EMPLOYMENT TRIBUNALS

Claimant: Jennifer Andrews

Respondent: (1) Princethorpe Foundation
(2) Ed Hester
(3) Beth Sharpe
(4) Ben Collie
(5) Eddie Tolcher
(6) Liz Griffin
(7) M Jolley Consultancy Limited
(8) Margaret Jolley

Heard at: at Birmingham **On:** 9 June and 16 June 2022 (in Chambers)

Before: Employment Judge Britton

Appearances
For the claimant: In Person
For the respondents: Mr B Frew (Counsel)

RESERVED JUDGMENT

It does not appear to the Tribunal that it is likely that on determining the complaint to which the application relates that it will find that the claimant has been unfairly dismissed by virtue of Section 103A of the Employment Rights Act 1996. The claimant's Interim Relief application is refused.

REASONS

Background

1. By her Claim Form presented on 27 May 2022. The claimant asserted that she had been dismissed for having made protected disclosures. The claimant alleges that this was the reason or principal reason for her dismissal and that her dismissal was therefore automatically unfair. Pending resolution of her unfair dismissal claim, the claimant has applied for interim relief pursuant to Section 128 of the Employment Rights Act 1996 (ERA 1996). Although there are a number of other

named respondents, this application can only be made against the first respondent, as they were the claimant's employer (hereinafter "the respondent"). The respondent is unwilling to reinstate and the claimant seeks an Order for the continuation of her Contract of Employment.

2. The claim for interim relief has been made within Claim Number 1302647/2022. This claim is linked to and follows on from the claimant's extant claim (Note: both claims have now been consolidated). The earlier extant claim is not concerned with her dismissal. I do, however, have the benefit of the Particulars of Claim and Grounds of Resistance in relation to the extant Claim Number 1301937/2022.

3. On the face of the relevant Claim Form (Claim Number 1302647/2022), the claimant appears to be relying upon a number of disclosures made between 14 January 2022 and 1 April 2022. It was identified during the course of this hearing that the claimant is relying on 11 disclosures in total, all made during that period and all of which were made to her employer.

4. The Protected Disclosures relied upon by the claimant, and pleaded within her Particulars of Claim, are the following:

   4.1 On 14th January 2022 the claimant wrote to Ed Hester (the Head Teacher), via email, copying in Beth Sharpe with an allegation regarding disability discrimination (Particulars of Claim (PoC) paragraph 11):

   4.2 On 18th January 2022 the claimant made an allegation to Mr Cyp Vella that he had sent out on behalf of a student an anti-trans questionnaire. This allegation was that it was not only discriminatory towards the claimant, but also other LGBT students in the School (PoC12).

   4.3 On 19th January 2022 the claimant repeated her disclosure to Beth Sharpe that the School was in breach of its Safeguarding Policy; including, but not limited to Keeping Children Safe In Education (KCSIE 2022, Sections 123 and 124), i.e., that the student had been or was likely to suffer harm as a result of being exposed to hate, discrimination and radicalisation on-line content when researching the content in trans-women in sport (PoC 13);

   4.4 On 3rd February 2022 the claimant alleged that the School were asking tutors to allow access to an on-line article by a known "Gender Critical" anti-trans person. This allegation was made first to Mr Issacs, Deputy Head of the Sixth Form and then subsequently to Beth Sharpe (PoC15);

   4.5 On 15th February 2022 the claimant complained to Beth Sharpe about Adam Rickart holding "gender critical" views, and that this was a safeguarding concern as Mr Rickart was Head of House responsible for LGBT children in his pastoral role (PoC16);

   4.6 On 3rd March 2022, the claimant repeated the safeguarding allegations to Mr Hester at 4.5 above (PoC20);

4.7 On 3rd March 2022, the claimant disclosed to Mrs Sharpe her concern regarding Mr Hester's attitude towards his safeguarding responsibilities (PoC21);

4.8 On 25th March 2022 the claimant raised a grievance against Mr Hester complaining of victimisation because of prior Protected Acts. This grievance was sent to Liz Griffin (PoC23);

4.9 On 26th March 2022 the claimant repeated her disclosure to Beth Sharpe regarding the anti-trans survey and safeguarding concerns around that (PoC24);

4.10 The claimant informed Mrs Sharpe that Michael Reddish, the former Deputy Head had instructed Adam Depledge (Head of Department) to artificially inflate the grade of a student (PoC 26);

4.11 The claimant disclosed to Mrs Sharpe that Mr Depledge had acted in breach of the JCQ and AQA Exam Board Regulations by providing assistance to a student with his coding project over and above that permitted by the Exam Board and the assistance given was not noted in the Student's Report or the Declaration required to be submitted in respect of work being the students' own work (PoC 27);

5. The issue to be determined is whether I am satisfied that "it is likely that on determining the complaint" the Tribunal will find that the reason or the principal reason for dismissal is the prohibited reason under Section 103A ERA 1996 which the claimant has asserted.

6. In essence, the issue breaks down into two questions which are, namely:

6.1 Did the claimant make one or more disclosure which was a protected disclosure within the meaning of the Employment Rights Act 1996?
6.2 Was the making of that disclosure the reason or principal reason for her dismissal?

7. The application for interim relief was heard in person and it was set down for a full one day hearing. I was provided with an agreed Bundle of Documents, numbered 1-333 and signed Witness Statements from the claimant and Mr Adam Mosley, a Union Representative, in support of the Claimant's case. I did not hear any oral evidence.

8. The claimant had less than 2 years' service at the effective date of termination and therefore does not have the qualifying service necessary to bring an "ordinary" unfair dismissal claim. It is not in dispute that the claimant was dismissed but the burden of proof is on the claimant to show that she made one or more protected disclosures and that this was the reason or principal reason for her dismissal.

Relevant Law

9. Sections 128-132 ERA 1996 set out the procedure for an application for interim relief. Section 128(1) provides that:-

> "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(d), 102(1), 103 or **103A**, or
> (ii) –
>
> (b) –
>
> 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).

10. As to the ground on which interim relief may be granted, Section 129(1) ERA states as follows:-

> (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(d), 102(1), 103 or **103A**, or
> (ii) –
>
> (b) –

11. Section 129 ERA also deals with the position that arises if the Tribunal is satisfied that it appears likely that on determining the complaint the Tribunal will find that the reason (or if more than one the principal reason) for the dismissal is one of those specified, as set out above, and for the purpose of this claim, the primary remedy is either reinstatement or re-engagement. If the employer is unwilling to reinstate or re-engage the employee pending the hearing of the unfair dismissal claim, the Tribunal shall make an Order for the continuation of the employee's Contract of Employment.

Application of the Relevant Law

12. The burden of proof is on the claimant to satisfy the Tribunal that it is "likely" he was dismissed for an automatically unfair reason: Bombardier Aerospace v McConnell [2008] IRLR 51.

13. The test that a Tribunal is required to apply when determining an application for interim relief is whether "it is likely that on determining the complaint" the Tribunal will find that the reason or the principal reason for dismissal was the reason which the employee has asserted. It is not sufficient that the employee is able to establish that "it is likely" that they were otherwise unfairly dismissed, ie for other reasons. In this case, the respondent contends that the reason or principal reason for dismissal was conduct, which is not a prohibited reason, and if that appears to be the real reason the application for interim relief will fail.

14. The correct approach to be applied to the meaning of "it is likely" has been resolved by case law. It is not sufficient for the employee to show that, on the balance of probabilities, he or she is going to win at the subsequent unfair dismissal hearing. It was held in Taplin v C Shippam Limited [1978] ICR 1068 that the appropriate test is higher than simply establishing that the balance is somewhat more in favour of the employee's prospect of success. It must, on the authority of Taplin, be established that the employee can demonstrate a pretty good chance of success.

15. The EAT endorsed the Taplin approach in Raja v The Secretary of State for Justice UKEAT/0364/009 and Dandpat v University of Bath [2009] UKEAT/0408/009.

16. For the interim application to succeed, the claim that the claimant was dismissed for an automatically unfair reason under Section 103A ERA must therefore stand "a pretty good chance of success" or, alternatively, as referred to by the EAT in Derby Daily Telegraph v Foss [1991] UKEAT/631/921 it is necessary for the claimant to establish that his case looks like "a potential winner".

17. In Ministry of Justice v Sarfraz [2011] IRLR562, EAT, Mr Justice Underhill confirmed the above referred to line of authorities and in his view "likely" connoted a significantly higher degree of likelihood than "probability" and is "something nearer to certainty than mere probability".

18. As stated by the EAT in Ministry of Justice v Sarfraz [2011] IRLR 562 for an application for interim relief to be granted, it must appear to be likely that a Tribunal will find that: -

    - The claimant has made a disclosure to their employer;
    - They believed that the disclosure tended to show one or more of the matters set out at (a)-(e), Section 43B ERA 1996;
    - The belief was reasonable;
    - The claimant believed the disclosure to be in the public interest;
    - The disclosure was the principal reason for the dismissal.

19. There must be a disclosure of information. In Cavendish Munroe Professional Risks Management Limited v Geduld UK EAT/0195/09, the EAT held that to be protected a disclosure must involve information, and not simply voice a concern or raise an allegation. In Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436, the Court of Appeal rejected the suggestion that, in Cavendish, the EAT

had identified the categories of "information" and "allegation" as mutually exclusive. Sometimes a statement that could be characterized as an allegation would also constitute information and amount to a qualifying disclosure. However, not every statement involving an allegation would do so. It would depend on whether it had sufficient factual content and was sufficiently specific. The court went on to note that it might be necessary to assess a statement in the light of the particular context in which it was made. The correctness of Kilraine was also acknowledged by the Court of Appeal in Simpson v Cantor Fitzgerald Europe [2020] EWCA Civ 1601.

20. It is possible for several communications together to cumulatively amount to a qualifying disclosure, even though each individual communication is not a qualifying disclosure on its own. In Norbrook Laboratories (GB) Limited v Shaw UK EAT/0150/13 the EAT held that three emails taken together amounted to a qualifying disclosure it did not matter that the last email did not have the same recipient as the earlier two because the earlier communications were "embedded" in the later communication. However, it is important for a claimant tot be able to clearly identify the disclosure of information upon which they seek to rely.

21. It is not necessary for the person making the disclosure to have stated explicitly that they reasonably believe that their disclosure tends to show one or more of the matters set out in Section 43B(1)(a)-(e). This is a factor which the Tribunal can consider in determining whether the disclosure is a qualifying disclosure. In particular, Section 43(B)(1)(b) ("breach of any legal obligation") is very broadly drawn. In Ibrahim v HCA International Limited UK EAT 0105/18, the EAT confirmed that an allegation of defamation is capable of amounting to a qualifying disclosure for these purposes. The EAT held that reference to "any legal obligation" is broad enough to include tortious duties and breach of statutory duties. It is immaterial that the employee did not use the legal terminology.

22. The Tribunal has to ask:

    22.1 Whether the worker believed, at the time that he was making it, that the disclosure was in the public interest; and
    22.2 Whether, if so, that belief was reasonable.

23. Belief in the public interest need not be the predominant motive for making the disclosure, or even form part of the worker's motivation. The statute uses the phrase "in the belief" which is not 2motivated by the belief". There are no "absolute rules" about what is reasonable to view as being in the public interest. It must therefore be the task of the Employment Tribunal to apply it "as a matter of educated impression" (Chesterton Global Limited v Nurmohamed) [2017] EWCA Civ 314.

24. It is for the employee to show that they have made a protected disclosure, that they have been dismissed and are, in other respects, entitled to bring an unfair dismissal claim. Following the Guidance given by the EAT on the burden of proof in Kuzei v Roche Products Limited [2007] IRLR endorsed by the Court of Appeal in Kuzei v Roche Products Limited [2008] IRLR 530 the burden is on the employee

to show the reason for a dismissal where the employee does not have the requisite qualifying service.

25. The respondent does not concede that the claimant has made a protected disclosure or that the reason or principal reason for the claimant's dismissal was an alleged protected disclosure. In order to determine the true reason for the claimant's dismissal, it is going to be necessary to make determinations in relation to disputed facts. It is not the role of an Employment Judge to make findings of fact when considering an application for interim relief. However, it is necessary for the tribunal to weigh the evidence available in order to make an assessment as to whether it appears that the claimant would be likely to succeed in her unfair dismissal claim on the basis that her dismissal was for a prohibited reason.

26. In London City Airport Limited v Chacko [2013] IRLR 610 the EAT stated as follows:-

> "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".

27. In London City Transport Limited the EAT went on to hold that what is required is an expeditious summary assessment as to how the matter looks to the Employment Judge on the material available and stated that this "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".

28. The approach in London City Transport Limited has been followed and endorsed in the case of Al Qasimi v Robinson EAT 0283/17 wherein Her Honour Judge Eady QC confirmed that by its nature and an application for interim relief had to be determined expeditiously on a summary basis. HHJ Eady QC went on to state that the Employment Judge had to be careful to avoid making findings that might tie the hands of the Tribunal hearing the case and that the task of the Employment Judge hearing an application for interim relief was an "impressionistic one".

Factual Background as it appears from the material available

29. The claimant commenced employment with the respondent on 1st September 2020 in the role of Teacher of Computer Science. The respondent is a School run by The Princethorpe Foundation.

30. In addition to teaching Computer Science, the claimant's day to day duties involved, amongst other things, communicating with parents, attendance at Parent's Evenings, participating with staff development, providing pastoral care of pupils and promoting the ethos of the School.

31. The claimant suffers were anxiety and the respondent had put in place adjustments to assist her during the course of her employment.

32. The claimant had exam invigilation duties scheduled for 5th January 2022. The claimant informed the respondent that she had heightened anxiety as a result of being required to carry out invigilation duties. The claimant's concern was that the invigilation duty would be in a restricted environment with students not wearing masks. The respondent had previously agreed that because of the claimant's anxiety her students would be required to wear masks in her class. The claimant's request was escalated to Mr Hester, who agreed on the 4th January 2022 that she could be removed from exam invigilation duties on the following day, the 5th January 2022.

33. The claimant then had some interaction with Mr Hester either by telephone on 5th January 2022 or at a meeting on 6th January 2022, or both. It is not clear from the respondent's case whether there denial of paragraph 19 of the claimant's first Particulars of Claim relates solely to the remarks allegedly made by Mr Hester or extends to a denial that there was a meeting. For the purpose of this interim relief application I do not have to decide whether the remarks allegedly made by Mr Hester were in fact made or whether those remarks, if said, showed a disregard for the obligations under the Equality Act 2010 as alleged by the claimant. This can only be determined by hearing oral evidence.

34. It is common ground that there was a conversation between the claimant and Mr Hester around this time and that the claimant's anxiety levels were discussed. It is common ground that Mr Hester did treat the claimant's request to be excused from exam invigilation duty as a "trigger" for him to raise with her the concerns that he had regarding the right balance of support for the claimant, as he felt that the reasonable adjustments that were in place were not working as well as the respondent had envisaged and concerns regarding the claimant's "conduct and/or working adjustments" were brought to the claimant's attention.

35. The claimant felt that the alleged comments of Mr Hester had violated her dignity and caused a humiliating environment for her, and she put her complaint in writing via email on 14th January 2022. The email was sent to Mr Hester and Beth Sharpe. It consisted of a request to discuss the claimant's concerns regarding the School's approach towards her disabilities and alleged that there had been a "sharp contrast" between how the claimant was treated prior to Mr Hester's involvement and the School's current approach.

36. For one of Mr Vella's classes, pupils were required to complete an Extended Project Qualification where they were required to pick a topic and gather research around that topic. In order to gather primary data, some pupils elected to utilise a Questionnaire. One pupil chose a topic with the title "Should Trans-Women be able to compete in the same sporting events as Cis Women?". The question was generated by the pupil and appears to have been approved by two teachers, other than Mr Vella. Upon reviewing the Questionnaire, Mr Vella did not think it had the ability to offend anyone and on 18th January 2022 he sent out the pupil's Questionnaire to all staff members, on behalf of the pupil. It appears not to be in dispute that the claimant was offended by the Questionnaire and that Mr Vella

apologised to the claimant and removed the Questionnaire. It is common ground that the claimant expressed her view to Mr Vella that she considered that the Questionnaire was discriminatory.

37. The claimant alleges that she verbally complained about the Questionnaire that Mr Vella had circulated to Beth Sharpe on 19th January 2022 and that she alleged that the School was in breach of its safeguarding policy, including, but not limited to Keeping Children Safe In Education, Sections 123 and 124. It is not clear whether this conversation took place. It is not referred to within the First Particulars of Claim or the Grounds of Resistance, nor is it referred to within the Claimant's Witness Statement. Oral evidence is required.

38. On 3rd February 2022 Mr Rickart circulated a presentation to Form Tutors that included a project called "The Counting Dead Women Project" written by Karen Ingalla-Smith. This project looked at violence against women and girls and contained a link to the list of women killed by men in the UK in 2021. This link was not provided to pupils but only to tutors due to the sensitivity of the presentation. The claimant recognised that the author of the presentation (Ms Smith) had also published work which she believed to be trans-phobic. Although the allegedly trans-phobic views of Ms Smith were not part of the presentation, the claimant appears to have found the link to be offensive as she considered that it was a link to a website operated by an anti-trans activist. The claimant felt that through this website students could access content that was derogatory towards trans-women.

39. It is common ground that on 3rd February 2022 the claimant sent an email to Mr Isaacs (Assistant Head of Sixth Form) in respect of the link and requested for it not to be provided to pupils. The claimant alleges that she made a verbal complaint to Mrs Sharpe about the tutors being asked to allow access to the article by Ms Smith, verbally on or shortly after 3rd February 2022. The precise detail of this complaint is not particularised beyond as set out above.

40. A few days later the claimant complained to Mr Rickart about the email and link whilst in the corridor, which appears to have led to a difference in views. The claimant found the attitude of Mr Rickart to be demeaning and Mr Rickart referred the encounter to Mr Hester because he felt that the claimant's behaviour was aggressive On or about 15th February 2022, the claimant complained to Mrs Sharpe about Mr Rickart, contending that Mr Rickart held "gender critical" views which she felt was a safe-guarding concern.

41. The claimant appears to have repeated her safeguarding allegations about Mr Rickart to Ed Hester on 3rd March 2022 and, as a result of this interaction, the claimant considered that Mr Hester did not take his safeguarding responsibilities "appropriately". As a consequence, he then spoke with Mrs Sharpe in order to raise this allegation and according to the claimant she contended that this was a matter that affected not only herself, but also other trans staff and students. The follow on from this seems to have been the provision of training to the pastoral team by the claimant.

42. On 24th March 2022 the claimant failed to attend her appointments at a Parent's Evening and failed to give any warning to staff, students or parents that this would be the case. As a consequence, the claimant was informed, on 25th March 2022,

that there would be an investigation into her failure to attend. The claimant felt that this was victimisation, which she made clear, and made it known that if the proposed disciplinary investigation was not resolved that day, then she would go to ACAS. The claimant went home early due to stress because of what she described as "victimisation", having explained that her inability to attend the Parents Evening was due to her medication.

43. Also, during the course of 25th March 2022, allegations relating to the claimant's conduct were raised by pupils from her Year 3 Computer Science class. The substance of the complaints were their experiences of "physical forfeits". The complaints were made to Ben Collie and were considered to be a safeguarding issue. Mr Collie reported the complaints to Ms Sharpe towards the end of the school day and this matter was followed up by her on the following Monday upon receipt of a written account of the allegation from Mr Collie, when she then sought advice from the Local Authority Designated Officer (LADO).

44. The respondent has a safeguarding policy for complaints against staff but in this instance Form C was not completed. During the disciplinary hearing, Ms Sharpe informed the claimant that Form Cs were no longer used and that an online system called "CPOMS" is now used. However, the respondent appears not to have made a record on CPOMS. The respondent's safeguarding policy also states that where a safeguarding allegation is made against a member of staff, then the matter should be directed to the Head Teacher, not Ms Sharpe as the Designated Safeguarding Lead. It also states that the Head Teacher should contact LADO within 24 hours.

45. In the meantime, late on 25th March 2022, the claimant sent a formal complaint regarding Mr Hester to the School's Trustees, by email. The claimant's complaint was that she had been discriminated against because of, or for reasons related to, her disability and being a trans woman. In addition, the claimant also complained of victimisation.

46. On the following day, 26th March 2022, the claimant sent an email to Beth Sharpe in order to reiterate her safeguarding complaint. Within this email the claimant stated that she felt that her complaint had not been adequately dealt with as a safeguarding issue and she also repeated her allegation that Mr Vella had allowed a student to be exposed to anti-trans propaganda in breach of KCSIE Section 123 and 124.

47. As a result of Ms Sharpe's discussion with LADO on 28th March 2022, she was advised to complete a Multi-Agency Referral Form. The notes made by Ms Sharpe appear to indicate that she was also advised that the allegation was felt to be serious and that it could be a Police issue that required suspension of the claimant. The claimant challenges the accuracy and/or authenticity of Ms Sharpe's notes.

48. However, the claimant was not suspended on 28th March 2022 and Ms Sharpe sent an email to the claimant at 17.55 on 28th March 2022 within which she stated "I am happy to meet you before your return to work to discuss how I can best support you". This sentiment is seemingly inconsistent with the LADO advice and is currently unexplained.

49. The claimant did not return to work the week commencing 28 March 2022 due to illness. Instead, Ms Sharp and Mr Tolcher, the Foundation Bursar, consulted LADO again on 30th March 2022, the upshot of which was the decision to suspend the claimant. The claimant was then invited to an investigation meeting to be held on 1st April 2022, which was conducted by Ms Sharpe. During the course of the investigation meeting Ms Sharpe informed the claimant that at the time that she sent the email regarding supporting her return to work, Ms Sharpe had not yet spoken to LADO which, according to contemporaneous documentation may not have been the case.

50. It also appears to be common ground that during the course of the investigation meeting the claimant stated that Mr Reddish, the former Deputy Head had instructed the claimant's Head of Department, Adam Depledge to artificially inflate the grade of a student and that Mr Depledge had acted in breach of the JCQ and AQA Exam Board Regulations by providing assistance to a student with his coding project.

51. Thereafter Ms Sharpe went on to produce what appears to be a reasonably thorough Investigation Report, which was forwarded to LADO on 7 April 2022. The LADO position in this matter appears to have been that the LADO threshold had been met.

52. The disciplinary hearing was Chaired by a third party, Margaret Jolley (of M Jolley Consultancy Limited), who was commissioned by the respondent. The disciplinary hearing was held over 2 days, on 27th April and 16th May 2022. It was Ms Jolley's decision to dismiss the claimant. The letter from Ms Jolley confirming her decision and setting out the reasons for it, is dated 24th May 2022. According to the contemporaneous documentation, the reason for Ms Jolley's decision to dismiss the claimant was her conduct.

53. The outcome letter summarised the allegations of misconduct as:

- Failing to attend appointments at a Parent's Evening on 24th March 2022 without giving warning to staff, students or parents;
- Failing to safeguard the welfare and best interests of pupils;
- Bringing The Foundation into disrepute by demonstrably inappropriate conduct;
- Committing acts of bullying, harassment and discrimination against other pupils and;
- Exhibiting intimidatory conduct.

54. Ms Jolley appears to have considered the evidence and the Claimant's contention that the allegations against her were in retaliation for her disclosures and in bad faith, but she rejected it. Within the letter dated 24th May 2022, which confirmed Ms Jolley's decision, she said:-

"It is my view that regardless of the timing of your grievance and claims by you, The Foundation was obliged to undertake a disciplinary investigation. At each stage they sought advice from the LADO regarding the appropriateness of the

action they were taking and this gave an external perspective. I do not believe that the Report that was sent to the LADO was exaggerated."

55. The disciplinary outcome letter dated 24 May 2022 is demonstrably thorough. The findings and the rationale for those findings is well structured and appears to be cogent. Mrs Jolley concluded that a warning would be appropriate in relation to the first allegation, but having also upheld allegations 2-5, the appropriate sanction was dismissal for gross misconduct.

Submissions

Claimant's submission

56. The claimant addressed me at length both in relation to her Witness Statement and her Submissions. I was then provided with a written Skeleton Argument she referred me to the matters set out therein.

57. The claimant submitted that although the burden of proof was on her to demonstrate that she had a pretty good chance of being successful in her substantive claim and the reason for dismissal, the burden of proof should in fact shift to the Respondent. In this regard, the claimant referred me to Steer v Stormsure Limited (2021) EWCA Civ 887 in support of her contention that article 8 of the Human Rights Act was engaged where the consequences of the dismissal are severe, as they potentially would be in this case.

58. The claimant also submitted that I should have regard to the most recent case law (Kilraine) and reject the respondent's submission that the claimant's alleged disclosures had not disclosed "information" and were merely allegations. The claimant contends that her disclosures were of information that tended to show a breach of legal obligations under the Equality Act and/or under KCSIE, and also miscarriage of justice in relation to her disclosures regarding inappropriate assistance for pupils/inflated exam grades.

59. In anticipation of the respondent taking issue that her alleged disclosures were not in the public interest by her submission the claimant reminded me that there is no requirement that a disclosure must be in the public interest, only that it was so in the reasonable belief of the claimant (Chesterton Global Limited v Nurmohamed) and that it has been established by case law that a disclosure may still be in the public interest even if only one other person is affected (Dobbie v Paula Felton t/a Feltons Solicitors UK EAT/0130/20).

60. By her submission the claimant also sought to remind me that certain disclosures are likely to be "made in the public interest" and in this regard she places reliance upon Okwu v Rise Community Action UK EAT/0082/19/00). The claimant submitted that the disclosure that a Head Teacher is failing in his duties with regards to the Equality Act ought therefore to be considered to be made in the public interest and that, in any event, she reasonably believed that her disclosures were in the public interest.

61. The claimant submits that her alleged disclosures on 25 and 26 March 2022 were the catalyst for the respondent escalating the complaint against her from a low

level concern. The claimant highlighted the respondent's failure to adhere to its safeguarding policy in connection with serious allegations prior to her disclosures on 25 and 26 March 2022. The claimant's submission highlighted the failure to complete Form C, the lack of involvement of the Head Teacher and the respondent's failure to take steps to address the safeguarding concerns within 24 hours. In addition, the claimant points to the respondent's failure to suspend on 28 March 2022 and the apparently inconsistent email that she received from Ms Sharpe suggesting that she would be supported in a return to work. The claimant also submits that the notes made by Ms Sharpe when speaking to LADO on 28 and 30 March 2022 were not accurate and/or authentic. In this regard she cites the fact that the notes made on 30 March 2022 are apparently mis-dated 31 March 2022.

62. Whilst the claimant acknowledges that on the face of it she was dismissed for conduct related reasons, i.e., the alleged imposition of forced physical punishments on her students, she submits that this alleged reason is a sham. The claimant contends that the respondent had misled LADO regarding the issue of whether pupils had spoken to their parents regarding the allegations against the claimant and has identified some apparent factual inconsistencies within the contemporaneous documentation, which she contends should significantly undermine the respondent's credibility.

63. The claimant submitted that she was likely to succeed at her substantive hearing and that she had shown cogent evidence of a shift in the Respondent's response to actions following her protected disclosures, which was not a mere coincidence. The claimant has contended that the respondent's failure to follow their safeguarding procedure could not have been a simple oversight as Mrs Sharpe is an experienced designated safeguarding lead.

Respondent's submission

64. The respondent provided a written submission, which set out the well established legal principles that an Employment Judge should have in mind with dealing with an application for interim relief. Incorporated within the respondent's submission was a substantial extract from the letter dated 24th May 2022 which communicated the outcome of the claimant's disciplinary hearing. This letter set out in detail not only the findings but also the rationale for those findings and the evidence upon which those findings were based. The respondent asserts that the reason for dismiss was conduct.

65. The respondent submits that the claimant's inference that there was a change in the respondent's approach following her alleged disclosures on 25 and 26 March 2022 in order to escalate the safeguarding complaint beyond a low level concern is purely conjecture. It is the respondent's case that the concern was never treated as a low level concern and that the respondent's case on causation is a "runaway conspiracy theory" involving pupils who raised the complaints, parents, various staff, LADO and the decision maker.

66. It was also submitted that the decision maker, Margaret Jolley, had been independent of the respondent and that she had been aware of the allegations

made by the Claimant in relation to alleged protected acts and protected disclosures. In other words, this was not a "Jhuti" case. It was submitted that the allegation against the claimant was extremely serious and that they had been investigated appropriately. The respondent contends that the sanction of dismissal was within the band of reasonable responses.

67. It also reiterated the respondent's contention, which was pleaded within their Grounds of Resistance in relation to the first claim, that the claimant had not in fact made any Protected Disclosures. The respondent submits that the claimant's communications on 25th and 26th March 2020 did not amount to the disclosure of information, but was merely an allegation or a statement of position. The respondent submits that the claimant did not have a reasonable belief that any information disclosed tended to show that an alleged relevant failure was made in the public interest or that any information disclosed was substantially true.

Conclusions

68. For the purpose of this ancillary relief application I have to rely upon the details of claim, since the application can only be considered in light of the pleaded allegations. As an ulterior reason for dismissal is argued by the claimant, the onus is upon her to clearly point to facts upon which she relies to demonstrate that a Tribunal is likely to find that the reason for dismissal was an automatically unfair reason. Notwithstanding the claimant's submission regarding "Stormsure", in my view, the legal position is that the burden of proof is on the claimant to satisfy me at this interim stage that the claimant is likely to establish that protected disclosures have been made and also the causative link between her alleged disclosures and her dismissal. Where multiple disclosures are found to have been made, an Employment Tribunal should consider whether, cumulatively, they were the principal reason for the dismissal.

69. Section 103A ERA requires the making of a protected disclosure to be the reason or, if more than one, the principal reason for dismissal. It is necessary for the Tribunal to determine the reason in the normal way (i.e, the set of beliefs causing the employer to dismiss); it is not enough simply to pose the causative question "but for the proscribed factor" would she have been dismissed?

70. At the final hearing, it is the fundamental task of the claimant to demonstrate that the reason for dismissal can properly and fairly be described as the making of a protected disclosure, as opposed to something else. Further, establishing the principal reason for dismissal is an exercise in identifying the reasons within the mind of the decision maker based on the facts known or relied upon by that individual. The Tribunal must be satisfied that the decision maker acted in good faith and without an improper motive when she accepted the evidence at the disciplinary hearing, including, in particular, the investigation report. As submitted by the respondent, on the facts of this case, the principle in Royal Mail Limited v Jhuti [2019] UK SC55 does not apply because Mrs Jolley, the decision maker, had been made aware of the alleged protected disclosures and understood that it was the claimant's contention that the allegations against her were a "sham" orchestrated in retaliation for her alleged protected disclosures. It follows

therefore that in order to succeed at the final hearing the claimant will need to satisfy the Tribunal that Mrs Jolley agreed to go along with the overall plan of the respondent to remove the claimant because she was a "whistle-blower".

71. As identified during the submission on behalf of the claimant, the factual background to this case is complex and the context in which the alleged protected disclosures were made is far from straightforward. It is plain that the respondent does not accept that the claimant has made protected disclosures and that they strongly assert that the decision to dismiss was a fair reason, namely the claimant's conduct.

72. In my view the fundamental issue in this case is causation. If I were to accept that the claimant did make one or more protected disclosure my view is that it would not greatly assist the claimant at this preliminary stage because this application has to fall at the "causation hurdle". Whilst I accept that the claimant has identified a notable inconsistency regarding the apparent attitude of Mrs Sharpe (paragraph 48 above) which will no doubt need to be investigated by the Tribunal in due course, and has pointed to what may well have been a lapse in the respondent following its Safeguarding Policy to the letter, these are matters that will need to be explored at the final hearing by oral evidence and cross examination of witnesses. The claimant has also pointed out the inference that the disciplinary action and dismissal of the claimant may well have been because of her protected disclosures because of the timing of the various events, but, again, in my view, whilst this is no doubt something that the Tribunal will investigate carefully at the Final Hearing, it is not sufficient for me to be satisfied on paper that the claimant is likely to establish at the Final Hearing that the reason for her dismissal was making protected disclosures.

73. The role of Mrs Jolley in the disciplinary process is of great significant because she, after all, was the decision maker. On paper it does very much seem to me as though Mrs Jolley approached her task diligently and in good faith. My impression from her letter dated 24 May 2022 is that she genuinely came to well -reasoned conclusions that the claimant should be dismissed for misconduct. At this preliminary stage, therefore, my view is that notwithstanding the largely circumstantial points that have been well made by the claimant, I cannot say that the claimant is likely to establish at the Final Hearing that the reason for dismissal advanced by Mrs Jolley was a sham and that the real reason for the claimant's dismissal was the making of protected disclosures.

74. It appears on the face of it to be arguable that some of the claimant's alleged disclosures may have disclosed information. The claimant has alleged that she made multiple disclosures and my impression is that either individually (in relation to her alleged discloses on 25 and 26 March 2022) or cumulatively she may well be able to establish at the Final Hearing that she disclosed information that tended to show that the respondent had failed to comply with their legal obligation under the Equality Act or KCSIE. However, I cannot say that she has a pretty good chance of establishing that she disclosed information, and nor can I say that this threshold is reached on the question of establishing both reasonable belief in the alleged relevant failure and that her disclosures were in the public interest. The claimant appears to have an arguable case that she made at least one protected

disclosure but the standard of proof at this stage is very high, as rehearsed within the case law set out above, and I cannot say that on paper the claimant's case passes that threshold in relation to her contention that she made one or more protected disclosures.

75. The view that I have set out in the paragraph above regarding the claimant's protected disclosures is an impression based upon the information available, which is based upon a proportionate analysis of the untested evidence and the submissions made by the parties. A comprehensive assessment of the claimant's alleged disclosures would require a detailed examination of their context. On balance, it seems to me that whilst an extensive amount of time could be spent trying to get to the bottom of this issue, it would be a fruitless exercise given my findings regarding causation and the summary nature of an interim relief hearing. There are clearly numerous factual and legal disputes about whether disclosures of information were made, either at all in some instances, or were in the reasonable belief of the claimant in the public interest that will need to be resolved at the Final Hearing with the benefit of oral evidence and cross examination of witnesses.

76. I have found that from the information available, there is no clear evidence which suggests that the test on the Section 128, in terms of likelihood of the claim for unfair dismissal succeeding, can be met.

77. At this preliminary stage, based upon the information I have available, I cannot reach a conclusion that the evidence upon which the claimant relies, is such that the claimant has a pretty good chance of succeeding.

78. For the reasons set out above, the claimant's application for Interim Relief fails.

Employment Judge Britton
23 June 2022