EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000958/2025

Hearing held in person in Edinburgh on 9 May 2025

Employment Judge McCluskey

C Glasgow	**Claimant** **Represented by:** **Mr S Glasgow** **Husband**
Love @ Care Ltd	**Respondent** **Represented by:** **Mr C Ocloo** **Consultant**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that the claimant's application for interim relief is refused.

REASONS

Introduction

1. The claimant brings a complaint under section 103A Employment Rights Act 1996 ('ERA'), namely that the reason for her dismissal was that she made one or more protected disclosures. The complaint arises from her

employment with the respondent which commenced on 16 December 2024. The claimant asserts that her employment ended on 15 April 2025. The respondent asserts that her employment ended on 7 April 2025.

2. The claimant applied for interim relief, having asserted that her employment ended on 15 April 2025. On that basis, a hearing was set down to determine her application.

3. The respondent lodged a file of productions on the morning of the hearing and one additional document, not in the file. Both parties referred to the file and the additional document in the hearing.

4. The ET3 response is due by 22 May 2025 and had not yet been lodged. The respondent advised that the complaints were denied.

5. Both parties made oral submissions in relation to the application with reference to the file of productions and the additional document. For the sake of brevity, the Tribunal will not set these out in detail. No oral evidence was led.

6. It was confirmed that the claimant relied upon the following acts which she asserts are protected disclosures:
    a. On 26 January 2025 the claimant submitted a formal grievance to her manager stating ‘I am concerned that my effective hourly rate may fall below the threshold established by the National Minimum Wage Act 1998 due to significant unpaid working hours. Activities such as traveling between clients, writing notes, waiting periods, and unpaid preparation tasks (e.g entering a client’s home, locating the individual, and greeting them before clocking in) are integral to my role and should be appropriately compensated”.
    b. On 7 February 2025, the claimant submitted a Social Care Complaint form to Fife Council asking for ‘clarification regarding the payment arrangements for adult social care workers employed by the respondent, which are funded by Fife Council’. The claimant set out

the same concerns as she had raised with the respondent on 26 January 2025 about her working hours and the National Minimum Wage Act 1998. She went on to ask Fife Council to 'clarify' policy and provide policy documentation and to take enforcement action.

Relevant law

Interim relief

7. Section 128 ERA states: '*(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and— (a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in— (i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or… may apply to the tribunal for interim relief. (2)The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date)*'.

8. In order to succeed in an application for interim relief, the claimant must show that it is '*likely*' that the complaint of unfair dismissal will succeed (section 129 ERA).

9. This has been interpreted as requiring the Tribunal to be of the view that, when the case proceeds to a hearing, there is 'a *pretty good chance of success*' for the claim. This means more than just the balance of probabilities (**Taplin v C Shippam Ltd [1978] IRLR 450**) and involves a '*significantly higher degree of likelihood*' than more likely than not (**Ministry of Justice v Sarfraz [2011] IRLR 562**). The burden on a claimant in an application of this type is therefore greater than it is at a full hearing.

10. The Tribunal hearing an application for interim relief has a difficult task as it involves an assessment of the papers available and submissions made. The Tribunal requires to undertake a broad assessment on the material available. The application is to be determined expeditiously and on a summary basis. The Tribunal has to make as good an assessment as it feels able to do. The correct approach was summarised by Her Honour Judge Eady QC in **Al**

Qasimi v Robinson EAT 0283/17 as follows: '*By its nature, the application had to be determined expeditiously and on a summary basis. The ET had to do the best it could with such material as the parties had been able to deploy at short notice and to make as good an assessment as it felt able. The ET3 was only served during the course of the hearing and it is apparent that points emerged at a late stage and had to be dealt with as and when they did. The Employment Judge also had to be careful to avoid making findings that might tie the hands of the ET ultimately charged with the final determination of the merits of the points raised. His task was thus very much an impressionistic one: to form a view as to how the matter looked, as to whether the claimant had a pretty good chance and was likely to make out her case, and to explain the conclusion reached on that basis; not in an over-formulistic way but giving the essential gist of his reasoning, sufficient to let the parties know why the application had succeeded or failed given the issues raised and the test that had to be applied*.'

11. Where the reason or principal reason for dismissal is that the claimant made a protected disclosure then the dismissal will be unfair under section 103A ERA. This is one of the categories of "automatic" unfair dismissal where the reason for dismissal alone renders it unfair.

Protected disclosure

12. Section 43A ERA provides: "*In this Act a 'protected disclosure' means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H*."

13. A qualifying disclosure is defined in section 43B ERA as "*any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following: a. … 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. … d. ... e. … f. ...*"

14. Section 43C(1) ERA provides '*A qualifying disclosure is made in accordance with this section if the worker makes the disclosure ..— (a)to his employer, or...(b)'*.

15. Section 43G ERA disclosure in other cases provides '*(1)A qualifying disclosure is made in accordance with this section if— a). . .(b)the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,(c)he does not make the disclosure for purposes of personal gain,(d)any of the conditions in subsection (2) is met, and (e)in all the circumstances of the case, it is reasonable for him to make the disclosure*'.

16. In **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436**, at paragraphs 35 and 36, the Court of Appeal set out guidance on whether a particular statement should be regarded as a qualifying disclosure: "*35. The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a 'disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the matters set out in sub-paragraphs (a) to (f). Grammatically, the word 'information' has to be read with the qualifying phrase 'which tends to show [etc]' (as, for example, in the present case, information which tends to show 'that a person has failed or is likely to fail to comply with any legal obligation to which he is subject'). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)*."

17. "*36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill J in Chesterton Global at [8], this has both a subjective*

and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters, and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

18. In **Simpson v Cantor Fitzgerald Europe [2020] ICR 236**, the EAT confirmed these principles, stating: '*43...As the Court of Appeal in Kilraine v Wandsworth London Borough Council 30 [2018] ICR 1850 made abundantly clear, in order for a statement or disclosure to be a qualifying disclosure, it has to have sufficient factual content and specificity such as is capable of tending to show breach of a legal obligation. The tribunal is thus bound to consider the content of the disclosure to see if it meets the threshold level of sufficiency in terms of factual content and specificity before it could conclude that the belief was a reasonable one. That is another way of stating that the belief must be based on reasonable grounds. As already stated above, it is not enough merely for the employee to rely upon an assertion of his subjective belief that the information tends to show a breach*.'

19. The likelihood of establishing each of the necessary elements essential to the claim has to be considered on a preliminary basis at an interim relief hearing. It follows that unless all aspects are established as likely the application for interim relief cannot be upheld.

Discussion and decision

20. The Tribunal reminded itself that, in terms of the application for interim relief, the relevant claim was under section 103A ERA, as this was what gave the claimant the right to make the application under section 128 ERA.

21. The respondent submitted that the claimant had received notice of her dismissal on 7 April 2025 and not 15 April 2025, as submitted by the claimant.

22. The respondent had produced a bundle of productions for the hearing. The respondent then produced a separate document which was an email from the respondent to the claimant's work email address on 7 April 2025 at 12.49pm. Attached to that email was the letter dated 7 April 2025, summarily dismissing the claimant for gross misconduct. The respondent said that the claimant had contacted the respondent using her work email address about an hour and a half earlier, on a different subject unrelated to her dismissal. The respondent submitted that because of this earlier contact the claimant was likely to have seen the email sent at 12.49pm with the dismissal letter. The claimant acknowledged that she had sent an email about one and half hours earlier using her work email account, as the respondent submitted. The claimant said she was on holiday at the time and had not tried to check her work email again until towards the end of that day. On trying to do so, she found that she was locked out of her work email account and could not access any emails. She did not see the dismissal letter sent by email. She received a hard copy of the dismissal letter to her home address on 15 April 2025. The envelope sending the letter was postmarked on 14 April 2025. The respondent accepted that it had sent the dismissal letter in the envelope which the claimant had brought with her to the hearing today and that it had locked the claimant out of her work emails on 7 April 2025. On the material available to the Tribunal, it was likely that the claimant had first seen the dismissal letter on 15 April 2025 when she had opened the letter in the post and that 15 April 2025 was the effective date of termination. Accordingly, the interim relief application was presented to the Tribunal before the end of the period of seven days immediately following the effective date of termination and had been made in time.

23. The Tribunal reminded itself that the question to be asked was whether it was "likely", on the material available to the Tribunal, the claimant would succeed in her claim under section 103A ERA. The Tribunal was not making any conclusive findings of fact or law in relation to that claim.

24. The Tribunal reminded itself that it was required to consider whether the claimant was likely to succeed on all the issues to be determined at the final

hearing in relation to the section 103A ERA claim. This included not just the question of whether the reason or principal reason for the claimant's dismissal was that she made protected disclosures, but also whether protected disclosures had been made.

Protected disclosure(s)

25. The Tribunal first considered whether the claimant is likely to be able to show that she made protected disclosure(s).

26. In relation to the grievance on 26 January 2025 to her employer, it appeared to the Tribunal that the claimant was likely to succeed in showing that this was a disclosure of information. It was about the hours which she said she was working carrying out various tasks and the remuneration she was receiving. She provided examples. She had referred to the national minimum wage legislation and asserted a breach of that legislation. It appeared to the Tribunal that she was likely to be able to show that she had a reasonable belief that that the disclosure would show or tend to show a breach of a legal obligation, again given that she had provided specific examples, cited the legislation and that she worked in a regulated environment. It appeared to the Tribunal that she was likely to be able to show that she had a reasonable belief that the disclosure was made in the public interest, given the potential impact upon members of the public who might be in receipt of care.

27. Accordingly, the Tribunal considers that the claimant is likely to establish that this grievance sent to the respondent, in so far as it relates to hours of work and hourly pay, is a protected disclosure.

28. The Tribunal next considered the Social Care Complaint form submitted to Fife Council on 7 February 2025, asking for clarification regarding the payment arrangements for adult social care workers employed by the respondent and funded by Fife Council.

29. The claimant submitted that this communication was a protected disclosure under section 43G ERA (disclosure in other cases).

30. The test for whether a disclosure made under section 43G ERA (disclosure in other cases) is a protected disclosure contrasts with the more limited requirement that applies at the qualifying disclosure stage under section 43B ERA where the disclosure is to the employer. A qualifying disclosure is made in accordance with section 43G ERA if the claimant reasonably believed that the information disclosed, and any allegation contained in it, are substantially true; she does not make the disclosure for purposes of personal gain; any of the conditions in subsection 43G(2) ERA is met; and in all the circumstances of the case, it is reasonable for the claimant to make the disclosure.

31. The Tribunal considered whether the claimant was likely to succeed in showing that she reasonably believed that the information she disclosed, and any allegation contained in it, are 'substantially true'.

32. The Tribunal was unable to conclude whether the Social Care Complaint form sent to Fife Council on 7 February 2025 is likely to meet the test at section 43G(1)(b) ERA. For example, on the one hand the claimant asks Fife Council to 'clarify' its policy on hourly payments and to provide policy documents. That may indicate that the claimant, whilst concerned, did not necessarily reasonably believe at that stage that the information disclosed and the allegation about breach of national minimum wage legislation was substantially true. On the other hand, the request on 7 February 2025 for Fife Council to take enforcement action might indicate that the claimant can show that the test at section 43G(1)(b) ERA is met. This is a matter which, the Tribunal concluded, can only be decided once evidence is heard and the context of what is said can be examined. Having reached this conclusion, the Tribunal did not go on to consider the tests at subsections 43G(1)(c) (d) and (e) ERA.

33. Accordingly, the Tribunal does not consider from the information available today that the claimant is likely to establish that she made a protected

disclosure on 7 February 2025. She may or may not be successful when all the evidence is heard and when documents are spoken to. That is a different matter. In the Tribunal's view, evidence needs to be heard first to be able to determine the context and to come to a decision on this matter.

Reason for dismissal

34. The Tribunal then considered whether the claimant was likely to show that she was dismissed because she had made protected disclosures.

35. The Tribunal considered the timeline of events which, from the documents and from parties' submissions, appeared to be as follows.
    a. On 26 January 2025 the claimant raised a grievance, which included matters about pay and the national minimum wage (the first protected disclosure);
    b. On 6 February 2025 there was a grievance meeting between the claimant and the respondent, about the grievance raised by the claimant on 26 January 2025. It appears that the claimant was told verbally at that meeting that the respondent's 'hands were tied' by what Fife Council directed the respondent to pay carers.
    c. On 7 February 2025 the claimant submitted the Social Care Complaint form to Fife Council asking it for clarification regarding the payment arrangements for adult social care workers employed by the respondent and funded by Fife Council (the second protected disclosure).
    d. On 17 February 2025 there was an incident involving the care of a client (LB), which occurred whilst the claimant was providing services to the client in the client's home. After the incident, there was group email communication on 17 and 18 February 2025 from the respondent to the claimant and other team members about the incident. It appears that in the group emails on those dates, there was general comment about what had happened on 17 February 2025 and general comment about the care of LB, but no suggestion in those group emails that there was any wrongdoing by the claimant.

e. It appears that on 19 February 2025 Fife Council first contacted the claimant's line manager about the claimant's Social Care Complaint form dated 7 February 2025.

f. It appears that on 20 February 2025 the claimant's line manager begins an investigation into the claimant about the incident on 17 February 2025 with client LB.

g. On 21 February 2025 the claimant receives a written outcome of her grievance following the grievance meeting on 6 February 2025. Her grievance about pay and the national minimum wage is not upheld.

h. On 21 February 2025, in a letter, the claimant is suspended on full pay.

i. On 19 March 2025 an external HR company produces an investigation report about the incident with LB on 17 February 2025 whilst the claimant was providing services to LB. The investigation report recommends the claimant is invited to a disciplinary hearing to answer specific allegations.

j. On 15 April 2025 the claimant is dismissed, without any disciplinary hearing. The reasons given for dismissal in the dismissal letter match the specific allegations in the investigation report. The reasons given for dismissal do not match the allegations set out in the suspension letter.

36. The claimant in submissions acknowledged, as above, that there had been an investigation into the incident on 17 February 2025 with client LB, which had been carried out by an external HR company. The HR company had prepared an investigation report, set out disciplinary allegations against the claimant and recommended that the claimant was invited to attend a disciplinary hearing to answer those allegations. There had been no disciplinary hearing, but those disciplinary allegations had been copied into the dismissal letter as the reasons for dismissal.

37. There is obviously a dispute between the parties as to the reason for dismissal. The Tribunal reminded itself that it was not its purpose today to resolve that dispute, especially given that no evidence is led at interim relief

hearings. The question today is whether the claimant is likely to show that she was dismissed for making a protected disclosure.

38. Given that there was an incident on 17 February 2025 involving the care of a client (LB) which occurred whilst the claimant was providing services to the client in the client's home; given that there was email communication on 17 and 18 February 2025 from the respondent to the claimant and other team members about the incident; given that there was an investigation into the incident on 17 February 2025 with client LB carried out by an external HR company; given that the HR company prepared an investigation report setting out disciplinary allegations against the claimant and recommending that the claimant is invited to a disciplinary hearing to answer those allegations; and given that in the dismissal letter the reasons given for dismissal match the specific allegations in the investigation report, it cannot be said that the claimant has a sufficiently high degree of likelihood of showing that the protected disclosure(s) was the reason or principal reason for her dismissal.

39. Accordingly, the elements of the claimant's case cannot be said, on a broad assessment, to have a pretty good chance of success. They may or may not be successful when all the evidence is heard and when documents are spoken to. That is a different matter. Hearing of evidence is necessary in the Tribunal's view to be able to determine the context and to come to a decision on these matters.

40. The application for interim relief is therefore refused.

Entered in register: 13 May 2025
and copied to parties