



EMPLOYMENT TRIBUNALS

Claimant: Mr A Goddard

Respondent: European Metal Recycling Limited

Heard at: Birmingham **On:** 10 October 2022

Before: Employment Judge Flood

Appearances

For the claimant: In person

For the respondent: Ms Quigley (Counsel)

DECISION ON INTERIM RELIEF APPLICATION

The claimant's application for interim relief under section 128 of the Employment Rights Act 1996 is refused.

REASONS

1. The claimant contends that he was unfairly dismissed for making a protected disclosure contrary to s 103A of the Employment Rights Act 1996 ("ERA 1996"). An application for interim relief was presented on 26 August 2022 under s 128 of the ERA 1996 within the prescribed time limit.
2. For the purposes of this hearing, I had before me the following documents:
 - 2.1. Outline Submissions prepared by Ms Quigley on behalf of the respondent.
 - 2.2. A bundle of documents (references to page numbers below relate to pages in that bundle).
 - 2.3. Additional documents submitted by the claimant by e mail on 9 October 2022 and added to the bundle of documents today (which were not objected to by the respondent).
 - 2.4. A witness statement prepared by Mr P Davison of the respondent signed and dated 7 October 2022 (which was admitted following an application made by the respondent, which the claimant objected to.)
3. Neither of the parties made an application to adduce any oral evidence.
4. I heard oral submissions from both parties, which were completed at just before 1.30 pm. I determined that it was in the interests of justice for the hearing to be

adjourned for a reserved decision to be made, given that a substantial number of documents had been submitted and referred to in submissions.

Outline of relevant facts (summary)

5. Although it is not the function of the Tribunal when considering an interim relief application to make findings of fact, some background information is required to assist me to form a view. I was referred to various documents by the parties in their submissions, which I have read along with the pleadings and the unsworn witness statement of Mr Davison. The relevant facts as I saw them in summary are as follows:
 - 5.1. The respondent operates around 65 metal recycling plants throughout the UK. It has a subsidiary, Mayer Environmental ('ME') which operates the MET Academy within which the claimant worked during his employment. ME performed an auditing function for the respondent at its sites to audit environment, quality and health and safety matters. If issues are discovered by ME, these were supposed to be escalated to site managers and the respondent's Safety, Health, Environment and Quality ('SHEQ') team. The MET Academy was the training division of ME which provided training in operating mobile plant and machinery, health and safety and environmental management.
 - 5.2. The claimant was employed by the respondent from 21 February 2022 until 29 August 2022. At the time of his dismissal he was employed as a Mobile Plant Instructor and Assessor and he travelled to the respondent's site providing training courses to employees on how to operate mobile plant machinery. A contract of employment which appeared to be that of the claimant's was at pages 33-40, although the claimant disputes this was issued to him. A job description for the role of Mobile Plant Trainer was shown at page 41-42 and records that the role involves ensuring that *'operational staff are fully trained in how to safely and effectively use all of the different plant machinery available to them, so that they can carry out their job successfully'*.
 - 5.3. The sites upon which the claimant worked were places where heavy machinery was being used and could potentially be dangerous so it self-evidently important that health and safety rules are observed. There are various pieces of legislation that applied to the respondent's operation, including the Health and Safety at Work Act 1974, the Provision and Use of Work Equipment Regulations 1998 ('PUWER'), the Lifting Operations and Lifting Equipment Regulations 1998 ('LOLER') and the Control of Substances Hazardous to Health Regulations 2002 ('COSHH'). The claimant has worked in this field for 22 years and has a number of qualifications as an operator and instructor of machinery. The respondent and the claimant are required to comply with rules operated by the National Plant Operators Registration Scheme ('NPORS') when running training course on the operation of machinery.
 - 5.4. The claimant relies on having made protected disclosures. Details of the alleged disclosures were not in the claim form. He stated he had been dismissed for whistleblowing and his claim form made reference to *'reporting'* findings to managers on site, his first line manager, the office in Nuneaton and that he reported *'some things'* to the Health and Safety Executive ('HSE'). At the outset of the hearing, I asked the claimant to

confirm which specific occasions when he made disclosures were being relied upon. He explained that he believed that when he completed and submitted defect forms in relation to equipment on site, that this amounted to a protected disclosure. The claimant will need to provide full particulars of the precise occasions on which he says he made disclosures but for the purposes of the hearing today, he referred me to a number of documents:

- 5.4.1. At page 111, a defect report submitted on 3 May 2022 in relation to equipment at a site in Liverpool;
- 5.4.2. At page 112, a defect report submitted on 26 May 2022 in relation to a site in Bradford;
- 5.4.3. At page 113, a defect report submitted on 6 June 2022 in relation to a site in Eccles
- 5.4.4. At page 107 and 114/115, a defect report submitted on 16 June 2022 in relation to a site in Nottingham listing a number of defects with a lift truck that the claimant had been due to carry out training on.

The claimant said that defects on machinery would be firstly raised by a phone call to his direct manager, Josh Clark-Barkess and it would then be raised with Malcolm Jones and they would discuss if the problem could be resolved. If not, he would send an e mail attaching the defect report (and any photos he took) to Mr Clark-Barkess, Mr Jones, Gary Pugh and the SHEQ team. The claimant said he no longer had access to his e mails to evidence the sending of these forms. I noted on review of the documents provided that there were e mails sent by the claimant apparently attaching a defect report to Mr Clark-Barkess on 27 June 2022 (page 109) and to Mr Clark-Barkess and Mr Jones on 6 July 2022 (page 110).

- 5.5. The claimant also said he made at least one disclosure to the HSE which he submitted following a near miss incident which he believed had taken place on 5 July 2022 in Sheffield. He believes this was submitted on either 5 or 6 July 2022 from his work e mail address and that Mr Pugh had a copy of it. He said he followed up this report after the meeting in which he was dismissed took place as he did not hear anything back.
- 5.6. The respondent is not in a position to accept or deny that any of the above are protected disclosures, as the detail was only provided in the hearing today. The claimant understands that each and every one of the disclosures he says were made will need to be particularised as soon as possible.
- 5.7. The claimant alleges he was dismissed because of having made these protected disclosures. The respondent says that the claimant was dismissed due to conduct, namely unsatisfactory course management together with attitude and behaviour which led to the claimant not passing his probationary period.
- 5.8. There are a number of key events and documents that the parties pointed out to me:
 - 5.8.1. The respondent drew my attention to its SHE Perfect Day and Stop Work Authority Policy at pages 43-59 which it says set out the policy for raising concerns pointing out that it records that all

employees had the power to stop work if they believed conditions or behaviours posed an imminent danger. It does not appear to be in dispute that the claimant never used the Stop Work process. The claimant said he had never seen this document before and was unaware of such a policy.

5.8.2. The claimant attended a meeting on 17 June 2022 with Mr Pugh where his performance since joining the respondent was discussed. A note of that meeting was at page 60 and it is noted that the claimant had *'settled well in to the team'* and had *'adapted to MET ways of working'*. It mentioned feedback being positive but raised one matter, namely that there had been *'some comments around shortening courses, which AG provided the rationale, the business expectation is not the same as the NPORS regulation which GP has noted and raised with the MET team'*. It again reiterated that the feedback had been good with positive comments.

5.8.3. I saw emails in the bundle at pages 61 to 65 between various managers of the respondent. At page 62, there was an e mail from Mr R Wooley on 11 July 2022 complaining that the claimant had attended site that day to conduct training but it had not taken place as he had *'condemned'* the vehicles on which training was due to be carried out on. This e mail attached pictures of the vehicle and a report on it from Allianz and went on to challenge the claimant's decision and referred to *'several complaints across the YEM patch'* and that *'Josh at Bradford was going to request a different trainer'*. This was responded to by Mr D Nevins (page 61) who stated that he agreed with Mr Wooley and suggested that the decision to cancel the course was *'ridiculous'*. A further response to the e mail chain (page 61) from Mr J Fowler agreed with the conclusions and mentioned another occasion when the claimant almost cancelled training for similar reasons.

5.8.4. I was also shown an e mail from Mr Jones to Mr Pugh on 14 July 2022 (page 63) which referred to a conversation he had had about the claimant carrying out training at a site when the site manager said they did not want the claimant as he *'points out too many issues and they've had nothing but problems with him'*. The e mail went on to state:

'This is not an Anthony issue, he has done what is expected of him. The problem with this is the culture on site where operations are more important than safety.'

'I am pleased our trainers are working safe rather than just getting the job done, however if trainers are refused on sites for doing their jobs in the future I think we should escalate to Herman.'

Mr Jones sent a further e mail on 29 July 2022 where he referred to a site requesting not to have the claimant on site because he *'always cancels our courses and he is quote 'a pain in the ass.'* *They also mentioned he condemns vehicles that have been signed off by Alliance.'*

5.8.5. A meeting was held with the claimant on 29 July 2022 which was chaired by Mr Pugh. No minutes were provided of that meeting. I was referred to a letter which was sent by the respondent to the claimant on 17 August 2022 (page 70-72). This referred to a probation review meeting being held and that the claimant's employment had been terminated. It set out a number of issues said to have been raised which led to the claimant's dismissal. Firstly, it mentioned feedback having been received from sites that there were *'regular attempts by yourself to either shorten, delay or cancel courses for unsatisfactory reasons'*. It went on to give examples referring to a one day abrasive wheel course that was cancelled; a FLT course in Hartlepool where the running of the course was delayed; a 360 course in Bradford where only 1 of 3 learners were assessed and course in Sheffield having been cancelled due to the yard being busy. Secondly it raised issues around *'Attitude and Behaviour'*, setting out examples of *'poor, unprofessional behaviour.'*

5.8.6. It also went on to address something the claimant raised by e mail on 7 August 2022 (see below), stating:

'In your email of 10th August, you cite the reason or dismissal is for raising health and safety concern. All EMR's employees are encouraged and empowered to raise health and safety concerns through our Stop Work Authority. All points raised by yourself on health and safety were given due consideration and addressed accordingly but were not the reason for dismissal. The reason for you failing to successfully complete your probation period, and for the termination of your employment, are your approach and commitment to training and your attitude and behaviours towards others'

5.8.7. Before this letter had been sent to the claimant, he sent an e mail to Mr Pugh and Mr T Venn (another respondent manager) on 7 August 2022 which referenced an audio recording taken of the meeting and went on to state:

'In short Gary explained my work was excellent but because I have identified several health and safety issues and I have reported them I have lost my job even though there was no issues with my work my performance my paperwork.

On the grounds of whistle blowing against the company on HSE reasons I have been forced out of a position I believe this to be victimisation, bullying and unlawful'

5.8.8. The claimant appealed against his dismissal and an appeal meeting was held on 30 August 2022, chaired by Mr M Hunt and Mr P Prescott and the notes were shown at pages 77-82. Each of the incidents referred to in the dismissal letter were put to the claimant and he responded on each matter. The claimant denied that he had shortened, delayed or cancelled course for unsatisfactory reasons and gave his explanations on the specific examples given namely course at Hartlepool, Bradford and Sheffield. The claimant also raised during this meeting that he had

not been issued with sufficient PPE and that the respondent had tampered with evidence by blocking his access to e mails. It was agreed that Mr Hunt would investigate a number of points raised.

- 5.8.9. The notes taken of discussions carried out with a number of managers at the respondent by way of investigation were shown at pages 86-92. The parties drew my attention to a number of particular entries. I was referred to conversations with Mr Prescott and J Burdock on 1 September relating to the Bradford 360 course where it is alleged that the claimant required confirmation in writing from a machine manufacturer, Liebherr, that a machine was usable despite having had confirmation on the phone (page 86). I was further referred to notes of a conversation with W Kelsall where the claimant was referred to as being a *'total arsehole'* and that he didn't want to do the job or work with the site and that he *'put everything in our path for the course not to take place'*. This went on to note that the claimant was not prepared to help someone who had failed a test to retest, that he was *'not constructive – very awkward'* and in the *'wrong job'*. It noted a conversation with J Edgley where it was recorded he thought the claimant went of the subject and was bragging and badmouthing the respondent. It further stated he was *'going out of his way to find something wrong with machine'* and he *'seemed smug about failing people'*. I was referred to a further conversation where a P Rodger had said that in relation to one incident that although he agreed that the *'equipment wasn't 100% - deeming them unsafe and unusable was a bit too far'* and that Allianz would not have failed the vehicles. He noted that the claimant was *'a bit anal'*.
- 5.8.10. A further conversation with Mr Jones was noted at page 89 and 90. In that conversation it was noted that Mr Jones said that the claimant took photos and recorded everything and was the *'keeper of all records and documents'*. He also mentioned that R Wooley and M Husband had said that they *'categorically didn't want AG as the trainer'* and that people were *'fed up of him raising concerns'* and that *'Its exposed that the culture is not quite right at EMR'*. Mr Jones confirmed that the claimant bragged about his earnings but that the claimant was correct not to retest an application who had failed on the day under the NPORs rules. A conversation with L Robinson was recorded where it was noted that the claimant had told people he had booked into a flash hotel and he had been to a casino and blown £1000. His view was that the claimant was *'finding an excuse not to do it and not do the course so he could just leave'*. He described him as not approachable and that no-one liked him.
- 5.8.11. The respondent provided the claimant with an outcome to his appeal by a letter dated 13 September 2022. This addressed the issues raised on each of the examples discussed in the appeal hearing and turned down the claimant's appeal. It concluded by stating that there had been:

'consistently negative feedback from both managers and learners on your attitude, methods of training, your communication with them of your concerns, and your refusal to work constructively with teams to resolve issues, choosing rather to work against them. I have also found there were repeated occasions where you did attempt to delay or shorten courses for reasons which I can understand caused frustration amongst managers especially when this behaviour was repetitive'. It further stated:

'We encourage everyone to flag H&S concerns, and empower all of our colleagues with Stop Work Authority to use in any situation they deem unsafe. Concerns are always taken seriously, but the way in which these are raised is important, especially when raised by someone, like a trainer, who is entrusted to contributed to the embedding and constant improvement of our safety culture.'

5.8.12. The claimant presented his claim to the Tribunal on 26 August 2022 (pages 4-15) and application for interim relief on 22 September 2022 (page 18). The respondent presented its response on 28 September 2022 (pages 29-49). On 4 October 2022 the claimant presented a further document entitled 'Grounds for Response and Evidence to be Supplied' (page 100-104). At page 101 of this document, it is stated:

'I have lost my job because I have up held the standards of the HSE the PUWER REGS 1998 and LOLER REGS 1998. I have reported to managers that there is faults with there machines. The management teams have not liked this because it brings cost' and later at page 103:

'..Gary told me that the directors have got rid of me because im finding to many defects and were gonna lose them as a customer'

The relevant law

6. **Section 43B(1) of the ERA** provides as follows:

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

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

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

7. **S 103A of the ERA 1996** states that if the reason for the employee's dismissal (or if more than one reason, the principal reason) was that the employee "*made a protected disclosure*", then that employee shall be regarded as unfairly dismissed.
8. **S 128 of the ERA 1996** makes provision for an employee to be able to make an application for interim relief where an unfair dismissal complaint has been presented and that the reason alleged is one of those specified in certain listed provisions (including **s 103A of the ERA 1996**). It stipulates that such an application must be made within 7 days of the effective date of termination of employment and a tribunal shall determine the application as soon as practicable after receiving it.
9. The relevant test under **s 129(1) of the ERA 1996** that the Tribunal must apply on an application for interim relief is that it must be satisfied:
"..that it is likely that on determining the complaint to which the application relates that it will find-
(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in-
(i) section.....103A ."
10. If the Tribunal is satisfied that this test is made out, it must then make enquiries as to whether the respondent is willing to re-employ or re-engage the claimant pending the final hearing. **S 129 (8) of the ERA 1996** deals with what is to be done if the employer is unwilling to do so and if so:
"the Tribunal shall make an order for continuation of the employee's contract of employment"
11. The correct test to apply as to the meaning of "*it is likely*" is that a balance of probabilities approach is insufficient. The decision of the Employment Appeal Tribunal in **Taplin v C Shippam Ltd** [1978] ICR 1068 found that it must be established that the employee can demonstrate a "*pretty good chance*" of success.
12. This was endorsed in the case of **London City Airport v Chacko** [2013] IRLR 610:
"It is not sufficient that the employee is able to establish that "it is likely" they were otherwise unfairly dismissed, i.e. for other reasons. They must be able to show that it is likely that it will be found that they have been dismissed for the sole or the principal reason of [their trade union activities]".
It was also confirmed that an employment judge:
"must do the best they can with such material as the parties are able to deploy" and requires "*an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material he has*"
13. The meaning of likely has been confirmed in **Wollenburg v (1) Global Gaming Ventures (Leeds) Ltd (2) Herd** (UKEAT/0053/18/DA (4 April 2018, unreported) which provides:
"Put shortly, an application for interim relief is a brief urgent hearing at which the Employment Judge must make a broad assessment. The question is whether the claim under section 103A is likely to succeed. This does not simply mean more

likely than not. It connotes a significantly higher degree of likelihood. The Tribunal should ask itself whether the Applicant has established that he has a pretty good chance of succeeding in the final application to the Tribunal.”

14. **His Highness Sheikh Khalid bin Saqr al Qasimi v Robinson** (UKEAT/0283/17/JOJ) HHJ Eady QC gave guidance as to how such cases should be approached in that:

“By its nature, the application had to be determined expeditiously and on a summary basis. The ET had to do the best it could with such material as the parties had been able to deploy at short notice and to make as good an assessment as it felt able....

The Employment Judge also had to be careful to avoid making findings that might tie the hands of the ET ultimately charged with the final determination of the merits of the points raised. His task was thus 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 had succeeded or failed given the issues raised and the test that had to be applied.”

15. This also confirmed (and updated) the directions given in the case of **Ministry of Justice v Sarfraz** [2011] IRLR 562 (EAT) that in the context of an interim relief application involving a Section 103A ERA automatic unfair dismissal claim, a Judge has to decide that it is likely that the tribunal at the final hearing would find five things: (1) that the claimant had made a disclosure to his employer; (2) that he believed that the disclosure tended to show one or more of the things itemised at (a)-(f) under s43B(1); (3) that the belief was reasonable; (4) that the disclosure was made in the public interest; and (5) that the disclosure was the reason or principle reason for dismissal. The **Sarfraz** case also confirmed that “likely” connotes something nearer to certainty than mere probability.

16. I was also referred to the case of **Williams v Michelle Brown AM/UKEAT/0044/19/00** where HHJ Auerbach considered the questions that arose in deciding whether a qualifying disclosure had been made

“It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.”

17. **Cavendish Munro Professional Risks Management Ltd v Geduld [2009] UKEAT 0195 – 09 – 0608, [2010] ICR 325, [2010] IRLR 38** made it clear that to be a disclosure there must be a disclosure of information, not an allegation.

18. **Fincham v HM Prison Service EAT/0925/01** confirmed that the disclosure of information must identify, albeit not in strict legal language, the breach of the legal obligation that the claimant is relying on.

19. **Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436** - paragraphs 31 and 32 on the irrelevance of the distinction between ‘allegation’

and 'information' in whistleblowing complaints as this is essentially a question of fact depending on the particular context in which the disclosure is made.

20. The burden of proof provisions in relation to Section 103A complaints which were set out in the case of **Kuzel v Roche Products Ltd [2008] EWCA Civ 380 (CA)** are relevant. The Court of Appeal approved the approach to the burden of proof set out by the EAT as being as follows:-

"1. Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent, some other substantial reason, was not the true reason?"

2. If so, has the employer proved his reason for dismissal?"

3. If not, has the employer disproved the Section 103A reason advanced by the Claimant?"

4. If not, dismissal is for the Section 103A reason."

It further noted at para 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."

21. In **Secure Care UK Ltd v Mott: EA-2019-000977-AT (previously UKEAT/0122/20/AT)**, the EAT found that the 'materially influences' test applicable to section 47B claims for detriment by reason of making a protected disclosure (see **Fecitt v NHS Manchester [2012] ICR 372**), was the incorrect test and the Tribunal should apply the sole / principal reason test required by the terms of section 103A.
22. In **Eiger Securities LLP v Korshunova: UKEAT/0149/16/DM** the EAT found that whether the making of a protected disclosure was "a matter which was in the employer's mind at the time of dismissal" is not the correct test and Tribunals should apply the test as to whether disclosure was the reason or the principal reason for dismissal.
23. **Martin v Devonshires Solicitors EAT [2011] ICR 352** found that a Tribunal had been entitled to find that the reason for the dismissal of an employee who had made complaints was her conduct at work and the manner in which she had complained, which could be "properly treated as separable' from the fact of having made complaints. In **Kong v Gulf International Bank (UK) Limited [2022] EWCA Civ 941** the Court of Appeal endorsed the separability principle and recognised that there may be a distinction between the protected disclosure itself, and the manner in which it was made. In such a case the Tribunal had to identify the real reason that operated in the mind of the relevant decision maker.

24. In Royal Mail Group Ltd v Jhuti [2019] UKSC 55, [2020] ICR 753, [2020] IRLR 139 the Supreme Court held that *'if a person in the hierarchy of responsibility above the employee... determines that, for reason A... the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision maker adopts..., it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination.'*

Submissions

25. The claimant contends that the respondent dismissed him just a month after a meeting where he was told he had been performing well and had good feedback. He contends that he was told at the dismissal meeting by Mr Pugh that the decision to dismiss him had been made by the directors 'above his pay grade' and it was because the claimant had 'defected so many trucks' and they did not want to jeopardise the contract with EMR. He says that the examples that have been relied upon by the respondent is inaccurate stating that although he pointed out defects, all decisions are ultimately made by management. He would make recommendations but it was his management that made the decisions and his advice was often not followed. He said that when he was submitting defect forms he was giving advice that in his view the machinery was unsafe and should not be used. He submits that he is required to do this by the rules of MPORS and if he had failed to do this, he could be sanctioned and lose his ability to practice. He contends that the decisions he made to take people off courses or fail employees are correct under the rules and regulations and best practice (and these would be supported by other professionals and the governing bodies). His view is that the managers of the respondent who were challenging his conclusions were not adequately qualified to make the assessment and were incorrect. He also makes the point that whether a piece of machinery had been passed by Allianz (the insurer) was irrelevant as defects could have arisen since the date Allianz signed the machine off as safe. He pointed out that he had received excellent feedback from attendees of all courses (shown at page 130 onwards). He referred to a list of cancelled course from Mr Jones' workbook at page 66 and 67 and stated that none of these matters were related to him but related to other people raising defects including problems with subcontractor training providers. He relies on the comments of Mr Jones at page 63 about the claimant pointing out too many issues to suggest that he was doing the right thing. He says there were discrepancies in his dismissal letter. The claimant showed the Tribunal some photographs which he said indicated what the issues were with the vehicles where he had submitted defect forms and explained that these photographs had been sent with defect forms and would support his view that the vehicles in question were unsafe. In his view he was dismissed because he had 'upset the boat' and that the respondent preferred sweeping health and safety issues under the carpet.
26. Ms Quigley points out that it is the claimant that bears the burden of proof of showing that he has a 'pretty good chance' that dismissal was because of having made protected disclosures and reminds me that this is more than a 51% likelihood of success. Dealing with whether this has been proved in respect of each of the questions required for the section 103A test, she firstly submits that the pleadings were silent on the disclosures relied upon and it now appears that it is the defect forms submitted that are said to be disclosures. She acknowledges that as health and safety is part of the claimant's role, that it is habitual for him to be communicating on matters of health and safety but that

without full particulars, the respondent cannot set out its position on whether the tests of section 43B ERA have been satisfied. The respondent acknowledges that the claimant may well have made disclosures, but the lack of particularity suggests that the Tribunal cannot satisfy itself that the claimant has a pretty good chance of showing he has done so.

27. She also suggests that the claimant has not satisfied the burden of proof in showing that any protected disclosures (if made) were the reason for dismissal. The respondent submits that the claimant was dismissed by Mr Davison with the decision being a joint decision by him and Mr Pugh. The respondent submits that there is no suggestion that disclosures were made to Mr Davison personally. The claimant suggests today that at least some of the defect forms were sent to Mr Pugh, but Ms Quigley makes the point that the claimant will have to prove that the dismissing officers knew of the disclosures or that the circumstances in Jhuti above applied. She submits that the evidence will show that it was the manner in which the claimant conducted himself, and not any disclosure he may have made, that was the reason for dismissal and refers to complaints that had been received from site managers with some stating that they did not want to have the claimant on site carrying out courses. It is pointed out that the appeal process looked at whether the raising of health and safety matters was the reason for dismissal. She submits that the appeal concluded that it was not and considered a large amount of evidence to support the wider issues that had arisen with the claimant namely: that the claimant had tried to shorten or delay courses for unacceptable reasons; was frustrating the training process to try and avoid running courses; was over pedantic; was not a team player and was unapproachable. She suggests that the fact that the claimant now says he made protected disclosures before the first work review meeting on 17 June 2022 when he received positive feedback weakens his case and shows that the fact of submitting defect forms was not seen as a negative issue by the respondent. She suggests this meeting also raises one issues that comes back again as a reason for dismissal and this is the shortening of courses. She submits that there is no evidence that Mr Pugh and Mr Davison were motivated by the protected disclosures made when they dismissed the claimant and that the reasons given in the dismissal letter for dismissal was in some way a sham to disguise the fact that the claimant was dismissed for having made disclosures. The respondent states that it is not suggesting that the claimant has no prospect of succeeding in his claim, but that what has been provided does not provide a 'smoking gun' to get the claimant to the very high threshold needed of having a pretty good chance of succeeding. She points out that there are significant disputes of fact between the parties and the case will require oral evidence to be heard and assessments of credibility made. Ms Quigley points out that one of the purposes of the claimant's employment was to raise matters of health and safety and this is a case she suggests where the issues of severability of the claimant's conduct from what he was he was saying will need to be determined. On that basis she submits that it is not possible to conclude that the claimant will be likely to succeed as required by section 128 ERA and so invited me to dismiss the application for interim relief.

Conclusion

28. I have taken account of the guidance set out at the caselaw above and that to succeed in his application for interim relief, I will have decide now that it is likely that the tribunal at the final hearing would find five things: (1) that the claimant

had made a disclosure to his employer; (2) that he believed that the disclosure tended to show one or more of the things itemised at (a)-(f) under s43B(1); (3) that the belief was reasonable; (4) that (again in the reasonable belief of the claimant) the disclosure was made in the public interest; and (5) that the disclosure was the reason or principle reason for dismissal. The first four of those items deal with whether protected disclosures had been made by the claimant and the last deals with the issue of causation i.e. whether the claimant was dismissed for making any such protected disclosures.

29. Looking at the first 4 matters and whether the claimant is likely to succeed in his argument that he had made protected disclosures, on balance and on summary assessment I conclude that he is. In relation to (1) above, the claimant was employed by the respondent in a role which involved consideration of health and safety matters. That was part of his function and it is probable that by notifying defects in machinery and assessing them to be unsafe he was making a disclosure of information.
30. The next issue is whether he is likely to be able to show that he believed that the disclosures tended to show one or more of the things itemised at (a)-(f) under s43B(1). The claimant will no doubt give evidence to say he did believe this to be the case. The respondent appears to challenge this as it is of the view that the claimant was being 'overly pedantic' and raising matters with the motive of trying to get courses cancelled or delayed, rather than because he had a genuine concern. This is a matter of fact for the Tribunal, but on balance and on what I have seen at this stage, I can say that the claimant has a 'pretty good chance' of proving this subjective element of the test.
31. The next issue is whether that the belief was reasonable. That is an objective matter and so again evidence from both sides will be relevant on what legal obligations are said to have been breached and whether it was reasonable for the claimant to conclude this had taken place. There is a distinct lack of particularity on the alleged disclosures, and detail was only provided at the hearing today. The claimant has mentioned various pieces of health and safety legislation that he contends he was acting in accordance with when submitting defect forms and says he did so because machinery was dangerous. The respondent was under the impression that the claimant was relying on alleged disclosures made to the HSE but it now appears that he relies on the defect forms he submitted in relation to machinery. It is clear from what the respondent will say that the conclusions the claimant reached when submitting defect forms are not accepted and its own managers consider he was incorrect in assessing and deeming machinery unsafe (see para 5.8.3 above). The Tribunal will need to hear evidence on these issues at the hearing itself to determine whether the claimant's belief was reasonable. However on a summary assessment on the brief materials I have seen to date, I determine that the claimant just clears the hurdle of showing that he has a pretty good chance of persuading a Tribunal that his belief was reasonable. The claimant is an experienced trainer and is highly qualified in what he does. He suggests that in all instances when he deemed a vehicle to be unsafe that he has supporting evidence to suggest that he did this correctly. There is clearly going to be a margin which allows for a difference of opinion between different professionals about the condition of vehicles and their suitability for safe use. On balance, I believe on a summary assessment, the claimant will be able to show that his opinion on the state of vehicles on at least

one of the disclosures relied upon, was one which objectively it was reasonable to hold.

32. The final issue is whether the disclosure was, in the reasonable belief of the claimant, made in the public interest. Similar considerations apply as I have set out in paragraph 31 above. I also take note that the respondent employed the claimant in a training (and to a certain degree, compliance) role to assist it to ensure it was operating safely and correctly. Objectively it is clearly in the public interest for a body such as the respondent where heavy machinery is in use every day to be safe and compliant in all such matters. On what I have seen to date, I conclude that the claimant is likely to be able to show that whatever was reported was done (in his reasonable belief) in the public interest.
33. I then moved on to look at the question as to whether the claimant is likely to be able to prove that having made protected disclosures, this was the reason he was dismissed. It is not sufficient in an application for interim relief that the employee is able to establish that '*it is likely*' they were otherwise unfairly dismissed, and indeed it is not of direct relevance at all in this claim, given that the claimant is not able to claim 'ordinary' unfair dismissal, having insufficient length of service. I have taken guidance from the case law above which tells me that the claimant must be able to show that it is likely that it will be found that they have been dismissed for the sole or the principal reason of having made a protected disclosure.
34. I firstly take note of the fact that the claimant's role was one in which the 'safe' operation of plant machinery was emphasised (para 5.2 above). The respondent operates in a high risk industry where machinery can cause serious injury and death if it is defective. The respondent has a dedicated audit function in ME which is focused on audit, environment, quality and health and safety and a SHEQ team (para 5.1 above). It operates a Stop Work policy, albeit the claimant says he was unaware of this (para 5.8.1). The claimant was one of a number of Mobile Plant Instructors. The defect forms (para 5.4) that the claimant relies upon were presumably forms provided by the respondent to enable Mobile Plant Instructors to make an assessment of whether the plant they were to teach on was safe and report if they determined they were not. There was clearly an infrastructure and process in place for employees to report health and safety issues they had observed with machinery. This does not suggest that the making of reports of defective machinery at all was discouraged. The claimant had already made a number of such reports when he received positive feedback at his first performance review meeting (para 5.8.2). It appears to me that the matter the claimant actually relies upon is the perception that he raised too many such defect forms whilst employed, rather than the raising of such concerns at all. That is something that the Tribunal will need to see and hear evidence upon at the hearing itself. The claimant points to e mails from Mr Jones where there is reference to the claimant pointing out 'too many issues' and always cancelling courses and commentary by Mr Jones that he supported the claimant's actions in doing so, referring to a poor culture on some sites (see para 5.8.4 above). He also refers to Mr Jones' statement made during the investigation about the culture at the respondent (see para 5.8.10 above), This does support the claimant's view but it is only a snapshot of information with the view of one individual, and by itself and at this early stage of proceedings is not conclusive.

35. The respondent points to other reasons for dismissal, namely that it alleged the claimant was shortening or cancelling courses unnecessarily and that his behaviour on courses was poor and unprofessional. It too has produced some evidence by way of e mails and investigatory notes with the views of various other employees and managers to support this purported reason for dismissal (see paras 5.8.4, 5.8.9 and 5.8.10). Again this is only a snapshot of the evidence. There is clearly a significant dispute of fact around this matter upon which evidence will need to be heard. I cannot conclude at this stage that the claimant has a pretty good chance of convincing a Tribunal that his evidence will outweigh that of the respondent. The Tribunal will also need to hear evidence and submissions on the separability of the claimant taking decisions to cancel courses/not pass candidates etc (which may or may not coincide with the submission of defect forms) and the manner in which such matters were dealt with (as per the *Martin* and *King* cases referred to above). The separate issue of the claimant's alleged poor behaviour will also need to be explored. The Tribunal will need to determine not just what was in the employer's mind at the time of dismissal but what was the reason or principal reason for dismissal (See *Mott* and *Korshunova* cases above). The Tribunal may also need to explore issues of invented or imputed reasons as highlighted by the *Jhuti* case. The claimant challenges the detail around the incidents that the respondent relies upon to support its decision to dismiss. Inaccuracies around whether the respondent was correct in its view on some of the individual incidents does not at this stage of summary assessment shed any light on the reason for the dismissal or what was in the mind of the dismissing officer. The claimant may be able to develop this argument with further evidence to support his contention that the stated reason for dismissal was not valid, and it was in fact because of the protected disclosures. A Tribunal of fact may well come to this conclusion that he is correct but the evidence will have to be examined in full at the merits hearing. On what I have seen at this early stage, I do not believe it is 'likely' that the claimant will be able to establish this.
36. On a broad assessment of the facts as I currently see them, I do not conclude that there is a significantly higher degree of likelihood than just a balance of probabilities chance that the claimant will show that his dismissal was for having made protected disclosures. I am conscious that I must avoid making findings that might tie the hands of the tribunal ultimately charged with the final determination of the merits. The claimant clearly has some prospects of showing that he did make such disclosures and that these were the reason for the dismissal, but I cannot conclude on a summary assessment that he had a pretty good chance of succeeding or 'that it is likely on determining the complaint to which the application relates that it that the reason (or if more than one the principal reason) for the dismissal' is the making of protected disclosures.
37. The application for interim relief is therefore rejected.

Directions for further conduct of the case

38. A case management hearing will now be needed for this claim so that the issues can be further clarified and directions can be made for future conduct of the case. The parties will be notified separately of when this will take place.
39. An issue that will need to be addressed at that hearing is whether there should be early disclosure of documents in order to enable the claimant to fully clarify his claim, in particular what protected disclosures are relied upon. The claimant

says he is hampered in his attempts to do this because he no longer has access to e mails to identify the occasions upon which he submitted defect forms and made reports to the HSE. He may request an order that all correspondence and e mails about defects and defect reports are disclosed. The claimant told me he will be instructing professional representation, so it appears that this may be something that his solicitors can firstly raise with the respondent's representatives before getting in touch with the Tribunal if he seeks orders, explaining exactly what order is sought and why this is necessary.

Employment Judge Flood

24 October 2022