Case Number: 6005371/2026

EMPLOYMENT TRIBUNALS

Claimant: Mr H Pottinger

Respondent: TT2 Limited

HELD at Newcastle Employment Tribunal by CVP

ON: 10 March 2026

BEFORE: Employment Judge Aspden

REPRESENTATION:

Claimant: In person
Respondent: Miss Martin, Counsel

JUDGMENT having been sent to the parties on 20 March 2026 and written reasons having been requested in accordance with Rule 60(4D) of the Employment Tribunals Rules of Procedure 2024, the Tribunal provides the following:

REASONS

1. The claimant has presented a complaint to the employment tribunal of automatic unfair dismissal relying on section 103A of the Employment Rights Act 1996 (ERA). That is a complaint that he has been unfairly dismissed and that the reason (or if more than one the principal reason) for the dismissal is that he made a protected disclosure.

2. The claimant has made an application for interim relief under ERA s128. This was the hearing of that application.

Summary of the claim for automatic unfair dismissal and the respondent's response

3. The claimant's case, in a nutshell, is as follows:

3.1. He made protected disclosures in June and July 2025 concerning 'serious regulatory, governance and safety issues, with potential financial implications for the public purse estimated between £1m and £5m.'

3.2. Although he made disclosures anonymously, the respondent knew or believed it was he who had made them and, because of that, set out to engineer the termination of his employment in the following ways:

3.2.1. In November 2025 the respondent concocted a number of allegations of gross misconduct and told him that unless he accepted a settlement offer he would face disciplinary action. The claimant says he had never previously been subject to any disciplinary or performance concerns during his 22 years of employment.

3.2.2. When he rejected the respondent's offer, the respondent instigated disciplinary proceedings for alleged gross misconduct.

3.2.3. Before those disciplinary proceedings were concluded, the claimant told the respondent he had made the protected disclosure(s).

3.2.4. The respondent then made a further allegation of gross misconduct against him after he briefly and inadvertently viewed an email in which the respondent sought legal advice about whether he could assert whistleblower protection.

3.2.5. The respondent subsequently used the fact that he had accessed that document as the pretext for dismissing him.

4. The respondent's position, in summary, is as follows:

4.1. During the summer of 2025 a number of serious issues arose concerning the claimant's conduct. Because of that, in November 2025 the respondent instigated a conversation with the claimant and made an offer with a view to the claimant's employment being terminated on agreed terms. During that conversation the respondent told the claimant about the allegations of misconduct and that disciplinary proceedings would follow if terms were not agreed.

4.2. The allegations were not concocted.

4.3. If the claimant made protected disclosures (which is not admitted) the respondent did not know he had done so at this time.

4.4. On the same day that the claimant rejected the respondent's offer, the claimant told the respondent he had made a protected disclosure. He did this in the hope it would shield him against disciplinary action.

4.5. Before the disciplinary proceedings were concluded, the claimant made a data subject access request and then, on 15 December, sent an email to the respondent in which the claimant (a) referred to an email between the respondent's external legal advisor and the senior management team which contained confidential legally privileged material about the claimant's employment; (b) requested documents containing reference to "E1" (a confidential reference for the claimant known only to the senior management team, members of the Board and the Respondent's external legal advisor); and (c) stated he was obtaining witness statements, despite having been instructed not to contact employees without authorisation or take his own witness statements.

4.6. The respondent was concerned that the claimant had accessed its IT systems and senior management emails without authorisation and began a disciplinary investigation, during which the claimant initially refused to answer questions about the email and ‘E1’ reference and then gave unsatisfactory responses.

4.7. The respondent decided that the original disciplinary allegations should be paused pending a disciplinary hearing into the new allegations arising from the Claimant’s email dated 15 December 2025.

4.8. After hearing what the claimant had to say, the chair of the disciplinary hearing concluded that the claimant had misused access to company systems to view confidential, legally privileged material and that this was gross misconduct. The chair did not believe the claimant’s assertion that his viewing the email had been inadvertent because it was plain from the subject line that the email related to the pre-termination negotiation and the Claimant had read the email in detail. The chair did not accept the claimant’s arguments that the respondent had waived legal privilege by virtue of the claimant having global systems access and that his status as a whistleblower allowed him to view the email.

4.9. The chair dismissed the claimant for that reason and no other reason.

5. The respondent confirmed at this hearing that for the purpose of these proceedings it has waived privilege in the email in question.

Legal Framework

6. ERA s103A says this:

> ***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.*

7. ERA s129 says that the tribunal may make an order for interim relief where:

> *‘…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 … 103A,…’*

8. In other words, I may only make an order for interim relief if it appears to me likely that the tribunal at the final hearing will conclude that the only reason the respondent dismissed the claimant (or if there was more than one reason, the main reason) was that the claimant made a protected disclosure.

9. At the final hearing it will be for the respondent to show the reason (or, if more than one, the principal reason) for the dismissal: ERA s98(1). A reason for dismissal ‘is the set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee’: Abernethy v Mott, Hay and Anderson [1974] ICR 323, CA. In Croydon Health Services NHS Trust v Beatt [2017] ICR 1240, CA, Underhill LJ said that the ‘reason’ for dismissal connotes the factor or factors operating on the mind of the decision maker which causes them to take the decision. It is a case of considering the decision-maker’s motivation.

10. Mr Pottinger referred to the case of Manchester NHS Trust v Fecitt [2011] EWCA 1190; [2012] ICR 372, and submitted that his claim of automatic unfair dismissal will succeed at the final hearing if the tribunal concludes that a protected disclosure materially influenced the decision to dismiss him. That is incorrect. In that case the Court of Appeal was addressing the test that applies to a detriment claim made under ERA section 48. That is not the test that applies in automatic unfair dismissal claims under s103A. If the fact that an employee made a protected disclosure was merely a subsidiary reason to the principal reason for dismissal, then the employee's claim under section 103A will fail.

11. There are a number of legal authorities on the approach to taken on an interim relief application.

    11.1. Taplin v Shippam [1978] IRLR 450;

    11.2. Ministry of Justice v Sarfraz [2011] IRLR 562;

    11.3. London City Airport v Chacko [2013] IRLR 610.

12. It is clear from the authorities that applications for interim relief are to be considered on a summary basis. A tribunal must do the best it can with such material as the parties are able to deploy at the hearing of the application by way of documents and argument in support of their respective cases. The Tribunal must carry out an assessment of whether the claimant is ‘likely’ to succeed in his complaint, bearing in mind that the evidence on both sides is as yet untested (see in particular, London City Airport v Chacko [2013] IRLR 610).

13. When considering whether a claimant is ‘likely’ to succeed, the tribunal must ask itself whether the claimant has shown that he has a ‘pretty good’ chance of succeeding at the final hearing: Taplin v C Shippam Ltd.

14. In Ministry of Justice v Sarfraz the EAT, Underhill J as he then was, said in paragraph 16:

    > *“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. Slynn J [in the case of Chacko] understandably declined to express that higher degree in percentage terms, since numbers can convey a spurious impression of precision in what is inevitably an exercise depending on the tribunal’s impression.”*

Conclusion

15. For me to form the view that the claimant’s claim of automatic unfair dismissal is likely to succeed, I would have to be of the view that the respondent has a significantly less than 49% chance of showing that it dismissed the claimant solely or mainly because of his conduct in accessing the email between the respondent and its lawyers. I do not accept that is the case. I say that for the following reasons.

    15.1. It is not in dispute that the claimant accessed and read the email between the respondent and its lawyers and at the time of dismissal the chair knew that was the case.

    15.2. I consider the respondent has a good chance of showing that the chair genuinely believed the claimant accessing that document was not inadvertent, as the claimant claimed, given the subject line of the email, and the fact that the claimant subsequently used it to seek information from the respondent without disclosing that he had seen it.

15.3. I also consider that the respondent has a good chance of showing that the claimant accessing that document amounted to gross misconduct. The claimant's argument that the document was neither confidential nor legally privileged because the respondent knew he had access to the IT systems is weak. His argument that he was justified in accessing the document because he was a whistleblower has even less merit.

15.4. Even if the tribunal at the final hearing finds that, before the respondent learned that the claimant had accessed the email, it had been intending to terminate the claimant's employment because it knew or suspected the claimant to have made protected disclosures, it does not follow that the tribunal is likely to conclude that that, and not the claimant's conduct in accessing the legally privileged document, was the reason, or the principal reason, for dismissal. Much will depend on the evidence given by the person who conducted the disciplinary hearing. Even if the tribunal considers that the respondent enthusiastically grasped the opportunity to dismiss the claimant for accessing confidential documents, it does not mean that the tribunal will find that the accessing such confidential documents was not the reason for dismissal or the main reason for dismissal. That is because, as recorded above, a finding that claimant making a protected disclosure materially influenced the decision to dismiss, will not be enough to lead to a finding of automatic unfair dismissal: the making of the protected disclosure must be the only or the main reason for dismissal.

16. For those reasons this is not a case in which it appears to me that it is likely, in the *Taplin* and *Sarfraz* sense, that the tribunal at the final hearing will find that the reason or principal reason for dismissal was that the claimant made a protected disclosure.

Approved by Employment Judge Aspden

Date: 22 May 2026