THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT (sitting alone)**
BETWEEN:

Ms R Kumbharati

Claimant

AND

Network Rail Infrastructure Ltd

Respondent

ON: **9 October 2020**

Appearances:
For the Claimant: **In person**
For the Respondent: **Mr J Braier, counsel**

OPEN PRELIMINARY HEARING FOR INTERIM RELIEF

The decision of the Tribunal is that the application for interim relief fails.

REASONS

1. This decision was given orally on 9 October 2020. The claimant requested written reasons.

2. By a claim form presented on 28 August 2020, the claimant Ms Radhika Kumbharati claims interim relief as she says she was dismissed because she was a whistleblower in the public interest.

The issues

3. The issue for this hearing was whether to award interim relief by making an order for the continuation of the claimant's contract of employment under sections 128 and 129 of the Employment Rights Act 1996.

The hearing

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

5. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended other than a barrister for the respondent who was not taking part in the hearing itself.

6. The parties were able to hear what the tribunal heard. From a technical perspective there were no difficulties of any substance.

7. The participants were told that is was an offence to record the proceedings.

8. No witness evidence was taken (see Rule 95).

Witnesses and documents

9. There was an electronic bundle of documents from the respondent of 187 pages, plus a bundle of 16 authorities and a skeleton argument from counsel.

10. There was a witness statement from Ms Ann Manning, the Head of HR of the respondent of 27 paragraphs. Evidence was not taken.

11. The claimant had not prepared a separate witness statement. The "list of documents" was also headed "Facts, Arguments and Statements" which with the agreement of the claimant was taken as a witness statement for this hearing.

12. The ET3 was not due to be filed until 28 October 2020 and had not been filed.

13. The night before the hearing the claimant sent three zip files of bundles for the hearing. Each of the three zip files contained numerous separate files. I asked the claimant how many pages she thought these files contained and how long she thought it would take to read them? The claimant had not printed them off and was not sure.

14. The respondent had not opened all of the files from the claimant. The respondent thought there were 140 files some of which were multiple pages.

15. I explained to the claimant that interim relief was intended to be a speedy application, dealt with in a day and that on a broad basis without delving into all the evidence, she should be in a position to show the tribunal that she had a pretty good chance of success. The tribunal has to do its best with the material it is given at short notice and make as good an

assessment as it is able and I explained that it may not be possible to read all the documents she had sent. This would only be suitable for a full trial. She should therefore take the tribunal to the key documents that she wished the tribunal to consider.

16. The parties were reminded of Rule 95 of the Employment Tribunal Rules of Procedure 2013, set out below.

17. All submissions and authorities referred to were fully considered, even if not expressly referred to below.

Relevant factual background.

18. The claimant commenced work for the respondent in June 2012.

19. The claimant raised a grievance in June 2018 which she said concerned "safe behaviour" and she raised a second grievance in July 2019 regarding her performance rating for 2018/2019. She complains of unreasonable delay in the handling of these grievances. The respondent's case is that the July 2019 grievance was upheld and the claimant's performance rating was amended from "partially achieved" to "good". The claimant considered that her rating should have been "exceeds" so she was not happy with the grievance outcome.

20. The claimant's 2018 grievance concerned a complaint about why she had been moved from a particular project at Old Oak Common. It does not fall within the remit of this hearing for the tribunal to go into the reasoning of this move. Despite the grievance process being concluded, the claimant continued to raise the matter. The claimant has two other sets of proceedings against the respondent which also do not concern the hearing of this interim relief application. They concern periods when her employment was continuing and this hearing deals with the reason for her dismissal.

21. The claimant was on a placement which was due to come to an end at the end of the financial year, on 31 March 2020. This placement had been put into effect when the claimant raised her 2019 grievance.

22. Ms Manning the Head of HR for the region sought alternative roles for the claimant in locations that she considered would be suitable for her. The claimant lives in Milton Keynes and Ms Manning found a job role for her in Milton Keynes which she considered to be a good fit. Ms Manning contacted the claimant about this role on 16 and 28 February but she says the claimant did not respond. I make no finding of fact about this.

23. As a result of the pandemic, the role that was identified ceased to exist but Ms Manning was able to find another role for the claimant in Milton Keynes. This had a start date of 20 July 2020. This was set out in an

email to the claimant dated 30 June 2020 at 16:03 hours, respondent's bundle page 128. I saw an email sent by the claimant about two hours later on 30 June 2020 at 18:21 hours to Ms Manning and another member of HR raising concerns about her performance rating and not dealing with the offer of the new role. This email said that the claimant wished to raise a formal grievance relating to performance rating for 2017/2018 and 2018/2019 as well as requesting an investigation for bullying, harassment, discrimination and victimisation by various managers in that time period as requested in a previous email.

24. The claimant sent a great deal of email correspondence to the respondent, which on the respondent case was considered unacceptable. At a meeting on 31 January 2020, Ms Manning asked the claimant to use her (Ms Manning) as the single point of contact for issues going forward. This was because the claimant had been contacting a number of different people in business she was therefore asked to have one point of contact for consistency.

25. Mrs Manning also complained that if the claimant did not receive an instant response to her email, even if she knew the recipients to be away, she would escalate her correspondence to someone else. I saw reference to this in the meeting notes at page 72 of the bundle. Although the meeting note was dated "*31 Feb 2020*", I see this as being an error (there being no 31 February) and is a reference to 31 January 2020.

26. Ms Manning in her witness evidence (statement paragraph 16) took the tribunal to an example of what she considered unacceptable correspondence. This was in relation to an email sent by Ms Manning in which she said she would let the claimant know by the end of the week who the HR contact would be regarding her performance review. The claimant replied on 16 June 2020, bundle page 111, saying: "*Why do you need end of the week to tell me who is the HRBP for the current performance review……. This is the present year not the past performance year, are you not aware of the timescales and HRBP? You asked me to contact you with all the requests, even though Joseph Mullally is the HRBP, hence I requested confirmation from you. I don't have to wait several days or weeks to understand timescales or who the HRBP is? Otherwise we will be wasting in NR [respondent] time and money in dealing with another grievance and victimisation."*

27. In her ET1 the claimant relies upon the fact that in November 2019 she raised health and safety compliance issues with HR when she believed that the respondent was not taking her grievance investigations seriously. She says that she reasonably believed that she raised these matters in the public interest.

28. In the ET1 at box 8.2 the claimant said "*I have made several qualifying protected disclosures from Jan 2020 to Human Resources, Employee relations advisor and Line manager*". She attached a "timeline of events".

She said that from this, it could be seen that disciplinary proceedings followed the protected disclosures, in particular after an appeal hearing in June 2020.

29. The claimant's case is that the reason for her dismissal was on the grounds of making public interest disclosures which she said were "*detailed in the additional information".*

30. The additional information section of the ET1 was at box 15 into which the claimant had put a chronology or "*timeline of events*". It set out a list of about 13 dates from November 2019 to August 2020.

31. The claimant relies on section 43B(1)(b) and (d), breach of a legal obligation and health and safety matters (the relevant law is set out below). In her ET1 she does not identify the legal obligations relied upon or the health and safety matters she says she disclosed.

32. The statement of Ms Manning gives the reason for dismissal of the claimant as a "*significant breakdown in working relationships".* Ms Manning referred the matter to a colleague, Ms Michelle Croft, Head of HR for Corporate Functions from a different part of the business, to carry out an independent review of what she saw as the breakdown in relations between the claimant and the respondent. The matters considered were set out in an overview as:

> • *There is a plethora of emails from RK citing issues with many people related processes that have been employed by both line manager and HR.*
> • *Many emails from RK are repeated; asking for the same information previously provided by HR*
> • *HR has been responsive, polite and professional to each of the emails from RK.*
> • *RK's style and tone of emails appear erratic at times and could be viewed as aggressive.*
> • *RK has blatantly ignored the requests from HR – that had been mutually agreed previously - to maintain one specific point of contact; Ann Manning.*
> • *RK has sent out emails to various other line managers and HR collegeaus [quoted as typed] in other areas of the business – not connected with the function or issues.*
> • *HR have been timely in every response to RK, even though many emails are reiterations of historical emails from RK, which have already been replied to by HR.*
> • *RK has not responded to the emails regarding her work status from both HR and line manager, they seem to be ignored as others are*

33. Ms Croft concluded in her report that there had been a significant breakdown in working relationships. The matter was referred to a disciplinary hearing.

34. The disciplinary hearing was held on 21 August 2020 at which a decision to dismiss was made on grounds of misconduct, explained as being a fundamental breakdown in the relationship between the claimant and the respondent. The decision to dismiss was given orally on 21 August by the dismissing officer Mr Luby, a Commercial Director. The decision was confirmed in a dismissal letter at page 166 of the bundle was dated 26

August 2020. It gave a termination date of 21 August 2020 with six months' pay in lieu of notice. The reasons given related to the sending of multiple emails in relation to the disciplinary and grievance processes, sending emails to other people when asked to direct her emails to one person, chasing responses from other individuals thus increasing their workload, failing to respond in relation to her return to work, not responding to job offers and not attending an induction meeting and a welcome/induction call.

35. Ms Manning made the point in her witness statement that the claimant had not made clear what she alleged was a protected disclosure. Ms Manning was aware that the claimant had sent a number of emails complaining about the delay in her grievance processes and that it caused her stress. Ms Manning said that the claimant has "*never expanded*" on her health and safety disclosures or said how or why she asserted that the respondent was breaching health and safety. Ms Manning said: "*The claimant never followed the bald assertion made in her emails up with any additional information at any meetings".*

36. The claimant said at the outset of this hearing that she relied upon having made 14 disclosures. We went through these from the ET1 and from the respondent's bundle with the claimant's confirmation and identified 19 disclosures.

The disclosures

37. Before setting these out, I make it clear that the references below to the disclosures are not intended as a replication of each disclosure, as this is a matter for the claimant to confirm, but to point to it and what it was about.

38. The first was on 28 November 2019 to the claimant's union representative. This asked the union representative for an update regarding the grievance of 15 July 2019 and asked what action the respondent was taking to reduce work related stress other than referring her to their counselling provider.

39. The second was on 29 November 2019 was to the HR Business Partner, complaining about the grievance delay and explaining the stressful conditions this was causing for her.

40. The third was on 8 January 2020 to an Employment Relations Adviser copied to the union representative about the delays and said it was causing stress resulting in long term sickness. She asked how the Health and Safety Act was being complied with if the grievance was taking so long.

41. The fourth was on 15 January 2020 to Mr Simon Hall a Senior HR Manager and copied to HR Business Partner Mr Mullally. The claimant

said that there was a failure to comply with the Health and Safety Act because her time sheets and records of her sick leave were going to someone who was not her manager.

42. The fifth disclosure was on 23 January 2020 to Ms Manning about the delays in the grievance investigation which was causing her stress. It was followed up with an email on 31 January 2020 with a formal request for information which the claimant said was a disclosure. I have put these two disclosures together as the 31 January email was said to be a follow up.

43. The sixth disclosure was on 31 January 2020 to Mr Alistair Sweeney, a former manager of the claimant, in which she said she had asked HR to look at the line management structure as she was suffering from stress and it referred to her ongoing ET claim. It also forwarded a 22 January 2020 email including a reference to a lack of access to her sickness records. The claimant wanted to know what actions were being taken on stress related risk.

44. The seventh disclosure was recorded in a document dated 21 February 2020 – the claimant asked what action was being taken to assess the risks associated with the line management structure. The claimant said this disclosure was made on 20 February 2020.

45. The eighth disclosure 27 March 2020 at 14:43 hours to Ms Manning – I did not see a copy of this so the claimant read it out – about her grievance and she said she wanted to raise a formal grievance about a request for health and safety information.

46. The ninth disclosure was made on 11 June 2020 at the grievance appeal hearing and set out in the notes of the grievance appeal hearing. The disclosure that the claimant said she made, was asking how they were demonstrating compliance with health and safety with the HSE.

47. The tenth disclosure was also at the grievance appeal hearing 11 June 2020 saying that the respondent was not demonstrating good health and safety performance. She also raised a point about a breach of the ACAS Code.

48. The eleventh was on 9 June 2020, also at the grievance appeal hearing and said that the respondent was not taking grievances seriously and not identifying the right investigators and victimising employees for raising grievances.

49. The twelfth was on 9 June 2020, also at the grievance appeal hearing and was a complaint about the grievance process.

50. The thirteenth was on 9 June 2020 also at the grievance appeal hearing and was a complaint about the process not being fair and transparent.

51. The fourteenth was on 11 June 2020 at the grievance appeal hearing and was again about a lack of a fair and transparent grievance process.

52. The fifteenth was on 11 June 2020 at the grievance appeal hearing and was a complaint about responsibilities and accountabilities and a concern that the respondent was not complying with health and safety regulations.

53. The sixteenth was also on 11 June 2020 at the grievance appeal hearing and was about a lack of a fair and transparent grievance process. There was also a concern that Mr Ross Harris had not identified any actions for misconduct by Mr Neil Soden.

54. The seventeenth was also on 11 June 2020 at the grievance appeal hearing about unreasonable delay with the previous grievance and the stress that the claimant was under and her concern the risks to health and safety with delays in grievances.

55. The eighteenth was on 16 June 2020 and said: '*I refer to the Programme Managers Job Description; some of the key responsibilities include 'Lead and inspire the team to maintain full engagement in meeting business objectives; Act upon and Lead and inspire the team to maintain full engagement in meeting business objectives; Act upon and discharge of, all Construction Design Management (CDM) obligations for projects as directed'. NS hasn't set up or cascaded any meetings or actions to demonstrates these key accountabilities. NS has neither set clear criteria nor shared examples to achieve exceeded or outstanding rating. In the spreadsheet, provided as part of the appendices, NS has given number 2 in the safety column. Following this, NS hasn't set up any plan to improve this safety objective. Inspite requesting, NS hasn't given any feedback on the close call raised to him in July 2018. Hence, I am concerned that NR aren't demonstrating the required trust and confidence to the regulator ORR and not demonstrating putting passengers first.*

56. The ninteenth was 21 August 2020, at the disciplinary hearing, where the claimant said she raised concerns about the disciplinary hearing manager related to her stress and breaching data protection legal obligations. The notes of the hearing showed that claimant said at her disciplinary hearing: "*you go through a lot of stress to understand why that allegation has come in the first place. I have looked at all the information provided to Norrie and Michelle, some sensitive information has been shared and I want to know why has this been shared I have never given consent for my sickness data and absence etc information to be shared I do not consent to that so why has it been shared? This is*

a breach of the data protection act".

Submissions from the respondent

57. The claimant's preference was for the respondent to make submissions first so that she could respond to this.

58. Counsel said that there is an onerous burden on the claimant and a high tests he test as connoting a '*significantly higher degree of likelihood'* than the '*more likely than not'* and something '*nearer to certainty than mere probability'*. The claimant could receive her salary through to trial and there is no provision for recoupment of this if she does not succeed. For this reason it is a high test.

59. The tribunal has to be satisfied on the protected disclosures and that they were the sole or principal reason for the dismissal. It needs to be the cause or the main cause of the dismissal. It is a summary exercise.

60. The respondent wished to concentrate on two elements: the sole or principal reason under section 103A and the public interest test. The respondent relied upon Ms Manning's statement, noting that she was not the dismissing officer, but the person who set the wheels in motion leading to the claimant's dismissal. It was her email of 23 July 2020 to the claimant setting out her reasons why she considered there was a fundamental breakdown in the working relationship. It led to the disciplinary hearing on 21 August 2020 with an oral decision to dismiss by Mr Luby, a Director. He sent the outcome letter which was the dismissal letter.

61. Putting to one side the final disclosure the claimant said she made at the dismissal hearing, the respondent submitted that all the other disclosures were made prior to the wheels being set in motion for the disciplinary process. Ms Manning was privy to some but not all of the disclosures. She was not aware of the disclosure to the union representative or the disclosure made on 20 February 2020. The claimant did not appear to suggest that her minutes of the grievance appeal hearing were sent to the respondent (this relates to the disclosures made on 9 to 11 June 2020 at the appeal hearing).

62. In Ms Manning's email in which she commenced the disciplinary process she made no reference to any of the matters that the claimant relies upon as protected disclosures. The respondent said it formed no part of the disciplinary correspondence, the independent investigation or the disciplinary hearing before Mr Luby on 21 August 2020 or any part of his letter of dismissal or oral decision. The respondent submitted that there was nothing that the claimant could point to, in order to show it was within consideration when Ms Manning and others were making their decisions. There was therefore no "*smoking gun*" to show the connection and the respondent submitted it was speculative and no more than the claimant's

efforts to create the picture she wanted. The respondent submitted this was fatal to her application for interim relief.

63. The respondent said that to the extent that the disclosure met the section 43B test, it was peripheral and not central to the grievance process she was undergoing. The grievance concerned her performance rating for 2018/2019.

64. In the claimant's grievance appeal letter of 9 March 2020 she made no reference to stress and at the hearing itself it received only a very brief mention. Yet the claimant says that this is the sole or principal reason for her dismissal.

65. The other disclosures were said to be even more peripheral to events, relating to sick leave forms and line management issues, these were said to be on the side-lines. The final disclosure at the disciplinary hearing itself, after Ms Manning has set the process in train about the breakdown in working relationships, the point being made was that sickness absence data had been shared as part of the dismissal process. This followed the claimant's failure to attend an induction meeting on 20 July 2020 for a new role she had been offered. The claimant's union representative himself said that there may be cases where the company could share this sort of information appropriately.

66. The respondent said there was a coherent narrative from Ms Manning as to the reason for dismissal that coincided with the contemporaneous documentation. There were a series of obstructive actions by the claimant throughout the period that Ms Manning dealt with her, a lack of acknowledgement of the steps taken to assist her, enormous management time spent on the claimant, her expectations of instant responses, grievances upon grievances, perceived rudeness in her dealings with Ms Manning and a refusal to turn up to new placement meetings. The respondent said that this showed the reason for the dismissal.

67. The respondent said that the claimant did not pass the high threshold that she needed to pass for interim relief.

68. On the public interest point, the respondent said the claimant was in great difficulty because her claims were personal, concentrating on her own grievance processes and the impact upon herself. There was nothing to suggest that the public interest played a part at the time she made the disclosures. The claimant had said in her ET1: "*There was information from Freedom of Information act and Subject Access request that there were several pending grievances under the same regional director which I reasonably believed was in Public interest*". The respondent said that the Freedom of Information request was made on 21 July 2020 and the response was on 20 August 2020, the day before dismissal. The

respondent said that any information that the claimant received from those requests could not have been in her mind when she made the disclosures. The claimant disagreed with these dates.

69. The respondent submitted that both in terms of content and what was in her mind at the time the disclosures were made, she has an "*uphill struggle*" to satisfy the public interest test and does not pass the high threshold for interim relief. A breach of internal guidelines such as the grievance procedure, is not a breach of a legal obligation – see ***Eiger Securities LLP v Korshunova 2017 IRLR 115 (EAT).***

70. The respondent submitted that a disclosure to a union representative is not a disclosure to the employer (first disclosure).

71. Certain of the disclosures were said not to be disclosures of information but an enquiry about the delay and what resources were available from the employer for those who were suffering from stress. This was said not to be a disclosure of information tending to show any of the matters under section 43B(1).

Submissions from the claimant

72. At the outset I indicated to the claimant that it would be helpful if she could answer the main points made by counsel for the respondent in terms of whether her disclosures were made in the public interest and the reason for dismissal. I said that this did not restrict her from saying anything else that she wanted to say.

73. The claimant said her first disclosure was on 28 November 2019 and this was to her union representative who was in the same region of the business as Ms Manning. The disclosure was about delay in the grievance investigation and stress and the claimant said that it did not just relate to her but to other employees. The claimant said she was told delays in grievances were common. There were others, not only herself, going through grievances. There were delays causing stress and this needed to be looked at.

74. On her second disclosure, this was similar. There was a recommendation in the previous grievance outcome to look at delays and this was not being looked in to. The claimant said it happened to her twice.

75. On her third disclosure, she said she made the disclosure in the public interest so that it did not happen to anyone else.

76. On the fourth disclosure it was sent to the Head of HR because the claimant wanted to escalate it because of delays in grievances in that region and that was why it was in the public interest.

77. The fifth disclosure was about health and safety and about how the respondent was recording and monitoring this and she asked Ms Manning for the information so it would be dealt with, for all colleagues and not just for herself.

78. On the sixth disclosure the claimant raised these matters with Mr Sweeney. She said that these sorts of matters were happening to other colleagues as well and this is why it was in the public interest.

79. On the seventh disclosure the claimant raised the matter of the secondments and she raised this through the closed call system so that it went outside of her own region. This was said to be in the public interest because the secondments within the respondent have issues with the line management structure and the sickness records and several colleagues had these type of secondments. The claimant said that it was important that informal secondments should not happen, so that employees health and wellbeing was not affected.

80. The eighth disclosure of 27 March 2020 was in the public interest because others were affected by delays in grievance investigations and it was stress related.

81. The ninth was at the appeal hearing and was in the public interest along the same lines.

82. The tenth concerning the breach of the ACAS Code meant that it caused undue stress to those raising grievances and the claimant said she was not the only person that it affected.

83. The eleventh concerned what the claimant said was a lack of experience of those investigating grievances because it is stressful for those involved and they have to appeal.

84. The thirteenth, fourteenth, sixteenth and seventeenth were about the lack of a fair and transparent grievance process. This was said to be in the public interest because the outcome is given without holding any grievance meeting and was not only about the claimant but about everyone else. On the sixteenth disclosure where no action had been taken against Mr Soden, this affected others and not just the claimant. Others had received a lower performance rating in the region the claimant was working and it could affect others.

85. The fifteenth was about responsibilities and accountabilities and a concern that the respondent was not complying with health and safety regulations in relation to grievances and informal secondments. It affected others as well as the claimant.

86. On the eighteenth disclosure the claimant said there were several closed calls raised in addition to her own and that feedback was not given for a considerable time to those who had raised them and there was a chance that safety performance would not be done in the correct manner for the ORR and the HSE. She said this made it in the public interest.

87. The nineteenth and final disclosure, made in her disciplinary hearing, was in the public interest because it was a breach of personal data and was provided to independent reviewers. As the claimant was not the only one who went through a disciplinary process she submitted this disclosure was in the public interest.

88. The claimant said she wished to go through some of the background information on the reason for dismissal. She said she was recruited into the Old Oak Common Road team in August 2016 and was soon moved into a secondment in another team, she said this was done informally. The second informal secondment took place in March 2019 and there was no formal change. At the time she was recruited the claimant said that Mr Dominic Baldwin was a Programme Director. The claimant said that no funding was available for her recruitment so that within two months she was moved into a different team. Mr Baldwin was later offered to the claimant as a mentor in February 2020. The claimant reminded the tribunal that she raised her two grievances. She said the first took 4.5 months and second grievance took 9 months for the grievance outcome. The appeal outcome took longer.

89. The claimant took the view that HR tried to speed things up when a tribunal process was happening and after that they slowed down again.

90. In relation to her sick leave and absences, she said that the day to day manager would not be aware of the reasons for the absence and no return to work meetings were arranged because the manager did not have access to the records and this affected all those employees who were informally seconded. This could be avoided by a formal secondment. The claimant also said Ms Manning was aware of her grievances back as far as November 2019.

91. The claimant said she had complained to Mr Luby about Ms Manning and he also heard her disciplinary. The claimant said she was not provided with HR support even though Mr Luby promised her this on 30 July 2020. The claimant also complained that there were no meetings with her about new roles. The claimant considered that Ms Croft was not independent in investigating the disciplinary issue and others within the process were not independent.

92. The claimant said that the reason given for her dismissal was not gross misconduct. The claimant submitted that sending emails, the details of

which she said she was unclear about, was not gross misconduct and she did not send multiple emails. She submitted that there was no evidence to support the allegation of gross misconduct. In relation to sending follow up emails, she said this was not gross misconduct. In terms of increasing the workload of anyone else, she said there was also nothing to prove this. In terms of failing to respond to her line manager, there was no information in Ms Croft's report to support this. In terms of not responding to emails about offers of new roles, again she said there was no information in the investigation report to support this and there were no dates given. The claimant said she had not applied for any new roles and she considered she was being misled by being told that there was a role available for her in Milton Keynes. In terms of not attending meetings with managers for new roles, she said she did not know why she had to attend these meetings and there had been no warning that if she did not attend, she may face disciplinary action.

93. The claimant submitted that it was clear that Ms Manning set up the disciplinary because she had raised complaints about health and safety and to prevent her from raising any more complaints about health and safety. The claimant raised issues in June 2020 and the outcome was given on 20 August 2020, one day before her dismissal, so that she could not raise any more issues. The claimant requested a formal meeting in March 2020 and raised a grievance but it was ignored.

94. The claimant said that there was no breakdown in the working relationship. She said that if there was any breakdown, it was a breakdown in communication which was not gross misconduct. There was nothing in the investigation report to prove it was gross misconduct. The claimant said that the dates of the Freedom of Information request given by the respondent were incorrect: she made a request in November 2019 and the response was on 24 December 2019. She said in her ET1 she was referring to a separate matter. She considered Mr Luby was not independent because he had come from her original region of Old Oak Common.

<u>The respondent's reply</u>

95. The respondent said that the claimant had only made one submission that the dismissal was because of the protected disclosures and that was about the date of the receipt of the grievance appeal decision which was one day before the date of the disciplinary meeting. The respondent said that this was put as a "*conspiracy of timing*" to prevent her raising health and safety matters and this was speculation. The claimant had made submissions about section 98(4) Employment Rights Act and the reasonableness of the process and not her case that the sole or principal reason was protected disclosures.

The relevant law

96. Section 128 of the Employment Rights Act 1996 sets out the circumstances in which a claimant may claim interim relief. This is described here as relevant to this case. An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and that the reason (or if more than one the principal reason) for the dismissal is one of those specified in section 103A of that Act may apply to the tribunal for interim relief.

97. If it appears to the tribunal that it is 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 in section 103A, the tribunal shall announce its findings and explain to both parties what powers the tribunal may exercise on the application, and in what circumstances it will exercise them.

98. The test for an application for interim relief was set out in the leading case of ***Taplin v C Shippam Ltd 1978 IRLR 450 EAT***, which arose in the original context in which interim relief was originally enacted, namely dismissal for trade union reasons. The case remains good law. The test for "*likely*" in section 129 means "*does the claimant have a 'pretty good chance' of success*".

99. In ***Dandpat v University of Bath EAT/0408/09*** the EAT reaffirmed the test that the claimant must demonstrate a 'pretty good chance' of success at trial, saying (at paragraph 20):

> *'We do in fact see good reasons of policy for setting the test comparatively high … in the case of applications for interim relief. If relief is granted the [employer] is irretrievably prejudiced because he is obliged to treat the contract as continuing, and pay the [employee], until the conclusion of proceedings: that is not consequence that should be imposed lightly'*

100. In ***Ministry of Justice v Sarfraz EAT/0578/10*** the then President, Underhill P said at paragraph 19 (in relation to the ***Taplin*** test) that "likely" connotes something nearer to certainty than probability. Richardson J in ***Wollenburg v Global Gaming Ventures (Leeds) Ltd EAT/0052/18*** (penultimate paragraph) said that such hearings are intended to be short, with broad assessments by the Employment Judge who cannot be expected to grapple with vast quantities of material.

101. The principles were reviewed and summarised by the Employment Appeal Tribunal in ***London City Airport Ltd v Chackro 2013 IRLR 610***:

> *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.*

102. In the context of a whistleblowing claim, the law was reviewed by the EAT (Eady J) in ***His Highness Sheikh Bin Sadr al Qasimi v Robinson EAT/0283/17***. The claimant must show that level of chance in relation to the elements of the claim that:

    a. she made the disclosure(s) to the employer;
    b. she believed that it or they tended to show one or more of the matters itemised in section 43B(1)
    c. her belief in that was reasonable
    d. the disclosure was made in the public interest; and
    e. the disclosure was the principal cause of the dismissal.

103. These are matters of fact for the tribunal and at interim relief stage the task of the tribunal is only to make a summary assessment of the strength of the case. Eady J said of the tribunal's task (judgment paragraph 59) 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 her case, and to explain the conclusion reached on that basis; not in an over formulistic 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."*

104. Rule 95 of the Employment Tribunal Rules Procedure 2013 provides that when a tribunal hears an application for interim relief, it shall not hear oral evidence unless it directs otherwise.

105. If the claimant succeeds the tribunal shall ask the employer whether it is willing pending the determination or settlement of the complaint to reinstate or re-engage the employee in another job on terms and conditions not less favourable than those which would have applied had he not been dismissed. If the employer is willing to reinstate the tribunal makes in order to that effect. If the employer is willing to re-engage and specifies the terms and conditions, the tribunal shall ask the employee whether he is willing to accept the job.

106. If the employee is not willing to accept re-engagement on those terms and conditions where the tribunal is of the opinion that the refusal is reasonable it shall make an order for the continuation of his contract and otherwise the tribunal shall make no water.

107. If on the hearing of the application for interim relief the employer fails to attend or states that it is unwilling to reinstate or re-engage the tribunal shall make an order for the continuation of the contract.

The whistleblowing authorities

108. Under section 48A of the Employment Rights Act 1996, a "protected disclosure" is defined as a "qualifying disclosure" which is disclosed in accordance with sections 43C to 43H of that Act.

109. Section 43B(1) of the Employment Rights Act 1996 defines a qualifying disclosure:

> *(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) the information disclosed tends to show 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 endangered,*
>
> *(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.*

110. 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*** the CA 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 subsection (1) - (of section 43B). There is no rigid distinction between allegations and disclosures of information.

111. In terms of the reasonableness of the belief, the Court of Appeal in ***Babula v Waltham Forest College 2007 ICR 1026*** said that whilst an employee claiming the protection of section 43B(1) must have a reasonable belief that the information he/she is disclosing, tends to show one or more of the matters in that section, there is no requirement to demonstrate that the belief is factually correct. The belief may be reasonable even if it turns out to be wrong. Whether the belief was reasonably held is a matter for the tribunal to determine.

112. The leading authority on the public interest test is ***Chesterton Global Ltd v Nurmohamed 2018 ICR 731.*** The worker's belief that the disclosure was made in the public interest must be objectively reasonable. The words "*in the public interest"* were introduced in 2013 to prevent a worker from relying on a breach of his or her own contract

of employment where the breach is of a personal nature and there are no wider public interest implications.

113. In ***Chesterton*** whilst the employee was found to be most concerned about himself (in relation to bonus payments) the tribunal was satisfied that he did have other office managers in mind and concluded that a section of the public was affected. Potentially about 100 senior managers were affected by the matters disclosed. The claimant believed that his employer was exaggerating expenses to depress profits and thus reducing commission payments in total by about £2-3million.

114. The Court of Appeal (CA) held that the mere fact something is in the worker's private interests does not prevent it also being in the public interest. It will be heavily fact-dependent. Underhill LJ noted four relevant factors:

- The numbers in the group whose interests the disclosure served
- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
- The nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people
- The identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest although this should not be taken too far.

115. The CA also sounded a note of caution (paragraph 36) that the public interest test did not lend itself to absolute rules. The broad intent behind the amendment to the law in July 2013 introducing the public interest test, is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved.

116. It is for the tribunal to rule as a question of fact on whether there was a sufficient public interest to qualify under the legislation. The term “public interest” has not been defined in the legislation. In ***Parsons v Airplus International Ltd EAT/0111/17*** the EAT pointed out that in law a disclosure does not have to be either wholly in the public interest or wholly from self-interest. It could be both and this does not prevent a tribunal from finding on the facts that it was actually only one of those.

117. The approach under section 103A ERA to determining the principal reason for dismissal is not a ‘but for’ test, but a ‘reason why’ test: ***Salisbury NHS Foundation Trust v Wyeth EAT/0061/15.***

Conclusions on interim relief application

118. The task for the tribunal on an interim relief application is to make a summary assessment of the strength of the case as to whether the claim is "likely" to succeed. The ***Taplin*** test remains good law: "*does the claimant have a pretty good chance of success*". Subsequent case law has shown that the test is comparatively high, following ***Dandpat.*** Following ***Sarfraz*** the test connotes a significantly higher degree of likelihood than "more likely than not" and connotes something nearer to certainty than mere probability. It is a high test.

119. The claimant relies on section 43B(1)(b) and (d) of the Employment Rights Act 1996 that her disclosures tended to show a breach of a legal obligation and breach of health and safety obligations. This related predominantly but not exclusively to her grievance processes.

120. I agree with the claimant that her grievance processes took many months but this is by no means the only factor to take into consideration.

121. Dealing firstly with the question of whether the claimant made disclosures which were protected disclosures, one of the main submissions from the respondent was that these matters concerned the claimant's personal employment issues and were not in the wider public interest. Whether the disclosures meet the public interest test is a question of fact for the tribunal to decide, following the change in the law in 2013. A disclosure does not have to be only in the public interest or only in self-interest. The respondent said that the claimant concentrated upon her own grievance process and the impact upon herself and there was nothing to suggest that the public interest played a part at the time she made those disclosures.

122. The claimant was clearly unhappy about the length of time that her grievances were taking and the stressful effect that it had upon her. The disclosures I was taken to appeared on the face of it to relate to her personally although she submits that it affected other employees and so this brought it into the realm of the public interest. I did not see, in the time available and within the information I was able to consider at this hearing, (bearing in mind the comments of Richardson J in ***Wollenburg***) much in the way of reference to other employees and the effect it may have upon them. I am not saying that there are definitely no such references but if there are, then this will be a matter for the careful preparation of all the evidence to go before the tribunal at a hearing.

123. Just because the matters disclosed affected others, does not automatically put the disclosures in the territory of the public interest. As Underhill LJ said at paragraph 36 of the ***Chesterton*** case, tribunals are expected to be cautious about reaching the conclusion of public interest because the broad intent behind the amendment to the law in

2013 was that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers. Underhill LJ specifically said he was not prepared to say it would never attract such protection. I considered it should be the more exceptional case where relevant findings of fact are made, after a hearing of all the evidence.

124. In this case my decision was that the claimant has not shown at this hearing that she was close to certain of being able to establish that her disclosures were in the public rather than her personal interest. I was not saying that she had no chance of establishing it, she has a prospect, but I was unable to say that her prospects were close to certain. She certainly had a personal interest with the disclosures she made, as was the case in ***Chesterton*** and her personal interest was not fatal. The fact that it is in her personal interests does not prevent it also being in the public interest. I considered this to be a fact-dependent matter upon which a tribunal should decide having heard and seen all the relevant evidence.

125. I took the view that the claimant also had more of a hurdle where she relied on a disclosure which was a question about the delay and what resources were available for those who were suffering from stress. This is not obviously or on face value a disclosure of information when it is in the form of an enquiry or a question. Again I was not saying that the claimant had no prospect of success but that she did not have a near certain prospect of success.

126. There must be protected disclosures in order for the claimant to succeed in a case under section 103A which is for automatically unfair dismissal because the reason for the dismissal was one or more of the disclosures. I find that the claimant does not meet the high threshold of establishing her prospects of success on this issue. It will need to be decided at a full hearing.

127. Even if I am wrong about this, one or more of the disclosures must also be the sole or principal reason for the dismissal. The reason for dismissal is strongly disputed. The claimant says that it was because she made the disclosures and to prevent her from making any further disclosures about health and safety. The respondent says it was because of a breakdown in working relationships. The claimant denies that there was a breakdown in working relationships, she says there was a breakdown in communications and this was not enough to amount to the gross misconduct which was found by Mr Luby. I had to ask if it appeared likely that the final tribunal would find that the principal reason for dismissal was one or more of the disclosures and whether there was any connection between the making of the disclosures and the decision to dismiss.

128. As the respondent submitted, there is a coherent narrative from Ms Manning as to the reason for instigating the disciplinary process and I

saw the notes of the hearing and Mr Luby's decision letter. I was taken to examples of the emails with the claimant that were relied upon, amongst other matters. There is no reference to the disclosures and this will need to be a matter for cross-examination of Mr Luby as to what exactly was in his mind when he made the decision to dismiss.

129. There was conduct which in the respondent's view gave cause for concern, there was an investigation and there was a disciplinary process. I was well aware that the disciplinary process was strongly criticised by the claimant, but this is a procedural matter that may go to the fairness or otherwise of the dismissal. It is not the reason for the dismissal. The final tribunal may find that the reason for dismissal was the claimant's conduct and/or the breakdown in the working relationships; it may find that it was the disclosures, if they are found to be protected.

130. I was unable to find on what was before me, that the claimant had a sufficient prospect of success such as to merit interim relief. The claimant has a prospect of success, as does the respondent. The claimant does not meet the test, described in ***Dandpat*** as comparatively high or in ***Sarfraz*** as nearer to certainty than probability.

131. In these circumstances the application for interim relief fails.

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Employment Judge Elliott
Date: 12 October 2020

Sent to the parties on: 12/10/2020 : : .
_____ for the Tribunals