EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8001535/2026

Preliminary Hearing held remotely in Glasgow on 10 July 2026

Employment Judge A Kemp

Mr R Scotland	**Claimant** **In person**
Falkirk Council	**Respondent** **Represented by:** **Ms L Usher** **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 he was constructively dismissed, and that that dismissal was automatically unfair under section 103A of the Act, amongst other claims. There was no dispute that the claimant had made his claim timeously for interim relief.

2. Joint Presidential Guidance has been issued, with effect from 22 June 2026, in relation to such applications. I have taken that into account.

3. Neither party argued that I should hear oral evidence. It is competent to do so given the terms of Rule 94, but not the norm in interim relief hearings as the Guidance indicates.

4. I therefore did not hear oral evidence, but considered the parties' written submissions which had been sent in advance in writing, as well as given orally in addition, and the various documents that had been referred to by the claimant in his submission by way of extract, and from the Bundle of Documents provided by the respondent which included many of those referred to by the claimant. Those documents were reasonably substantial, extending to over 200 pages.

5. I decided that in order to determine matters, and in light of the Guidance, I should spend an hour reading as many of the documents as I could, including the two written submissions, and then hear oral argument (which the claimant indicated he wished to make) for up to half an hour each, before then considering whether I could give an oral judgment. I had not been able to read all of the documents that the parties had identified in their submissions were the ones that I should read in the time I had allocated for that, and in light of that and the nature of the competing arguments I decided that it was not possible to give an oral judgment. I have read the documents further, and considered the written and oral submissions in more detail, before doing so.

6. The submissions from both parties were of a conspicuously high quality. I am grateful to both involved for the amount of work that that obviously involved, and for the clarity of the arguments.

Background

7. The following background is a summary of some of the main aspects of the position as I have understood it to be from the parties' submissions and documentation put before me. For the avoidance of doubt I have not made any findings in fact as if at a Final Hearing as I have not heard any evidence. The background is not intended as an exhaustive exposition of matters, but as a very broad summary.

8. The claimant is a primary school teacher. He was employed by the respondent He has been involved in teaching a pupil with additional support needs, identified as A. That pupil has issues that lead to dysregulation, which can include periods of screaming. Matters in relation to the pupil have involved a number of agencies and included meetings with the claimant during January 2026.

9. The claimant states that he is a disabled person under the Equality Act 2010. His conditions include ADHD. He raised the impact of the screaming by pupil A on him in an email to the Principal Teacher Ms McGlynn on 26 January 2026 as a "strong physiological nervous system response". He

referred to occupational health advice and interim arrangements to "ensure a safe and sustainable system of work."

10. On the same day he exchanged emails with Ms Diane Russell who had been involved in the arrangements for pupil A. She told him that she could not see anything in that pupil's pastoral notes. He also emailed Ms E Fitzpatrick an Educational Psychologist that day seeking guidance.

11. On 30 January 2026 the claimant commenced a period of absence from work. A fit note from his GP noted stress at work, anxiety and ADHD, and that he may be fit for work with "advised to avoid exposure to screaming".

12. The claimant alleges that he has made a series of protected disclosures that centre around pupil A, including issues over how that pupil has been managed, the recording of decisions, the safety of staff and pupils, and related matters. The disclosures he claims to have made include one on 2 February 2026. He referred to the said issues as to pupil A and were identified as safeguarding concerns in an email of that date to Ms McGlynn. He set out the circumstances and his concerns at length. He sought "an independent senior review of current risk assessments and safeguarding arrangements, clarification of who holds responsibility for safeguarding oversight in this case and confirmation of interim arrangements while a formal review is undertaken."

13. The message of 2 February 2026 was forwarded to HR of the respondent by the Principal Teacher who received it, with her own commentary on it, expressing her disagreement and referring to the claimant as someone challenging to manage.

14. At that date the claimant commenced a period of absence from work on account of stress which he attributed to circumstances at the workplace. The claimant had had periods of stress in 2024 and 2025, which are understood to have related to ADHD and anxiety. Initially he was in receipt of full pay as sick pay.

15. The respondent commenced a process involving Occupational Health (OH), and a stress risk assessment. Referral to OH is standard practice under the respondent's policy for managing absence. An OH report was prepared, understood to be on 27 February 2026. The claimant withheld his consent for the OH report to be disclosed on the basis of correspondence in relation to that matter. He did not agree with the terms of the report and sought to have sight of the referral form.

16. The claimant emailed Mr Colin Moody, who is understood to be the person at the respondent with responsibility for matters that include whistleblowing, as protected disclosures are colloquially known.

Messages between the claimant and Mr Moody started on 19 February 2026 and continued on 23, and 27 February. Mr Moody appears to have delayed in addressing matters, which I was told was because of his involvement in Scottish Parliamentary elections and a lack of time. Mr Moody did not explain that to the claimant at the time.

17. On 21 March 2026 the claimant’s pay was reduced to half pay. He had utilised the entitlement to full pay by that date, partly because of the earlier absences. The claimant raised that with payroll administration and reserved his position as to how his pay had been treated.

18. On 4 March 2026 the claimant emailed the respondent and asked that the coding of his absence be reviewed and changed to work related illness. He referred to the OH report.

19. The correspondence in relation to OH included a message from the claimant on 23 March 2026, to which he did not receive a response.

20. The claimant raised the matter of his pay with payroll on 27 March 2026.

21. The claimant believed that the decision to reduce pay was wrong. He believed that he was entitled to full pay as his view was that his absence was the result of workplace stress. The decision was taken by Ms McCabe of the respondent, who did so firstly as she did not have medical evidence to support it as the claimant had not agreed to the OH report being provided, secondly that his own GP fit notes referred to other matters as well as workplace stress, being ADHD and anxiety and thirdly as a condition for receipt of full pay was that the matter was recorded as an accident at work at the material time, which she understood had not been done, unless there were good reason for that not to be done. The reasons were set out in a letter of 23 April 2026. The claimant responded to it raising questions, and correspondence between them took place.

22. The claimant pursued a grievance dated 28 April 2026 in relation to that decision, and related matters. It was acknowledged.

23. The claimant commenced a claim against the respondent in May 2025 which is proceeding under claim number 8001160/2026. It has a variety of claims made within it, including ones as to health and safety, protected disclosures, unauthorised deductions from pay, and disability discrimination. It was received by the respondent on or around 21 May 2025.

24. The respondent decided to seek legal advice, and to pause progress on the grievance until that had been done, at or around that time. The

respondent did not inform the claimant that his grievance had been so paused.

25. Shortly before 25 June 2026 the claimant received a pay slip for that month. He believed that that was the final straw, that trust and confidence in the respondent had broken down and that what occurred was a constructive dismissal. He tendered his resignation that day, with immediate effect, noting that there had been no substantive response to his grievance, no remedy to his concerns as to pay, and no route identified for addressing the issues he had raised on 2 February 2026, amongst others.

26. That resignation was acknowledged and it was stated that a letter about the grievance was on the point of being sent. It was separately sent to the claimant after his resignation on the same day.

27. The present Claim was presented on 27 June 2026.

Submissions

28. The parties had as noted provided detailed written submissions which they supplemented orally and also made reference to a series of authorities. I have considered them all, although not all are referred to specifically below.

The law

29. The following is a basic summary of the statutory provisions. What is colloquially referred to as a constructive dismissal is set out in section 95(1)(c) of the Act. 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. The claimant requires to prove that he held a reasonable belief that there was a matter falling within those provisions.

30. The issue of what was 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.

31. The onus of proof that there was a dismissal falls on the claimant. That requires what in Scots Law is referred to as a material breach of contract, and was explained under principles of English law in ***Western Excavating (ECC) Ltd v Sharp*** [1978] ICR 221. The test was further addressed in

London Borough of Waltham Forest v Omilaju [2005] ICR 481 and ***Kaur v Leeds Teaching Hospitals NHS Trust*** [2018] ICR 1137.

32. The initial onus in a case where the principal reason for dismissal is alleged to be what are often called protected grounds, which includes as here where the claimant alleges constructive dismissal, 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 (***Dahou v Serco Ltd*** [2017] RIRL 81) and if that is done the onus may then shift to the respondent to prove that the sole or principal reason was not a protected disclosure.

33. The provisions as to interim relief are found in sections 128 and 129 of the Act. Section 128 states 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."

34. Section 129 states as follows:

> "**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."

35. The Tribunal can in summary make an order for interim relief if it is "likely" that the claim for automatic unfair dismissal will succeed. The meaning of the word "likely" for this and similarly worded statutory provisions has been

considered in several cases, and are referred to in the Guidance. The leading case is ***Taplin v C Shippam Ltd*** [1978] ICR 1068. The EAT there 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 in this context 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.

36. 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 probability.

37. It has been held that is not appropriate to attempt to decide the case as if at a Final Hearing – ***Parkins v Sodexho Ltd*** [2002] IRLR 109. 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."

Discussion

38. In basic 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. 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. There is a relatively high bar for the claimant to overcome if interim relief is to be ordered.

39. There are arguments to be made for both parties. The claimant put the matter into three questions, and although there are liable to be more that is a reasonable basis for review of matters.

40. The first is whether he made protected disclosures under sections 43A and B of the Act. It seems to me from the material and submissions before me that he has a pretty good chance of succeeding with that. Whilst it is disputed by the respondent it seems to me that the 2 February 2026 message on which he principally relies does meet the statutory definition. It does address his own position to a not insignificant extent, and refers to safeguarding but it goes beyond that, and addresses how pupil A has been managed, issues of the health and safety of pupils and staff, record keeping, management of risk and safeguarding issues. These involve children at a primary school, including pupil A, and staff. Whilst a not insignificant part appears to me to be about the claimant’s position, and the impact of pupil A’s behaviour on him as an individual, it is not confined to that. It includes information. It further seems to me that the claimant has a pretty good chance of proving that his belief on these matters was reasonable, and that that belief included that the issues he raised were in the public interest. They involve management of complex and difficult circumstances where a pupil has additional support needs.

41. The second question is whether the claimant has a pretty good chance of proving the dismissal. The onus is on him at least initially. The statutory test is in section 95, and case law has made clear that it has a number of elements. An essential element is that there must be breach of a material term of contract, referred to in some of the case law as a repudiatory breach. The implied term as to trust and confidence can do so. Where a final straw is relied on that must not be innocuous. Here it is said that there is a combination of matters, the failure to address his pay concerns and delay in responding to his grievance being among them. The respondent denies that he was dismissed on such a basis, and separately argues that even if it was in material breach either it had good cause for its actions or any breach was not sufficient to amount to a material breach.

42. On a fairly fine balance it appears to me that the claimant does not have a pretty good chance of proving a dismissal. That his grievance was not addressed for a material period of time is one factor. That he was not told it had been paused is another. That he was not told that Mr Moody would or could not progress the matters raised with him because of pressures of

other work is a further one. Looking at matters collectively, which include the comparison of how the claimant's absence was managed as against how the safeguarding issues he raised were managed, it seems to me that he has a reasonable argument.

43. But there are two countervailing considerations that I consider tip the balance against him as against the pretty good chance of success test. The first is that this is a constructive dismissal, and proof of that is far from easy. The test is not solely whether there was a material breach of contract. It is also whether the respondent had reasonable and proper cause for its actions. Where the circumstances include management of a pupil with the needs referred to, policies and procedures, and for Mr Moody the issue of other matters, it is I consider at the least materially possible that what happened was for reasonable and proper cause. The respondent's position appears supported by a number of those involved in the care of pupil A who had particular expertise that the claimant on the face of it does not. It seems to me that these issues may lead to a finding of there being no dismissal in law, although the absence of responses to his grievance and from Mr Moody, or an explanation for there being delays, puts the claimant in a reasonably strong position.

44. But the second is I consider the more significant matter. It is that although the claimant argues that trust and confidence had been so seriously damaged or destroyed that he was entitled to resign, which means that he rescinded the contract, he is now seeking to resurrect that contract by this application. There is at least potentially a material inconsistency between those two arguments. It is perhaps one reason why the Guidance refers to the issue of constructive dismissal as being one factor where interim relief may be more difficult to pursue, to paraphrase its terms. It is not determinative, but the claimant resigned in circumstances where his options included proceeding with the first claim and for example maintaining the argument of unauthorised deductions from wages, as well as a claim under section 47B of the Employment Rights Act 1996, amongst others. There is more than a hint of artificiality in his resigning on the basis of breach of trust and confidence, then immediately seeking interim relief to restore the contract that the party has resigned from, seeking payment of full pay, both in principle and against the circumstances of the present case.

45. On that basis my view is that the claimant does not meet the statutory test for the essential question of whether there was a dismissal in law, but I address matters further lest I am wrong on that point.

46. The third question is whether the claimant has a pretty good chance of proving that the circumstances that led to what is claimed to be a constructive dismissal were such that the sole or principal reason for the dismissal was his having made protected disclosures. He acknowledged

that that was the most difficult part of the test for him. The position is also referred to in the Guidance as already noted.

47. I have come to the conclusion that the claimant again does not meet the test. That is for a number of reasons, each of which are I consider material. Firstly, whilst he refers to documents from the respondent in support of his application that is not all of the material relevant in a case such as this. Ms Usher explained the position from the respondent's perspective. The context is the management of pupil A which is inevitably not a simple matter. The claimant may disagree with the views of others, but clearly there are views different to his own, and that appears to include a number of those with different expertise to the claimant. That will be I anticipate the subject of extensive oral evidence, and likely further documentary evidence. The claimant's disagreement with the views of others appears to include the terms of the OH report, but it seems to me that his evidence being preferred to those of a number of others who are liable to give evidence is not likely. I did not consider that the documentation supported the claimant as completely as he argued for.

48. Secondly, this is a complex case with different people are involved doing different things in different circumstances. The claimant is not pursuing this matter against a dismissal, where one person was a decision-maker and whose decision can be directly addressed. He is arguing that there was, as he put it, a cluster of matters, including ones of a form of background, all of which collectively led to the material breach. They include a mix of issues personal to him, such as his pay, and others that are not. That does not assist him in arguing that the sole or principal reason for the circumstance he claims was a dismissal was the making of one or more protected disclosures. It is suggestive of there being more than one reason for what happened, and although it is possible that all could ultimately be traced back to one or more protected disclosures that seems to me to be unlikely. It is not impossible, but experience and consideration of the circumstances of this case leads me to conclude that it is not so likely to succeed as that one can say that the statutory test is met.

49. Thirdly, the decision not to award him full pay when absent is, on the face of it, one that follows the process for that. From what I understand at least two of the three elements that were required to decide it in his favour were missing. Those were medical evidence which includes an OH report, which was as the claimant did not authorise the release of that, and an accident report at the time of the issue arising or in summary a good reason for that not being done. For the former the position is somewhat unclear, as there is a message from the claimant that appears to agree to its release, but Ms Usher's position was that it had not been provided, and that is what the decision letter of 23 April 2026 states. For the latter it would appear that the claimant did not make an accident report at the time. Whilst

there may be a reason for his not doing so it is not immediately apparent that it would be a good reason.

50. The failure to pay full pay and related matters clearly were it seems to me a material part of the reason for the resignation, reading the terms of the resignation letter, but their connection to any disclosure appears to me to be at limited. The claimant would require to prove that the given reasons for the decisions that led to his being entitled to resign were simply untrue, and hid the real reasons, with those reasons being principally related to the making of protected disclosures. That is possible, but not I consider likely from the material before me such that it cannot be said that the claimant has the pretty good chance explained in authority.

51. There is more than a small element of issues being raised which particularly affect the claimant as an individual, and are not issues of public interest, not least over his pay but also the impact of pupil A's dysregulation on him and what he sought by way of interim and more permanent measures about that. Some of his decisions are ones that can be criticised by the respondent, for example not co-operating with the release of the OH report. His attempt in submission to trace everything that occurred back to the protected disclosures did not in my view appear convincing.

52. In coming to that view I considered all the arguments for the claimant, which included for example the apparent dissimilarity in how his absence was treated as against his disclosures. There does appear to be more than one delay, as there was a lack of action over his grievance, and over the actions of Mr Moody, and in each case he was not told at the time. These are matters that go some way towards raising a prima facie case. But they are to be assessed in the context of there being several aspects to matters, and not all are obviously ones of protected disclosure. At this stage it does not appear to me that the claimant has sufficient to establish a prima facie case that the sole or principal reason for the circumstances that led to his resignation are his making of one or more protected disclosures.

Conclusion

53. Looking at all matters before me in the round it seems to me that there are a number of areas where there will be a substantial conflict in evidence, at present there is not sufficient to support what the claimant argues for to the extent required in an interim relief application, which means that I cannot say that the claimant has a pretty good chance of success in the claim under section 103A so as to meet the test in section 128 of the Act as explained in authority.

54. I have therefore refused the application for interim relief. For the avoidance of doubt the decision should not be taken as indicating a view that the

claim under section 103A will 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. Nothing that I have said is intended in any way to affect that final determination of the claim, which will be determined on contested evidence given on oath and subject to cross examination none of which of course took place before me. It is also liable to include further documentation I have not had sight of.

55. The parties may wish to consider whether to combine the two claims in advance of the Preliminary Hearing already fixed for claim 8001160/2026. If they agree that that is appropriate they can write to the Tribunal to confirm that. Case management can then be addressed at that stage for both cases if thought appropriate. Parties can also liaise over what case management orders might be appropriate and agree as much as they can on that. If complete agreement is reached the Preliminary Hearing may not be required, but if not the matters agreed will assist both the Tribunal and the parties.

Date sent to parties 17 July 2026