EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mr C Beevers	**v**	**(1) FICC Markets Standards Board Limited** **(2) Mr J Yallop** **(3) Mr G Harvey** **(4) Mr C Nichols** **(5) Mr S O'Connor**

Heard at: London Central
On: 3 September 2019

Before: Employment Judge Hodgson

Representation

For the Claimant: Mr M Paulin, counsel
For the Respondents 1,2, 4, and 5: Ms D Sen Gupta, QC.
Respondent 3: did not attend

DECISION

The claim for interim relief fails and is dismissed.

REASONS

Introduction

1. The claimant was employed by the first respondent from 12 June 2017 until 29 June 2019. The claimant alleges that his employment was terminated because he made protected disclosures. In addition, he

alleges detriment for making protected disclosures and brings a claim of wrongful dismissal.

2. He issued proceedings in the London Central Employment Tribunal on 5 July 2019. He applied for interim relief; it is that application with which I am concerned.

3. When there is a claim of automatic unfair dismissal contrary to section 103A Employment Rights Act 1996 (generally referred to as dismissal for whistleblowing), section 128 of the same act gives a right to bring a claim for interim relief.

> **(1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed by his employer 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.**

4. Interim relief is an exceptional form of relief granted pending determination of a complaint of unfair dismissal see **Taplin v C Shippam Ltd** [1978] ICR 1068. It is common ground that **Taplin** remains good law. When considering whether it is likely the claimant will succeed, it is not enough to show a likelihood on the balance of probability. The claimant must show that his case has "a pretty good chance of" of success.

5. The principles are reviewed and summarised by the Employment Appeal Tribunal in **London City Airport Ltd v Chackro** [2013] IRLR 610:

> **10. The correct approach to be applied to the meaning of "it is likely" has been a matter of some controversy. It has been argued by some, not least in the relevant passages in *Harvey on Industrial Relations and Employment Law*, that it will be sufficient for the employee to show that, on the balance of probabilities, he or she is ultimately going to win at the subsequent unfair dismissal hearing. However, the weight of authority is against a simple balance of probabilities approach. As long ago as the decision of this Employment Appeal Tribunal in Taplin v C Shippam Ltd [1978] ICR 1068 it was held 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. While that cannot substitute for the statutory words, it has been the guiding light as to the meaning of "likely" in this context that has been applied over the subsequent three of more decades by the EAT. As recently as November 2009, this EAT in a constitution presided over by the then President, Underhill J, upheld the Taplin approach: Dandpat v University of Bath [2009] UKEAT/0408/2009. In that case, the appellant had sought to contend that the authority of Taplin had been undermined by a decision of the House of Lords. This EAT rejected that submission and in due course, held as follows:**
>
> > **"Taplin has been recognised as good law for 30 years. We see nothing in the experience of the intervening period to suggest that**

> **it should be reconsidered. On ordinary principles we should be guided by it unless we are satisfied that it is plainly wrong. That is very far from being the case. 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 required 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 lightly." [20]**

6. The EAT also gave some guidance on the approach to be taken at paragraph 23:

> **23. In my judgment the correct starting point for this appeal is to fully appreciate the task which faces an employment judge on an application for interim relief. The application falls to be considered on a summary basis. The employment judge must do the best he can with such material as the parties are able to deploy by way of documents and argument in support of their respective cases. The employment judge is then required to make as good an assessment as he is promptly able of whether the claimant is likely to succeed in a claim for unfair dismissal based on one of the relevant grounds. The relevant statutory test is not whether the claimant is ultimately likely to succeed in his or her complaint to the Employment Tribunal but whether "it appears to the tribunal" in this case the employment judge "that it is likely". To put it in my own words, what this requires is an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material that he has. The statutory regime thus places emphasis on how the matter appears in the swiftly convened summary hearing at first instance which must of necessity involve a far less detailed scrutiny of the respective cases of each of the parties and their evidence than will be ultimately undertaken at the full hearing of the claim.**

7. An interim relief hearing is envisaged to be a summary process. There is no specific requirement on either party to provide evidence.[1] Moreover, it is possible that an interim relief hearing would occur even before the time for filing a response has expired.

8. Rule 95 Employment Tribunal Rules of Procedure 2013 applies rules 53 – 56 relating to preliminary hearings to interim relief applications. It specifies the tribunal shall not hear oral evidence, unless it directs otherwise.

9. The substantive law relating to whistleblowing needs to be considered.

10. Under section 43A Employment Rights Act 1996, a worker makes a protected disclosure in certain circumstances. To be a protected disclosure, it must be a qualifying disclosure. Qualifying disclosures are identified in section 43B Employment Rights Act 1996:

[1] Unusually in this case, the claimant sought a witness order for an ex-colleague Mr McClean, which was rejected by EJ Tayler; however, EJ Tayler later ordered Mr McClean to provide a witness statement, to both parties, in respect to his knowledge of the relevant disclosure. The claimant's view about this at the hearing was unclear. I invited the claimant to make an application if it was in the interests of justice to vary the order. No request to vary the order was made.

> **(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, or is likely to be deliberately concealed.**
>
> **(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.**
>
> **…**
>
> **(5) In this Part 'the relevant failure', in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).**

11. The following questions must be addressed: first, is there a disclosure of information; second, does the disclosure of that information tend to show one of the matters referred to in section 43B(1)(a)-(e); third, what was the belief of the employer making the disclosure; and fourth, was the belief that there was a public interest reasonably held. All of these elements must be satisfied if the claim is to succeed at a final hearing.

12. 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. (see **Kilraine v Wandsworth LBC** [2018] EWCA Civ1 1436). Each case will turn on its own facts.

13. It may be possible to aggregate disclosures, but the scope is not unlimited, and it is a question of fact for the tribunal.

14. It may be necessary to indicate the legal obligation on which the claimant is relying, but there may be cases when the legal obligation is obvious to all and need not be spelled-out (see **Bolton School v Evans** [2006] IRLR 500 EAT). However, where the breach is not obvious, the claimant may be called upon to identify the breach of obligation that was contemplated when the disclosure was made. It may be necessary to identify a legal obligation (even if mistaken), as opposed to a moral or lesser obligation (see **Eiger Securities LLP v Korshunova** [2017] IRLR 115, EAT.)

15. The reasonable belief of the worker must be considered. The test is whether the claimant reasonably believed that the information 'tended to show' that one of (a) to (f) existed; the truth of disclosure may reflect on the reasonableness of the belief.

16. Reasonable belief is to be considered by reference to the personal circumstances of the individual. It may be that an individual with specialist or professional knowledge of the matters being disclosed may not have a reasonable to belief, whereas a less informed, but mistaken individual might. Each case must be considered on its facts.

17. The public interest element was added in 2013 in order to reverse the decision in **Parkins v Sodexho Ltd** [2002] IRLR 109, EAT. This has been considered by the CA in **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ979. Underhill LJ gave the lead judgment in the Court of Appeal and addressed whether a disclosure made in the private interest of the worker may also be in the public interest, because it serves the interests of other workers as well (see Underhill LJ, paragraph 32). Underhill LJ declined to interfere with the tribunal's decision and set out his reasons at paragraph 37.

> **.. the correct approach is as follows. In a whistleblower case 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 Mr Laddie's fourfold classification of relevant factors which I have reproduced at para. 34 above may be a useful tool… but that is subject to the strong note of caution which I have sounded in the previous paragraph.**

18. Underhill LJ expressly refused to rule out the possibility that a disclosure of a breach of a particular worker's contract will not be in the public interest. At paragraph 36 he stated:

> **…I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the Parkins v Sodexho kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because 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 – even, as I have held, where more than one worker is involved. But I am not prepared to say never…**

19. I would observe in Mr Beevers' case, it is not clear how far the claimant relies on a breach of his own contract, but if he does, the disclosure could be in the public interest.

20. The tribunal must consider all the circumstances, Underhill LJ also gave some general guidance. Starting at paragraph 26, he dealt with some

"preliminaries." He reiterated that the tribunal must first ask whether the worker believed, at the time he was making the disclosure that it was in the public interest and if so, whether that belief was reasonably held. At paragraph 27 he stated:

> **First, and at the risk of stating the obvious, the words added by the 2013 Act fit into the structure of section 43B as expounded in Babula ... The tribunal thus has to ask (a) whether the worker believed, at the time that he was making it, that the disclosure was in the public interest and (b) whether, if so, that belief was reasonable…**

21. At paragraph 28 he noted that it was not for the tribunal to substitute its own view, but stated that importing tests from other areas of law may not be helpful.

> **…I do not believe that resort to tests formulated in different contexts is helpful. All that matters is that the tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking…**

22. When considering the dismissal, it is necessary to consider the thought processes of the individual or individuals who dismissed.

23. The claimant relies on the case of **Kuzel v Roche Products** [2008] ICR 799, in which LJ Mummery gave the leading decision.

24. The relevant sections as follows:

> **52. Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.**
> **53. Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.**
> **54. Fifthly, the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.**
> **…**
> **56. I turn from those general comments to the special provisions in Part X of the 1996 Act about who has to show the reason or principal reason for the dismissal. There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant…**
> **57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
> **58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and**

> **to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.**
> **59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.**
> **60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.**

25. In order to determine this interim relief application, it is necessary to take a view on the likelihood of the 103A claim succeeding. I am considering how the case appears to me at present, and then I am projecting forward to consider the likely findings of the final tribunal. This involves considering what must be established, forming views on both the likely strength of the evidence, and how that evidence will be interpreted.

26. For the purposes of this application, it is necessary for me to identify the main points about which the tribunal must be satisfied before a claimant can succeed. I should then consider the nature of the dispute in relation to each matter and the likelihood of the issue being decided in the claimant's favour.

27. First, there must be a disclosure of information. There is a dispute concerning this.

28. Second, the disclosure of information must be protected. In order for it to be protected, it is necessary to look at the thought processes of the claimant at the time when the disclosure was made. In this case, there are two specific disputes. First, at the time of the disclosures, whether in the reasonable belief of the employee the factors stated in 43B (1) (a) – (f) applied. Second, were the alleged disclosures made in the public interest.

29. Third, one or more of the protected disclosures must be the sole or principal reason for the dismissal. It is for the final tribunal to decide, as a question of fact, what is the reason for dismissal. In deciding that reason, it may be appropriate to draw secondary inferences from primary findings of fact. The reason for dismissal is disputed. I must ask if it appears to me likely that the final tribunal will draw an inference, or find directly on the primary finding of fact, that the sole or principal reason for dismissal was the protected disclosure.

The hearing

30. At the commencement of the hearing, the respondent objected to the hearing proceeding in public. This led to an application, which I considered. I decided that interim relief applications are a form of preliminary hearing in which a preliminary issue is determined. It follows that the hearing shall be in public. I gave oral reasons. There was no request for those reasons.

31. Following that ruling, the respondents[2] made an application pursuant to rule 50 Employment Tribunal Rules of Procedure 2013 for that to be anonymisation, at least for the purposes of the interim relief hearing, of three banks, referred to during the application as A, B and C. I considered that application over lunch and on resuming at 14:00, I gave a further full oral judgment rejecting that application. I was not asked for reasons.

32. It follows the hearing proceeded in public; no documents were redacted.

33. Before me, I had the claimant's ET1 and various ET3s filed on behalf of the respondents. The third respondent was not represented. The remaining respondents were represented by Ms Sen Gupta, QC.

34. The schedule to the claim form is detailed. It is 31 pages long and contains 63 paragraphs.

35. I was principally concerned with the response of the first respondent; the grounds of resistance were 20 pages long, and very detailed.

36. In addition, the claimant relied on two statements: his own (running to 62 pages), and Mr Maclean's.

37. The respondent relied on two statements form two witnesses: Mr David O'Connor (who is the person said to have decided to dismiss), and Mr Mark Yallop.

38. In addition, I received four bundles of documents. The first bundle contained the witness statements and pleadings. The three remaining bundles contained documentation which would normally be provided on disclosure. There were over 1400 pages of documents.

<u>The claimant's proposed approach</u>

39. The claimant invites me to read all of the documents as disclosed. It is his case that I should note the factual basis said to support his case and take the view that the tribunal which hears his claim will accept his factual account. It is asserted that the factual account, as contended for by the claimant, will lead the tribunal that hears the claim to draw inferences from

[2] Ms Sengupta QC made the application for the respondents 1, 2, 4, and 5. In these reasons when I refer to respondents, I am referring to all respondents, other than respondent 3, unless I state otherwise.

those primary findings of fact which will lead it to conclude that the sole or principal reason for dismissal was the making protected disclosures.

40. It is less clear to me whether the respondents agree with that approach. In any event the respondents say that there are significant disputes relating to the relevant factual circumstances, the honesty of the claimant, what direct evidence exists in relation to the dismissal, and what inferences may be drawn. In short, it is the respondents' position, whatever approach I take, and in whatever detail I look at the papers, that it is obvious I cannot say the claim is likely to succeed, as the factual position is fundamentally uncertain, and there is a real prospect of the respondent, at the very least, undermining the claimant's factual assertions.

41. I have serious reservations about the claimant's approach. The determination of an interim relief application, is, essentially, a summary procedure. Whilst it is possible that evidence can be called, and cross examination could take place, oral evidence can shall not be heard, without permission.[3] I have considered the witness statements. They have added nothing material to the claim form and the response. The statement from Mr McClean has been of no assistance. I do not consider it would have been appropriate for him to give oral evidence, as must have been envisaged when the application for a witness order was made.

42. As normally there will normally be no oral evidence, normally there will be not cross-examination. It follows that it is envisaged the evidence will not be tested. Put simply, interim relief applications are not mini-trials based on tested evidence.

43. There may be cases where the main relevant facts are clear or undisputed. The key factual circumstances may be supported by cogent and unambiguous documentation. There are other cases where there is a lengthy history of dispute, including allegation and counter allegation. There may be multiple grievances and complicated disciplinary investigations and procedures. It is important when considering an application for interim relief to have regard to the range of potential findings of fact by a tribunal that hears the final claim. It may not be appropriate for me to assume that either one side or the other will establish the factual matrix for which it contends.

<u>The relevant background</u>

44. The first respondent is an organisation that was established in 2015, as a private sector response to the conduct problems revealed in global wholesale fixed income currency and commodities markets (FICCI). Its function is to help raise standards. The claimant was employed as a senior technical adviser. It is the claimant's case that he, in addition to his

[3] See rule 95 Employment Tribunal Rules of Procedure 2013.

work for the first respondent, also provided expert evidence in various cases.

45. His claim form states he was employed under the terms of an oral contract in May 2017. He states the terms of that contract were recorded in a written employment contract concluded on 28 March 2018. He states that "the context to the formation of an agreement to his contract of employment… included transparent reference to and knowledge of his activities as an expert witness."[4] The claim form goes on to say, "the claimant further avers that during the course of his employment the first respondent… accepted his work as an expert witness, gave express and/or implied permission for such work, and in fact permitted such work to occur within the claimant working hours."[5]

46. The claim form falls short of stating that he gave any list of the matters in which he was currently involved, when he started his employment.

47. It is the claimant's case that, in fact, he was involved in litigation in America involving the Deutsche Bank. He was an expert witness. It appears to be common ground that on 6 June 2018, the Deutsche Bank contacted the first respondent, and stated there was a conflict-of-interest arising due to the claimant providing expert witness evidence on behalf of Axiom Investment Advisors LLC and others. The claimant would have given expert evidence against the Deutsche Bank. I understand that the case in America has since settled.

48. It is the claimant's case that this led to pressure being applied to the respondent, and the respondent dismissed him as a result of that pressure. It is in this context that the claimant says he made protected disclosures. His claim form states the following, "in response to the pressure being placed on the claimant to withdraw as an expert witness, the claimant made the following protected disclosures."[6] The first protected disclosure relied on was made on 14 June 2018. This concerned alleged improper pressure placed upon him by Mr Harvey on or around 7, 8, 11 and 12 June 2018. The improper pressure was to withdraw from giving expert witness evidence in the Axiom case. It follows that there were no protected disclosures prior to Deutsche Bank raising its concerns.

49. He then relies on various further protected disclosures leading up to 1 August 2018, all of which are concerned with the alleged attempts by Deutsche Bank to, as he puts it to, "intimidate him as a witness in the proceedings."[7] He says that the action of Deutsche Bank was tampering with a witness, and that it was unlawful. It appears to be his case that the response of the first respondent was also unlawful, in some sense,

[4] Claim form paragraph 13
[5] Claim form paragraph 16
[6] Claim form paragraph 25
[7] Claim form paragraph 25.3

because the pressure from Deutsche Bank amounted to tampering with a witness. I do not need to explore this further.

50. It is common ground that he was suspended on or about 17 August 2018.

51. Following the suspension, Mr Thomas Ogg, a barrister, was appointed by the first respondent to investigate the allegations against the claimant as set out in the suspension letter of 17 August 2018.

52. It is clear that the allegations were serious. They include the following: failing to disclose, when seeking an appointment with the first respondent, his involvement in the Axiom litigation; by not devoting his full-time and attention to the first respondent; failing to report his wrongdoing to the CEO; failing to promote the interests of the first respondent; and misleading the first respondent on more than one occasion.

53. The investigation process was lengthy and it lasted several months. It led to a detailed investigation report which was critical of the claimant.

54. Thereafter, this led to a disciplinary process. During the course of that disciplinary process, the claimant made further alleged protected disclosures. These included the alleged doctoring of his contract of employment, others concerned the process itself. I do not need to consider them in detail.

55. The disciplinary proceedings were conducted by Mr O'Connor. At the heart of that investigation was the claimant's involvement in the Axiom case. There were other matters arising which concerned further conduct of the claimant: including involvement in a JP Morgan case; sending an inappropriate email; failure to cooperate during investigation; and failing to disclose covert recordings.

56. By letter of 23 January 2019 the claimant was required to attend at a disciplinary hearing. The allegations were set out.

57. The claimant criticises the length of the investigation. It is respondent's case that the investigation filled 50 folders each of 250 pages. Many witnesses were interviewed. This led to a lengthy report.

58. The disciplinary hearing was delayed, at least in part, because of the claimant's medical health. The first meeting took place on 21 March 2019. There was a second meeting on 4 April 2019, and a third and final disciplinary hearing on 14 May 2019. It is the respondent's case that Mr O'Connor made a number of findings, which I should summarise briefly as follows: the claimant had been dishonest with Mr Yallop in relation to the requirement to give evidence in the Axiom case; the claimant made false and misleading statements to Mr Lavender in relation to his involvement in the Axiom case; the claimant failed to inform the first respondent of the hearing on 21 August 2018 in the Axiom case; the claimant concealed work undertaken in a JP Morgan case; the claimant failed to deal openly

with the first respondent by failing to inform it of the scheduled JP Morgan case; the claimant circulated an anonymous email attaching advice of Howard Kennedy with the intention of destroying the confidential nature of that email and using it to his advantage; and the claimant failed to cooperate with the investigation by not disclosing covert audio recordings.

59. The claimant has appealed the decision and the appeal has yet to be heard.

60. It follows that at the heart of this case there is a dispute about what was agreed concerning the claimant acting as an expert witness, what information was supplied by the claimant and when, and whether the first respondent's reaction to the complaint by Deutsche Bank was appropriate. I note that there are other matters relied on, but for my purposes it is sufficient to identify the central issues.

61. It is common ground that there is no protected disclosure made prior to the first respondent being notified by the Deutsche Bank of its concerns.

62. It is appropriate that I should review the strength of the case in relation to the main points which need to be decided as they appear to me.

63. Has there been a disclosure of information? The claimant seeks to rely on numerous alleged protected disclosures. The initial disclosures arise out of the first respondent's reaction to the concerns raised by Deutsche Bank. I have been taken to evidence which demonstrates that, at the very least, the question of resignation was raised. The claimant categorises this as improper pressure. In essence, the claimant's position is that he is raising a concern about pressure being placed on him. He alleges the pressure has the effect of requiring him, or encouraging him, to cease to act as a witness or in the alternative to resign. It appears likely that he will show that he made the allegation and that it contained sufficient detail to be seen as a disclosure of information. It follows, it seems to be likely that he will demonstrate that there was a disclosure of information.

64. The second question is whether the disclosure of information is protected? It appears to me that there are greater difficulties with this. It is the respondent's position that it received from Deutsche Bank sensitive confidential information, necessary for fulling its role with the Deutsche Bank, to which the claimant had access. This raises very serious questions. In order to be an expert witness, it is necessary to be independent. If an individual works for a company, and is directly or indirectly involved in providing services to a particular organisation such as a bank, it may be inappropriate for that individual to be involved in litigation as an expert witness against the organisation. At the very least, there would be a risk that the expert’s independence would be challenged at trial. Moreover, there is a risk of the individual, whether consciously or otherwise, inappropriately using information which has been supplied in the context of the business relationship. Put simply, there is a real prospect of conflict.

65. The claimant was a senior employee who can be expected to have a detailed understanding of his role as an expert witness and a sophisticated appreciation of what should be appropriate conduct for an expert witness. This is relevant to two points. First, to the extent the claimant asserts in a disclosure that there is some potential wrongdoing by the respondent, it must be taken that he understands the complexity of the situation, and the possibilities of actual, or perceived, conflict. This is relevant when considering whether in the reasonable belief of the claimant that any of the matters detailed at 43B (1)(a) – (f) Employment Rights Act 1996 applied. Second, it may be necessary to consider carefully the claimant's motivation. I presume as an expert witness he was paid. It appears to be his position that he should have continued as an expert witness, and clearly, he resisted any suggestion that there was a difficulty, and that he should not be allowed to continue in both roles. This leads me to question whether he was making the disclosures in the public interest, or whether the motivation was his private interest. It is possible that, even if he were acting in his own interest, there may be a wider public interest. It is clear that the claimant did not immediately report to the lawyers involved in the American litigation the intervention of Deutsche Bank, and it may be necessary to consider why he delayed. I have serious doubts both as to whether he had a reasonable belief that the disclosures tended to showed any of the relevant actual potential or wrongdoing as envisaged by section 43B(1), and whether the disclosures were made in the public interest.

66. The third question is whether any protected disclosure was the sole or principal reason for the dismissal? The claimant's case on this is that such a finding will depend upon what the appropriate secondary inferences to be drawn from the primary findings of fact. During submissions, I noted that the claimant was accused of dishonesty. I enquired what would be the effect on the likelihood of drawing of inferences if such dishonesty were to be found as a fact. I received no satisfactory response. I would observe that the claimant is accused of dishonesty, and such dishonesty underpins the alleged reason for dismissal. The dishonesty alleged against the claimant is significant and wide ranging. It starts at the beginning of his employment, when it is alleged he materially failed to disclose his involvement in the Axiom case. There is further alleged concealment in relation to a JP Morgan case. It is alleged the claimant acted dishonestly in circulating an email with confidential information. It is said that he was dishonest in the way he concealed information. These are very serious allegations.

67. It is important to step back from the detail of this case. The respondent is involved in seeking to raise standards of conduct in global wholesale markets. It is important that individuals involved in the respondent should demonstrate integrity and honesty. The claimant's case falls short of asserting he gave full and frank disclosure of all his involvements as an expert witness at all material times. Instead, he seems to suggest that it was accepted, as a general principle, that he could act as an expert

witness. This potential lack of full and frank disclosure is a serious tension in this case and is problematic. The question of whether he could, in principle, act as an expert witness is a different question to that of whether it is appropriate to act as an expert witness in any particular case. Where there is a clear conflict, it may be legitimate to address that conflict, particularly if the first respondent learns about the potential conflict from a third party.

68. There are real questions about the claimant's conduct in this matter. There may be reasonable and appropriate answers. On the evidence I have been taken to and having regard to the way in which the case is put in the claim form, there is a real prospect of the respondent establishing a degree of dishonesty on the claimant's part. If such dishonesty were established, it is likely be very difficult to persuade a tribunal to draw the inferences which the claimant says are necessary to establish his case.

69. I have considered the reasons put forward by the respondent. If the tribunal decides that there were proper facts on which Mr O'Connor could have formed his alleged views, it is likely that the tribunal will find that he genuinely believed the claimant had been dishonest, and genuinely have dismissed for the reasons given.

70. I should note that I have been invited to consider, in detail, the various witness statements, and all of the documents. It is not necessary for me to set out in detail all of the documents to which I have been taken and demonstrate my interpretation of each and every document. The claimant's case proceeded on the basis that he had an absolute right to act as an expert witness against Deutsche Bank and the respondent should have no grounds for complaint. The fact that the respondent did raise concerns, and alleged dishonesty, which it says formed part of the reason for dismissed, is not in dispute. The claimant's case makes the assertion it is obvious that the first respondent was wrong to suggest that he had undertaken any wrongdoing, and as he had raised it is an alleged protected disclosure, it must follow that he was dismissed for whistleblowing.

71. There is a real prospect, in my view, of a tribunal concluding that that the respondent identified, correctly, that there was a conflict and was appropriate in investigating that conflict, and ultimately, in dismissing for the reasons stated by the respondent.

72. It may be that the claimant will convince a tribunal that his interpretation is correct. I must ask whether it appears the claimant is likely to succeed in his claim that he was dismissed contrary to section 103A. On the claimant's own case this depends on the inferences which can be drawn from the primary finding of fact. There is a real prospect that the claimant will not establish the facts on which he relies. There is a real prospect of the respondent establishing that the claimant was dishonest. There is a real prospect of the respondent establishing that it had proper reasons to investigate, discipline, and dismiss. In the circumstances it cannot be said

that the claimant is likely to succeed in the sense that he had a pretty good chance of success. There is a real prospect of the claim failing. The complexity of the evidence, the difficulty in establishing the relevant facts, and the conceptual problems both in relation to whether there are any protected disclosures, and the causation of the dismissal, all serve to demonstrate that it is necessary to consider this case on the basis of a detailed consideration of the evidence, as tested in cross examination.

73. I reject the application for interim relief.

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Employment Judge Hodgson

Dated: 9 September 2019

Sent to the parties on:

10 September 2019

For the Tribunal Office