EMPLOYMENT TRIBUNALS

Claimant: **Ms C Thompson**

Respondent: **Maintel Holdings PLC**

Held at: **London South Employment Tribunal by video**

On: **16 May 2024**

Before: **Employment Judge Burge**

Representation
For the Claimant: Ms Tuck KC, Counsel
For the Respondent: Mr Kibling, Counsel

INTERIM RELIEF JUDGMENT

The Judgment of the Tribunal is:

1. The application for interim relief is refused.

REASONS

The Application

1. The Claimant made an application for Interim Relief pursuant to s.128 of the Employment Rights Act 1996 ("ERA"), relying on her claim for automatic unfair dismissal for having made protected disclosures brought under s.103A ERA.

2. I was provided with a bundle of 369 pages. The Respondent provided its Response, which they will be formally submitting with an ET3 form in due course.

3. The Claimant provided a witness statement for this hearing and a witness statement from Christopher Mills (Harwood Capital Management Group, Investor). On behalf of the Respondent, a witness statement was provided from Clare Bates (Independent Non-Executive Director). I did not hear oral evidence, in accordance with Rule 95 of the Employment Tribunal Rules. I reviewed the statements for the sole purpose of understanding the case that the Claimant and Respondent intend to put forward at the final hearing.

4. Ms Tuck KC and Mr Kibling provided detailed written and oral submissions for which I am grateful. Ms Tuck KC clarified that it is the Claimant's case that the first 5 alleged protected disclosures resulted in detriments but was the final two disclosures that were the reason, or the principal reason, for her dismissal. Those final two alleged protected disclosures were made:

    a. During a meeting on 31 January 2024; and

    b. In a written grievance dated 23 February 2024.

5. I make no findings of fact but it is helpful to set out a summary of the Claimant's case and what the Respondent says about it.

6. The Claimant claims automatic unfair dismissal and whistleblowing detriments. No complaints of discrimination have been brought but in her particulars of claim the Claimant says that she may "present separate additional claims in connection with discrimination on grounds of sex, age and disability in due course".

7. The Respondent is a provider of cloud and managed communication services. The Respondent is the holding company for its trading subsidiaries operating in the telecommunications industry. The Respondent is listed on the Alternative Investment Market of the London Stock Exchange (AIM). As an AIM listed company, the Respondent appointed Cavendish as its Nominated Adviser (NOMAD).

8. The Claimant was originally appointed as a Non-Executive Director and Chair of Audit Committee of the Respondent on 1 October 2023. She became Executive Chair on 1 November 2022. John Booth had been Non-Executive Chair since 1996 and then was a Board member and shareholder.

9. On 16 February 2023 the then CEO of the Respondent, Ioan Macrae, resigned. The Claimant became interim CEO from 1 March 2023 which was a full time position.

10. In December 2023 the Claimant, Mr Booth and Ms Bates had a meeting and exchanged emails about the length of the Claimant's tenure as interim CEO. In an email on 13 December 2023 Ms Bates set out the discussion they had had with the Claimant which included that she had made a significant contribution to the Respondent and that they wanted her to stay on until a permanent CEO was in post which they anticipated would be September 2024.

11. On 31 January 2024 the Claimant had a meeting with Mr Booth and Ms Bates. According to Ms Bates' notes of meeting, they discussed the lack of recruitment of a CEO and Mr Bates raised issues with the Claimant which she denied, the Claimant becoming upset towards the end of the time when Ms Bates left the meeting at 17.20. The notes of meeting end at 17.20 but the Claimant says that meeting continued after Ms Bates left. In her witness statement the Claimant says that she told Mr Booth that his proposal in relation to dividends would breach the Companies Act and would be in breach of the covenants with HSBC. However, this is not reflected in the minutes. The Claimant says she made a note of "most of the exact words" she used in her diary on the train on the way home. That diary extract has not been disclosed, the Claimant's reasoning being that she is not at home to be able to retrieve it.

12. On 21 February 2024 the Nomination Committee decided to split the Claimant's roles.

13. On 23 February 2024 the Claimant raised a grievance. It detailed various protected disclosures that the Claimant said she had made as well as allegations of sex and age discrimination. It also set out the AIM listing rules as published on the LSE website that the Claimant maintained had been breached.

14. At a Board meeting on 26 February 2024 following the Nomination Committee's recommendation the Claimant's appointment as Interim CEO was terminated on notice and that notice expired on 8 April 2024.

15. On 29 February 2024 a shareholder, Hardwood, raised a number of issues with the NOMAD and asked for an undertaking that the Claimant would not be removed.

16. Ms Bates received feedback from two individuals, including the new interim CEO, who raised concerns about the Claimant's conduct.

17. On 16 April 2024, the Claimant was sent the grievance outcome with reasons. The Respondent did not uphold the grievance and said that independent lawyers had confirmed that none of the allegations amounted to actual regulatory breaches.

18. The Claimant's employment as Executive Chair was terminated summarily on 17 April 2024 following an Extraordinary Board meeting. In the letter of termination, the Respondent cited significant concerns regarding issues with leadership style, lack of integrity and the breakdown of relationships between the Claimant and members of the Board. The seriousness of the situation was said to have become more apparent through the investigation of her grievance claims and the questions posed by the review.

19. The Claimant submitted her claim on 24 April 2024.

20. The issue for me to determine was whether the Claimant's automatic unfair dismissal claim was likely to succeed at the substantive hearing.

The Law

Interim relief

21. The statutory provisions concerning interim relief are set out in sections 128 – 130 ERA 1996:

"128 Interim relief pending determination of complaint.

(1)An employee who presents a complaint to an employment tribunal that he 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—
(i)section…. 103A…
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.

129 Procedure on hearing of application and making of order.

(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…. 103A, or
[…]

(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."

22. In order to determine 'whether it is likely' the claimant will succeed at a full hearing, the EAT said *in London City Airport v Chacko* 2013 IRLR 610, that this requires the Tribunal to carry out an 'expeditious summary assessment' as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party.

23. 'Likelihood' has been interpreted to mean 'a pretty good chance of success' at the full hearing - *Taplin v C Shippam* 1978 ICR 1068. The burden of proof was intended to be greater than that at a full hearing, where the Tribunal only needs to be satisfied on the balance of probabilities that the claimant has made out his case - or 51% or better. A pretty good chance is something nearer to certainty than mere probability.

24. The Employment Appeal Tribunal reaffirmed the proposition that a claimant for interim relief must demonstrate a 'pretty good chance' of success at trial, the Employment Appeal Tribunal remarked in *Dandpat v University of Bath* UKEAT/0408/09, at para 20.:

> *"We do in fact see good reasons of policy for setting the test comparatively high in the case of applications for interim relief. If relief is granted the [employer] is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the [employee], until the conclusion of proceedings: that is not consequence that should be imposed lightly".*

25. Claimants in complicated, long running disputes can obtain interim relief, it is not just for simple cases (*Raja v Secretary of State for Justice* EAT 0364/09).

26. Ms Tuck KC drew my attention to the unreported case of *His highness Sheikh Khalid Bin Saqr Al Qasimi v Robinson* UKEAT/0283/17/JOJ wherein HHJ Eady KC summarises the relevant law. HHJ Eady KC describes the task of the Tribunal as follows:

> *"By its nature, the application had to be determined expeditiously and on a summary basis. The ET had to do the best it could with such material as the parties had been able to deploy at short notice and to make as good an assessment as it felt able. The ET3 was only served during the course of the hearing and it is apparent that points emerged at a late stage and had to be dealt with as and when they did. The Employment Judge also had to be careful to avoid making findings that might tie the hands of the ET ultimately charged with the final determination of the merits of the points raised. His task was thus very much an impressionistic one: to form a view as to how the matter looked, as to whether the Claimant had a pretty good chance and was likely to make out her case, and to explain the conclusion reached on that basis; not in an over-formulistic way but giving the essential gist of his reasoning, sufficient to let the parties know why the application had succeeded or failed given the issues raised and the test that had to be applied."*

Protected Disclosures

27. The statutory provisions are contained in the Employment Rights Act 1996:

> *"103A Protected disclosure*
> *An employee who is dismissed shall be regarded for the purposes of this Part*

as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection
[(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—
(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 one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

43C Disclosure to employer or other responsible person
[(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith—
(a) to his employer, or
(b) … "

28. Under section 103A, a dismissal is automatically unfair if "the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure". Whether the dismissal flows from the disclosure is a question of causation. In the present case, it is for the Claimant to show that the predominant causative basis for her dismissal was for making protected disclosures.

29. Section 43B ERA defines a qualifying disclosure as any disclosure of information which is made in the public interest and which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs a-f.

30. For an application for interim relief to be successful, a Tribunal needs to be satisfied on the evidence before it that it is likely that each element of the s.43B definition is likely to be met and that the final Tribunal is likely to find that the principal reason for dismissal was the disclosure. The Claimant must therefore show that it is likely that the Tribunal at the final hearing will find that:

    a. she made the disclosure(s) to the employer;
    b. she believed that it or they tended to show one or more of the matters itemised in the ERA 1996 s 43B(1);
    c. her belief in that was reasonable;
    d. the disclosure(s) was or were made in the public interest; and
    e. the disclosure(s) was or were the principal cause of the dismissal.

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

> *"... In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under s.43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…"*

Conclusion

32. The Claimant's appointment as Interim CEO was terminated on notice and that notice expired on 8 April 2024. The Claimant did not put her claim in within 7 days of the termination of that appointment and so she cannot claim interim relief for that employment. The rest of the Judgment therefore is only in relation to the Claimant's employment as Executive Chair.

33. I must undertake an expeditious summary assessment, doing the best I can with the untested evidence advanced by each party, to determine whether it is likely that the Claimant will show that she made protected disclosures as defined by s.43 ERA and whether it is likely that she will show that she was dismissed for making those protected disclosures.

34. It appears that the Respondent was keen for the Claimant to stay as Interim CEO in December, yet something changed so that by the Board meeting on 26 February 2024, the Claimant's appointment as Interim CEO was terminated on notice and then the Claimant's employment as Executive Chair was terminated summarily on 17 April 2024.

35. In relation to the 31 January 2024 meeting, in her witness statement the Claimant says that she told Mr Booth that his proposal in relation to dividends would breach the Companies Act and would be in breach of the covenants with HSBC. Ms Tuck KC submits that Mr Booth made an allegation that the Claimant had an intention to take the company private and that the Claimant gave information to Mr Booth that engaging with a subset of investors and misleading them amounted to a MAR breach and QCA governance code. However, even though the public to private allegation is raised by Mr Booth, the Claimant providing information on alleged wrongdoing is not reflected in the minutes. The Claimant says she has diary entries at home that back up her assertions but they are not before the Tribunal at this hearing. I conclude that the conflict of evidence needs to be properly tried at a final hearing with disclosure and oral evidence. On what I have before me I cannot say that it is near to certain or that the Claimant has a pretty good chance of successfully showing that she did make the disclosures and that they meet each element of the statutory test.

36. In relation to the Claimant's grievance dated 23 February 2024, it is lengthy and details lots of alleged wrongdoing on the part of the Respondent. The Respondent produced a summary document of what it understood to be the protected disclosures. I am mindful that lengthy cases are capable of attaining interim relief. In her grievance the Claimant does set out the AIM listing rules as published on the LSE website that the Claimant maintained had been breached. On the face of them, on a rough summary assessment,

I can conclude that some of them are likely to meet the statutory definition. This is because the Claimant made the disclosures to her employer, it is likely that she believed that they tended to show breach of a legal obligation in particular with regard to AIM listing rules and FCA Market Abuse Regulations, it is likely that her belief in that was reasonable; and it is likely that the disclosures were made in the public interest. It does not matter that the Respondent says its legal advisers advised that none of the allegations amounted to actual regulatory breaches.

37. However, it is not clear on the evidence before me why the Claimant's Executive Chair role was terminated. This is a matter to be properly tested with evidence at the final hearing. My expeditious summary assessment is that it is not "likely" that the reason or principal reason for her dismissal was the protected disclosures. The Claimant might be right, or the Respondent might be right. Not having heard any evidence, it cannot be said, at this stage of the proceedings, that it is near to certain or that the Claimant has a pretty good chance of success on this element of her claim.

38. The application for interim relief is therefore refused.

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Employment Judge **Burge**

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Date: 17 May 2024