



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8002065/2026

Preliminary Hearing held remotely in Aberdeen on 3 September 2026

Employment Judge A Kemp

Mr S Boyle

**Claimant
In person**

CMD Group Scotland Ltd

**Respondent
Represented by:
Ms D Devlin
Paralegal**

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 dismissal was automatically unfair under section 103A of the Act, amongst other claims.
2. Joint Presidential Guidance has been issued, with effect from 22 June 2026, in relation to such applications. I have taken that into account. The claimant confirmed that he had read it.

3. I explained to the claimant at the start of the hearing that I could assist him to an extent under Rule 3 but not as if acting as his solicitor.
4. It is I consider helpful to state that the only issue before me was whether or not to grant interim relief in relation to the claim under section 103A of the Act. There are other issues which were raised during submission particularly by the claimant, such as issues under section 44 of the Act, and other statutory duties, and there may be other matters such as detriment under section 47 but they are at best matters of background in relation to what was before me.
5. I did not 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.
6. I considered the parties' submissions, and the various documents that had been referred to by the parties. There was a Bundle of Documents provided by the respondent, which included those provided by the claimant, as well as the Bundle supplied by the claimant. The respondent had not complied with the orders for exchange of documents in that firstly they were provided over 24 hours late and secondly exceeded the 50 page limit. I took that into account in my consideration. The respondent had helpfully prepared a skeleton submission which was spoken to.
7. I decided having heard the submissions that it was not possible to give an oral judgment. There are some matters raised in the case which are not straightforward, and I wished to consider matters before issuing a decision.

Submissions

8. The claimant argued in very brief summary that there had been a dismissal by the acts of the respondent in stopping payment of his salary and cutting him off from access to digital documentation and resources such as Facebook and otherwise. That had happened because he had made protected disclosures to them over matters including the presence of an air rifle on the premises, that one person they employed was living on the premises, and that he had been assaulted by a member of staff. He had raised matters with the respondent itself, which had not addressed them. They included not providing him with the necessary equipment and testing in relation to use of chemicals. Four days after his last disclosure, and after he had intimated that he left the workplace because it was dangerous, his pay had been stopped, and access removed. That was done because of the disclosures, and was retaliation from them. He argued that the respondent's submission over lack of resignation was an attempt to avoid the issue raised. He argued that the Claim Form was confirmation of his resignation, but that the dismissal had been earlier on 11 August 2026. He said that he had recordings where the respondent's director admitted

matters such as manipulating a health and safety investigation such that the report on that was worthless and as to the respondent not sending him what he had asked for. He referred to his claims under sections 44 and 103A of the 1996 Act, although that before me was only the latter, and said that his claims were bound to succeed.

9. The respondent argued again in very brief summary that the claimant had not resigned, and that there had therefore not been a dismissal. The respondent had written to the claimant on 11, 14 and 20 August 2026 to state that he remained employed and was being encouraged to return to work, but that as he had not returned he was not entitled to be paid. His argument that the workplace was dangerous was wrong and evidenced by a health and safety report from an independent party. The respondent denied that the conversation the claimant referred to had taken place. Its position was that the claimant not attending work meant that he did not require access to online or other facilities and they would have been provided to him on his return to work. Their position remained that he was still an employee as he had not resigned, and the respondent had not dismissed him. The skeleton argument referred to the authorities for interim relief, and the pretty good chance of success test was not met.

The law

10. 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.
11. 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.”

12. 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."

13. 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, many of which are referred to in the Presidential Guidance. The founding 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.
14. 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.
15. It has been held that it 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."

16. That there is a dispute in evidence is not a sufficient basis, of itself, to refuse to award interim relief. An assessment of matters is required as addressed in *Duffy v Baxtr 3 Ltd* [2026] EAT 119.
17. 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.
18. 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.
19. 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] IRLR 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.

Discussion

20. 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.

21. There are arguments to be made for both parties. There are three basic questions to address in such a matter, and although there are liable to be more that is a reasonable basis for determination of the application in my view.

Were there protected disclosures?

22. The first is whether the claimant has a pretty good chance of proving that 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. There are documents which refer to matters being raised both with the respondent directly and other bodies including the HSE and Police Scotland. Whilst some of the matters are not necessarily those where a reasonable belief that the matter was raised in the public interest meet the test for interim relief, there are others which do, such as the allegations in relation to a working air rifle on the premises, which the respondent wrongly said was not in working condition, and the allegation that a member of staff was living at the premises unlawfully. There are also it appears to me other issues that may arise such that these are not exhaustive but sufficient to address this aspect. Whilst the respondent does not accept that protected disclosures were made I do not accept their argument in that regard.

Was there a dismissal?

23. The second question is whether the claimant has a pretty good chance of proving that there was a dismissal. The onus is on him. The statutory test is in section 95, the word dismissal is repeated in section 128, and case law has made clear that it has a number of elements.
24. The claimant appears to have thought at the time of presentation of the Claim Form that the acts of the respondent not only were a material breach of his contract of employment, but were sufficient of themselves to amount to a dismissal, or that if resignation were required that was by reason of his having either contacted ACAS or presenting the Claim Form itself. His position was that the dismissal was on 11 August 2026, or at the latest on 17 August 2026.
25. 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 being the term of English law. Breach of the implied term as to trust and confidence can do so. Here it appears to me that the claimant has a pretty good chance of proving that in its actions the respondent was in material breach of contract. That is as it intimated a withdrawal of wages in

circumstances where the claimant had intimated health and safety concerns, and although the respondent argues that it handled that issue appropriately it seems to me that it did not, because it withheld information from the claimant, took other steps against him which appeared to me inconsistent with facilitating a return, and appeared to have taken steps to conceal what had happened. It had also not been accurate at the least, and possibly truthful, about an air rifle on its premises.

26. That raises the issue of whether a material breach of contract is of itself a dismissal for the purposes of section 128. The statutory scheme for interim relief is dependent on there being a dismissal on a particular date, because of the time frame required to bring the claim for interim relief, and it appears to me that the dismissal cannot happen without the parties both being aware of it either because they did know or ought reasonably to have known. It is not necessary to use the words of dismissal or resignation, as conduct can suffice, but it appears to me that the other party must be aware of that conduct or that it ought reasonably to have been aware of it. That was the approach of the Supreme Court in *Gisda Cyf v Barratt* [2010] IRLR 1073 albeit not in the same context as the present.
27. What the claimant in effect argues is that the acts of the respondent were so serious a breach of contract that they of themselves amounted to a dismissal. It does not appear to me that that is the correct analysis in law however. Such an approach in the context of acts of the employee not employer has been specifically rejected by the EAT on a number of occasions such as in *Forgings and Presswork Ltd v McDougall* [1974] IRLR 243, [1974] ICR 532, *NIRC, Rasool v Hepworth Pipe Co Ltd* [1980] IRLR 88, [1980] ICR 494, *EAT* which was approved in *Terinex Ltd v D'Angelo* [1981] ICR 12, and by the Court of Appeal in *London Transport Executive v Clarke* [1981] IRLR 166. In that last case Lord Denning said that certain breaches were completely inconsistent with the continuance of the contract of employment and automatically terminated it, such as meeting the definition of dismissal, but he was in the minority. The majority decision was against his argument.
28. The law in Scotland is not exactly the same over contract issues, as was addressed by the Inner House in *Aberdeen City Council v McNeill* [2014] IRLR 113 but in this respect it appears to me that there is no material difference. What was termed the elective theory was applied in the Supreme Court decision of *Société Générale, London Branch v Geys* [2013] IRLR 122, which was to the effect that if there is a fundamental or material breach of contract the innocent party may choose (elect) whether or not to accept it. That is not I consider supportive of the argument of a dismissal automatically from the acts of the respondent in stopping pay and removing access digitally.

29. This means in my view that even if the claimant might be able to argue that there was a dismissal from the events that took place even if he did not inform the respondent that he had resigned before presenting his Claim Form, that argument is not one that I consider has a pretty good chance of success. In my view they are very low.
30. I next address the issue of what the claimant argued about intimation of his resignation on the basis of the material breach, called rescission in Scots Law. What the claimant said is that he thought that raising matters with ACAS was sufficient. He ticked a box on the Early Conciliation Form that he was raising an automatic unfair dismissal claim. But that was on 10 August 2026, the day before he received a communication to the effect that he was on unpaid leave. It was the intimation of that lack of payment, coupled with what he said was a digital lockout, meaning that his access to documentation held electronically, and matters such as Facebook operated by the respondent, was withheld from him, that he said amounted to the dismissal. In any event his taking that step is not intimation to the respondent, and it is not clear from what was before me whether the respondent has yet received any contact from ACAS as the claimant was told that there was a wait of about eight weeks.
31. The act of withdrawing salary by the respondent took place in circumstances where the claimant had on the previous day, 10 August 2026, intimated that he was on what he described as statutory safety leave under section 44 of the 1996 Act. In making that reference he was stating a matter directly contrary to any suggestion of termination of employment as at that date.
32. On 11 August 2026 there were exchanges of messages. The respondent as a part of the message asked the claimant to confirm his position, as their position was that he was still employed. They also did so on 14 and 17 August 2026. The claimant did not reply as he wished all communications to go through ACAS. He accepted that he had not directly communicated to the respondent in the period between 11 and 17 August 2026, the date of presentation of the Claim Form, that he had terminated the contract of employment because of their actions, or words to that effect.
33. The argument for the claimant is at least in part that the claimant was entitled to terminate the contract because of the material breach. I consider that the claimant has a pretty good chance of success with that. That, however, is not sufficient to be a dismissal, colloquially known as a constructive dismissal in this context. There must be I consider a termination of employment. Termination of the contract by the employee is required under section 95(1)(c). That requires the claimant in some way to inform the respondent of that.

34. I consider that as the claimant did not inform the respondent by some means of the termination of the employment on or before 17 August 2026, the date on which the Claim Form was presented, he does not have a pretty good chance of establishing that there had been, by time of presentation of that Claim, a dismissal. There was a message sent to the HR consultant appointed by the respondent to deal with his grievance on 19 August 2026 which can be read as intimating termination but that was later than the Claim Form.
35. The claimant alleged as an alternative argument in this regard that the presentation of the Claim Form was itself the intimation of resignation constituting a dismissal, as it referred to the section 103A claim, and the claim for interim relief. It seems to me however that there are difficulties with that argument. As at the time of presentation of the Claim Form there was not in my view a dismissal, as the respondent was not aware of it at that time. It only became aware when the Claim Form was later sent to it, separately to and after the message of 19 August 2026 referred to. It seems to me that the earliest that the respondent was aware of the claimant's position was the 19 August 2026 email to its HR consultant, as its agent. That means that at the date of presentation of the claim the respondent was not aware of a dismissal and no dismissal had taken place.
36. Section 128 uses the past tense "he has been unfairly dismissed". It seems to me that it follows from those words that as at date of presentation of the Claim Form the claimant must have been dismissed as that term is understood in law. But for the reasons given he had not, as the earliest date for a dismissal I consider from what was before me was two days after the presentation of the Claim Form.
37. Secondly there are inconsistencies within the Claim Form, as the claimant ticked the box indicating his employment continued. The claimant explained that ACAS told him that the contract was paused by the whistleblowing, but if that is what was said to him that does not accurately and comprehensively explain matters. He did also refer to sections 103A and 128, but the Claim Form does not directly address when the employment terminated.
38. The final argument for the claimant in this regard is that the respondent's words or actions amounted to a dismissal by them. A dismissal can be effected by words or conduct or a combination of the two, as to which there is a great deal of case law. Where matters are ambiguous the weight of authority is for the application of an objective test. But it seems to me that the claimant's prospects on that matter are not very good. Whilst the actions can be criticised as being in breach of the implied term, and a detriment for either health and safety issues under section 44 or for having made a protected disclosure under section 47, they are not likely to be

sufficient to amount to a dismissal effected by the respondent. The words and conduct do not appear to me to be sufficient ones from which dismissal can be inferred, and at the time the respondent made it clear that it was not intending so to do. That intention is not determinative but a factor to consider.

39. On the information before me I consider that there is at least a material level of doubt over whether the claimant will be able to establish that there was a dismissal as at the date of presentation of the Claim Form. I consider that he does not meet the statutory test for this, essential, element of matters and for that reason the application for interim relief cannot be granted.

Causation

40. 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. Had the claimant overcome the issue of dismissal, I would have found for him in this regard. The timing of matters does not appear to me coincidental but that of itself is not sufficient. There are in addition however indications from what was put before me of the respondent seeking to address his concerns not openly and candidly, but by influencing how the report by Citation on health and safety concerns was prepared. It misled him as to the utility of the air rifle. It appears not to have addressed issues of health and safety in various respects, but rather to have attempted either to conceal them or to find a way not to have to address them. These are matters not on the basis of evidence as none was heard, but from the submissions and documentation before me. It appears to me that they raise a prima facie case to the extent that the onus may shift to the respondent, and discharging that onus where the respondent did not accept that a telephone conversation had taken place which the claimant states was recorded and offered to produce the recording for does not appear likely, again from the information available to me.

Overall consideration

41. In light of that finding, I looked again at the issue of dismissal. The claimant argued that if employers could act as the respondent had, whistleblower protection would be entirely ineffective. I consider that he is wrong in that argument however.
42. If there is a material breach of contract effected because of a protected disclosure the employee has a choice. He or she can resign with or without notice, intimating that to the employer and make a claim of automatic unfair dismissal, including for interim relief, or not resign, not accept the material breach, and pursue other remedies which may include those

under sections 44 and 47 of the Act but also for example unauthorised deductions from wages under section 13 or a civil court action for breach of contract. The difficulty for the claimant in this case is that he did not intimate his resignation prior to the presentation of his Claim Form, and it does not appear to me that he meets the statutory test for interim relief.

43. I appreciate that the claimant is a party litigant, and that these provisions were not simple for him to understand, as well as the fact that his understanding of matters may not have been helped by what he was told by others. Had he had legal advice at the time matters may have been handled differently and the outcome may have been different. But I require to apply the statutory provisions in light of the case law in relation to them to the circumstances of the case as they appear to me on summary assessment.

Conclusion

44. 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, because there is a material level of doubt over whether at the time the Claim Form was presented the claimant had been dismissed. I have therefore refused the application for interim relief.
45. For the avoidance of doubt the decision should not be taken as indicating a view that the claim under section 103A, or indeed one under section 44, which is a different statutory claim, will fail. It may or may not succeed after the Tribunal has heard all of the evidence at a Final Hearing. There may yet be an application to amend to add further claims independent of that under section 103A. Nothing that I have said is intended in any way to affect the 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.

Date sent to parties

08 September 2026