EMPLOYMENT TRIBUNALS

Claimant: **Mr A. Mehmood**

Respondent: **Goldex Investments (Essex) Limited**

Heard at: **East London Hearing Centre (in public, by CVP)**

On: **27 November 2023**

Before: **Employment Judge Massarella**

Representation
Claimant: Represented himself
Respondent: Mr Y. Mahmood (litigation consultant)

JUDGMENT having been sent to the parties on 29 November 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

WRITTEN REASONS

1. Reasons for my decision to refuse the Claimant's application for interim relief were given orally at the hearing. The Claimant asked for written reasons by email dated 1 December 2023; they are provided below.

Introduction

2. By a claim form presented on 26 September 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 Claimant gives his dates of employment in the claim form as 1 September 2021 to 21 September 2023. The narrative section of the claim form runs to 7 pages and identifies five occasions on which the Claimant says he made protected disclosures.

3. This hearing was listed to determine his interim relief application.

The hearing

4. The Respondent had provided a bundle of documents. The Claimant had submitted documents separately, with a covering summary. There was a statement from Mr Khan for the Respondent and two statements from the Claimant. I heard no live evidence. Both the Claimant and Mr Mahmood each

made extensive oral submissions. Mr Mahmood also provided a skeleton argument.

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; the burden of proof is on him 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]).

<u>Automatically unfair dismissal</u>

24. 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.**

25. 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.

Conclusions on the interim relief application

26. The managing director of the Respondent company is Mr Kafeel Khan, who was also the Claimant's line manager. The Claimant was the company accountant.

27. It is the Claimant's case that the sole or principal reason for his dismissal was that he made protected disclosures. The Respondent's case is that the Claimant was dismissed for gross misconduct relating to a serious data breach: extracting and sending to himself by email on a nonworking day a large amount of data, containing personal information relating to all the Respondent's employees going back to 2018. The Claimant did not send it to his personal email account; rather he emailed it from one work account to another (both of which he controlled); doing so allowed him to access the data on his personal mobile phone. He was suspended on 1 September 2023.

28. In his oral submissions today, based closely (as it must be, absent any application to amend) on the disclosures identified in the ET1, the Claimant clarified that he made six alleged protected disclosures: on 11 May 2022; 28 September 2022; 24 July 2023; 15 August 2023 (two disclosures/groups); and 24 August 2023.

29. On the basis of what I have seen and heard today I think the Claimant will struggle to persuade the Tribunal at the final hearing that either of the 2022 matters amounted to protected disclosures. In relation to the May 2022 document, they may conclude that it was a simple complaint about the difficulties the Claimant felt that he (and others) had encountered in the course of his employment thus far. They may also conclude that the information disclosed was insufficiently specific to constitute a potential disclosure.

30. In relation to the September 2022 disclosure, the alleged likely breach of a legal obligation is not clear to me from the document itself. The Claimant clarified it today as a breach of the Equality Act 2010. It will be a matter for the Tribunal at the final hearing to decide whether that was something he had in mind at the time. I cannot conclude at this stage that he has a pretty chance of doing so. In any event, both the first two alleged disclosures long predate the dismissal which, in my judgment, will make it less likely that the Tribunal will find that they were the sole or principal cause of the dismissal.

31. By contrast, the remaining four alleged disclosures took place within a relatively short period of time between 24 July and 24 August 2023 and not long before the disciplinary charges against him were raised. My initial impression is that the Claimant may have better prospects of persuading the Tribunal at the final hearing that these matters were protected disclosures. The breaches of legal obligations the Claimant says he disclosed information about are more evident on the face of the documents to which I was taken: the showing of a personal expense as a business expense; the making of retrospective arrangements to avoid a tax liability on a termination payment made to Mr Khan's daughter; the underpayment by the Respondent of

corporation tax and so forth. If the Tribunal concludes that the Claimant's belief in likely breaches of legal obligations was a reasonable belief, it may well be open to the argument that the fact that the Claimant raised numerous such issues within a short period of time made the Claimant a problematic employee, and that the Respondent wanted to be rid of him.

32. However, there are two main difficulties for the Claimant. The first of these is that the Respondent can point, as the true reason for dismissal, to a conduct matter which, on its face, appears to be serious and one which appears to be separate from the alleged protected disclosures.

33. The second difficulty the Claimant will face is that, at the time, not only did he not deny extracting the data, but he sought to give different explanations for doing so. Two of these explanations are not ones that the Claimant now advances; that in itself may be problematic for him. The third explanation is that he had been instructed to investigate the data at a meeting with Mr Khan and the external accountant; that does appear to have been an explanation which he advanced at the time, most explicitly at the appeal stage. The Claimant relies on a transcript of a covert recording which he made of a meeting at which he says he was given the instruction. My preliminary view is that the transcript does not appear to disclose a sufficiently clear instruction to do what he did, and in the way that he did it. Even if it is right that he was instructed to look at the data for a legitimate purpose, it may not explain why he decided to email it to himself, thereby making it accessible away from the workplace; and it may not explain why he decided to extract as much data as he did.

34. There was an investigatory meeting on 18 September 2023, which the Claimant did not attend. He was then invited to a disciplinary meeting, which he did attend. By letter dated 21 September 2023, the Claimant was summarily dismissed. He appealed but the appeal was dismissed. Questions of procedural fairness may well arise for the purposes of the ordinary unfair dismissal claim, but they are irrelevant to the prospects of success of the automatically unfair dismissal claim, where the only question for determination by the Tribunal will be what the sole or principal reason was for the dismissal.

35. In all the circumstances, and on the basis of the material to which I have been taken at the hearing today, I cannot conclude at this stage that the Claimant has a 'pretty good chance' of succeeding in his claim of automatically unfair dismissal.

36. Consequently, the Claimant's application for interim relief must fail.

37. To be clear, I am not saying that the Claimant does not have an arguable case: the immediate proximity of the last four alleged disclosures to the commencement of the disciplinary procedure may suggest a causal connection; the apparently serious nature of the concerns raised in some of the disclosures may also provide a motive for the Respondent wanting to dismiss employee who may have been regarded as troublesome; the Tribunal may conclude that the Respondent seized on the handling of the data as a pretext for dismissing the Claimant. However, an arguable case is not enough for the purposes of an interim relief application. These are matters which can only properly be determined at a final hearing, after full disclosure has taken

place and the Tribunal is in a position to make findings of fact and draw conclusions from them.

Employment Judge Massarella
Date: 18 December 2023