EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
MR G LEIGH-GILCHRIST	**AND**	**NAILSEA SOCIAL CLUB**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 22ND NOVEMBER 2024

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

APPEARANCES:-

FOR THE CLAIMANT:- **IN PERSON**

FOR THE RESPONDENT:- **MS M WAHABI**

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's application for interim relief pursuant s128 Employment Rights Act 1996 is dismissed.

2. Further case management directions are contained in a separate Case Management Order.

Reasons

1. By this claim the claimant brings a claim of unfair dismissal and/or automatic unfair dismissal (S103A ERA 1996) asserting that the reason (or principal reason) for his dismissal was that he had made public interest disclosures within the meaning of s43B ERA 1996.

2. The application before me today is for an order for interim relief in the making of a continuation of a contract of employment order (s129 ERA 1996). The respondent resists the application on the basis that it is not "likely" (within the meaning of s129) that the tribunal which determines the complaint will make a finding that the claimant was automatically unfairly dismissed pursuant to s103A ERA 1996.

3. The tribunal can only make one of the orders set out in section 129 if it holds that it is "likely" that the tribunal which determines the complaint will find (in this case) that the reason or principal reason for dismissal fell within s103A. "Likely" in the context of s129 means that there is "a good chance" that the tribunal will find in the claimant's favour; and a good chance means something more than the balance of probabilities, indeed a significantly higher likelihood (*Ministry of Justice v Sarfraz [2011] IRLR 562 per Underhill P*). That test applies to all aspects of the claimant's claim that may be in issue.

4. The respondent submits that there are two fundamental aspects of the claim, both of which are in dispute, and that on the information before the tribunal that there is not a good chance that the final tribunal will find in the claimant's favour in respect of either of them. They are:

i) <u>Protected Disclosures</u> – The respondent submits that on an assessment of the existing documentary evidence the claimant is unlikely to establish that he has made any protected disclosure.

ii) <u>Reason or principal reason for dismissal</u>-The respondent submits that the reason for the termination of the claimant's engagement is clearly set out in writing; is supported by documentary evidence; and that there is nothing, at least at present, to indicate that the reason given was not the true reason. Whilst it may be linked or related to, or has arisen from any disclosure (if the disclosure is found to be a protected disclosure) the reason or principal reason for dismissal was not the disclosure itself, but the disciplinary allegations against the claimant.

<u>Background</u>

5. For the avoidance doubt in this section I will set out the factual background as I understand it on the basis of the pleadings and the parties' other information. However I may be wrong and/or the position may change. I have heard no evidence and am not making, or purporting to make, any findings of fact.

6. The respondent is a private members social club. The claimant was employed as Club Steward from 1st August 2020 until his dismissal on 25th July 2024

7. He contends that throughout 2023 he made verbal disclosures to the respondent that he believed that the respondent was carrying out improper use of CCTV. On 4th February 2024 the claimant lodged a grievance. He alleges that he was sent images from the Club Treasurer's mobile phone which showed images obtained from a work Whatsapp Group which showed images from the club's CCTV system together with comments from members of the committee, and that this was the subject matter of the grievance. A grievance meeting was held on 15th February. The claimant was then absent through sickness until July 2024 and the report was not finalised until 10th July 2024. The grievance as to the monitoring of staff and members via CCTV was not upheld; the grievance as to the breach of data protection in the sharing of images on social media was upheld in part in relation to the "ill advised" comments; the grievance as to his feelings of being "monitored " himself claimant' was not upheld.

8. On 18th July 2024 the claimant was suspended and invited to an investigation meeting in relation to the information contained within the grievance which suggested that the claimant had accessed a colleagues mobile phone and downloaded images without consent. At the meeting on 19th July 2024 the claimant refused to discuss the issue.

9. On 23rd July 2024 the claimant was invited to a disciplinary hearing to face charges of : accessing, reviewing and forwarding images from a colleagues phone without permission; refusing to assist in the investigation; disclosing the contents of his suspension letter. The claimant refused to attend the disciplinary meeting which proceeded in his absence and concluded that his actions amounted to gross misconduct resulting in his summary dismissal. The claimant subsequently appealed but his appeal was unsuccessful.

<u>Protected Disclosure</u>

10. The claimant potentially relies on the following as protected disclosures:

i) The 4th February 2024 grievance; (the verbal concerns raised with members of the committee as to the improper use of CCTV during 2023 are relied on as background only) .

11. He alleges that, at least in his grievance, he disclosed information tending to show the commission of a criminal offence in that serious data breaches were occurring in the monitoring and/or downloading of images of staff and or members of the club / public.

12. The respondent submits that there is a live issue as to whether the claimant could have formed a reasonable belief as to the commission of a criminal offence. Breach

of data protection is a vague allegation, and the claimant has never specified what criminal statute has been or may be broken, or what criminal offence has or may be committed. It is not at all clear what criminal offence he is alleging, or more particularly, believed he was alleging at the time. The claimant alleges that prior to making of the disclosure he spoke to ICO and was informed that a number of criminal offences as to the misuse of the data may have occurred..

13. The issue of how he assessment of this question should be approached has been very recently summarised by Eady J in *Hall v Paragon Finance [2024] EAT 181:*

*By section 103A **ERA**, it is provided that:*

"An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

*32. The burden of proving the reason or principal reason for dismissal rests with the employer, unless (as here) the claimant lacks the required qualifying period of employment, such that they need to show that the ET has jurisdiction to hear the claim **Maund v Penwith District Council** [1984] ICR 143 CA.*

*33. As for what is a "protected disclosure", that is defined by section 43A **ERA**: a protected disclosure is a qualifying disclosure (as defined by section 43B), made in accordance with any of sections 43C-43H.*

*34. Section 43B **ERA** relevantly provides:*

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
...
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, ..."

35. Sections 43C-43H then set out the circumstances in which a qualifying disclosure can be made such as to be "protected"; most obviously relevantly, section 43C provides that will be so if the disclosure is made to the employer.

*36. Where it is said that there is a failure to comply with a legal obligation, the source of the obligation should be identified (**Blackbay Ventures Ltd v Gahir** [2014] IRLR 416 EAT, HHJ Serota QC presiding); although the identification of the obligation does not have to be detailed or precise, it must be more than a belief that certain actions are wrong, see **Eiger Securities LLP v Korshunova** [2017] IRLR 115 EAT, Slade J presiding, where it was observed that:*

"46. ... Actions may be considered wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. ..."

*37. Moreover, the disclosure of the information in question must itself have identified the breach of legal obligation concerned (**Fincham v HM Prison Service***

*UKEAT/0991/01, Elias J (as he then was) presiding), albeit the identification of the obligation need not be "in strict legal language" (**Fincham**, paragraph 33), and may be considered to be obvious when seen in context (**Bolton School v Evans** [2006] IRLR 500 EAT, Elias J presiding, at paragraphs 40-41; upheld by the Court of Appeal at [2006] EWCA Civ 1653).*

*38. A belief for these purposes may be mistaken but nonetheless reasonably held; as the Court of Appeal observed in **Babula v Waltham Forest College** [2007] EWCA Civ 174, [2007] IRLR 346 (albeit there addressing a case involving a disclosure of information that was believed to show that a criminal offence had been committed):*

"75. ... Provided his belief (which is inevitably subjective) is held by the tribunal to be objectively reasonable, neither (1) the fact that the belief turns out to be wrong – nor, (2) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is, in my judgment, sufficient, of itself, to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute." (per Wall LJ, with whom the other members of the Court agreed)

*On the other hand, in determining whether a claimant has a reasonable belief, the ET is entitled to take into account their particular knowledge and expertise; as the EAT (HHJ McMullen QC presiding) opined in **Korashi v Abertawe Bro Morgannwg University Local Health Board** [2012] IRLR 4:*

"62. ... many whistleblowers are insiders. That means that they are so much more informed about the goings-on of the organisation of which they make complaint than outsiders, and that that insight entitles their views to respect. Since the test is their "reasonable" belief, that belief must be subject to what a person in their position would reasonably believe to be wrong-doing."

*Whether a particular disclosure is a qualifying disclosure is thus to be assessed in the light of the particular context in which it is made, see **Kilraine v London Borough of Wandsworth** [2018] EWCA Civ 1436, [2018] ICR1850, per Sales LJ (as he then was) at paragraph 41.*

14. Whilst in this case the allegation is of a disclosure of a criminal offence similar principles apply. Equally the claimant is a litigant in person and I have no doubt that had he been represented he would have alleged that the disclosures tended to show either the commission of a criminal offence or breach of a legal obligation. (As is set out in the accompanying Case Management Order in my judgment the claimant is clearly relying on both, although either is sufficient in any event). It is notable, in my judgment that the grievance was understood to contain an allegation of a breach of "data protection". This is obviously capable of including breaches of the criminal law and/or of legal obligations owed under the Data Protection Act and/or the GDPR. The claimant states that prior to lodging his grievance he contacted the ICO and was told that the allegations appeared to involve allegations of the commission of criminal

offences, which is where he derives his belief that they had occurred. If this is correct, it is on the face of it sufficient to establish a reasonable belief.

15. Although I have heard no evidence in my judgment it is likely for the reasons set out above that the claimant will be able to establish each of the elements of a protected disclosure.

Reason/ Principal Reason for Dismissal

16. The respondent's second submission is that the reason for dismissal is set out clearly in the documentation and is the disciplinary allegations faced by the claimant. If the grievance is held to be a protected disclosure two of the disciplinary allegations (accessing, reviewing and forwarding information from a colleagues phone without permission ; and the refusal to assist in the investigation) arose from and are connected to the grievance. However they contend that as a matter of law that this is not sufficient. In order to succeed in his claim of automatic unfair dismissal it will need to be found that the disclosure itself was the reason or principal reason for dismissal. What led to the claimant's dismissal was not the disclosure itself, but the fact of the claimant acquiring confidential information without permission from the Treasurer's mobile phone, his use of that information; his refusal to co-operate with the investigation into that issue, and the breach of the conditions of his suspension. Manner. They submit that at present there is no evidence to support a contention that in fact it was the disclosure itself, there is nothing before the tribunal today which would allow it make any finding that it is likely that such a finding would be made, or that at the very least that is an issue that can only be determined at the final hearing.
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17. It is notable that in his own submissions the claimant relies on a looser connection to the disclosure; and in my judgment the respondent is correct that here is nothing before me today which would allow me to hold that it is likely that the necessary causal connection between any disclosure and the dismissal will be found.

18. For that reason the claimant's application for interim relief is dismissed.

EMPLOYMENT JUDGE CADNEY
Dated: 22nd November 2024

Judgment sent to the parties on
13 December 2024 By Mr McCormick

for Secretary of the Tribunals