Case Number: 6009366/2025

EMPLOYMENT TRIBUNALS

Claimant: Mr. L Fragkoulis

Respondent: EMW STax Ltd

Heard at: London South, via hybrid

On: 16 May 2025

Before: Employment Judge Cawthray

Representation
Claimant: Mr. Sekar, Counsel
Respondent: Ms. Egan, Counsel

JUDGMENT

The Claimant's application for interim relief under section 128 of the Employment Rights Act 1996 is refused.

REASONS

Introduction and Background

1. The Claimant made an application for Interim Relief made under section 128 of the Employment Rights Act 1996 ("ERA"), pending the determination of his claim for automatic unfair dismissal for having made protected disclosures brought under section 103A ERA.

2. By a claim form presented on 18 March 2025 the Claimant claims that he was automatically unfairly dismissed by the Respondent for making protected disclosures pursuant to section 103A of the Employment Rights Act (the "ERA").

3. This application for interim relief was presented in the ET1, as a 4 page attachment. The Claimant, within the ET1, states the effective date of termination was 11 March 2025. An application for interim relief must be

made within 7 days immediately following the effective date of termination.

4. The claim form also comprises other complaints, but no ACAS Early Conciliation took place. The other parts of the claim were rejected on 30 April 2025.

5. The Respondent has not yet been directed to provide any response.

6. A Notice of Hearing is on file dated 30 April 2025. My understanding is that parties see get a notification when the Tribunal uploads documents. The Claimant says they were not notified of the hearing, but that the hearing date does show on the portal. The Respondent is not yet using the portal, but confirmed the Respondent had received a posted Notice. The Tribunal clerk, on review of the file, said the Notice of Hearing had been sent to both parties by post.

7. On 30 April 2025 the Respondent was sent a Notice of the Interim Relief Application.

Procedure

8. The Claimant provided a 250 page bundle with a separate index and a witness statement.

9. The Respondent provided a bundle of 119 pages and a witness statement for Mr. Craig Powell.

10. At the outset of the hearing I discussed with the parties whether any reasonable adjustments were required for the hearing today, and other than regular breaks, none were required.

11. I did not hear oral evidence, in accordance with Rule 94 of the Employment Tribunal Rules 2024, but I read the statements and the documents to which I was referenced. I asked the parties to set out precisely which documents they wished me to read.

12. Both parties gave oral submissions, and Mr. Shaker submitted a four page factual submission.

13. I considered the basis of the interim relief application upon the claim as currently presented and as set out in the ET1.

The Issues

14. I explained at the outset of the hearing, and before the parties gave submissions, that for the Claimant's application of interim relief to succeed, I need to be satisfied, as regards each of the limbs of the Claimant's claim, that it is likely that, at the final hearing, the Tribunal will find in the Claimant's favour and that his claim will succeed.

15. For the Claimant to succeed at final hearing in his claim under section 103A ERA, the Tribunal will have to find each of the following:

a) That the claimant made the alleged disclosures relied on;
b) That they amounted to a protected disclosure within the meaning of section 43A ERA;
c) That the reason, or principal reason, for dismissal was the claimant having made the protected disclosure(s) relied on.

The Law

16. The Employment Tribunal Procedure Rules 2024 state:

Interim relief proceedings

94. *When the Tribunal hears an application for interim relief (or for its variation or revocation) under section 161 or 165 of the Trade Union and Labour Relations (Consolidation) Act 1992(**35**) or section 128 or 131 of the Employment Rights Act 1996(**36**), rules 52 to 54 (preliminary hearings) apply to the hearing and the Tribunal must not hear oral evidence unless it directs otherwise.*

Interim relief

17. The statutory provisions concerning interim relief are set out in the Employment Rights Act 1996 as follows:

128 Interim relief pending determination of complaint.

(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and—

(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

(i) section 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, may apply to the tribunal for interim relief.

(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days immediately following the effective date of termination (whether before, on or after that date).

(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

(5) The tribunal shall not exercise any power it has of postponing the hearing of an application for interim relief except where it is satisfied that special circumstances exist which justify it in doing so.

129 Procedure on hearing of application and making of order.

(1)This section applies where, on hearing an employee's application for interim relief, it appears to the tribunal that it is likely that on determining the complaint to which the application relates the tribunal will find—

(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—

(i) section 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.

(2) The tribunal shall announce its findings and explain to both parties (if present)—

(a) what powers the tribunal may exercise on the application, and

(b) in what circumstances it will exercise them.

(3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

(a) to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or

(b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(4) For the purposes of subsection (3)(b) “terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed” means, as regards seniority, pension rights and other similar

rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6) If the employer—

(a) states that he is willing to re-engage the employee in another job, and

(b) specifies the terms and conditions on which he is willing to do so,

the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.

(8) If the employee is not willing to accept the job on those terms and conditions—

(a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and

(b) otherwise, the tribunal shall make no order.

(9) If on the hearing of an application for interim relief the employer—

(a) fails to attend before the tribunal, or

(b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3), the tribunal shall make an order for the continuation of the employee's contract of employment.

18. An application for interim relief will be granted where, on hearing the application, it appears to the Tribunal that it is likely that on determining the complaint to which the application relates, a tribunal will find that the reason for dismissal is the one specified (s.129(1) ERA). The meaning of the word "likely" in section 129(1) has been considered in a number of authorities.

19. In order to determine 'whether it is likely' the claimant will succeed at a full hearing, the EAT said *in London City Airport v Chacko* 2013 IRLR 610, that this requires the Tribunal to carry out an 'expeditious summary assessment' as to how the matter appears on the material available, doing the best it can with the untested evidence advanced by each party. This will involve a less detailed scrutiny than would happen at a final hearing. My task is to assess how the matter appears to me, and Rule 94 states the tribunal shall not hear oral evidence unless it directs otherwise. I am also to avoid making findings of fact that could cause difficulty to a tribunal hearing the final hearing of the case.

20. 'Likelihood' has been interpreted to mean 'a pretty good chance of success' at the full hearing. In *Taplin v CC Shippam Ltd* [1978] ICR 1068 the EAT set out that it meant a "*higher degree of certainty in the mind of the tribunal than that of showing that he just had a "reasonable" prospect of success*". It went on to suggest that the tribunal "*should ask themselves whether the applicant has established that he has a "pretty good" chance of succeeding in the final application to the tribunal*".

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

22. The burden of proof was intended to be greater than that at a full hearing, where the Tribunal only needs to be satisfied on the balance of probabilities that the claimant has made out his case - or 51% or better. A pretty good chance is something nearer to certainty than mere probability.

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

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

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

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

<u>Automatic unfair dismissal</u>

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

    103A Protected disclosure

    An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

    43A Meaning of "protected disclosure

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

43B Disclosures qualifying for protection.

(1)In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, 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.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part " the relevant failure ", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C Disclosure to employer or other responsible person.

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure -

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

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

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

29. For an application for interim relief to be successful, a Tribunal needs to be satisfied on the evidence before it that it is likely that each element of the s.43B definition is likely to be met and that the final Tribunal is likely to find that the principal reason for dismissal was the disclosure.

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

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

31. In *Kong v. Gulf International Bank (UK) Ltd* [2022] WCA Civ 941 the Court of Appeal upheld the decision that it was not incorrect for a Tribunal to find that the claimant's dismissing managers were not motivated by the protected disclosure but by the view that they took of the claimant's conduct which they considered to be an unacceptable personal attack and reflective of a wider problem with her interpersonal skills.

Summary/Claimant's case/Conclusions

32. It is helpful to set out a brief summary of the positions and key events based on the contemporaneous documents.

33. I reiterate that I have heard no oral evidence and I do not seek to make findings of fact, but to set out my expeditious summary assessment, doing the best I can with the untested evidence advanced by each party.

34. The Claimant alleges that he has made 4 protected disclosures. The alleged disclosures took place between March and November 2024. Each alleged disclosure is oral. The alleged disclosures are not set out in writing.

35. Ms. Sekar, on behalf of the Claimant, confirmed the alleged protected disclosures relied upon with reference to the paragraphs in the claim form. I have set out below the paragraphs containing the alleged protected disclosures. All the alleged protected disclosures were made to the Respondent's staff.

4. In March 2024 he was asked to provide answers to an HMRC inspector who questioned why questionnaires from vendors had blank responses and why we had claimed a capital allowances report for a building which had been destroyed by fire, including all the fixtures and fittings that had been destroyed by the fire. The Claimant was asked by Craig Powell, the lead manager at the Brighton Practice, to find a counter-argument, despite the Claimant repeatedly telling Mr Powell that EMW Stax should never have produced a report for a building that was destroyed and so the claim should not be pursued. The case is ongoing with the HMRC inspector saying he would not be able toaccept the claim if all the relevant documents were not produced, but since that time the Claimant noticed a change in attitude and treatment towards himself.

5. At the beginning of October 2024 the Claimant was asked to split the purchase price of a building consisting of commercial and residential parts so tax relief could be claimed for the commercial part. This is done when the solicitors have confirmed the purchase price on completion and according to a set procedure, but the Claimant was asked by his line manager, Eileen Smith, to do it on the basis of the gross purchase price according to the floor area before getting the final purchase price from the solicitor, despite his saying that this was wrong.

6. At around the same time the Claimant was approached by Craig Powell (Operations Director) and was told that we needed to produce a report for a claim based on current expenditure as we do not know how much was roughly spent back then. The property was built from scratch and there would not be much left in their records from that build, so the Claimant was told we would need to get the target figure from the fixed asset register and reverse price it, only focusing on the build costs from 1989-1990 and the surveyor needs to price it up by unwinding the inflation'. The Claimant told Mr Powell that with this approach is nowhere stated especially as we do not know what was installed back in 1989-1990 and whether this fixtures and fittings are still there or not as clients can get tax relief for fixtures and fittings that might no longer exist as they might have been removed in recent years by previous owners. I was told the work had to be done so as not to lose a good client and a report was produced for the costs which were spent back in 1989-1990 although EMW STAX was completely unsure what was installed and Mr Powell's approach was to put claimed costs using ""some assumptions".

7. In November 2024 I was told to advise on tax relief claims for a company where another tax consultancy a few years previously had claimed a total of £133,131 of special rate pool allowances attracting tax relief at 6% of the taxable profits. The Claimant immediately brought this to the attention of his line manager, Eileen Smith, and Hasanul Karim, a Senior Tax Advisor, that we can't

produce a report where there had already had a report for electricity, lighting and cold water systems from another tax consultancy. I was told we work for the company not for HMRC. The Claimant kept asking questions about whether this a correct way to do things and was told that EMW Stax could leave a note on the file for HMRC on the submitted claim that there was another report but not identifying which one was the correct one for tax purposes. The Claimant understood this was so they could keep the client by doing work as Mr Karim also told him that as EMW Stax calculated the land value of the property in a different way and if the land value exceeds the figure found by the other consultancy EMW Stax's report is the correct one.

36. It is understood the section 43B(b) is being relied upon, breach of a legal obligation.

37. Based on the pleadings and documents, the Claimant signed a contract of employment on 2 February 2023. It appears to be the case that the Claimant submitted a grievance on 29 January 2025. The grievance appears to relate to comments made by staff, what he considered inappropriate behaviour by colleagues, including Eileen Smith, and the level of pay for the tasks he was undertaking. Within the grievance the Claimant wrote:

    "I was clearly very upset by this feedback but I knew this was done deliberately because of what happened last year and as a result now Eileen is targeting me due to the fact that I exercised whistleblowing for the company and she did not want anything like that to happen."

38. However, nowhere in the Claimant's grievance does he reference any of the four alleged protected disclosures set out above. There is reference to Mr. Powell, in December 2024, asking the Claimant to work on a HMRC investigation matter, and that he reported to Mr. Powell it being a 50/50 thing. This does not appear to accord with any of the alleged protected disclosures now being relied on.

39. The grievance was being managed by Hive HR. The Claimant corresponded with Hive HR via his personal email account.

40. A grievance meeting had been scheduled for 21 February 2025.

41. On 18 February 2025 the Claimant sent a number of emails from his work account to his private email account. On 19 February 2025 the Claimant was suspended. An investigation meeting took place on 5 March 2025.

42. In a letter dated 5 March 2025 the Claimant was invited to a disciplinary meeting and within the letter it stated:

    "At this hearing we will consider disciplinary action against you, in line with the Company Disciplinary Procedure. This is with regard to the unauthorised release of client data to your personal email account, this is in breach of your employment contract clauses 13 and 15."

43. Prior to the disciplinary meeting, on 10 March 2025, the Claimant wrote to Mr. Powell, and there does not appear to be any reference to any of the alleged protected disclosures in the letter.

44. A disciplinary meeting took place on 11 March 2025. A dismissal letter dated 11 March 2025 purports to set out the reasons why the Respondent says the Claimant was dismissed:

> *"Following a thorough investigation conducted in accordance with the company's disciplinary procedure, it has been determined that you have been found guilty of serious misconduct. Despite careful consideration of your statements and the evidence you provided during the investigation hearing, the company has concluded that your conduct was of such a serious nature as to justify summary dismissal."*

45. The letter sets out 7 specific reasons on why Mr. Powell made the decision to dismiss the Claimant.

46. The Claimant suggests the reason given by the Respondent was not genuine, and the real reason was his disclosures.

47. The issue for me to determine was whether the Claimant's automatic unfair dismissal claim was likely to succeed at the substantive hearing. I considered both parties submissions in full in reaching my conclusions, and the specific documents to which I was referred.

48. I dealt first with determining whether it is likely that the Claimant will show that he made protected disclosures as defined by s.43 ERA and then go on to consider whether it is likely that he will show that he was dismissed for making those protected disclosures.

49. It is not clear whether all of the alleged protected disclosures contain a conveyance of information, and as all the alleged protected disclosures are oral disclosures, detailed consideration on evidence on this will be required to determine exactly what was said by the Claimant.

50. Indeed, in regard to the alleged disclosure in March 2024. It appears that the Claimant says he told Mr. Powell that the Respondent should never have produced a report for a building. Evidence and findings of fact on the what was said and whether there was only an allegation or an actual conveyance of information is required.

51. In regard to the alleged disclosure set out in paragraph 5 of the claim form it is noted that most of the paragraph relates to what the Claimant says he was asked to do by Eileen Smith, and the only reference to what he allegedly said was he said *"that this was wrong*". Again, evidence and findings of fact on the what was said and whether there was only an allegation or an actual conveyance of information is required.

52. In regards to the alleged disclosure set out in paragraph 6 of the claim form, similarly, most of the paragraph relates to what the Claimant says he was asked to do by Mr. Powell and the Claimant says he: *told Mr Powell that with this approach is nowhere stated especially as we do not know what was installed back in 1989-1990 and whether this fixtures and fittings are still there or not as clients can get tax relief for fixtures and fittings that might no longer exist as they might have been removed in recent years by previous owners.* Again, evidence and findings of fact on the what was said and whether there was only an allegation or an actual conveyance of information is required.

53. In regards to the alleged disclosure set out in paragraph 7 of the claim form the Claimant says he: "*brought this to the attention of his line manager, Eileen Smith, and Hasanul Karim, a Senior Tax Advisor, that we can't produce a report where there had already had a report for electricity, lighting and cold water systems from another tax consultancy…. The Claimant kept asking questions about whether this a correct way to do things".* Again, evidence and findings of fact on the what was said and whether there was actual conveyance of information is required.

54. At this stage, it is unclear whether any or all of the disclosures were made in the public interest, but I note the disclosures generally relate to alleged breach of legal obligations, and in general terms a breach of tax rules and regulations. I do consider that, in theory, information conveying a breach of a rule or regulation about taxation could amount to a breach of legal obligation, but this will depend on exactly what was said, and what the Claimant reasonably believed.

55. My expeditious summary assessment is that I cannot reasonably conclude that it is "likely" that any or all of the alleged disclosures will meet the test. They may meet the test, or they may not, which is not sufficient to grant interim relief.

56. Further, there is a dispute about whether or not the reason, or principal reason, for dismissal was because the Claimant made one or more of the protected disclosures. As noted, the letter of termination says that the reason for the Claimant's termination was because it was determined that the Claimant had committed gross misconduct.

57. There is a dispute of fact on whether or not Mr. Powell, as the dismissing officer, was aware of the alleged protected disclosures in October and November 2024. This is a matter that will need to be determined upon hearing the evidence at a full hearing after proper consideration of all the evidence.

58. It is noted that the alleged protected disclosures took place between March 2024 and November 2024. The Claimant was dismissed on 11 March 2025. This is a year after the first alleged protected disclosure, approximately six months after the second and third alleged disclosures and three months after the last alleged protected disclosure.

59. In the period from the last alleged disclosure to dismissal there had been a grievance process commenced, an investigation and disciplinary meeting.

60. At present, it is difficult to see any causative link between the alleged disclosures and the termination, which appears to have been prompted by the Respondent becoming aware of the Claimant emailing himself work materials.

61. Undertaking an expeditious summary assessment based on the untested evidence available to me, I conclude that the Claimant might show that it was the disclosures that caused his dismissal or, equally, the Respondent might show that it was the Claimant's conduct and Mr. Powell's belief that the Claimant had committed gross misconduct by sending emails with confidential information to his personal email address that led to termination of employment. Either reason might be correct. Not having heard any evidence, it cannot be said, at this stage of the proceedings, that it is near to certain or that the Claimant has a pretty good chance of success on this element of his claim. There is a reasonable (but as yet untested) explanation by the Respondent.

62. The application for interim relief is therefore refused.

Approved by:

Employment Judge Cawthray

16 May 2025

JUDGMENT SENT TO THE PARTIES ON
17 May 2025

FOR THE TRIBUNAL OFFICE

P Wing

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of

Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/