Neutral Citation Number: [2024] EAT 181

Case No: EA-2024-000500-RS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 November 2024

Before :

THE HONOURABLE MRS JUSTICE EADY DBE, PRESIDENT

- -

Between :

MR N HALL

Appellant/Respondent to the Cross-Appeal

- and -

PARAGON FINANCE PLC

Respondent/Cross-Appellant

- -
- -

Nicolas Hall, the **Appellant** in person
Ashley Serr (instructed by Bexley Beaumont Ltd) for the **Respondent**

Hearing date: 5 November 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties by email and release to The National Archives.
The date and time for hand-down is deemed to be 10:30am on 21 November 2024

SUMMARY

Practice and procedure – interim relief hearing – section 128 Employment Rights Act 1996
Whistleblowing protection – qualifying disclosure – section 43B Employment Rights Act 1996 – reason for dismissal – section 103A Employment Rights Act 1996

On an application for interim relief on a claim of automatic unfair dismissal for making a protected disclosure, the Employment Tribunal ("ET") had held that the claimant was not likely to establish two of the three protected disclosures relied on (PD1 and PD2), but that he was likely to show he had made the third disclosure (PD3) and that, given advice he had received from a regulator, he had held a reasonable belief that this tended to show a failure to comply with a legal obligation. The ET went on however, to find that the claimant was not likely to be able to show that PD3 was the reason for his dismissal, as the respondent had held concerns, arising prior to the disclosure, regarding his behaviour and willingness to accept advice and guidance.

The claimant appealed against the ET's conclusions relating to PD1 and PD2, and to its decision on the question of causation; the respondent cross-appealed the decision relevant to PD3.

Held: dismissing the appeal; allowing the cross-appeal

Accepting that, on an application for interim relief, the ET was only required to make a summary assessment of the case, and to provide the essential gist of its reasoning, the conclusions in respect of the three disclosures showed a failure to understand, or engage with, the parties' respective cases and could not stand. On PD1 and PD2, the respondent had made clear that the focus of the dispute was on the question whether these were qualifying disclosures; there was no basis for the ET's finding that the fact, or essential content, of the disclosures was disputed and that the claimant was not likely to succeed in showing he had made these disclosures (as opposed to whether he had thereby made qualifying disclosures). Equally, however, the ET's finding on PD3 was premised on the claimant having received advice from the regulator that there had been a breach of a legal obligation, but that was not his case (he had said the regulator had advised him what to do if he thought there was a breach, not that it had expressed the view that there was). Even allowing for the fact that this was a decision on an application for interim relief, the ET's findings on the three protected disclosures could not stand.

Although that meant the cross-appeal must succeed, the claimant's appeal faced the additional hurdle of the ET's further finding on causation. The ET's reasoning made clear it considered the claimant was not likely to succeed on this question given the concerns the respondent had identified which related to his behaviour going back to January 2023, pre-dating any of the disclosures. Although the ET had referred to a particular expression of the respondent's concerns on 28 June 2023 (which post-dated PD1 and PD2), it was apparent that it had also had regard to the earlier history in this regard; even if the claimant had succeeded in his application for interim relief on PD1 and PD2, the ET's permissible finding on causation (at the interim relief stage) would still stand. That was, moreover, the case notwithstanding the additional arguments the claimant had advanced on this question at the hearing of his appeal: ultimately he was seeking to raise perversity challenges, which evinced an error of understanding as to the role of the ET on an application for interim relief.

The Honourable Mrs Justice Eady DBE, President

Introduction

1. This appeal concerns a judgment given on an interim relief application relating to a claim of automatic unfair dismissal by reason of making a protected disclosure. It includes challenges to the way the Employment Tribunal ("ET") characterised the nature of the dispute between the parties, to its approach to the question whether there had been a qualifying disclosure, and to its application of the legal test when considering the issue of causation in this context. More generally, the appeal raises questions as to the standard required of an ET when giving its decision on an application for interim relief.

2. In giving this judgment I refer to the parties as the claimant and respondent, as below. This is my ruling on the claimant's appeal, and the respondent's cross-appeal, relating to the decision of the ET sitting at Birmingham (Employment Judge Wedderspoon, sitting alone, on 13 March 2024), sent to the parties on 14 March 2024, by which the claimant's application for interim relief was refused. Representation before the ET was as it has been at this hearing.

The background

3. The respondent is a specialist finance provider, offering a range of savings and lending products in the United Kingdom. The claimant was employed by the respondent as an internal auditor from 30 May 2022 to 22 February 2024.

4. By his ET claim, presented on 29 February 2024, the claimant complained he had been dismissed for making a public interest disclosure, such that his dismissal was automatically unfair. Pursuant to section 128 **Employment Rights Act 1996** ("ERA"), he made an application for interim relief. It was this application that fell to be determined by the ET at the hearing on 13 March 2024.

5. As at the date of the ET hearing, the respondent had not been required to file its response to the claim; it had, however, provided a document setting out "*grounds of resistance*" for the purposes of the interim relief hearing, and was able to explain its case by way of submissions before the ET. The ET heard no oral evidence but had been provided with a 264 page bundle and had witness statements from two employees of the respondent, along with the claimant's detailed particulars of claim and a timeline he had created.

6. In support of his claim, the claimant relied on three disclosures, which he contended were protected

disclosures for the purposes of the **ERA**; these were said to have been made on 3 February 2023 ("PD1"); on 25 May 2023, and over the next few months ("PD2"); and on 10 July 2023 ("PD3").

7. PD1 related to an audit concerning the respondent's finance division's asset management team. The claimant had started work on this audit on 1 November 2022 and had identified what he considered to be several years of non-compliance with relevant accounting standards. It was the claimant's case that the head of asset and portfolio management had confirmed to him that no attempts had been made to comply with the accounting standards in question, albeit several of the published financial statements stated the opposite. The claimant considered this gave rise to a significant risk that a material misstatement existed in the 2022 financial statements and, if unresolved, would also arise in the 2023 statements. The claimant included these matters within his record of findings, sharing these with the relevant stakeholders, including the respondent's financial controller, Mr Keith Allen. It was the claimant's case that, after several email exchanges, on 3 February 2023, he had had a video call with others, including Mr Allen, during which his findings were challenged, it being said that the relevant accounting standard could be differently interpreted, a view that was shared by Ms Sarah Mayne, the respondent's internal audit director. The claimant said that Ms Mayne had ultimately agreed that the issues he had identified could be included within the report but material amendments were made to the wording, which he believed minimised or concealed the true nature and extent of his findings.

8. The respondent accepted the claimant had raised issues about the application of appropriate accounting standards; its case was that the practical application of these standards to its business was technical and involved a significant element of judgement: it was not the simple application of hard and fast rules, capable of a binary answer, and, in the course of the audit, there would be a number of discussions and views would differ. The respondent also relied on the footnotes in the audit report, which made specific reference to the accounting standards in issue, submitting that there could be no credible or reasonable suggestion that it was seeking to conceal anything; indeed, it was the respondent's case that the description of the application of the standards was far more accurate coming from Ms Mayne, who was better qualified and more experienced than the claimant. It further made the point that the report was signed off by its external auditor, KPMG, and that others had also considered it and had no concerns. This, the respondent submitted, was relevant in considering whether the claimant could have had any reasonable belief that there was a breach of a legal obligation. In its grounds of resistance document, the respondent had made clear that it did not consider any breach of the

standards relied on by the claimant would, in any event, amount to a breach of a legal obligation, and it maintained that the claimant could not have had any reasonable belief that it would.

9. PD2 arose from what the claimant considered to be a security breach in an IT operating system relating to a subsidiary company of the respondent, in respect of which the claimant was carrying out an audit. The issue the claimant raised was associated with the user profile of a former employee, who had left some 26 months earlier; on 25 May 2023, he reported this finding to the respondent's data protection officer and cyber security team. It was the claimant's case that, although an investigation had concluded that the employee in question still had an active local application account and it was possible to access the back office system, where sensitive customer data was held, the respondent's data protection officer nevertheless determined that there was no need to tell the Information Commissioner's Office, because there was no evidence of any actual breach. The claimant said that, when he voiced his disagreement in a meeting with the assigned internal audit manager, Ms Mayne had initially stated that the security breach finding did not need to be included within the record of findings, albeit, when the claimant challenged this, he said she conceded that it could be included, but the wording was again amended such that he considered it minimised or concealed the true nature and severity of the finding. The claimant continued to challenge this wording over the next few weeks, stating that this was in breach of the standards, principles and code of ethics of the Institute of Internal Auditors (IIA), and raising his concerns with his line manager, Ms Helen Barnes, and the principal internal auditor, Mr Tom Coppins. It was the claimant's case that Mr Coppins expressed the view that the issue should have been included within the formal documentation.

10. For its part, the respondent acknowledged that the claimant had raised issues in respect of the IT system but said that the head of cyber security had concluded that it was impossible to know what the leaver had done or whether there was any data breach. In its grounds of resistance for the purposes of the interim application hearing, the respondent further stated that a failure to comply with the standards, principles and code of ethics of the IIA would not amount to a breach of a legal obligation.

11. More generally, it was the respondent's case that, by this time, the claimant had become increasingly accusatory, mistrustful and belligerent. It said that, during a 1:1 on 17 January 2023, the claimant had been reminded of the need for collaboration during the audit process. In February 2023, it was said that he refused to take direction from the respondent's audit director, Ms Mayne, saying that he intended to take external

advice. In a subsequent 1:1, on 23 May 2023, the claimant had described the respondent's monitoring tool as "*Big Brother*", alleging that it evidenced the respondent's distrust of the workforce. In June 2023, he had challenged an assessment (stating he was delivering moderate performance and had moderate potential), saying he should be at a higher grade and that this indicated he was not valued and did not fit in.

12. While not disputing the bare facts of these particular incidents, the claimant says a cursory review of the underlying documentation would demonstrate that the characterisation of his behaviour urged by the respondent – that he was increasingly accusatory, mistrustful and belligerent – was not one that could reasonably be drawn. To the extent that the ET considered these were matters that demonstrated genuine concerns relating to his conduct, the claimant says that could only have been on the basis that it had accepted the respondent's summary without scrutiny or challenge.

13. In any event, the ET recorded that, on 26 June 2023, the claimant contacted the Association of Chartered Certified Accountants ("ACCA") for advice and was provided with relevant guidance. On 28 June 2023, the claimant discussed this guidance, and his concerns, with two colleagues.

14. Meanwhile, as the ET also noted, on 28 June 2023, Ms Mayne spoke to HR about her concerns that the claimant was becoming unmanageable.

15. On 5 July 2023, at a meeting with Ms Barnes, it was stated that the claimant had refused to accept that Ms Mayne should have the final say on the content of an audit report and challenged other senior colleagues as being unethical and unprofessional; the respondent said the claimant had stated he had to "*continue to challenge*" notwithstanding that Ms Barnes reminded him that he had previously been advised as to the appropriate way to challenge the audit process. More generally, it was the respondent's case that, after this date, the claimant became more argumentative and issues regarding his conduct were escalating such that this was viewed as insubordination; on 5 and 6 July 2023, Ms Mayne raised the deteriorating relationship between the claimant and the senior management team with the respondent's chief people officer; it was agreed this would be dealt with under the disciplinary policy following Ms Mayne's return from leave on 17 July 2023.

16. On 10 July 2023, however, the claimant sent a written whistleblowing grievance to the chair of the respondent's whistleblowing committee (PD3), whereby he sought to escalate his previous oral disclosures. As the ET recorded, this was a lengthy document, which set out the claimant's concerns relating to the asset management audit to which PD1 related, and identified potential IT security breaches discovered during the

TBMC audit, giving further detail of the matters raised by PD2. Within this document, the claimant stated that he had raised these matters but his concerns had been dismissed; he referred to the ACCA ethical code of conduct, which stated that a professional accountant should not be associated with reports containing materially false information, or statements made recklessly, with bias, or that omitted or obscured information where that was misleading; the claimant also contended there had been material breaches of the Chartered Institute of Internal Auditors (CIIA) international professional practices framework and code of ethics.

17. It was the respondent's case that, as a result of the claimant's whistleblowing grievance of 10 July 2023, the disciplinary process that had earlier been proposed was put on hold. The claimant's whistleblowing grievance was then investigated by the respondent's chief risk officer, with KPMG acting as external advisers.

18. On 21 August 2023, the claimant complained that he was not at the right grade or rate of pay, that he had been mis-sold the role and felt he was being used as cheap labour. On 6 September 2023, he described being de-motivated and seeing lots of red flags in the business.

19. On 11 September 2023, as an agreed welfare step, the claimant was placed on garden leave while the whistleblowing investigation continued.

20. By a report of 12 October 2023, the investigation into the claimant's whistleblowing concerns concluded there had been no failures on the part of the audit team and the claims raised were unproven. On 8 November 2023, Ms Barnett met with the claimant to give feedback on the investigation report and sought his assurance that he would follow guidance from managers in the future; the claimant refused to agree.

21. Following this, the parties entered into negotiations regarding the termination of the claimant's employment but were unable to reach an agreement.

22. On 5 January 2024, the claimant was invited to attend a disciplinary hearing on 12 January 2024, conducted by Mr Marius van Niekerk, general counsel. After investigating matters further, by letter of 22 February 2024, Mr van Niekerk determined that the claimant should be dismissed for some other substantial reason, namely a serious breakdown in the relationship, partly attributable to the claimant's past actions and behaviour towards his internal audit management team, and partly to his subsequent unwillingness or inability to reflect critically on his own behaviour, such that his continued employment would have a detrimental impact on the internal audit management team and the claimant's colleagues within the division.

23. Before the ET, the respondent made the point that the claimant was part-qualified, having previously

failed his ACCA qualification on more than one occasion, and was one of the most junior members of the audit team. The audit which formed the background to PD1 was only the second the claimant had carried out and the more senior managers to whom he had spoken each had decades of relevant experience. Some 50 audits would be carried out each year, and it was possible that the team might not agree on all points; as Ms Mayne was accountable for all the reports, she had the final say. At most, the claimant was saying there was a breach of ethics but that was not sufficient to establish a breach of a legal obligation and he could not have had any reasonable belief that there was such a breach. In any event, even if a relevant disclosure had formed part of the background, that did not mean it was the sole or principal reason for the dismissal.

24. It was the claimant's case, however, that, prior to his blowing the whistle, no disciplinary issues had been raised with him and it had not been suggested that he was difficult to manage; he considered he was dismissed because he had blown the whistle, and would not promise he would not do so again in the future.

The ET decision

25. The ET reminded itself that it was conducting an interim hearing and, as such, was not making findings of fact, but, relying on the material provided by each party, highlighting the strongest points on each side, to decide whether, at the final hearing on the merits, it was likely that the ET at that hearing would find that the reason, or principal reason, for the dismissal was a prohibited reason for the purposes of section 129(1) **ERA**.

26. Approaching its task in this way, the ET concluded that it could not be said that there was a pretty good chance of establishing at a final hearing that the claimant was making a relevant disclosure in respect of either PD1 or PD2. In respect of PD1, it stated:

> "34. ... Taking into account, that the content of the conversation is disputed by the respondent and that during the preparation of an audit being prepared of collaborative discussion of the team, ... it cannot be said that there is a pretty good chance of establishing at a final hearing that the claimant was making a disclosure."

As for PD2, the ET held:

> "35. ... The claimant's version of the discussions are disputed by the respondent. On the basis that the content of the discussions is disputed by the respondent, the Tribunal had not heard any live evidence, the Tribunal does not find that there is a pretty good chance of establishing that the claimant made a disclosure on this date."

27. The ET did not go on to then address the question whether the claimant had a pretty good chance of establishing that PD1 and/or PD2 were qualifying disclosures, or whether he was likely to succeed in showing

that either were the reason, or principal reason, for his dismissal.

28. On the other hand, the ET did determine that the claimant had a pretty good chance of establishing at final hearing that he had made disclosures in PD3, and that he was likely to succeed in showing that this was a disclosure that the respondent had failed to comply with a legal obligation, namely a breach of data protection laws (a legal obligation to which the respondent was subject). The ET considered, by setting out his belief that there were breaches of the CIIA code, the claimant had identified the source of the legal obligation, such that, he had a pretty good chance of establishing there was a breach of a legal obligation. Going on to consider the further questions, whether the claimant believed the disclosure was made in the public interest and whether such a belief was reasonable, the ET found that, in respect of PD3, the claimant had a pretty good chance of establishing both these matters at the final hearing; specifically, as to whether the claimant's beliefs were reasonable notwithstanding his "*junior experience*", the ET concluded:

> "43. ... The claimant was an insider but inexperienced and less qualified tha[n] other members of the audit team who had a wealth of knowledge and experience. His case is that he contacted his regulator who informed him there was a breach. The Tribunal determined that the claimant had a pretty good chance of establishing at the final hearing that he reasonably believed that there was a breach of a legal obligation and that his disclosure was made in the public interest."

At the hearing before me, both parties have said that this part of the ET's decision does not accurately record the claimant's evidence: although he had said that he had contacted the regulator, he had not said he had been told there was a breach; rather, it was the claimant's case that the regulator had provided advice as to what he should do if he thought there was a breach.

29. The ET then turned to consider the question of causation, again focusing on PD3. Finding that this presented a challenge for the claimant's application, the ET set out the parties' respective cases on this point, as follows:

> "44. ... The claimant says there were no issues raised by the respondent about his conduct until his protected disclosure. The respondent determined to dismiss the claimant on 22 of February 2024. The reason given for the claimant's dismissal in the hearing outcome letter was that there had been an irretrievable breakdown of trust. The respondent's case is that the claimant was unlikely to accept reasonable advice and guidance from the more experienced and fully qualified internal audit management team. Furthermore, the respondent had concerns about the claimant's behaviour and attitude on 28 June 2023 prior to him making the public interest disclosure on 10 July 2023. In the case of **Kong v Gulf International Bank UK Limited** (2022) EWCA Civ 941 it was held in an appropriate case an employer can take action against a worker who makes a protected disclosure in what is regarded as an unreasonable or unacceptable manner or who acts in an unacceptable way in relation to a protected disclosure and in such cases it is legitimate for Tribunals to find

> that although the reason for dismissal is related to the disclosure it is not in fact because of the disclosure itself."

30. The ET then explained the view it had formed on this question:

> "45. By reason of the fact that the respondent had concerns about the claimant's conduct and attitude prior to the public interest disclosure and that it had concerns that the claimant would not accept guidance in the future (potentially related to the disclosure but not because of the disclosure), the Tribunal is not satisfied that the claimant has a pretty good chance of establishing that the dismissal was for the sole or principal reason of making a public interest disclosure."

31. The ET therefore refused the application for interim relief, observing that this did not mean that the claimant would not succeed at final hearing:

> "47. ... The threshold to granting an interim relief application is a high one and the Tribunal is not satisfied that the claimant has met this threshold."

32. I understand that the full merits hearing of the claimant's claim is now listed to take place during 2025.

The legal framework

31. By section 103A **ERA**, it is provided that:

> "An employee who is dismissed shall be regarded … 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."

32. The burden of proving the reason or principal reason for dismissal rests with the employer, unless (as here) the claimant lacks the required qualifying period of employment, such that they need to show that the ET has jurisdiction to hear the claim **Maund v Penwith District Council** [1984] ICR 143 CA.

33. As for what is a "*protected disclosure*", that is defined by section 43A **ERA**: a protected disclosure is a qualifying disclosure (as defined by section 43B), made in accordance with any of sections 43C-43H.

34. Section 43B **ERA** relevantly 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—
> ...
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> ..."

35. Sections 43C-43H then set out the circumstances in which a qualifying disclosure can be made such as to be "*protected*"; most obviously relevantly, section 43C provides that will be so if the disclosure is made to the employer.

36. Where it is said that there is a failure to comply with a legal obligation, the source of the obligation should be identified (**Blackbay Ventures Ltd v Gahir** [2014] IRLR 416 EAT, HHJ Serota QC presiding); although the identification of the obligation does not have to be detailed or precise, it must be more than a belief that certain actions are wrong, see **Eiger Securities LLP v Korshunova** [2017] IRLR 115 EAT, Slade J presiding, where it was observed that:

> "46. ... Actions may be considered wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. ..."

37. Moreover, the disclosure of the information in question must itself have identified the breach of legal obligation concerned (**Fincham v HM Prison Service** UKEAT/0991/01, Elias J (as he then was) presiding), albeit the identification of the obligation need not be "*in strict legal language*" (**Fincham**, paragraph 33), and may be considered to be obvious when seen in context (**Bolton School v Evans** [2006] IRLR 500 EAT, Elias J presiding, at paragraphs 40-41; upheld by the Court of Appeal at [2006] EWCA Civ 1653).

38. A belief for these purposes may be mistaken but nonetheless reasonably held; as the Court of Appeal observed in **Babula v Waltham Forest College** [2007] EWCA Civ 174, [2007] IRLR 346 (albeit there addressing a case involving a disclosure of information that was believed to show that a criminal offence had been committed):

> "75. ... Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong – nor, (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute." (per Wall LJ, with whom the other members of the Court agreed)

On the other hand, in determining whether a claimant has a reasonable belief, the ET is entitled to take into account their particular knowledge and expertise; as the EAT (HHJ McMullen QC presiding) opined in **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4:

> "62. ... many whistleblowers are insiders. That means that they are so much more informed about the goings-on of the organisation of which they make complaint than outsiders, and that that insight entitles their views to respect. Since the test is their "reasonable" belief, that belief must be subject to what a person in their position would reasonably believe to be wrong-doing."

Whether a particular disclosure is a qualifying disclosure is thus to be assessed in the light of the particular context in which it is made, see **Kilraine v London Borough of Wandsworth** [2018] EWCA Civ 1436, [2018] ICR1850, per Sales LJ (as he then was) at paragraph 41.

39. As for whether a dismissal was by reason of the claimant having made a protected disclosure, it is for the ET to identify the real reasons for the dismissal and, having done so, to evaluate whether they were separate from the protected disclosure or were so closely connected with it that a distinction could not fairly and sensibly be drawn (sometimes described as the "separability principle"), see the guidance provided by the Court of Appeal in **Kong v Gulf International Bank (UK) Ltd** [2022] ICR 1513.

40. Where a complaint is made under section 103A **ERA**, the claimant can apply for interim relief under section 128. If, on the hearing of that application, it appears to the ET that it is likely that, on determining the complaint, the ET will then find in favour of the claimant, an order must be made for interim relief (see section 129 **ERA**). The test to be applied in this regard has been characterised as requiring the claimant to show they have a "*pretty good chance*" of succeeding at the substantive hearing (**Taplin v Shippam Ltd** [1978] ICR 1068 EAT, Slynn J (as he then was) presiding); that, in turn, has been interpreted as meaning "*a significantly higher degree of likelihood than just more likely than not*", (**Ministry of Justice v Sarfraz** [2011] IRLR 562 EAT, Underhill P (as he then was) presiding).

41. The history of the ET's power to grant interim relief, and the nature of the order that is made in this respect, was considered by the EAT (Cavanagh J presiding) in **Steer v Stormsure Ltd** [2021] ICR 807, where it was reiterated that the "*likely to succeed*" test has to be applied to all of the matters that the claimant has to prove. Deciding an interim relief application does not, however, involve a final determination of liability issues in the case; it is, rather, the determination of the specific issue of liability in respect of the right, or otherwise, to interim relief; see the observations of HHJ James Tayler in **Queensgate Investments LLP v Millet** [2021] ICR 863 EAT.

42. The determination of an application under section 128 **ERA** is thus intended to provide an expedited interim evaluation as to whether the claimant is likely to succeed at trial; it will not be considered unless it is presented within seven days of the effective date of termination, and will then be heard as soon as practicable, allowing the respondent at least seven days' notice of the application and hearing. Moreover, by rule 95 of schedule 1 of the **Employment Tribunals (Constitution of Rules of Procedure) Regulations 2013** ("the ET Rules"), it is provided that an ET will not hear oral evidence on an interim relief application unless it directs otherwise. In this context, in **Dandpat v University of Bath** [2009] UKEAT/0408/09, the EAT (Underhill P presiding) emphasised that:

> "17. … An application for interim relief is ... necessarily summary in character. It was in our view enough for the Tribunal to indicate the essential gist of its reasoning. …"

To similar effect, in **Parsons v Airplus International Ltd** UKEAT/0023/16 (HHJ Shanks presiding), it was observed:

> "8. On hearing an application under section 128 the Employment Judge is required to make a summary assessment on the basis of the material then before her of whether the Claimant has a pretty good chance of succeeding on the relevant claim. The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself. In giving reasons for her decision, it is sufficient for the Judge to indicate the "essential gist of her reasoning": this is because the Judge is not making a final judgment and her decision will inevitably be based to an extent on impression and therefore not susceptible to detailed reasoning; and because, as far as possible, it is better to not say anything which might pre-judge the final determination on the merits."

And, in **Raja v Secretary of State for Justice** UKEAT/0364/09 the EAT (HHJ Birtles presiding) provided the following guidance:

> "25. What a Tribunal has to do in an application for interim relief is to examine the material put before it, listen to submissions and decide whether at the final hearing on the merits "that it is likely that" that Tribunal will find that the reason or reasons for the dismissal is one or more of those listed in section 129(1). What is clear is that the Tribunal must not attempt to decide the issue as if it were a final issue: **Parkins v Sodexho Ltd** [2002] IRLR 109 ..."

43. Thus the determination of an application for interim relief will inevitably be broad brush and impressionistic; it is intended that such applications are to be made and heard very shortly after dismissal, before a respondent has been required to serve a response, long before any evidence is required to be served and usually without oral evidence. The ET must give reasons for its decision, allowing the parties to understand why they have won or lost on the question of liability in respect of the right to interim relief, but the ET is not required (and should not attempt) to make a summary determination of the claim itself. Appreciating the nature of the ET's decision on an interim relief application, the Employment Appeal Tribunal will be loathe to interfere with the assessment made at first instance. Parliament has made clear that the question of likelihood of success in this context is a matter for the ET; given the evaluative assessment required of this specialist tribunal, well used to determining issues of liability at trial and, therefore, best placed to determine likelihood of success on an application for interim relief, the decision made could only be susceptible to challenge on appeal if it revealed an error of legal principle, or failed to have regard to that which was relevant or took account of that which was irrelevant, or was properly to be characterised as perverse.

The appeal and cross-appeal

44. The claimant's appeal was permitted to proceed to a full hearing by Matthew Gullick KC, sitting as a Deputy High Court Judge, who considered it disclosed arguable questions of law as to whether: (1) the ET was in error in thinking there was a dispute as to PD1 and PD2; (2) the ET erred in its apparent reliance on the fact that PD1 took place in the course of a "*collaborative discussion*"; and (3) the ET's conclusions on causation would not apply to PD1 and PD2, which occurred before 28 June 2023. For its part, the respondent cross-appealed, contending that the ET had erred in concluding that, at trial, it was likely that, in relation to PD3, it would be shown that the claimant had a reasonable belief in the breach of a legal obligation by the respondent.

45. In the month preceding the full hearing in this matter, the claimant applied to amend his notice of appeal to add an additional ground of appeal, contending that the ET had reached a perverse decision in finding that it was not likely that the claimant would be able to show that his dismissal was related to PD3. For reasons provided in my order seal dated 14 October 2024, I refused that application.

The claimant's submissions

46. In support of the first ground of appeal identified by DHCJ Gullick, the claimant submitted that, in its conclusion on the protected status of PD1 and PD2, the ET had relied upon the fact (as it recorded at paragraphs 34 and 35) that these were disputed by the respondent, but neither the respondent's grounds of resistance for the interim relief hearing nor its submissions made at that hearing positively disputed that PD1 and PD2 had been made as alleged. To the extent it was suggested that the dispute related to whether he had a reasonable belief in a failure to comply with a legal obligation, the claimant pointed out he had been employed by the respondent as an auditor and was lead auditor in both instances relied on; this was relevant context (**Korashi**); the fact that he was junior to those to whom he made the disclosures could not be determinative (that would undermine whistleblowing protection); in any event, the ET had accepted that he had the requisite reasonable belief in relation to PD3, which put into writing the matters raised by PD1 and PD2.

47. As for the second ground, the claimant contended that the ET had introduced an irrelevant factor by focusing on the collaborative nature of audit discussions as a reason to reject the protected status of PD1 (this was not a reason relied on in relation to PD2): the collaborative nature of audit procedures could not mean PD1 was not a qualifying disclosure. He had stated categorically that there had been a breach of core standards;

that this was part of a collaborative audit discussion could not negate whistleblowing protection. Whether a disclosure was a qualifying disclosure depended upon the substance of the communication, assessed in its factual context (**Kilraine**); this was a disclosure of specific, factual information about breaches of legal, professional and regulatory obligations, made as part of an audit process.

48. As for PD3, and the respondent's cross-appeal, the claimant accepted it had not been his case that the regulator had advised him as to whether there had been a failure to comply with a legal obligation; but the ET had, in any event, found he had identified the source of the legal obligation in issue and had permissibly concluded that he had a pretty good chance of establishing he had the requisite reasonable belief.

49. In respect of the third point of appeal identified by DHCJ Gullick, the claimant contended that the ET's reasoning on causation had been based on (1) the fact that what was alleged to be the conduct that had led to the dismissal had pre-dated PD3; and (2) that it was likely that the respondent's case would be accepted, that it had dismissed the claimant because he would not accept reasonable advice and guidance in the future, and that, while potentially related to PD3, it was not because of it (see **Kong**). In respect of PD1 and PD2, however, if these were found to be qualifying disclosures, they had occurred well before the alleged conduct concerns of 23 June 2023, and the ET's reasoning at (1) could not stand. Moreover, the claimant argued that the respondent's "*reasonable advice and guidance*" had been unreasonable, contradicting relevant regulatory standards and principles; the ET had failed to properly consider or weigh the evidence in this regard. The ET had, further, misapplied the separability principle by failing to impose the burden of proof on to the respondent (**Kuzel v Roche Products Ltd** [2008] EWCA Civ 380, [2008] ICR 799 at paragraph 56), and, wrongly relying on **Kong**, had failed to properly scrutinize the respondent's case or to identify the concerns it held, which were that the claimant would blow the whistle in future.

The respondent's submissions

50. In respect of the first point raised by the appeal, the respondent acknowledged that the claimant had undoubtedly raised issues about the applicability of accounting standards (PD1) and the alleged omission of the IT system issue from a record of findings document (PD2); the particulars of claim, had, however, run to some 14 pages (120 paragraphs) and included a number of disputed factual allegations (e.g. whether the head of asset and portfolio management had confirmed no attempts had been made to comply with the accounting

standards in question (PD1), and whether the disclosure relating to what was said to be a data breach (PD2) was the breach or the alleged failure to include it in the record of findings); the ET had recorded that the content of these oral conversations was disputed - given the summary nature of the process, that was sufficient. In any event, even if the ET had found the disclosures were made as alleged, given: (i) the claimant's lack of qualifications and experience, (ii) the seniority and experience of the management team and its response; (iii) the unambiguous entries in the final audits; and (iv) the fact the relevant accounts had been signed off by an external auditor, the ET could not have found - to the interim relief standard - that the claimant had a *reasonable* belief that the information disclosed tended to show a failure to comply with a legal obligation.

51. As for the ET's reference to the collaborative nature of the process (the second point identified in the appeal), while it could not be ruled out that a qualifying disclosure might be made in that context, it was not wrong of the ET to take that into account as a relevant factor.

52. As for PD3 (the subject of the cross-appeal), the ET considered it relevant that the claimant had obtained advice from the regulator, but it had not been his case that the regulator had advised there had been any breach of a legal obligation and, for the reasons identified in relation to PD1 and PD2, the ET could not have found - to the interim relief standard - that the claimant had a *reasonable* belief that the information disclosed tended to show a failure to comply with a legal obligation

53. Addressing the final point raised by the appeal, this had been allowed to proceed on the basis that, if the claimant succeeded in respect of PD1 and/or PD2, and it was considered he could establish, to the requisite interim relief standard, these were qualifying disclosures, then there were protected disclosures pre-dating the raising of concerns about the claimant's performance on 28 June 2023. This, however, placed too much weight on one date: as the ET recorded, instances of the claimant having exhibited concerning behaviour - through his failure to accept advice and guidance - dated back to at least 17 January 2023; a fair reading of the decision (which required only the essential gist to be given) made clear it was the respondent's concerns going further back than 28 June 2023 which resulted in the application failing on causation.

Analysis and conclusions

Protected disclosures

54. It is convenient to first consider the ET's conclusions on the question whether it was likely

(understanding that to mean, whether there was a "*pretty good chance*", *per* **Taplin v Shippam**) that the claimant would establish at trial his claim of having made three protected disclosures. On this issue, both sides complain that the ET misunderstood, or mischaracterised, the case before it. The claimant says the ET wrongly considered there was a dispute as to whether he had made the disclosures relied on as PD1 and PD2; the respondent objects to the ET's mis-recording of the claimant's evidence as to the advice he received from the regulator, which appeared to inform its findings on PD3.

55. Accepting, as I do, the minimal requirements upon an ET when providing its decision on an application for interim relief, and recognising that it is sufficient for it to simply provide the essential gist of its reasoning, explaining why the parties won or lost on the question of liability in respect of the right to interim relief (**Queensgate Investments**; **Danpat**; **Parsons v Airbus**; **Raja**), I consider that both parties have justified concerns arising from the ET's judgment in the present case.

56. In respect of PD1 and PD2, the respondent may have disputed aspects of the claimant's case (for example, whether the head of asset and portfolio management had confirmed that no attempts had been made to comply with relevant accounting standards (PD1), or as to the precise nature of the disclosure relating to what was said to be a data breach (PD2)), but I cannot see that it was actually contesting that the claimant had made disclosures of information in respect of both the audits in issue, and that, in so doing, he had identified what he contended were breaches of particular accounting standards and principles. While it is right to acknowledge that the respondent had not set out its fully pleaded response to the details of the claim, the grounds of resistance prepared for the purpose of the interim relief hearing made clear that, on the question whether the claimant had made any protected disclosures, the real focus of the dispute was as to whether the claimant had a reasonable belief that there had been any failure to comply with a legal obligation. On this point, the respondent both argued that the standards and principles referenced by the claimant did not give rise to legal obligations as such, and that the claimant – given the context of the discussions in question, and his lack of experience and qualification - could not reasonably have believed that they did. Within that context, it is hard to understand the ET's explanation for finding it unlikely (applying the standard required for interim relief purposes) that, in respect of both PD1 and PD2, the claimant would be able to establish that he was making a disclosure.

57. Acknowledging the circumstances in which it was providing its decision (the written judgment seems

to have been produced overnight), I have considered whether a fairer reading of the ET's reasoning might allow for the possibility that it had in fact found it unlikely that the claimant would be able to establish that he was making a *qualifying* disclosure. That, I can see, might be one way of reading the explanation provided in relation to PD1, where the ET considered it relevant that this related to a collaborative discussion, involving the expression of different views on the issues raised, such that – on the respondent's case – an inexperienced, junior, participant (such as the claimant) could not reasonably have believed this to involve a disclosure that tended to show any failure to comply with a legal obligation. Although the claimant (by his second ground of appeal) objects that this would be an irrelevant consideration, and would undermine whistleblowing protection, I disagree. To amount to a qualifying disclosure, the identification of the legal obligation in question would have to be something more than a breach of guidance (**Eiger Securities**); although the claimant would not have to show he was necessarily correct (it is possible for a belief to be mistaken but also reasonably held; *per* **Babula**), the context of the discussion would be relevant in determining whether that (i) he subjectively held the requisite belief, and (ii) it was reasonable for him to do so (**Korashi**; **Kilraine**). The ET thus did not err in having regard to this context as being a potentially relevant consideration when determining what was likely to be found at the final hearing.

58. There are, however, other objections to this alternative construction of the ET's reasons. First, such an interpretation would have to assume that the ET's reference to "*a disclosure*" (paragraph 34) was intended to mean "*a qualifying disclosure*", and that it had elided these two questions when dealing with PD1, which would stand in contrast to the approach it had adopted in relation to PD3. Secondly, this construction would fail to address the ET's apparent understanding that the *"content of the conversation"* was disputed by the respondent, when there would seem to be no basis for drawing that conclusion on the documents available to the ET at the interim relief stage. Even allowing that the respondent might have indicated orally that it disputed particular aspects of the claimant's account (for example, as to what the head of asset and portfolio management allegedly said to the claimant), I am unable to see any basis for recording that it was actually disputing the content of the conversation on 3 February 2023, and the fact that the claimant had made the disclosures relied on as PD1 (as opposed to disputing the content of those disclosures, or that they amounted to disclosures of non-compliance with a legal obligation).

59. As for the ET's decision in relation to PD2, that was premised solely on the basis that "*the content of*

the discussions is disputed by the respondent" (ET, paragraph 35). Again, even acknowledging the fact that the respondent had not yet set out its pleaded case, and may have orally identified some points of dispute as to the precise nature of the disclosure, it is hard to see the basis for the ET's apparent understanding that there was sufficient disagreement as to the content of the relevant discussions to justify its conclusion that the claimant did not have a pretty good chance of establishing that he had made any disclosure in this regard. As with PD1, the respondent's grounds of resistance for the interim relief hearing made clear that the focus of the dispute on this point was as to whether there had been a *qualifying* disclosure, but the ET's reasoning does not suggest, at least so far as PD2 was concerned, that it engaged with that aspect of the case.

60. Allowing for the challenging circumstances in which the ET had to produce its decision, I have again considered the possibility that, on a fair reading of the reasons provided, the ET's reference to "*a disclosure*" should be interpreted as meaning "*a qualifying disclosure*". It seems to me, however, that this would be even more difficult in relation to PD2. Certainly the ET's reasons provide no explanation as to why it considered the claimant would be unlikely to succeed (to the requisite standard) on this point. Accepting that the respondent had questioned whether the claimant could be said to have had a reasonable belief in any failure to comply with a legal obligation in respect of PD2, I bear in mind that the ET went on to find that he had a pretty good chance of meeting this requirement in relation to PD3, which encompassed the earlier disclosures the claimant had made in PD1 and PD2 and seems to have referenced the same sources of the legal obligation alleged (*per* **Blackbay Ventures**). Even allowing for the minimal standards required of the ET in providing its reasons for refusing the application, I am unable to see how the claimant can properly understand why it was found that he was unlikely to succeed on this aspect of his case at trial.

61. Having acknowledged the difficulties that arise in relation to the ET's decision in respect of PD1 and PD2, it is, however, also hard to understand the reasoning provided for the finding made on PD3. Accepting that the ET had made clear that it found the claimant had a pretty good chance of establishing that he had made a disclosure that (contrary to the respondent's case) identified a failure to comply with a legal obligation, when considering whether he had a reasonable belief that the matters disclosed tended to show there had been such a failure, the ET's reasoning was premised on the basis that this was what the claimant had been advised by the regulator (see paragraph 43). Before me, however, it was common ground that that was not what the claimant had said: it was his case that the regulator had advised him as to the steps he should take if he

considered there had been a breach of a legal obligation; it had expressed no view as to whether or not there was such a breach.

62. Again I have considered whether, allowing for the circumstances in which the ET produced its decision, this might be viewed as a venial error of understanding, which would not undermine the essential gist of the reasoning. It was, however, clear at the hearing of the application for interim relief that there was a fundamental dispute as to whether the claimant reasonably believed that his disclosures tended to show the respondent had failed to comply with a legal obligation. In addressing the likely success of the claimant's claim in respect of PD3, the ET's reasoning identifies the advice it understood he had received from the regulator as a material factor in its determination that he would have a pretty good chance in demonstrating the requisite belief such that this amounted to a qualifying disclosure; the error the ET thus made in this regard goes to the heart of its reasoning on this particular point, and I cannot see that its finding can stand.

63. For the reasons provided, I do not consider that the ET's conclusions on the three protected disclosures are sustainable: the explanation provided by the ET in each instance fails to engage with the case before it, and – given that case - it is not possible to understand why it determined the application in the way that it did on each of PD1, PD2, and PD3. At this point, however, it is necessary to turn to the ET's decision on causation and the third point addressed by the claimant's appeal: if the ET was wrong to find (applying the requisite standard) that the claimant was unlikely to establish he had made protected disclosures in respect of the matters relied on as PD1 and PD2 (and whether or not its decision on PD3 could stand), would it also need to re-visit its conclusion on causation?

Causation

64. In permitting the claimant's appeal to proceed to a full hearing, DHCJ Gullick plainly saw this third point as arguably flowing from a successful challenge to the ET's findings relating to PD1 and PD2, characterising the question in this regard as follows:

> "Having found that there was not a sufficient prospect of the remaining two disclosures being established on the facts, the Employment Judge did not go on to address in the alternative the claimant's prospects of successfully establishing the other elements of his claim in relation to those alleged disclosures. Those alleged disclosures were from some time before the date of 28 June 2023 referred to in paragraphs 44-45 of the written reasons, and so it appears to be arguable that the Employment Judge's analysis on causation which was applied to the 10 July 2023 disclosure would not apply in relation to those alleged earlier disclosures."

65. In argument, the claimant has sought to extend this ground of challenge to also attack the ET's approach to the question of causation more generally, and its application of the guidance in **Kong**. Although that was plainly not a point envisaged by DHCJ Gullick when permitting this matter to proceed (indeed, there is no reference to these points in the claimant's notice of appeal), the respondent has not objected to this extension of the argument before me. This is a point I will return to below.

66. Addressing the question identified by DHCJ Gullick, I am clear that the ET's analysis of the claimant's likelihood of success on causation was not limited to the period post-dating 28 June 2023 and, therefore, that there is nothing in this third ground of appeal. Although it is right that the ET's reasoning was focused on PD3, and that, in that context, it (understandably) placed emphasis on the specific raising of concerns about his behaviour and attitude on 28 June 2023, it is also clear that the ET's conclusion – that the claimant did not have a pretty good chance of establishing at trial that his dismissal was for the sole or principal reason of making a public interest disclosure – was founded upon its view of the respondent's case more generally. In this regard, it is noticeable that, when summarising the respondent's case at paragraph 44, the ET referred both to the respondent's general view that the claimant was "*unlikely to accept reasonable advice and guidance*" and to the particular expression of its concern on 28 June 2023. Moreover, when recording its own conclusion, at paragraph 45, the ET did not limit its analysis to one particular date, referencing instead the respondent's broader concerns that the claimant would not accept guidance in the future.

67. The ET had set out the history of the respondent's concerns in some detail in its decision, essentially recording the matters I have summarised at paragraph 11 above. That history suggested that the respondent's concerns about the claimant's behaviour went back to at least January 2023, thus pre-dating either PD1 or PD2; certainly Ms Mayne's conversation with HR on 28 June 2023, during which she was said to have expressed the concern that the claimant was becoming unmanageable, was not an isolated incident, and it is apparent that the ET had in mind this full context when asking whether it was likely that the claimant would be able to establish his case on causation at trial.

68. The claimant seeks to criticise this conclusion, arguing that the ET: (i) failed to impose a burden of proof on the respondent to demonstrate the reason for his dismissal (per **Kuzel**); (ii) simply accepted the respondent's case without proper scrutiny, when even a cursory review of the contemporaneous documentation would demonstrate the matters relied on by the respondent did not evidence genuine concerns relating to his

behaviour; and (iii) erred in its application of **Kong**. Given the limited ground of challenge in the claimant's notice of appeal, and the focused nature of DHCJ Gullick's grant of permission to appeal on this point, I am not at all clear that these additional arguments are properly open to the claimant. Moreover, it seems to me that, in advancing these further submissions, the claimant is really seeking to pursue a perversity challenge, notwithstanding the earlier refusal of his application to amend in this regard. The respondent has not, however, objected to these additional arguments being taken at hearing and I can, in any event, address them relatively shortly.

69. First, the claimant has misunderstood the guidance provided in **Kuzel** in relation to the application of the burden of proof. While it is right that the Court of Appeal in that case made clear that, on a claim of unfair dismissal (automatic or otherwise), it will be for the employer to make good the reason for the dismissal, where the claim is brought by an employee who would not have sufficient continuity of service to pursue such a claim unless they were able to establish that they had been dismissed for an automatically unfair reason, then it will be the employee who has the primary burden (*per* **Maund**). In any event, the question for the ET on an application for interim relief is whether, carrying out what will inevitably be an impressionistic assessment of the case before it, the claimant has a pretty good chance of establishing their claim at trial. That is the test that the ET in the present case kept very much in mind, making clear that the imposition of this higher threshold on the question of liability for interim relief (the issue before it) did not mean that the claimant might not succeed at the final hearing. And this provides the answer to the second additional argument raised by the claimant: the ET was not making an adjudication upon all the evidence at this stage; rather, carrying out what could only be a summary assessment of the material before it, the ET was forming a view as to which case was likely to prevail at trial. The claimant's submission in this regard evinces an error of understanding about the nature of the ET's task at the interim relief stage; he may well have good points to make about the contemporaneous documentation at the final hearing, but that does not mean that the ET was wrong in forming the view that it did on his application for interim relief.

70. Turning then to the third additional argument raised by the claimant, I am also clear that the ET did not err in its application of the guidance provided in **Kong**. Acknowledging that the question whether the concerns relied on by the respondent can truly said to be separable from the claimant's protected disclosures will be a matter for detailed evaluation at trial, on a summary assessment of the material before it at the interim

relief stage, the ET was entitled to form the view that the claimant was unlikely to be able to show that his dismissal was because of his protected disclosures, as opposed to his conduct associated with, or consequent upon those disclosures. Ultimately the claimant's argument in this regard identifies no error in the ET's approach to **Kong**; it is a perversity challenge that is founded upon his disagreement with the conclusion reached at the interim relief stage.

Disposal

71. For the reasons provided, notwithstanding my conclusions relating to the ET's decision on PD1 and PD2, the ET's judgment is thus upheld on the question of causation and the claimant's appeal is dismissed. As for the respondent's cross-appeal relating to PD3, although this is upheld, given my decision on the appeal, no further direction is required.