**Case Number: 3201465/2020 V**

# EMPLOYMENT TRIBUNALS

**Claimant:** **Ms E Paton**

**Respondents:**
**(1) Wernick Group (Holdings) Limited**
**(2) Wernick Group Limited**
**(3) Wernick Construction Limited**
**(4) David Wernick**
**(5) Benjamin Wernick**

**Heard at:** **East London Hearing Centre**

**On:** **Wednesday 24 June 2020**

**Before:** **Employment Judge W A Allen QC**

**Representation**

Claimant: Ms R Jiggins

Respondent: Ms J Temple

**This has been a remote video hearing which was agreed to by the parties. The form of remote hearing was V: video - fully (all remote) by CVP. A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing. The documents that I was referred to are in the tribunal file, and in the written submissions, authorities and bundles of documents produced by the parties, which I had before me.**

# JUDGMENT

**The judgment of the Tribunal is that:-**

**The application for interim relief fails and is dismissed.**

# REASONS

1 This hearing was listed to deal with the Claimant's interim relief application made in her ET1 claim form presented on 31 May 2020. The Claimant's position is that the reason or principal reason for her dismissal was that she made one or more protected disclosures and that this amounted to an automatic unfair dismissal contrary to Section 103A Employment Rights Act 1996 ('ERA').

2 At the outset of the hearing the parties agreed that the legal basis on which my decision today would be based was that set out in paragraph 5 of the record of the Case Management Preliminary Hearing on 10 June 2020, subject to reflecting the 2013 amendments to the ERA by the removal of (iv) relating to good faith and its substitution with the question as to whether the Claimant reasonably believed that he disclosures were made in the public interest. As amended, that paragraph now reads as follows:

> 2.1 Interim relief is available in appropriate protected disclosure dismissal cases where the claimant is "likely" to succeed in all the issues required to establish the claim. 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" applying *Taplin v C Shippam Ltd* [1978] IRLR 450 (EAT) – a trade union dismissal case under TULR(C)A, s 163. Following the reasoning of *Ministry of Justice v Sarfraz* [2011] EAT 562 and updating it to reflect the 2013 amendments to the ERA, the EAT clarified that, in making an order for interim relief under ss 128 and 129 ERA, 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: (i) that the claimant had made a disclosure to her employer; (ii) that she believed that that disclosure tended to show one or more of the things itemised at (a)–(f) under s 43B(1) of the 1996 Act; (iii) that that belief was reasonable; (iv) that she reasonably believed that the disclosure was made in the public interest; and (v) that the disclosure was the principal reason for his dismissal. In that regard, the word "likely" does not mean "more likely than not" (that is at least 51% probability) but connotes a significantly higher degree of likelihood.

3 Another way of framing the necessary degree of likelihood is that the Claimant needs to have 'a pretty good chance of success' (*Raja,* para 28).

4 I had before me written submissions from both parties submitted in advance of the hearing. A Claimant's bundle ran to page 150f and a Respondent's bundle ran to page 102. I looked only at the documents which were referred to in submissions. I heard oral submissions today from both parties' representatives. I had indicated that there was no need to produce the authorities referred to above and I was referred to a number of additional authorities in written submissions:

> 4.1 *Bombardier Aerospace v McConnell* [2008] IRLR 51 *and McConnell v Bombardier Aerospace (No 2)* [2009] IRLR 201

4.2 *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38

4.3 *Chesterton Global Ltd (t/a Chestertons) v Nurmohamed* [2017] EWCA Civ 979

4.4 *Kuzel v Roche* [2008] ICR 799

4.5 *Halpin v Sandpiper Books Ltd* [2012] UKEAT/0171/11/LA

4.6 *Prince v Groundwork Wrexham* [2013] UKEAT/0492/12/GE

4.7 *Thomas & Betts Manufacturing Ltd v Harding* [1980] I.R.L.R. 255

4.8 *British Aerospace v Green* [1995] ICR 1006

4.9 *Taymech Lld v Ryan* [1994] EAT/663/94

4.10 *El-Megrisi v Azad University* [2009] UKEAT/0448/08/MAA

4.11 *Royal Mail v Jhuti* [2019] UKSC 55

*Kilraine v London Borough of Wandsworth* [2018] ICR 1850 was also referred to during oral submissions.

5 The identification of the correct employer is a matter which remains in dispute. For today's purposes I have taken the employer to be Wernick Buildings Limited but a final determination of that question will need to await further preliminary or final hearings in this matter.

6 I make no findings of fact. It is neither necessary or desirable for me to do so at an interim relief hearing. The outline chronology put forward by the Claimant is that she was employed by the Respondent from 15 October 2013 to 26 May 2020, latterly as a Divisional Manager in what I understand to be the South West Division which covers both the South West of England and Wales. The Claimant is also a founder member of the Disabled Workers Union ('DWU'). The Claimant and only the Claimant was dismissed in May 2020; the Respondent says by reason of reason of redundancy. The Claimant had been placed in a pool of one, the Claimant says unfairly, and the documentary evidence suggests that the redundancy process had started by 21 or 22 April 2020.

7 In accordance with the directions made at the Preliminary Hearing on 10 June, the Claimant has set out in tabular form allegations as to the protected disclosures that she made and that chart (at paragraph 7 of the Claimant's skeleton submissions) states as follows:

| Date | Manner | Information Disclosed | Legal Obligation |
|---|---|---|---|
| 28 Feb 2020 | Verbally to BW - AM | That EP believed deploying AD to Scotland for other than a brief period would be a breach of the duty to make reasonable | S 20-21 Equality Act |

| | | | |
|---|---|---|---|
| | | adjustments because of his son's disability. | |
| 28 Feb 2020 | Verbally to BW – PM | That SW's decision to send AD to Scotland would be disability related harassment or discrimination arising to his child's disability knowing he would be unable to meet his caring responsibilities if deployed to Scotland for other than a brief period if additional support was not offered | S 15 & S 26 Equality Act |
| 2 Mar 2020 | Verbally to BW | That instructing EP to remove one of MP (disabled wife) or AD (disabled child) from the business by the end of the summer because both were associated with disabled people would be unlawful disability discrimination. | S 15 & S 26 Equality Act |
| 4 May 2020 | Written Grievance | That SW directed EP to work while on furlough | Coronavirus Job Retention Scheme Treasury Direction |
| | | That R was paying men in equivalent roles more than EP. | S 66 Equality Act 2010 |
| | | That proceeding with the alleged 'redundancy' would be unlawful victimisation for having done a protected act / automatically unfair for whistleblowing | S 27 Equality Act S103A Employment Rights Act |
| | | That the unreasonably short time for consideration of settlement was unreasonable conduct | S 111A Employment Rights Act |

8 The Respondent does not accept that the communications of 28 February 2020 and 2 March 2020 amounted to disclosures or that any of the disclosures were protected or qualifying disclosures.

9 It is the Claimant's contention that she reasonably believed that her disclosures on 28 February and 2 March 2020 concerning deployment of staff with disabled family members tended to show a breach of the Equality Act 2010 and that she reasonably believed that in making those disclosures she did so in the public interest. It is the Claimant's contention that the disclosures contained within her written grievance dated 4 May 2020 tended to show breaches of the Coronavirus Job Retention Scheme Treasury Direction; the equal pay sections of the Equality Act 2010; and (referring back to the earlier disclosures) breaches of the Equality Act 2010 and of Section 103A of the

Employment Rights Act 1996 itself; and that there had been a breach of Section 111A of the Employment Rights Act 1996 in the length of time allotted to the Claimant for consideration of a settlement proposal.

10 The Respondent did not object to me having sight of without prejudice documents in relation to the settlement proposal.

11 Addressing the questions before me one by one: firstly is the Tribunal likely to find that the Claimant made disclosures on the basis as set out in the table in the skeleton replicated above. On the limited information before me I considered that the Claimant was likely to establish that she made the disclosures largely as alleged. A Tribunal would apply the principle in *Kilraine* to the effect that any sharp distinction between disclosure of information and an allegation could well be artificial.

12 It was not in dispute that if made those disclosures were made to the employer.

13 Putting the next two questions together, the next issue is whether it is likely that the Tribunal would find that the Claimant had a reasonable belief that her disclosures tended to show a breach of a legal obligation. It is not usually particularly difficult for someone in the Claimant's position to establish that she reasonably believed that there was a breach of a legal obligation.

14 The Respondent accepts that the Claimant did raise issues about another employee with a disabled child being required to travel to Scotland. It is not necessary for the Claimant to be right in her assertion or belief about a breach of a legal obligation. Some excellent points were made in Ms Temple's submissions about whether alleged breaches of the Equality Act relating to associative discrimination would actually be breaches under our understanding of the current legislation and case-law but it seems likely that a tribunal would find that the Claimant believed that they tended to show breaches of legal obligation and that it was reasonable for her to so believe. For the Claimant, a founder member of the Disabled Workers Union, to raise points that might point to associative discrimination in the disability field, is likely to be found to be something that she would reasonably believe tended to show a breach of a legal obligation. I remind myself that the words of the statute are 'tended to show' which certainly leaves room for the Claimant's position, whether she knew of the caselaw on associative discrimination and Section 15 of the Equality Act or not. I remind myself also that harassment under Section 26 of the Equality Act 2010 does not require the person subjected to harassment to have the protected characteristic and also that harassment is defined widely within the legislation.

15 Turning to the second group of disclosures, it also seemed likely that a tribunal would find that the Claimant had a reasonable belief that the disclosures about the Treasury Direction on furlough, the equal pay legislation and referring back to the previous disclosures tended to show breaches of legal obligations (or a likely future breach in the case of s103A ERA).

16 I was not satisfied that a tribunal would be likely to find that the Claimant reasonably believed that there had been a breach of Section 111A of the Employment Rights Act 1996. The assertion in her grievance that without prejudice protection had been removed did not necessarily suggest that she considered that there had been a breach of a legal obligation in that regard.

17 The next question is in relation to the public interest and whether the Claimant reasonably believed that the disclosures made by her were made in the public interest and I will deal with them in reverse order.

18 Dealing with those made in the grievance of 4 May, I did not consider that a tribunal was likely to find that the Claimant reasonably believed that the furlough scheme, equal pay and a103A and s111A ERA disclosures were made in the public interest. Those were matters which were specific to the Claimant. I considered the Claimant's argument that in relation to the furlough scheme and in relation to the equal pay matter, any such disclosure or at least the type of disclosure specifically made by the Claimant could inherently reasonably be believed to be in the public interest. That is certainly arguable. However, the argument did not on the limited information before me today seem likely (in the *Taplin* sense) to succeed in persuading the Employment Tribunal in this case.

19 The situation was however different in relation to the Equality Act disclosures said to have been raised by the Claimant in February and March 2020 (and again on 4 May 2020). These affected workers other than the Claimant, albeit only one or two workers directly. The Respondent accepted that the question for the Employment Tribunal would not have been whether it was in the public interest but whether the Claimant reasonably believed that her disclosures were in the public interest. The Court of Appeal in *Chesterton v Nur Mohammed* established that a disclosure did not need to serve the interests of persons outside the workplace to be regarded as something which could reasonably be believed to be in the public interest. I am in no doubt that this point is arguable on the Claimant's part but the more difficult question for me is however whether the Tribunal ultimately determining this matter was likely to find that the Claimant reasonably believed those disclosures to have been in the public interest and that involves a subjective element (the belief) and an objective test (whether it is reasonable). I considered it (just) likely (in the *Taplin* sense) that a tribunal would find in the Claimant's favour on this issue, taking into account her position in the DWU; the public importance of discrimination issues; and that the matters that she raised related to co-workers and were not specific to the Claimant.

20 The most fundamental question in the case seem to me to be the final question which was whether the tribunal were likely to find that the Claimant's disclosures (or at least those that were qualifying and protected) were the reason or principal reason for her dismissal. This is where the Respondent concentrated its submissions. In relation to the 4 May 2020 grievance disclosures about furlough, equal pay and ss103A and 111A, even if I am wrong about the likelihood of the Tribunal determining that the Claimant reasonably believed them to be in the public interest, it also seems to me that the Tribunal would be likely to find that they came too late in the process for the Tribunal to be likely to determine that they were the reason or principal reason for the decision to dismiss. I come to that conclusion, even accepting, as I do, the Claimant's submission that it is the cumulative effect of disclosures that is relevant rather than any specific disclosure. Indeed the Claimant's own written submission suggests at paragraph 31 that the Respondent had decided to remove the Claimant from the business from at least 21 April 2020. For that reason and because I had already found against the Claimant in relation to the bulk of the 4 May 2020 matters (on the question of reasonable belief in public interest) I focused on the disability discrimination disclosures.

21 Given the pool of one, I thought it likely that a tribunal would reject what seemed initially to be attractive submissions by the Respondent that Section 105 of the Employment Rights Act 1996 would exclude the possibility of interim relief if there was a genuine redundancy situation; and given that pool of one and that only one person was made redundant, I accept the Claimant's submission that a tribunal would be likely to scrutinise the Respondent's actions in dismissing the Claimant purportedly for redundancy more carefully that would be the case for example in a mass redundancy situation or a case where the Claimant was in a large pool.

22 There is very hotly disputed evidence as to whether there is a genuine redundancy situation and I am not even nearly able to make findings of fact today nor should I do so in relation to some of the matters on which I have heard submissions. I note only that the Claimant's case, put with considerable passion and vigour by Ms Jiggins, is certainly arguable. The Respondent unsurprisingly relies on the Covid19 pandemic. The Claimant unsurprisingly points to the availability of the furlough scheme (which could have been utilised for her for longer) and also points to the paucity of evidence as to the Respondent's thinking on redundancy, prior to its communications with the Claimant in April 2020. The Respondent can point to a redundancy process which appears to have started at least on 21 or 22 April (in so far as it affected the Claimant), the various steps of which are evidenced by correspondence. It also points to the Claimant's initial reaction to being informed about the threat of redundancy which related to the 'D2C scheme' which does not (at least on the information before me) appear to be related to the protected disclosures at all and also to the Claimant's more considered reaction when she gave her responses to the redundancy proposal which itself suggested the possibility of redundancies (albeit not her redundancy). The Claimant says that this is a sham redundancy or at least it is a grossly unfair redundancy and that inferences can be drawn from that. The Claimant points to the Claimant being the only redundancy in some 700 plus staff members. The Respondent comes back on that saying that the unique nature of the Claimant's particular job; and the unique nature of the business in Wales (having the Managing Director on tap) is something that a Tribunal would take into account. These are all matters which would no doubt the subject of considerable evidence including witness evidence and argument at the final Tribunal hearing. I remind myself that it is not for Employment Tribunals to decide whether employers make good decisions when they decide to make employees in general or specific employees redundant, but, that said, simply claiming that a redundancy situation exists is not a cloak behind which an employer can get rid of a troublesome whistle blower. Without making any findings of fact and without suggesting that a tribunal could not possibly find this point in favour of the Claimant, I am not able to determine that a tribunal is likely to find that the reason or principal reason for the dismissal was that the Claimant made a protected disclosure. Given the very real possibility of the Respondent establishing that redundancy (even a flawed redundancy) was the reason or principal reason, I cannot say that the Claimant has a pretty good chance of success on that issue, to the standard that is required by the guidance provided in the caselaw that I have referred myself to and for that reason this application for interim relief fails and is dismissed.

23 I was very grateful to both Ms Jiggins and Ms Temple for their participation in the case - for the preparation that went into it; getting all of the documents to the Tribunal and for dealing with the case by video - which is, at least at the present time, an unusual manner. I am also grateful to those observing, including the lay parties, for their civilised participation.

24 Another case management hearing will be required in the case but I think that it is not right for me to set any dates for that at the moment because it will have to wait for the Respondent's ET3 to come in (if it comes in). The matter will then be listed in the usual way for such a hearing in order to go through the issues in the substantive case and make case management orders.

**Employment Judge Allen QC**
**Date: 3 July 2020**