# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| Ms A McCormick | **v** | BusinessF1 Magazine Limited |

**Heard at:** Bury St Edmunds (by CVP) **On:** 05 March 2021

**Before:** Employment Judge Laidler

**Appearances**
**For the Claimant:** In person.
**For the Respondent:** Mr T Rubython, Director.

**COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.**
This has been a remote hearing on the papers which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable during the current pandemic and all issues could be determined in a remote hearing on the papers.

# JUDGMENT

The claimant's application for Interim Relief is refused.

# REASONS

1. This matter was originally listed for the 26 March 2021 but the respondent requested a postponement which was granted to today's date.

2. The parties were advised to lodge any documents no later than 3 days prior to this hearing. The respondent lodged their documents yesterday afternoon and at approximately 9pm, and they were not before the Judge for this hearing and the later documents were not seen by the claimant until this morning. The hearing was adjourned for about one hour whilst the documents were obtained although late the Judge did consider the written submissions and the claimant had time to read them but the Judge has not taken into account the witness statements produced as this was not a hearing at which evidence was to be heard.

3. The claimant brings a complaint of automatically unfair dismissal under s.103A of the Employment Rights Act 1996 claiming that the reason or principal reason for her dismissal was that she made protected disclosures.

4. She will have to satisfy a Tribunal at the full merits hearing that she made protected disclosures within the meaning of s.43B. This requires there be a disclosure of information which in the reasonable belief of the worker is made in the public interest and tends to show one or more of the matters outlined in the section which include that the Health & Safety of any individual had been, is being or is likely to be endangered.

5. There has been considerable case law on what amounts to a disclosure of information and the Tribunal has taken note of the case of Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 in which the Employment Appeal Tribunal made it clear that the ordinary meaning of giving information is the conveying of facts and that a statement which is general and devoid of specific factual content cannot be said to be disclosure of information tending to show a relevant fact. In another case of Kilraine v London Borough of Wandsworth [2018] ICR 1850 the Court of Appeal held that information in this context is capable of covering statements which might also be characterised as allegations, it must has sufficient factual content to be capable of tending to show one of the matters listed in s.43B whether an identified statement or disclosure in any particular case meets that standard will be a matter for evaluative judgment by a Tribunal in the light of all the facts of the case. It is a question that is likely to be closely aligned with the issue of whether the worker making the disclosure had the reasonable belief that the information he or she disclosed tends to show one of the six relevant failures.

6. The Tribunal explained at the outset of this hearing the statutory provisions it must consider in dealing with the claimant's Application for Interim Relief at s.128 of the Employment Rights Act 1996. S.129 provides that the Tribunal must consider whether it is likely that the Tribunal ultimately hearing the claim will find that the reason or if more than one the principal reason for the dismissal was that the claimant raised protected disclosures. In the case of London City Airport Limited v Chacko [2013] IRLR 610 the EAT stated that this test requires the Tribunal to carry out an "expeditious summary assessment" as to how the matter appears on the material available doing the best it can with the untested evidence advanced by each party. This it observed necessarily involves a far less detailed scrutiny of the parties' cases than will be ultimately be undertaken at the full hearing. The basic task and function of this hearing is to make "a broad assessment on the material available to try to give the Tribunal a feel and to make a prediction about what it is likely to happen at the eventual hearing before a full tribunal". When considering the likelihood of the claimant's succeeding at Tribunal the correct test to be applied is whether he or she has a pretty good chance of success at the full hearing. Taplin v C Shippam Ltd [1978] ICR 1068, this approach has been adopted

in other cases when it was made clear that a pretty good chance of success is not very obviously distinguishable from reasonable prospects of success but that was however rejected. The message to be taken from Taplin was clear, it has been stated that likely does not mean simply more likely than not but cenotes a significantly higher degree of likelihood something nearer to certainty than mere probability.

7. On the claimant's own case set out in her skeleton argument for today she states that she and others were raising concerns in the office about Covid safety from in or around 22 December 2020. The national lockdown was brought into force on the 4 January 2021 and the claimant states that on 5 January Natalie Reese her line manager verbally raised Health & Safety concerns with Mr Rubython. The staff continued however to work in the office.

8. On 10 January 2021 Natalie again emailed concerns to Mr Rubython following which the staff including the claimant were told they would not be allowed in the office until the lockdown was over. There is a dispute as to whether or not the claimant was working from home which is not for this Tribunal to determine. The respondent considered she was not covered by the Furlough Scheme having just started employment with it.

9. The claimant refers to a telephone call with Mr Rubython on 11 January when she again expressed her concerns about Health & Safety in the office. There is a dispute as to what was then agreed. The respondent produced an email the claimant sent on 11 January 2021 at 00.49 in which the claimant referred to there being a "safe environment to work in" where social distancing was possible. As evidence has not been heard the Tribunal makes no findings about that email and in particular whether it was sent before or after the conversation with Mr Rubython that day on the telephone.

10. There were then what the claimant calls multiple attempts to gain clarity on the Health & Safety concerns but with no response.

11. There were then issues between the parties about the claimant attending the office for a meeting and the use of grievance procedure which again this Tribunal does not need to determine.

12. By letter of 29 January 2021 the respondent terminated the claimant's employment by exercising what was referred to as a special notice regarding Covid in the contract of employment which provided that as a new business "operating in very difficult circumstances and business conditions it may become impossible to navigate making it impossible to employ the claimant and in that event giving them the right to dismiss without notice". This Tribunal makes no findings or conclusions on that clause merely stating that that is what was relied upon by the respondent.

## The Tribunal's Conclusions

13. The Tribunal cannot state at this interim stage that it is likely the claimant will establish that she raised protected disclosures and that that was the reason for her dismissal.

14. The Tribunal has taken account of the guidance cited above and cannot conclude that there is a significantly higher degree of likelihood of success being something nearer to certainty than mere probability. The claimant will have to establish that the matters raised by her were disclosures of information, raising concerns will not be sufficient, some of the concerns appear to have been raised by others and not the claimant. If the claimant establishes that she did raise protected disclosures the Tribunal will have to decide whether the reason or more than one the principal reason was the raising of those disclosures.

15. As the claimant does not have 2 years' service to claim ordinary unfair dismissal she will acquire the legal burden of proving on the balance of probability that the reason for dismissal was an automatically unfair reason. It follows from these conclusions that the claimant's Application for Interim Relief is refused.

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Employment Judge Laidler

Date: ……29/03/2021…….

Sent to the parties on: 30/03/2021.
THY
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For the Tribunal Office