EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000032/2023

Held in Glasgow on 6 February 2023

Employment Judge C McManus

Mr A Fleming	**Claimant** **In person**
Abbey Metal Ltd	**Respondent** **Represented by:** **Ms M Jenkins -** **Solicitor**

ORDER FOR CONTINUATION OF CONTRACT AND

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's application for interim relief is successful and an Order for Continuation of Contract is issued under sections 129 and 130 of the Employment Rights Act 1996 in the following terms:

1. On the basis of the normal pay period being weekly, the claimant having worked 5 days per week and having received net weekly payment from the respondent in the sum of £337.98, paid by bank transfer to the claimant's bank account, on a Friday, and the Effective Date of Termination of Employment being 16 January 2023:

    a. The contract of employment between the claimant and the respondent shall continue in force under section 130 of the Employment Rights Act 1996, from the date of its termination on 16 January 2023 until the determination or settlement of this complaint under Employment Tribunal case number 8000032/2023.

    b. The amount to be paid by the respondent to the claimant in respect of the period between the Effective Date of Termination of employment

and the date of this Judgment is calculated at the daily rate of (£337.98 / 5) £68.60 x 19 working days (17/1/23 – 10/2/23) and is £1,303.40 (ONE THOUSAND THREE HUNDRED AND THREE POUNDS AND FORTY PENCE).

c. That sum of £1,303.40 (ONE THOUSAND THREE HUNDRED AND THREE POUNDS AND FORTY PENCE) is to be paid to the claimant by the respondent by way of bank transfer to the account where wages were paid to the claimant by the respondent during the course of his employment with them and to be received within 7 days of the date of this Judgment (i.e. by 17 February 2023).

d. Commencing on Friday 17 February 2023, further sums of £337.98 to be paid to the claimant by the respondent weekly, each Friday, by bank transfer to the account where wages were paid to the claimant by the respondent during the course of his employment with them, for the duration of the period which this Order has effect, as set out at (a) above.

REASONS

Introduction and initial discussions

1. The claimant claims unfair dismissal, alleging that the reason for his dismissal was because he made protected disclosures in respect of alleged health and safety issues (whistleblowing). The claimant does not have the necessary qualifying length of service to bring an ordinary claim of unfair dismissal. The ET1 claim form was submitted on 22 January 2023, giving dates of employment from 6 April 2022 to 16 January 2023. The claimant seeks Interim Relief.

2. The claimant's position is that he was dismissed as a result of having made the alleged protected disclosures set out in a Note given to the respondent on 12 January 2023. This Note was in the respondent's Bundle at page 25 – 26 (R25 – R26) and in the claimant's Bundle at page 3 – 4 (C3 – C4). The version in the respondent's Bundle has some handwritten annotations on it. It was not

disputed that this Note was received by the respondent. The respondent's position is that the claimant was dismissed for his conduct. The dismissal letter refers to the claimant's alleged conduct on 13 January 2023.

3. An application for Interim Relief may be made where a claim is made under section 103A of the Employment Rights Act 1996 ('the ERA') and the claim is submitted to the Employment Tribunal within 7 days of the termination of employment. The claim form was therefore presented within the prescribed time for pursuing an application under Section 128(1)(a)(i) of the Employment Rights Act 1996 (the ERA). In these circumstances, a Hearing was arranged for 6 February 2023 to determine the Interim Relief application.

4. On 2 February 2023, the respondent's representative wrote to the Tribunal, copied to the claimant, referring to the Notice of Hearing and seeking confirmation on whether evidence would be heard at the Interim Relief Hearing. On 3 February a reply was sent to the respondent's representative (copied to the claimant) including the following terms:

"Your correspondence of 2 February has been referred to Employment Judge McManus who has reviewed the file and has asked me to confirm that no direction has been made by the Tribunal for witness evidence to be heard at the Interim Relief Hearing in this case, which is scheduled to take place on Monday 6 February 2023. The Notice of Hearing is in general terms, with reference to witnesses being applicable to cases where such a direction has been made under Rule 95 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013."

5. Also on 3 February, email correspondence was sent to the parties in the following terms:

"Further to email correspondence sent to parties from the Tribunal on 1 February, EJ McManus has asked me to write to parties to clarify that at the Interim Relief Hearing, under Rule 95 of the Employment Tribunal Rules of Procedure 2013), the Employment Judge taking the Hearing will not hear oral evidence, but will seek to be addressed by both the claimant and the respondent, or their representative, on the interim relief issues, in terms of

Section 128 of the Employment Rights Act 1996, and not the merits of the full claim. This will proceed by each party or their representative giving their submission, i.e. setting out their legal argument in respect of the interim relief application.

Although no evidence will be heard at the Interim Relief Hearing, each party or their representative in their submissions at the hearing may rely on documentary evidence to support their position at the Interim Relief Hearing.

If a party intends to rely on documentary evidence at the Interim Relief Hearing, they should prepare a Bundle of documents, in chronological order and with numbered pages, incorporating all documentary productions intended to be referred to at the Interim Relief Hearing, and bring to the Hearing one set for the Judge, one set for their own use, and one set for the other party's use.

Parties are encouraged to co-operate to prepare a joint set of documents containing both parties' documents with a single index. Parties are also encouraged to liaise and prepare, for the Tribunal's use, an agreed statement of facts, and chronology of key events / documents to be relied upon or referred to by either party at the Interim Relief Hearing.

If either party intends to rely on any authorities i.e. previous decisions which are relevant to the issue, then notification should be given to the other party or their representative of the case law intended to be relied upon.

It would be helpful if parties or their representatives could provide outline written submissions at the Hearing, to be provided to the Tribunal and exchanged with the other party / representative."

6. The hearing took place in person at the Glasgow Tribunal Centre. The claimant represented himself. The respondent was professionally represented by Ms Jenkins (solicitor).

7. The respondent had not submitted an ET3 by the date of this Interim Relief Hearing but sought to rely on the terms of the ET3 skeleton paper apart in the respondent's Bundle (R18 – R22).

8. Both parties produced a Bundle of Documents. Neither Bundle was extensive. The claimant's Bundle ran to 11 pages. The respondent's Bundle ran to 30 pages, including the ET1, ET3 Skeleton Paper Apart and the Respondent's Chronology. There was some duplication of documents between the Claimant's and the Respondent's Bundles. Both Bundles contained a copy of a handwritten note written by the claimant and signed by a several other employees of the respondent ('the Note'). It was this Note that the claimant relied upon as setting out protected disclosures to the respondent. This Note was in the respondent's Bundle at page 25 – 26 (R25 – R26) and in the claimant's Bundle at page 3 – 4 (C3 – C4). The version in the respondent's Bundle has some handwritten annotations on it.

9. The claimant also sought to rely on 5 separate videos, which he said showed some of the alleged health and safety breaches set out in the Note. The claimant did not rely on these videos having been disclosed to the respondent.

10. I noted that the claimant was not legally represented, while the respondent was. I said that in terms of the overriding objective in Rule 2 of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('The Tribunal Rules'), I have a duty to deal with cases fairly and justly, and where one party is legally represented and the other is not, that includes a duty to ensure parties are on an equal footing, as far as practicable.

11. The respondent's representative provided her written submissions on the Interim Relief application to the claimant and to me, together with a copy of the case law authorities relied upon by the respondent for this Hearing. Time was given for these to be read.

12. There was discussion whether the videos that the claimant sought to rely on should be shown at this Hearing. These were sent to the respondent's representative and viewed by them. The videos were each around a minute long. It was the claimant's position that the videos showed some of the alleged health and safety breaches he set out in the Note relied on as being a protected disclosure. I considered that the videos may be relevant to the likelihood of the claimant establishing at the Final Hearing that he had

believed what was set out in the Note in respect of health and safety concerns, and that that belief was reasonable. That was significant with regard to the likelihood of the claimant proving at the Final Hearing that he had made a protected disclosure, in terms of section 103A and section 43B of the ERA. I allowed the videos to be shown, on the basis that no findings in fact would be made at this Hearing and therefore I would not be making any findings of any health and safety breach by the respondent. On that basis, Ms Jenkins had no objection to the videos being viewed in the Hearing. A Tribunal clerk arranged for these to be viewed on screen in the Tribunal room. There was no oral evidence at this Hearing, so no person spoke to the content of the videos, although the videos included some descriptive narration by the claimant.

Issue to be determined

13. I required to determine whether interim relief should be granted to the claimant pending a final determination of the claimant's claims against the respondent that he was automatically unfairly dismissed in terms of section 103A ERA.

14. It was the respondent's position that in the event of the claimant's application for interim relief being successful, reinstatement would be refused. The claimant did not wish reinstatement. In these circumstances, if interim relief was granted, I required to make an Order for Continuation of Contract under section 130 of the ERA, in appropriate terms.

Relevant law

15. The circumstances in which an application for interim relief can be made is set out in section 128 ERA.

> *(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 … 103A, …*

may apply to the tribunal for interim relief.

16. Such an application must be brought within 7 days of the date of dismissal. There was no dispute that the claimant's application for interim relief was properly brought within the terms of section 128 ERA.

17. In order to succeed in his application for interim relief, the claimant must demonstrate that it is likely that in determining his claim, a Tribunal will find that the reason or principal reason for the claimant's dismissal was that the claimant had made protected disclosures.

18. The leading authority is *Taplin v C Shippam Ltd* [1978] IRLR 450, EAT, where the Employment Appeal Tribunal ('EAT') further defined "*likely*" as "*pretty good chance of success*". The test is that the claimant has a "*pretty good chance of success*" in establishing that the reason that he was dismissed was that he had made a protected disclosure. In *Taplin* the EAT expressly ruled out alternative tests. According to the EAT, the burden of proof in an interim relief application was intended to be greater than at a full hearing, where the Tribunal need only be satisfied on the "*balance of probabilities*" that the claimant had made out his case.

19. In *Ministry of Justice v Sarfraz* [2011] IRLR 562, EAT, Mr Justice Underhill, then President of the EAT, commented that the test of a "*pretty good chance of success*" does not mean simply "*more likely than not*" but connotes a significantly higher degree of likelihood, i.e. "*something nearer to certainty than mere probability*".

20. Where, as here, interim relief is sought in a whistleblowing case under section 103A ERA, the claimant must show that it is likely that the Tribunal will find (1) that he made the disclosure or disclosures to the employer, (2) that he believed that disclosure tended to show one or more of the things itemised in section 43B(1)(a)-(f), (3) that his belief was reasonable, (4) that the disclosure was made in good faith, and (5) that the disclosure was the principal cause of the dismissal. It is a requirement that the disclosure is of information and not simply the making of an allegation or statement of opinion, albeit that the

distinction is not always an easy one to draw and a disclosure of information may be made alongside the making of an allegation.

21. It is also required that the claimant reasonably believes the disclosure to be made in the public interest albeit that this does not have to be his or her predominant motive in making it.

22. In *Al Qasimi v Robinson* EAT 0283/17, the EAT had to consider whether an Employment Judge had applied the test correctly to a "*whistleblowing*" claim under S.103A, in which the central question was whether the claimant was likely to succeed in showing that she had made "*protected disclosures*" as defined in sections 43A-43H ERA. The correct approach was summarised by Her Honour Judge Eady QC, now President of the EAT, in these terms:

"By its nature, the application had to be determined expeditiously and on a summary basis. The [Tribunal] had to do the best it could with such material as the parties had been able to deploy at short notice and to make as good an assessment as it felt able. The Employment Judge also had to be careful to avoid making findings that might tie the hands of the [Tribunal] ultimately charged with the final determination of the merits of the points raised. His task was thus very much an impressionistic one: to form a view as to how the matter looked, as to whether the claimant had a pretty good chance and was likely to make out her case, and to explain the conclusion reached on that basis; not in an over-formulistic way but giving the essential gist of his reasoning, sufficient to let the parties know why the application had succeeded or failed given the issues raised and the test that had to be applied."

Submissions

23. The respondent's representative spoke to her written submissions. She relied on the following authorities:

Taplin v C Shippam Ltd [1978] IRLR 450, EAT

Raja v Secretary of State for Justice UKEAT/0364/09/CEA

Dandpat v The University of Bath UKEAT/0408/09/LA

Ministry of Justice v Sarfraz [2011] IRLR 562, EAT

Robinson v Sheikh Khalid Bin Saqr Al Qasimi EAT 0283/17

24. The claimant gave oral submissions. Both answered questions from me. Parties' positions in submissions are referenced in the 'Discussion and Decision' section below.

Discussion and decision

25. In the present case, I have had regard to the claim form and response. I have also considered the documents I have been referred to by the parties. Finally, I have taken into account the submissions of the parties. I have had to take a broad-brush approach to consideration of the matter given the nature of the issue to be determined. I am also mindful that I do not want to say anything which might be said to place any limits on any findings which might be made by the Tribunal, after hearing all the relevant evidence and submissions. I noted that at an interim relief hearing I require to make a summary assessment based on the material before me of whether the claimant had a pretty good chance of succeeding on the relevant claim. In my summary assessment, I am not making any findings of fact but setting out my observations based on the material before me, of the likelihood of the claimant succeeding at a full hearing in his complaint under section 103A of the ERA. I make my decision following the guidance from the EAT in *Al Qasimi*. I had regard to the documents before me in the Bundles produced by the claimant and the respondent. I noted the claimant's position that CCTV of the alleged altercation on 13 January 2023 was available, in the respondent's possession. Although the respondent did not dispute that that was available, and they did not seek to rely on CCTV evidence at this Hearing, I took into account the direction that no evidence was to be heard at this Hearing and so placed little weight on that position. I formed an impression of how the matter looked on the basis of what was before me. I considered it to be significant that there was no dispute in respect of a number of matters.

26. I took into account the terms of the dismissal letter (at R27). I took into account that in that letter there is no reference to alleged misconduct by the claimant specifically on 11 or 16 January 2023, relied on by the respondent in their skeleton paper apart (R18 – 22, at paragraphs 6 and 16). It was not in dispute that no formal disciplinary action had been initiated against the claimant prior to his dismissal. It was not in dispute that there was no disciplinary hearing or appeal hearing for the claimant. I took into account the terms of the claimant's appeal letter (R28 – 29 and C7 – 8). In that appeal letter the claimant sets out in clear terms that he believes that he was dismissed "*as a result of making a protected disclosure (whistleblowing)",* referencing the Note which was given to the respondent's Director (John McLean) on 12 January 2023. I took into account the terms of the response to that appeal (R30 and C9). In that response the claimant was "*advised that after discussion we advise you that your written appeal against the termination of your employment has been unsuccessful*". It was not in dispute that there was no appeal hearing. There was no indication from the papers before me of any steps being taken by the respondent to address what was set out in the Note, or in the claimant's appeal letter. There was no indication in the papers before me of any response from the respondent to the other employees who had signed the Note. There was no indication from the papers before me of Health and Safety Policies in place covering the matters set out in the Note. Included in the respondent's Bundle (at R24) is a notice in respect of the requirement for employees on site to wear "*proper protective clothing and footwear*". The claimant in his ET1 alleges that he was involved at an accident at work on 30/12/22, which was not reported in the accident book. There was no indication from the papers before me of any accident book records being kept by the respondent.

27. I did not accept the respondent's representative's position in her submissions (at paragraph 27 (d)) that "*This was not a case where there is what may be considered an obvious or even tenable direct connection between any alleged protected disclosure and / or the decision to dismiss."* In discussion on her submissions, the respondent's representative conceded that at least the timing of the dismissal had a direct connection to what is relied upon as being

the protected disclosure. I considered the timing and factual circumstances of the altercation to appear to be closely linked to the alleged protected disclosure. Even on the respondent's case at paragraphs 10 and 11 of their skeleton paper apart to the ET3, the conduct relied upon as the reason for dismissal was linked to the claimant raising health and safety concerns.

28. I considered it to be particularly significant that it was not in dispute that the altercation relied upon in respect of the reason for dismissal being the claimant's conduct was about the Note. I considered that to be significant with regard to the likelihood of the claimant establishing that the reason or principal reason for his dismissal was that he had made protected disclosures in that Note. The dispute between the parties to be resolved at the Final Hearing is about who engaged, or first engaged in aggressive behaviour about that Note.

29. The respondent's representative relied on the circumstances in the leading authority of *Taplin* as being similar to this case, and that in *Taplin* no interim relief had been granted. In *Taplin* the claimant was dismissed for conduct reasons related to the way in which he carried out his trade union activities, as set out by the EAT at paragraph 12 of their decision. The application for interim relief in that case was made in the context of the claimant being a trade union representative. The position of parties before the EAT in *Taplin* with regard to the likelihood of that claimant's claim being successful are set out at paragraph 26 of their decision. That includes:

"*Unfortunately, although we agree about everything so far in this decision, we are divided in our view as to the final outcome of the case. Two members of the Tribunal consider that although had the matter been before them afresh they might have come to a different conclusion than the Chairman, there was material before him upon which he should make an order. They consider that he was entitled, having seen witnesses, to come to the view that in all the circumstances the right course was that the matter should now proceed to a hearing. The third member of the Tribunal takes the opposite view and he is of the opinion that no reasonable Tribunal would have reached the conclusion*

which the Chairman reached on the evidence before him when properly directing himself. He would accordingly make an interim order under s 78."

30. In paragraph 27 of their decision in *Taplin*, the EAT specifically states that they have "*deliberately refrained from expressing any views upon the merits of the case or from analysing in detail the reasons why we have severally reached our views as to what the ultimate outcome of the case ought to be in view of the fact that the matter will have to go to a final hearing in any event."*

31. Given what is set out by the EAT in those paragraphs 26 and 27 of their decision, I did not take that decision as authority in respect of the merits of the interim relief application before the Tribunal in *Taplin.* Ms Jenkins sought to rely on *Taplin* with regard to the merits of this interim relief application. I did not accept her reliance on *Taplin* in that regard. I have determined the claimant's claim on the basis of the position before me, with regard to the meaning of 'likely' given by the EAT in *Taplin.*

32. Taking into account the relevant law and the information before me, in particular the undisputed matters as set out above, I formed the impression that the claimant does have a pretty good chance of succeeding in his claim under section 103A ERA. I found the following factors particularly relevant in reaching this decision:

a. That what is relied upon as being the protected disclosure is set out in writing in the Note.

b. The undisputed content of the Note.

c. The annotated comments in the version of the Note at R25 – R26.

d. The reference to alleged health and safety issues in the Note

e. That the Note was signed by other employees of the respondent, as well as the claimant.

f. That it is undisputed that the Note was received by the respondent's Director on 13 January 2023.

g. That it is undisputed that the alleged altercation relied upon by the respondent as being the conduct for which the claimant was dismissed, arose from a discussion on the Note

h. That it is undisputed that there was no disciplinary action initiated against the claimant in respect of his alleged conduct on 11 January 2023 (before making the alleged protected disclosure), as referred to at paragraph 6 of the skeleton paper apart to the ET3.

i. That it is undisputed that there was no disciplinary procedure initiated in respect of the claimant, either in respect of his alleged conduct on 13 January or any other date.

j. The timing of the claimant's dismissal relative to the alleged protective disclosure.

k. The claimant's length of service.

l. The content of the letter dismissing the claimant.

m. There having been no disciplinary hearing.

n. The content of the claimant's letter appealing the dismissal, in particular there being reference to the claimant's position that he was dismissed because he made a protected disclosure.

o. There having been no appeal hearing

p. The content of the letter informing the claimant that his appeal had not been successful, in particular there being no response to the claimant's position in his appeal letter that he was dismissed for making a protected disclosure.

q. That there was no reliance before me of any policies or procedures in respect of Health and Safety being in place, other than what is relied on at R24.

r. That the Health and Safety Notice included in the respondent's Bundle (R24) referred to possible invalidation of insurance and "*repeated*

(obviously failed) attempts to alert staff as to the requirement" to wear proper protective clothing and footwear.

s. That there was no reliance before me on any steps taken by the respondent to address with other employees the matters set out in the Note.

33. I took into account that the claimant will require to prove at the Final Hearing that the reason or principal reason for his dismissal was that he made a protected disclosure (in the Note). On what was before me, without making any final determination, I formed the impression it is likely that a Tribunal will determine that what is set out in the Note as alleged protected disclosures will satisfy the test in section 43B of ERA.

34. I take into account the respondent's representative's reliance on the person dismissing the claimant not being involved in the altercation. I consider it to be significant that the alleged altercation was with the respondent's Director and the impression that the respondent is a small company.

35. I take into account the respondent's representative's position that there was no evidence to suggest that the dismissing officer was aware of the claimant having made the statement he relies on as amounting to protected disclosures. It is not disputed that the conduct relied upon arose in relation to the Note. I consider that to be significant to the likelihood of a determination that the reason or principal reason for the claimant's dismissal was that he made protected disclosures in the Note.

36. I take into account that the Note makes no specific reference to section 103A or the making of protected disclosures. I am satisfied on the undisputed content of the Note that there is a pretty good chance that it will be determined at Final Hearing that that Note contained protected disclosures (with reference to the definition of a qualifying disclosure set out in section 43B ERA and to section 43C ERA). My impression from what was before me was that it is likely that at the Final Hearing the Tribunal will find (1) that in the Note the claimant made disclosures to the respondent, (2) that the believed that disclosure tended to show that the health and safety of individuals was being,

and / or was likely to be endangered (with reference to ERA s43B (1)(d)), (3) that the claimant's belief was reasonable, (4) that the disclosure was made in good faith, and (5) that the disclosure was the principal cause of the dismissal. In forming my impression that it is likely that the claimant's belief will be found to be reasonable, I took into account the content of the videos relied on by the claimant.

37. I took into account that the requirement is a requirement that the disclosure is of information and not simply the making of an allegation or statement of opinion, albeit that the distinction is not always an easy one to draw and a disclosure of information may be made alongside the making of an allegation. I took into account both the content of the Note and the handwritten annotations in the version in the respondent's Bundle (R25 – R26). I make no findings on whether what is set out in the Note is accurate.

38. I take into account that the consequences of this Order in respect of placing obligations on the respondent to make payments to the claimant, before a Final Hearing, when all relevant evidence may be heard. Taking into account the position of the EAT in *Dandpat (*at paragraph 20) of their decision. I do not make this Order lightly. I take into account the EAT's position in *Dandpat* in respect of there being no obligation on a tribunal to hear oral evidence in an interim relief application (paragraph 12 of the EAT's decision).

39. For the above reasons, I decided on what was before me that it is likely that a Tribunal hearing all the relevant evidence is likely to find that the claimant's dismissal is automatically unfair in terms of section 103A ERA. I consider that the claimant has a pretty good chance of proving that the principal reason for the dismissal was the making of the alleged protected disclosure.

40. The claim for interim relief is therefore successful.

41. However, the claimant should note that this decision does not mean that a Tribunal hearing all the evidence will find in his favour. Nothing in this decision affects the determination of the Tribunal on the issues before it at the Final Hearing.

42. In circumstances where reinstatement or reengagement is refused, an Order for Continuation of Contract is made under section 130 ERA. The respondent's representative produced copy wage slips (R 31). The claimant denied receipt of these wage slips but agreed that his net weekly pay from the respondent was £337.98. It was agreed that in the event of the interim relief application being successful, an Order for Continuation of Contract should be made under section 130 ERA. It was agreed that this should reflect payment from 17 January 2023, at a weekly net rate of £337.98, being a daily net rate of (£337.98 / 5) £66.60.

43. An Order for Continuation of Contract is made as set out above.

44. Nothing in this decision affects the claimant's duty to mitigate his losses arising from termination of the employment with the respondent.

45. During these proceedings the claimant made references to possible applications to amend his claim (to correct a typo) and to having received an ACAS Certificate. I explained that at this Hearing I was only dealing with the interim relief application and that the claimant should write to the Tribunal office (copied to the respondent's representative) with any proposed amendment to the ET1 claim form.

Employment Judge: **C McManus**
Date of Judgment: **10 February 2023**
Entered in register: **10 February 2023**
and copied to parties