EMPLOYMENT TRIBUNALS

Claimant: Ms S Messi

Respondent: Change Grow Live

Heard at: **London South (remotely by CVP)**
On: **15 August 2024**

Before: **Employment Judge Heath**

Representation
Claimant: Mr J Robertson (Litigation friend)
Respondent: Mr J Davies (Counsel)

RESERVED JUDGMENT

1. The application for interim relief is dismissed.

2. The claimant shall pay the respondent's costs of the application in an amount to be assessed.

REASONS

Introduction and background

1. The claimant presented an ET1 on 22 July 2024 in which ticked the box indicating unfair dismissal, whistleblowing and that she was making an application for interim relief. She set out the following complaint in Box 8.2:

> *Unfair dismissal for making protected disclosure to government public bodies and the police*
> *And suffered a detriment for union membership*
>
> *The employer used the disciplinary sanction as a punitive act to retaliate and victimised me and denied me my statutory rights to be represented by an union representatives in my grievance hearing and the disciplinary hearing that went ahead in my absence despite telling both Simon Holmes and Gaynor Taylor my union representative was ill and they refused to postpone it and the*

hearing was unfair in which they breached article 6 and article 10 of EHRC.

2. The claimant had previously made an application for interim relief in respect of the same employment on 2 May 2024. This was dismissed by Employment Judge Fowell on 3 June 2024, essentially on the basis that the claimant had not been dismissed at that point. He ordered the claimant to pay the respondent's costs of the application in an amount to be assessed.

Procedure

3. The hearing was listed to start at 1pm, initially as an adjustment to accommodate the claimant's health problems. The claimant subsequently indicated in correspondence prior to the hearing that she would not attend the hearing. Mr Robertson told me that he was content for the hearing to proceed, and that he had been given authority by the claimant to present the application.

4. At the start of the hearing I raised with both parties that in my reading prior to the hearing I had observed that judgments in respect of an interim relief application in the case of *Messi v Precise Media Monitoring Limited (T/A Onclusive)* 2200391/2023 were in the bundle and referred to in the respondent's skeleton argument. I informed the parties that I had been the judge in that case and had dismissed the claimant's application for interim relief, refused to reconsider my decision and not awarded costs. I drew the parties' attention to paragraphs 6, 7 and 11 of *Ansar v Lloyds TSB Bank Plc* [2007] in which the EAT had observed that parties cannot assume or expect that findings adverse to a party in one case entitled that party to a different judge or tribunal in a later case. Something more must be shown. A real danger of bias might be thought to arise in a case where the credibility of any individual were an issue to be decided by the judge, and the judge had in a previous case rejected the evidence of a person in such outspoken terms as to throw doubt on their ability to approach such persons evidence with an open mind on any later occasion.

5. I indicated to the parties, subject to any observations they may have, that my provisional view was that the nature of an interim relief application is that a judge would not be making findings of fact, and that I had not done so in the previous case. I considered that I had not expressed myself in outspoken terms in deciding the previous case, but invited the parties' observations. Both parties expressly indicated that they were satisfied that I should not recuse myself.

6. I was provided with a 574 page bundle, a witness statement from Mr Simon Holmes, and skeleton arguments by both representatives. Both parties agreed that, as is the norm under Rule 95 Employment Tribunal Rules of Procedure 2013 ("ET Rules"), no live evidence would be given at the hearing. I indicated that I had read both skeleton arguments and most of the evidence referred to in Mr Holmes's witness statement prior to the hearing. Mr Robertson made oral representations, Mr Davies made oral

representations, and Mr Robertson made a brief reply. The scope of the representations was on the application for interim relief itself and a consequent application for costs by the respondent if the application was dismissed.

7. I indicated to the parties at the end of their representations that I would try my best to give an oral decision that day, but if it became clear to me that I was able to do this, the tribunal staff would let the parties know that I would provide a reserved decision. In the event, because of the amount of material put before me and the complexity of some of the arguments, I instructed the tribunal staff to email the parties to let them know that I would have to provide a reserved decision.

Narrative of events

8. I will set out a narrative of events as they appeared to me on an expeditious summary assessment of the documents I have seen. I stress that I am not making findings of facts, but setting out my impression of events emerging from what was placed before me.

9. The respondent is a registered charity which provides drug and alcohol rehabilitation, criminal justice, and homelessness services in England and Scotland.

10. The claimant applied for a role with the respondent, and on 1 February 2024 accepted an offer of the role of SAP Concur Expense Assistant. On the same day she ticked boxes in digital documents to indicate that she had read the respondent's data protection policies and code of conduct.

11. On 12 March 2024 she was provided with a written contract of employment, clause 17 of which set out obligations relating to confidentiality in these terms:

> *You shall not use or disclose to any person either during or at any time after your employment with Change Grow Live any confidential information. For the purposes of this clause, confidential information means any information or matter about Change Grow Live or any of its service users or the affairs of Change Grow Live or any of its business contacts or about any other matters which may come to your knowledge in the course of your employment, and which is not in the public domain or which is in the public domain as a result of your breach of this agreement.*

12. On 18 March 2024 she commenced employment with the respondent, it appears working largely or exclusively from home.

13. On 22 March 2024 the claimant completed data protection training. She also had 1-2-1 training from her line manger Mr Metzner about the scope of her role.

14. By 10 April 2024 the claimant was raising issues (cc'd to numerous people including the chief executive) that the respondent was failing to comply with legal obligations relating to equal pay, reasonable adjustments and

health and safety. There was further correspondence which indicated that the respondent was seeking to treat this as a formal grievance, and that it provided her with access to the whistleblowing policy.

15. On 28 April 2024 the claimant was absent from work, which was certificated by a GP on 2 May 2024.

16. Between 28 April 2024 and 2 May 2024, it appears that the claimant accessed numerous files on the respondents computer systems. Details of these files are set out in a subsequent investigation report and appear at pages 124 -125 of the bundle. The files appear to have been accessed between 10.51am on 28 April 2024 and 8.27pm on 2 May 2024.

17. At 7:49 PM on 2 May 2024 the claimant sent an email (page 63 of the bundle) to the Information Commissioner's Office ("ICO"), the Bristol Employment Tribunal and a number of the respondent's employees. This email set out that she was raising concerns in the public interest in good faith that the respondent was not complying with their legal obligations on GDPR, data protection and confidentiality. She said that sensitive employee information should be secure and not in a public forum for everyone to have access. She said that she was a whistleblower. She also said the respondent discriminated against employees, including herself, which could be demonstrated by claims against them in online employment tribunal decisions. She attached numerous screenshots of what appear to be photographs of a computer screen showing numerous documents (pages 64 to 81 of the bundle). These documents appear to show details of settlement agreements between the respondent and a former employee, names of people to whom redundancy payments were made, names of people to him settlement agreements had been made including amounts paid, letters about previous employees complaints, HR advice on risk of dismissal of an employee of the respondent and liability in respect of two employment claims, salary information of individuals employed by a London Borough and information relating to a dismissed employee. This information appears to be information that would be confidential to the respondent and the individuals in question. The screenshots show that the files were stored in the respondent's Sharepoint.

18. In his submissions Mr Davies said that the claimant's email of 2 May 2024 had come "out of the blue". As such, the claimant had made disclosures to outside agencies without first having made disclosures to the employer. In his reply to Mr Davies' submissions Mr Robertson said that the claimant had raised orally with her line manager that she had discovered that personal data was not being stored safely. As set out above, the evidence appears to suggest that the claimant accessed the file from 10.51am on 28 April to 8.27pm on 2 May 2024. This was while the claimant was off sick. It is my impression that the claimant is unlikely to establish that she had orally raised data issues with the respondent while she was off sick. The first mention of this potentially important matter appears to have been made during the hearing today and there appears to be nothing in the

documents to support such an oral disclosure having been made. It appears inherently unlikely that the claimant would raise such a matter orally while off sick between 28 April and 2 May 2024, and I cannot see why she would have raised the issue orally before she accessed the documents. My impression is that the first disclosure was made in the email of 2 May 2024.

19. On 3 May 2024 the respondent restricted the claimant's access to its data systems.

20. On 7 May 2024 the respondent suspended the claimant. The allegations were:

> • *Without authorisation, you accessed and disclosed sensitive confidential information relating to the business of Change Grow Live and private individuals, and*
> • *You have conducted yourself in a way that has destroyed trust and confidence in your continued employment with Change, Grow, Live.*

21. The basis of the allegations were set out and referred to the 2 May 2024 email and its attachments, and the email correspondence the clamant engaged in that was destructive to the relationship of trust and confidence.

22. It appears that a large number of emails were sent by the claimant, and on 15 May 2024 one of the respondent's HR advisers asked the claimant to restrict this communication. The claimant responded that the employment tribunal would deal with this.

23. An IT investigation was started to look into the claimant's access to the files. This was completed on 21 May 2024 this

24. Ms McVan, Head of Service, Greater Manchester was appointed to carry out a disciplinary investigation into the claimant's actions.

25. On 21 May 2024 Ms McVan invited the claimant to an investigation meeting on 24 May 2024. On this day she also interviewed Mr Metzner. Mr Metzner set out that the information the claimant had disclosed was taken from an audit file in the finance shared drive. The claimant would not need to access this file, and this had been explained to her during training. He said that there would be no need for the claimant to have accessed the files where the sensitive information was located. He also set out the difficulties he had had in his relationship with the claimant, in that he had been trying to assist her with health-related matters and she would not cooperate. He explained how his relationship with her had been very stressful.

26. On 23 May 2024 a Mr Gallaer was interviewed by Ms McVan. He explained that the claimant should only be accessing the SAP Concur Expenses folder during her employment, and this had been made clear to her from her training. The location of the sensitive information the claimant

had disclosed was within folders she should not have been accessing. She must have accessed a multitude of different folders, files and layers to find that information and should not have been privy to that data. He explained that he felt the claimant had also sent unreasonable, inappropriate and intimidating emails to people. The claimant had threatened to call the police which made him worry for his family.

27. There was a fair amount of correspondence between Ms McVan and the claimant, in which the claimant made clear that she would not attend a disciplinary investigation. So, on 30 May 2024 Ms McVan sent the claimant 45 questions relating to her investigation. The claimant did not answer these questions.

28. On 28 June 2024 must McVan completed her investigation report. This report set out the allegations, the evidence relied on (which it appended), the background and context, the response of the claimant to the investigation/mitigation, and the investigatory findings.

29. Under "Employee Response/Mitigation" Ms McVan set out her correspondence with the claimant, her offers of reasonable adjustments (including the chance to be accompanied at a meeting that did not attract the right of accompaniment under statute or contract), the claimant's refusals to attend meetings or answer questions.

30. In terms of the investigation findings, Ms McVan dealt with matters under several headings:

    a. **Why the information was accessed in the first instance by Ms Messi**: Ms McVan noted that it was not possible to determine this as the claimant had not engaged with the investigation. However, the information the claimant had accessed had no relevance to the claimant's role, was accessed without permission and not for a purpose relevant to her role and that she had conducted an inappropriate search to locate confidential and sensitive information. This did not comply with data protection principles or the respondent's data protection policy.

    b. **How the information was accessed by Ms Messi**: again, the claimant's non-engagement meant that Ms McVan could not determine how the files were accessed, but Ms McVan noted the claimant had access to shared folders in the finance files, and had accessed them through a computer and looked at files not relevant to her job. At some point the claimant had transferred the information to her personal email address. She had stored this confidential and sensitive information without permission, which was not in line with the data protection policy.

    c. **The dates and times that data and information was accessed, stored and sent by Ms Messi to CGL and external agencies whilst being absent from work**: I have set out these dates elsewhere. Ms McVan concluded that the claimant had actively

sought out 80 files of confidential and sensitive information while she was off sick. Some of these were accessed well outside of core hours, and no-one had requested her to access these files.

d. **Where/how the emails were sent from, by Ms Messi, to external agencies, and employees within CGL**: Ms McVan found that the emails were sent from the claimant's personal email address, and the information must have been sent by her sending documents and images to that account. This was in breach of the data protection policy, in that she stored confidential and sensitive information on in this unsecure personal digital space without the consent, agreement or knowledge of the data subjects and the organisation.

e. **Behaviours that are destructive to the employment relationship**: Ms McVan set out that the claimant refused reasonable requests to limit the number of groups of people she communicated with by email numerous emails to external and internal people with incorrect and misleading information, that she was accusatory in her tone about staff, that she had not allowed investigations to be concluded before sending further intimidating and fictitious emails. This had an adverse effect on certain staff. Ms McVan set out in a table a schedule of accusatory, intimidatory and threatening emails. She also set out a table detailing communication which suggested the claimant ignored requests and instructions to limit the number of people she copies into emails.

31. Ms McVan set out a conclusion that there was sufficient evidence to proceed with a disciplinary hearing in respect of both allegations.

32. On the same day, 28 June 2024, Mr Holmes, Head of Services, Scotland, wrote to the claimant inviting her to a disciplinary hearing on 5 July 2024 by Microsoft Teams. He provided the investigation report and the disciplinary policy, gave the claimant the opportunity to provide written representations, to be accompanied by a representative, to set out any requirements for reasonable adjustments and notified her that she could contact the employee assistance programme. He told her that as the allegations potentially amounted to gross misconduct, the outcome of the disciplinary hearing could result in her summary dismissal.

33. At some point the claimant contacted Mr Holmes to say that she was unwell, her representative was not available and she could not attend the meeting on 5 July 2024.

34. On 9 July 2024 Mr Holmes wrote to the claimant rescheduling the meeting to 12 July 2024 by Microsoft Teams. He said that if the claimant's usual representative was unavailable, she should make alternative arrangements. He said that if the claimant did not attend a decision could be taken in her absence.

35. That same day the claimant emailed Mr Holmes (cc numerous other individuals and organisations) asking for the hearing to be postponed as she was unwell and did not have representation. She asked Mr Holmes and his colleagues to stop harassing her and threatening to dismiss her when she had already been dismissed on 3 May 2024.

36. There was further correspondence between Mr Holmes and the claimant. On 10 July 2024 Mr Holmes said that the meeting would not be postponed and would proceed in her absence if she did not attend. The claimant responded to ask Mr Holmes to stop harassing her and threatened to report him to the police.

37. On 12 July 2024 Mr Holmes chaired the disciplinary hearing supported by Ms Taylor of HR. The claimant did not attend and the management case was presented by Ms McVan.

38. Ms McVan summarised her report and answered various questions, both about the substance of her report and the process she followed.

39. Mr Holmes took time to consider his decision. On 22 July 2024 he sent the claimant a disciplinary hearing outcome letter.

    a. He set out the circumstances leading up to the disciplinary hearing and set out his reasons for proceeding in the claimant absence.

    b. He set out the allegations she faced.

    c. In respect of **Without authorisation, you accessed and disclosed sensitive confidential information relating to the business of Change Grow Live and private individuals:** he found that there was clear evidence that the claimant had accessed and disclosed sensitive information without authorisation. This information was not within the remit of her role and was a breach of the respondent's data protection policy. He was satisfied the claimant had read and acknowledged and agreed to this policy and had completed an information security training. He found she had deliberately accessed and shared confidential information with several parties without authorisation. He said the information she had disclosed was highly confidential and sensitive as it related to payments made by the respondent to former employees. It was private, sensitive and confidential to those individuals and commercially sensitive to the respondent. She had no business accessing that information as it had no bearing on her role. The claimant's actions were a gross breach of confidentiality in that she had not adhered to data protection principles that data was to be used fairly, lawfully and transparently, that it would be used for specified, explicit purposes, and that it would be used in ways that were adequate, relevant, and limited to only what was necessary.

    d. Mr Holmes referred to evidence that the claimant had deliberately accessed restricted files for no purpose, and which had no

relevance to her role, whilst signed off work. The claimant should have been aware from her training that she should not have done this, but that in any event, this should have been self-evident. The claimant had deliberately accessed confidential information and not provided any explanation for her actions.

e. Mr Holmes upheld this allegation and considered it amounted to gross misconduct.

f. In respect of the allegation that **You have conducted yourself in a way that has destroyed trust and confidence in your continued employment with Change Grow Live**: Mr Holmes referred to the investigation report and appendices, which made clear that the claimant's relationship has become more difficult and impacted on several colleagues. The claimant had sent emails and made various allegations which, together with the breach of confidentiality, has negatively impacted trust and confidence.

g. There was further evidence to suggest the claimant had acted inappropriately by sending multiple emails to colleagues which had a detrimental impact on them and she had not complied with reasonable management requests to restrict this.

h. Mr Holmes concluded that this amounted to gross misconduct.

i. Mr Holmes went on to consider the appropriate sanction for the misconduct he had found, and considered whether a lower sanction from dismissal was appropriate. However, he decided that due to the seriousness of the allegations, which amounted to gross misconduct, his decision was that summary dismissal was appropriate.

40. Mr Holmes expanded on his decision in his witness statement for this hearing.

a. He said he considered that the claimant's disclosure is did not amount to whistleblowing, in that the data that had been accessed by the claimant and attached to her email of 2 May 2024 related primarily to private agreements between the respondent and former employees.

b. He said the claimant's actions appeared to breach the respondent's policies and terms of confidentiality and data protection, which were well known to the claimant through her training.

c. The claimant's role was very specific and there was no need to access the files containing the documents she disclosed.

d. The claimant did not engage with the disciplinary process whatsoever.

e. Correspondence involving the claimant had been extremely challenging and had impacted various people

f. There was a precision in respect of what the claimant accessed whilst on sick leave, and he believed what she was doing was intentional. She had undertaken a calculated search to access precise documents which she would never need to access within the remit of her role.

Other proceedings

41. It appears the claimant has commenced around 62 employment tribunal claims nationally. Some judgments available online were in the bundle and referred to in Mr Holmes's witness statement. As set out above, I myself have heard, and dismissed, an interim relief application the claimant brought against a different employer.

42. An unusual feature of this case is that this is the claimant's second application for interim relief against this respondent. Employment Judge Fowell dismissed the claimant's interim relief application in a judgment sent to the parties on 6 June 2024. In summary, it appeared to Employment Judge Fowell that there was little material on which he could conclude that the claimant had been dismissed when she made her application for interim relief. It appeared she was relying on her suspension as in actual fact being her dismissal.

43. Employment Judge Fowell went on to determine an application by the respondent for costs. He observed that this was the 11th application the claimant had made for interim relief, all of which had been refused (I would add that the application for interim relief I am considering is the 12th one since 13 January 2021). He referred to my own judgment on costs in the Precise Media Monitoring Ltd case. He went on to determine as follows at paragraph 24:

> *Applications for interim relief are relatively rare. To have brought so many, in so short a space of time, against so many employers, and to have had them all rejected indicates that this is a scheme which Mrs Messi is engaged in rather than any genuine pursuit of justice. This is in my view a plainly vexatious application and, it follows, totally without merit.*

The law

Interim relief

44. The relevant provisions of the ERA are as follows:

> ***Section 128(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) … 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).

45. Section 129 provides:

(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

46. Section 129 goes on to set out the consequences it appearing to the tribunal that it is likely that the tribunal on determining the complaint finding that the dismissal was automatically unfair (amongst other things not relevant to the current application).

47. Section 161 of Trade Unlon and Labour Relations (Consolidation) Act 1992 provides:

(1) An employee who presents a complaint of unfair dismissal alleging that the dismissal is unfair by virtue of section 152 may apply to the tribunal for interim relief.

…

(3)In a case where the employee relies on section 152(1)(a), (b) or (ba), or on section 152(1)(bb) otherwise than in relation to an offer made in contravention of section 145A(1)(d), the tribunal shall not entertain an application for interim relief unless before the end of that period there is also so presented a certificate in writing signed by an authorised official of the independent trade union of which the employee was or proposed to become a member stating—

(a)that on the date of the dismissal the employee was or proposed to become a member of the union, and

(b)that there appear to be reasonable grounds for supposing that the reason for his dismissal (or, if more than one, the principal reason) was one alleged in the complaint.

48. Section 152 Trade Unlon and Labour Relations (Consolidation) Act 1992 provides:

(1)For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded

as unfair if the reason for it (or, if more than one, the principal reason) was that the employee—

> *(a)was, or proposed to become, a member of an independent trade union,*
>
> *(b)had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time, F3. . .*
>
> *(ba)had made use, or proposed to make use, of trade union services at an appropriate time*

49. The meaning of the word "likely" in section 129(1) ERA has been considered in number of authorities. In *Taplin v CC Shippam Ltd* [1978] ICR 1068 the EAT set out that it meant a "*higher degree of certainty in the mind of the tribunal than that of showing that he just had a "reasonable" prospect of success*". It went on to suggest that the 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*".

50. In *Ministry of Justice v Sarfraz* [2011] IRLR 562 the EAT stated "*In this context "likely" does not mean simply "more likely than not" – that is at least 51% - but connotes a significantly higher degree of likelihood*".

51. The likely to succeed test applies to all elements of the claim (*Hancock v Ter-Berg* UKEAT/0138/19). In a claim of automatic unfair dismissal under section 103A ERA, this means satisfying the test in respect of all the elements relating to protected disclosures in part IVA ERA.

52. The tribunal is to carry out an "expeditious summary assessment" of the material put before it, doing as best it can with the untested evidence advanced by each party. This will necessarily entail a less detailed scrutiny than would happen at final hearing. My task is to assess how the matter appears to me, and Rule 95 Employment Tribunals Rules of Procedure 2013 states that the tribunal shall not hear oral evidence unless it directs otherwise. I am also to avoid making findings of fact that could cause difficulty to a tribunal hearing the final hearing of this matter (*Raja v Secretary of State for Justice* UKEAT/0364, *Dandpat v The University of Bath* UKEAT/0408/09/LA and *London City Airport v Chacko* [2013] IRLR 610, *Al Qasimi v Robinson* EAT/0283/17).

<u>Automatic unfair dismissal</u>

53. Section 43A ERA provides that "*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*".

54. Section 43B ERA provides:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*

> *(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, or is likely to be deliberately concealed.*

Disclosures to persons other than employer

55. Section 43F of the Employment Rights Act 1996 provides that:

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

56. The list of persons and bodies prescribed, and the purposes for which a disclosure may be made to them, is contained in the Schedule to the Public Interest Disclosure (Prescribed Persons) Order 2014 SI 2014/2418. The Information Commissioner and Health and Safety Executive are prescribed persons. The Employment Tribunal, the

Equality and Human Rights Commission and HMRC are not prescribed persons.

57. Section 43G(1) of the Employment Rights Act 1996 provides that:

> *A qualifying disclosure is made in accordance with this section if—*
>
> *…*
>
> (b) *[the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,*
>
> (c) *he does not make the disclosure for purposes of personal gain,*
>
> (d) *any of the conditions in subsection (2) is met,*

58. Section 43G(2) of the Employment Rights Act 1996 provides that:

> *(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F, (b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or (c) that the worker has previously made a disclosure of substantially the same information—*
>
> (i) *to his employer, or*
>
> (ii) *in accordance with section 43F.*

59. Section 43G(3) provides that:

> (3) *In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—*
>
> *…*
>
> *(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,*
>
> *…*

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

60. In *Chesterton v Nurmohamed* [2017] IRL 837 the Court of Appeal set out factors to be considered by a tribunal in deciding whether a disclosure was made in the public interest. They are the numbers whose interests the disclosure serve; the nature of the interests affects; the nature of wrongdoing disclosed; the identity of the alleged wrongdoer. Where a disclosure raises questions of a personal character, the question of whether it is reasonable to regard it as being in the public interest is to be answered by considering all of the circumstances of the case. It is a two stage test requiring the tribunal to consider i) whether the worker genuinely believed at the time that the disclosure was in the public interest, and ii) if so, was it reasonable for them o hold that belief.

61. Once it is established that there has been a disclosure, the next important point is that these provisions only protect the individual against detriment or dismissal because of that act of disclosure; if therefore the individual used improper means to investigate their suspicions and is disciplined solely because of that, they will not have the special protection. In *Bolton School v Evans* [2007] IRLR 140 (which concerned an employee who hacked into his employer's computed system to demonstrate its insecurity, the EAT observed "An employee cannot be entitled to break into his employer's filing cabinet in the hope of finding papers which will demonstrate some relevant wrongdoing … He is liable to be disciplined for such conduct, and that is so whether he turns up such papers or not'. The Court of Appeal also rejected his claim, partly adopting the EAT's reasoning and also holding that neither the physical act of hacking nor telling the headmaster about it afterwards was a 'disclosure' in the first place.

62. Section 103A ERA provides that "*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*".

63. In determining the reason why the employer dismissed the employee, the tribunal is to determine the set of facts which caused the employer to dismiss, and this will involve an examination of the motivations of the person who dismissed (*Abernethy v Mott Hay & Anderson* [1974] ICR 323, *Simpson v Cantor Fitzgerald Europe* [2021] ICR 695).

Conclusions

64. I again stressed that these conclusions are my impressions based on an expeditious summary assessment of the material put before me.

65. I have also set out a narrative of events in perhaps more detail than would normally be expected in an interim relief application. Partly this is due to the complexity of some of the arguments and the amount of material put before me. I have also done so because there appears to be a wider

context to this application than is normally found in interim relief applications.

66. I would also add that I have attempted both to examine the detail and to step back and look at the wider picture in forming my impressions.

"Serial litigant"

67. The respondent has squarely put in issue in its response to this application its characterisation of the claimant as a serial litigant. It seeks to put this forward as a matter which illuminates a determination of this application, and as a matter going to the issue of costs.

68. Mr Robertson in his skeleton and representations to me suggests the respondent and its solicitors are being "dishonest", and their characterisation of the claimant as a serial litigant is "speculative and unsupported", "prejudicial", "undermining trust in the legal profession" and "attempts to intimidate and discredit the claimant".

69. The claimant has presented, on information available to this region's Acting Regional Employment Judge, and communicated to the claimant by letter dated 26 July 2024, 62 employment tribunal claims. She has made 12 applications for interim relief in a period of 3 ½ years. All of these have been unsuccessful. Mr Robertson was unable to confirm whether or not the claimant had put in this number of claims, but accepted that she had put in a number of claims.

70. On any view, the claimant's employment litigation record is wholly extraordinary. My impression is that this is a background which does provide context to my consideration of this application, and I will return to it when dealing with costs. I also do not accept Mr Robertson's observations about the respondent's all their legal advisers' characterisation of the claimant.

71. I stress that I am determining this application for interim relief on the basis of this application itself and the material put before me. The fact that the claimant has a litigation history serves as a background and a context, though one which does provide some illumination of the issues in the application.

The application

Protected disclosure – to employer

72. As I have set out above, the claimant read the respondent's data protection policies and code of conduct when she accepted the respondent's offer of employment. She received her contract of employment a week before she started working for the respondent which clearly set out obligations relating to confidentiality.

73. The claimant was given training on data protection and told by her line manager in 121s the scope of her role and the files she would need to access in order to carry out her role.

74. The claimant began to be embroiled in workplace difficulty which led her to raising complaints to the highest level of the organisation within a matter of weeks of starting work.

75. Within a matter of a couple of weeks from articulating those difficulties the claimant went off sick from work.

76. While off sick, and at times outside of core hours, my impression is that the claimant set about on a concerted hunt to find information which she could potentially use as part of advancing some sort of agenda within the workplace. Whilst off sick, my impression is that she made a deliberate and focused attempt to search for material in places she had no business whatsoever in accessing so that she could use this material to advance her own ends. My impression is that she went hunting for a whistle that she could blow.

77. As I have set out above, my impression is that she made no oral disclosure to her manager before she went off sick or between 28 April and 2 May 2024 that there were issues within the respondent organisation with data security.

78. On an expeditious summary assessment it appears to me that the circumstances of the claimant's email of 2 May 2024 are very closely akin to the situation outlined in the *Bolton School* case of an employee breaking in to a cabinet in the hope of finding incriminating papers. The scenario in this case appears to be the digital equivalent of just that.

79. I am aware that the impressions I have set out are fairly forthright. However, they are justified on examining the facts of this case set against the context of an individual who has brought 62 employment tribunal claims and 12 recent applications for interim relief. Although I do not consider myself bound by Employment Judge Fowell's findings relating to costs, that the claimant was engaged on a scheme rather than genuinely pursuing justice, I accord them significant respect. The context of the claimant's significant experience of employment litigation, and in particular of whistleblowing, to me suggests that her actions within employment at the respondent organisation have the appearance of a calculated strategy.

80. The impressions above which I have outlined mean that I do not find it likely that the claimant will establish that she made a protected disclosure on 2 May 2024. This is regardless of the content of her email and the screenshots she attached. It may well be that she disclosed information that tended to suggest breach of legal obligations in respect of data security, but there are significant issues about the manner in which she went about this.

81. The impressions I have formed lead me to the further impression that, given the manner in which the claimant set about disclosing information, that it is not likely that she will establish that she had a reasonable belief that making the disclosures was in the public interest. There is sufficient material in this application, and in the wider background and context, to lead to the appearance that the claimant was pursuing her own agenda rather than acting in the wider public interest.

Protected disclosure – someone other than the employer

82. The respondent's skeleton argument suggests that a disclosure was made to the ICO and the Health and Safety Executive ("HSE"), which it accepts are both prescribed persons. The email of 2 May 2024 does not appear to be addressed to the HSE, but I will proceed on the basis that a disclosure was made to that body as it makes no difference to my conclusions. The Bristol Employment Tribunal and the Equality and Human Rights Commission are not prescribed persons.

83. There was no material before me to suggest the claimant reasonably believed that she would be subjected to a detriment by the respondent if she made a disclosure to her employer or in accordance with section 43G(2)(a) ERA. There was no material before me to suggest a likelihood of evidence relating to a relevant failure would be concealed or destroyed if she made a disclosure to her employer. The claimant had not previously made a disclosure of substantially the same information either to her employer, or in accordance with Section 43F ERA. The claimant's conduct does not appear reasonable in accordance with section 43G(3) ERA in that her disclosure to external parties in her 2 May 2024 email was in breach of her duty of confidentiality to her employer under her contract of employment. Furthermore, she failed to comply with the respondent's whistleblowing and data protection procedures.

84. Accordingly, it appears to me that the claimant is not likely to establish that she made disclosures in accordance with the various provisions relating to disclosures to persons other than her employer.

Dismissal for trade union membership

85. In respect of any claim for automatic unfair dismissal relating to trade union membership, no evidence has been provided that there was a certificate under section 161(3) TULR(C)A 1992. It does not appear that a trade union membership dismissal claim is likely to succeed.

Reason for dismissal

86. The evidence within Ms McVan's report, Mr Holmes' disciplinary outcome letter and Holmes's witness statement presnent the appearance of a cogent and well evidenced dismissal for gross misconduct relating to unauthorised access to confidential and sensitive material, and conduct destroying trust and confidence. There is no compelling material appearing to point towards the dismissal being for any other reason. Going

back to the EAT's analogy in the *Bolton School* case, Mr Holmes appears to have dismissed the claimant for breaking into the filing cabinet rather than disclosing what she found within it.

87. It does not appear likely that the claimant will establish that the reason or principal reason for dismissal was that she made protected disclosures.

Costs

88. Rule 75 ET Rules provides:

> *(1) A costs order is an order that a party ('the paying party') make a payment to—*
>
> *(a) another party ('the receiving party') in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;*

89. The power to make a costs order is in Rule 76 which provides:

> *(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—*
>
> *(a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted;*
>
> *(b) any claim or response had no reasonable prospect of success;*

90. Rule 84 ET Rules provides:

> *"In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay".*

91. Costs orders are the exception rather than the rule in employment tribunal proceedings, but that does not mean that the facts of the case must be exceptional (*Power v Panasonic (UK) Ltd* UKEAT/0439/04).

92. I have set out above that my impression is that the claimant has set about, effectively, manoeuvring herself into a position where she would make herself a whistleblower. In manoeuvring herself into this position she breached the obligations of confidentiality she owed to the respondent under her contract of employment. I have also set out the reasoning of Employment Judge Fowell in ordering costs against the claimant for engaging in a vexatious scheme rather than genuinely pursuing justice. I agree with Employment Judge Fowell's reasoning. The reason is entirely applicable to this subsequent application for interim relief. It follows that I

find that the claimant has been vexatious in bringing this application . It was an application wholly without merit.

93. Mr Robertson told me that the claimant is currently on universal credit. I know nothing else about her means, but will proceed on the basis that she does not have much if any disposable income or savings. I have regard to that, but nonetheless, I take into account the fact that the claimant has made 11 previous interim relief applications, all of which have been unsuccessful, including one less than two months ago, which commented on the vexatious nature of her application. It is therefore, in my view, appropriate to make an order for costs.

94. The amount of costs will be determined at a separate hearing which will also consider the claimant's means . I understand that such a hearing is to take place in respect of the previous application before Employment Judge Fowell. As I have concluded that the threshold for a costs order has been met , and that it is appropriate to make an order for costs, I see no reason why Employment Judge Fowell cannot also make a determination on the amount of costs to be paid in respect of this application.

Employment Judge **Heath**

16 August 2024