the claimant will succeed at a full hearing, the EAT said in *London City Airport v Chacko* 2013 IRLR 610, that this requires the Tribunal to carry out an 'expeditious summary assessment' as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party. This will involve a less detailed scrutiny than would happen at a final hearing. My task is to assess how the matter appears to me, and Rule 95 states 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 the case.

16. 'Likelihood' has been interpreted to mean 'a pretty good chance of success' at the full hearing. 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 burden of proof was intended to be greater than that at a full hearing, where the Tribunal only needs to be satisfied on the balance of probabilities that the claimant has made out his case - or 51% or better. A pretty good chance is something nearer to certainty than mere probability.

19. The Employment Appeal Tribunal reaffirmed the proposition that a claimant for interim relief must demonstrate a 'pretty good chance' of

success at trial, the Employment Appeal Tribunal remarked in *Dandpat v University of Bath* UAEAT/0408/09, at para 20.:

20. *“We do in fact see good reasons of policy for setting the test comparatively high in the case of applications for interim relief. If relief is granted the [employer] is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the [employee], until the conclusion of proceedings: that is not consequence that should be imposed lightly”.*
21. The likely to succeed test applies to all elements of the claim (*Hancock v Ter-Berg* UAEAT/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.
22. Claimants in complicated, long running disputes can obtain interim relief, it is not just for simple cases (*Raja v Secretary of State for Justice* EAT 0364/09).

#### Automatic unfair dismissal

23. The statutory provisions are contained in the Employment Rights Act 1996:

#### **103A Protected disclosure.**

*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.*

#### **43A Meaning of “protected disclosure**

*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.*

#### **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—*

*(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.*

*(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.*

*(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.*

*(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.*

*(5) In this Part “ the relevant failure ”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).*

**43C Disclosure to employer or other responsible person.**

*(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure -*

*(a) to his employer, or*

*(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—*

*(i) the conduct of a person other than his employer, or*

*(ii) any other matter for which a person other than his employer has legal responsibility,*

*to that other person.*

*(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.*

24. Under section 103A, a dismissal is automatically unfair if “the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure”. Whether the dismissal flows from the disclosure is a question of causation. In the present case, it is for the

Claimant to show that the predominant causative basis for her dismissal was for making protected disclosures.

25. Section 43B ERA defines a qualifying disclosure as any disclosure of information which is made in the public interest and which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs a-f.

26. For an application for interim relief to be successful, a Tribunal needs to be satisfied on the evidence before it that it is likely that each element of the s.43B definition is likely to be met and that the final Tribunal is likely to find that the principal reason for dismissal was the disclosure.

27. In *Chesterton Global Ltd. and Anr. v Nurmohamed* [2017] IRLR 832 CA, Lord Justice Underhill said, at para 37:

*(1) "... In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s.43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker..."*

28. In *Kong v. Gulf International Bank (UK) Ltd* [2022] WCA Civ 941 the Court of Appeal upheld the decision that it was not incorrect for a Tribunal to find that the claimant's dismissing managers were not motivated by the protected disclosure but by the view that they took of the claimant's conduct which they considered to be an unacceptable personal attack and reflective of a wider problem with her interpersonal skills.

### **Summary/Claimant's case/Conclusions**

29. I make no findings of fact but it is helpful to set out a summary of the Claimant's case and what the Respondents say about it.

30. I reiterate that I have heard no oral evidence and I do not seek to make findings of fact, but to set out my expeditious summary assessment, doing the best I can with the untested evidence advanced by each party.

31. The Claimant alleges that she has made 11 protected disclosures, six of which appear to be entirely oral. The alleged disclosures took place between 4 July 2022 and 27 February 2023. I have sought to summarise the alleged disclosures in outline form below, in terms of the date, who to, the form and provision in 43B seemingly relied upon.

A - 4 July 2022 – Christopher Barton – written risk assessment – workplace stress concerns re team [H & S]

B 2 August 2022 – Christopher Barton – oral – discrimination, harassment & victimisation [legal obligation]

C – 4 August 2022 – Christopher Barton – oral - workplace stress re team [H &S]

D – 22 August 2022 – Christopher Barton and Sarah Kershaw – oral - workplace stress re team [H &S]

E – 30 August 2022 – Christopher Barton – oral - discrimination, harassment & victimization [legal obligation]



F – 27 September 2022 – Christopher Barton – oral - workplace stress [H &S]

G – 29 September 2022 – Karen Grave – email [page 4 Claimant's Bundle]

H – 11 October 2022 Christopher Barton – oral - workplace stress [H &S]

I – 17 October 2022 - Karen Grave – email [page 4 Claimant's Bundle]

J – 18 October - anonymously to Navex – R external WB tool – written [pages 99 and / or 105 Respondent's Bundle]

K – 7 February 2023 to the CEO – email [page 27 Claimant's Bundle]

32. Based on the pleadings and documents, it seems that the Claimant was suspended on 18 October 2022 with reference to actions that allegedly took place on 17 October 2023 regarding postings by the Claimant following a meeting on 14 October 2022 of the Minority Ethnic Group and Allies Staff Network. It is submitted this meeting was attended by over 100 people, including some external to the Respondent.
33. The Respondent appears to have undertaken an investigation, having appointed an external investigator - a Jenny Bristow. The investigation report dealt with three allegations of potential misconduct, and also considered management of matters raised as whistleblowing concerns by the Claimant.
34. The Claimant attended a disciplinary meeting on 27 April 2023.
35. In a letter dated 4 May 2023 the Respondent seemingly notifies the Claimant that she has been dismissed and refers to upholding two allegations of gross misconduct, one regarding the comments she made in the Minority Ethnic Group and Allies Staff Network and the other regarding accessing of information.
36. The Claimant says that her dismissal, on 4 May 2023, was because she made one more protected disclosure. The Respondent says the Claimant was dismissed following two findings of gross misconduct.
37. The issue for me to determine was whether the Claimant's automatic unfair dismissal claim was likely to succeed at the substantive hearing. I considered both parties detailed submissions in reaching my conclusions, and the specific documents to which I was referred.
38. I deal first with determining whether it is likely that the Claimant will show that she made protected disclosures as defined by s.43 ERA and then got on to consider whether it is likely that she will show that she was dismissed for making those protected disclosures.
39. Most of the alleged written disclosures have been provided. However, there are a number of oral alleged disclosures on which little specific detail about what was alleged specifically to have been said is provided. There also appears to be a factual dispute regarding what was said.
40. It is not clear whether all of the alleged protected disclosures will contain a conveyance of information, indeed particularly in relation to oral disclosures evidence and detailed evidence on this will be required. It is unclear whether any or all of the disclosures were made in the public

interest, but I note the reference to stress levels refers to herself and other colleagues. Further, it is not clear whether or not the Claimant had the reasonable belief that all or any of the alleged disclosures tended to show one or more of the matters set out in sub-paragraphs a-f of 43B of ERA, although the ET1 references breaches of legal obligations and health and safety in a generic way as summarised above.

41. It seems that the alleged disclosure on 7 February 2023, may meet the threshold, but in relation to all of the alleged disclosures this is a matter to be properly tested with evidence at the final hearing. My expeditious summary assessment is that I cannot reasonably conclude that it is “likely” that any or all of the alleged disclosures will meet the test. They may meet the test, or they may not, which is not sufficient to be granted interim relief.
42. Further, there is a dispute about whether or not the reason, or principal reason, for dismissal was because the Claimant made protected disclosures. The letter of dismissal says that the reason for the Claimant’s dismissal was for gross misconduct, in relation to postings by the Claimant and accessing confidential information. There appears to be some admission in relation to the postings made by the Claimant on 17 October 2023. The timing of the alleged disclosure on 18 October 2022 is not clear, it is not clear if this happened before or after the Claimant was notified that she was suspended. However, the suspension does take place in close proximity to the comments posted by the Claimant in the Teams chat. The suspension started the commencement of the disciplinary process;
43. *Kong* is authority that standards of behaviour can properly be separated from the making of a protected disclosure. Undertaking an expeditious summary assessment based on the untested evidence available to me, I conclude that the Claimant might show that it was the disclosures that caused her dismissal or, equally, the Respondents might show that it was the Claimant’s behaviour that led to dismissal. Either reason might be correct. Not having heard any evidence, it cannot be said, at this stage of the proceedings, that it is near to certain or that the Claimant has a pretty good chance of success on this element of his claim. There is a reasonable (but as yet untested) explanation by the Respondents.
44. The application for interim relief is therefore refused.

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Employment Judge Cawthray

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Date 14 July 2023