IN THE EMPLOYMENT TRIBUNAL (SCOTLAND) AT EDINBURGH

Judgment of the Employment Tribunal in Application for Interim Relief in Case No: 8000219/2024, Following Interim Relief Hearing Held at Edinburgh on the 19th of March 2024

Employment Judge J G d'Inverno

Ms Sandra Messi	**Claimant** **In Person**
User Testing Limited	**Respondent** **Represented by:** **Mr Salter of Counsel instructed by Mr James England, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's Application for Interim Relief is refused.

J d'Inverno

Employment Judge

28 March 2024

Date of Judgment

Date sent to parties 28/03/2024

I confirm that this is my Judgment in the case of Messi v User Testing Limited and that I have signed the Judgment by electronic signature.

REASONS

1. This case called for Interim Relief Hearing on the Cloud Based Video Platform at 10 am on the 19th of March 2024. The Hearing, which had initially been set down to proceed In Person at Edinburgh, was converted to a remote CVP Hearing on the Application of the claimant.

2. The claimant appeared on her own behalf. The Respondent Company was represented by Mr Salter of Counsel.

3. Parties had each lodged with the Tribunal and mutually exchange a skeleton submission and a list of case authorities, to be referred to at the Hearing. In addition, the Tribunal had before it; the claimant's ET1, a skeleton Grounds of Resistance on behalf of the respondent (the ET3 was not yet due for filing), a Hearing bundle prepared by the respondent and a number of miscellaneous documents lodged by the claimant in a series of emails sent to the Tribunal and copied to the respondents in the days prior to the Hearing.

Preliminary Matters

4. At the outset of the Hearing the Tribunal heard parties on two preliminary matters;

   (a) An Application at the instance of the claimant for an "Unless Order".

   The Application was one made by the claimant in the week prior to the Interim Relief Hearing and related to a document which she asserted the respondent should have provided her with but had not, being a document which vouched, that is to say provided evidence of, her alleged poor performance which, in terms of the letter of dismissal on 29th February 2024, the respondents assert was the principal reason for their termination of the claimant's probationary contract (pages 181 and 182 of the Bundle).

(b) The potential use, in the course of the Interim Relief Hearing of recordings and self prepared transcripts of recordings made by the claimant of conversations between herself and certain of the respondent's Managers.

5. The purpose of an Unless Order is to compel compliance by a party with an Order of the Tribunal through the contingency of a sanction triggered by non compliance. As at the date of the Interim Relief Hearing no such Order in respect of which there had occurred non compliance, was in place.

6. The document which was sought is said to be sought for the purposes of demonstrating that the respondent did not act fairly or acted without sufficiency of grounds in dismissing the claimant for the purported reason of poor performance. The claimant's aspiration, in making the Application was to have had the document sought, produced via the compulsion of the Unless Order prior to or at today's Hearing, in the hope that it would demonstrate a lack of sufficiency of evidence justifying the decision to dismiss her on the purported ground of non performance.

7. The sufficiency of the evidence upon which the respondents dismissed the claimant for the purported reason of non performance is not, *per se*, the issue which the Tribunal requires to determine at today's Interim Relief Hearing. It is premature to consider such an Application at this juncture in proceedings and the Tribunal declines to do so. Separately, let it be assumed that any document which the respondent were to produce and upon which it relied in part as vouching the level of the claimant's performance during her probationary period was to be regarded as insufficient to justify their decision to so dismiss her, that lack of sufficiency would not serve to demonstrate that the claimant was likely to succeed at a full evidential Hearing in establishing that the principal reason for her dismissal was because she had made one or other or both of the alleged qualifying and protected disclosures which, at paragraph 8.2 of her initiating Application ET1 she gives notice of founding upon for the purposes of her complaint of automatic unfair dismissal in terms of section 103A of the Employment Rights Act 1996 ("ERA"); and further, for

the purposes of Application for Interim Relief in terms of section 128 of the ERA, that last being the issue with which the Tribunal is concerned at today's Hearing.

8. The recordings and other transcripts to which the claimant seeks to make reference at today's Hearing are said to demonstrate dishonesty on the part of the respondent in relation to their operation of their probationary process and their assessment of the claimant during her probationary period including, in particular, an alleged failure to tell the claimant orally in her one to one assessments that she was not performing well on the one hand whereas, on the other hand, that was the reason, in the respondent's assessment and in terms of the letter of 29th February 2024, for which they dismissed the claimant.

9. Let it be assumed that the recordings and transcripts to which the claimant wishes to make reference do demonstrate what is described above, that does not in its turn go to demonstrate that the claimant is likely to establish at an evidential Hearing that the principal reason for her dismissal was the fact that she had made the alleged qualifying and protected disclosures relied upon by her.

10. In terms of Rule 95 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 Schedule 1, a Tribunal will not hear oral evidence at a Hearing on an Application for Interim Relief but will seek to be addressed by both the claimant and the respondent or their representatives on the Interim Relief issues, in terms of section 128 of the ERA and not the merits of the full claim. That process proceeds by each party or their representative, making their submission during which they each set out their legal arguments in support of or in opposition to the Interim Relief Application. Parties may rely on relevant documentary evidence which goes to show that the claimant is likely, or is not likely, to establish at an evidential Hearing on the Merits that the principal reason for her dismissal was that of having made the alleged protected disclosures on which she gives notice of founding.

11. The general prohibition against the hearing of oral evidence which is contained in Rule 95 is for the long established reason that the Tribunal at such an Interim Hearing must avoid making findings in fact which have the effect of binding or restricting the scope of inquiry which is to be undertaken at a full evidential Merits Hearing. For the above reasons the Tribunal determined that neither the tape recordings nor the transcripts made of them by the claimant will form part of today's Hearing.

12. In relation to the desired reliance upon recordings the claimant referred the Tribunal to the Judgment of Employment Judge McManus issued in the Employment Tribunal (Scotland) at Glasgow on the 6th of February, that being a case in which Judge McManus allowed the showing and viewing of videos at an Interim Relief Hearing.

13. Having had the opportunity of reading the Learned Judge's Judgment and Reasons I distinguish that Judgment on its facts. At paragraph 12 of her Judgment Judge McManus states "*It was the claimant's position that the video showed some of the alleged health and safety breaches he set out in the note relied on as being a protected disclosure. I considered that the videos may be relevant to the likelihood of the claimant establishing at the Final Hearing that he had believed what was set out in his note in respect of health and safety concerns and that that belief was reasonable. That was significant with regard to the likelihood of the claimant proving at the Final Hearing that he had made a protected disclosure in terms of section 103A and section 43B of the ERA. I allowed the videos to be shown, on the basis that no findings in fact would be made at this Hearing and therefore I would not be making any findings of any health and safety breach by the respondent. On that basis Ms Jenkins*" [the respondent's representative in that case] "*had no objection to the videos being viewed at the Hearing*".

14. In the instant case the respondent's representative opposed the playing of the tapes or reference to the transcripts of them made by the claimant, on the grounds that they were irrelevant to the issue before the Tribunal at the Hearing on the Interim Relief Application. As already set out above, based

on the claimant's description of what the recordings contain and unlike the Tribunal in Case Number 8000032/2023, the Tribunal in the instant case did not consider that that went to show the likelihood of the claimant proving at Final Hearing that she had either made the protected disclosures relied upon or that the principal reason for her dismissal was that she had made those alleged disclosures.

The Issue before the Tribunal for Determination

15. The issues which the Tribunal required to determine were

(a) Whether Interim Relief should be granted to the claimant, in terms of sections 128 and 129 of the ERA, pending a final determination of her complaint, directed against the respondent, that she was automatically unfairly dismissed in terms of section 103A of the Employment Rights Act 1996, that is for the principal reason that the claimant had made a protected disclosure, and

(b) In the event that Interim Relief is to be granted whether the Tribunal should order that the claimant be reinstated on particular terms and or make an Order for the continuation of the claimant's Contract of Employment.

16. The claimant and the respondent's representative each spoke to their respective written submissions which, having been mutually exchanged and submitted before the Tribunal, are not reiterated here. The claimant addressed the Tribunal first, the respondent's representative responded and the claimant exercised a limited right of reply. With the exception of the decision of Employment Judge McManus in Case Number 8000032/2023 upon which the claimant relied and which the respondent's representative urged the Tribunal to distinguish, parties were otherwise agreed as to the relevant applicable law each iterating the Applicable Law as summarised citing and relying upon

(a) the terms of sections 103A, 128 and 129 of the ERA and of the leading case authorities including:-

(1) **Taplin v Shippam Limited** [1978] IRLR 450, EAT

(2) **Ministry of Justice v Sarfraz** [2011] IRLR 562, EAT

(3) **His Highness Sheikh Khalid Bin Saqr Al Qasimi v Robinson**, UKEAT/0283/17/JOJ, Judgment, paragraph 59

(4) **Wollenburg v Global Gaming Ventures (Leeds) Limited**, EAT/0052/18 per Richardson J (penultimate paragraph)

(5) **London City Airport v Chacko** [2013] IRLR 610 at page 23 per Mr Recorder Luba QC

(6) **Parsons v Air Plus**, UKEAT/0023/16/JOJ 4 March 2016 at paragraph [8]

(7) **Dandpat v University of Bath** UKEAT/0408/09 10 November 2009 unreported

(b) sections 48A and 43C to 43H and section 43B(1) of the ERA, in relation to public interest disclosure and the authorities referred to by the respondent's representative in that regard including;

(8) **Kilraine v London Borough of Wandsworth** [2018] ICR 185

(9) **Babula v Waltham Forest College** [2007] ICR 1026

(10) **Chesterton Global Limited v Nurmohamed** [2018] ICR 731

(11) **Salisbury NHS Foundation Trust v Wyeth**, EAT/0061/15

The Applicable Law

17. Rule 95 of the ETR provides that for procedure on an Application for an Interim Relief that the Hearing should be conducted as a Preliminary Hearing

within Rules 53 to 56. The leading authorities combine in giving guidance indicating that the Judge hearing the Application should make a brisk summary assessment based on the relevant material available.

18. Such Hearings are intended to be short with broad assessments made by the Employment Judge who cannot be expected to grapple with vast quantities of material (see **Wollenburg** – No (4) on the List).

19. The circumstances in which an Application for Interim Relief can be made are set out in section 128 of the ERA; viz:-

> *"(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 … 103A, … may apply to the Tribunal for interim relief"*

20. Such an Application may be brought within 7 days of the date of dismissal as it is accepted by the respondents it has been in the instant case.

21. In order to succeed in an Application for Interim Relief a claimant must demonstrate that it is likely that in determining his or her claim a Tribunal will find that the reason or if more than one the principal reason for the dismissal was the one prescribed by section 103A of the ERA, namely that the claimant had made a protected disclosure.

22. The leading authority is **Taplin** (No (1) on the List) where the Employment Appeal Tribunal further defined "likely" as meaning "*a pretty good chance of success*". The test is that the claimant has "*a pretty good chance of success*" in establishing that the reason he/she was dismissed was that he had made a protected disclosure. In **Taplin** the EAT expressly ruled out alternative tests.

According to the EAT the burden of proof in an Interim Relief Application was intended to be greater than at a full Hearing, where the Tribunal need only be satisfied on the "balance of probabilities" that the claimant had made out his case.

23. In **Ministry of Justice v Sarfraz** (No 2 on the List) Mr Justice Underhill, then President of the EAT, commented that the test of a "*pretty good chance of success*" does not mean simply "more likely than not" but connotes a significantly higher degree of likelihood, i.e. "*something nearer to certainty than mere probability*". "A "*good arguable case*" is not enough" – see **Parsons v Air Plus** (No 6 on the List) at paragraph 18.

24. The threshold for succeeding in an Interim Relief Application is accordingly a high threshold complementing what is "an exceptional form of relief" (see **Taplin** at paragraph 19).

25. In **Dandpat v University of Bath** UKEAT/0408/09 (10 November 2009 unreported) (No 7 on the List) the EAT stated at paragraph 20:-

> "*20 … we do in fact see good reasons of policy for setting the test comparatively high, in the way in which this Tribunal did, in the case of applications for interim relief. 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 the proceedings: that is not [a] consequence that should be imposed likely".*

26. A Tribunal is not to be criticised for concluding that matters are not sufficiently clear cut at the interim relief stage for it to have sufficient confidence in the eventual outcome such as to grant interim relief (see **Parsons** No (6) on the List at paragraph 18).

27. In approaching the task:-

> "*The application falls to be considered on a summary basis. The Employment Judge must do the best he can with such*" [relevant] "*material as the parties are able to deploy by way of documents and argument in support of their respective cases … what this requires is an expeditious summary assessment by the first instance Employment Judge as to how the matters look 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 a full Hearing of the claim.*" (see **London City Airport** – No (5) above at paragraph 23).

28. In **Parsons v Air Plus** – (No (6) on the List) the EAT offered the following guidance as to approach:-

> "*On hearing an application under section 128 the Employment Judge is required to make a summary assessment on the basis of the material then before her of whether the claimant has a pretty good chance of succeeding on the relevant claim. The Judge is not required (and would be wrong to attempt) to make a summary determination of the claim itself. In giving reasons for her decision, it is sufficient for the Judge to indicate the essential gist of her reasoning": this is because the Judge is not making a final Judgment and her decision will inevitably be based to an extent on impression and therefore not susceptible to detailed reasoning; because, as far as possible, it is better not to say anything which might prejudge the final determination on the merits.*"

29. In **Al Qasimi v Robinson** (No (3) on the List) at paragraph 59 the EAT said the following regarding approach:-

> "noting that the Tribunal is only to make a summary assessment of the strengths of the case the EAT said, that it was:-
>
> > "*very much an impressionistic one: to form a view as to how the matter looked, as to whether the claimant had a pretty good chance and was likely to make out his case, and to explain the conclusion reached on that basis; not in an overformulistic way but giving the essential gist of his reasoning sufficient to let the parties know why the application has succeeded or failed giving the issues raised and the test to be applied.*"

30. The burden of proof sits with the claimant throughout who must succeed in each element of the claim. As Underhill P expressed the position in **Ministry of Justice v Sarfraz** (No (2) on the List):-

> "In order to make an Order under section 128 and 129 the Judge had to have decided that it was likely that the Tribunal, at the Final Hearing, would find 5 things:
>
> (1) That the claimant had made a disclosure to his employer;
>
> (2) That he believed that the disclosure tended to show one or more of the things itemised at paragraphs (a) to (f) under section 43B;
>
> (3) That that belief was reasonable;
>
> (4) That the disclosure was made in good faith; and

(5) That the disclosure was the principal reason for his dismissal

31. Since the decision in **Sarfraz** the good faith test is one which is now only relevant to Remedy. It has been replaced with the test of whether the applicant reasonably believed the disclosure to be in the public interest.

32. It is a requirement that the disclosure is of information and not simply the making of an allegation or statement of opinion, albeit that the distinction is not always an easy one to draw and a disclosure of information may be made alongside the making of an allegation.

33. It is a requirement that the claimant reasonably believes the disclosure to be made in the public interest albeit that this does not have to be his or her predominant motive for making it.

34. Under section 48A of the ERA a "protected disclosure" is defined as a "qualifying disclosure" which is disclosed in accordance with sections 43C to 43H of the Act. Section 43B(1) of the ERA defines a qualifying disclosure as follows:-

*"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) that a criminal offence has been committed, is being committed or is likely to be committed,
(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) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed."

35. Disclosure of information should be given its ordinary meaning, which revolves around conveying facts. It is possible an allegation may contain information whether expressly or impliedly. In **Kilraine v London Borough of Wandsworth** [2018] ICR 185 (No (8) on the List), the English Court of Appeal said that in order for a statement or disclosure to be a qualifying disclosure, it had to have sufficient factual content and specificity such as is capable of tending to show one of the matters listed in sub section (1) – (of section 43B). There is no rigid distinction between allegations and disclosures of information.

Discussion and Determination

36. In terms of **Ministry of Justice v Sarfraz**, the first question to be subjected to the test incorporated in sections 128 and 129 of the ERA as further defined in the case authority is:-

(1) That the claimant had made a disclosure to his employer.

37. It was a matter of concession on the part of the respondent that in the event that the Tribunal were to hold that the claimant had made a qualifying disclosure it would fall to be regarded as a protected disclosure.

38. In the course of the Hearing some confusion arose as to what were the alleged disclosures upon which the claimant gave notice of founding as protected disclosures for the purposes of her complaints. In her initiating Application ET1 at page 7, section 8.2 the claimant gives unequivocal notice

of founding upon two disclosures for the purposes of her claim being disclosures respectively made on the 27th and 28th of February 2024 to the Information Commissioner's Office (and the second possibly also to the Solicitors Regulatory Authority of England and Wales). In the same section of her ET1 the claimant also made reference to having "raised concerns to the ICO, the Health and Safety Executive (HSE) and the Equality and Human Rights Commission (EHRC) "*since 13th of February 2024*". The claimant also made such additional reference in the course of her primary submission.

39. At section 8.2 at page 7 of her initiating Application ET1 the claimant makes reference variously to communications with the Information Commissioner's Office ("ICO") on 27 February 2024 and the SRA (the Solicitors Regulatory Authority) undated but subsequently identified and produced by her as on the 28th of February 2024, "*for not complying with Code and not adhering to AP processes and falsifying documents ... I raised concerns to the ICO, HSE (Health and Safety Executive), EHRC (Equality and Human Rights Commission) since 13 2 2024*". What is in total a 10 line paragraph concludes in the last 3 lines with "*I am applying for interim relief application under section 103A Employment Rights Act ("ERA") the principal reason of my dismissal is because of making protected disclosures in good faith with relevant evidence to government bodies and I followed company procedure and was retaliated against."* In her submissions before the Tribunal the claimant also made reference to having been given notice/summoned to what she described as a disciplinary meeting on the 14th of February 2024 on the day after she raised concerns of discrimination in the work place "*amongst other concerns to the CEO of the respondents Andy M*".

40. However, the claimant removed the earlier arising ambiguity by stating and emphasising that whereas she had made mention of raising concerns on or around the 13th of February 2024 the only alleged disclosures which she gave notice of founding upon for the purposes of her complaint of automatic unfair dismissal and for the purposes of her Application for Interim Relief were:-

(1) That said to be constituted by her email communication of the 27th of February 2024 timed at 3.58 pm sent to the Information Commissioner's Office and copied to the respondents which is produced by the claimant amongst her miscellaneous documents sent to the Tribunal, and is in the following terms:-

> "*Good afternoon ICO*
> *As outlined in my email of the 16 2 2024, see evidence that User Testing and various employees are not complying with data protection laws and have breached confidentiality and GDPR. I have come across a lot of confidentiality documents that are not redacted and held in a public forum for everyone to see and which contains sensitive information of employees. I am reporting ethical violation of User Testing Code of Conduct and Employee UK Guidebook and reporting this as per whistleblowing policy and their own policy in which HR and CEO documented that people should speak up in case of these breaches and without fearing of retaliation.*
> *S"*

And,

Second, that said to be constituted by her email communication to the Solicitors Regulatory Authority in England and Wales and timed at 14:20 on the 28th of February and copied to the respondents and which is produced by the claimant amongst the miscellaneous documents sent by her to the Tribunal and is in the following terms:-

> "*Employees still worked despite expired contract – raising these concerns in the public interest and in good faith –"*

41. The claimant confirmed that that indeed was her position, namely that she did not found or seek to found upon any disclosures other than those of the 27th and 28th February for the purposes of her claim when asked by the Tribunal,

to confirm its understanding of what she had said. It is accordingly the identified and confirmed alleged disclosures of 27th February to the ICO and 28th February to the SRA that require to be considered for the purposes of today's Hearing. While, as is recognised in the authorities, there is no clear dividing line between allegations which do not amount to disclosures for the purposes of qualifying for protection in terms of the statutory regime, on the one hand, and the 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 matters itemised in section 43B(1) of the ERA, in the instant case that a person has failed, or is failing or is likely to fail to comply with any legal obligation to which he is subject, on the other, the position is insufficiently clear cut at this Interim Relief stage, upon the material presented for the Tribunal to form the view on the summary assessment which it makes, that the claimant is likely to establish at a full Hearing; firstly that she made disclosures which were both disclosures and qualifying disclosures for the purposes of section 42A of the ERA and separately, let it be assumed that she did, that she will succeed in establishing, at a Final Hearing, that the principal reason for her dismissal was that she made one, or other, or both of the alleged disclosures on which she confirms she relies such as to allow the Tribunal to have sufficient confidence in the eventual outcome to grant relief.

42. In exercising her limited right of reply the claimant also emphasised that the respondents had already taken the decision to dismiss her before the meeting scheduled for 14th of February 2024, which did not proceed because it was postponed at her request so that she could arrange for the attendance of her Trade Union representative, But for that postponement, she submitted she would have been sacked on the 14th of February 2024 had the meeting proceeded. The claimant was adamant that she was in no doubt that the decision to dismiss her had already been taken by the 14th of February and it was delayed until the 28th of February only because the probationary review meeting was delayed/postponed until that date.

43. Separately, the Minutes of the Probation Review Hearing, produced at pages 168 to 180 of the Bundle, record that the respondent's Dismissing Officer Ms Hilo took the decision to dismiss the claimant shortly after the meeting, which commenced at 11 am, on the 28th February 2024 and adjourned at 12:05 with the intention to reconvene once a decision had been made as to next steps. Having taken the decision to dismiss the claimant, the respondent sought to reconvene the meeting in the course of the working day on 28th February, to inform the claimant of the decision but was informed by the claimant's Trade Union representative that she was unavailable. The decision to dismiss was accordingly communicated to the claimant by letter dated 29th February 24 which is produced at pages 181 to 182 of the Bundle. The alleged protected disclosure, to the Information Commissioner's Office, of 28th February, upon which the claimant founds and which is produced at pages 228 and 229 of the Bundle does not bear to have been sent by the claimant, and copied to the respondents (on 2 occasions) until 18:24 and 19:01 that evening respectively; that is, at times after the decision to dismiss the claimant was taken by the respondent's Dismissing Officer.

44. I am unable to form a view, in those apparent circumstances and on the material available, that the claimant is likely to establish at a full Hearing that the principal reason for her dismissal was an alleged disclosure contained in the communication sent by her to the ICO at 18:24 and again at 19:01 on the 28th of February 2024.

45. The first of the alleged disclosures founded upon, that of the 27th of February, apparently sent twice to the ICO and or to the SRA at 15:59 and 16:03 on the 27th of February and produced at pages 219 and 223 of the Bundle are communications sent before the date and time on and at which the respondent took the decision to dismiss. There is nothing in the material presented, however, which goes to suggest that either of those communications had been brought to the notice of the decision taker Miss Hilo prior to her decision to dismiss the claimant. The notes (Minute) of the probationary review meeting of 28th February (pages 168 to 180 of the Bundle) do not contain reference by any of those participating, including both

the claimant and her Trade Union representative, to the alleged disclosure of 27th February 2024. Other than the fact that the alleged disclosure of 27th February was made in the afternoon of the preceding day there is nothing in the material presented which goes to suggest or from which inference might be drawn that the principal reason for the claimant's dismissal was the fact of her having made that disclosure. The claimant's own positions in submission, that she was certain that the decision to dismiss her had been taken on the 14th of February prior to the probationary review meeting originally set down for that date and, but for the rescheduling of the meeting at her request, that the decision to dismiss her would have been communicated to her then, if anything, would tend to suggest or give the impression that the making by the claimant of the alleged disclosure of 27th February 24 was not the reason, let it be assumed that the communication was to be found to meet the requirements firstly, of a disclosure and secondly, a qualifying disclosure for the purposes of the statutory provisions.

46. It may be that at a Final Hearing the claimant may succeed in establishing that the alleged disclosure of 27th February indeed met the requirements of a disclosure and of qualification for protection and further that the fact of her having made that disclosure was known to the Dismissing Officer and further that it was the principal reason for her dismissal rather than those enumerated in the written reasons for dismissal provided to her on the 29th of February 24. Matters are not sufficiently clear cut at this Interim Relief stage, however, for the Tribunal to have sufficient confidence in the eventual outcome such as to grant Interim Relief. On the material and apparent circumstances presented. I am unable to form the view that the claimant is likely, that is to say has a pretty good chance (**Taplin v C Shippam Limited**) being something nearer to certainty than mere probability (**Ministry of Justice v Sarfraz**) of successfully establishing those matters, to say nothing of the other requirements that she believed that it tended to show one or more of the matters itemised in section 43B(1), that her belief in that was reasonable and that the disclosure was made in the public interest.

47. Separately, in relation to the question of causation the material presented does not appear to go to suggesting that either of the two disclosures, confirmed by the claimant as those founded upon, or for that matter any of the "*other concerns*" raised to which the claimant makes reference at section 8.2 of her ET1 but which she expressly stated in the course of her submissions that she did not rely upon for the purposes of her claim or Application for Interim Relief, are likely to be established as the principal reason for her dismissal. The documentary material presented, excluding the witness statement of Miss Hilo appears to support a view that the reason for dismissal is that advanced by the respondent.

48. In exercising her right of reply the claimant expressed concern at the reliance which the respondent's representative sought to place upon the witness statement of Miss Hilo which was included in the respondent's Hearing bundle. She made the point that at a Hearing which, in terms of Rule 95 oral evidence is not to be given, reliance by the respondents upon a witness statement was both unfair and resulted in her not being placed, as a party litigant, on an equal footing with the respondents. She separately urged the Tribunal to disregard the witness statement on the grounds that it was untruthful.

49. The claimant is accurate in her description of the effect of Rule 95, namely "*… Rules 53 to 56 apply to the Hearing and the Tribunal shall not hear oral evidence unless it directs otherwise"*. The Tribunal had not directed that evidence in chief of witnesses might be received by way of witness statement. The explanation for the presence in the Bundle of a witness statement may lie in the fact that in England and Wales the taking of evidence in chief by witness statement is a default setting in civil proceedings whereas in Scotland, including in the Employment Tribunal, there is still adherence to the best evidence rule.

50. By way of reassuring the claimant that she was not disadvantaged by the presence or reference by the respondent's representative to the witness statement the Tribunal makes clear that in determining the Application for

Interim Relief, it has placed no reliance upon the witness statement beyond taking account of the fact that there is nothing in it, perhaps unsurprisingly, which goes to support the claimant's contention that the principal reason for her dismissal was the making of a protected disclosure. As has been set out above, the onus of proof on an Interim Relief Application does not sit with the respondent to establish that the principal reason for dismissal was that which the respondent asserts. Rather, the onus sits with the claimant to show that it is likely that she will succeed in establishing all of the elements itemised and confirmed by the EAT in **Al Qasimi v Robinson** and **Ministry of Justice v Sarfraz**. On the materials presented, and setting aside entirely the contents of the witness statement of Miss Hilo, and on the submissions made, the Tribunal has been unable to form the view that the claimant has discharged that onus and accordingly the Application for Interim Relief is refused.

J d'Inverno

Employment Judge

28 March 2024

Date of Judgment

Date sent to parties 28/03/2024

I confirm that this is my Judgment in the case of Messi v User Testing Limited and that I have signed the Judgment by electronic signature.