



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Maria Marino  
**Respondent:** London Borough of Newham  
**Heard at:** East London Hearing Centre  
**On:** 20 September 2022  
**Before:** Employment Judge F Allen

## Representation

**Claimant:** In person  
**Respondent:** Mr Moher (Solicitor)

# JUDGMENT

The claimant's application for interim relief is dismissed.

# REASONS

## Introduction

1. On 25 August 2022 the claimant brought a claim for automatic unfair dismissal as a result of making protected disclosures, age discrimination, race discrimination, sex discrimination and money claims.

2. In the claim form the claimant applied for interim relief and the hearing of the interim relief application was listed to be heard on 20 September 2022 before the respondent had filed its Grounds of Resistance.

## The Hearing

3. The hearing proceeded by way of submissions and, having checked with the parties, the documents I considered were:

- ET1 with Particulars of Claim

- Bundle of documents provided by the claimant running to 255 pages
- A written overview of the claimant's submissions
- Statements of Christopher Holland and Paul Ugwu from the respondent.

4. The claimant also showed the tribunal and Mr Moher, representing the respondent, two short videos on her mobile phone and two pictures. The first video showed the construction site at Arthingworth Street on 25 April 2022 and the second Sandar Apartments on 3 May 2022. One picture showed a room which had a wooden roof and the claimant said contained combustible material and the second picture showed a second room which the claimant said potentially contained asbestos.

5. During the submissions the claimant had a comfort break and said that she felt dizzy as she was stressed and had not eaten. Although I offered a break for the claimant to eat, she said she did not want a break but wanted to continue.

### **Claimant's case**

6. The claimant's dismissal took place on 19 August 2022 and, following early conciliation, the claim was presented to the Employment Tribunal on 25 August 2022. The procedural requirements, pursuant to section 128 of the Employment Rights Act 1996, for making an interim relief claim are met.

7. In the Particulars of Claim, overview and submissions the claimant says that the principal reason she was dismissed from her employment was that she made protected disclosures relating to health and safety and expenditure of public money which showed a failure to comply with legal obligations. These disclosures were made to management within the London Borough of Newham and were made before her two-month Probation Period Review on 6 April 2022, at two CTM meetings on 27 April 2022 and 4 May 2022 and at a site progress meeting on 5 May 2022. In a further meeting with Paul Ugwu on 16 May 2022 the claimant says she again raised health and safety issues and additionally issues relating to expense and loss claims and overspending.

8. It is the claimant's position that she is an architect and overqualified for the role of Construction Manager. She has the skills and qualifications for the role of Construction Manager and prior to making the protected disclosures she had received positive feedback from Paul Ugwu, her peers and contractors that she was very good at her job, her work was wonderful and she was a very nice person. No performance issues had been raised with her and additionally she had been assigned new schemes.

### **Respondent's case**

9. The respondent in the witness statements of Paul Ugwu (Senior Construction Manager and claimant's line manager) and Christopher Holland (Head of Delivery in the Housing Delivery Team and Paul Ugwu's line manager) dispute the facts of this case even down to the role of the claimant. The claimant states that she worked for the respondent unpaid as a Construction Manager

from 25 January 2022 and by written contract from 7 February 2022 to 19 August 2022 and as an unpaid design lead. The respondent disputes that the claimant worked unpaid from January 2022 and says that the claimant was not asked to do any design work as lead role.

10. The respondent, in submissions, accepts that the claimant made protected disclosures related to health and safety (that they were made at the time of the second month probation meeting and meeting on 4 May 2022 is disputed). The respondent's position is that there is insufficient evidence to show that the claimant made disclosures tending to show that the respondent has failed, is failing or is likely to fail to comply with a legal obligation.

11. The respondent did not make detailed submissions in respect of whether the belief the claimant had was reasonable and in the public interest. Although not conceding this issue the main issue which was significantly opposed in submissions was whether the principal reason for the claimant's dismissal was that she had made these protected disclosures.

12. It is the respondent's position that the claimant did not pass her probationary period for capability and performance reasons which are set out in the claimant's five-month review. The respondent says that Health and Safety issues are taken seriously and the claimant, although an architect did not demonstrate that she had the transferable skills necessary for her role as a Construction Manager.

## **The Law**

13. The relevant statutory provisions and legal authorities are as follows: Section 128 Employment Rights Act (ERA) 1996 provides:

128. Interim relief pending determination of complaint

- (1) An employee who presents a complaint to an employment tribunal that he has been unfairly dismissed and –
  - (a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in –
    - (i) section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or
    - (ii) paragraph 161(2) of Schedule A1 to TULRCA 1992,...

may apply to the tribunal for interim relief.

14. The question to be considered upon an application for interim relief is set out in s129 ERA 1996:

129. Procedure on hearing of application and making of order

- (1) This section applies where, on hearing an employee's application for interim relief, it appears to the 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 the dismissal is one of those specified in section 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A.”

15. Interim relief can therefore be ordered where the Tribunal finds that it is likely that a final hearing will decide that the reason (or principal reason) for dismissal was the employee having made protected disclosures contrary to s 103A ERA1996.

16. Interim relief does not apply to claims for unlawful discrimination and victimisation see *Steer v Stormsure Ltd* [2021] EWCA Civ. 87.

17. The meaning of the word 'likely' has been considered in several cases. In *Taplin v C Shippam Ltd* [1978] IRLR 450 EAT, (decided under similar provisions relating to interim relief applications in dismissal for trade union reasons) the EAT held that it must be shown that the claimant has a 'pretty good chance' of succeeding, and that that meant something more than merely on the balance of probabilities.

18. A 'pretty good chance' of success was interpreted in the case of *Ministry of Justice v Sarfraz* [2011] IRLR 562, EAT, as meaning 'a significantly higher degree of likelihood than just more likely than not'. Underhill P stated in *Ministry of Justice v Sarfraz* [2011] IRLR 562 that, “in this context ‘likely’ does not mean simply ‘more likely than not’ – that is at least 51% - but connotes a significantly higher degree of likelihood.”

19. The burden of proof is on the claimant and in the case of *Ministry of Justice v Sarfraz* [2011] IRLR 562 the EAT determined that in order to make an order for interim relief in a case involving allegations of automatically unfair dismissal under section 103A of ERA, the Tribunal must decide that it was likely that the Tribunal at the final hearing would find five things:

- (i) that the claimant had made a disclosure to his employer;
- (ii) that he believed that that disclosure tended to show one or more of the things itemised at (a) to (f) in section 43B(1) of ERA;
- (iii) that the belief was reasonable;
- (iv) that the disclosure was made in good faith (The requirement that the disclosure be made in good faith has now been removed and replaced by the requirement that the claimant reasonably believed that it was made in the public interest); and
- (v) that the disclosure was the principal reason for his dismissal.

20. The word “likely” does not mean “more likely than not” (that is, at least 51% probability), but connotes a significantly higher degree of likelihood.

21. "Protected disclosure" is defined in s43A Employment Rights Act 1996. In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

22. The disclosure must be a disclosure of information, of facts rather than opinion or allegation (although it may disclose both information and opinions/allegations), *Cavendish Munro Professional Risk Management v Geldud* [2010] ICR; *Kilraine v LB Wandsworth* [2016] IRLR 422.

23. In determining whether the reason for the claimant's dismissal was her alleged disclosure, it is not sufficient for the disclosure to be "in the employer's mind" or for it to have influenced the employer. The Tribunal must consider whether that disclosure was the "sole or principal reason" for his dismissal, and that the principal reason for her dismissal was because she had made a protected disclosure pursuant to section 43B that being a disclosure of information which in the reasonable belief of the worker is made in the public interest and tends to show:

- i) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject.
- ii) That the health and safety of any individual has been, is being or is likely to be endangered.

### **Consideration**

24. My task in an interim relief application is to make a summary assessment of the evidence in front of me and the test I have to apply is the relatively high threshold of the "pretty good chance of success". This test reflects the serious consequences which follow for an employer if an interim order is made.

25. I have not heard any oral evidence; no evidence has been tested by cross examination and I am not undertaking an extensive fact-finding exercise. I have taken a broad overview of the documents provided including the videos and considered carefully the submissions of both parties including the written overview provided by the claimant which she had produced to assist her in her submissions.

26. In giving my reasons it is sufficient for me to indicate the "essential gist of my reasoning" because I am not making a final judgment and an interim relief decision is not susceptible to detailed reasoning.

27. The Claimant must show that it is likely that the Tribunal at the final hearing will find that:

1. she made the disclosure(s) to the employer;
2. she believed that they tended to show one or more of the matters listed in the ERA 1996 s 43B(1);
3. her belief in that was reasonable;

4. the disclosure(s) was or were made in the public interest; and
5. the disclosure(s) was or were the principal cause of the dismissal.

**Has the claimant made a disclosure to her employer?**

28. The respondent accepts that the claimant made health and safety disclosures to her employer. In respect of the disclosures relating to the employer's failure to comply with any legal obligation, this related to the management of finances. The claimant addressed this in her submissions and referred to pages 181-182 of her bundle of documents which is the outcome of the Probationary Appeal Hearing and says that the claimant raised various issues including management of contracts, but the claimant accepted at the hearing that she had not provided evidence to support her assertions in respect of disclosures relating to the management of finances. I find that the claimant, has not satisfied the comparatively high test to show that such disclosures relating to the employer's failure to comply with any legal obligation have been made and I proceed to deal with the health and safety disclosure only.

**Did the claimant reasonably believe that the disclosure tended to show that the health and safety of any individual has been, is being or is likely to be endangered and was the disclosure made in the public interest?**

29. I am prepared to accept on summary assessment of the evidence and for the purposes of this application that it is likely that the claimant reasonably believed that there were health and safety issues on the construction sites she visited and that disclosure was in the public interest. The claimant's belief was founded on what she saw when she visited the construction sites. The claimant took videos and pictures as evidence, and it was part of her job description to "Ensure Newham policies and the highest health and safety procedures are followed and met in projects signed off. This includes raising any potential safety issues immediately with Senior Management and advising on appropriate actions to mitigate any risk".

30. On summary assessment of the evidence and bearing in mind that evidence has not been tested in cross examination, I consider that the claimant will be likely to be able to persuade a Tribunal that she had a genuine and reasonable belief that the disclosures relating to health and safety issues on the construction sites she visited were made in the public interest and not in her personal interest.

**Was the disclosure the principal reason for his dismissal?**

31. This leaves the causative link between the protected disclosures and dismissal and whether the disclosures were likely to be the reason for the dismissal. My consideration is a broad overview of the evidence I have been shown and I remind myself again that it must be "likely" that the disclosure is the reason or principal reason for the dismissal and the claimant must show that she has "a pretty good chance of success".

32. There are clear factual disputes between the parties on matters which go to the core of the question as to what the principal reason for the dismissal was. These factual disputes need to be determined before it could be concluded that the claimant was dismissed for making protected disclosures and not for performance and capability reasons. To determine this question a Tribunal will, at least, need to hear evidence from Paul Ugwu, Christopher Holland and the claimant together with undertaking a detailed scrutiny of relevant documents provided by both parties, including the 250 page bundle which has been submitted by the claimant.

33. I cannot say the claim is likely to succeed, as the factual position is unclear, and there is a real prospect of the respondent, at the very least, undermining the claimant's factual assertions. For these reasons the application for interim relief fails and is dismissed.

34. I make clear to the claimant that she has not lost her right to pursue her claim before the Tribunal and to proceed to a final hearing. The test for interim relief is a comparatively high one and has not been met on this occasion.

**Employment Judge F Allen**  
**Date: 27 September 2022**