EMPLOYMENT TRIBUNALS

Claimant: **Ms Jane Barnes**

Respondents: **(1) The Campaign for Drawing (t/a The Big Draw)**
(2) John Stachiewicz
(3) Isobel Macleod

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **30 August 2024**

Before: **Employment Judge Gardiner**

Representation

Claimant: Anthony Korn, counsel
Respondent: Sophia Richards, litigation consultant

JUDGMENT

The judgment of the Tribunal is that:-

The Claimant's application for Interim Relief under Section 128 Employment Rights Act 1996 is not well founded. It is accordingly dismissed.

Oral reasons were given on the day of the Interim Relief hearing. By email dated 1 October 2024, the Respondent has requested written reasons.

REASONS

1. This is the Claimant's application for interim relief from the First Respondent, referred to in these Reasons as the Respondent.

The test for granting interim relief

2. Section 129 Employment Rights Act 1996 sets out the test for granting interim relief. Interim relief shall be granted where it appears to the Employment Tribunal that "it is likely that on determining the complaint to which the application relates the

tribunal will find that the reason (or if more than one the principal reason) for dismissal is one of those specified in… section 103A". So far as is pertinent to this case, that means that the reason or principal reason for the Claimant's dismissal is that he has made a protected disclosure.

3. Section 103A Employment Rights Act 1996 provides:

> "An employee who is dismissed shall be regarded for the purpose of this Part as unfairly dismissed if the reason (or if more than one, the principal reason for the dismissal is that the employee made a protected disclosure"

4. Section 43B Employment Rights Act 1996 provides:

> **43B Disclosures qualifying for protection.**
>
> (1) In this Part a "qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

5. In *Dandpat v University of Bath* (UKEAT/408/09) (10 November 2009, unreported) and *Raja v Secretary of State for Justice* (UKEAT/0364/09/CEA) [2010] All ER (D) 134 (Mar) the EAT held that a claimant must show a "pretty good chance of success" to be granted interim relief, applying *Taplin v C Shippam Ltd* [1978] IRLR 450 (EAT) – a trade union automatic unfair dismissal case under s 163, TULR(C)A 1992.

6. For this purpose, the word "likely" does not mean "more likely than not" (that is at least 51% probability) but connotes a significantly higher degree of likelihood (*Ministry of Justice v Sarfraz* [2011] IRLR 562 at paragraph 16). It does not however amount to a "beyond reasonable doubt test".

7. Following the reasoning of *Ministry of Justice v Sarfraz* at paragraph 14 and updating it to reflect the 2013 amendments to the Employment Rights Act 1996, in making an order for interim relief under Section 128 and 129 Employment Rights Act 1996, the employment judge in a whistleblowing case must find that it was "likely" that the employment tribunal at the Final Hearing would find five things:

(1) That the claimant had made a disclosure of information to his employer;

(2) That he believed that that disclosure tended to show one or more of the things itemised at (a) – (f) under Section 43B(1) of the 1996 Act. Here the only basis relied upon is (d);

(3) That the belief was reasonable;

(4) That he reasonably believed that the disclosure was made in the public interest (which need not be the only motivation) and

(5) That the disclosure was the principal reason for his dismissal.

8. To amount to a 'disclosure of information' the communication ought to have sufficient factual content and specificity to be capable of showing a relevant failure (*Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436).

9. A belief can be a reasonable belief even if it is wrong. This is clear from both *Babula v Waltham Forest* [2007] ICR 1026 and from *Chesterton Global Limited v Nurmohamed* [2018] ICR 731.

10. In *Chesterton Global Limited v Nurmohamed* [2018] ICR 731, the Court of Appeal indicated the following factors were a useful tool as to whether a claimant's belief that the disclosure was made in the public interest was a reasonable belief (paragraphs 34 and 37):

(a) the numbers in the group whose interests the disclosure served—see above;

(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed—a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;

(c) 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;

(d) 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—though this should not be taken too far.

Introduction and evidence

11. In short, the Claimant claims that she is likely to succeed in her argument that the principal reason for her dismissal was that she had made a protected disclosure.

12. The Tribunal's task on an interim relief application is to make a broad-brush assessment of the evidence that has been currently prepared. It is to do this on the papers without hearing any oral evidence. As a result, the Tribunal is not making any findings of fact. Rather it is assessing what appears to be the current evidential terrain and evaluating the strength of the Claimant's case at this preliminary stage based on that terrain.

13. The evidence before the Tribunal was contained in a witness statement from the Claimant, a bundle of documents collated by the Claimant running to 327 pages, in two statements from Isobel MacLeod and from John Stachiewicz, and in a further bundle of documents from the Respondent running to 83 pages. No cross reference was made to the latter bundle in the Respondent's witness statements. I was not taken to any pages in this bundle by Ms Richards in the course of her oral submissions.

14. In advance of the hearing, Mr Anthony Korn, counsel for the Claimant, sent in a written skeleton argument and the Respondent provided written submissions.

15. It is an inherent aspect of an interim relief application that it is decided at a preliminary stage based on an initial review of the available evidence. As a result, there is limited opportunity to review and to respond to evidence prepared by the other side. The start of today's hearing was delayed so that both parties could read and take instructions on material from the other side which had not been received until shortly before the hearing. Both sides accepted that they had sufficient time to prepare and were ready to make their submissions. The submissions ended at 1pm and the Tribunal took time to review the available evidence and prepare oral reasons.

Key events

16. The key events as recorded in the evidence before the Tribunal on this application appear to be as follows. These are not findings of fact, given that no witness evidence has been formally adduced by hearing oral evidence from witnesses.

17. Since 17 August 2022, the Claimant was employed as the Executive Director of the Respondent charity. Her annual salary was £36,000 gross. She reported to a Board of eight trustees, who served the charity without receiving any remuneration. There was also a Head of Operations who also was remunerated for their work on behalf of the Respondent.

18. Towards the end of 2023, the Respondent was experiencing funding difficulties. This was largely the result of notification in the middle of October 2023 from its significant funder, Concepts, a US company, that it would not be continuing with its funding from January 2024. That company had provided around half of the Respondent's funds to cover its operating costs. The difficulties were raised by the Claimant with the Board at a meeting on 20 October 2023 and further discussed at a full Trustee meeting on 13 December 2023.

19. On 14 December 2023, the Claimant sent an email to the Board members. This email is said to contain two protected disclosures – the first regarding the parlous

financial state of the company, and the second regarding whether it was necessary to hold an AGM. It was worded as follows (with bold text and italics as written by the Claimant):

> "Dear all,
>
> In answer to the questions raised please see below:
>
> **Numbers**
> 68 artists in total - 78 works - this means just additional 18 artists to the 40.
> 58 physical works
> 8 films
> 12 digital - international
>
> **T&C's**
> Regarding the T&C's - we altered these when we extended the deadline from September to the October deadline. Making this change was not an issue then. We also altered this with the dates closing the exhibition 1 day earlier from the 18th to the 17th to facilitate the get out. However it states **40+** artists.
>
> A statement from Parker Harris:
>
> ***'Given that you had the most extraordinary amount of entries I think it is right and proper that you choose more works. The 40 was only a guideline to cover yourself in the instance that you could only find 40 decent works. As it was none of us envisaged you would get such a large and quality submission. I know the artists will be delighted that more are included as it gives them more opportunities to network and engage with the other artists and their audiences.'***
>
> **Guest List:**
> The draft guest list is attached - please email both Sandra and I with any additional names you would like added to the document.
>
> **JRP - Target**
> To reiterate from previous meetings and Executive Director's Reports - currently the JRP is on target.
>
> Extract from November's 2023 Executive Director's Report:
>
> > **The income generated from JRP** : £70,977.00.
> >
> > **Income after Parker Harris initial costs**: £52,121.43.
> > **5k is still to come in from GoStG** - £57,121.43
> > Parker Harris maintains that this will increase substantially next year.
> > **The target JB set FOR JRP**: £48,365

> Comparison, in 2019: £17, 759 (1,262 entries) and a 15k deficit to put on exhibition absorbed by The Big Draw - This is based on the only financial document given to me regarding the 20119 financial modelling and which we have based the 2023 JRP financial modelling. This has also been recorded in many minutes and Executive Director's Reports.

[At this point the Claimant's email included a table featuring financial information under the heading "John Ruskin Prize Target"]

Financial situation

The current financial situation is a result of Concept's being unable to continue to provide support compounded by the fact The Big Draw has been operating on a business model where the core activity does not bring in sufficient income. Any financial business model where the core activity of the business does not 'wash it's face' and is disproportionately reliant on the support of one major sponsor, is at risk and vulnerable. it is not advisable to operate like this.

As mentioned, I have written to Foster and Partners to ask for a donation of 9k in line with their annual donation policy of 5k per year to a charity. 9k would be just under 2 years' worth of donations. However, I was unaware and concerned to hear in the Trustee meeting that Foster and Partners had on a previous occasion donated to us to help us out and fire fight the situation, with the caveat that we should not be in the position again. Disappointedly, it seems this was not heeded and The Big Draw has carried on with the same unviable financial business model resulting in the same precarious situation.

[At this point the email included a table showing income and approximate deficits for the financial years from 2016 to 2023]

But KPI's from prior Business Plan and financial modelling would have clearly revealed this.

It is prudent to have different funding stream:
Earned income
Funding
Donations
Corporate Sponsorship

Over the last 17 months as a team we have:
- Started a funding application to ACE - told to stop
-Suggested extending our charity reach - told No
- Outsourcing funding – No

- Suggested income generated activities:

*Art Ball - with Patron named tables, drawing on table clothes and auctioning them. No
*Art Afternoon tea with silent auction. No - even though Narinder has stated that he raised 100k in one event such as this for another charity he is associated with.
* Doodle bar at events - no
*Drawing symposium with free venue and staffing support at Hauser and Wirth - where Lord Foster and Narinder have said they would speak - No
* Print and Drawing International Prize - where Parker Harris have a free venue they are just securing. NO
* Female Cartoon Symposium - No - although Netherlands have now run with this instead.

Sponsorship:
Met Architect Jake Snell and his team at LCCI event, they were keen to sponsor us. Told No as we had to be careful who we associated with.

I understand that not all ideas are appropriate but although all ideas have been met with a no - there has not been an alternative offered to date. As a team we are open and ready to embrace ideas and opportunities.

Moving forward, we need to be laser focused and ensure all activities are fit for purpose. To that end I have attached:

Governance Documents:
I have attached for reference the Memorandum of Association for The Campaign of Drawing as there may be members of the Board who are unaware of the details within it. I can see we need to be running an AGM.

And also reference:

Guidance Videos:
Also please see below a link which takes you to very helpful 5 minute video offering guidance on a number of pertinent issues:
https://www.gov.uk/government/collections/5-minute-guides-for-charity-trustees

All of which I hope you find helpful.
Communication is key here, making sure our communication is open and transparent so we are all operating on the same page. It might be helpful in each meeting we have feedback from each Lead Trustee and I would also like to set up regular, 1:1, bi monthly meetings with each trustee.

Emma, can you please send me over the draft funding application as agreed in the meeting last night. Thank you.

As previously mentioned, staff morale is at rock bottom, we are exhausted.

Have a lovely Christmas

Kind regards

Jane"

20. She attached a version of the Memorandum and Articles of Association that she had downloaded from the Charity Commission website. This was an out-of-date version dating from 2006. The current version had been agreed in 2011 and notified to Companies House.

21. By way of a follow up email, Mr Stachiewicz wrote an email to Isobel MacLeod in the following terms:

> "Dear Isobel,
>
> I'm finding Jane's tone and approach increasingly antagonistic and frustratingly difficult to work with, as I'm sure you are. I know that you more than anyone else have expended a huge amount of effort and energy into supporting the charity and if I'm feeling rather beleaguered by it then I can only begin to guess at how you're feeling. I rather despair as to where we go from here but would love to think that there's an answer somewhere out there.
>
> I can't really see a way through this at present other than trying to get through the JRP with reputation intact and finances not too battered and then looking for a new home for TBD or unravelling it but I'd very much appreciate your thoughts and seeing if our views dovetail.
>
> If you have some time on Monday or Tuesday for a call that would be marvellous.
>
> With thanks and very best wishes,
>
> John"

22. This email did not specifically reference the Claimant's comments in her 14 December 2023 email about the need for an AGM. Indeed, it does not appear from the evidence to which I have been referred that there was any email sent to the Claimant or to another Trustee specifically picking up on this particular observation from the Claimant. The thrust of the Claimant's submission is that this is to be inferred from the reference to her tone and approach.

23. Mr Stachiewicz emailed Rachel Gadsden, who I take to be another Trustee, on 18 December 2023 in which he wrote as follows:

> "You're absolutely right of course about concerns relating to Jane's increasingly belligerent attitude to and communications with the Board. She is as you say under a lot of pressure but her aggressive approach isn't helping. I'm continuing to pick this up with her but I'm finding that there's a

> fine line between on the one hand directing and being supportive of her and on the other alienating her further. It's a deeply tricky situation."

24. That is a passage relied upon by the Claimant. In addition, Mr Stachiewicz also wrote as follows in the next paragraph:

> "I'll be spending some more time this week in seeing what we might do to help Jane and the team get through these next stages and I have no doubt that it will be a bumpy ride, but I'm constantly buoyed by your support and the efforts of a number of our fellow trustees."

25. On 19 December 2023, the Claimant emailed Mr Stachiewicz. She had been meeting with a company called Achates, who she described as a very well-respected Arts Consultancy. It appears that she had approached them with a view to securing their help to secure funding. By way of reaction, Mr Stachiewicz wrote the following to his fellow Trustees:

> "To my mind although they are more reputable than the rather dubious NPG proposal it's still a case of throwing money that we don't have at a rather speculative bid. And although I know that Jane does apparently have previous experience of successfully putting together funding bids I'm not entirely confident that she has the wherewithal to compose something suitably apposite for The Big Draw. However I wanted to sound you both out before I reply to Jane."

26. The approach of another Trustee, Emma Black, was not to dismiss the Claimant's suggestion out of hand. She acknowledged in her response that if they could answer a list of questions then a bid could be made to Garfield Weston. However, she doubted that they would get £30,000 from such a bid. The Respondent seems to have made significant efforts to find alternative sources of funding. The Claimant was centrally involved in seeking these alternative sources.

27. On 15 January 2024 there was a meeting between the Claimant and Mr Stachiewicz which discussed the financial situation. Following that meeting, the Claimant sent him an email setting out her understanding of the financial situation. This recorded a disagreement between the Claimant and Mr Stachiewicz about the best way to secure further funding. This is the third alleged protected disclosure and was worded as follows:

> "Dear all,
>
> Thank you for this email John. Firstly I would like to thank Tom for arranging the meeting and for everyone giving their time today. As I have said many times before, time is the most precious thing you can give to anyone.
>
> It might be helpful to reply to each point raised in the email in turn:
>
> **Loan agreement and contracts**: Yes - we need Melissa to send the final copies through of both the loan agreement and the contracts for freelance staff and it would be helpful if you could chase her up please.

Achates:
- I will chase Foster and partners up regarding potential additional funding.
- Regarding the spread sheet we are using as **a budget for JRP** - and I am sure you will correct me if I am wrong with this Isobel, but it was originally put together by Rachel who ran the 2019 JRP . Eleanor and I then used this as a template to input updated information and figures. Isobel then inputs additional information into it - unless it is a completely new spreadsheet that I am unaware of.?

- With regard to the concern: ***' that Achates would not be in a position to put together a coherent and compelling application without significant input from you and Sandra,***' I am used to: working for companies like this; using companies like this and working with organisations who use companies like this. It will not take 2 days to facilitate this. I know and understand the key information they need. I anticipate an initial meeting of 1 hour, with key documents sent to them and then they produce a draft which Sandra and I would sign off on. Companies like this are engaged to minimise work for staff not create more. To reiterate it would not take 2 days worth of interactions to write a funding. bid and to be clear it would not distract from the JRP. However a real concern is the longer we leave it the time for the money to be secured is compromised. Ultimately we cannot leave it until the exhibition closes on the 17th February and then apply for funding as with an 6-8 week decision process this would take us to the end of April /May and we need the funding in place by the end of February beginning of March.

- The Priority is of course JRP - but I feel that we need to also be sorting the financial side out once and for all to stop constant fire fighting, through having a robust business model with multiple streams of income.

The biggest stresses for the team come from:

- **Obstructive** responses to any suggestion to secure funds - these are relentless. For example, even a negative comment regarding if we actually sell the work, that it would create another set of problems in relation to VAT. These negative comments have been for every single suggestion ever made to secure extra funds, even with help from Narinder. Just selling 10% of the work could potentially secure £35.300.

- **Not having the mandate** to secure the financial future.

- **The unnecessary pressure** we are being put under with the uncertain financial future and subsequent job insecurity, whilst also managing an exceptional international Art Prize. Alarmingly from the meeting today it is clear conversations have already taken place about closing The Big Draw, and the processes that needs to go through to do this, which neither I nor the staff have been privy to when of course it directly impacts the team's

livelihood. This is a huge concern for anyone else in this position. It might be helpful to flag up a couple of points, which I tried to voice earlier:

1. Croner: When we were looking at getting rid of Eleanor, due to performance concerns, Croner was extremely helpful. Eleanor was on the older contract not the new Croner one. In both it states out jobs are **subject to funding**. However, when we explored the potential of telling Eleanor that the funding wasn't there for her job, Croner explained that regardless of this being in our contracts, we would have to follow **due process** and undertake **a business review**, where all jobs would come under scrutiny, to prove that the funding wasn't there for her job. This Business Review, in line with the ever-changing employment law, would come at additional cost and have costs attached for redundancy. Hence why we went through the 'support' avenue, which eventually led to Eleanor resigning. I have to reiterate that employment law is ever changing and very specific and Croner are the employment specialists, hence why we signed up to them. If it is the intention to close the Big Draw then this review would have to take place within the next few weeks.

2. Union: We have all joined a union and any business review would have to be discussed with our union to ensure due process was being followed.

- JRP Priority: I agree that the priority is obviously the JRP however, this can be managed, whilst Achates writes a funding bid.

- At the moment I feel, all the team feel, we are being put under unnecessary negative pressure. Pressure and positive stress is expected and factored in when facilitating such an ambitious project like JRP; there is that burst of excitement and adrenaline that makes it a success. BUT what is unhealthy and unnecessary is the relentless negative 'dis- stress-' which feels like it is being dished out in spades, this causes people to feel **disempowered** and the short point is that it **makes people ill** and no one should ever do that to another human being - it is unnecessary.

From a team perspective we feel that Tom is moving mountains to help us and whatever happens we will be entirely grateful for his support.

I am glad there is a huge amount of goodwill towards us, but the short point is that at this moment in time we actually do not feel there is. I am hopeful that on the other side of this we will see that there has been this support and look forward to seeing it.

However, having said all this I would like to reiterate that the team is determined to make the JRP a huge success, regardless.
Moving forward, I feel it is wise that HR - Croner is present in our next board meeting. Having spoken to the Charity Commission I am also aware that they provide additional support and can attend meetings, which might also

> be helpful to use. Everyone on the board has exprectional [sic] skills and experience that can be used in a much more positive way.
>
> The JRP has superb ground breaking work in it, the exhibition will be exceptionally diverse and celebrates all art forms - but as I write this to you all, I just feel overwhelming sadness that the focus is never on the positives or solution focused. I have served on and worked with many boards, particularly with Arts Council England, I have never encountered anything quite like this. After all we all went through and some of us are still going through from the pandemic, I would have thought that we would have all re-prioritised and be working for the greater good, blasting obstacles out of our way, finding creative solutions not creating unnecessary problems and obstacles. I am still hopeful we can do that.
>
> Have a lovely evening.
>
> Kind regards
>
> Jane"

28. Further emails between Ms MacLeod and Mr Stachiewicz on 23 January 2024 expressed a degree of gloom about the future. Ms McLeod said:

> "Its all a bit tense at the moment but I am really trying to avoid any confrontation or unnecessary annoyance to team."

29. In response, Mr Stachiewicz said:

> "I'm struggling at the moment to see a way through all of this. It would be extraordinary and rather wonderful if Anita could somehow subsume the operation within hers but that does rather seem like clutching at straws."

30. From 31 January 2024 to 17 February 2024, the Respondent ran the John Ruskin prize and exhibition. The Trustees were personally involved in organising and operating the exhibition. It was hoped that the publicity surrounding this event might generate further sources of funding. That proved not to be the case.

31. The Claimant relies on a sentence in an email on 7 February 2024 sent by Isobel MacLeod to a group of others that reads "I'd be interested in how Shula [another of the Trustees] thought today went". She argues that this is one Trustee asking another Trustee to report back on her own conduct and performance.

32. The essence of the Claimant's case is that the Respondent took an early decision that she should be dismissed and then contrived a redundancy process which she argues was a sham. Particular reliance is placed on an email dated 5 March 2024 from Mr Stachiewicz which read:

> "Our main thorny problems at the moment seem to be:
> • Jane's redundancy

• The Croner contract (Melissa - have you had a chance to look at this at all)"

33. I have been taken to a document which is said to date from 8 March 2024. It is not in the format of an email, is not dated, and no help is provided by the index to the bundle. This discusses a possible future organisational structure in which an operational role would be retained and this person would also support Batsford Gallery. It anticipated that the Executive Director role occupied by the Claimant would be made redundant. This presupposed that there would be an arrangement with Batsford Gallery whereby Batsford Gallery would provide the Respondent with funding and Batsford Gallery would carry out commercial activities under the Big Draw brand. That proposed involvement with Batsford Gallery was never realised.

34. The Respondent had an arrangement with Croner HR to provide assistance with Human Resources issues. On 7 March 2024 Croner HR provided a draft redundancy letter to the Respondent for the Respondent to send to the Claimant.

35. On 8 March 2024, Melissa Sterling emailed Ms MacLeod headed "Redundancy Notice letter". It read:

> "Thanks, Isobel,
> I'm happy to prepare the letter once the termination date is agreed.
> Does Jane have any equipment belonging to TBD?
> Is there an expectation that she will work her notice period?
> Best regards
> Melissa"

36. On 11 March 2024 there was an informal meeting held between the Claimant and the Chair and Treasurer of the Trustees. This discussed the potential for the Claimant to be made redundant. There is a difference between the parties as to the extent to which her redundancy was said to be inevitable at this point.

37. On 13 March 2024, Croner HR was engaged at least in part in connection with conducting a redundancy exercise. It is said that a redundancy notice letter was prepared on 21 March 2024.

38. On 22 March 2024, the Claimant raised two grievances. One was described as a whistleblowing grievance. The other was a grievance which raised disability and age discrimination arguments.

39. The whistleblowing grievance is not argued by the Claimant to be a separate protected disclosure. It was recorded in a three-page document. Whilst it referred to the 14 December 2023 email in relation to the failure to hold an AGM and alleged a failure to act in the The Big Draw's best interest to secure funding, it did not indicate that the latter was a breach of a legal obligation, still less make any reference to Section 172 Companies Act 2006.

40. A grievance hearing was held on 16 April 2024 and was conducted by Croner. On the same day, the Claimant lodged a data subject access request. On 17 April 2024, a redundancy at risk meeting was held with the Claimant and her union

representative. Further meetings were held on 23 April 2024 and on 29 April 2024. On 3 May 2024, Croner's case report on redundancy was issued.

41. On 9 May 2024, the Claimant was given notice of redundancy. The Operations Manager was also made redundant on the same date. On 29 May 2024, the Claimant forwarded a letter from the Charity Commission flagging up that regulatory issues had been drawn to its attention and informing the Trustees that it would be issuing regulatory advice.

42. The Claimant appealed against her redundancy. Her appeal was unsuccessful.

43. The Claimant's instructions to Mr Korn, her representative at this interim relief hearing, were that a person called Matilda Barrett was subsequently engaged as a new Executive Director. She had the role of running the 2025 John Ruskin prize and exhibition. This is not referred to in her witness statement.

The Claimant's case

44. So far as the protected disclosures are concerned, the first of the two alleged protected disclosure made in the email of 14 December 2023 concerned the current financial situation at the Respondent. The Claimant's case is that this was a qualifying disclosure in that it disclosed information that she reasonably believed amounted to a breach of a legal obligation, namely the obligation that applied to company directors to promote the success of the company, imposed by Section 172 Companies Act 2006.

45. Section 172 Companies Act 2006 is worded as follows:

> **172 Duty to promote the success of the company**
>
> (1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company.

46. The second alleged protected disclosure is said to be the following sentence in the same email:

> "Moving forward, we need to be laser focused and ensure all activities are fit for purpose. To that end I have attached:

> Governance Documents:
>
> I have attached for reference the Memorandum of Association for The Campaign of Drawing as there may be members of the Board who are unaware of the details within it. I can see we need to be running an AGM."

47. The Claimant argues she reasonably believed this to be a breach of the legal obligation imposed on the company to comply with the terms of the Memorandum of Association. In fact, the document attached to the email was the version of the Articles of Association which was currently searchable on the Charity commission website.

48. The third protected disclosure is said to be the written confirmation provided in the email dated 15 January 2024. The Claimant's case is that she reasonably believed that the information she was disclosing tended to show a breach of Section 172 Companies Act 2006.

49. The Claimant points to the email reaction to her email of 14 December 2023 and subsequent emails to argue that there is a causal connection between any protected disclosures and her subsequent dismissal. Her case is that they show a pretty good case that her protected disclosures was the principal reason for her dismissal.

The Respondent's case

50. The Respondent argues that the alleged protected disclosures were not qualifying disclosures within the meaning of Section 43(1)(b) ERA 1996. It argues that the principal reason for the dismissal was redundancy not any previous protected disclosures. It points to the gap of five months between the protected disclosures and notification of dismissal.

51. The Respondent argues based on *McConnell v Bombardier Aerospace trading as Short Brothers Plc* [2008] IRLR 51 that interim relief cannot be granted as a matter of law. On the latter point, the *McConnell* case concerned automatically unfair selection for redundancy where the principal reason was a reason which as a matter of law made the selection automatically unfair. It does not apply to the redundancy situation in the present case where both of the remaining employees were made redundant.

52. As a result, the issue for me to decide is whether the Claimant has a pretty good chance of establishing at the Final Hearing that the principal reason for her dismissal was that she had previously made a protected disclosure.

Conclusions

Qualifying disclosure

53. I accept that the Claimant has an arguable case that the financial disclosures made on 14 December 2023 or on 15 December 2024 were in law qualifying disclosures. However, on the evidence before me, I do not accept that she has a pretty good chance of successfully showing that the financial disclosures made on 14

December 2023 or on 15 January 2024 were protected disclosures, for the following reasons:

1. It was the Claimant's role to report to the Trustees on the Respondent's current financial situation. This appeared to be what she was doing in her email dated 14 December 2023. Whilst a protected disclosure can be made if an employee is discharging the duties inherent in their role, the fact that it is their role is potentially relevant to whether they had the required beliefs when sending the email.

2. There is no reference in either this email or in the email of 15 January 2024 to Section 172 of the Companies Act 2006. Whilst I accept that it is not a prerequisite that a protected disclosure should identify the legal obligation which is said to be engaged, it is relevant to whether the Claimant will be found to have that belief and to whether that belief will be judged to be reasonable.

3. The Whistleblowing Grievance makes no reference to either communication as a protected disclosure. Nor does it allege that there has been a breach of Section 172 Companies Act 2006, either expressly or by reference to the nature of the obligations that it imposes on company directors.

4. The Particulars of Claim makes no reference to Section 172 Companies Act 2006.

54. So far as the alleged qualifying disclosure regarding the need to hold an AGM is concerned, I am prepared to accept that the Claimant has a pretty good chance of successfully showing that this was a disclosure of information. This matter is certainly not beyond argument. It appears that the Claimant is expressly disclosing that the legal documents require an AGM to be held and it is potentially implicit in her choice of wording that this requirement is overdue. Whether that is the proper interpretation of the Claimant's wording will need to be assessed once full evidence has been gathered and tested in cross examination.

55. I am also prepared to accept that she reasonably believed that her disclosure that "we need to be running an AGM" was a breach of a legal obligation. The failure to hold an AGM was apparently inconsistent with the documents she was attaching, even if those documents had been subsequently updated. Even if her belief was wrong, it was a reasonable belief.

56. However, whilst it is arguable that this disclosure was reasonably believed to be a disclosure made in the public interest, I do not consider that the Claimant has a pretty good chance of showing this. The disclosure itself makes no reference to the public interest. Nor does the whistleblowing grievance. I accept that a Claimant can be wrong about whether something is in the public interest, whilst still having a reasonable belief that it is in the public interest. I note what is said at paragraph 18 of the Particulars of Claim. However, considering the *Chesterton* test, it is not clear how the Claimant will establish that it was reasonably believed to be in the public interest to disclose that this particular charity had failed to comply with its governing documents by failing to hold an AGM. It is potentially relevant to the public interest

(or the lack of it) that this particular step had not been required by the Memorandum or Articles of Association since 2011. This aspect of the legal test which needs to be satisfied to amount to a qualifying (and hence a protected) disclosure is not one that has a pretty good chance of success.

57. Therefore, I do not consider that the Claimant has a pretty good chance of showing that any of the three alleged protected disclosures were protected disclosures.

Causation

58. I accept that the Claimant has an arguable case that her dismissal was at least influenced by qualifying protected disclosures. It appears that the Trustees were frustrated with their perception of the Claimant's attitude as demonstrated in her email of 14 December 2023. However, on the evidence before me, I do not accept that she has a pretty good chance of successfully showing that this was the principal reason for her dismissal for the following cumulative reasons:

1. There is strong evidence that the Respondent was in significant financial difficulties. It had lost its major funder and had been unable to replace those funds from other sources. The Claimant herself had raised the precarious nature of the Respondent's finances and the perilous situation that the Respondent was in.

2. The Respondent therefore needed to make urgent and significant cost savings.

3. Saving the Claimant's salary of £36,000 together with the additional employment costs associated with her role was a significant cost saving.

4. The only other employee was also made redundant at the same time as the Claimant. There is no suggestion that that other employee had also made protected disclosures.

5. Whilst there is potential evidence from which it can be argued that the decision to make the Claimant redundant was predetermined, it appears that the Respondent took external advice from Croner and asked Croner to carry out a redundancy exercise.

6. There was a gap of five months between the date of the alleged protected disclosure and the date of her dismissal.

7. It is unclear why the information disclosed in the email dated 14 December 2023 or the email of 15 January 2024 would be sufficient provocative as to lead the Respondent to retaliate by dismissing her.

8. There are no specific references to the email of 14 December 2023 or the email of 15 January 2024 in the internal documents disclosed as part of the Claimant's data subject access request.

9. On the current evidence, it would appear that the principal reason for her dismissal was that there was a redundancy situation and urgent and significant cost savings needed to be made.

Conclusion

59. The outcome therefore is that this claim for interim relief must fail. In so finding, I recognise that the evidential picture may be different once all the evidence has been adduced at a Final Hearing. This will include fuller explanations as to the Claimant's beliefs. I also recognise that I have not evaluated the strength of the Claimant's claim for pre-dismissal protected disclosure detriment. This does not arise on an interim relief application.

Employment Judge Gardiner
9 October 2024