EMPLOYMENT TRIBUNALS

Claimant: Miss S Alexander

Respondent: SMS Connections Ltd

Heard at: Cardiff **On:** 2 October 2023

Before: Employment Judge C Sharp
(sitting alone)

Representation:
Claimant: In person
Respondent: Mr L Entwhistle (Solicitor)

JUDGMENT

The judgment of the Tribunal is that the Claimant's claim for interim relief is refused.

REASONS

The Application

1. The Claimant made an application for Interim Relief pursuant to s.128 of the Employment Rights Act 1996 ("ERA"), relying on her claim for automatic unfair dismissal for having made protected disclosures brought under s.103A ERA. Where I refer to page numbers, or use square brackets, I am referring to the electronic page number of the bundle provided by the Respondent; this numbering does not match the numbering printed at the bottom of the bundle.

2. The application for interim relief is limited to the s.103A ERA claim and brought against the Claimant's previous employer, the Respondent. At the outset of the hearing, I checked whether the Claimant was able to bring an interim relief application under s100(1)(a) or (b) as the facts as pleaded might have

sustained such a claim. The Claimant said that she was not only a health & safety adviser to clients of the Respondent, but also the designated health & safety representative advising the Respondent itself for its sites (but not one appointed by the workers as required under s100(1)(b)). Mr Entwhistle was without instructions on this point. There was a short adjournment, where the Claimant was asked to review her job description and Mr Entwhistle to try to get instructions. confirmed that the Claimant was effectively employed as a Health & Safety adviser sent to advise clients of the Respondent, but was not the designated Health & Safety representative at the Respondent. After the adjournment, the Claimant confirmed that she was going to argue that she was the designated health & representative under s100(1)(a) ERA, while Mr Entwhistle confirmed that this contention was resisted.

3. The claim is set out within the ET1 form, but does not plead the claim in legal terms. It is evident that the Claimant complains that she has been dismissed due to raising health & safety concerns on 7 June 2023 (the Claimant pleads 5 June 2023, but the email on which she relies is dated 7 June 2023, which is confirmed in the Response). While this could be a claim under s100 ERA, interim relief would only be available if the Claimant had been appointed the Health & Safety representative by the employer, workers or is a member of the safety committee. However, raising health & safety concerns (that the health & safety of any individual is/was/will be endangered) is within the scope of s103A.

4. The Claimant provided a "*position*" statement for this hearing, which I have treated as an untested witness statement. I did not hear oral evidence, in accordance with Rule 95 of the Employment Tribunal Rules. I reviewed the statement. The Claimant also sent various emails to the Tribunal office (which were copied to the Respondent). I have considered these emails, which included the email of 7 June 2023.

5. The Respondent has provided a Response, and further submitted an amended Response (though permission has not been given by the Tribunal to amend). It also provided a bundle of 202 pages, containing authorities and evidence. Mr Entwhistle, who appeared on behalf of the Respondent, drew my attention to the most pertinent points in the authorities during his submissions, though I read through all of the evidence provided.

6. I make no findings of fact, but it is helpful to set out a brief summary of the Claimant's case and what the Respondent says about it as far as it is relevant to an application for interim relief. The Claimant was employed as a Safety, Health, Environment & Quality (SHEQ) Advisor. Her role involved her giving advice on health and safety, amongst other matters. The Claimant says that she was a competent employee, who was improving at work (having had some issues identified in her probation period, which had been extended and continued at the time of dismissal), who sent an email raising health & safety concerns about fire safety in a particular building on 7 June 2023 to Stuart

Draper (who had been present at the inspections), amongst others. The Claimant says that she was challenged about the email and its tone, and after a period of sick leave between 26 June and 10 July 2023, she returned to work to then be dismissed on 14 July 2023. The Claimant asserts that the reason or principal reason for her dismissal was the email of 7 June 2023, which she says is a protected disclosure or an email which compromised part of her activities as a designated health and safety representative.

7. The Respondent says that there were issues with the email of 7 June 2023, in that it was inaccurate, overly long, sent to people who should not have been sent it, and was inappropriate in tone. It denies that the Claimant was dismissed over a month later because of it. The Respondent says that the Claimant was dismissed because in essence her performance had not improved sufficiently and it had become clear she would require too much support to reach the required standard. The Respondent denies that the email of 7 June 2023 was a protected disclosure or was made in the course of the duties of the designated representative (as it does not accept that the Claimant is protected by s100(1)(a) ERA).

8. I heard submissions from both parties before deliberating. 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.

9. I explained to the parties that I must avoid making findings of fact that could cause difficulty to a tribunal dealing with 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).

The Law

Interim relief

10. The statutory provisions concerning interim relief are:

"128 Interim relief pending determination of complaint
(1) An employee who presents a complaint to an [employment tribunal]—
(a) that he has been unfairly dismissed by his employer, and
(b) that the reason (or, if more than one, the principal reason) for the dismissal is one of those specified in section 100(1)(a) and (b), [101A(d),] 102(1) [, 103 or 103A] [or in paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992],

may apply to the tribunal for interim relief.
---
(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.

11. 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).

12. 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.

13. "*Likelihood*" has been interpreted to mean "*a pretty good chance of success*" at the full hearing - *Taplin v C Shippam* 1978 ICR 1068. 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. 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*". The likely to succeed test applies to all elements of the claim (*Hancock v Ter-Berg* UKEAT/0138/19).

14. 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* UKEAT/0408/09, at para 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".

Health & Safety

15. The statutory provisions are contained in the ERA:

"100 Health and safety cases

(1) 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—

(a)having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities."

17. While the Claimant's wider claims may be based on other provisions within this section, in order to obtain interim relief, she needs today to show that she has a pretty likely chance of showing that she was the designated health & safety representative appointed by the Respondent to prevent or reduce risks at work (and not one of a number of health & safety officers employed by it), and that the email of 7 June 2023 was her carrying out those duties, and that undertaking those duties by sending that email was the principal reason for dismissal.

Protected Disclosures

16. The statutory provisions are contained in the ERA:

"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, tends to show one or more of the following—
…
(d)that the health or safety of any individual has been, is being or is likely to be endangered…

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 in good faith—
(a) to his employer…"

17. 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 the making of protected disclosures.

18. Section 43B ERA defines a qualifying disclosure as any disclosure of information which in the reasonable belief of the worker 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 s43B.

19. 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 s43B definition is likely to be met and that the final Tribunal is likely to find that the principal reason for dismissal was the disclosure.

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

    "... 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…"

21. 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.

Conclusion

22. I must undertake an expeditious summary assessment, doing the best I can with the untested evidence advanced by each party, to determine whether it is likely that the Claimant will show that she carried out an activity protected by s100(1)(a) ERA or made protected disclosures as defined by s43 ERA and whether it is likely that she will show that she was dismissed for making a protected disclosure.

23. On the basis of what is before me, I cannot find that the Claimant has a pretty good chance of success in relation to the s100(1)(a) or s103A claim. The Claimant has adduced no evidence that shows she is the designated Health & Safety representative under s100(1)(a); working in health and safety is not sufficient. The Claimant was new to her role and working under supervision; she was less likely to hold such an important role. Her job description does not say that she is the designated representative; it says "*The post holder will provide day to day technical support on all planned and reactive SHEQ related matters within their area of responsibility and support other team members and business functions across all regions as required*" [114]. I find that the Claimant has not shown that she has a pretty good chance of proving that she was the designated representative. This of course does not mean that the Claimant might not be able to rely on other provisions of s100, but only s100(1)(a) and (b) can be used as a basis for interim relief. On this basis, the application in respect of the alleged health and safety dismissal fails (but in case I am wrong, the question of the reason for dismissal is addressed below).

24. I am persuaded that the Claimant has a pretty good chance in showing that the email of 7 June is a protected disclosure as it sets out difficulties with locating individuals in fire drills, which is a matter that relates to their endangerment of the health and safety. The Claimant has a pretty good chance of showing that the email was information as it gave detail of the issues. It may be incorrect information or highlighting required changes to the fire evacuation procedure known already to others as the Respondent suggests, but the law does not require a disclosure to be correct or new. It requires a reasonable belief by the worker that the information disclosed tends to be a matter covered by s43B. The only reason cited to the Tribunal is s43B(1)(d), namely the endangerment of the health and safety of any individual. The Claimant in an email to the Tribunal of 27 September 2023 (7.13pm) talks about the dangerousness of the situation in that particular building; her position statement is silent. I accept that the Claimant's evidence on this is limited and untested, and may not necessarily survive cross-examination at the final hearing, but having read the email of 7 June, it is clear that the Claimant was concerned that individuals were at risk due to failings in the then-current procedure. In my view, she has a pretty good chance of establishing this point.

25. In relation to reasonable belief that the disclosure was in the public interest, I reiterate that I have not heard evidence from the Claimant; the documents I have do not address the existence of such a belief. I did put to Mr Entwhistle that a case could be constructed from the email itself if one extrapolated from what had been said; Mr Entwhistle reasonably pointed out that while it could be done, the Claimant had not actually done so. I did also highlight paragraph 37 of the *Chesterton* judgment with Mr Entwhistle and whether there were features in this case that made it reasonable to regard the disclosure as being in the public interest. His answer was that it probably more likely went to credibility

and likelihood as according to the Claimant in her email of 27 September 2023 to the Tribunal, others knew but only the Claimant was dismissed.

26. I take the view that in circumstances such as these where I have concluded the Claimant has a pretty good chance of showing that she had disclosed information relating to a matter set out in s43B ERA, that she had a reasonable belief that it showed any individual had/was/would be endangered, and that the matter in question related to fire safety (whether in relation to those in the building or not being sure who is actually in the building), these are features that have a pretty good chance of being in the public interest.

27. Questions about the tone, accuracy, and distribution list of the email of 7 June 2023 may though fall into *Kong* territory. This is something that I cannot say the Claimant has a pretty good chance of succeeding with on the basis of what is before me. There appears to be consistent significant concerns about her communication, even before her email of 7 June 2023.

28. More critically, it is evident that by March 2023, the Claimant had not successfully passed her probation and it was extended by 6 months. There were regular meetings where the Claimant was told that she needed to improve in more than one area and what was required. These pre-date and post-date the email of 7 June 2023; the evidence before me does not support the Claimant's argument that there was a sea-change in the attitude towards her once she sent the email of 7 June 2023; indeed, some of the evidence before me significantly undermines that contention (for example, the consistent messaging before and after 7 June 2023 that she was not meeting the required standard and needed to reflect on her communication style). It is notable that by 23 June 2023 (just before the Claimant took sick leave), she was told that she was making errors that she should not be making by that stage and her conduct was not professional [186]. None of these criticisms appear to relate to the email of 7 June 2023.

29. In the one-to-one meeting of 10 July 2023, the Claimant herself set out a list of things on which she required support and accepted that she was not meeting the required standard [189-190]. In the final review meeting, the Claimant was found to have failed to meet the required standard in four out of seven areas. It is possible that the section about her communication relates to the email of 7 June 2023, but other areas do not e.g. the criticism of her investigations work. The Claimant may well argue that "*picking at her work*" was motivated by her email of 7 June 2023, but she is not supported in this by the evidence that shows long-standing concerns that led to the extension of her probation in March 2023.

30. Consequently, the Claimant has not shown that she has a pretty good chance of showing that the reason or principal reason for her dismissal was the making of a protected disclosure (or carrying out an activity under s100(1)(a) ERA).

The evidence indicates that there are issues to be determined about her tone/conduct/manner (and this was explained to the Claimant in the appeal letter at page 199) and whether her dismissal was actually principally due to her performance (as stated in the dismissal letter at page 197). The Respondent has evidenced sufficiently that there is a basis for the following comments in the appeal letter [198]:

"From the information provided to me, I can see that there were a number of concerns raised around your performance and behaviour during your time at SMS. I can see that during your first few months, you had mediation with another employee due to strained working relationships with them. There was a 1-2-1 meeting in January 2023 where you were told that things were not going as well as expected. At your probation review in March 2023 the conclusion was your performance was not sufficiently good for us to pass your probationary period, and therefore it was extended. Accordingly, your probation was extended by an additional 6 months due to performance concerns, issues around working relationships and your need for additional support. You also received a Record of Conversation in early June 2023 relating to your approach to your colleagues and lack of patience when dealing with them. Then a final probation review took place on 13th July 2023 and you were then told your employment was being terminated on 14th July 2023 as you had not reached the standard required for the role."

31. Not having heard or tested 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 with the automatic unfair dismissal claims. I accept that the Claimant may be in a position to rebut the Respondent's contentions at the final hearing, but she has not shown that she has a pretty good chance of success for each required limb for the two automatic unfair dismissal claims.

32. The application for interim relief is therefore refused.

Employment Judge C Sharp
Dated: 2 October 2023

JUDGMENT SENT TO THE PARTIES ON 3 October 2023

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche