EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mr D Clarke	Tyres on the Drive Limited

v

PRELIMINARY HEARING

Heard at: Birmingham **On: 20 June 2018**

Before: Employment Judge Flood

Appearance:

For the Claimant: **Mr Braier of Counsel**

For the Respondent: **Mr Searle of Counsel**

JUDGMENT ON INTERIM RELIEF APPLICATION

The Judgment of the Tribunal is that the claimant's application for interim relief under section 128 of the Employment Rights Act 1996 is refused.

REASONS

1. The Claimant's claim is that he was subject to a detriment for making a protected disclosure contrary to **s 47B of the of the Employment Rights Act 1996** **("ERA 1996"**) and/or because he did a protected act contrary to **s 27 (1) of the Equality Act 2010**. The claimant also claims that he was unfairly dismissed for making a protected disclosure contrary to **s 103A of the ERA 1996** or contrary to **s 94 of the ERA 1996**. An application for interim relief was presented on 1 June 2018 under **s 128 of the ERA 1996** within the prescribed time limit.
2. For the purposes of this hearing, I had before me the following documents:
   2.1. A Skeleton argument prepared by Mr Braier on behalf of the claimant.
   2.2. A witness statement from the claimant signed and dated 20 June 2018.

2.3. An agreed bundle of documents ("the Bundle).

2.4. A bundle of authorities prepared by the claimant and two additional authorities provided by the respondent.

3. Neither of the parties made an application to adduce any oral evidence so I have decided the application on the basis of the written witness statement and the documents in the Bundle. This was sufficient for me to form a view on the issues pertinent to this application.

4. The parties also confirmed that the focus of the hearing today would not be on whether or not the alleged protected disclosures in the claim were protected disclosures within the meaning of **s43A of the ERA 1996**, but the key area of dispute was on the "reason why" aspect of **s103A** and whether or not it was likely that the Tribunal would find at a main hearing that reason or principal reason for the dismissal was the making of the protected disclosures.

5. I heard oral submissions from both parties, which were completed at 12.30 pm. I then adjourned to deliberate with a view to providing an oral decision. Unfortunately due to a prolonged fire drill at the Tribunal, there was insufficient time complete this so the hearing was adjourned at 3.30 pm for a reserved decision to be produced.

The relevant law

6. **S 103A of the ERA 1996** states that if the reason for the employee's dismissal (or if more than one reason, the principal reason) was that the employee "*made a protected disclosure",* then that dismissal will be unfair.

7. **S 128 of the ERA 1996** makes provision for an employee to be able to make an application for interim relief where an unfair dismissal complaint has been presented and that the reason alleged is one of those specified in certain listed provisions (including **s 103A of the ERA 1996**). It stipulates that such an application must be made within 7 days of the effective date of termination of employment and a tribunal shall determine the application as soon as practicable after receiving it.

8. The relevant test under **s 129(1) of the ERA 1996** that the Tribunal must apply on an application for interim relief is that it must be satisfied:

"..that it is likely that on determining the complaint to which the application relates that it 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 ."

9. If the Tribunal is satisfied that this test is made out, it must then make enquiries as to whether the respondent is willing to re-employee or re-engage the claimant pending the final hearing. **S 129 (8) of the ERA 1996** deals with what is to be done if the employer is unwilling to do so and if so:

"*the Tribunal shall make an order for continuation of the employee's contract of employment*"

10. The correct test to apply as to the meaning of "*it is likely*" is that a balance of probabilities approach is insufficient. The decision of the Employment Appeal Tribunal in **Taplin v C Shippam Ltd** [1978] ICR 1068 found that it must be established that the employee can demonstrate a "*pretty good chance*" of success.

11. This was endorsed in the case of **London City Airport v Chacko [**2013] IRLR 610:

> "*It is not sufficient that the employee is able to establish that "it is likely" they were otherwise unfairly dismissed, i.e. for other reasons. They must be able to show that it is likely that it will be found that they have been dismissed for the sole or the principal reason of [their trade union activities]*".

It was also confirmed that an employment judge:

"*must do the best they can with such material as the parties are able to deploy" and requires "an expeditious summary assessment by the first instance employment judge as to how the matter looks to him on the material he has*"

12. The meaning of likely has been confirmed in the most recent judgment on this issues, **Wollenburg v (1) Global Gaming Ventures (Leeds) Ltd (2) Herd** (UKEAT/0053/18/DA (4 April 2018, unreported) which provides:

"*Put shortly, an application for interim relief is a brief urgent hearing at which the Employment Judge must make a broad assessment*. *The question is whether the claim under section 103A is likely to succeed. This does not simply mean more likely than not. It connotes a significantly higher degree of likelihood. The Tribunal should ask itself whether the Applicant has established that he has a pretty good chance of succeeding in the final application to the Tribunal*."

13. In the recent unreported EAT case **His Highness Sheikh Khalid bin Saqr al Qasimi v Robinson** (UKEAT/0283/17/JOJ) HHJ Eady QC gave guidance as to how such cases should be approached in that:

"*By its nature, the application had to be determined expeditiously and on a summary basis. The ET 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 ET 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."

14. HHJ Eady QC also confirmed (and updated) the directions given in the case of **Ministry of Justice v Sarfraz** [2011] IRLR 562 (EAT) that in the context of an interim relief application involving a Section 103A ERA automatic unfair dismissal claim, a Judge has to decide that it is likely that the tribunal at the final hearing would find five things: (1) that the claimant had made a disclosure to his employer; (2) that he believed that the disclosure tended to show one or more of the things itemised at (a)-(f) under s43B(1); (3) that the belief was reasonable; (4)

that the disclosure was made in the public interest; and (5) that the disclosure was the reason or principle reason for dismissal. The **Sarfraz** case also confirmed that "likely" connotes something nearer to certainty than mere probability.

15. In addition, in carrying out the summary assessment required, the burden of proof provisions in relation to Section 103A complaints which were set out in the case of **Kuzel v Roche Products Ltd** [2008] EWCA Civ 380 (CA) are relevant and I was directed in particular by the claimant's representatives to paragraphs 56-60 of that judgment. I also note that the Court of Appeal approved the approach to the burden of proof set out by the EAT as being as follows:-

"1*. Has the Claimant shown that there is a real issue as to whether the reason put forward by the Respondent, some other substantial reason, was not the true reason?*

2. If so, has the employer proved his reason for dismissal?

3. If not, has the employer disproved the Section 103A reason advanced by the Claimant?

4. If not, dismissal is for the Section 103A reason."

The same paragraph goes on to note that:

"it is not at any stage for the employee (with qualifying service) to prove the Section 103A reason."

16. However I take particular note that the burden of proof is on the claimant in **this application**.

The relevant facts

17. Although it is not the function of the Tribunal when considering this application to make findings of fact, some background information is required to put the case into context. I was referred to many documents by the claimant and respondent's representative in their submissions, which I have read. The relevant facts as I saw it are briefly as follows:

    17.1. The claimant was until 26 May 2018 employed by the respondent (a business which he himself founded in April 2011) latterly as Strategic Adviser having formerly been its Chief Executive Officer ("CEO").

    17.2. The respondent is a mobile tyre fitting company, which allows customers to book online or by telephone to have new tyres fitted/punctures repaired at a location of their choice. It has around 200 employees.

    17.3. In December 2016 the claimant stepped down as CEO but stayed on in the capacity of Strategic Adviser. The claimant alleges he was pressured to step down by the investors, and the respondent acknowledges that some of its investors were indeed reluctant to have the continued involvement of the claimant in the business from December 2016

onwards. He remained a major shareholder in the respondent. A settlement agreement was signed at this time. What exactly the claimant's role was to entail seems to have been the subject of some dispute and there were a number of outstanding matters relating to the settlement agreement, the claimant's shareholding in the respondent and the on-going employment of the claimant.

17.4. One advantage suggested by Mr Braier to the on-going employment was that this projected externally a happily mutually agreed parting of the ways and a smooth transition. What is clear is that whatever the perception externally, this was clearly not the case and the relationship was strained from this point.

17.5. Both parties agree that perhaps the main reason for the continued employment of the claimant was that he needed to remain so employed to take advantage of entrepreneurial tax relief. It is not clear how long the arrangement was to continue. In March 2017 the respondent appointed Ray Fernandez as interim CEO.

17.6. The claimant relies on having made a total of six protected disclosures between April and November 2017. Details of the alleged disclosures are set out in the claimant's amended ET1 and the claimant's witness statement; where documents exist, copies are in the Bundle. The alleged disclosures can be summarised as follows:

17.6.1. Disclosure on 24 April 2017 relating to an alleged discriminatory attitude towards female customers (p 1-7 of Bundle);

17.6.2. Disclosure on 24 April 2017 regarding a potential breach of data protection relating to a well known client of the respondent (p 4-6 of Bundle);

17.6.3. Disclosure on 27 July 2017 relating to some faults/failures in safety standards noted by the claimant when the respondent was carrying out repairs to the claimant's BMW car (p 12 of Bundle);

17.6.4. Disclosure on 13 August 2017 re failure to comply with safety standards (p 23-25 of Bundle);

17.6.5. Disclosure on 6 November 2017 to board members about the same matters and an issue with the maintenance of a car jack (p 85 of Bundle);

17.6.6. Disclosures made at a meeting on 22 August 2017 between claimant and Mr Fernandez of the respondent followed up with a dossier, which was presented to the respondent the next day 23 August 2017 (p 28-63 of Bundle). A number of matters were raised here in particular:

i. that an issue of shares was prejudicial to the rights of shareholders and contrary to the Articles of Association of the respondent;

ii. that the respondent traded as insolvent whilst failing to inform shareholders; and

iii. that the respondent's board were making decisions on pay with regard to the female members of its staff and the board that were discriminatory on the grounds of sex.

Mr Braier confirmed that this paragraph 17.6.6 was his strongest case relating to protected disclosures and the reason for dismissal.

17.7. The respondent accepts that all the above were protected disclosures so I do not need to examine the details of the disclosures too much further than this.

17.8. During August and September there were a large number of e mails between the claimant and Mr Fernandez and/or Mr Macfarlane of the respondent, which both parties drew my attention to in part during their submissions. The chronology was not entirely clear from the Bundle but in particular I was referred to e mails from:

17.8.1. Mr Fernandez to Mr Macfarlane forwarded to the claimant by Mr Fernandez dated 4 August 2017 (p 25 of Bundle);

17.8.2. The claimant to Mr Macfarlane dated 13 August 2017 (p 23-25 of Bundle);

17.8.3. Mr McFarlane to the claimant dated 15 August 2017 (p 22 of Bundle);

17.8.4. The claimant to Mr Fernandez dated 23 August 2017 (enclosing the dossier referred to above)

17.8.5. Mr Fernandez to the claimant of 4 September 2017 (p 75 of Bundle;

17.8.6. The claimant to Mr Fernandez dated 11 September 2017 (p 73-74 of Bundle) where the claimant listed "*the main issues relating to my employment and issues with my settlement and employment contracts*" and then went on to set out 13 numbered points

17.9. The claimant met with Mr Fernandez in September 2017 and the claimant followed this up with an e-mail on 25 September 2017 (p 77 of the Bundle). There were some further short e-mails between the claimant and Mr Fernandez with the claimant chasing up a response and Mr Fernandez explaining that a response would be forthcoming (p 78-79). The respondent responded substantively to the points made in an e-mail from Mr Fernandez to the claimant dated 3 November 2017 (p 80-83 of Bundle).

17.10. In this e mail the Mr Fernandez stated "

" *I am now able to confirm that it is not the case as you alluded to at our meeting, that the Board is seeking to end your employment. However, as you will appreciate, the role of Strategic Adviser has not been utilised in the way it was originally anticipated when it was created for you last year. The Board has therefore had to consider whether or not this role is viable going forward and as things stand, it appears that it is not. It is therefore possible that the role of Strategic Adviser may be at risk of redundancy in the near future – a decision has yet to be made on that. However as part of our commitment to you to and to assure you that we value your input and want you to remain within the business, I would like to discuss with*

you a change in role which would ensure you retained continuity of employment (I understand that this is important for you to continue benefitting from entrepreneurs relief) and would provide you with a more pro-active role within the business"

The letter then goes on to state:

"However, you will appreciate that in order to allow both sides to more forward, we would need an assurance from you (in the form of a legally binding agreement) that a line has been drawn under the last 12 months, particularly in terms of the threat of litigation from you. It is simply not possible for us to move forward and continue working with you, with the constant threat of litigation in the background."

The letter went on to respond to a number of the outstanding queries raised by the claimant, numbered 1-9, which seem to correspond to some of the 15 numbered points raised in the claimant's e-mail of 11 September (see 17.8.6 above).

17.11. The claimant e-mails Mr Fernandez on 19 November (p 93-94 of the Bundle) requesting access to files, e-mail and also to be able to recover his physical property and states that he will take action for recovery through the courts if this is not done.

17.12. As the above summary demonstrates, there are many disputed facts relating to the on-going discussions and disputes on many different levels between the claimant and the respondent after the settlement agreement was entered into. I make no findings to resolve these factual disputes. At the full hearing a Tribunal will have to make findings on a number of these matters.

17.13. The respondent writes to the claimant on 5 December (p 96-97 of the Bundle) confirming that he is at risk of redundancy. It stated:

"*we have not needed to seek your advice on strategy at all over the course of the last 12 months and for that reason, I write to confirm that the role is now formally at risk of redundancy*"

The letters goes on to set out details of the consultation process that will be followed and states that an independent HR adviser will be appointed to assist with the process. The letter also stated:

"*As you are aware in your role of Strategic Adviser, you are required to provide advice as and when required. For the avoidance of doubt, if evidence emerges that you are continuing to work during the consultation period, in particular with Halfords, we will treat this as a disciplinary matter*. "

17.14. The consultation period then ensued and there was initially a meeting on 14 December, the notes of which were set out at page 103-109 of the Bundle. During this meeting, the claimant challenges the respondent as to whether it is a genuine redundancy situation. He also asks whether the fact that he has made protected disclosures is the reason why he was being made redundant which is denied by the respondent:

"*DCL- With regard to the issues I have raised that amount to protected disclosure. Is this the reason why the business wants me out? It is because I'm holding the business accountable?*

RF-The issues you have raised with regard to corporate governance has nothing to do with this process."

17.15. There was further e-mail correspondence between the parties following this meeting. The claimant complains at the meeting and following this about the redundancy consultation process adopted by the respondent and the way that it was carried out alleging that it is a "sham" and that it had closed its mind to the outcome of the consultations. He also complains about the way the search for alternative employment was handled and in particular that he was not interviewed for any role he applied for, even those roles that were well below his ability (such as call centre operative). I make no comment on the quality of the redundancy consultation process generally as it is not directly relevant to the issues I have to determine. These will be relevant for the main hearing of the claimant's complaint for unfair dismissal. The key issue in this application is the reason for the dismissal of the claimant and it is only if these matters shed any real light on showing what the reason might be that they are worthy of comment or full consideration at this stage.

17.16. A further consultation meeting took place on 4 January 2018 attended by the claimant, Mr Fernandez, Ms Cuddy the HR representative and Ms Atkinson Williams, who was the claimant's representative. Minutes of this meeting were at pages 148 A-J of the Bundle. Mr Braier referred me to page 148F of these meeting minutes, where Mr Fernandez states about the claimant:

"*you have berated the company , and its employees and I'm not sure that would be considered strategic advice. I advised you that I don't and haven't had the need for strategic advice as our focus is on operational improvement*"

Mr Searle referred me to page 148G where there was an exchange between the claimant and Mr Fernandez as follows:

DCL- It was agreed that I would remain and employee, give strategic advice and be the face and founder of the business. I would then be able to benefit from the Entrepreneurs Tax Relief, I don't know why you are now breaking that.

DCL – Ray I feel sorry for you that the people who made the agreement have now gone back on what was agreed without paying me for it.

DCL- My role hasn't changed so there is no redundancy. The role is similar to a Fire Warden. Just because you don't get called doesn't mean the role is redundant.

RF- And you would expect this arrangement to go on forever, providing no contribution to the business? The Company pays you a salary of £120,000 per year. As an investor/shareholder you would expect to see value and contribution in that role. What would you expect the role to be in existence for?"

17.17. The meeting was acrimonious and ended early. There was again further e-mail correspondence between the claimant and the respondent where a number of allegations were made, the claimant again stating that the respondent had failed to respond to his protected disclosures. The claimant applied for a number of positions within the respondent but was unsuccessful in these applications. The remaining consultation process was conducted in writing. The claimant was issued with notice of redundancy on 23 February 2018 confirming that his employment would end on 26 May 2018 and would be placed on garden leave until this date. The claimant appealed against his redundancy on 26 February and an appeal meeting was held on 22 March 2018, the notes of such meeting being at p175A-175G of Bundle. His appeal was rejected by a letter dated 26 March 2018 (p176-179 of Bundle).

Submissions

18. I considered in detail the written skeleton argument of the respondent. In addition, in oral submissions Mr Braier makes reference to the case of **Kuzel v Roche** (above) regarding the burden of proof when considering whether the reason (or principal reason) for the dismissal is that under **s 103A**. He submits that

    18.1. It is for the employer to show that it had a fair reason for dismissal and that the reason for not some other reason and potentially fair;

    18.2. Next the claimant must call some evidence to suggest that there is a different and inadmissible reason (e.g. making protected disclosures);

    18.3. The tribunal hearing the case then needs to make findings of primary fact and draws inferences to decide what was the reason bearing in mind that the employer has the burden to show it has dismissed for a potentially fair reason;

    18.4. If the tribunal is not satisfied that the employer has discharged the burden it is open to it to find that it is for the reason the employee asserts (although it is not compelled to do so).

19. He then goes on to submit that the likelihood is that the tribunal hearing this case will be dissatisfied that redundancy was the reason for dismissal and accordingly go on to find that the sole of principal reason for the dismissal was the protected disclosures, noting that it only needs to be "a protected disclosure". He therefore argues that the claimant is able to show that he has a pretty good chance of succeeding

20. He submits that the redundancy came out of nowhere and no evidence has been adduced of minutes, plans or correspondence or of any analysis as to explain why on 5 September the claimant was notified that he was at risk of redundancy. He points to the timing of various events, including the fact that the claimant made disclosures from April 2017 up to August 2017, but when a formal response came in November 2017 he was told that there would be a risk of redundancy. He points out that the formal redundancy came just four weeks after the last protected disclosure of the claimant.

21. Mr Braier submits that the potential redundancy (and offer of potential new role) was used as leverage (both stick and carrot) to try and attempt to get the claimant to sign a binding agreement in relation to any outstanding claims.

22. The redundancy process itself is alleged to be a predetermined sham. Mr Braier relies on the lack of any documentation submitted at the hearing today which show how this decision was reached and then points to the various flaws which he submits show the process was a sham. In particular I was directed to the manner in which the possibility of the claimant obtaining alternative employment was dealt with as showing that this was not a good faith attempt to find alternative employment and avoid a redundancy.

23. Mr Braier then submits that all of this taken together suggests that the claimant's case exceeds the likely to succeed threshold and it is likely that the tribunal will find that on the facts that the reason for the dismissal was the making or protected disclosures.

24. He made the further point that as to the argument by the respondent that there could be another reason for the dismissal as well as redundancy that there is no documentation adduced by the respondent to suggest that this was the case. The grounds of resistance had not been submitted as yet (nor was it required to be) but if this were being alleged, he suggests that a draft ET3 should have been submitted setting this out

25. Mr Searle for the respondent did not submit a skeleton argument and says that one reason for this is that in this application the respondent is not required to prove anything. He then took me to various documents in the Bundle, which he says shows that the application has no merit. He made reference to the case of **Wollenburg** (above) and refers to paragraph 25 and states that in his submission an application for interim relief does not require the claimant to show that he is more likely to succeed than not on the particular allegation but requires a "*significantly higher degree of likelihood*" and that he has a "*pretty good chance*" of success. He contends that the reason this application has been made today is that the claimant needs to be employed by the respondent to claim tax relief and suggests that the dismissal has nothing at all to do with protected disclosures. He submits that the applications under section 129 are really for those situations where there is credible evidence that the employer has dismissed for reasons related to protected disclosures. He made reference to examples of cases where there is an immediate dismissal after a disclosure was made and also where there is a "smoking gun". Mr Searle suggests that this is not the scenario here. He acknowledges that at the trial for unfair dismissal, the respondent will have the burden of proof. He also indicated that the reason for dismissal that is likely to be asserted by the respondent is redundancy, albeit that there is likely to be a subsidiary argument that in the alternative the dismissal was for another substantial reason, namely the irretrievable breakdown in the relationship.

26. In persuading me to conclude that the true reason for dismissal was redundancy, Mr Searle points out that the respondent had gone through a full redundancy process with the claimant, and that the claimant on his own case agreed that in 18 months he was never called upon by the respondent to do any work. His role was unique, was created for him and was largely a vehicle for tax relief it is said.

27. I was referred to page 22 of the Bundle, which Mr Searle suggests shows that on 15 August the respondent had replied to the claimant in relation to his protected

disclosures and they were dealing with these by investigating the matters. I was referred to page 25 of the Bundle where the respondent's response a shown and attached a report of the investigation (which I believe to be page 26) he argues that this was a sensible approach. I was invited me to draw inferences that this showed that the respondent was not trying to "do the claimant in" or dismiss him because of his protected disclosures.

28. I was then referred to page 64 of the Bundle, which was an e-mail from the claimant to Mr McFarlane where the claimant asks about how his employment issues are being dealt with. He then refers me to page 73 of the Bundle where again the claimant raises issues with the settlement agreement he signed a year earlier. The respondent points out that the issues being raised here are nothing to do with protected disclosures but was related to his on-going employment dispute and his exclusion from the running of the business.

29. I was then referred to page 77 of the Bundle where the claimant follows up on a meeting held between Mr Fernandez and himself on or around 22 September. Mr Searle suggested that this is evidence that at this stage the employment relationship is not going well and this has nothing to do with any protected disclosures. Mr Searle submits that the dispute at this stage related to employment issues and those are they that are listed at points 1-14 in the e-mail from the claimant of September 11 (page 73). He points to the e-mail of 30 October from the claimant at page 78 and again notes that there is nothing about protected disclosures here. The respondent also contends that the e mail from the respondent to the claimant of November 3rd at page 80-83 also backs up the suggestion that the dismissal of the claimant was not related to protected disclosures as this letter is dealing with the various employment issues raised by the claimant, not the issue of protected disclosures.

30. Mr Searle submitted that the letter issued to the claimant which notified him of his potential redundancy sets out clearly the basis for the redundancy situation arising, namely that the respondent had not needed to seek the advice of the claimant at all in the 18 months he had been doing the role. He also states that the letter at page 97 clearly shows that the respondent was not happy with something that the claimant was doing with Halfords. He goes on to point out that during the final consultation meeting with the claimant it is clear that the main complaint that the claimant has is that the settlement agreement he signed has been reneged upon and that Mr Fernandez at this time makes it clear that it did not see any value in the claimant's current role continuing. He also then submits that in the claimant's appeal against redundancy meeting held on 22 March 2018, the claimant stated that the last good month the company has was October 2016 and also himself acknowledges since that time the company had "*never called on my services to help resolve a lot of those issues*" .

31. He invited me to dismiss the application for interim relief contending that the claimant's dismissal had nothing to do with protected disclosures and that the claimant's need to be in employment is why the application has been made at all.

Conclusion

32. I considered carefully all the submissions made by Mr Braier for the claimant but on balance, I preferred the respondent's submissions and I have reached the

conclusion that it is not likely that the claimant can show at trial that the main or principal reason for dismissal was that the claimant had made protected disclosures. I remind myself that it is not sufficient that the employee is able to establish that "*it is likely*" they were otherwise unfairly dismissed, i.e. for other reasons. They must be able to show that it is likely that it will be found that they have been dismissed for the sole or the principal reason of, in this case, having made a protected disclosure.

33. I considered the submission of Mr Braier on the burden of proof that will be applicable to the tribunal hearing this case where the reason for dismissal is alleged to be that protected disclosures have been made. Whilst this has been of assistance, I have no doubt that further evidence of what the reason for the dismissal actually was will be explored further at the final hearing. On the information I have seen to date, and without any evidence being adduced by the respondent as to the true reason for dismissal, I do not accept that the claimant has a pretty good chance of being able to show that the respondent dismissed him for the making or protected disclosures. There were many other factors at play that led to the dismissal of the claimant. The relationship between the claimant and the respondent was not a good one and had deteriorated after the claimant agreed to step down from his role in 2016. There was an allegation that the settlement agreement reached between the parties had been breached. The claimant had many complaints about his on-going employment situation, access to data, documents and his property. He remained a shareholder and had many complaints about the way that the respondent was running the business in which he held a significant stake. An element of this complaint formed part of the protected disclosures raised, but my impression was that claimant was largely aggrieved by the way he felt he had been excluded from the business he had set up. The disclosures he made seem to be of less significance, even to the claimant himself, than these other matters in dispute between the parties.

34. The respondent would appear to have been motivated by factors other than the disclosures the claimant made. There is evidence that the respondent took steps to investigate and address the matters raised by the claimant, in particular those relating to safety and standards. The disclosures made in relation to corporate governance in particular the share issue would appear to have been more relevant to the interests of the claimant as a shareholder and arising out of his frustration around being unable to influence the direction of the business. I found to be compelling the conversation between the claimant and Mr Fernandez on 4 January 2018 when the claimant's and Mr Fernandez's frustrations with the situation were revealed. The claimant was largely aggrieved that he felt that his settlement agreement had not been honoured. Mr Fernandez of the respondent was aggrieved that the claimant remained employed at an annual salary of £120,000 having not, in his view, contributed to the company.

35. There is reference in the various e-mail correspondence and the meeting notes to the protected disclosures made. Mr Braier points to the timing of the disclosures made and the decision to instigate a redundancy process. However I fail to be convinced that this is particularly instructive as there were various other issues in dispute and being discussed in correspondence throughout this period. I do not see that this particularly persuades me that making the disclosures was the primary reason why the respondent chose to terminate the claimant's employment.

36. Much was made of the "carrot and stick" approach made by Mr Fernandez to encourage the claimant to reach an amicable settlement on the matters of dispute. However I do not see that this sheds light on whether or not the reason for dismissal is the protected disclosures. There was so much in dispute between the parties at this time as well as the fact of disclosures having been made, and it does not appear to me that the possibility of litigation on the consequences of protected disclosures was particularly what the respondent had in mind at the point of writing this letter.

37. It is to be remembered that other than the submissions made at the hearing, we have not heard from the respondent yet as to what its case is. Mr Searle gave an indication today that it is likely to contend that the dismissal was on the grounds of redundancy and/or some other substantial reason namely that the employment relationship had irretrievably broken down. There are certainly documents that were pointed out to me that would support both of these contentions. Mr Braier points to the lack of evidence adduced as evidence that redundancy had been concocted from nowhere as a pretext for a dismissal for making protected disclosures. I am not persuaded that the documents show that this is the case. A Tribunal of fact may well come to this conclusion but the evidence will have to be examined in full at the merits hearing, but at this interim stage, I do not believe it is likely that the claimant will be able to establish this.

38. As to suggestions of the redundancy consultation process being a sham, this is a matter that is directly relevant to the claimant's complaint for unfair dismissal under **s 94 of the ERA**. Procedural failings alleged by the claimant will no doubt be explored in detail at the final hearing to determine whether a dismissal was fair in all the circumstances. The claimant may have raised these to invite me to draw inferences on the motive for dismissal. However I am not prepared to draw that inference here. This did not assist me in determining whether the claimant's dismissal was likely to be found to be for making a protected disclosures.

39. I also do take note of the common ground between the parties that it was crucial to the claimant for tax purposes that he remain employed by the respondent. This would appear to be the prime motivation for the claimant's on-going role as an employee in the respondent's business.

40. The key issue that is going to have to be decided by the tribunal in the full unfair dismissal complaint is what the reason for the dismissal was. There are conflicting reasons put forward by the claimant and the respondent, which a tribunal will need to decide upon having heard all the evidence. Detailed application of the burden of proof provisions applicable can only take place at a full merits hearing when the facts have been properly found.

41. It is not a case where I am able to conclude that the claimant has a pretty good chance of succeeding in this particular element of his claim as the weight of evidence I have seen does not point to this conclusion. On a broad assessment of the facts as I see them, I do not conclude that there is a significantly higher degree of likelihood than just a balance of probabilities chance that the claimant will show that his dismissal was for having made protected disclosures. I am conscious that I must avoid making findings that might tie the hands of the tribunal ultimately charged with the final determination of the merits, but my impression is that dismissal is not likely to be found to be for the reason or principal reason that protected disclosures were made.

42. The application for interim relief is therefore rejected.

Directions for further conduct of the case

43. The respondent is due to submit its response to the claim by 9 July 2018 and that this timescale should remain as it is.

44. I have determined that it would be helpful to list a telephone closed preliminary hearing for this case so that the issues can be further clarified and directions can be made for future conduct of the case. The parties will be notified separately of when this will take place.

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Employment Judge Flood

2 July 2018