# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms T. Adams**

**Respondents:** **(1) Morgan Stanley & Co. International PLC**
**(2) Mr Rehan Latif**

**Heard at:** **East London Hearing Centre**

**On:** **10 November 2023**

**Before:** **Employment Judge Massarella**

**Representation**
Claimant: Mr Edward Brown KC
Respondent: Mr Gavin Mansfield KC

# JUDGMENT

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

**1. the Claimant's application for interim relief is refused.**

# REASONS

1. Judgment on the Claimant's application for interim relief was given orally at the hearing. Mr Brown (Counsel for the Claimant) asked for written reasons on the day; they are provided below.

## Introduction

2. By a claim form presented on 24 October 2023, the Claimant raised complaints including automatically unfair dismissal by reason of making public interest disclosures (s.103A Employment Rights Act 1996 ('ERA')). The claim form contained an application for interim relief. The Regional Employment Judge listed this hearing to determine that application.

## The hearing

3. I had a 405-page bundle of documents, containing witness statements from the Claimant and Ms Jane Mills on behalf of the Respondent. Ms Mills is Head of Employee Relations, Policy and Human Resources Governance for EMEA;

skeleton arguments from Counsel; and a joint bundle of authorities. It was agreed that I would not hear oral evidence.

4. I pre-read the skeleton arguments and the statements, and heard oral submissions, limited by agreement to ensure that the application could be finally determined today. I am grateful to both Counsel for their assistance.

**The law**

5. By section 129(1) of the Employment Rights Act:

> **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 section 103A […]**

6. S.103A ERA provides that where the sole or principal reason for the dismissal is that an employee has made a public interest disclosure, the dismissal is automatically unfair.

7. Interim relief should be ordered if it appears that it is likely that on determining the complaint the Tribunal will find that the reason or principal reason for the dismissal was the proscribed ground (s.129 ERA).

8. What is meant by 'likely' to succeed is clarified in *Taplin v Shippam Ltd* [1978] ICR 1068. It means:

> **'a greater likelihood of success in his main complaint than either proving a reasonable prospect or a 51 per cent. probability of success and that an industrial tribunal should ask themselves whether the employee had established that he had a "pretty good" chance of succeeding in his complaint of unfair dismissal.'**

9. This formulation was affirmed in *Dandpat v University of Bath* (2009) UKEAT/0408/09/LA, where it was said:

> **'there were good reasons of policy for setting the test comparatively high… 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.'**

10. A 'good arguable case' is not enough (*Parsons v Airbus* UKEAT/0023/16/JOJ 4 March 2016).

11. The task of the Tribunal hearing an interim relief application is (*London City Airport v Chacko* [2013] IRLR 610):

> **'to make an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he or she has… doing the best he or she can with the untested evidence advanced by each party'.**

12. By Rule 95 of the Employment Tribunal Rules 2013, the Tribunal should not hear evidence on an application for interim relief unless it directs otherwise.

13. The hearing should be conducted as a Preliminary Hearing within Rules 53 to 56. The proper approach is as follows (*Parsons* at para 8):

> **'On hearing an application under section 128 the Employment Judge is required to make a summary assessment on the basis of the material then before her of whether the Claimant has a pretty good chance of succeeding on the relevant claim. The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself. In giving reasons for her decision, it is sufficient for the Judge to indicate the "essential gist of her reasoning": this is because the Judge is not making a final judgment and her decision will inevitably be based to an extent on impression and therefore not susceptible to detailed reasoning; and because, as far as possible, it is better not say anything which might pre-judge the final determination on the merits'.**

14. A Tribunal cannot be criticised for concluding that matters are not sufficiently clear cut at the interim relief stage for it to have sufficient confidence in the eventual outcome to grant interim relief (*Parsons* at [18]).

15. It is the Claimant's application and the burden of proof is on her throughout.

Protected disclosures

16. A protected disclosure is a qualifying disclosure made by a worker in accordance with any of sections 43C to 43H. A qualifying disclosure is defined by section 43B, as follows:

> **(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. In *Williams v Michelle Brown AM*, UKEAT/0044/19/OO at [9], HHJ Auerbach identified five issues, which a Tribunal is required to decide in relation to whether something amounts to a qualifying disclosure:

> **'It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.'**

*What was the disclosure of information?*

18. As for what might constitute a disclosure of information for the purposes of s.43B ERA, in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 CA, Sales LJ provided the following guidance:

> **'30. the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the Judgment below at [30], set out above, and I would respectfully endorse what he says there. Section 43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other […]**
>
> **31. On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying**

> **disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision.**
>
> **[…]**
>
> **35. In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1).**
>
> **[…]**
>
> **36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case.**
>
> **[…]**
>
> **41. It is true that whether a particular disclosure satisfies the test in section 43B(1) should be assessed in the light of the particular context in which it is made. If, to adapt the example given in in the *Cavendish Munro* case [at paragraph 24], the worker brings his manager down to a particular ward in a hospital, gestures to sharps left lying around and says "You are not complying with health and safety requirements", the statement would derive force from the context in which it was made and taken in combination with that context would constitute a qualifying disclosure. The oral statement then would plainly be made with reference to the factual matters being indicated by the worker at the time that it was made. If such a disclosure was to be relied upon for the purposes of a whistleblowing claim under the protected disclosures regime in Part IVA of the ERA, the meaning of the statement to be derived from its context should be explained in the claim form and in the evidence of the Claimant so that it is clear on what basis the worker alleges that he has a claim under that regime. The employer would then have a fair opportunity to dispute the context relied upon, or whether the oral statement could really be said to incorporate by reference any part of the factual background in this manner.'**

19. Where a disclosure is vague and lacks specificity, it will not provide sufficient information: *Leclerc v Amtac Certification Ltd* UKEAT/0244/19 at [26-31].In *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540, the EAT held that two or more communications taken together may amount to a qualifying disclosure even if, taken on their own, each communication would not.

20. Where the link to the subject matter of any of ERA s.43B(1) is not stated or referred to, or is not obvious, a Tribunal may regard this as evidence pointing to the conclusion that the information is not specific enough to be capable of qualifying as a protected disclosure (*Twist DX Ltd v Armes* UKEAT/0030/20 at [86] and [87]).

*Did the worker believe that the disclosure tended to show one or more of the matters listed in sub-paragraphs (a) to (f)? If he did hold that belief, it must be reasonably held.*

21. The issues arising in relation to the Claimant's beliefs about the information disclosed were comprehensively reviewed by Linden J. in *Twist DX Ltd*, from which the following principles emerge.

    21.1. Whether the Claimant held the belief that the disclosed information tended to show one or more of the matters specified in s.43B(1)(a)-(f) ('the specified matters') and, if so, which of those matters, is a

subjective question to be decided on the evidence as to the Claimant's beliefs (at [64]).

21.2. It is important for the ET to identify which of the specified matters are relevant, as this will affect the reasonableness question (at [65]).

21.3. The belief must be as to what the information 'tends to show', which is a lower hurdle than having to believe that it 'does show' one of more of the specified matters. The fact that the whistleblower may be wrong is not relevant, provided his belief is reasonable (at [66]).

21.4. There is no rule that there must be a reference to a specific legal obligation and/or a statement of the relevant obligations or, alternatively, that the implied reference to legal obligations must be obvious, if the disclosure is to be capable of falling within section 43B(1)(b). Indeed, the cases establish that such a belief may be reasonable despite the fact that it falls so far short of being obvious as to be wrong (at [95]).

22. In s.43B(1)(b) ERA, 'likely' requires more than a possibility or risk that the employer (or other person) might fail to comply with a relevant obligation. The information disclosed should, in the reasonable belief of the worker at the time it is disclosed, tend to show that it is probable, or more probable than not that the employer (or other person) will fail to comply with the relevant legal obligation. If the claimant's belief is limited to the possibility or risk of a breach of relevant legislation, this would not meet the statutory test of likely to fail to comply (*Kraus v Penna* plc [2004] IRLR 260 EAT at [24]).

*Disclosure in the public interest*

23. The Court of Appeal considered the 'public interest' test in *Chesterton Global Ltd v Nurmohamed* [2018] ICR 731. The following principles emerge.

23.1. The Tribunal must ask: did the worker believe, at the time he was making it, that the making of the disclosure was in the public interest (at [27])? That is the subjective element.

23.2. There is then an objective element: was that belief reasonable? That exercise requires that the Tribunal recognise that there may be more than one reasonable view as to whether a particular disclosure was in the public interest (at [28]).

23.3. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it (at [30]).

23.4. 'Public interest' involves a distinction between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest (at [31]).

23.5. It is still possible that the disclosure of a breach of the Claimant's own contract may satisfy the public interest test, if a sufficiently large number of other employees share the same interest (at [36]).

Automatically unfair dismissal

24. There is an important distinction between detriment cases, where it is sufficient that the disclosure is a material factor in the treatment, and dismissal cases, where it must be the sole or principal reason.

25. S.103A ERA provides:

> **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.**

26. The approach to the burden of proof in section 103A claims was summarised by Mummery LJ in *Kuzel v Roche Products* [2008] ICR 799 as follows:

> **'[…]**
>
> **[52] Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.**
>
> **[53] Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.**
>
> **[…]**
>
> **[57] I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
>
> **[58] Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.**
>
> **[59] The ET must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, it is not necessarily so.**
>
> **[60] As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence, in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.'**

## Conclusions on the interim relief application

27. The Respondent is a regulated financial services firm, which operates a 'speak up' culture. The Claimant joined the Respondent in April 2016 as an associate.

In January 2017, she was promoted to the role of vice president and then to Executive Director in January 2019. She had a period of maternity leave in 2022, after which he was promoted to co-head of leveraged finance sales.

28. The Claimant says she made three protected disclosures:

    28.1. a concern she raised in April 2021 about Mr Latif asking her to arrange a corporate client event at his father's hotel ('the conflict of interest matter');

    28.2. a concern she raised in September 2022 about potential market abuse by Ms Nasim, regarding a bond tender by Aston Martin Lagonda Global Holdings plc ('the Aston Martin bond matter');

    28.3. her grievance of 27 April 2023, in which she repeated the two earlier disclosures and alleged that she was being subjected to retaliatory treatment because she had made them ('the grievance').

29. I deal first with these alleged public interest disclosures.

30. In relation to the conflict of interest matter, the Claimant says in her statement that she was concerned that Mr Latif's request 'gave rise to a possible conflict of interest … I therefore spoke to Charlotte Ryan, compliance officer, to ask whether there was any particular procedure we needed to follow'. There is some lack of clarity as to what precise information she disclosed to Ms Ryan, but assuming she told her what Mr Latif had asked her to do, she describes this as related to a possible conflict-of-interest, rather than a likely conflict of interest. Her account was very similar in the internal grievance. On the authorities as they stand, that would not satisfy the limb of the test which requires more than a possibility that the employer might fail to comply with the relevant obligation. The information must, in the reasonable belief of the worker at the time, tend to show that it is probable that there will be such a failure. For this reason, and if her evidence at trial is the same as the evidence she gives in her statement for today's hearing, I cannot conclude that the Claimant has a 'pretty good chance' of persuading the Tribunal at the final hearing that this was a protected disclosure.

31. In relation to the Aston Martin bond matter, the Claimant says in her ET1 that she 'sought advice' about whether Ms Nazim's conduct 'could be abusive of market rules'. Again, expressed in this way, it would fall foul of the same threshold requirement that the disclosure must tend to show a probable, rather than a possible, breach of a legal obligation. I note that in the internal grievance the Claimant wrote that she was 'in doubt' as to what position might be, which prompted her to 'walk over to Charlotte's desk to ask her to confirm if it would be permissible' to act as Ms Nazim had done. There is then the fact that, in January 2023, the Claimant wrote to Miss Catherine Allen, saying again that she had merely 'asked compliance a question to clarify the process' and saying in terms that it was not intended to be whistleblowing. Based on this evidence, I cannot conclude that the Claimant is likely to be able to persuade the Tribunal that this was more than an ethically scrupulous checking exercise on her part.

32. As for the grievance, although this is relied on as a cumulative disclosure, incorporating the previous two disclosures, I accept Mr Brown's submission

that this is not bound to fail, even if the Tribunal takes the same view of the first two disclosures as I have tentatively taken. The Respondent had a wider definition of whistleblowing than the one contained in the employment rights act, which protected employees from retaliation if they raised potential, as opposed to likely, breaches of legal obligations. There will be a dispute as to the contractual status of those policies. Nonetheless, on this issue, I think that the Claimant may have a better chance of persuading the Tribunal that she disclosed information which tended to show a likely breach of the Respondent's regulatory obligation to protect an employee from retaliation for raising compliance concerns. The difficulty she may face is in persuading the Tribunal that that is what she believed at the time; that it is not a position which she has articulated, or which has been articulated on her behalf, after the event. Mr Mansfield points out that in her witness statement the Claimant describes her disclosures as follows: 'the hotel incident, the Aston Martin incident and my concern over scapegoating following the coffee incident'. According to that account, she identified three concerns, but she does not expressly say that there was a causal link between both the first two and the third. There is a reference in the context of CITE incidents, albeit somewhat generalised, to the fact that she 'remained concerned that [Mr Latif] seemed to want to use this situation to punish me'. I have concluded that the Claimant has an arguable case that the grievance contained the protected disclosure relied on by the Claimant, but I cannot go so far at this stage as to conclude that the argument will probably succeed.

33. In circumstances where I am not convinced of the Claimant's prospects of persuading a Tribunal at a final hearing that she made protected disclosures, it follows inevitably that I cannot conclude that she has a pretty good chance of succeeding in her claim of automatically unfair dismissal. For these reasons alone, her application for interim relief must fail.

34. If I am wrong about that, I go on to consider the Claimant's chances of persuading the Tribunal that the retaliation she alleges actually took place, either before the grievance (in which case it will go to the question of reasonable belief) or after (in which case it will go to causation).

35. The Claimant describes a sudden hostility on the part of senior colleagues, in particular Mr Latif, in early 2023, after she made her second disclosure, and in the period leading up to a decision to lodge a grievance. The description (at this stage at least) is generalised and, where it is more specific, reliant on oral remarks which are disputed. There does appear to have been a change in the relationship between the Claimant and her colleagues in the period leading up to her decision to lodge a grievance, but the Respondent says there is another explanation for it: that an incident (the 'coffee incident' referred to above) took place which led to a complaint about the Claimant's conduct towards a colleague which, in turn, led to the emergence of wider concerns about her communication style. I was taken to an investigation report which, on its face, appeared to support that assertion. It is the Respondent's case that those concerns then fed into her scores in the redundancy exercise.

36. The Claimant says there was a meeting in March 2023 at which Mr Latif and Ms Goodacre tried to force her out; the Respondent says that it was the Claimant who raised a potential exit package. Again, I was taken to a file note

which appeared to support the Respondent's position (although, of course, the accuracy of that note may be challenged in due course).

37. Mr Brown reminded me of the guidance in *Fecit* that, where a whistleblower is subject to a detriment without being at fault in any way, Tribunals will need to look with a critical – indeed sceptical – eye to see whether the innocent explanation given by the employer for the adverse treatment is indeed the genuine explanation. The difficulty with that submission is that I cannot be confident at this stage that the Claimant was without fault in any way. The Tribunal which deals with the final hearing may conclude that she was, or it may accept the Respondent's explanation that its concerns were genuine and well-founded.

38. There is then the fact that the Respondent says that the Claimant was so aggrieved by this investigation into her interactions with colleagues that she said she was going to resign, and that it was Mr Latif who persuaded her not to do so. If the Tribunal accepts that this occurred, it may significantly influence their view as to whether it is then likely that Mr Latif would then go to great lengths to secure her dismissal.

39. There are factors which may lead to a conclusion in the Claimant's favour: the fact that the Claimant had had a successful career trajectory up to that point; the simple chronological fact that she was put at risk of redundancy shortly after she lodged a grievance; and the fact that Mr Latif, who was one of the subjects of the grievance, played a significant role in the redundancy dismissal exercise. Mr Brown asks why, given that the Claimant had raised a grievance against him, Mr Latif was not excluded from the scoring process.

40. The most persuasive factor may turn out to be that the overall headcount of the department appears to have increased, although I did not find the evidence as to that to be sufficiently clear-cut at this stage to enable me to conclude that the Claimant has a pretty good chance of showing that the redundancy was a sham. On the face of it, it was a large-scale exercise, which affected others in the Claimant's department. Moreover, it was not under Mr Latif's sole control and his scores were moderated by other managers. I see the force in Mr Mansfield's submission that the Claimant will have to persuade the Tribunal that Mr Latif either manipulated colleagues, in HR and elsewhere, or that they were complicit in a plan to remove the Claimant from the business. She may succeed in doing so, but a conclusion of that sort can only properly emerge once all the evidence has been heard.

41. As I have already said, Mr Brown relies on oral remarks which Mr Latif is said to have made about the Claimant as 'smoking guns' which reveal his true (retaliatory) intentions. However, only one of them is not in dispute (an observation that he was concerned that the Claimant may not be a 'team player'), and the others are mostly hearsay. Although they may turn out to be crucial at trial, they cannot play a meaningful role at this stage when no live evidence has been heard. I cannot say at this stage that the Claimant is pretty likely to succeed in persuading the Tribunal to conclude that Mr Latif's 'team player' remark was connected to her disclosures.

42. Mr Brown invited me to draw an inference from the fact that Mr Latif did not attend today to give evidence and did provide a statement. In my judgment,

nothing can be read into his absence at an interim relief hearing; the position would, of course, be different at a final hearing. Inferences must be based on findings of fact, and I make no such findings today.

43. In my judgment, the Claimant has an arguable case and one which she may be able to make good in due course, once disclosure has taken place, witness statements have been exchanged and all the witnesses have been the subject of what will undoubtedly be the most forensic of cross-examinations on both sides. However, based on the untested evidence and submissions before me today, I cannot conclude that the Claimant has a pretty good chance of succeeding in her claim that the sole or principal reason for her dismissal was that she made protected disclosures, if indeed she did so.

44. Consequently, the Claimant's application for interim relief fails for that reason as well.

**Employment Judge Massarella**
**Date: 20 November 2023**