5 **EMPLOYMENT TRIBUNALS (SCOTLAND)**

Case No: 4107218/2023

Hearing Held in Person on 21 December 2023

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Employment Judge S Neilson

Mr G McManus	**Claimant**
Brothers of Charity Services Scotland	**Respondent** **Represented by** **Mr Gorry**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application for interim relief is unsuccessful.

REASONS

35 **Introduction and Background**

1. This case called for a hearing on an application by the claimant for interim relief under Section 128 of the Employment Rights Act 1996 ("ERA").

2. The claimant was the former Chief Operating Officer of the respondent. He was employed from 1 March 2022 until 30 November 2023, when he was dismissed. The respondent is a company limited by guarantee and is a charity. The respondent provides social care services in the Scottish borders.

3. In his ET1 the claimant alleges that he was unfairly dismissed and that the reason or principal reason was due to disclosures that he made to the Care Inspectorate.

4. The hearing was held in person. The claimant was unrepresented. Mr Gorry, Solicitor, appeared for the respondent. The claimant lodged a number of documents and the respondent lodged a bundle of documents. These documents will be referred to below. Included within the documents lodged by the claimant was a 5-page written note headed "Prepared statement of facts in relation to claim for interim relief pending formal hearing/conciliation". This document essentially set out the claimant's submissions – although he did elaborate on these submissions before the Tribunal. There was an ET1. An ET3 had been lodged on the morning of the hearing by the respondent.

5. The Tribunal explained at the outset that it would not hear oral evidence – in accordance with Rule 95 of the Employment Tribunal Rules 2013, but that it would proceed to determine the issue of interim relief based upon the documents that had been submitted and the oral submissions that were made. The Tribunal explained to the claimant that, in respect of the application for interim relief, the onus was on him to establish that he had "a pretty good chance of success" in establishing at a final hearing that the reason or if more than one reason, the principal reason, for his dismissal is that he had made a protected disclosure or disclosures.

6. The respondent did not dispute that the claimant was an "employee" for the purposes of Section 103A of the ERA and it was common ground that the employment of the claimant terminated on 30 November 2023 and that the claimant had been paid a lump sum equivalent to 12 weeks salary in lieu of 12 weeks' notice.

7. The ET1 having been received by the Employment Tribunal on 5 December 2023 the claimant's application for interim relief was accordingly in time within the terms of Section 128 of the ERA (which requires the application for interim relief to be made within 7 days of the dismissal).

5 8. It was also accepted by the respondent that the person to whom the alleged disclosure was made by the claimant, a manager within the Care Inspectorate, was a person who fell within the terms of Section 43F of the ERA.

Relevant Law

10 9. The circumstances in which an application for interim relief can be made are set out in section 128 of the ERA. Section 129 of the ERA then sets out the procedure on the hearing of the application.

10. Section 128 of the ERA provides:

"An employee who presents a complaint to an employment tribunal that he
15 *has been unfairly dismissed and (a) that the reason or (if more than one the principal reason) for the dismissal is one of those specified in section…. 103A ….. may apply to the tribunal for interim relief."*

11. Section 103A of the ERA provides that *"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason*
20 *(or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

12. Accordingly, to succeed in his application for interim relief, the claimant must (in accordance with Section 129 of the ERA) demonstrate that it is likely that in determining his claim, a Tribunal will find that the reason or principal reason
25 for the claimant's dismissal was that the claimant had made a protected disclosure or disclosures.

13. The leading authority with regard to the test under Section 129 of the ERA is *Taplin v C Shippam Ltd [1978] IRLR 450*, where the Employment Appeal Tribunal ('EAT') further defined "likely" (in the context of Section 129 of the

ERA) as meaning a "pretty good chance of success". The test is that the claimant has a "pretty good chance of success" in establishing that the reason that he was dismissed was that he had made a protected disclosure. In *Taplin* the EAT expressly ruled out alternative tests. According to the EAT, the burden of proof in an interim relief application was intended to be greater than at a full hearing, where the Tribunal need only be satisfied on the "balance of probabilities" that the claimant had made out his case.

14. In *Ministry of Justice v Sarfraz [2011] IRLR 562*, EAT, Mr Justice Underhill, then President of the EAT, commented that the test of a "pretty good chance of success" does not mean simply "more likely than not" but connotes a significantly higher degree of likelihood, i.e. *"something nearer to certainty than mere probability"*.

15. Section 43A of the ERA defines a "protected disclosure" as a "qualifying disclosure" made by a worker in accordance with any of sections 43C to 43H.

16. Section 43B of the ERA defines a "qualifying disclosure" as *"any disclosure of information, which in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following;-*

    (a) *That a criminal offence has been committed, is being committed or is likely to be committed,*

    (b) *that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,*

    (c) *that a miscarriage of justice has occurred, is occurring or is likely to occur,*

    (d) *that the health or safety of any individual has been, is being or is likely to be endangered,*

    (e) *that the environment has been, is being or is likely to be damaged, or*

(f) *that information tending to show any matter falling within any of the preceding paragraphs has been, or is likely to be deliberately concealed."*

17. Section 43F of the ERA provides: -

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

(a) *Makes the disclosure…to a person prescribed by an order made by the Secretary of State for the purposes of this section, and*

(b) *reasonably believes-*

10 (i) *that the relevant failure falls within any description of matters in respect of which that person is so prescribed, and*

(ii) *that the information disclosed, and any allegation contained in it, are substantially true.*

15 (2) *An order prescribing persons for the purposes of this section may specify persons or descriptions of persons, and shall specify the description of matters in respect of which each person, or persons of each description, is or are prescribed."*

18. The Public Interest Disclosure (Prescribed Persons) Order 2014 lists the
20 Care Inspectorate as a prescribed person for the purposes of Section 43F of the ERA. The matters in respect of which they are prescribed are stated in that Order to be *"Matters relating to the provision of care services, as defined in the Public Services Reform (Scotland) Act 2010."*

19. Section 47 of the Public Services Reform (Scotland) Act 2010 states: -

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"Care services

(1) In this Part, a "care service" is any of the following—

(a) a support service,

(b) a care home service,

(c) a school care accommodation service,

(d) a nurse agency,

(e) a child care agency,

5 *(f) a secure accommodation service,*

(g) an offender accommodation service,

(h) an adoption service,

(i) a fostering service,

(j) an adult placement service,

10 *(k) child minding,*

(l) day care of children,

(m) a housing support service."

More extensive definitions of the above terms are then set out in Schedule 12 to
15 the Public Services Reform (Scotland) Act 2010

Issues to be Determined

20. There are three issues to be determined in this application for interim relief.

21. Firstly, whether there was a "qualifying disclosure" by the claimant as defined by Section 43B of the ERA. The key components of whether there was a
20 "qualifying disclosure" are: -

(a) Was there a disclosure of information?

(b) Which in the reasonable belief of the claimant was made in the public interest?

(c) Which in the reasonable belief of the claimant tends to show
25 one or more of (a) to (f) in paragraph 14 above?

22. Secondly was there a "protected disclosure"? The respondent accepts that the alleged qualifying disclosure was made to a prescribed person under

Section 43F of the ERA. However, to be a “protected disclosure” the requirements of Section 43F(1)(b) must be met. These requirements are: -

(a) Did the claimant reasonably believe that the relevant failure falls within any description of matters in respect of which that person is so prescribed?

(b) Did the claimant reasonably believe that the information disclosed, and any allegation contained in it, are substantially true?

23. Thirdly, if there was a “protected disclosure” was the reason or principal reason for the dismissal that the claimant made the protected disclosure?

Submissions – Claimant

24. The claimant’s position was that he was unfairly dismissed as a consequence of protected disclosures he made to the Care Inspectorate.

25. The claimant’s position was that on 21 November 2023 he had a Teams meeting with Lynne Hepburn from the Care Inspectorate (“LH”) and in the course of that meeting he made a number of disclosures which were protected disclosures. He alleged that he made the following disclosures to LH:-

(a) Concerns regarding governance and compliance issues within the respondent.

(b) That he understood there had been a practice within the respondent of falsifying the files that the respondent held for each registered manager. In particular that there was a standard file that met the requirements that the Care Inspectorate might look for with regard to a registered manager and the practice had been simply to use that standard file but change the name of the registered manager on the file – so that in reality the file did not actually relate to that specific registered manager.

(c) That there had been a failure to provide incident reports ("Notifications") to the Care Inspectorate. These Notifications, which were a legal requirement, relate to any adult protection concern – which might include e.g abuse, significant harm or staffing issues. Some of the failures went as far back as 2008/2009.

(d) Issues around the undermining, by the respondent, of the approved management review and restructure that had been approved by the respondent in April 2023.

(e) Flip flopping on decision making within the respondent – in terms of inconsistency in dealing with people issues such as performance. A specific example was provided with regard to the treatment of employee Simon Cullum – an employee put at risk of redundancy, trialled in another role, then made redundant but subsequently offered new employment.

26. The conversation with LH was on Teams and lasted approximately one hour.

27. The claimant alleged that he made these disclosures as he wanted to reset the relationship between the respondent and the Care Inspectorate and to demonstrate transparency and ownership of issues. This followed upon a Care Inspectorate report into the respondent in the summer of 2023 that had given the respondent a "weak" rating.

28. As a consequence of making these disclosures the claimant alleged that was called to a Teams meeting on 30 November 2023 with the Chief Executive, Jane Moore ("CEO") and the head of HR, Fiona MacDonald. At that meeting he was notified that his employment was terminated with immediate effect. A number of reasons were given at that meeting for his dismissal and one of the reasons stated by the CEO was that he had met

with the Social Care Inspectorate without including or informing the CEO and this was disappointing.

29. His dismissal came against a background where his performance had not previously been questioned or criticised; he had received substantial salary increases in the period from when he started through to July 2023 (rising from a starting salary of £54,000 in March 2022 to £70,000 in July 2023).

30. The claimant was aware that LH had spoken to the CEO between their conversation on 21 November 2023 and his dismissal on 30 November 2023 but he was not aware exactly what they had discussed. The claimant produced a copy of a Whatsapp exchange between himself and LH on 30 November 2023 where he stated *"Hi Lynne, as you will appreciate I can't discuss today's developments. What did get mentioned is that my private meeting with you is known and reported to the Board? Obviously I need to keep this confidential as I have stated I intend to fully challenge Jane and the Chair on their decision today. Was it your understanding we had a confidential and without prejudice conversation Lynne?"* To which LH replies *"My private meeting with you was questioned by Jane last week. It was my understanding that we had a confidential and without prejudice conversation. It was a supportive meeting again in confidence and without prejudice."* The claimant specifically stated that in his submissions to the Tribunal that *"he had no knowledge or awareness of what LH said to Jane [the CEO] or vice versa."*

31. The dismissal was pre-determined. He was given no opportunity to answer any of the allegations. There was no fair process and no right of appeal.

32. There had, the claimant believed, been significant behavioural changes from the CEO and the Chair of the Board, Brother John O'Shea, towards him after 21 November 2023.

33. The letter of dismissal dated 6 December 2023 set out reasons for dismissal that were at odds with what was discussed at the meeting on 30 November 2023.

Submissions – Respondent

34. For the respondent Mr Gorry highlighted that the onus was on the claimant to establish that he had a "pretty good chance" of showing both that he made protected disclosures as defined and that the reason he was dismissed was because of the protected disclosures. It was not disputed that the person to whom the disclosures were allegedly made was a prescribed person within Section 43F of the ERA but Mr Gorry did draw attention to the higher threshold required under 43F(1)(b).

35. With regard to the disclosures themselves Mr Gorry submitted that at best only two of the alleged disclosures might be considered to be capable of meeting the requirements of Section 43B and 43F of the ERA. These were the alleged disclosures in respect of the falsification of files and the failure to provide the Notifications – and even here his position was they did not meet the necessary tests.

36. On the issue of the link between alleged disclosures and the decision to dismiss there was no evidence to show that the respondent knew about the disclosures. The respondent accepts it was aware there had been a call (and was aware on 24 November 2023) – but had no knowledge as to the content save as set out at paragraph 24 of the ET3 where the respondent states "*On 21 November 2023 the Claimant had a Teams call with the Care Inspectorate. The Respondent is unaware of the content of the discussions on that call but has been advised by the manager at the Care Inspectorate that the claimant complained about the managers within the Social Work department of the Respondent's funder, the Scottish Borders Council.*"

37. The respondent were also able to point to a timeline that showed the real reason for dismissal was not linked to the alleged disclosures. In particular Mr Gorry highlighted that there were issues in the working relationship between the claimant and the respondent as set out from paragraph 10 of the ET3. He drew attention to a breakdown in the relationship between Fiona MacDonald and the claimant from September 2023 and concerns the CEO had about unprofessional e mails from the claimant. Mr Gorry referred to e mail

exchanges between Fiona MacDonald and the claimant on 27 and 28 September 2023 (documents 38 to 35 of the respondent bundle) that he suggested showed unfair criticism of Fiona MacDonald by the claimant regarding an employee's registration details. There were also concerns regarding the claimant's approach to the re-employment of an employee, Simon Cullum. Mr Gorry referred to e mails (documents 39 to 45 and 49 to 51 of the respondent's bundle) which he stated showed the claimant initially accepting that Simon Cullum (an employee at risk of redundancy) might be considered for alternative employment and then changing his view and alleging that this might cause a serious reputational risk. Further Mr Gorry referred to complaints made to the CEO on 16 November 2023 by two of the claimant's direct reports about the claimant's conduct at a meeting (paragraph 14 of the ET3) and further supported by an allegedly inappropriate e mail from the claimant to two of his direct reports on 20 November 2023 (document 52 of the respondent's bundle). Finally, Mr Gorry referred to an e mail sent late at night on 23 October 2023 by the claimant to the CEO containing criticism of the strategic plan (document 46 to 48 of the respondent bundle) – as further evidence of a breakdown in the relationship between the claimant and CEO.

38. Mr Gorry submitted that all of this culminated in the CEO speaking to the Chair of the Board, Brother John O'Shea, on 20 November 2023 to discuss the continued employment of the claimant. This is supported by e mail exchanges at 56, 57 and 59 of the respondent's bundle. They agreed to seek legal advice. Legal advice on a potential termination was sought from Ben Doherty at Lindsays Solicitors on 20 November (per document 55 of the respondent's bundle). A call with Ben Doherty of Lindsays then took place on 21 November 2023 (per document 67 of the respondent's bundle) and a decision was made to terminate the claimant's employment. That was actioned on Thursday 30 November 2023 when the claimant returned from annual leave. The respondent did not become aware of the claimants call with LH until Friday 24 November 2023.

39. The respondent's position is that in all the circumstances the claimant cannot show that he has a pretty good chance of succeeding at the final hearing.

Discussion & Decision

40. In the present case, the Tribunal has had regard to the ET1 and ET3 and has also considered the documents submitted by the parties. The Tribunal has also taken into account the submissions of the parties. The Tribunal has taken a broad-brush approach to consideration of the matter given the nature of the issues to be determined. The Tribunal is also mindful that at this interim stage it does not want to say anything which might be said to place any limits on any ultimate findings of fact which might be made by the Tribunal at the final hearing, after hearing all the relevant evidence and submissions. The Tribunal at an interim relief hearing is required to make a summary assessment based on the material before it of whether the claimant has a pretty good chance of succeeding on the relevant claim. In this summary assessment, the Tribunal is not making any findings of fact but setting out it's observations based on the material before it, of the likelihood of the claimant succeeding at a full hearing in his complaint under section 103A of the ERA.

41. The first issue to consider is the likelihood of the claimant succeeding in showing that he did make a protected disclosure or disclosures. Firstly, the Tribunal must consider if any of the alleged disclosures were qualifying disclosures under Section 43B of the ERA. Of the disclosures highlighted at paragraph 24 above the Tribunal does have difficulty in seeing how the claimant is likely to succeed in establishing that disclosures (a), (d) and (e) amount to disclosures of information which in his reasonable belief show or tend to show one or more of the issues in 43B(1)(a) to (f) of the ERA.

42. Generalised concerns about governance and/or compliance are unlikely to amount to a disclosure of "information".

43. Concerns about the undermining of the management review and the restructure - even if there had been specific information contained in what the claimant said – did not seem to the Tribunal to be capable of being in a category where, in the reasonable belief of the claimant, they could be said to show or tend to show any criminal offence; illegality or any health and safety endangerment.

44. The flip flopping on decision making also struck the Tribunal as unlikely to meet the requirement of showing or tending to show, in the reasonable belief of the claimant, any criminal offence; illegality or any health and safety endangerment.

45. Regarding disclosures (a), (d) and (e) the Tribunal is not satisfied at this preliminary stage that there is a pretty good chance of the claimant successfully showing that these amounted to qualifying disclosures.

46. However, the position is different with disclosures (b) and (c).

47. Both the disclosures regarding the falsification of files and the failure to provide Notifications do appear to the Tribunal to be disclosures of information. It does seem to the Tribunal that it would be reasonable for the claimant to consider that these disclosures would show or tend to show either some criminal offence, or breach of a legal obligation or a health and safety risk – given the regulated environment within which the respondent operates and the potential impact upon the health and safety of those within their care. With regard to public interest it does seem to the Tribunal that it would be within the reasonable belief of the claimant that these disclosures were made in the public interest given the potential impact upon the provision of care within the Borders Region of Scotland and the impact upon members of the public who might be in receipt of that care. Turning to Section 43F the Tribunal does consider that the claimant does have a pretty good chance of successfully establishing that he reasonably believed the relevant failure fell within the description of a "care service" and that the information disclosed both with regard to the falsification of files and the Notification are substantially true. Accordingly, the Tribunal does consider that the claimant has a good chance of successfully establishing that he did make protected disclosures in his conversation with LH on 21 November 2023.

48. Turning to the issue of causation. Does the claimant have a pretty good chance of successfully establishing that the reason for the dismissal (or if more than one, the principal reason) was that the employee made a protected disclosure. At this preliminary stage the Tribunal, having had regard to the

documents put in front of the Tribunal, the ET1 and the ET3 and the submissions by both parties, does not consider that it can be said that the claimant has a pretty good chance of establishing that link.

49. It is not disputed that the claimant made the alleged disclosures, upon which he relies, on Tuesday 21 November 2023. However, the Tribunal has not been directed to any direct evidence that establishes that the respondent was aware, prior to 30 November 2023, of the disclosures that were made to LH. The claimant produced typed notes that he alleged set out what was discussed at the meeting on 30 November 2023 with the CEO and Fiona MacDonald. These disclose that his meeting with LH was specifically mentioned. The note of the meeting from the claimant sets out what the claimant alleges the CEO said about him as follows:- *"I have met with the Social Care Inspectorate without including/informing the CEO stating this was disappointing."* However, the respondent's position is that they were only made aware on 24 November 2023 that a conversation had taken place between LH and the claimant – and at that point they believed it to relate to complaints about managers within the Scottish Borders Council. The Whatsapp exchange between the claimant and LH on 30 November that was disclosed by the claimant simply confirms that LH stated "*My private meeting with you was questioned by Jane last week. It was my understanding that we had a confidential and without prejudice conversation. It was a supportive meeting again in confidence and without prejudice."* Whilst there are clearly issues here around who said what to who and when, based upon the information before the Tribunal the Tribunal cannot be satisfied that the claimant has a pretty good chance of showing that the respondent was aware, prior to 30 November 2023, of the protected disclosures having been made. All of the evidence is equally consistent with the explanation given by the respondent.

50. With regard to the time-line of events in the period from September 2023 through to 30 November 2023 the Tribunal has taken into consideration the documents produced by the respondent which suggest that there were some relationship issues in the period from September through to November 2023.

There is then the e mail from Fiona MacDonald to Ben Doherty at Lindsays on 20 November 2023 (page 55 of the claimant's bundle) and the Teams meeting invite from Ben Doherty at Lindsays to the CEO and Fiona MacDonald for a meeting on Tuesday 21 November 2023 at 14:30 (page 67 of the respondents bundle). Both support the contention of the respondent that the decision to dismiss the claimant was under consideration prior to the meeting that the claimant had with LH on 21 November 2023.

51. The Tribunal has also had regard to what the claimant himself said about his relationship with the respondent deteriorating prior to 21 November 2023. In particular he referenced meetings with the Board in October 2023 in which he described the Chair of the Board as being distant and a member of the Board cutting him off when he tried to talk about the care Inspectorate. He also referred to a meeting with the CEO and Fiona MacDonald on 15 November 2023 when he told them he thought there was a fracture in their relationship.

52. Whilst the Tribunal finds it surprising that the claimant goes from a position in or about July/August 2023 where he has had no complaints about his performance and a substantial pay rise to being dismissed in November 2023 and in addition considers that the evidence regarding a relationship breakdown might be described as sparse, there is enough to suggest, at this preliminary stage, that there were relationship problems between the claimant and the senior management in the respondent prior to 21 November 2023 and that combined with the absence of any clear evidence that the respondent was aware of the disclosures made means that in the view of the Tribunal the claimant does not have a pretty good chance of establishing that the reason for dismissal (or the principal reason) was related to the disclosures that he made on 21 November 2023.

53. The application is accordingly refused.

54. The Tribunal would conclude by reminding parties that this decision is purely in the context of the application under Section 128 of the ERA and has no bearing upon any final decision in the case when the Tribunal and the parties

will have had the benefit of hearing oral testimony, with appropriate cross examination, and consideration of all relevant documentary evidence.

Employment Judge
S Neilson

02.01.2024

Date sent to Parties:-
10 04/01/2024