EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001571/2025

Preliminary Hearing held on a hybrid basis in Aberdeen on 10 July 2025

Employment Judge A Kemp

Mr R Joseph	**Claimant** **In person**
PizzaExpress Ltd	**Respondent** **Represented by:** **Mr P Singh** **Solicitor**

JUDGMENT

The application for interim relief under section 128 of the Employment Rights Act 1996 does not succeed.

Introduction

1. This preliminary hearing was arranged to determine an application for interim relief made by the claimant under section 128 of the Employment Rights Act 1996 ("the Act"), The claimant alleges that his dismissal by the respondent was automatically unfair under section 103A of the Act.

2. The respondent has not yet entered appearance, which is due by 24 July 2025. It contacted the Tribunal through its agents on 8 July 2025 to state that it had become aware of the present hearing, that it had not had sight of the documentation for the claim which the respondent did not consider it had received, and sought a postponement. The claimant responded to object to the application to postpone.

3. That application was refused by me on 9 July 2025 on the basis that the respondent had been sent the documentation through its agents at around 9am that day, and had the day to prepare for the hearing, but that it could renew its application for postponement at the hearing itself.

4. The Tribunal allowed the respondent's solicitor to attend remotely given the circumstances. The claimant attended before me in person. This was a hybrid hearing as a result.

5. The claimant sent documentation in support of his application for interim relief by email to the Tribunal and respondent on 8 July 2025, and provided a further document at the hearing. The respondent did not add to the documents but did provide a skeleton argument in advance of the hearing.

6. The respondent did not renew its application for postponement, and I therefore heard argument from each party. I wish to commend both the claimant and Mr Singh for their helpful arguments and for the work each did in preparing for this hearing.

7. Neither party argued that I should hear oral evidence, on which the cases of ***NASUWT v Harris*** UKEAT/0061/19, ***Dandpat*** (cited below) and ***Coyle v Ferguson Marine Ltd*** ET Case 4105502/20 are relevant. It is competent to do so given the terms of Rule 94, but not the norm in interim relief hearings. It appeared to me that in the circumstances of the present case it was appropriate to hear submissions only, that being the apparent intent of the Rule unless there were sufficient reasons to hear oral evidence, which neither party contended for. I therefore did not hear oral evidence, but considered the parties' submissions, the documents that the claimant had prepared in a bundle, and an evidence schedule the claimant had helpfully prepared for this hearing, as well as his claim form.

8. For the avoidance of doubt I do not make findings in fact as if at a final hearing. I have not heard any evidence. I take the circumstances from the documentation before me, as explained during submissions, so far as I was able to. There was no dispute that the claimant had made his claim timeously for interim relief.

Claimant's submission

9. The claimant's position was set out fully in his evidence schedule document, which he spoke to during the hearing. The following is a basic summary of his position. The claimant set out that position eloquently, and argued strongly that the only reason for his dismissal was the protected disclosures he had made. He set out those disclosures in his schedule document, and argued that they were protected disclosures. He argued that the treatment he received was so different to that of Mr Tortolano, who had acted aggressively towards him on 8 April 2025 including making racial comments that amounted to discrimination, but for whom no

disciplinary action of any kind had been taken. In contrast, many weeks after the incident and contrary to contemporaneous reports at the time from him and his manager, the respondent had acted on what it alleged was his conduct and comments, but ignoring the strong mitigations that there were. He denied making the crude remarks that were alleged by two members of staff, which he said had not been raised at the time and where the staff concerned had not been able to say when it allegedly occurred. He argued that they were long serving members of staff who were friends with management and that the allegations had been concocted. He argued further that he had not been involved in any data breach, that the iPad was used by all staff, and that anyone could have accessed it and sent the email to his own email account. He had not sent the email to his own email account.

10. He also argued that he had made a series of disclosures but that the respondent had not responded effectively to them, either ignoring them or in its formal response to his grievance not dealing with it in any way appropriately. He argued further that the treatment he had received from the respondent was unfair, and that that supported his position that the real reason for dismissal was because of the disclosures he had made.

Respondent's submission

11. Mr Singh had helpfully provided a skeleton argument which referred to the law, and the authority of ***Sarfraz*** referred to below. He argued again in basic summary that the disclosures were not protected, and were not ones in the public interest. If there were disclosures made they were not the sole or principal reason for the dismissal, which was the claimant's conduct. Mr Tortolano was not appropriate to use as a comparator as the circumstances of the case against him were different, and did not include the other matters referred to in the dismissal letter. He argued that there would require to have been a conspiracy between managers and staff at the same level as the claimant, including managers from other restaurants, in order for the claimant's position to be accepted. He argued that that was not what had happened, and that the statutory test for interim relief was not met.

The law

12. The following is a basic summary of the statutory provisions. Section 103A of the Act provides that if the reason, or if more than one the principal reason, for a dismissal is the making of a protected disclosure the dismissal shall be regarded as unfair. What is a qualifying and protected disclosure is set out in section 43A and B of the Act.

13. The provisions as to interim relief are found in sections 128 and 129 of the Act. The Tribunal can make orders for interim relief if it is "likely" that the

claim for automatic unfair dismissal will succeed, to paraphrase the meaning of the section.

14. Section 128(3) states that the application shall be determined as soon as practicable. An order for continuation of a contract of employment can be made under section 130 (Mr Singh confirmed that the respondent would not re-instate or re-engage if the interim relief application were to succeed).

15. The meaning of the word "likely" for these purposes has been considered in several cases. The leading case is ***Taplin v C Shippam Ltd*** [1978] ICR 1068. The EAT held that it must be shown that the claimant has a "pretty good chance" of succeeding, and that that meant something more than merely on the balance of probabilities. That approach to the word "likely" has been followed in several subsequent decisions, for example, ***Dandpat v The University of Bath and Anor*** UKEAT/0408/09***, Raja v Secretary of State for Justice*** UKEAT/0364/09***, Ministry of Justice v Sarfraz*** [2011] IRLR 562 and ***His Highness Sheikh Khalid Bin Saqr Al Qasimi v Ms T Robinson*** UKEAT/0283/17/JOJ. An application for leave to appeal ***Dandpat*** on whether that was the correct interpretation of the word likely was refused by the Court of Appeal, reported at [2010] EWCA Civ 305.

16. In the case of ***Ministry of Justice v Sarfraz*** [2011] IRLR 562*,* which was a case regarding interim relief in the context of protected disclosures specifically, the EAT held that "likely" connotes "a significantly higher degree of likelihood" than probable. Success that is more likely than not is not sufficient.

17. It is not appropriate to attempt to decide the case as if at a final hearing – ***Parkins v Sodexho Ltd*** [2002] IRLR 109.

18. The approach to interim relief was explained in ***London City Airport v Chacko*** [2013] IRLR 610*,* in which the EAT considered the nature of the interim relief hearing and commented as follows:

> "*The application falls to be considered on a summary basis. The employment judge must do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The employment judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the employment tribunal but whether 'it appears to the tribunal' in this case the employment judge 'that it is likely'. To put it in my own words, what this requires is an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material*

that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim."

19. The issue of what is the reason or principal reason for dismissal has been considered in a number of cases. That has included the Supreme Court in ***Royal Mail Group v Jhuti*** [2020] IRLR 129, and earlier authorities including ***Co-operative Group v Baddeley*** [2014] EWCA Civ 658 and ***Abernethy v Mott, Hay and Anderson*** [1974] IRLR 213. The initial onus in a case where the principal reason for dismissal is alleged to be on what are often called protected grounds, and whereas here the claimant does not have the service necessary to claim unfair dismissal under section 94 of the Act, is on the claimant to raise a *prima facie* case, or at least the articulation of issues requiring explanation which is capable of establishing that alleged principal reason (see ***Dahou v Serco Ltd*** [2017] RIRL 81) and if that is done the onus may shift to the respondent.

Discussion

20. In summary I require to consider whether the claimant is likely, in the sense of having a pretty good chance which is significantly higher than more probable than not, to succeed at the final hearing on the claim under section 103A. That is less than what may be described as absolute or near certainty, but more than likelihood, and can perhaps be paraphrased as a strong probability. I do so on the basis of what is a summary procedure, and without the benefit of hearing all the evidence that would be heard at the final hearing, with that evidence tested in cross examination. What I have before me is also that available at this stage, and may be more full at the time of a final hearing.

21. There are arguments to be made for both parties. Looking at the position from the perspective of the claimant, his dismissal did follow his raising a number of issues with the respondent, some at least of which are in my opinion likely to be regarded as protected disclosures. He has raised matters of health and safety in particular of the safety of food served to the public in a large restaurant chain. He raised the safety of members of staff working there, who he says have to rush to complete tasks when less staffed than they ought to have been. He has raised issues to do with taking breaks under the Working Time Regulations 1998.

22. It is true that he was not able to articulate the detail of health and safety breaches, but he does not require to do so. He has to have a reasonable belief of there being a breach, and a reasonable belief that that is in the public interest. It seems to me from reading both the documents he produced and the evidence schedule that he has a pretty good chance of succeeding with the argument that he did make protected disclosures.

23. The claimant strongly believes that it was those disclosures that was the reason, or principal reason, for the dismissal, he denies the allegations of gross misconduct made against him, and in simple terms argues that those alleged reasons are a form of smokescreen, fabricated by the respondent to seek to hide the real reason.

24. He has some points that support his position. They include firstly, that the 8 April 2025 incident appears to have been instigated by Mr Tortolano, who was aggressive towards him and used discriminatory language when doing so. Secondly, that Mr Tortolano was not subject to any discipline at all. Thirdly, that he was “ambushed” as he put it for the first investigatory meeting. Whilst it is not at all unusual to have no companion present for it, it is somewhat unusual not to have advance notice of it taking place and what might be addressed at it. Fourthly, there is a delay between the matters alleged, and their being addressed. Whilst the respondent has sought to explain that from annual leave and illness, it does not necessarily answer all of that issue.

25. Fifthly, he denies the allegation of crude language, and those who make it were not able to provide a date when it occurred, such that that evidence is less than complete. Sixthly, he says that the iPad from which an email was sent to his own account was one to which all staff had access, and that the information in the email which was effectively copied on could not be regarded as confidential when it was not protected by the respondent. Seventhly, he contrasts the investigation of him with that of Mr Tortolano, and raises issues around the investigation such as the one question asked of his manager in the investigation, when she could have given answers on a wide range of issues, and the four meetings held with him against a short one with Mr Tortolano.

26. Finally, he argues that the respondent deliberately separated out the disciplinary process from the disclosures, did not allow him to raise the points from the disclosures as mitigation, did not investigate his disclosures or respond to them adequately, and acted to dismiss him before the conclusion on the disclosures and his grievance. What the respondent did, after dismissing him, was write to him to reject all his allegations, which he disputes stating that he has documentary and video evidence to prove them. There are many other points of detail, and arguments made around them, but that summarises the main points I consider that the claimant made.

27. Looking at the position from the respondent’s perspective, allegations were made of what may be described as inappropriate behaviour by the claimant with abusive and threatening comments, inappropriate comments with a sexual element, inappropriate accessing of information, and sending an email to himself. If those allegations are true, they may well amount to gross misconduct. The claimant challenges them, however.

He did admit to calling a colleague a "*bald fucking loser*", as noted in the dismissal letter. He denies that that is discriminatory, but there is authority to the contrary.

28. The dismissal letter states that there are witness statements about aggressive behaviour which contradicted his account that customers did not leave as a result. That is indeed what the statements state, on their face. There does appear to have been an altercation between the claimant and Mr Tortolano, and the claimant does appear to have reacted, even if it is accepted that Mr Tortolano was the initiator of it, and used inappropriate language himself. Had that been the only matter alleged against the claimant, the claimant's position would most certainly have been stronger. But there are two other allegations.

29. The dismissal letter did not accept the claimant's denial of the comment with regard to the brownie which at the least was highly inappropriate if made, and did not consider that to have been fabricated by the witnesses to it as the claimant alleged. There are two witness statements which support that, at least on their face. They are from colleagues of the claimant rather than from management. It is not easy to see on what basis they would be fabricated, save from their being part of a conspiracy against the claimant. It is not impossible that there is a form of conspiracy, and the claimant argued that they were friends with management, but conspiracy involving those persons is not the most natural and obvious conclusion to reach, from the material before me. There are other aspects to this which are relevant as I address below, but the central allegation of conspiracy is not a simple matter to establish, and in this regard it is relevant to note that the onus of proof falls on the claimant.

30. There was also reference to a form of data breach, with an email sent to the claimant's email account from a laptop used in the store which was password protected. The claimant denied doing so, saying that it must have been a mistake. It is not easy to see why someone else by mistake would have sent an email to the claimant's personal email account. It is not impossible, but not the most natural and obvious conclusion to reach, and if an email is sent to a private email account with what on the face of it is not intended for wider publication that could amount to gross misconduct. Why someone other than the claimant would send such a message to the claimant's email account is not clear. Who did so was not made clear, and the claimant may well of course not know that, assuming that his version of events is right.

31. Again, therefore whilst the claimant's position might be supported after evidence is heard, it is not a straightforward argument for him because of the written record of an email sent to his account, which on the face of the material before the disciplinary manager, and before me, is supported by a witness stating that the claimant was seen using the iPad at the time,

and in the context of there having been issues raised by him over the level of staffing and related matters.

32. Timing is one factor to consider, with these issues having arisen after the claimant made a series of what he claims to be protected disclosures, but it is a well-established principle that just because something happens after an event it does not follow that it happened because of it (*post hoc non ergo propter hoc,* is the Latin maxim).

33. On the face of the written witness statements provided during the investigation and the terms of the investigation report itself there was in my view at least some material before the decision maker which was a basis on which someone in that position could have reached the decision that was reached. There is a basis for the finding of gross misconduct, unless there was some form of wider conspiracy to dismiss the claimant as he alleges for the making of disclosures.

34. It is far from beyond argument that the decision-maker was either part of such a large conspiracy, or was manipulated into the decision unwittingly, similar to that in ***Jhuti***. I require to balance the arguments for the claimant against those of the respondent and consider whether the former are sufficient to meet the statutory test for granting interim relief, which is essentially whether the claimant has a pretty good chance, greater than one of probability, of succeeding. This is a case in which there are very likely to be many factual issues in dispute, which is so dependent on the evidence that is led by the parties and particularly on how the Tribunal assesses the evidence of the decision maker on dismissal, that at this stage I do not consider that I can say that the claimant has that pretty good chance of success.

35. The key considerations that led me to conclude that the statutory test is not met are firstly, the disciplinary investigation which was undertaken, which included some material from the claimant amounting to an admission in part, and other aspects that were disbelieved, secondly, that there was more than one witness statement implicating the claimant, such that his position is that those who gave witness statements were all lying, involving a reasonably large number of employees of varying levels of seniority, which is not on the basis of my experience particularly likely although it could be, thirdly, that whilst there was a degree of a lack of specification in some of those statements particularly as to when the crude remark matter occurred, and they were taken fairly long after the event there was at least a degree of corroboration of the remark within them, fourthly, that there was an email apparently sent to the claimant's email account, which is not on the face of it something likely to have been done in error and finally that on the face of it the decision maker took a decision on the evidence that there was available, and did so quite long in time after the first of the alleged disclosures was made, which is I consider more

consistent with a finding from the material than there being a conspiracy from the making of disclosures which in my experience is more likely to be acted on quickly if at all, and finally, that establishing the kind of conspiracy the claimant alleges is not evidentially straightforward.

36. As I was finalising this judgment, after having made my decision, the claimant's email seeking to make an additional submission after the hearing had concluded was passed to me. I have considered it, but do not consider that it affects the outcome. The issue of timing I have addressed above. The second issue that the claimant alleges is that his accessing emails was itself a disclosure, to paraphrase. The basis for this aspect of the dismissal, as I understand it to be from the dismissal letter, was an email that the claimant was alleged to have sent, which contained a message said to be confidential. That original email, including the terms contained within it, is a different issue to whether the disclosure, which is something that the claimant does, was made, and was protected in law.

37. I have to add however that the claimant put forward strong arguments as to why his case was likely to succeed, which he clearly believes in passionately, and I did consider all that he said and put before me in documentary form with care. I came quite close to granting the interim relief he sought. The manner of his treatment as against that of Mr Tortolano appears both striking and surprising, even with the qualification of the other allegations. The disciplinary hearing was held notwithstanding his grievance, and doing so does not appear consistent with the ACAS Code of Practice. Unfairness is not the test, but taking matters in that order is not what normally might be expected. The grievance investigation does not appear to be as full as one might normally expect, and was commenced quite long after the disclosures commenced, if they are held to be protected disclosures. That is far from an exhaustive list of the matters that a final hearing may deal with.

38. These and other factors are matters that can be explored fully when evidence is heard. Whilst a finding for the claimant requires a finding in effect of a conspiracy of some kind against him, with fabrication of evidence as he alleges, conspiracy does on occasion happen, as the ***Jhuti*** case exemplifies. A final hearing can consider all of the evidence, and hear from a number of witnesses, on the issues in dispute.

39. For the avoidance of doubt the decision should not therefore be taken as indicating that the claim under section 103A is likely to fail. It may or may not succeed after the Tribunal has heard all of the evidence at a final hearing, at this stage one cannot know. On the basis of the pleadings and material before me there is certainly an issue to try. Nothing that I have said is intended in any way to affect that final determination of the claim. All that I have determined is that the claimant does not meet the

reasonably high threshold for granting interim relief from the material I had before me.

Conclusion

40. The application for interim relief was accordingly refused. For clarity, I have framed this decision as a judgment in light of the decision of the EAT in ***Queensgate Investments LLP and others v Millet*** UKEAT/0256/20/RN which held that interim relief was a substantive claim. This decision determines that claim, and falls within the definition of judgment in Rule 2 of the Employment Tribunal Procedure Rules 2024.

Date sent to parties: 21 July 2025