EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000128/2023

Hearing of application for interim relief under section 128 of the Employment Rights Act 1996

Employment Judge Campbell

Mr T Jones	**Claimant** **Represented by:** **Mr J Jones - Lay Representative**
Glasgow City Council	**First Respondent** **Represented by:** **Mr K McGuire - Counsel**
Ms Alison Allan	**Second Respondent** **Represented by:** **Mr K McGuire - Counsel**
Mr John McGhee	**Third Respondent** **Represented by:** **Mr K McGuire - Counsel**
Ms Melissa Keelan	**Fourth Respondent** **Represented by:** **Mr K McGuire - Counsel**
Ms Annemarie McGougan	**Fifth Respondent** **Represented by:** **Mr K McGuire - Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The judgment of the employment tribunal is that, applying section 129(1) of the Employment Rights Act 1996, the claimant was not deemed likely to succeed in his claim of automatic unfair dismissal under section 103A of that Act; and

2. His application for interim relief by way of a continuation order is therefore refused.

REASONS

Background

1. The claimant presented his claim to the tribunal on 23 March 2023. He makes complaints of unlawful discrimination based on the protected characteristics of age and sexual orientation, detriment by reason of having made protected disclosures and automatic unfair dismissal by reason of making protected disclosures. The claimant resigned and his unfair dismissal complaint is therefore one of constructive dismissal.

2. Within his claim form the claimant indicated that he wished to apply for interim relief under section 128 of the Employment Rights Act 1996 ('ERA'). A hearing was therefore arranged for today to determine the application.

3. The claimant is not formally legally represented, but has been assisted in preparing his claim and presenting his application today by his brother, who is referred to in this judgment as Mr Jones. The respondent was represented by Mr McGuire of counsel.

4. The parties had helpfully each prepared a set of background documents which they intended to rely on in the application. Where relevant those are referred to below.

5. The respondent also submitted a typed witness statement taken from each of the individual respondents. Those were electronically signed and countersigned by hand by a solicitor within the first respondent's legal team.

6. Mr McGuire also provided a note of his submissions and copies of case authorities her referred to.

7. I reiterated the nature and purpose of today's hearing at the outset. I reminded the parties that it was not for me to make any definitive findings of fact or to decide any of the complaints made. The respondent had not yet been able to

submit a response form in reply to the claim, as is often the case in interim relief claims.

8. I confirmed that my role was confined to carrying out a preliminary assessment of the claim of automatic unfair dismissal only, with a view to deciding whether it was likely to succeed at the full hearing of the claim which will follow.

9. The claimant had previously emailed the tribunal to enquire about the process for arranging the attendance of witnesses. He had referred to three employees of the first respondent whose evidence he wished to lead, two of which were outside of Scotland. After the initial discussion about the scope and nature of this hearing, and including the requirement that it can only be postponed if there are special circumstances, it was confirmed that the claimant did not wish to take further steps to have any witnesses attend today, and would present his application based on the papers provided as supplemented by his own (and Mr Jones') submissions.

10. I adjourned the hearing to read all of the parties' submitted documents. The hearing was then reconvened and the claimant made oral submissions in support of his application made via the documents he had provided. Mr Jones made some supplementary submissions, including in relation to the respondents' case as contained in their witness statements and Mr McGuire's note of submissions. I asked a number of further questions of the claimant to ensure I properly understood his case on what I saw to be points relevant to his application today. Mr McGuire spoke to his note of submissions and other documents to emphasise the respondents' basis of objection to the application.

11. Once the parties had been heard I confirmed that I would deliberate and issue a judgment as soon as possible in writing. I was mindful that a number of discrete points had to be dealt with, and some of the issues were relatively finely balanced.

Relevant law

1. Provisions in relation to the remedy of interim relief are found in sections 128 to 132 ERA.

2. Section 128(1) reads as follows:

> ***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 …103A,…*
>
> *may apply to the tribunal for interim relief.*

3. Section 129 ERA states:

> ***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—*
>
> *(a) that the reason (or if more than one the principal reason) for the dismissal is one of those specified in—*
>
> *(i) section …103A.*
>
> *(2) The tribunal shall announce its findings and explain to both parties (if present)—*
>
> *(a) what powers the tribunal may exercise on the application, and*
>
> *(b) in what circumstances it will exercise them.*

(3) The tribunal shall ask the employer (if present) whether he is willing, pending the determination or settlement of the complaint—

(a) to reinstate the employee (that is, to treat him in all respects as if he had not been dismissed), or

(b) if not, to re-engage him in another job on terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed.

(4) For the purposes of subsection (3)(b) "terms and conditions not less favourable than those which would have been applicable to him if he had not been dismissed" means, as regards seniority, pension rights and other similar rights, that the period prior to the dismissal should be regarded as continuous with his employment following the dismissal.

(5) If the employer states that he is willing to reinstate the employee, the tribunal shall make an order to that effect.

(6) If the employer—

(a) states that he is willing to re-engage the employee in another job, and

(b) specifies the terms and conditions on which he is willing to do so,

the tribunal shall ask the employee whether he is willing to accept the job on those terms and conditions.

(7) If the employee is willing to accept the job on those terms and conditions, the tribunal shall make an order to that effect.

(8) If the employee is not willing to accept the job on those terms and conditions—

(a) where the tribunal is of the opinion that the refusal is reasonable, the tribunal shall make an order for the continuation of his contract of employment, and

(b) otherwise, the tribunal shall make no order.

(9) If on the hearing of an application for interim relief the employer—

(a) fails to attend before the tribunal, or

(b) states that he is unwilling either to reinstate or re-engage the employee as mentioned in subsection (3),

the tribunal shall make an order for the continuation of the employee's contract of employment.

4. A body of case law has evolved in relation to the way in which employment tribunals should consider applications for interim relief. Where relevant, case authorities and the applicable propositions they demonstrate are referred to in the body of the judgment below.

Legal issues

The following legal issues had to be decided in relation to this application:

1. Was it likely that the claimant's complaint of automatically unfair dismissal by reason of having made protected disclosures would succeed at a full hearing, and in particular was it likely that:

a. The claimant made one or more disclosures of information to his employer or another responsible person as provided for in section 43C ERA;

b. He held a genuine and objectively reasonable belief that the information disclosed tended to show any of the circumstances set out on section 43B(1) ERA applied;

c. He held a genuine and objectively reasonable belief that his disclosures were in the public interest;

d. The first respondent materially breached his contract of employment;

e. The claimant affirmed the breach and resigned in response to it;

f. He did so promptly and before waiving the breach; and

g. If he was therefore constructively unfairly dismissed, the sole or principal reason was that he had made one or more protected disclosures.

Discussion and decision

1. The starting point for the claimant's application for interim relief is his legal case as it is currently stated. He alleges that he was automatically unfairly dismissed by reason of making protected disclosures.

Protected disclosures

2. The claimant relies on three alleged protected disclosures as follows:

a. On 28 October 2022 he made an oral statement to a trainee with the first respondent's Psychological Services department about the fifth respondent's handing of a particular pupil, referred to in his documents and in this judgment as 'pupil A', on 3 October 2022 (referred to as the **'pupil A incident'**);

b. On 4 November 2022 he made a further oral statement to a different member of the Psychological Services department about the pupil A incident;

c. On 8 November 2022 he sent an email to the third respondent, the Headteacher of the school where he was seconded, with an attachment containing his account of the pupil A incident.

3. The claimant's account of what the pupil A incident involved is contained in his third alleged disclosure above, which was produced [R7-8]. The same document described the circumstances of his speaking to the two individuals within Psychological Services which he relies on as his first and second disclosures [R9]. There is no separate documentation of the first and second disclosures.

4. In summary, the issue the claimant had with the fifth respondent's part in the pupil A incident was that he believed she detained the pupil unnecessarily in a classroom with herself and the campus police officer when the pupil was obviously in distress as a result of her doing so. The pupil had been disruptive in class but had been taken to the Hub where they spent some time with the claimant and appeared to have calmed down. The pupil was said to have had complex needs such that having the perception of being confined, especially with a police officer involved, would be especially stressful for them. Further, it was said, the pupil was detailed for an excessive period of some forty minutes, at least part of which was without the presence of a parent or the school's Child Safety Officer, both of which joined part way through. The claimant himself was not in the room, but went to and from the door outside as the meeting was going on and listened in to what was happening in the room.

5. In his third disclosure the claimant said:

'I believed at the time that [the fifth respondent] had made an error of judgement in her handling of the situation and suspected that it may well have been a breach of [Pupil A's] rights according to the UNCRC and the law under the Equality Act 2010, on account of [their] ASD.'

6. The term UNCRC was a reference to the United Nations Convention on the Rights of the Child. The reference to ASD was in recognition of the condition Autistic Spectrum Disorder.

7. The claimant relied on this passage as evidence of his holding a reasonable belief that there had been both a failure to comply with a legal obligation by the first respondent and that the health or safety of an individual had been or was likely to be damaged – both qualifying circumstances under section 43B(1). He did not provide any more detailed reference to either piece of legislation in terms of how the fifth respondent was believed to have transgressed them.

Constructive automatic unfair dismissal

8. The claimant confirmed that his claim is based on an alleged breach of mutual trust and confidence by the first respondent rather than any breach of an explicit term of his contract.

9. It follows that if he is successful in proving such a breach, it would be a fundamental or material breach of contract.

10. The claimant relies on a course of conduct culminating in a 'last straw' rather than a single event as being the breach of mutual trust and confidence. He refers to:

    a. Each of the circumstances which he alleges is an act of unlawful discrimination, harassment or victimisation by each of the individual respondents;

    b. Other examples of conduct on the part of the respondents, particularly the fifth respondent, including spreading false rumours about him, ostracising him and asking others questions designed to elicit adverse responses about him;

    c. The way in which a meeting with the second respondent was conducted on 16 March 2023, in which the last straw was said to have occurred.

11. The claimant's case is that he met with the second respondent, a Senior HR Officer with the first respondent, on 16 March 2023 in furtherance of the various complaints he wished to make at the time against the third, fourth and fifth respondents. He wished to raise a formal grievance and provided the text of the complaints he wished to raise.

12. The respondents' account of the meeting, coming principally from the second respondent, was different from the claimant's version. She referred to it in her statement as *'amicable and [it] was not unpleasant or antagonistic'.* There are other more specific differences of fact. For example, the claimant suggested that she had dismissed his desired outcome out of hand in a way suggesting

that she had already pre-judged it, whereas she said she had advised him that some of the outcomes he was looking for were not possible to provide under the grievance policy. Similarly, the claimant accused her of switching from an informal meeting to a formal one, whereas she stated that she kept the meeting informal with the purpose of agreeing which process would be followed. The second respondent emailed the claimant a summary of some of the points discussed and, she believed, agreed at the meeting very shortly after it ended [R32], but the claimant believed that her email *'seriously misrepresents both the content of the meeting and the character of your conduct during the meeting'* as he stated in an email he sent her the following day, in which he also confirmed his immediate resignation [R27-32].

13. The claimant identifies as the last straw in a course of conduct that during the above meeting the second respondent offered him two options *'with conditions that were wholly untenable'.* Those were:

    a. To withdraw his complaints (i.e. no longer request that they be decided under a formal process) and enter a mediation process with the individuals he had complained about; and

    b. To continue with his formal complaints and be redeployed at another school while they were being determined, *'with the understanding that my status as a whistle blower and any relevant protections would be disregarded and that I would be returned to St Andrew's RC Secondary School following the conclusion of the investigation'.*

14. The claimant's position today was that he understood those were the only two options being made available to him at the time. It was unclear how his 'status' and 'protections' as referred to would be lost if he chose the second option. There was nothing in the documents to suggest this had been said by the second respondent.

15. Further, in her email of 16 March 2023 the second respondent had recorded that the first option had been declined and that *'On return from absence we can temporarily redeploy you to a primary school.'* This comment recognised that the claimant at the time was being medically certified as unfit to work and

was absent from the school. The language of the email does not on the face of it suggest the claimant was being forced to move to another school while his complaints were being handled.

16. As stated above, the claimant emailed his resignation to the second respondent. He did so shortly after midnight on 17 March 2023.

Consideration of the application

17. The Employment Appeal Tribunal helpfully reiterated in ***His Highness Sheikh Khalid Bin Saqr Al Qasimi v Ms T Robinson UKEAT/0283/17/JOJ*** the approach which an employment tribunal should take when considering an application for interim relief based on a claim of unfair dismissal by reason of the making of protected disclosures. In particular, paragraphs 5 to 18 of the judgment set out a summary of the legal framework to such applications.

18. Paragraph 9 of the judgment is a reminder that the word 'likely' in section 129 has to be read as meaning having a 'pretty good chance of succeeding', not merely a possible chance or 'could well happen'. The metaphorical bar is deliberately set high because of what is at stake if the application is granted – a respondent may have to reinstate a claimant, or at least restore their pay and benefits, for a number of months pending the outcome of the claim at a final hearing. Furthermore, there is no provision for the claimant to pay any of that back should their claim ultimately be unsuccessful.

19. Paragraph 11 confirms that the 'likely' test has to be applied to each component of a claimant's case, i.e. whether they made a disclosure of information, whether they did so to their employer or another permitted person, whether they had a real belief, reasonably held, in circumstances within section 43B(1) applying and whether they similarly had a genuine and reasonable belief that their disclosure was being made in the public interest. The test would also apply to each sequential test within the overall assessment of whether a claimant had been dismissed wholly or principally for making their disclosure(s) – which in the claimant's case would involve each aspect of the test of constructive unfair dismissal.

20. Paragraph 12 refers specifically to claims based on more than one alleged protected disclosure. It says that in those cases an employment tribunal must be satisfied that the 'likely' test applies to the relevant criteria for each putative disclosure, not just some or at least one of them.

21. Applying the principles of Bin Saqr Al Qasimi as I must, I found that the claimant was unable to establish today that he was likely to succeed at a future full hearing in his claim of automatic unfair dismissal under section 103A.

22. I considered that in particular the following issues arose:

Protected disclosures

a. The first and second alleged disclosures were not described in sufficient detail to make it likely that they conveyed information to the necessary and specific extent, nor to establish a reasonable belief in any circumstances within section 43B(1) and a reasonable belief in the public interest being served;

b. The first and second disclosures were not sufficiently likely to have been made to the claimant's employer, as they appeared to have been made to people within another department of the first respondent with a remit to support individuals in the claimant's position. As such it was not clear that they had the necessary authority or status to qualify as the 'employer' in this sense. Nor was there any reference to an alternative prescribed procedure which the claimant was following so as to be permitted to make his disclosures to a party who was not his employer. Nor for completeness was there any evidence today which would have triggered section 43G or H;

c. The third alleged disclosure, whilst having the advantage of being in writing and produced in its entirety, was not likely to have demonstrated the claimant's reasonable belief that either a legal obligation had been, or would be, breached or that a person's health

or safety had been endangered. This was for a combination of reasons, including:

i. That if the email conveyed 'information' then it met that requirement only just, in the sense that it referred to two pieces of legislation but said nothing about how each might have been contravened;

ii. The email expressed that the claimant 'suspected' that the fifth respondent 'may' have breached those provisions. This together with the lack of detail in (i) above suggests he was unsure of any breach or other circumstance which would fall within section 43B;

iii. The claimant was unable to explain in sufficient further detail today how either set of provisions could have been breached in the circumstances; and

iv. Considering his account of the pupil A incident, and noting that he was not present in the room where it occurred, it was in particular unlikely that a finding would be made that he reasonably believed in an endangerment to the individual's health or safety.

d. No finding is made here to the effect that it would have been unlikely for the claimant to establish that his disclosures were genuinely and reasonably believed by him to be in the public interest, but that is academic for present purposes given the other obstacles above.

e. The above determinations alone would be sufficient to reach a conclusion that the application could not succeed, given the tenets of ***Bin Saqr Al Qasimi*** and in particular paragraphs 11 and 12 of the EAT's judgment. However, the unfair dismissal claim was also considered.

Constructive unfair dismissal

f. As the claimant was not 'actively' dismissed by the first respondent, he will have to show that there was a material breach of contract – he relies on the obligation to maintain mutual trust and confidence – which occurred solely or principally by reason of making one or more protected disclosures.

g. It cannot be said to be likely on the evidence currently available that he would do so given that:

i. He relies on being given two options on 16 March 2023 by the second respondent regarding how to proceed with his complaints. He described them together as 'wholly untenable'. On the evidence available today at least, the first option is not untenable. He was offered the chance to pursue a less formal mediation process as an alternative to a formal complaint. He was allowed to decline it, which he did and on the face of the documents that was accepted by the second respondent. It was not an apparently inappropriate option for the second respondent to offer in the circumstances.

ii. The second option was not obviously untenable either. The claimant was absent through illness, and so may not have physically relocated to another school at all, depending on how long the process took. If he had been certified as fit to return, the offer to work in another school and away from the persons complained about appears to be reasonable and not unusual. It is not clear from any of the documents, or the claimant's own recollection, that he was being told he must be redeployed as soon as fit to work. The wording of the second respondent's email of 16 March 2023 suggests not. Although a last straw need not be a breach of contract in itself, it cannot be wholly innocuous. It is unclear at present whether the claimant would

be likely to show that the offering of the two options went beyond the innocuous in terms of actions a reasonable employer should not take;

iii. Even if it is ultimately established that the provision of the two options by the second respondent as described by the claimant represented a breach of mutual trust and confidence, or a last straw, any connection to the making of the alleged protected disclosures appears tenuous. The legal test requires that the making of the disclosures is the sole or principal reason for the dismissal, and not merely a present factor to a lesser degree. It could potentially equally be said that the second respondent acted as it did for an unconnected reason;

iv. The claimant does admittedly seek to rely on how the meeting on 16 March 2023 was conducted in a wider sense. However, as recognised above there is a large degree of factual dispute between his account of it and the second respondent's own. Without the evidence as a whole being properly tested, for example by witnesses giving evidence and being cross-examined under oath, it cannot be said that he would likely satisfy a tribunal that his account of the meeting was correct in every material way;

v. This issue also affects his claim beyond the alleged last straw of the meeting of 16 March 2023. That is to say, he relies on a number of other alleged events making up a continuous course of conduct which can all be attributed to the first respondent as his employer. On the basis of the witness statements provided on behalf of the individual respondents it can be seen that there are a number of disputes over the facts of those events, as well as other matters that those individuals appear to want to raise in the context of how they interacted with the claimant. Again therefore there are simply to many factual issues in dispute at this early stage to allow it to be said that it is likely the first

respondent breached the obligation of mutual trust and confidence when considering a sequence of a number of events relied on and when viewing the final meeting as a potential last straw.

Conclusion

23. The test contained in section 129 gives no apparent discretion to an employment tribunal to award the remedy of interim relief by granting a continuation order once it has concluded that it is not likely that the relevant claim (here as made under section 103C ERA) will succeed at a full hearing. Therefore the application must be refused.

24. Nothing in this judgment should be taken as establishing facts relevant to the claim, which will be a task for the future tribunal dealing with the full hearing (assuming no extrajudicial resolution in the meantime). By then it is likely that the parties' respective cases will have progressed and become more focussed, in that the respondents will have provided a detailed reply to the claim so that the claimant has fair notice of their position, and the parties will have disclosed further relevant documents to each other. It is at this hearing that the relevant evidence, and the witnesses, will be examined in full, in contrast to the necessarily provisional assessment of the claimant's case at this early stage.

25. As this application has now been dealt with the claim will proceed as normal by way of, presumably, the lodging of a response by the respondents and the fixing of a case management preliminary hearing.

Employment Judge: **B J Campbell**
Date of Judgment: **14 April 2023**
Entered in register: **19 April 2023**
and copied to parties