EMPLOYMENT TRIBUNALS

Claimant: **Mrs K Nicholls**

Respondent: **Wyncroft Surgery (A Partnership)**

Heard at: **East London Hearing Centre**

On: **28 April 2023 & 9 May 2023**

Before: **Employment Judge B Beyzade**

Representation
Claimant: **In person (assisted by her daughter Mrs H White)**
Respondent: **Mr Simon J Hoyle (Consultant [he was accompanied by Mrs Sion Turner, Practice Manager])**

JUDGMENT having been sent to the parties on 19 May 2023 and written reasons having been requested in accordance with Rule 62(3) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, the following reasons are provided:

REASONS

Introduction

1. In this case, the claimant presented a claim to the Employment Tribunal on 15 March 2023, in which she complains that she was automatically unfairly dismissed by the respondent for the reason or principal reason that she made a protected disclosure under section 103A of the Employment Rights Act 1996 ("ERA 1996"), and she applied for interim relief pursuant to section 128 of the ERA 1996 ("ERA 1996").

2. In her claim form, she indicated that she wished to claim interim relief in respect of her claim.

3. At the time of hearing the claimant's application for interim relief, the respondent had not submitted an ET3 response form, and this was due to be filed by 15 May 2023. However, it was intimated by the respondent's representative that an ET3 will be sent to the Tribunal and that the respondent opposed her application for interim relief.

4. A hearing was listed to take place on 28 April 2023 in order to determine the interim relief application. The claimant appeared on her own behalf (assisted by her daughter Mrs H White), and Mr Simon Hoyle, Consultant, appeared for the respondent

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(he was accompanied by Mrs Sion Turner, Practice Manager).

5. By agreement, the respondent's title was amended to Wyncroft Surgery (A Partnership).

The Hearing

6. A bundle of documents was presented by the respondent. This included some of the documents which the claimant had provided previously. The claimant also provided a number of loose documents that were not contained in a file or page numbered. In addition, I had a copy of the Tribunal file which contains correspondences between the parties and the Tribunal, including but not limited to, an email from the claimant dated 26 April 2023 sent at 11.10am and an email from the respondent dated 26 April 2023 sent at 9.36am, attaching the respondent's response to the claimant's interim relief application.

7. References to those documents were made by the parties during the hearing.

8. Prior to the start of the hearing, I was asked by the claimant to disregard an email between her, and her union representative dated 13 March 2023 on the ground that this was legally privileged. The claimant confirmed she wanted me to read the email dated 16 February 2023 between her and the Care Quality Commission ("CQC") which was within the same email chain. The respondent's representative did not object in the circumstances. Accordingly, I removed that document from my file of papers, I did not read or take account of that document and I marked the version of the document on the Tribunal file with the words "not considered."

9. The respondent sought to rely on two witness statements from Mrs Sion Turner (Practice Manager) and Dr Maya Mistry (GP Partner). I declined to consider those witness statements having heard submissions from both parties. For the reasons given orally during the hearing, I did not consider those witness statements.

10. The claimant objected to the application, and she submitted that she had not been given adequate time to review these and to prepare a response. The respondent's representative pointed out that the case papers arrived at short notice, and they had been prepared by colleagues. Both witnesses had prepared statements and were able to attend today. It was submitted that the witness statements provided an overview of the documents that the Tribunal will need to read as part of today's hearing. The respondent's representative submitted that there was no bar which prevented the Tribunal from considering witness statements, although he accepted that considering oral evidence would be rare. He submitted that the Tribunal may wish to read those statements or disregard them as it sees fit.

11. Having heard submissions from both parties in relation to whether I should consider the evidence of Mrs Turner, and Dr Mistry, having considered the claimant's objections, and the terms of Rule 95 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("ET Rules") which states that in an application of this nature the Tribunal shall not hear oral evidence unless it directs otherwise, I declined to consider the evidence of Mrs Turner and Dr Mistry. It was acknowledged by the respondent's representative that considering oral evidence is not usual in this type of hearing. I noted that there are aspects of the written witness statements provided which will not be relevant in terms of the issues before the Tribunal today. The claimant received the evidence on Tuesday this week, there are a number of contested matters within the written evidence, and it would not be in accordance with the Tribunal's overriding objective to require the claimant to deal with that evidence during today's hearing. I indicated that I would consider any submissions and documents to which the parties wish to refer, and I considered that my decision did not prejudice the claimant or the respondent. The respondent's representative suggested that the written witness statements provided an overview of the documents, and I considered that this was a matter upon which the respondent's representative could address me on in terms of his oral submissions. This will also ensure that both parties are on an equal footing in accordance with the overriding objective set out in Rule 2 of the ET Rules.

The issues

12. At the outset of the hearing the Tribunal recorded the issues to be investigated and determined during today's hearing in the following terms, the parties being in agreement with these:

12.1 Should the claimant's application for interim relief be granted:-

12.1.1 Is it likely that on determining the complaint to which the application relates, the Tribunal will find that the reason or principal reason for dismissal is that the claimant made a protected disclosure? (likely meaning "having a pretty good chance")

13. In terms of the issues that the Tribunal is likely to have to investigate and determine at any Final Hearing, unless the tribunal directs otherwise, they are:

1. The issues that the Tribunal will be required to investigate and determine at the final hearing are as follows, the parties being in agreement with these:

(i) It is not disputed that the claimant was dismissed and that she was a worker at all material times.

(ii) Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

1.1.1 What did the claimant disclose? The claimant says she made disclosures on these occasions:

1.1.1.1 Email from the claimant to Sian Turner and Dr Maya Mistry dated 15 February 2023 in which she complained about incorrect medication being provided to a patient, that she believed this was sabotage, and that she had a real concern for patient safety. The claimant sent a further email to Ms Turner and Dr Mistry on 16 February 2023 in which she provided further details and she stated she had concerns that it could not be guaranteed that her work was being tampered with.

1.1.1.2 Email from the claimant to the Care Quality Commission dated 16 February 2023 in which the claimant states "…*I am worried for patient safety as it appears my work is being tampered with and the wrong medication has been given out to the wrong patient*".

The respondent accepts that there were disclosures made and that the above emails were sent by the claimant. The respondent disputes whether they were qualifying disclosures.

1.1.2 Did she disclose information? The respondent accepts that there has been a disclosure of information. The respondent states that in the email dated 15 February 2023 at 19.the claimant set out the events as she finds them without expressly saying that a patient could take the wrong medication.

1.1.3 Did she believe the disclosure of information was made in the public interest? The respondent accepts that the claimant states that these concerns were really worrying her for her in terms of patient safety. The respondent accepts that because the disclosure concerned issues about patient safety and the respondent provided services to the general public, the claimant's disclosure was concerned with the public interest.

1.1.4 Was that belief reasonable?

1.1.5 Did she believe it tended to show that:

1.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation (*Health and Social Care Act 2008* which is the enacting statute which requires CQC regulation and requirement to implement and monitor policies) to which he is subject; and/or

1.1.5.2 the health or safety of any individual had been, was being or was likely to be endangered. The claimant's case is

that her disclosure concerned the health and safety of a patient (or potentially more than one patient).
It is accepted by the respondent that the claimant's disclosure concerned Health and Safety of patients and breach of a legal obligation.

1.1.6 Was that belief reasonable? This is disputed. The claimant accuses others of sabotaging the workplace to make it appear that she was culpable or blameworthy. There is a dispute as to who made the medication error and how it occurred. The claimant suspects that her colleagues deliberately swapped the medication. If the claimant made the medication error, she would have been obliged to report that as a serious untoward incident, and the respondent questions whether she honestly did that or whether she manufactured an explanation to try and shift any blame.

1.2 In relation to the emails dated 15 and 16 February 2023 sent to the respondent, if the Tribunal finds that the claimant made a qualifying disclosure, it is accepted that it was a protected disclosure because it was made to the claimant's employer.

Further or alternatively,

1.3 If the claimant made a qualifying disclosure, was it made:

1.3.1 To the Care Quality Commission in accordance with section *43F, of the Employment Rights Act 1996? The Tribunal will also need to consider the following in relation to any qualifying disclosure that the claimant contends was made under section 43F:*

1.3.1.1 Did the relevant disclosure fall within any description of matters in respect of which that person is so prescribed? The respondent does not dispute that the CQC is a person so prescribed.

1.3.1.2 *Was the information disclosed, and any allegation contained in it, substantially true?*

If so, it was a protected disclosure.

(iii) What was the reason for the claimant's dismissal? Was the claimant dismissed for the reason or principal reason that she made a protected disclosure? Or was she dismissed because of misconduct (not gross misconduct) and/or some other substantial reason (complaints from colleagues and their willingness to work with the claimant) as the respondent avers?

14. Having discussed and agreed the complaints and issues with the claimant and the respondent's representative and having agreed the terms of the preliminary issue that I had to decide at this hearing in terms of the claimant's application for interim relief,

the claimant and the respondent's representative made oral submissions which I found to be informative. Both parties made references to documents which they invited me to read, where relevant.

15. I explained the procedure to parties and what powers the tribunal may exercise on the claimant's application, and in what circumstances it will exercise them.

The claimant's submissions

16. The claimant made submissions in support of her application for interim relief, in which she set out the nature of her claim and that she was unfairly dismissed by the respondent for the reason, or principal reason, that she had made protected disclosures under section 103A of ERA 1996.

17. The claimant identified that her protected disclosure was sent in an email to Mrs Turner, copied to Dr Maya Mistry on 15 February 2023 at 7:28pm in which she asserted that she identified information in accordance with s43B ERA 1996, that the respondent had failed to comply with a legal obligation, and/or their health and safety obligations. That email states as follows:

> "Dear Sian/Dr Mistry,
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> This evening the wife of RD came into the Surgery and explained primarily that her husband needed his new med which was done today. Then she went on to explain that on Monday she collected Apixaban which was dispensed and bagged by me on the 8th Feb, also rivaroxaban was in the same bag for her mum MS 15/10/35, which was dispensed the following day Thursday 9th. Now my concern is not only was the Apixaban dispensed and bagged on 8th Feb but these two people coincidentally are related, now I wouldn't have known that. Also the items I dispensed on 9th Feb for RD were never handed out on Monday 13th Feb but she said the script was in the bag of Apixaban but I have located the original script filed away in the box unsigned, I have now put it back in basket for doctor to sign. So if the rivaroxaban had have ended up in RD's main bag of medication that his wife never received until today it may have made sense because they were labelled at the same time on Thursday but not on a bag that was dispensed and bagged the previous evening.
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> My concern is as previously stated sabotage and only someone who knew they were related would have done this. My real concern is for patient safety above all else because while this is happening how long before someone is seriously ill or dies because of these mindless mind games in order to make me look like I have made a serious mistake. Why would one patients have Apixaban and rivaroxaban?
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> These concerns are really worrying me for patient safety.
>
> Kind regards,
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> Kay Nicholls"

18. The claimant sent a further email on 16 February 2023 at 10:54am to Mrs Turner and Dr Mistry in the following terms:

> "Just to clarify the script for the above dated 09/02/23 was signed out as collected on 13/02/23 but in fact it was not collected until yesterday 15/02/23, so not sure why it was signed out as collected then but on the script it has yesterday's date and I was here when it was collected.
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> I am feeling increasingly stressed as once I leave here at 6.30pm on Friday night no matter how many precautions I have taken to ensure my work remains as I have left it, it cannot be guaranteed that tampering is not happening in order to cause me undue stress and trouble. But the worse thing is the potential danger to the patient."

19. The claimant further reported her concerns to the Care Quality Commission ("CQC") by email dated 16 February 2023 at 1:08pm stating:

> "I am writing in confidence as I am very concerned about what has been happening within the GP dispensary, I am one of three dispensers, the other two work Monday and Tuesday I cover Wednesday to Friday. I have voiced my concerns to the practice manager and a practice partner for a while now concerning my two colleagues about their animosity towards me and they want me to leave or be sacked. But now it has taken a sinister turn and I am worried for patient safety as it appears my work is being tampered with and the wrong medication has been given out to the wrong patient. But they are son in law and mum in law in, something I wouldn't have known but the other ladies have been here a lot longer and would know that fact, also the strange thing is the items were dispensed and bagged originally on different days. So tampering must have occurred for these two items to end up in the same bag with surnames beginning with D and S from different days and the medications were both blood thinners.
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> I don't think this is something that can and should wait for two weeks until our next dispensary meeting as I have let my manager know I am super stressed about leaving my work at 6.30 on a Friday intact then to come in Wednesday to this situation. I have also let them know my main concerns is the patient safety aspect of what is going on here, will it take harm or death to a patient?"

20. There were a number of further correspondences between the CQC and the claimant thereafter. I was shown an email dated 2 March 2023 sent at 5:19pm from the CQC inspector thanking the claimant for providing an update and advising that she would discuss the information with her line manager and contact her again the following week. The claimant was asked that if there were further patient safety concerns that arose to advise the inspector accordingly.

21. The claimant argued that following the making of the protected disclosures on those dates, she was called to an unannounced meeting on 9 March 2023 at which she was summarily dismissed (she was dismissed with immediate effect, but she received a payment in lieu of notice and outstanding holiday pay). At that meeting the claimant asserted that she was not told the reasons for her dismissal.

22. The reasons for her dismissal were not provided in the dismissal letter dated 9 March 2023 and the claimant was not provided within that letter a right of appeal.

23. However, an appeal hearing did take place following a receipt of an appeal against the claimant's dismissal dated 13 March 2023. A hearing took place on 23 March 2023 and the notes of that meeting record as follows:

[KQ which refer to Mr Quinnear (Coroner Face 2 Face consultant)]

"KQ - So, the reason I've been give for your dismissal was due to the irrevocable breakdown in the relationship between yourself and three other staff members, 2 dispensers and 1 receptionist, which came to a head on the 8th of March where it is alleged that KN locked the dispensary door when there was 4 member of staffs on the premises."

24. The claimant said that those matters were not the real reason for her dismissal and that these matters were not discussed with the claimant prior to her dismissal.

25. She referred to a background of issues she experienced with her colleagues and the grievance she had raised previously, in relation to which she said she did not receive a written outcome.

26. The claimant made no submissions with regard to her financial position or the effects of the decision to dismiss her, save that she advised that she was not currently in employment.

The respondent's submissions

27. For the respondent, the respondent's representative submitted that the claimant's submissions had clarified that her only protected disclosures were on 15 February 2023 and her email that was sent on the following day. He did not admit on behalf of the respondent that the emails would amount to a qualifying disclosure, and that, in fact, the key issue was whether the claimant had a reasonable belief in respect of the disclosure that she was making to the respondent.

28. He said the claimant's allegations relating to sabotage were disputed, that this were a serious allegation, and would require investigation by way of witness evidence at a Final Hearing. The respondent's representative submitted that this is a key matter in terms of determining whether the claimant held a reasonable belief.

29. He also said that the Tribunal could not determine whether the allegations made to the CQC were substantially true without hearing witness evidence.

30. The respondent's representative submitted that there was a lot going on and the claimant was causing problems within the respondent's business separately from her complaints about her protected disclosures. The respondent's representative asserted that it was these behaviours by the claimant (separate from her complaints about her protected disclosures) which were the reason for her dismissal.

31. The claimant was employed as a dispenser, and she was normally required to work 20 hours per week. The respondent's representative described the claimant's actions as arising from the animosity with her colleagues.

32. The respondent's representative submitted that the respondent had investigated the issues raised by the claimant in her correspondences in February and March 2023, they had further explored these with the claimant during the appeal meeting and he submitted that those were not qualifying disclosures.

33. The respondent's representative referred to the dispensary meeting held on 24 January 2023, the dispensary meeting on 9 February 2023, the dispensary meeting held on 3 March 2023 and the appeal hearing held on 23 March 2023.

34. The respondent's representative submitted that it was the claimant's attitude, and behaviour towards staff rather than the respondent's reaction to her whistleblowing complaints, which led to her dismissal. He said that these gave rise to a fair dismissal, namely some other substantial reason.

35. He also stated that one of the claimant's colleagues, who the claimant had reported to the police, had been dismissed at around the same time that the claimant was dismissed.

36. Additionally, he submitted that the claimant had shown no evidence that the fact she had reported her concerns to the CQC was known by the practice manager (or the respondent) prior to her dismissal.

37. He advised that the respondent would not be willing to reinstate or reengage the claimant given the circumstances.

38. The respondent's representative, thereafter, referred the Tribunal to a number of authorities, which I took into consideration in reaching my decision.

The Law

39. Section 128 of the ERA 1996 provides as follows, so far as is relevant:

> (1) "An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and –
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> (a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in –
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> (i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or
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> (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or
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> (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."

40. Section 129 of the ERA 1996 sets out the procedure on the hearing of the claimant's application and making of order in the following terms:

"[

(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."

41. In *Taplin v C. Shippam Ltd* [1978] ICR 1068, the EAT held that the word "likely" in what is now s. 129 ERA 1996, should be interpreted as follows (at p. 1074): "On the other hand we are not persuaded that there is a dichotomy between "probable" and "likely" as expressed by the chairman of the industrial tribunal. We find it difficult to envisage something which is likely but improbable or probable but unlikely and we observe that the *Shorter Oxford English Dictionary* definition does define "likely" as
"probable." Nor do we think that it is right in a case of this kind to ask whether the applicant has proved his case on a balance of probabilities in the sense that he has established a 51 per cent. probability of succeeding in his application, as has at one stage been contended before us. Nor do we find Mr. Hand's alternative suggestion of a teal possibility of success to be a satisfactory approach. This again can have different shades of emphasis. It seems to us that the section requires that the employee shall establish more clearly that he is likely to succeed than that phrase is capable of suggesting on one meaning. On the other hand it is clear that the tribunal does not have to be satisfied that the applicant will succeed at the trial. It may be undesirable to find a single synonym for the word "likely" but equally, we think it is wrong to assess the degree of proof which has to be established in terms of a percentage as we have been invited to do.

We think that the right approach is expressed in a colloquial phrase suggested by Mr. White. The industrial 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."

42. In *London City Airport v Chacko* [2013] IRLR 610, the EAT gave guidance as to the correct approach for an Employment Judge in assessing whether a claim has a "pretty good chance of success", at [23]:

"23. In my judgment the correct starting point for this appeal is to fully appreciate the task which faces an employment judge on an application for interim relief. The application falls to be considered on a summary basis. The employment judge must do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The employment judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the Employment Tribunal but whether "it appears to the tribunal" in this case the employment judge "that it is likely". To put it in my own words, what this requires is an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim."

43. The case of *Ministry of Justice v Sarfraz* [2011] IRLR 562 gives further guidance. The EAT determined that in order to make an order for interim relief in a case involving allegations of automatically unfair dismissal under section 103A of ERA, the Tribunal must decide that it was likely that the Tribunal at the final hearing would find five things:

"14. Thus in order to make an order under sections 128 to 129 the Judge had to have decided that it was likely that the Tribunal at the final hearing would find five things: (1) that the Claimant had made a disclosure to his employer; (2) that he believed that that disclosure tended to show one or more of the things itemised at (a) to (f) under section 43B (1) ; (3) that that belief was reasonable; (4) that the disclosure was made in good faith; and (5) that the disclosure was the principal reason for his dismissal."

44. I note that the requirement that the disclosure be made in good faith has now been removed following the amendment of this provision. It must now be shown that the claimant reasonably believed that the disclosure was made in the public interest.

45. In terms of the fifth requirement that that the disclosure was the principal reason for his dismissal, in that regard, the EAT said:

> "The discussion in Taplin was complicated by Slynn J having to address the unusual way in which the chairman had directed himself. A caviller might also say that "a pretty good chance of success" is not very obviously distinguishable from the rejected formula "a reasonable chance of success". Nevertheless, the basic message of the judgment read as a whole is clear. In this context "likely" does not mean simply "more likely than not" — that is at least 51 per cent — but connotes a significantly higher degree of likelihood. Slynn J understandably declined to express that higher degree in percentage terms, since numbers can convey a spurious impression of precision in what is inevitably an exercise depending on the Tribunal's impression."

46. I also referred to the decision made by the former President of the Employment Appeal Tribunal, Mr Justice Choudhury, in the case of *Dr Colin Hancock v Mr M TerBerg and NHS England Midlands and East* [2020] ICR 570 in which the EAT held that on a proper construction of sections 128 and 129 of the ERA 1996, all elements of the complaints of unfair dismissal for a proscribed reason were to be determined at the interim relief hearing on a likely to succeed test:
"52. For the reasons set out above, and notwithstanding Mr Butler's eloquent and forceful submissions, I am satisfied that the likely to succeed test applies to all elements of the complaint of unfair dismissal for one of the proscribed reasons that may properly be the subject of an application for interim relief, and that the tribunal did not err in applying that test to the question of employee status."

Discussion and conclusion

47. This is an application for interim relief under sections 128 to 132 of the ERA 1996. The claimant asserts that she was automatically unfairly dismissed by the respondent on 9 March 2023 for the reason or principal reason that she had made a protected disclosure (or protected disclosures) to the respondent, and thereafter, to the CQC.

48. For the purposes of an interim relief application, I am required to make a decision as to the likelihood of the claimant's success on the Tribunal determining the claimant's complaint to which the claimant's application relates at a Final Hearing based on the material before me at this hearing (section 129(1) of the ERA 1996).

49. The correct test is set out in the case of *Taplin v C Shippam Ltd* [1978] ICR 1068 (please see above). The EAT made it clear, in that case, in terms of the burden of proof upon the claimant at an interim relief hearing, and the question to be addressed by the Tribunal being whether the claimant has "a "pretty good" chance of succeeding in the final application to the tribunal".

50. I have reminded myself that this is not a case in which I am asked to make an assessment of whether or not the claimant has a reasonable prospect of success, as would be required in a strike out application, but rather, where I am required to determine whether the high test of 'likelihood' envisaged in section 129(1) of the ERA 1996, has been met. The high bar is there because there is a risk that the respondent could be irretrievably prejudiced if they are required to treat the contract as continuing until the conclusion of the hearing.

51. In my judgment, the test is not met, in this case.

52. I have reached this conclusion for the following reasons.

53. I have considered whether the claimant's prospects of showing that the information contained in the claimant's emails sent on 15 February 2023 and 16 February 2023 to the respondent and the further email sent to the CQC on 16 February

2023, amounts to a qualifying disclosure, has "a "pretty good" chance of succeeding in the final application to the tribunal".

54. In terms of her email dated 15 February 2023, sent to the respondent, the claimant refers to medication of two patients being mixed up. She specifically identifies the ethos of the patients' concern and the medication in question. She also refers to the fact that the two patients coincidentally are related, that she would not have known that fact, that she dispensed the items in question on her working days, whereas the bags containing the medication were dispensed on one of her non-working days.

55. She also refers to her concern being sabotage and her real concern was for patient safety, namely that a patient could become seriously ill or die because of the: "…mindless mind games in order to make me look like I've made a serious mistake".

56. The second email sent to the respondent on 16 February 2023 added additional information in relation to the same concerns that were raised by the claimant in her email dated 15 February 2023. I have considered the information contained in both emails.

57. In relation to the five points that I am required to take account of in terms of the case of *Sarfraz* (above), firstly, the respondent's representative did not dispute that the disclosures sent by way of emails dated 15 and 16 February 2023 were made to the claimant's employer.

58. It is also evident from the content of those emails that the claimant believed that the disclosure of the information she made to the respondent tended to show that the safety of patients were at risk. It is likely that the claimant's concerns would fall within the terms of section 43B(1)(d) "that the health or safety of any individual has been, is being or is likely to be endangered." The fact that this was a key concern for the claimant was also shown within the content of her email sent to the CQC on 16 February 2023.

59. Whilst I cannot be certain that the claimant will succeed, as it is not clear whether the medication mixed between two patients was deliberately wrongly carried out, I accept that the claimant does have a significant chance of success and therefore I accept that for the purposes of this application only, that the claimant has a pretty good chance of successfully showing that she made a protected disclosure to the respondent in her emails dated 15 and 16 February 2023 within the requirements of s 43B of the ERA 1996, save in relation to the issue of whether she held a reasonable belief at the relevant time.

60. I cannot reasonably determine that there is a pretty good chance of the claimant showing she held a reasonable belief in terms that the information she disclosed to the respondent showed that the health or safety of patients has been, is being or is likely to be endangered at this stage of the proceedings (and without hearing evidence from relevant witnesses). At this stage I have been shown a limited number of email correspondences and there is likely to be further email and potentially other correspondences and documentation available that may be

relevant to this issue. The claimant's serious allegations relating to alleged sabotage and her concerns regarding patient safety will need to be investigated further and explored in terms of evidence. I was mindful that there had not been full disclosure, that the claimant had not provided a full written statement, and indeed, I also kept in my mind that I have not heard from any of the respondent's witnesses.

61. In the event that I had been able to conclude that it was likely that the claimant would be able to show at a Final Hearing that the claimant held a reasonable belief that the information she disclosed to the respondent tended to show that the health or safety of patients has been, is being or is likely to be endangered, I would have proceeded to consider whether the disclosure of information was made in the public interest. For completeness, I find that it is likely that the claimant will establish that she believed that she was making her disclosure in the public interest. This is because the claimant refers to her patient safety concerns in both her email to the respondent dated 15 February 2023 and in her email to the CQC dated 16 February 2023, and the safety of patients within a GP practice is a matter within the public interest.

62. However, the claimant would also need to show that her belief that her disclosure was made in the public interest was a reasonable belief. I am unable to investigate and determine at this early stage of the proceedings, and in the absence of reviewing and hearing further evidence, that the claimant held a reasonable belief in that regard.

63. In addition, in relation to the disclosure made by the claimant to the CQC, and in terms of section 43F of the ERA 1996, the respondent's representative accepted that the CQC was a person proscribed by an order made by the Secretary of State for the purposes of section 43F(1)(a) of the ERA 1996. I am prepared to accept for the purposes of the claimant's application, that the claimant reasonably believed that in terms of her email correspondence dated 16 February 2023 sent to the CQC, and section 43F(1)(b)(i) that the relevant failure of which the claimant complained fell within any description of matters in respect of which that person is so prescribed (and that the CQC are a relevant body tasked with investigating patient safety issues at GP surgeries). However, I am not in a position to determine whether the claimant has a pretty good chance of showing that the claimant reasonably believed that the allegations made by the claimant to the CQC on 16 February 2023 were substantially true in terms of section 43F(b)(ii) of the ERA 1996 (without hearing witness evidence and reviewing all relevant documents that are likely to be available at the Final Hearing).

64. However, even if I found that the claimant had a pretty good chance of showing that she had made a qualifying disclosure in terms of section 43B of the ERA 1996, and/or in terms of section 43F of the ERA 1996 (which I do not find), the reason or the principal reason for the claimant's dismissal is fundamental to the claimant's claim. There is a dispute as to the reason or principal reason for dismissal. The claimant is convinced that she was dismissed because she made protected disclosures. She points to the fact that prior to making her disclosures, the respondent's actions towards her were different, and in addition, she states that the respondent had not been dealing with her grievance which was presented

in writing. She further submits that immediately after she made her disclosures, the respondent's actions towards her further changed and she was ultimately summarily dismissed.

65. On the other hand, the respondent's representative points to the behaviour of the claimant on a number of occasions and cites examples of the claimant's conduct. The respondent's representative says that the claimant had less than two years of continuous employment and therefore the respondent chose not to follow a full disciplinary procedure. Whilst the dismissing manager was aware of the claimant's disclosures which was addressed to her in email correspondence, it is averred by the respondent that they was not the reason or the principal reason for the claimant's dismissal and there were pre-existing issues between the claimant and the respondent.

66. It is not possible for me to reach any or any firm conclusion based on the evidence which has been shown to me at this hearing, that the claimant has a pretty good chance of success in terms of showing that the reason or the principal reason for her dismissal was the protected disclosures she made to the respondent and/or to the CQC. The key issue in terms of the reason or the principal reason for the claimant's dismissal is disputed, and I am conscious that I have seen or heard no evidence from the Practice Manager who was the dismissing officer (and who also determined the claimant's appeal). The Tribunal at the Final Hearing be required to consider the Practice Manager's evidence as well as the claimant's evidence, in addition to any other relevant witnesses and documents before they can reach a conclusion in terms of what was the reason or principal reason for the claimant's dismissal (and what the reason or principal reason for dismissal in the mind of the Practice Manager was at the relevant time). This is a fact sensitive exercise, it will require hearing witness evidence and reviewing the totality of the evidence including documents and correspondences that are available at the Final Hearing.

67. In these circumstances and having considered the terms of section 129(1) of the ERA 1996 including the relevant test in terms of likelihood of success and the five points that I am required to consider from the case of *Sarfraz* (above), I am unable to grant the claimant's application for interim relief.

68. I would like to clarify that the claimant has lost nothing in terms of the claimant's right to advance her claim before the Tribunal and to proceed to a Final Hearing. The test for interim relief is a high one and has not been met on this occasion.

Conclusion

69. Accordingly, the claimant's application for interim relief is refused.

70. I have made Case Management Orders under separate cover with a view to ensuring that the claimant's claim may proceed to a Final Hearing as soon as possible.

Postscript

71. The respondent's representative sent an email to the Tribunal on 05 May 2023. As this email was received after the hearing on 28 April 2023 concluded, I did not take this email into account or invite the parties to make any further submissions. In any event, the relevance of the authority and the further submissions was not clear in the context of the claimant's application. My decision in relation to this matter was in line with the Tribunal's overriding objective set out in Rule 2 of the ET Rules. If this is a matter which the respondent wishes to pursue, it should (if so advised) be raised in the respondent's defence, and it may ultimately be a matter that will require to be determined at the Final Hearing.

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Employment Judge Beyzade
Date: 19 December 2023

REASONS SENT TO THE PARTIES ON
Date: 21 December 2023

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Parmi Puaar
FOR THE TRIBUNAL OFFICE