EMPLOYMENT TRIBUNALS

Claimant		Respondents
Ms A Berahavaya	**v**	**McMullan Studio Ltd**

PRELIMINARY HEARING

Heard at: **London Central (by CVP videolink)**

On: **12 October 2021**

Before: **Employment Judge Brown**

Appearances
For the Claimant: **Mr F Clarke, Trade Union Representative**
For the Respondents: **Miss C Urquhart, Counsel**

JUDGMENT

The Judgment of the Tribunal is that:

1. **It is not 'likely' that on determining the complaint to which the application relates the Tribunal will find that the reason or principal reason for the Claimant's dismissal is that specified in s103A ERA 1996.**

2. **Interim relief is therefore not appropriate in this case.**

REASONS

The Complaints/Interim Relief Application

1. By a claim form presented on 8 November 2021, the Claimant brought a complaint of automatically unfair dismissal as a result of making a protected disclosure.

2. The claim contained an application for interim relief. This hearing was to determine that application.

3. It was agreed that, whilst witness statements had been provided for the hearing, there would be no live evidence.

4. I had a witness statements from: the Claimant and Mr Andrew McMullan, Director and founder of the Respondent Company.

5. There were 2 Bundles of documents, one from each party. Page references in these reasons prefixed with C refer to the Claimant's Bundle and those prefixed with R refer to the Respondent's Bundle. Both parties relied on written skeleton arguments, as well as making oral submissions.

6. The Claimant was employed by the Respondent as an Architectural Assistant Part 2 from 28 June 2021 until she was dismissed on 01 November 2021. The Respondent is an Architectural Practice.

7. The Respondent contends that the Claimant was dismissed for the potentially fair reason of a capability. The Claimant claims that she was dismissed because of her alleged disclosure within *s.103A ERA*.

The Claimant's Case and Skeleton Argument

8. In the Claimant's particulars of claim at paragraph 7, the Claimant contends,

   "7. On or around 14 October 2021, the Claimant stated to her employer, Andrew McMullan, that she was being seriously overworked and was far exceeding normal working patterns, which was having a detrimental impact on her mental health. She contends that this amounted to a protected disclosure within the meaning of s.43A ERA and an assertion of a statutory right within the meaning of s.104 ERA in that:

   a. she provided information to the effect that the Respondent was acting in breach of its legal obligations under ss.4, 10, 12 and 13 WTR (s.43B(1)(b) ERA), in that she brought to the Respondent's attention that: (i) she was having to exceed the 48 hour working week in order to comply with deadlines; (ii) she was sometimes unable to take a rest break of more than 11 hours per 24 hours; (iii) she was frequently unable to take appropriate rest breaks, and (iv) therefore annual leave entitlement was being calculated wrongly. The Respondent had not been fully aware of this as he typically left the office significantly earlier than other staff to spend time with family; and/or
   b. she provided information to the effect that the health and safety of her and her colleagues was or was likely to be endangered (s.43B(1)(b) or (e) ERA), in that she brought to the Respondent's attention that the culture of overwork was having a detrimental effect on staff mental health;
   c. she had reasonable grounds for believing that one or both of these disclosures fell within s.43B(1)(b) and/or (e);
   d. she had reasonable grounds for believing that one or both these disclosures were made in the public interest, in that she was concerned with the health and safety of most/all of staff; and e. she made the disclosure to her employer within the meaning of s.43C."

9. The Claimant clarified at this hearing that she relies on *s43B(1)(d)* , not *s43B(1)(e) ERA 1996.*

10. In her witness statement for this hearing, the Claimant addresses her alleged protected disclosure at paragraph 6 and 7,

"6. After my return to the office, I had asked the director, Andrew Mcmullan, to have a conversation about my mental health concerns and lack of work-life balance. The conversation happened on the 14th of October. Specifically, I disclosed to him my current working hours, how not having breaks affects my working efficiencies, confronted all the times I had to stay back due to overload, explained that the long hours are not caused due to my software proficiencies and asked to brainstorm how to ease off my schedule moving forward.

7. Andrew Mcmullan agreed that the overworking in the office was caused due to the company being understaffed and mismanaged. After this he promised to revise my post-competition schedule and give me time to practice software and the more technical side of the projects at a measured pace. He agreed that I was efficient in the tasks given on days when I had to stay late."

11. In summary, the Claimant says that she made this protected disclosure on 14 October 2021 and, very shortly afterwards, on 1 November 2021, the Respondent dismissed her.

12. At this hearing, Ms Urquhart, for the Respondent, clarified the issues between the parties. She said, for the purposes of this hearing, that she would not argue strongly that there had been no disclosure of information by the Claimant on 14 October 2021. However, Ms Urquhart said that there were real issues as to whether the Claimant could show, to the requisite standard, that:

    12.1. In the Claimant's reasonable belief, any information she disclosed was made in the public interest; and
    12.2. The reason or principal reason for dismissal was the Claimant's alleged protected disclosure, rather than the Claimant's capabilities and attitude.

13. The Claimant contends that I should be satisfied that she had a reasonable belief that her disclosure was made in the public interest because:

    13.1. The relevant conversation evidently related to the work and welfare of other colleagues, in that Mr McMullan accepted at the time that the issues facing the whole office were "caused due to the company being understaffed" (Claimant's witness statement, para. 7). He therefore accepted that the issue was a company-wide one.
    13.2. The clear implication from the evidence is that the conversation related not only to the Claimant, but to all members of staff.
    13.3. That being so, disclosure of information on an issue affecting a whole company, and not just the Claimant, must in the public interest. It would be impossible for the Claimant to make a disclosure which affected a wider group of people in the Company.

14. The Claimant also contends that, at this stage, there is overwhelming evidence that she was dismissed because of her protected disclosure. She relies on the following matters:
    14.1. The proximity in time between the disclosure and her dismissal;
    14.2. From the Claimant's witness statement and the text messages the Claimant has produced from colleagues, at C41, 45, 50, 52, 53, 60-62, it is

apparent that there was significant disquiet in the office. It is a reasonable inference that the Respondent dismissed the Claimant either (a) to make an example of her for raising concerns or (b) because it saw her as the focal point or "troublemaker" for raising those concerns.

14.3. The Respondent's putative reasons for dismissal are not credible and not supported by any evidence which might reasonably be expected to be available at this stage;

14.4. Given the wholly unconvincing reasons for dismissal put forward by the Respondent, it is "likely" that the Claimant will prove at the final hearing, that the true reason for dismissal was her protected disclosure.

15. The Claimant contends that the Respondent's purported reasons for dismissal are not credible because:

15.1. The Respondent contends that the Claimant's work was unsatisfactory and had to be redone, and that performance related concerns were raised with her 10 times, but the Respondent has produced no contemporaneous evidence to support these contentions, whether in the form of an appraisal, or meeting notes, emails, messages or Whatsapps.

15.2. There was an appraisal document for the Claimant but the Respondent had not recorded any concerns in it;

15.3. The appraisal document required the Claimant to identity 3 areas of focus for the coming year – indicating that the Claimant's contract was envisaged to be continuing in the coming year;

15.4. The Claimant's 3 month probationary period had ended on 29 September 2021, but the Respondent did not terminate her employment at that point, nor extend her probation period;

15.5. The Respondent's assertion that the Claimant "committed a breach of contract by using student software illegally" on 10 October 2021 is a clear fabrication. The screenshots at C44, C49, C58 demonstrate that Mr McMullan was aware that the Claimant was using an unlicensed device so that she could complete necessary work at home that weekend.

The Respondents' Contentions and Evidence

16. In summary, the Respondent says that it is not "likely" the ET will find, at the Final Hearing, that the Claimant's words, as set out in her own Particulars of Claim and in her own witness statement, disclosed information which the Claimant reasonably believed was in the public interest.

17. Even if the Claimant did make a protected disclosure, the Respondent say that it is also not "likely" that a Tribunal at a Final Hearing will find that the protected disclosure was the sole or principal reason for dismissal, rather than the Claimant's capabilities and attitude.

18. The Respondent relied on Mr Andrew McMullan's witness statement evidence to support these contentions. It also produced email exchanges between Mr McMullan and his HR advisers regarding the Claimant's dismissal.

19. Ms Urquhart for the Respondent contended that, looking at the factors to be taken into account in deciding whether the Claimant had a reasonable belief that her

disclosure was made in the public interest, the Claimant's alleged disclosure is not capable of being seen as in the wider public interest:

19.1. There is no suggestion of any deliberate wrongdoing by the Respondent.

19.2. The Claimant does not refer to other employees in her alleged disclosure.

19.3. In any event, she had only five colleagues. The Respondent submits that a disclosure that up to five people are allegedly working over-long hours is not, without more, a matter of wider public interest: it is a wholly standard workplace complaint.

20. Ms Urquhart said that there was a real dispute between the parties as to reason for dismissal. She said that the Respondent's evidence indicated that the Claimant was dismissed for poor performance. For example:

a. In his witness statement at [3], Mr McMullan states: "her work was unsatisfactory and was often re-done by other members of the team" and "the Claimant would ignore regular behavioural feedback";
b. Also at [3], Mr McMullan states that on 12 August 2021 "the Claimant spoke out of turn and undermined the project by suggesting to the client an unfeasible proposal…";
c. Further, at [3] Mr McMullan states that on 11 October 2021 the Claimant "committed a breach of contract by using student software illegally… which caused a significant erosion of trust for me with the Claimant…";
d. The Employment Timeline provided by Mr McMullan shows "at least 10 occasions when I relayed performance feedback or concerns about the Claimant's standard of work and/or behaviour" paragraph [4] of his witness statement, such as on 21 July , 13 August, 18 August, 23 August, 28 September and 14 October.
e. On that basis, performance concerns were being raised long before the alleged disclosure;
f. On 24 October 2021, Mr McMullan sought HR advice about terminating the Claimant's contract, writing: "It's not working out – poor time management and not following instructions", page R12 ;
g. On 25 October Mr McMullen told the HR consultant that he had previously raised concerns with the Claimant about her performance, p R11.

21. Ms Urquhart contended that the appraisal document simply showed that the Respondent had not carried out a formal appraisal on the Claimant, in that it had not been completed by the Respondent at all. She said that it was not in dispute that the Company was extremely busy at the relevant times.

Documents

22. The Claimant's Bundle of documents contained text messages between the Claimant and her colleagues about their work.

23. The Respondent produced the Claimant's appraisal document. It appeared only to have been completed by the Clamant.

24. The Respondent produced emails it sent to its HR adviser concerning the Claimant's dismissal. These include an email dated on 24 October 2021 from Mr McMullan which said, "I'm looking to terminate someone's contract before their 3-

month review takes place. It's notworking out – poor time management and not following instructions. Lots of crossed wires and a bad fit." R12

25. The Respondent produced a detailed time line of the Claimant's employment, created by Mr McMullan for this hearing

26. The Bundles contained the dismissal letter dated 1 November 2021. It said,
"When you commenced employment with us on 28th June 2021 in the role of Architectural Assistant you were informed that your employment was subject to the satisfactory completion of a probationary period. We met on 1 November 2021 to discuss your performance during the probationary period and I explained to you that, unfortunately, you have not reached the standards we require to demonstrate your suitability for the role.
Therefore I have no option but to terminate your contract with immediate effect. You are entitled to 1 week's notice, which will be paid to you."

Legal framework

27. *Section 128 Employment Rights Act 1996* provides:

'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,
……
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'.

28. The question to be considered upon an application for interim relief is set out in *s129 ERA 1996*:
'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,

….".

29. Interim relief can therefore be ordered where the Tribunal finds that it is likely that a final hearing will decide that the reason (or principal reason) for dismissal was the employee having made protected disclosures contrary to *s 103A ERA1996.*

30. The meaning of the word 'likely' for these purposes has been considered in several cases. In *Taplin v C Shippam Ltd* [1978] IRLR 450, [1978] ICR 1068 EAT, decided under similar provisions relating to interim relief applications in dismissal for trade union reasons, the EAT (Mr Justice Slynn) held that it must be shown that the claimant has a 'pretty good chance' of succeeding, and that that meant something more than merely on the balance of probabilities. That approach to the word 'likely' has been followed in subsequent decisions, *Dandpat v University of Bath* (2009) UKEAT/0408/09 UKEATPA/1284/09 UKEATPA/1285/09 UKEATPA/1391/09 unreported at para 20, *Ministry of Justice v Sarfraz* (2011) UKEAT/0578/10, [2011] IRLR 562 at paras 16–17 and *His Highness Sheikh Khalid Bin Saqr Al Qasimi v Robinson* UKEAT/0283/17/JOJ, unreported (Qasimi v Robinson), at paras 8–11.

31. A 'pretty good chance' of success was interpreted in the whistleblowing case of *Ministry of Justice v Sarfraz* [2011] IRLR 562, EAT, as meaning 'a significantly higher degree of likelihood than just more likely than not'. Underhill P stated in *Ministry of Justice v Sarfraz* [2011] IRLR 562 that,

    "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." (para 16).

32. There are policy reasons why the threshold should be thus. Underhill P said, in *Dandpat v The University of Bath and anor* (unrep, UKEAT/0408/09/LA),

    "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." (para 20)

33. The Claimant must show the necessary level of chance in relation to each essential element of *s103A ERA 1996* automatic unfair dismissal*,* see *Simply Smile Manor House Ltd and ors v Ter-Berg [2020] ICR 570.*

34. The Claimant must therefore show that it is likely that the Tribunal at the final hearing will find each of the following:

    34.1. she disclosed information to the appropriate entitty;
    34.2. she believed that the information tended to show one or more of the matters itemised in the ERA 1996 s 43B(1);
    34.3. she believed the disclosure(s) was or were made in the public interest
    34.4. her belief in both these matters was reasonable; and
    34.5. the disclosure(s) was or were the principal cause of the dismissal.

35. "Protected disclosure" is defined in *s43A Employment Rights Act 1996*: "In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."

36. "Qualifying disclosures" are defined by *s43B ERA 1996,*

"**43B Disclosures qualifying for protection**

(1) In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) …
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) ….
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) …
(f) … . ".

37. The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations), *Cavendish Munro Professional Risk Management v Geldud* [2010] ICR [24] – [25]; *Kilraine v LB Wandsworth* [2016] IRLR 422.

38. The test for "reasonable belief" is a two-stage test, *Chesterton Global Ltd v Nurmohamed* [2017] IRLR 837, at para 29. The two stages are:
a. Did the claimant have a subjective genuine belief that the disclosure (i) tended to show one of the matters set out in s.43B(1) ERA, and (ii) was in the public interest? If so,
b. Did the claimant have objectively reasonable grounds for so believing in both such cases?

39. This is a two-stage test, which the ET must follow, and the two stages ought not to be elided, *Ibrahim v. HCA International* [2020] IRLR 224, CA, para 17, per Bean LJ.

40. Underhill LJ said, in *Chesterton Global Ltd v Nurmohamed* [2017] IRLR 837, para [31], that the meaning of 'in the public interest' was not defined by Parliament. Instead, ".. the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression". However, "the essential distinction" to be drawn was "between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest".

41. At [35] and [37] Underhill LJ set out the factors which are useful in deciding whether a disclosure relating to a breach of a worker's own contract (or where the interest in question is personal in nature) was made in the public interest:

"(a) the numbers in the group whose interests the disclosure served ….;
(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;
(d) the identity of the alleged wrongdoer …, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities …".

42. Underhill LJ explained at paras [36] and [37]:

"… [36] the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers…

[37] "…where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case, but [counsel for the employee's] fourfold classification of relevant factors which I have reproduced … may be a useful tool. As he says, the number of employees whose interests the matter disclosed affects may be relevant, but that is subject to the strong note of caution which I have sounded in the previous paragraph."

Causation

43. In determining whether the reason for the Claimant's dismissal was her alleged disclosure, it is not sufficient for the disclosure to be "in the employer's mind" or for it to have influenced the employer. The Tribunal must consider whether that disclosure was the "sole or principal reason" for her dismissal, *Eiger Securities LLP v Korshunova* [2017] IRLR 115).

Discussion and Decision

44. I had to assess whether it appeared likely that a Final Hearing would find that the Claimant had succeeded in each of the elements of an automatically unfair dismissal claim under *s103A ERA 1996.*

Qualifying Disclosure

45. The Claimant contends that she disclosed information which she reasonably believed was in the public interest.

46. I considered that there was a real issue as to whether a Final Hearing would decide that, in the Claimant's reasonable belief, the information was disclosed in the public interest. The Claimant's own words, as pleaded in the claim form and in her witness statement, addressed her own working conditions and not those of others.

47. I considered that the Respondent had a powerful argument that, on the words alleged to have been used by the Claimant in her particulars of claim and witness statement, she had only been referring to her own contract or personal interest –

whatever Mr McMullan might have said in response about more general understaffing.

48. Further, I considered that the Respondent had a strong argument that the *Chestertons* factors indicate that the information was not disclosed in the public interest: The Respondent could argue persuasively that:
    48.1. Numbers in the group affected: The only person mentioned was the Claimant. Even the wider group of employees was small;
    48.2. The nature of the wrongdoing disclosed: a disclosure that up to five people are allegedly working over-long hours is not, without more, a matter of wider public interest: it is a standard workplace complaint;
    48.3. There was no suggestion of any deliberate wrongdoing by the Respondent;
    48.4. The identity of the wrongdoer: the Respondent is a small company employing a small number of people.

49. I therefore decided that I could not say that there was a "pretty good chance" that, a Final Hearing would decide that the information was disclosed in the public interest. As all the criteria for a protected disclosure would need to be satisfied, I could not say that there was a "pretty good chance" that a Final Hearing would decide that the Claimant had made a protected disclosure.

Reason for Dismissal

50. In order for the Claimant to be entitled to interim relief, I would also need to assess that it was "likely" that the Tribunal would find that the protected disclosure was the principal reason for the dismissal.

51. It would not be enough that it was one of a number of reasons for dismissal.

52. On the material available to me, I did not consider that it was "likely" (in the sense of a significantly higher degree of likelihood than more likely than not) that a Tribunal would conclude that the protected disclosure was the principal reason for dismissal.

53. I noted that there would be evidence available to a Tribunal, from Mr McMullan, that he and clients had been dissatisfied with the Claimant's work. Mr McMullan will say that these concerns pre-dated any protected disclosure.

54. I acknowledged that the Claimant has a powerful argument that there is almost no documentary evidence to support Mr McMullan's assertions that he had raised performance concerns with her, before her alleged disclosure. Even at this early stage, it might be expected that, if there was such documentary evidence, the Respondent would have provided it to this hearing. The Respondent was able to provide other documents, such as exchanges between Mr McMullan and his HR advisers and a detailed time line of the Claimant's employment, created by Mr McMullan for this hearing.

55. I also acknowledged that the Claimant's probationary period had ended some time before the Claimant was dismissed. It did not appear to be in dispute that the probationary period had not been formally extended. It was not in dispute that the Claimant's employment continued after the end of the contractual probationary

period. That could indicate that there were no performance concerns regarding the Claimant at the end of the probationary period.

56. I noted that the appraisal document contained no criticisms of the Claimant's performance.

57. On the other hand, I considered that the Respondent could argue, as Ms Urquhart suggested, that the Respondent was a small, busy employer, and the lack of documentary evidence simply reflected its lack of resources. It could rely on the appraisal document to show that it had not engaged with the appraisal process at all, rather than that the Claimant's performance was satisfactory.

58. I considered that the oral evidence of the witnesses was likely to be very important in determining the reason for dismissal. I noted that the burden of proof would be on the Claimant to show that her protected disclosure was the principal reason for dismissal. That would be an inherently difficult task.

59. Ultimately I considered that the reason for dismissal in this case could only be properly assessed having heard oral evidence. While the Claimant might have good evidential arguments, they were not enough, at this stage, to satisfy me that it was "likely" that a Tribunal would find that her alleged protected disclosure was the (principal) reason for dismissal.

60. Interim relief is therefore not available to the Claimant.

61. I held a case management Preliminary Hearing at the end of this hearing.

10 December 2021

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Employment Judge Brown

Sent to the parties on:

10/12/2021.

For the Tribunal: