EMPLOYMENT TRIBUNALS

Claimant: **Dr C Ryan**

Respondent: **London Metropolitan University**

Heard at: Watford (via CVP)

On: 11 December 2024

Before: Employment Judge P Smith

Appearances

For the Claimant: In person

For the Respondent: Mr D Leach of Counsel

REASONS

Issued pursuant to rule 60 of the Employment Tribunal Procedure Rules 2024

1. At an interim relief hearing that took place via video link on 11 December 2024 the Tribunal dismissed the Claimant's application for interim relief. The judgment was sent to the parties on 30 January 2025. These written reasons have been issued at the request of the Claimant, such request having been made within the 14-day time period specified by **rule 60(4)(b)** of the **Employment Tribunal Procedure Rules 2024**.

Introduction

2. By way of a claim form presented to the Tribunal on 24 October 2024 the Claimant brought a claim of unfair dismissal and an application for interim relief. The claim of unfair dismissal presented is solely based upon the Claimant's assertion that the principal reason for his dismissal was the automatically unfair reason of his having made a protected disclosure, contrary to **s.103A Employment Rights Act 1996**. The application for interim relief was made within the necessary seven-day timescale set by **s.128(2)** as the parties agree that the Claimant's effective date of termination was 18 October 2024.

3. Following a discussion with the parties at the outset of the interim relief hearing it was agreed by both sides that I should decide the main issue of principle first. That issue is the **s.129(1)** question, namely whether it appears to the Tribunal that it is likely that on determining the complaint to which the application relates the Tribunal will find that the reason (or if more than one the principal reason) for the dismissal is the **s.103A** reason.

4. If I decided that question in the Respondent's favour then the application for interim relief would fail and go no further. However, if I decided that question in the Claimant's favour it would then be necessary to go on to address the additional formalities required of the Tribunal by **ss.129** and **130**.

5. In deciding the **s.129(1)** issue I made no factual findings and nothing in what I will come on to say in these Reasons should be taken as my having done so. Any future Tribunal deciding this case will not be bound by my summary assessment of the likely outcome from the perspective of this very earliest stage in the proceedings. It may be that the outcome is different, or possibly even very different, from that which I considered likely to occur as at the date of the interim relief hearing.

The law

6. In "whistleblowing" cases brought under **s.103A Employment Rights Act 1996**, **s.128** of the **Act** confers a power upon Employment Tribunals to make certain orders for interim relief pending the determination of the complaint, if certain conditions are satisfied. The first is that a **s.103A** claim is made, and the second is that it is presented within seven days of the employee's dismissal.

7. The third condition is that I must be satisfied, on a summary assessment based on the information that is available to me, that the Claimant is "likely" that on determining the claim the Tribunal will find that the **s.103A** reason was the principal reason for the Claimant's dismissal (**s.129(1)**).

8. Approaching the same question but from the opposite direction, it is also trite law that if I am persuaded that the reason advanced by the employer – in this case, a conduct-related reason – is likely to be found to be the principal reason then it is not necessary to make an assessment of whether any of the contended-for protected disclosures are likely to be found to be protected disclosures by the Tribunal at the full hearing of the claim: **Hall v Paragon Finance Plc [2024] EAT 181** (Employment Appeal Tribunal).

9. In the context of this kind of application, "likely" has been defined as meaning something more than merely the balance of probabilities likelihood (i.e. 51%) but something substantially higher, namely a "pretty good chance" (**Taplin v C Shippam Ltd [1978] IRLR 450** and **Sarfraz v Ministry of Justice [2011] IRLR 562**, both EAT).

10. The assessment of likelihood also involves the Tribunal considering any ancillary or incidental matters upon which the success of the claim depends (**Hancock v**

Ter-Berg [2020] IRLR 97, EAT). Such matters an actually be highly significant, and they could for example include the question of as whether the Tribunal has jurisdiction to hear the unfair dismissal claim at all, the employment status of the Claimant (whether they were an "employee" of the Respondent), whether an amendment to the claim form is necessary and likely to be granted, *etc*.

11. Whilst an application for interim relief by definition involves a broad-brush assessment and (generally) the hearing of no live evidence, it is an exercise that must encompass each element of the claim which the Claimant will be required to establish at the full hearing. He must also demonstrate – to the **Taplin** "pretty good chance" standard – his satisfaction of each component inherent in the making of a protected disclosure (see **Sarfraz**). In a **s.103A**-based interim relief application that necessarily involves the Tribunal determining whether the Claimant has a pretty good chance of establishing:

    11.1. That he made a disclosure of information to the employer;

    11.2. That he believed that the information disclosed tended to show one or more of the matters itemised in **s.43B(1)** of the **Act**;

    11.3. That his belief was reasonable;

    11.4. That he reasonably believed that the disclosure was made in the public interest; and,

    11.5. That the disclosure was the principal reason for his dismissal.

12. Some **s.103A** cases are known as "tainted information" cases. In essence, such a case involves a person in the hierarchy of responsibility above the employee determining that the employee should be dismissed for the impermissible **s.103A** reason, but hides it behind an invented reason which the (otherwise unwitting) decision-maker adopts. If those circumstances are made out, the Supreme Court has determined that the Tribunal should find the reason for the dismissal as being the hidden reason rather than the invented reason: **Royal Mail Group v Jhuti [2019] UKSC 55**.

The material available to me

13. The summary assessment I was required to carry out in order to determine whether it is indeed "likely" (in that higher sense) necessarily included me looking at any documents the parties put before me, but also to read any witness statements that had been prepared even at this early stage in the proceedings.
14. Both sides provided documents and witness statements in advance of this hearing, and I read them. The Claimant provided a witness statement for himself and the Respondent provided a witness statement for Joanna Cooke, who was present at a conversation between the Claimant and herself on 9 April 2024 and of which there is no contemporaneous written record. The bundle of documents amounted to 662 pages but I was in fact only taken to a very limited number of those documents by the parties during the course of the hearing.

15. I reminded myself that all of the evidence was untested at this stage.

The alleged protected disclosures in this case

Protected disclosures 3 and 4

16. In his Particulars of Claim the Claimant advanced four communications he contended amounted to protected disclosures within the meaning of **s.43B(1)**. However, the fourth alleged disclosure was made on 21 October 2024 which was after his dismissal. It therefore cannot possibly have influenced the earlier decision to dismiss him and no unfair dismissal claim could properly be advanced on the basis of it. If such a claim is to be advanced, it has no reasonable prospects of success. Even without delving into the detail of that disclosure there is no prospect whatsoever of the Claimant establishing that he has a "pretty good chance" of establishing that it was the principal reason for his dismissal.

17. In addition, in submissions at the hearing the Claimant abandoned his reliance on the third alleged protected disclosure (his grievance to the Vice-Chancellor of 25 September 2024) as being the principal reason as to why he was dismissed. I therefore did not have to take this matter any further.

Protected disclosures 1 and 2

18. Having abandoned his reliance on the third protected disclosure and upon my assessment of the fourth, the Claimant nevertheless contended that it was the making of his first and second protected disclosures which formed the principal reason he was dismissed. It was therefore necessary to examine them both.

Protected disclosure 1

19. In paragraph 60(a) of his Particulars of Claim the Claimant described his first protected disclosure in the following terms:

> *On 9 April in an online meeting with my Line Manager Joanna Cooke, I disclosed that Dr Naveed Kazmi had granted permission to a supervisee of mine to reprocess data collected from human participants for secondary analysis without informed and explicit consent. I believed this to be a breach of a legal obligation to data subjects on the part of a representative of the university as data controller, contrary to BERA paragraph 28, and the principles of transparency, purpose and storage limitation outlined in the university's Data Protection Policy, 2.1., a), b) & e), corresponding to Article 5 of UK GDPR a), b) and e), and Recitals 39 & 43.*

20. This was an oral conversation and was not minuted or noted anywhere.

21. In his 18-page witness statement for the interim relief hearing the Claimant referred to this conversation but nowhere did he cite the particular words he contended he used which was information that tended to show that there had been a breach of a legal obligation. He had to be asked what those words were at the hearing itself. He told me that his words were:

> *"That the module leader was allowing students to reuse data in absence of consent and had been misleading participants by instructing students to tell participants from whom they collected data in second year that they would destroy the data after the project was finished, but then reused it the next day. They were playing fast and loose with consent. This was not informed consent."*

22. In her witness statement for this hearing Ms Cooke said that she could not remember any reference being made by the Claimant to the GDPR on indeed any GDPR-related issues being discussed at that meeting.

23. In relation to this particular disclosure, it appeared to me that there was a fundamental dispute of fact about what the Claimant actually communicated at the meeting of 9 April 2024.

24. In my judgment, the Claimant does not have a pretty good chance of establishing that he used the words he told me about at the hearing, at all. Whilst a conversation between him and Ms Cooke plainly happened, there is no corroborative evidence of what was discussed. Such evidence might have pointed towards one side having a better chance than the other of establishing whose version is correct, at the full hearing. That would not necessarily have amounted to a "pretty good chance", but it could have done. In relation to this conversation one party cannot remember the operative issue, and the other only mentioned what he says he said orally at the hearing of his interim relief application. It was not in his lengthy witness statement or in his well-prepared Particulars of Claim, and I found that to be a significant omission that could in fact point away from the Claimant's version as being likely to be the one accepted at the full hearing.

25. Applying the high standard set by **Taplin** and **Sarfraz**, I could not conclude that a finding on the facts, in either direction, is "likely". The matter is very much up in the air. It follows that I could not accept that the Claimant had a "pretty good chance" of establishing that his first contended-for protected disclosure was indeed a protected disclosure.

Protected disclosure 2

26. In paragraph 60(b) of his Particulars of Claim the Claimant described his first protected disclosure in the following terms:

> *On 8 May, I informed the Principal Lecturer Joanna Cooke by email that there had been an identity breach of one of our students in relation to special category data on our dissertation module. I believed this was not only a breach of a legal obligation to the student-participant on the part of the university as data controller, but also a criminal offence, insofar as it deprived a student who had relinquished data under conditions of strict anonymity of her right to privacy, in accordance with UK GDPR, Recital 75.*

27. In contrast to the first protected disclosure, this alleged disclosure was set out in writing. I was taken to the operative parts of one of the Claimant's emails from that date (8 May 2024) which appeared in the bundle. The part relied on by the Claimant as amounting to a protected disclosure was:

> *I hope he is, because there is an instance of severe ethical misconduct in one of the dissertations submitted yesterday.*
>
> *The candidate made the mistake of selecting participants from her cohort (which is a definite no-no, and I can't understand why this was permitted, as it breaks all concerns with objectivity, as well as ethics).*
>
> *Because of the topic, the candidate discusses all kinds of sensitive issues with participants, including medical diagnoses. One even discussed self-harming ideation.*
>
> *Yet, despite these sensitive issues, the data provides sufficient information concerning the first participant that she is easily identifiable among our cohort. The second participant we don't even have to guess, because the author of the piece has left her real name in!*
>
> *Now I know all kinds of things about this student of mine that I ought not to, because the candidate has been so lax with protecting the identities of her participants (and, interestingly, there is nothing about anonymity or confidentiality in the Ethical section of her Methodology chapter).*
>
> *The supervisor has signed off the piece's allegiance with ethical principles, whereas it is clear that there has been no such adherence I am curious to know how the principles guiding research have become to be treated so cavalierly that our research dissertation module has descended to such levels of egregious misconduct and negligence.*

28. Within this document the majority of the Claimant's criticism is directed to the student in question, but it is right to say that criticism is also made of the student's dissertation supervisor, Ms Stephenson. However, putting this exchange in its proper context, on the face of this email what appears to have happened (and I do not make a finding in this regard) is that a dissertation had been signed off by a colleague of the Claimant's, despite this student's mistake. There is no suggestion that the dissertation was for wider publication or had in fact been publicised.

29. The Claimant contended that the information he communicated in this email tended to show that a person had breached a legal obligation to which they were subject (**s.43B(1)(b)**), and that a criminal offence had been, or was likely to have been, committed (**s.43B(1)(d)**.

30. On my summary assessment, I thought it inherently unlikely that the Tribunal at the full hearing of the claim will find that objectively, the Claimant reasonably believed that what had happened in this situation amounted to a breach of the **GDPR** where there had been no publication (nor any intention to publish) this dissertation even if it finds that, subjectively, he did actually believe it himself. A breach of ethical

principles – which is the language the Claimant used in the email – does not necessarily equate to a breach of a legal obligation.

31. I am reinforced in this view because in argument at this hearing the Claimant told me he held *"the department"* responsible for the breach of the legal obligation rather than Ms Stephenson personally. That was, in my judgment, inherently vague. In truth, it appeared to me to amount to a criticism of systems and perceived bad practice rather than an allegation that a legal obligation had been breached.

32. In addition, as regards the criminal offence element (**s.43B(1)(d)**) the Claimant suggested to me at the hearing that the "egregious misconduct" he had referred to in this email was not in fact egregious, but unwitting, misconduct. In addition, the Claimant was clear that he did was not saying that it was misconduct on the part of Dr Kazri, but of Ms Stephenson.

33. The suggestion made by the Claimant at the hearing that someone could unwittingly commit misconduct, whether to the criminal standard or at all, in relation to this student's mistake in their dissertation seemed to me to be absurd. The fact that the Claimant referred to this in that email as "egregious misconduct" but had to resile from that today, shows in my judgment that his argument that he reasonably believed that a criminal offence had, or may have, been committed is not just inherently unlikely but remotely unlikely.

Conclusion on protected disclosures

34. It follows from the above reasoning that I took the view, on a summary assessment, that neither of the protected disclosures maintained by the Claimant in his application for interim relief are likely to be found to have been protected disclosures at the full hearing of this claim. This application must therefore inevitably fail.

Reason for dismissal

35. Despite my conclusion in relation to the two remaining protected disclosures I have nevertheless gone on to determine the question of whether it is likely that the Claimant would establish that the principal reason for dismissal was the making of a protected disclosure, in the event that my summary assessment in relation to those disclosures is found to have been wrong.

36. In my judgment, again on a summary assessment, this is not likely. My reasons are as follows.

37. The Claimant accepted today that Alexandra Banks (the dismissing officer) was not aware of the disclosures herself, and instead acted on the basis of tainted information. At first blush this looked to me like a **Jhuti**-based argument. However, it seems to me likely to fail for a number of key reasons:

    37.1. Firstly, Mr Leach is right to observe that in general terms, **Jhuti**-based cases are notioriously difficult to establish in practice, even where there is compelling evidence.

37.2. Secondly, as the Supreme Court referred in **Jhuti**, the reason which is passed on to and adopted by the decision maker in "tainted information" cases should be an invented reason. That argument is comprehensively defeated by the Claimant's concession in this hearing that at least four of the persons who made allegations about him within the disciplinary process did not know of, and thus could not have been motivated by, the alleged protected disclosures. The Claimant's contention that what those individuals said did not amount to evidence because it was not corroborated in writing is unlikely to be taken seriously by any Tribunal at a full hearing.

37.3. Thirdly, I have examined the Claimant's dismissal letter (page 361). That, in my view, was the best evidence available to me in this hearing that would cast light on the reasoning of the decision maker. That letter reveals that there was rather more to the Claimant's dismissal, and the reasons for it, than anything relating to the 9 April 2024 or 8 May 2024 exchanges. Even if the Claimant could show that a protected disclosure had played some part in the reason for his dismissal, that of itself would fall short of showing that it was the principal reason and his unfair dismissal claim would also fail on that basis.

37.4. Fourthly, I am not assisted by the Claimant's argument regarding inconsistent treatment. In essence, he contends that others who did not make protected disclosures were treated more leniently, and that this means he was treated as he was because of having made one. The first of the two comparators (Dr Beck) was not dismissed and had only two allegations (out of 4) levelled at him and found proven. That differed from the case of the Claimant, and there was not a complete overlap in terms of the respective allegations in any event. The situation with the second comparator (Mr Scott) is much less clear as whatever process may take place regarding him has not been concluded at this stage. It therefore cannot be known whether Mr Scott will, or will not, be treated any differently from the Claimant. Perhaps unsurprisingly, I found that an inconsistent treatment argument based on what *might* happen to another person to be unpersuasive.

Conclusion on the interim relief application

38. For all of the above reasons, the Claimant's application for interim relief was refused and it was not necessary for me to go on to consider the additional components of **ss.129** and **130** of the **Employment Rights Act 1996**.

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Case No. 6016170/2024

Employment Judge P Smith

Date: 27 February 2025

JUDGMENT SENT TO THE PARTIES ON

9 June 2025

AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS