



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103455/2023

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Held in Glasgow on 25 July 2023

Employment Judge L Wiseman

10 **Ms Annabel Mowat**

**Claimant
Represented by:
Ms J Forrest
Solicitor**

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Centred (Scotland)

**First Respondent
Represented by:
Mr N McDougall
Advocate**

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David Brookfield

**Second Respondent
- as above**

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Anne Petrine Macdonald

**Third Respondent
- as above**

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John Gordan Bruce

**Fourth Respondent
- as above**

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Derek Brown

**Fifth Respondent
- as above**

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Helen Eunson

Sixth Respondent
- as above

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Simon Jack

Seventh
Respondent
- as above

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Douglas Wilby

Eighth Respondent
- as above

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Michael Allan Rae

Ninth Respondent
- as above

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided to dismiss the application for interim relief.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 20 June 2023 alleging that she had been unfairly dismissed, and that her dismissal was automatically unfair because the reason for it was because she had made protected disclosures. The claimant further alleged she had been subjected to detriment for having made protected disclosures. The claimant made an application for interim relief.
2. The respondents entered a response in which the first respondent accepted the claimant had been dismissed, but asserted the reason for dismissal was

gross misconduct. The respondents denied the claimant had made protected disclosures.

3. This hearing was to determine the application for interim relief. I heard submissions from the representatives and I was also referred to a folder of productions and witness statements produced by the claimant and Margaret McRae, trade union representative.

Claimant's submissions

4. Ms Forrest confirmed the claimant's position that the reason or principal reason for her dismissal on the 13 June 2023 was that she had made a protected disclosure (section 103A Employment Rights Act). The claimant asserted she had also been subjected to detriment, but this was not the subject of this hearing.

5. Ms Forrest referred to the case of ***His Highness Sheikh Khalid Bin Saqr Al Qassim v Robinson 2018 UKEAT 0283/17*** and in particular the guidance of Justice Eady:

"(1) A tribunal will not normally hear oral evidence on an interim relief application.

(2) The application has to be determined expeditiously and on a summary basis.

(3) The tribunal has to do the best it can with such material as the parties have been able to deploy at short notice and to make as good an assessment as it is able to do so.

(4) The tribunal has to be careful to avoid making findings of fact that might tie the hands of the tribunal which is ultimately charged with the determination of the substantive merits of the case.

(5) The tribunal is required to decide whether it is likely that the claimant will succeed at a full hearing of the unfair dismissal complaint. When considering the likelihood of the claimant succeeding at tribunal the

test to be applied is whether the claimant has a pretty good chance of success at the full hearing.”

6. Ms Forrest also referred to the case of ***The Ministry of Justice v Sarfraz UKEAT 0578/2019*** where the EAT held that the word “likely” used in section 129 Employment Rights Act (*Interim relief can only be granted if the tribunal thinks that the claimant is likely to establish at full hearing that the protected disclosure was the reason or principal reason for the dismissal*) means “a significantly higher degree of likelihood” than just more likely than not. The EAT also pointed out that section 129 Employment Rights Act, read in conjunction with section 43B Employment Rights Act means that it must be likely that a tribunal will find:
- (a) the claimant has made a protected disclosure;
 - (b) they believed that the disclosure tended to show one or more of the matters itemised at (a) to (f) under section 43B Employment Rights Act;
 - (c) the belief was reasonable;
 - (d) the worker reasonably believed the disclosure to be in the public interest; and
 - (e) the disclosure was the principal reason for the dismissal.
7. Ms Forrest acknowledged the burden of proof was on the claimant at this stage.
8. Ms Forrest understood there was no dispute regarding the fact disclosures were made by the claimant to her employer. The claimant met with Ms Ann Petrine Macdonald, Vice Chair of the Board on the 17 March 2023 and made the initial disclosure of her concerns. There was a dispute regarding whether the claimant had disclosed “concerns” or disclosed “information”. Ms Forrest referred to the cases of ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325*** and ***Kilraine v London Borough***

of Wandsworth 2018 EWCA Civ 1436 where guidance had been given regarding the distinction between information and making an allegation.

9. Ms Forrest invited the tribunal to have regard to the claimant's witness statement where she noted the matters raised with Ms MacDonald (broadly, matters relating to the finances of the respondent organisation and whether the Board was fully informed). Ms Forrest submitted these matters were disclosures of information which the claimant had looked into before speaking with Ms MacDonald.
10. The disclosures tended to show that the respondent had failed, was failing or was likely to fail to comply with any legal obligation to which it was subject (section 43B(1)(b)). The claimant is not required to specify the legal obligation she considered had been breached when making the disclosure (*Twist DX Ltd and others v Armes UKEAT/0300/20*).
11. Ms Forrest also referred to the case of *Blackbay Ventures Ltd t/a Chemistree v Gahir UKEAT/0449/12* where the ET held that other than in obvious cases, where a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference, for example, to statute or regulation. Ms Forrest submitted the claimant's concerns focussed on feeling misled by Mr David Brookfield, CEO and wondering if the charity trustees (the Board of Directors) were receiving all of the information they needed in order to meet their obligations in running the organisation and ensuring good governance. The legal obligation was obvious and related to the duties of directors under the Companies Act 2006 and to that of charitable trustees in Scotland under the Charities and Trustee Investment (Scotland) Act 2005. The claimant was not suggesting criminal wrongdoing, but she did have concerns that the Board were not fully appraised of the financial situation and that money wasn't available to spend on the allocated purpose (grant allocation) as had been applied for in good faith.
12. The tribunal must assess whether the claimant's belief in the matters disclosed was reasonable. This is an objective standard (*Korashi v*

Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4).

The EAT in the case of ***Phoenix House Ltd v Stockman 2016 IRLR 848*** gave further guidance on the approach to be adopted, and stated “*on the facts believed to exist by an employee, a judgment must be made as to whether or not, first, that belief was reasonable and secondly, whether objectively on the basis of those perceived facts there was a reasonable belief in the truth of the complaints*”.

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13. Ms Forrest submitted the claimant’s belief, at the time of making the disclosure, was reasonable in circumstances where she held a senior position within the organisation, she had not seen the management accounts for some time, she hadn’t been invited to Board meetings for some time, it was reasonable to believe the Board may not have been informed of the position and she had reasonable grounds to believe the Board had not sanctioned some of the spend.
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14. Ms Forrest did not understand the issue of the disclosure being in the public interest was in dispute.
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15. In conclusion, Ms Forrest submitted the claimant had a significantly higher degree of likelihood in establishing that she made a protected disclosure.
16. There was no dispute regarding the fact the claimant was dismissed with immediate effect on the 13 June 2023. The tribunal must ask itself whether, taken as a whole, the disclosures were the principal reason for the dismissal (***El-Megrisi v Azad University in Oxford EAT 0448/08***). The letter of dismissal outlined the reasons for the dismissal, being (a) you demonstrated unacceptable behaviours and standards of conduct in relation to your interactions with Josh Fisher, Head of Finance; (b) You were instrumental in contributing towards a fundamental breakdown in working relationships and this has led to a breakdown in mutual trust and confidence between David Brookfield, Josh Fisher and June Jeffrey and yourself and (c) your competency as a senior manager has been brought into question.
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17. Ms Forrest submitted there was insufficient evidence to uphold those allegations, and, even there was sufficient evidence to uphold the allegations,

the allegations were not separable from the protected disclosures themselves. Ms Forrest invited the tribunal to have regard to the chronology insofar as the claimant had made disclosures on the 17 March, had been suspended on the 20 March, had attended a grievance hearing on the 28 April, had received the grievance outcome on the 12 May, had been invited to a disciplinary hearing on the 15 May and thereafter dismissed. This demonstrated a clear pattern of behaviour towards the claimant which was not supportive of her raising concerns.

18. Ms Forrest also invited the tribunal to have regard to the fact Mr Brown, who took the decision to dismiss, was aware of the concerns the claimant had raised with Ms MacDonald. Ms Forrest also challenged the sufficiency of evidence against the claimant to allow the respondent to reach the decision which they did regarding the reasons for dismissal.
19. Ms Forrest submitted this was not a case where there were separable facts between the protected disclosure and the dismissal. There was no issue of misconduct regarding how the claimant obtained the information she disclosed. Rather, there was an attempt to prevent the claimant from using the whistleblowing policy set out in the Handbook.
20. Ms Forrest invited the tribunal to grant the application for interim relief and to make an order for the continuation of the claimant's contract.

Respondent's submissions

21. Mr McDougall, in his submission, referred to the IDS Employment Law Handbooks on Unfair Dismissal and Whistleblowing at Work.
22. Mr McDougall referred to sections 128 and 129 Employment Rights Act and submitted the test to be applied was a high one: the onus was on the claimant to satisfy the tribunal that she had a "pretty good chance of success" at the full hearing. The claimant had to satisfy the tribunal that she had a pretty good chance of success in proving she had made a protected disclosure (in terms of section 43B Employment Rights Act) and that this was the reason (or principal reason) for the dismissal.

23. The respondent took issue with two points regarding the question of whether the claimant had made a protected disclosure in terms of section 43B Employment Rights Act. Firstly, the respondent's position was that the claimant's alleged disclosures were the expression of her concerns rather than the conveyance of factual information. The language used in the ET1 was of "concerns" regarding the financial position of the respondent. Further, the source of the claimant's concerns was a discussion with the respondent's Head of Finance. The claimant stated Mr Fisher, Head of Finance, was happy to share the information with her. In these circumstances, the claimant did not subsequently disclose anything the respondent was not already aware of; and the fact Mr Fisher happily shared the information with the claimant called into question the claimant's motive in seeking to voice her concerns using the whistleblowing policy.
24. Mr McDougall submitted this all pointed to the claimant not having a pretty good chance of success in showing disclosures of information were made. However, if the tribunal was not with the respondent on that point, the tribunal must next consider whether the claimant had a pretty good chance of showing there was a reasonable belief the disclosure/s tended to show a breach of a legal obligation. Mr McDougall referred to the cases of **Blackbay Ventures** (above) and **Eiger Securities LLP v Korshunova 2017 ICR 561**.
25. Mr McDougall invited the tribunal to have regard to the ET1 at paragraph 18 where it was said that "*Those disclosures were qualifying disclosures because she believed they contained information tending to show that her employer was failing or was likely to fail to comply with a legal obligation to which it was subject. These beliefs were reasonable.*" It was submitted the claimant appeared to have adopted the rolled-up method which tribunals were to avoid. There was a list of 13 alleged protected disclosures all said to be failures to comply with an unspecified legal obligation. The claimant had not identified the source of the legal obligation she says she believed had been failed. The claimant's representative, in the submissions today, had identified potential sources of legal obligation, but this could not simply be attributed to the claimant after the event. This was all the more significant because the

claimant was the Deputy CEO and should have been able to identify the legal obligation.

26. Mr McDougall, in response to the submissions of the claimant, noted the alleged disclosures were continuously described as “concerns”. Further, at
5 paragraph 15 of the ET1 the claimant stated she had stopped being invited to Board meetings in August 2022. This could be a detriment, and if so, it began before the meeting when the claimant said she made the protected disclosures.

27. Mr McDougall invited the tribunal to refuse the application for interim relief.

10 **Decision**

28. I had regard to the terms of sections 128 and 129 Employment Rights Act; the IDS Employment Law Handbooks (Unfair Dismissal and Whistleblowing at Work) and to the cases to which I was referred. I also had regard to the key
15 productions to which I was referred and to the witness statements produced, although I did not find the witness statements to carry any weight in circumstances where they mostly repeated what was in the claim form, and were not tested by cross examination.

29. I reminded myself that my task in hearing an application for interim relief is not to make findings of fact or determine substantive issues, but rather to
20 consider and decide whether the claimant has a pretty good chance of success at a full hearing. This is a high test.

30. I noted there was no dispute regarding the fact the claimant met with Ms MacDonald on the 17 March 2023 to voice her concerns regarding the financial situation of the first respondent and concerns about changes within
25 the organisation and the working environment. There is a dispute between the parties regarding the issue of whether the claimant disclosed facts/information. Both parties put forward robust arguments to support their respective positions. I decided, having had regard to the matters said by the claimant to have been raised (paragraphs 27, 28, 29, 30, 21, 36 and 39 of her

witness statement) that the claimant had a pretty good chance of success in proving that in some of the disclosures made, she did disclose information.

5 31. The parties also put forward robust arguments regarding the issue of whether there was a reasonable belief the disclosures tended to show a breach of a legal obligation. I considered the submissions of the respondent, on the face of it, demonstrated that the claimant does not have a pretty good chance of satisfying the tribunal that she had a reasonable belief the alleged disclosures tended to show a breach of a legal obligation. It was not at all clear, for example, looking at the disclosures said to have been made, what the legal obligation/s was/were.

10 32. I next considered whether the claimant had a pretty good chance of success in showing that the reason (or principal reason) for the dismissal was the making of the protected disclosure/s. Mr McDougall made no direct submissions regarding this matter, but he did point to paragraph 15 of the ET1 where it was said that *“[The claimant] had stopped being invited to board meeting or strategy meetings since around August 2022. She had always attended these since 2015”*. This pre-dated the making of any disclosures by the claimant.

15 33. The claimant’s position is that the real reason for dismissal was because of having made protected disclosures and that there was a pattern of treatment towards her which was not supportive of her raising her concerns. This is disputed by the respondent. I considered that the information provided by the claimant in her claim form and at the meeting with Ms McDonald suggested there was much going on prior to the making of any disclosures, and this will undoubtedly be an issue about which the tribunal hearing the claim will wish to hear evidence.

20 34. I concluded, for all of these reasons, that the claimant did not have a pretty good chance of success in proving that the principal reason for her dismissal was the making of a protected disclosure.

35. I decided to dismiss the application for interim relief.

5 **Employment Judge: L Wiseman**
Date of Judgment: 27 July 2023
Entered in register: 28 July 2023
and copied to parties

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