EMPLOYMENT TRIBUNALS

Claimant: Ms C Vrancx

Respondent: Kelvin Hughes Ltd

Heard at: Watford Employment Tribunal (In Public; By Video)

On: **29 August 2024**

Before: Employment Judge Quill (Sitting Alone)

Appearances
For the Claimant: In Person
For the Respondent: Ms H Platt, counsel

Judgment with reasons having been given orally on 29 August 2024, and a later request for written reasons having been made by the Claimant, the following written reasons are supplied.

WRITTEN REASONS

Introduction

1. The Claimant made an application for interim relief based on an allegation that the Claimant's dismissal was contrary to s.103A of the Employment Rights Act.

The hearing and the evidence

2. I had the document bundles which the parties had sent in (the details of which I read out to the parties). In addition, I had a skeleton argument.

3. The parties also provided some witness statements which I read. No evidence on oath was taken.

4. The hearing was conducted entirely remotely by video. The Claimant and the Respondent's representative and I could all hear each other easily.

5. During the hearing, I discussed the Claimant's position with her and sought clarification from her, and the Claimant made submissions in support of the application and the Respondent opposed the application.

The law

6. The statutory test which I must apply is the one that is set out in s.129(1) of the Employment Rights Act 1996.

> (1) This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—
> (a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—
> (i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or
> (ii) paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or
> (b) that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

7. In other words I must decide if it appears to me that it is likely that on determining the complaints to which the application relates the tribunal will find that the reason, (or - if more than one - the principal reason), for the dismissal is one of those specified in sub-paragraph 1(a). That includes s.103A of the Employment Rights Act 1996, which is the only such reason relevant to this application.

> 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.

8. S.103A of the Employment Rights Act refers to the fact that an employee who is dismissed shall be regarded for the purposes of Part X 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.

9. When making a decision on an interim relief application, I do not make any formal findings of fact which are intended to be binding at any later stage of the proceedings. I am assessing - amongst other things - the likelihood of disputed facts being proved in the Claimant's favour at the final hearing. There is only limited material available to a judge making a decision on an interim relief application but my decision has to be based on whatever material is available to me.

10. When considering the likelihood of the Claimant ultimately succeeding on the application the correct test to be applied is whether the Claimant has a "pretty good chance" of success at the full hearing. This is the test first set out in Taplin v C Shipham Ltd [1978] ICR 1068. As numerous appellate decisions have stated (for example Ministry of Justice v Sarfraz [2011] IRLR 562 and Wollenberg Global Gaming Ventures (Leeds) Ltd [2018] 4 WLUK 14; the latter of which is as recent as 2018), the test that was set out in 1978 in Taplin remains the appropriate one. The test does not simply mean "more likely than not"; it denotes that a significantly higher degree of likelihood is required.

11. For the Claimant to succeed in the interim relief application, it is necessary for her to show that there is a pretty good chance of succeeding on each required element of the s.103A claim. In other words that she has to show there is a pretty good chance that the final tribunal will decide that there actually was a protected disclosure, as well as showing that there is a pretty good chance that the disclosure, if any, was the principal reason for the dismissal.

12. There are three requirements that need to be satisfied and for the definition of protected disclosure in s.43A of the Employment Rights Act to be met. There needs to be a disclosure within the meaning of the Act; that disclosure has to be a qualifying disclosure; and it must be made by the worker in a manner that is set out at sections 43C through to 43H.

13. The disclosure must contain information and there must be sufficient information in the disclosure if it is to qualify under s.43B(1).

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

14. In terms of whether the employee thought that the disclosed information tended to show one of those things, the employee's actual subjective belief must be analysed by the tribunal both to decide what, in fact, the employee did believe and also to decide if the actual belief was reasonable.

15. In relation to the public interest part of the criteria, as per Chesterton Global Ltd v Nurmohamed [2017] I.R.L.R. 837, the question for the tribunal is whether the worker believed - at the time he was making it - that the disclosure was in the public interest and whether that belief was reasonable. While the worker must have a genuine and reasonable belief that the disclosure of the information is in the public interest, this does not have to be the worker's motivation for making the disclosure.

16. If the Claimant is unable to show that he has a pretty good chance of showing that the disclosure was made in accordance with any of s.43C through to s.43H then interim relief should not be granted. (Although, for the purposes of this application, the Respondent did not seek to dispute this part of the requirement.)

17. It is for the Respondent to prove what its reason was for dismissing the employee. However, if the final tribunal decides that the reason or the principal reason for the Claimant's dismissal was something other than a protected disclosure then the claim for breach of s.103A fails even if the dismissal was for a reason that is different to the one put forward by the employer see for example Kuzel v Roche Products Ltd [2008] ICR 799.

18. Evidence that the employer has acted in a high handed or unreasonable or peremptory fashion or has deliberately turned a blind eye to evidence that the employee was not guilty of wrongdoing are not necessarily sufficient. Their only relevance would be if they supported an inference that the employer's purported reason was not the true reason for the dismissal.

19. The factual reason for the dismissal of an employee is the set of facts known to the employer or the set of beliefs held by the employer which caused the employer to dismiss the employee. That is subject - in protected disclosure cases - to the Supreme Court decision in Royal Mail Group Ltd v Jhuti [2019] UKSC 55; where the real reason for the dismissal is hidden from the decision maker behind an invented reason, it is the tribunal's duty to look behind the invented reason. If an investigator or senior manager wants to get rid of the employee and they trick or deceive the dismissing officer into deciding that the employee had committed misconduct, then the reason which the investigator or the senior manager had for wanting to get rid of the employee can potentially be attributed to the employer as the dismissal reason for s.103A.

"Redundancy" as alleged dismissal reason

20. Section 139 ERA states in part

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or

(b) the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

(2) For the purposes of subsection (1) the business of the employer together with the business or businesses of his associated employers shall be treated as one (unless either of the conditions specified in paragraphs (a) and (b) of that subsection would be satisfied without so treating them).

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

21. Within subsection 139(1), there are 4 states of affairs described: (a)(i); (a)(ii); (b)(i) and (b)(ii). These are sometimes called "redundancy situations", though the phrase does not appear in the legislation.

22. In an unfair dismissal case, where the employer is relying on "redundancy" as the fair reason for dismissal, it is for the employer to demonstrate that (at least) one of these states of affairs existed. (ie that there was a "redundancy situation" as it is sometimes called). That is a question of fact for the tribunal to determine on the evidence.

23. If there was such a state of affairs, then, as made clear by the House of Lords in Murray v Foyle Meats Ltd [1999] ICR 827, the tribunal has to go on to decide if the dismissal was, in the words of section 139(1), "*wholly or mainly attributable to*" the existence of that state of affairs. Again, in an unfair dismissal case, because of section 98(1) ERA, it is for the employer to satisfy the tribunal that that was the case. The issue is one of causation. Was the "redundancy situation" the reason that the employer decided to terminate the contract of employment.

24. The latter step is a crucial part of the reasoning. It is not merely sufficient for the tribunal to be satisfied that a redundancy situation existed. The reason in the Abernethy sense must be determined. See, for example, Kellog Brown and Root (UK) Ltd v Fitton & Ewer UKEAT/0205/16/BA UKEAT/0206/16 at para 24. In that case, the reason was found to be not the closure of a work location (though that was a "redundancy situation") but the employees' refusal to move to a new work location. Thus, the dismissal was not "wholly or mainly attributable" to the redundancy situation, and the correct label for the dismissal reason was not "redundancy".

25. Subject to the points just mentioned, for the tribunal to be persuaded that the reason for the dismissal was redundancy, the employer does not have to prove:

25.1. why the "redundancy situation" existed. [Of course, where the claimant's argument is that the employer is simply giving a "sham" reason, the claimant is entitled to ask the Tribunal to decide that the employer has lied about the state of affairs that is said to have led to the dismissal; that is an argument that the dismissal was not "attributable" to a redundancy situation (if any).]

25.2. or that there was nothing that the employer could have done to avoid it.

26. For section 103A ERA, the employee only succeeds if the Tribunal decides that a protected disclosure (or more than one protected disclosure) was the principal reason for the dismissal. There is an alternative route to showing an automatically unfair dismissal within section 105(6A) ERA. That section applies where the principal reason for the dismissal is that the employee was redundant, but the reason that the employee was selected for redundancy was that they had made a protected disclosure (or more than one protected disclosure). However, while section 105 ERA provides a route for an employee to succeed in an unfair dismissal claim, it is not one of the sections (as itemised in sections 128 and 129 ERA) that can lead to an application for interim relief being successful.

The parties' submissions and my analysis of the alleged disclosures

27. In this case, the Claimant presented a claim on 6 August 2024.

28. This followed Early Conciliation Certificate issued on 30 July 2024.

29. The claim sought interim relief, citing the appropriate legislation, and made an assertion that there was an unfair dismissal contrary to 103A. The dismissal date was alleged to be 31 July 2024. The Claimant had been told about the dismissal before then, including by letter dated 29 July 2024. The actual effective date of termination will be determined in due course. However, for today's purposes, the parties are agreed that I should treat it as being 31 July and the Respondent does not dispute that the Claimant has complied with the procedural requirements for an interim relief application.

30. The Claimant has worked for the Respondent since 2020. Both the offer letter, dated 19 February, and the contract, referred to her role as being senior buyer. The contract refers to a full job description being attached but such a document does not appear to be in the bundle of documents supplied by either side. The Claimant has included notes of her one to one meeting with her line manager on 1 November 2022. That document also referred to the Claimant's job title as being

senior buyer. However within the document the Claimant is recorded as stating that her job description and job title did not accurately reflect the role she was doing and referred to doing work managing subcontracts with third parties, amongst other things. According to the document, the line manager stated he was willing to undertake a job specification review.

31. During oral submissions the Claimant stated that she had repeatedly raised with her employer that the costs of her work were not accurately recorded in documents and that the employer's documents did not demonstrate clearly enough that she was doing project management work as well as the work of a senior buyer. This is a factual dispute. On the Claimant's case, it undermines the Respondent's argument that she was dismissed because it decided that it did not require senior buyers. She argues that she was performing a role different to (just) senior buyer, and that the Respondent knew that. On the evidence available to me, the Claimant does not have a pretty good chance of showing that the Respondent did not genuinely believe that her role was that of senior buyer.

32. The particulars of claim document is included within both parties' bundles. Paragraph 12 of the document asserts that - from May 2023 onwards - the Claimant had started to raise concerns with the employer. She goes into more detail about what she means by that in her witness statement between paragraph 21 and paragraph 76.

33. While I have not ignored those assertions, the actual protected disclosures which the Claimant relies on are those set out at paragraph 21 of the particulars of complaint and the earliest of those is 1 May 2024.

34. In other words, while the Claimant is asserting (amongst other things) that the (alleged) events between May 2023 and 30 April 2024 led to the alleged protected disclosures (the first of which was on 1 May 2024), and while those events might (on the Claimant's case) demonstrate the Respondent's attitude towards compliance issues, the Claimant is not asserting that her earlier communications amounted to a protected disclosure for the purposes of either her claim before the tribunal as a whole, or for the purposes of the interim relief application in particular.

35. On 1 May 2024, the Claimant had a meeting (at her request) with the Respondent's compliance and legal officer (paragraph 21a of Particulars of Complaint). This was not the first time they had met and on the Claimant's case she had raised related issues with him in the past.

36. The specific information which the Claimant alleges that she communicated that day was that she believed the Respondent was not complying with a legal

obligation to comply with the terms of industry security notices. In particular she alleged that the Respondent needed to, and had failed to, obtain specific authorisation prior to supplying the contents of classified documents to some subcontractors, in particular those based overseas.

37. She alleges that she gave specific details of the subcontractors in question and of the reasons for her concerns. She alleges she pointed out specific documents related to the industry security notices and to the requirements for particular levels of authorisation.

38. The Respondent reserves the right to deny that this was a protected disclosure as the litigation continues. However for today's purposes they Respondent has confirmed that it is content for me to proceed on the assumption that the Claimant has a pretty good chance of demonstrating that there was a protected disclosure during this meeting

39. On the Claimant's case, she and the compliance and legal officer did not discuss the topic again. She believes that the Respondent might have subsequently sought to obtain the authorisation which she believed was necessary (but not until significantly later).

40. Around 15 May 2024, in an email to her line manager, the Claimant raised issues about breaches of the industry security notice requirements. She alleged that the Respondent had potentially been in breach since May 2023 and also that a particular contractor - whom she identified - was potentially failing to comply with the encryption requirements when it was sending communications to the Respondent

41. As with its position on the first alleged protected disclosure, the Respondent reserves the right to dispute that paragraph 21b of the particulars of claim does not, in fact, refer to a protected disclosure; however, for today's purposes it is content for me to proceed on the basis that the Claimant has a pretty good chance of establishing that this was a protected disclosure.

42. The third alleged protected disclosure is the email shown at page 66 of the Claimant's bundle. This was the Claimant's email of 17 May 2024 at 12:11pm. In the email, she alleges that the Respondent is in breach of export legislation, while acknowledging that internally others have a different view.

43. While I am not making any binding decisions today, my assessment is that the Claimant has a pretty good chance of demonstrating, at the final hearing, that this email was a sufficiently clear communication of information and that the type of

wrongdoing that the Claimant was referring to was that set out in section 43B(1)(b) ERA. On its face, the email is referring to the breach of a legal obligation. It is true that the expression "exports legislation" is slightly vague, but it is clarified somewhat by the comments in the email in which the Claimant is specifically referring to the Respondent not having the required licence as yet and by implication stating that the activities that she is referring to in email or a breach of export legislation given the apparent absence of the licence in question.

44. Although the Claimant's evidence will potentially be tested in cross examination at the final hearing, for today's purposes I am satisfied that the Claimant has a pretty good chance of showing that she subjectively did believe that the information she was disclosing tended to show breach of a legal obligation and also that it was reasonable for her to hold that belief

45. Similarly, I think she has a pretty good chance of showing that she genuinely believed that it was in the public interest that companies in the Respondent's industry would take security obligations seriously, and would adhere to licencing requirements and export legislation in general, and adhere to any specific security requirements for specific products. It is very likely indeed that the tribunal will decide that it was reasonable for her to hold the belief that her disclosure was in the public interest.

46. In other words, my assessment is that she also has a pretty good chance of showing that the contents of paragraph 21c of the particulars of complaint include details of a protected disclosure

47. The other two alleged disclosures are significantly later in the chronology and are less likely to be crucial - in my opinion - to the tribunal's decision about whether the Claimant was dismissed because she had made a protected disclosure

48. On 3 July 2024, the Claimant sent the email which appears at page 68 of her bundle. To the extent that it simply repeats information from the 17 May item, I think there is also a pretty good chance that this would be found to be a protected disclosure. It was sent to the compliance and legal officer again. Even if it had only been sent to him that would not have prevented its being a protected disclosure, because there is no requirement that the disclosure in question has to supply information that the recipient was previously unaware of. However, in any event, it was also sent to two other employees, being the Claimant's own line manager and also to the Head of Human Resources

49. My assessment is that there is no new information which was capable, by itself, of amounting to a protected disclosure in the 3 July document. As I say, that does

not mean that it cannot be a protected disclosure; however, it is a factor that is relevant to my assessment of how likely it is that the Claimant will prove her assertion that the reason for her dismissal was that she had made (one of more of) the protected disclosures which she relies on.

50. The Claimant also alleges that, at her appeal meeting, she referred to the other 4 protected disclosures mentioned above. This was to the Respondent's managing director. The evidence will be examined carefully at the final hearing and it will ultimately be a matter for that tribunal to decide; however, for today's purposes I think the Claimant has a pretty good chance of demonstrating that, during her appeal, including at the appeal meeting itself, she referred back to the 4 alleged protected disclosures mentioned above. For each of those 4, I have decided that she has a pretty good chance of showing it is a protected disclosure, and I think that she also has pretty good chance of showing that the alleged disclosure in paragraph 21e of the particulars of complaint is also a protected disclosure.

51. On the Claimant's case the first time that she knew that she was potentially at risk of redundancy was 22 May 2024, not earlier than that. So after 3 of the alleged protected disclosures (and fairly soon after), but before the other 2.

52. The Claimant accepts that - at a much earlier point in time - there had been a discussion about the needs for cost savings; however, on her case, nothing came of that. In particular, she had not, in due course, been asked to come up with suggestions for cost savings (although she would have been happy to do so) and so, as far as she was concerned, the matter was resolved, without her own role being affected, and she believed that there was no ongoing concerns about the Respondent needing to make (further) savings.

53. In around April 2024, the Claimant had come across a document on the Respondent's computer systems. It was not deliberately and specifically supplied to her, rather she found it. It was a PowerPoint document which referred to the need for possible savings. The Claimant alleges that she discussed this with her manager promptly and he stated that the Claimant had nothing to worry about because there would be no plans to make headcount reductions which would affect her. There might need to be evidence about, and findings of fact about, this conversation at the final hearing.

53.1. On the Claimant's case, it shows that, as recently as April 2024 (shortly before the first protected disclosure), there was no plan to dismiss her, or put her at risk of redundancy; she therefore alleges that it shows that the Respondent's attitude towards her changed soon afterwards, and she invites the inference

that this was because of protected disclosures that were made soon afterwards.

53.2. On the Respondent's case, the line manager had actually been involved (already) in the discussions which led to the redundancy proposals being announced later, including the proposals to delete senior buyers.

53.3. So one possibility is that the Respondent's case is false. Ie the line manager told the truth to the Claimant in April 2024 (that he knew of no such plans) and that the Respondent is now putting forward a false chronology. However, another possibility is that the Respondent's case is true, and that the line manager decided to lie to the Claimant in April 2024 when she asked him about the document which she had found.

53.4. I am not suggesting that the two possibilities mentioned in the previous sub-paragraph are the only possible findings of fact that the Tribunal might make at final hearing, after it has heard from the Claimant and the line manager about what each of them claim was said. However, I am simply saying that even if the Tribunal fully accepts the Claimant's account of what the line manager said to her in April 2024, that does not inevitably mean that the Tribunal will decide that the line manager was unaware, at the time, that there had been ongoing discussions which included the possibility of deleting the senior buyers' roles.

54. On the morning of 22 May 2024, the Claimant had a one to one meeting with the line manager. She perceived his behaviour as being slightly unusual. Based on the questions he asked her, she formed the view that he was planning to actually take over her work and carry it out himself. Furthermore, towards the end of the meeting, he asked her about documents which she had saved on an external drive. It is the Claimant's opinion that the purpose of these latter questions was that the Respondent was intending to dismiss her with the real reason being that it was dismissing her because of her protected disclosures, but it was planning to use - as a false pretext - an argument that she had committed gross misconduct.

55. It is the Claimant's opinion that, for whatever reason the Respondent decided not to allege gross misconduct, but instead to come up with the sham reason of redundancy in order to dismiss her (and that the real reason was one or more of the 3 protected disclosures that she alleges she had made by that date).

56. On the Claimant's case it was later that day, 22 May 2024, in the afternoon, that the line manager told her about the alleged redundancy exercise and, in particular, that senior buyer roles had been put at risk of redundancy

57. On the Claimant's case the decision had already been made that she would definitely be dismissed and the way that the line manager spoke to her about the situation demonstrated that the final decision had already been made.

58. The Respondent had one other senior buyer apart from the Claimant. My assessment is that the Respondent will probably be able to show that that person was also put at risk of redundancy at a similar time to the Claimant, and, jumping ahead, that they were dismissed at a similar time to the Claimant

59. The Claimant alleges that that other senior buyer had a significantly different role to the Claimant. She argues that the differences in role between her and the other senior buyer are such that the Respondent will not be able to show that the decisions in relation to the other person (who had not made protected disclosures, as far as I am aware) were the same as the decisions for her. In other words, she alleges that she was singled out for dismissal because of protected disclosures, and the (alleged) fact that other people (including another person with job title "senior buyer") were made redundant around the same time does not assist the Respondent's argument to the contrary.

60. Specific evidence about what the respective "senior buyers" each did will potentially be needed at the final hearing. However, on the material before me today, I am not persuaded that the Claimant has a pretty good chance of showing that her role was so different to that of the other senior buyer that it is irrelevant to the section 103A argument that the other senior buyer was also dismissed.

61. In any event, even if the Claimant does show that her own role was significantly different to that of the other senior buyer, that does not, in itself, lend positive weight to her own argument that the dismissal reason was that she had made protected disclosures. It would still be true that other employees were also made redundant.

62. According to the witness statement prepared for today's purposes by the Head of Human Resources, at the final hearing the Respondent will be attempting to prove that its head office in Germany initiated a discussion - in around December 2023 - which asked for a review of headcounts and cost base. Furthermore, it is alleged that the Claimant's own line manager came up with the specific proposals to delete the tier of senior buyers in response to that. The alleged proposal was that some of the work previously done by the senior buyers would be done by himself, some by programme managers and some by the existing junior buyers.

63. If the Respondent makes out the factual allegation that the reason for the dismissal is the one that was just described then the dismissal reason is likely to be found to be by reason of redundancy, regardless of whether the dismissal is found to be fair or unfair once the process itself has been properly analysed and considered, and once there has been examination of the reasons that the Claimant was selected.

64. However, the evidence that the tribunal is likely to think of as being most important when deciding whether (as the Claimant alleges) redundancy was a sham reason is evidence about whether the proposals came into existence for the first time after the alleged protected disclosures or before then. If the Respondent can show that the proposal to delete the senior buyers tier had been put forward before the protected disclosures alleged in paragraph 21 of the Claimant's Particulars of Complaint, then that will make it less likely that the Tribunal, at the final hearing, will decide that the Respondent has put forward a sham reason, which it came up with in order to get rid of the Claimant because of the alleged protected disclosures.

65. Page 37 of the Respondent's bundle is an email dated 10 April at 1:23pm. 10 April is before the earliest of the protected disclosures that the Claimant is relying on in support of the interim relief application.

66. The covering email itself does not explicitly refer to the Claimant or to senior buyers. The subject line is "FW: SAVINGS V3". The header information does not state which (if any) attachments there were. However, within the body of the email, it is asserted that: "*Attached is the proposed headcount reduction plan we are working to on costings, and the Organisation plan of Peter's immediate team*."

67. At the final hearing, the Respondent will be attempting to demonstrate that one of the attachments was the document shown at page 40 of this bundle, which does name the Claimant. Furthermore the Respondent will be attempting to demonstrate that that shows that terminating the Claimant's employment was being actively considered as of 10 April 2024, including by reference to the argument that termination pay was shown in one of the columns.

68. Similarly the Respondent will also be attempting to show that an email which the Head of HR sent on 1 May 2024 at 9:30am had an attachment, with the heading "Restructure of Commercial Compliance Group", and that - in the document - the Claimant was named in a list of potential redundancies for the purposes of cost savings.

69. These are factual assertions and the Respondent's evidence will be tested at the final hearing. Potentially, the Respondent will need to prove that these documents are genuine, and were created on the dates that are alleged, as well as proving

that the documents do mean what the Respondent has asserted today that they mean.

70. However it is not fanciful or farfetched for the Respondent to allege, based on this evidence, that before the alleged protected disclosures, including before those between 1 May and 17 May, the Respondent already had plans in place to potentially terminate the Claimant's employment. The issue of whether these were firm plans, or simply proposals about which they intended to consult, will be relevant to the "ordinary" unfair dismissal complaint. However, for the section 103A issue the relevance is that, even if they were merely ideas or possible suggestions, the evidence before me seems to show that the Claimant does not have a pretty good chance of showing that the Respondent only came up with a plan to delete her role after she had done the things described in paragraph 21 of Particulars of Complaint.

71. I am not considering whether the claim of ordinary unfair dismissal is likely to succeed or fail and I have no comment whatsoever to make about that. The issue for me today is not whether consultation could or should have started earlier

72. Furthermore, the Claimant's arguments about whether there was alternative employment available are only relevant if they can help her show that she has a pretty good chance of showing that the principal reason for the dismissal was protected disclosure.

Interim Relief Decision

73. The Claimant does not have a pretty good chance of showing that the disclosures were the principal reason for her dismissal.

74. It is not impossible that the Claimant will succeed at a final hearing. However, the test for me today is not that his application fails only if she has little reasonable prospects. Nor is the test that the application succeeds if she has at least 51% chance of success at the final hearing; the bar is much higher than that.

75. There is nothing inherently implausible about dismissing an employee in order to save costs, especially not at the same time as dismissing other people, purportedly for the same reason. On the other hand, dismissing an employee very soon after they had made one or more protected disclosures, and when there had been no previous hint or suggestion that they might be made redundant does potentially create a suspicion that the stated reason is not the real reason.

76. In this case, the Claimant suggested to me that it is the latter scenario. She might succeed in showing that at the final hearing, once she has had the chance to consider all of the disclosed documents, and to cross-examine the Respondent's

witnesses (or to invite adverse inferences if particular witnesses are not called by the Respondent).

77. However, as discussed above, firstly she herself had found a PowerPoint presentation prior to the protected disclosure, and secondly, the Respondent has put forward documents, which the Claimant would not have seen at the time, which it says show that the plans to restructure (and the specific plans to delete the senior buyers' roles in particular) pre-dated the alleged protected disclosures.

78. The test under section 103A is not whether the employer acted reasonably when it dismissed. Furthermore, the test under section 103A is not whether any of the other so-called "automatic unfair dismissal" sections in Part X might be applicable. The test is specifically whether or not the principal dismissal reason was that the Claimant had made one or more protected disclosures.

79. My assessment of the material available today is that it does not show that the Claimant does have a pretty good chance of being successful in that argument at the final hearing, and the interim relief application fails.

Case Management

80. The Respondent mentioned certain applications that it might make in writing after this hearing. For that reason, it was not appropriate to fix a date for future hearings, and case management issues will be dealt with in due course. The date by which the Respondent is due to file its ET3 has not been varied.

Employment Judge Quill

Dated: 9 November 2024

Sent to the parties on:

14 December 2024

For the Tribunal: