

Neutral Citation Number: [2026] EAT 119

Case No: EA-2026-SCO-000010-AW

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh, EH3 7HF

Date: 10 August 2026

Before:

RECORDER FRASER BUTLIN KC

Between:

MR BRANDON DUFFY

Appellant

- and -

BXTR 3 LTD T/A HOUSE OF GODS

Respondent

Mr Brandon David Duffy, the Appellant in person
Ms Isabelle Shankar, for the Respondent

Hearing date: 6 August 2026

JUDGMENT

SUMMARY

INTERIM RELIEF – WHISTLEBLOWING

When determining an application for interim relief under Section 129(1) **Employment Rights Act 1996**, the tribunal must assess whether the Claimant has a “pretty good chance” of succeeding in his claim. That is a high bar and paragraph 39 of the Employment Tribunal Presidential Guidance is clearly correct when it states that “If an employer identifies an apparently good reason for dismissing the claimant that is unrelated to a protected disclosure, this is usually something the tribunal will need to decide at the final hearing on the basis of full evidence. It is difficult to see how the claimant will show that they have a pretty good chance of success, unless they have clear evidence that this was not the real reason.” However, in this case the Tribunal treated the mere existence of factual disputes as determinative, and did not make an expeditious, summary assessment of the issues as they were required to do.

RECORDER FRASER BUTLIN KC:

Introduction

1. This is an appeal against a judgment of the Glasgow employment tribunal that was sent to the parties on 14 January 2026. The judgment refused the claimant’s application for interim relief and he appeals that judgment.
2. I refer to the parties as they were below.

Key Facts

3. The Respondent is a hotel business. The Claimant started work with the Respondent on 10 November 2025 in their food and beverage team. There was an incident at their premises on 25 November 2025 during which the police were called. The Claimant contends that he made a protected disclosure to his manager that evening about fire escape doors being left open and compromised building security with resultant serious issues relating to the health, safety and welfare of guests and staff. The Respondent disputes that any disclosure was made. The Claimant was dismissed from his role on 28 November 2025. The Claimant contends that it was because of his protected disclosure. The Respondent disputes this and says that the decision to dismiss the Claimant was taken on 22 November 2025, albeit that it was communicated to the claimant on the 28th and that it was because the Claimant was in his probation period and was not going to meet the standards required.

Judgment of the Tribunal

4. The tribunal set out the law on interim relief properly at paragraph 4. They stated at paragraph 5 that the application was refused because:

“...it was very clear from the submissions that there will be significant factual disputes and issues of credibility to resolve in terms of not only whether a qualifying disclosure was made by the claimant, but also, crucially, whether the decision to dismiss the claimant had already been made by the respondent prior to any disclosure albeit the claimant was not

informed of that decision until some days later.”

5. The tribunal briefly set out the conflicts in the evidence and then at paragraph 8 they said:

“I, based on these respective positions, concluded there are fundamental issues of fact and credibility in dispute and, for that reason, it could not be said the claimant had a pretty good chance of succeeding at the full hearing. I decided, for these reasons, to refuse the claimant’s application for interim relief.”

On that basis, they refused the application for interim relief.

The law on interim relief

6. Section 103A of the **Employment Rights Act 1996** (“**ERA**”) provides that if the sole or principal reason for a dismissal is that the employee made a protected disclosure, the dismissal should be regarded as unfair. Section 128 makes provision for an application for interim relief, which will keep the contract of employment in force for limited purposes until determination of the claim of unfair dismissal. Section 129(1) sets out the test which must be satisfied before the application is granted. Section 129(1) provides:

“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 dismissal is one of those specified in –

(i) Section ... 103A ...”

7. Where, as here, interim relief is sought in a whistleblowing case under section 103A **ERA**, the Claimant must show that it is likely that the ET will find (1) that he made his disclosure to the employer, (2) that he believed that disclosure tended to show one or more of the things itemised in section 43B(1)(a)-(f), (3) that his belief was reasonable, (4) that the disclosure was made in good faith, and (5) that the disclosure was the principal cause of the dismissal (see **Ministry of Justice v Sarfraz** [2011] IRLR 562).

8. The word “likely” requires that the Claimant has a “pretty good chance of succeeding” in his claim (see **Taplin v C Shippam Ltd** [1978] ICR 1068 at 1074A-F and **Ministry of Justice v Sarfraz** [2011] IRLR 562 at paragraph 16). It connotes a significantly higher degree of likelihood than more likely than not.

9. Presidential Guidance on interim relief came into effect from 22 June 2026, which obviously post-dates the tribunal’s decision in this case. The Guidance was produced because, despite interim relief being an emergency measure which places a high threshold for claimants to meet before an order is made, there has been a significant increase in applications for interim relief before the tribunal. In relation to protected disclosures, the Guidance states at paragraph 39:

“Second, the claimant will need to show that there is a pretty good chance the tribunal will find that the protected disclosure caused the dismissal. The employer usually disputes this. If an employer identifies an apparently good reason for dismissing the claimant that is unrelated to a protected disclosure, this is usually something the tribunal will need to decide at the final hearing on the basis of full evidence. It is difficult to see how the claimant will show that they have a pretty good chance of success, unless they have clear evidence that this was not the real reason.”

10. I would endorse that paragraph of the guidance.

11. The test for interim relief is a high bar for a Claimant. As the EAT in **Dandpat v University of Bath** UKEAT/0408/09 observed, this is for “good reasons of policy ... If relief is granted the respondent is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the claimant, until the conclusion of proceedings: that is not [a] consequence that should be imposed lightly.”

12. The application for interim relief must be made urgently, and the tribunal must determine the application as soon as practicable after it is received; see section 128(3)-(5). The tribunal will not hear oral evidence unless it makes a positive decision to do so.

13. In **Al Qasimi v Robinson** (UKEAT/0283/17/JOJ) HHJ Eady, as she then was, observed at paragraph 59 as follows:

“By its nature the application had to be determined expeditiously and on a summary basis.

The ET had to do the best it could with such material as the parties had been able to deploy at short notice and to make as good an assessment as it felt able. ... The Employment Judge also had to be careful to avoid making findings that might tie the hands of the ET ultimately charged with the final determination of the merits of the points raised. His task was very much an impressionistic one: to form a view as to how the matter looked, as to whether the Claimant had a pretty good chance and was likely to make out her case, and to explain the conclusion reached on that basis; not in an over-formulistic way but giving the essential gist of his reasoning, sufficient to let the parties know why the application succeeded or failed given the issues raised and the test that had to be applied.”

14. The EAT in **Dandpat** observed that a tribunal, in giving their judgment, was required to “indicate the essential gist of its reasoning” (at paragraph 17).

Grounds of Appeal

Ground 1

15. Ground 1 argues that the tribunal erred in their application of the “pretty good chance” test in that they treated the mere existence of factual disputes as determinative of the application for interim relief.

16. The Claimant submits that identifying the factual disputes is not the same exercise as assessing how the disputes appear on the available material. He submits that the tribunal identified that the key question was whether the decision to dismiss had been made before the protected disclosure was made. However he says the tribunal erred by simply identifying that there were disputes to be resolved and declining relief because of those disputes rather than making an expeditious assessment of those disputes. He submits that the existence of factual disputes is not determinative.

17. The Respondent submits that the decision that the tribunal reached was the only one they could have reached because the two core issues in the case would necessarily require oral evidence so that the pretty good chance test could not be met. The Respondent contends that the two disputes that are identified by the tribunal were not incidental and were the core of the question, and this inevitably meant that the test for interim relief was not met.

18. In my judgment, in relation to Ground 1, I consider that the tribunal did err. While it is

important to read the tribunal's reasons as a whole, and bearing in mind the summary nature of the assessment by the tribunal and the importance of short judgments when dealing with interim relief applications, I consider that in this case, the tribunal took the existence of factual disputes as determinative of the application for interim relief. That is apparent from the face of paragraphs 5 and 8 of the reasons. In so doing, the tribunal erred in not making a summary assessment of the evidence.

Ground 2

19. Ground 2 argues that the tribunal erred by failing to take into account material evidence, namely a voice recording of the Claimant in discussion with managers of the Respondent, and in so doing it was perverse for them to prefer the Respondent's untested witness evidence.

20. The Claimant submits that the transcript of the recording was before tribunal, but the tribunal failed to make any findings about the contents of the recording that took place immediately after the dismissal took place. The Claimant submits that the matters raised in the recording and other documents are contrary to the evidence in the witness statement of John Kennedy and the consequence is that the tribunal's findings are therefore perverse.

21. The Respondent submits that the transcript was reviewed at the hearing but that it was not as material as the Claimant seeks to suggest because the individuals on the recording were not the people who he made his disclosure to and there was no evidence that the dismissing manager knew the specific content of that disclosure, as opposed to being aware of the incident generally.

22. In my judgment, in relation to Ground 2, it is correct that the tribunal makes no reference to the voice recording that was apparently played for them. This ground of appeal goes beyond a complaint that the tribunal failed to provide adequate reasons (that is addressed by Ground 3) and argues that this indicates perversity in their judgment in preferring the Respondent's untested witness evidence. I do not accept that the tribunal erred in this regard. The bar for a perversity appeal is high and requires there to be an overwhelming case that the tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached (**Yeboah v Crofton** [2002] EWCA Civ 794). The extent to which the voice recording goes to the

reason for dismissal is moot, and is not the smoking gun that the claimant seeks to suggest.

23. Moreover, in light of my determination on ground 1, it will be evident that I consider that the tribunal did not come to any conclusions either way as to the reason for the claimant's dismissal so it cannot be argued that they were perverse in finding one thing or another, because they did not in fact make any assessment of the point.

24. That leads to Ground 3 of the appeal.

Ground 3

25. Ground 3 is that the tribunal erred in failing to provide adequate reasons for its decision.

26. The Claimant submits that the tribunal, having identified that there was a coincidence of timing between the disclosure and dismissal, did not then explain why the pretty good chance was not met. He submits that the reasons do not address the contents of the transcript, the evidence of a prior decision to dismiss and the credibility of the witnesses. He submits that there has been a total absence of engagement with the substance of the case, particularly the transcript which he described as a central piece of contemporaneous evidence.

27. The Respondent accepts that more could have been said about the assessment by the tribunal but that this was a summary assessment and the issue is whether the parties can understand the outcome. In this case, the Respondent submits that the parties can because the gist of the decision has been provided.

28. In relation to Ground 3, I consider that this ground of appeal is made out in relation to the tribunal's failure to refer to and address the contents of the voice recording / transcript. This was an important piece of evidence that needed to be weighed in the balance and in failing to address it, the tribunal failed to give adequate reasons to explain their decision.

29. In those circumstances, the appeal is allowed.

Disposal of the appeal

30. The Court of Appeal in **Jafri v Lincoln College** [2014] EWCA Civ 449 sets out the test that

must be applied to determine whether the EAT should determine a matter themselves or should remit the matter to the tribunal. Paragraph 21 states:

“It is not the task of the EAT to decide what result is ‘right’ on the merits. That decision is for the ET, the industrial jury. The EAT’s function is (and is only) to see that the ET’s decisions are lawfully made. If therefore the EAT detects a legal error by the ET, it must send the case back unless (a) it concludes that the error cannot have affected the result, for in that case the error will have been immaterial and the result as lawful as if it had not been made; or (b) without the error the result would have been different, but the EAT is able to conclude what it must have been. In neither case is the EAT to make any factual assessment for itself, nor make any judgment of its own as to the merits of the case; the result must flow from the findings made by the ET, supplemented (if at all) only by undisputed or indisputable facts. Otherwise there must be a remittal.”

31. The application of **Jafri** to cases of interim relief was helpfully set out by HHJ Richardson in **Wollenberg v (1) Global Gaming Ventures (Leeds) ltd (2) Mr A W Herd** (UKEAT/0053/18/DA) at paragraph 39 when he held that in his case:

“This is not a case where there is a knockdown point of law which can enable the EAT to reach its own conclusion on the basis of findings by the ET supplemented by undisputed or indisputable facts. Some factual assessment by the EAT would be necessary. *Jafri* says that that is not permissible. It follows that the case must be remitted.”

32. The Claimant submits that I can decide the case myself because the answer is clear on the permissible material. He submits that I should determine the application for four reasons:

- (1) an interim relief application is a summary, paper-based evidence with no oral evidence so there was no advantage for the ET over the EAT making the decision;
- (2) the need for expedition given the final hearing commences on 7 September;
- (3) the parties both invite the EAT to dispose of the interim relief application; and
- (4) the material is contained within the papers available.

33. He submits that there was a pretty good chance of him succeeding so I should grant interim relief, particularly in light of the contents of the recording and scheduling that showed him working shifts through to December. He submits that if there is to be remission, then it should be remitted to a different tribunal because fresh eyes are needed.

34. The Respondent submits that in order to save costs I should substitute my decision for that

of the tribunal. The Respondent urges me to make the same findings as the tribunal, namely that the interim relief application should be dismissed particularly in light of the very high threshold involved in interim relief. However, the Respondent submits that should I allow Ground 1 the case would need to be remitted to the tribunal. Unless Ground 2 were upheld, the Respondent argues that it should be remitted to the same tribunal.

35. In relation to the appeal before me, I consider that it would not be appropriate to determine the application myself. One of the reasons that I have allowed the appeal is that the tribunal failed to make the necessary summary assessment of the material before them and instead took the existence of disputed facts as determinative of the issues. In those circumstances, if I were to seek to determine the matter myself, I would necessarily have to make some factual assessment, albeit in a summary and expeditious manner. In those circumstances, following **Jafri**, I must remit the case to the tribunal. There is no reason why it cannot be remitted to the same tribunal. Given that they have already considered the material and in light of the summary nature of the assessment that needs to be undertaken, I consider it is most appropriate to remit the matter to the same tribunal.