EMPLOYMENT TRIBUNALS

Claimant: **Miss AB**

Respondent: **The Commissioners for Her Majesty's Revenue and Customs**

Heard at: **Cardiff (by video)** **On: 26 February 2021**

Before: **Employment Judge Harfield**

Representation:
Claimant: In Person
Respondent: Mr Allsop (Counsel)

RESERVED JUDGMENT

It is the decision of the Employment Judge sitting alone that the application for interim relief is refused because it is not likely that, on determining the complaint, that the tribunal will find that the principal reason for claimant's dismissal was her asserted protected disclosures.

REASONS

Anonymity

1. At the outset of this hearing I raised of my own volition the question of anonymity. There are earlier proceedings between the parties under case number 1600083/2019 that were determined at an employment tribunal chaired by Employment Judge Sharp. Those earlier proceedings decided complaints of harassment related to sex and victimisation at the core of which was a complaint by the claimant that she was a victim of a sexual assault by another individual, identified as Mr XY (albeit ultimately that Tribunal found that the alleged sexual assault was not made out as a matter of fact). The employment tribunal in that case made an anonymity order covering both the claimant and Mr XY. The reasons are set out in

that previous Judgment. Since that previous Judgment the claimant has been dismissed. In these proceedings she alleges (amongst other things) that the principal reason for her dismissal was asserted protected disclosures. The protected disclosures the claimant seeks to rely upon relate, in part, to her original complaint of a sexual assault. I was therefore concerned whether similar issues relating to anonymity would arise (or indeed whether if these proceedings were not subject to the same anonymity it could lead to the easy post event identification of the claimant and Mr XY in the earlier Judgment). I therefore sought the parties' views. The claimant wished there to be anonymisation for the reasons dealt with in the earlier Judgment. Mr Allsop said that the respondent's position was neutral albeit when asked specifically about Mr XY he said the preference would be for anonymisation.

2. I made an anonymity order covering the claimant and Mr XY for the purposes of the public interim relief hearing and this interim relief Judgment only. That was largely for the reasons set out in the earlier Judgment of the Judge Sharp led tribunal and which I therefore will not repeat here for the sake of expediency. I should, however, add that the earlier Tribunal ultimately concluded that the conduct complained of about Mr XY was not established and the claimant did not succeed in her harassment related to sex or victimisation complaints. However, it does not necessarily follow from that the claimant would then fall outside the ambit of the Sexual Offences (Amendment) Act 1992. Moreover, there would remain the issue of the identification of Mr XY as being the recipient of the allegations found to be not proven and the risk that if the identify of one individual was no longer subject to anonymity whether it would be relatively easy for the other individual to then be identified. I should, however, emphasise that the order was only made for the purposes of the interim relief application and this interim relief Judgment. The Tribunal will have to consider afresh during case management prior to the final hearing in this case whether there should be further anonymity orders or indeed a Restricted Reporting Order.

Claimant's application

3. On 25 February 2021 the claimant wrote objecting to the fact that she had filed her hearing bundle and written legal argument on 22 February 2021 and that the respondent had filed their bundle and witness statement of Mr Edwards that day. The claimant said the respondent had not complied with the hearing notice and that she had been put at a disadvantage as the respondent had been in prior receipt of her documents. She said that she had not put in her bundle, or her legal argument as much as she otherwise would have done and that she would have prepared a witness statement herself if she had more time. She asked to have the respondent's defence to her interim relief application struck out.

Alternatively, she argued that she could not have a fair hearing as she was taking sedative medication and could not read through the large quantity of material provided. The claimant said that the respondent should not have been caught unawares by her application for interim relief and its urgent listing as she had copied them in when the proceedings where originally presented. She said that her situation should be considered to amount to special circumstances justifying a postponement. I should also add that on the morning of the hearing itself the respondent filed further documents comprising a skeleton argument and a bundle of authorities.

4. I did not grant the claimant's application to either postpone the hearing or strike out the respondent's defence to her interim relief application. I gave oral reasons at the time which I will not repeat fully here. However, I gave considerable weight to the requirement to determine an interim relief application as soon as practical. The impact on the respondent in not permitting them to respond to an interim relief application could be serious and disproportionate given the potential orders that can be made if an application is granted. I also needed to take time myself that morning to read the relevant documents for the hearing, so I was satisfied there was time for the claimant to have reading time that morning to read the respondent's additional documents over and above that which she already had.

5. I was also satisfied that whilst the claimant would always have been able to prepare a witness statement or produce other documents (she knew since her presentation of her claim on 21 January 2021 that she was bringing a claim for interim relief) she would not be disadvantaged as I would not hearing any actual live witness evidence only reading the statement of Mr Edwards. The claimant would have the full equivalent opportunity, as she was there representing herself, to say what she wanted to say in support of her application or talk about what evidence she says would be available in support of her claim. The respondent's bundle to a large degree contains documents either in the claimant's own bundle or available to her, with the exception of a small number of documents the claimant would have time to read. The respondent's skeleton argument set out that which Mr Allsop would have been able to say by way of oral submissions in any event. There was a large authorities bundle but I explained to the claimant there was no expectation on her to read them and indeed I did not have the time available to do so myself. Mr Allsop, however, in his skeleton argument drew out the key paragraphs from the relevant case law. The basic principles of the law relating to interim relief the claimant was also aware of in any event and set it out herself in her own legal argument. They are of course the principles I would always have to apply in any event and were in headline terms already within my knowledge.

6. I was satisfied that my approach accorded with the observations in London City Airport Ltd v Chacko [2013] IRLR 610 that an interim relief hearing is an expeditious summary assessment to be undertaken by me as to how the matter looks to me on the material that the parties are able, in the limited time available, to put before me. It is designed to be a swiftly convened summary hearing which involves a far less detailed scrutiny of the parties' positions than will ultimately be undertaken at the full hearing. I therefore decided to proceed and considered that to do so would be sufficiently fair to the claimant and in the interests of justice.

7. I therefore took from the parties the key documents from their respective bundles that they were inviting me to read and then took some reading time. On reconvening both parties made oral submissions. The claimant had time to say whatever she wished in support of her application. I spent considerable time with the claimant seeking to understand what protected disclosures she said she had made that she was relying on for her interim relief application. I also asked the claimant to set out whatever she wished to in support of her arguments about why she says the principal reason for her dismissal was such a protected disclosure or disclosures. I then heard from Mr Allsop before reserving my decision. I have had before me the respondent's bundle, the claimant's bundle, their respective written legal arguments, and the witness statement of Mr Edwards who, on the face of it, is the individual who decided to dismiss the claimant.

The Legal Framework

Interim relief procedure

8. The relevant statutory matrix is found within the Employment Rights Act 1996, it states 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 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or
(ii)…, or
(b)…..,
may apply to the tribunal for interim relief.

(2) The tribunal shall not entertain an application for interim relief unless it is presented to the tribunal before the end of the period of seven days

immediately following the effective date of termination (whether before, on or after that date).

(3) The tribunal shall determine the application for interim relief as soon as practicable after receiving the application.

(4) The tribunal shall give to the employer not later than seven days before the date of the hearing a copy of the application together with notice of the date, time and place of the hearing.

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 100(1)(a) and (b), 101A(1)(d), 102(1), 103 or 103A, or
(ii)paragraph 161(2) of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992, or

(b)that the reason (or, if more than one, the principal reason) for which the employee was selected for dismissal was the one specified in the opening words of section 104F(1) and the condition in paragraph (a) or (b) of that subsection was met.

(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."

Protected disclosure dismissal

9. The issues that I have to undertake a summary assessment of are those which relate to the constituent elements of a protected disclosure and then consideration of the principal reason for the dismissal.

10. Those constituent elements are set out in section 43B-K, 44 and 103A of the employment Rights Act 1996.

11. Section 103A, so far as material, provides:

"*An employee who is dismissed shall be regarded for the purposes of this Part 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."*

12. A "protected disclosure" is defined by s.44A of the 1996 Act as a "qualifying disclosure" that was made in accordance with ss.43C–H. In that regard, s.43B(1), so far as material, provides:

"(1) ... a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following –
(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed."

13. To be a qualifying disclosure the disclosure also has to be made to the claimant's employer or other defined individual. Disclosures made not to the employer or other responsible person tend to have more criteria to satisfy. Those provisions potentially relevant appear to be sections 43C(1) and 43G. These state:

"*43CDisclosure to employer or other responsible person.*

(1)A qualifying disclosure is made in accordance with this section if the worker makes the disclosure

(a)to his employer, or

(b)where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i)the conduct of a person other than his employer, or

(ii)any other matter for which a person other than his employer has legal responsibility,

to that other person."

43G Disclosure in other cases.

(1)A qualifying disclosure is made in accordance with this section if—

… (b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c)he does not make the disclosure for purposes of personal gain,

(d)any of the conditions in subsection (2) is met, and

(e)in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2)The conditions referred to in subsection (1)(d) are—

(a)that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b)that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c)that the worker has previously made a disclosure of substantially the same information—

(i)to his employer, or

(ii)in accordance with section 43F.

(3)In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a)the identity of the person to whom the disclosure is made,

(b)the seriousness of the relevant failure,

(c)whether the relevant failure is continuing or is likely to occur in the future,

(d)whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e)in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f)in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4)For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure."

14. At the full hearing, the burden of proving each element of the statutory definition in relation to establishing a protected disclosure lies upon the claimant. In relation to the burden of proving the reason or principal reason for dismissal, in Kuzel v Roche Products Ltd [2008] IRLR 530 it was held that it is for the employer to show a potentially fair reason for dismissal. Where the employee asserts a different or inadmissible reason for dismissal then some evidence must be produced supporting the employee's positive case to the extent of challenging the evidence put forward by the employer and producing some evidence of a different reason. The Tribunal must then find what the principal reason for dismissal was on the basis that it is for the employer to show the reason for it. If the employer does not show the reason to the satisfaction of the Tribunal, it is open for the Tribunal to find that it is the reason asserted by the employee. But the Tribunal is not obliged to do so. It is possible the Tribunal might find a different reason to that asserted by the parties. That all said the case law is also clear that assessments of the passing of the burden of proof may have little role to play in cases where the Tribunal is able to make express findings of fact about the reason why the relevant decision maker decided to dismiss.

The test to apply in an interim relief application

15. The burden of proof in respect of the interim relief application, rests on the claimant and as set out above, the statutory test is whether it appears to the Tribunal that it is likely on determining the complaint to which the application relates the Tribunal will find that the reason (or principal reason) for the dismissal is that specified in section 103A.

16. The term "likely that on determining the complaint…" was examined in Taplin v Shipman Ltd 1978 IRLR where the test was expressed to be whether the claimant has a "pretty good" chance of succeeding in the final application to the tribunal. In Ministry of Justice v Shafraz [2011] IRLR 562 that test was again endorsed and was expressed to be a standard higher than having a fifty-one per cent prospect of succeeding. Again it

was said in London City Airport Ltd v Chacko that the claimant has to "demonstrate a pretty good chance of success."

17. It is also important to remember that the Tribunal is engaged in a predictive exercise as to the likely outcome at the full hearing. It is not appropriate for me to seek to determine the factual issues as if this was a final determination of the matter; Wollenberg v Global Gaming Ventures (Leeds) Ltd and Herd UKEAT/ 0053/ 18 DA. Further the test of "likely to succeed" applies to all aspects of the claim that the claimant will have to prove not just the reason for dismissal; Hancock v Ter-Berg and another [2020] IRLR 97. It will therefore include all the constituent elements necessary to establish that a protected disclosure was made and not just whether the disclosure was the principal reason for dismissal.

Does it appear to the Tribunal, on the material available, that at the final hearing there is a pretty good chance the Tribunal will find that the claimant made a protected disclosure or disclosures?

18. The claimant in her claim form included "Appendix A" which is said to contain both protected disclosures relied upon and protected acts for an Equality Act victimisation claim. The latter is not relevant to the interim relief application. Some of the items listed have "protected disclosure" marked against them but some do not, and some had no identifying label against them. I therefore spent some time with the claimant (factoring in that she is a litigant in person), understanding which of the matters listed she said were protected disclosures for the purposes of the interim relief application. She identified the following. However, I should make clear that these are the asserted protected disclosures the claimant relied on for the interim relief application. It may well be that the claimant relies on others, or expresses them in a different way, in the actual substantive case.

(a) In a series of emails (9 September 2018, 11 September 2018, 13 September 2018 and culminating on 28 October 2018) the claimant disclosed information about alleged sexual touching by Mr XY, that by the time of the 28 October 2018 was a disclosure of information that the claimant believed tended to show that a criminal offence (sexual assault under s3 of the Sexual Offences Act 2003) had been committed. The claimant asserts that this was a reasonably held belief and also that she held a reasonable belief the disclosure was made in the public interest. [1 and 2 of Appendix A];

(b) In October 2018 the claimant made a report of the alleged sexual assault to the police. Again, the claimant says this was a reasonably held belief and also that she held a reasonably belief the disclosure

was made in the public interest (as she does for all her asserted protected disclosures). [3 of Appendix A];

(c) On 30 October 2018 the claimant told her line manager, Mr Webb, that she had reported the alleged sexual assault to the police. The claimant says this was a fresh protected disclosure albeit about the same subject matter [3 of Appendix A];

(d) On 1 November 2018 the claimant made a formal internal complaint in which she says she again disclosed information that she believed tended to show that she had allegedly been subject to the same sexual assault (criminal offence) [4 of Appendix A];

(e) On 8 November 2018 the claimant sent a further email seeking to extend her formal complaint in which she says she again disclosed information that she believed tended to show that a criminal offence had been committed *and* also that there had been a breach of a legal obligation (breach of the Equality Act in respect of a complaint of sex discrimination relating to the same alleged sexual touching) [4 of Appendix A];

(f) On 24 November 2018 the claimant sent a further email seeking to extend her formal complaint in which she says she disclosed information that she believed tended to show that there had been breach of a legal obligation (breach of the Equality Act in respect of a complaint of sexual harassment relating to the same alleged sexual touching and an earlier alleged incident in respect of which the claimant said Mr XY had looked around her mouth in a sexually inappropriate manner) [4 of Appendix A];

(g) On 13 December 2018 the claimant sent a further document in which she says she disclosed information that she believed tended to show that further criminal offences had been committed by Ms Ellis-Jenkins, Ms Jones, Mr XY and HMRC of perverting the course of justice in having, according to the claimant, deliberately concealed the earlier alleged criminal offence of sexual assault. The claimant says that she again also made a protected disclosure in respect of the alleged original criminal offence of sexual assault itself [4 of Appendix A];

(h) On 7 October 2019 the claimant sent a document headed “formal concern under Civil Service Code” to Ms Ciniewicz. The claimant says that she disclosed information that she believed tended to show that:

- Mr XY had lied to Internal Governance in breach of the Civil Service Code,

- Internal Governance had assisted Mr XY by failing to investigate her concern which was in breach of the Civil Service Code;
- Ms Block had not investigated the claimant's complaint in a manner that complied with the Civil Service Code.

The claimant says that she believed this information tended to show a breach of a legal obligation as the individuals concerned were contractually obliged to comply with the Civil Service Code. She says that she also disclosed information that she believed tended to show that these individuals had committed criminal offences in perverting the course of justice. [7 of Appendix A]

(i) On 19 October 2020 the claimant sent an email to Sir Jim Harra in which she says she disclosed information which in her belief tended to show that:

- Mr Thompson and Ms Wallington had acted in breach of the Civil Service Code in sending a misleading reply to the claimant's MP (breach of a legal obligation);
- HMRC had breached the claimant's contract of employment in not giving her the right to raise a formal grievance or to appeal the decision made about her original complaint. Mr Thompson and Ms Wallington then said that the claimant's complaint had been dealt with fairly and transparently. HMRC breached confidentiality in handling the information the claimant provided in relation to her complaint as she asserts that HMRC had no lawful authority to process her information in a way that breached her contract of employment (breach of a legal obligation – unlawful processing of personal data) [11 of Appendix A]

(j) The claimant gave evidence at the earlier Tribunal hearing on July 2020 which she says discussed claims of claimed sexual harassment and victimisation and involved her recounting what she alleged was a criminal sexual assault. The claimant says that she disclosed information which in her belief again tended to show that a criminal offence had been committed and that there had been a breach of legal obligations under the Equality Act [paragraph immediately under Appendix A headed "protected acts and protected disclosures."]

19. The asserted protected disclosures (a), (c), (d), (e) and (g) all relate to the same core point of the claimant saying she disclosed information to her employer that she says she reasonably believed tended to show that a criminal offence had been committed and that she reasonably believed the disclosure was in the public interest. Mr Allsop argues that the claimant

cannot demonstrate a pretty good chance of successfully establishing these were protected disclosures. He refers to findings or observations made in the Judge Sharp led tribunal which he says means the claimant comes to this tribunal will a significant credibility gap. He also relies on the earlier findings that the claimant had an unreasonable propensity to assert discrimination if someone does not agree with her and that she had an unrealistic perception of events at the relevant time. He says it is unlikely the claimant would persuade a Tribunal that she held the requisite reasonable beliefs.

20. In Darnton v University of Surrey it was said:

> *"29. … It is extremely difficult to see how a worker can reasonably believe that an allegation tends to show that there has been a relevant failure if he knew or believed that the factual basis was false unless there may somehow have been an honest mistake on his part. The relevance and extent of the employment tribunal's enquiry into the factual accuracy of the disclosure will, therefore, necessarily depend on the circumstances of each case. In many cases, it will be an important tool to decide whether the worker held the reasonable belief that is required by s.43B(1). We cannot accept Mr Kallipetis's submission that reasonable belief applies only to the question of whether the alleged facts tend to disclose a relevant failure. We consider that as a matter of both law and common sense all circumstances must be considered together in determining whether the worker holds the reasonable belief. The circumstances will include his belief in the factual basis of the information disclosed as well as what those facts tend to show. The more the worker claims to have direct knowledge of the matters which are the subject of the disclosure the more relevant will be his belief in the truth of what he says in determining whether he holds that reasonable belief."*

21. The earlier Judge Sharp led tribunal was not hearing a whistleblowing claim. It did, however, have to decide if the alleged sexual assault had happened and it had to address some overlapping principles in the victimisation complaints it heard. In that earlier case the respondent did not advance an argument that the claimant had given false evidence or information or had made a false allegation or when making the alleged protected act had acted in bad faith. The tribunal found the alleged assault/harassment related to sex did not happen as a matter of fact. The earlier tribunal did not, on the face of it that I can see, make an express finding that the claimant definitively knew or believed that the factual basis was false. The earlier tribunal did find that the claimant, by the time of the hearing, gave an account that had become extreme and disproportionate. But again that is not necessarily a finding that the claimant knew or

believed the factual basis was false. There can be various reasons why a claimant may behave that way. At the final hearing in these proceedings, the tribunal will therefore have to assess the evidence available as to, accepting the allegation to be not proven, how and why the claimant will say that it was still reasonable for her to have believed otherwise (set within the context of the findings of fact made by the earlier tribunal). There are similar overlapping considerations as to establishing reasonable belief in the public interest. I do not have that evidence before me as to why the claimant would say her belief was a reasonable one in the circumstances, and I therefore cannot currently say that the claimant has a pretty good chance of establishing that reasonable belief. But I have gone on to undertake a summary assessment of the reason for dismissal, taking into account these alleged protected disclosures in any event.

22. I would apply the same analysis to the claimant's asserted protected disclosures where she says she disclosed information that in her reasonable belief tended to show there had been a breach of the Equality Act in respect of her complaints of direct discrimination and harassment in relation to the alleged behaviour of Mr XY. The Judge Sharp led tribunal found that the claimant did make a protected act in this regard for the purpose of the Equality Act. The test is of course a different to that for a protected disclosure, but it does overlap. As I have said, the question of good faith was not put before that earlier tribunal by the respondent.

23. I turn next to the claimant's claimed protected disclosure that she says she disclosed information she believed tended to show that further criminal offences had been committed by Ms Ellis-Jenkins, Ms Jones, Mr XY and HMRC of perverting the course of justice in having, according to the claimant, deliberately concealed the earlier alleged criminal offence of sexual assault. In my summary assessment I consider the claimant may have some difficulties with establishing this was a protected disclosure or disclosures. Looking at what the claimant wrote as at 13 December 2018, potentially on the face of it she was not saying that she believed that the deliberate concealment of a criminal offence was in itself a criminal offence of perverting the course of justice. Further would this be a reasonably held belief from the claimant's perspective in circumstances in which the earlier tribunal has found that a reasonable worker in the claimant's position would have, when considering the actions of her managers, have taken into account that if she did not herself know it was a potential criminal offence how could the managers be in a better position to know this? I would not, on what is available to me, assess the claimant as having a pretty good chance of success. But I have in any event gone on to undertake a summary assessment of the reason for dismissal and its link to this claimed protected disclosure in any event.

24. Turning to the claimed protected disclosure to Ms Ciniewicz, I would accept the claimant may have a prospect of establishing that she reasonably believed lying to Internal Governance could be breach of the Civil Service Code and therefore breach of a legal obligation. The legal obligation does not have to ultimately exist if the belief it does exist is in itself reasonably held. Whether the claimant believed and reasonably believed (and reasonably believed her disclosure was in the public interest) more specifically that Mr XY had so lied in his dealings with Internal Governance is however very much linked to the observations I have made above as to whether the claimant had a reasonably held belief in her original disclosure to start with, where I found the claimant, on what is before me, did not have a pretty good chance of establishing it. But I have, however, gone on to undertake a summary assessment of the reason for dismissal and its link to this claimed protected disclosure.

25. In relation to the claimant's allegations about Internal Governance themselves, the claimant may be able to establish she did believe from her perspective that Internal Governance/ Ms Block had not investigated her complaints properly. It is, however, a more difficult issue for the claimant whether she can establish she reasonably believed that was a breach of a legal obligation, bearing in mind the Judge Sharp led tribunal's finding that any reasonable person would take the view that the respondent had taken all reasonable steps available to it to demonstrate how seriously it viewed the matter/ it did not as a matter of fact find that there were failings with how it was dealt with. That said the claimant did not necessarily know as at the time of her email to Ms Ciniewicz that which the Tribunal ultimately knew about the Internal Governance investigation. There is, however, the added potential difficulty for the claimant in also establishing she had a reasonable belief if she is ultimately unable to establish she had a reasonably held belief in the original complaint (as above). There is also the potential difficulty, bearing in mind the earlier tribunal's findings, whether this would be said to be demonstration of the tribunal's findings that the claimant had a tendency to say that actions or statements that she did not like or agree with were therefore unlawful in some way. That would again feed into the reasonableness of the claimant's belief. Overall, I would not say that the claimant has a pretty good chance of establishing this as a protected disclosure on what is currently available to me. I would also be doubtful about the claimant establishing that this email to Ms Ciniewicz amounted to a disclosure of information which the claimant reasonably believed tended to show that these individuals had committed a criminal offence of perverting the course of justice. I have, however, gone on to assess the question of the reason for dismissal, as potentially linked to this claimed protected disclosure in any event.

26. I am also doubtful about the claimant establishing that she made protected disclosures in her "complaint 1" attachment sent to Sir Jim Harra. The claimant may struggle to establish that any belief that Mr Thompson and Ms Wallington had breached the Civil Service Code, and therefore a legal obligation, was reasonably held in their telling the claimant's MP that the claimant's complaint had been dealt with "fairly and transparently". I say this for the same reasons set out above in relation to Internal Governance. I would make the same observations about the alleged breach of confidentiality and whether the claimant could also reasonably have believed her disclosure was in the public interest. In particular, I struggle to follow the claimant's legal analysis in relation to the alleged breach of confidentiality which could potentially be considered as a somewhat tortuous route to try to establish an alleged breach of contract. But I have gone on to undertake an assessment in respect of the decision to dismiss in any event.

27. The claimant also relies upon her reports to the police and her evidence to the employment tribunal in the Judge Sharp led tribunal hearing. Again, this is heavily linked to the reasonableness of the claimant's belief in her original complaint which I have already addressed above and for that reason I cannot say that I consider the claimant has a pretty good chance of establishing she made protected disclosures. A complaint under 43G may well be very difficult for the claimant to succeed in (if that is indeed the way she intends to say her complaints to the police and the Tribunal were covered – the claimant was unable to answer this question at the interim relief hearing) because of the earlier Tribunal's finding that the Internal Governance disciplinary investigation was conducted properly. However, it is possible the claimant may rely on 43C(1)(b)(ii) which has a different threshold (although still requires a reasonable belief that the information disclosed tends to show one of the qualifying wrongdoings and a reasonable belief it was made in the public interest). I have gone on to again make an assessment of the decision to dismiss that includes this alleged protected disclosure in any event.

Does it appear to the Tribunal, on the material available, that at the final hearing there is a pretty good chance the Tribunal will find that the reason or principal reason for the claimant's dismissal was a protected disclosure or disclosures?

28. I concentrate here on my summary assessment as to what I consider the tribunal is likely to find was the decision for the claimant's dismissal, rather than an analysis of the burden of proof, because in my viewpoint that is what the tribunal at the substantive hearing is likely to focus upon.

29. It remains important to bear in mind that this is a forecast summary predictive assessment. It does not mean that this is what the tribunal will ultimately decide.

30. But in my summary assessment on the information I have before me (and in particular the notes of the meeting between the claimant and Mr Edwards, the emails that passed between them, Mr Edwards' decision letter and the correspondence between the claimant and her line manager, particularly in regard to pay/return to work/ occupational health referral) I think the tribunal is likely to find that it was Mr Edwards who decided to dismiss the claimant. Again, on a predictive summary assessment I consider the tribunal is likely to find he did so principally because he genuinely did not consider there was a realistic prospect of returning the claimant to the workplace in a way that would function, and function without ongoing disruption and potential distress to HMRC employees.

31. On the material before me, I consider it is likely that the tribunal will find in particular that Mr Edwards:

(a) Considered there were practical difficulties with returning the claimant to the workplace. In particular, on what is before me, I consider the tribunal is likely to find that Mr Edwards considered that the claimant had been and would be likely to continue to obstruct a referral to occupational health given, on his likely viewpoint, the claimant had refused to release the last report, and had failed to co-operate with her line manager in agreeing what would be sent to occupational health, that the claimant had said she "nothing to say to OH anyway", and the apparent statement by the claimant she wanted her complaints of breach of contract and deduction from wages dealt with first before she would co-operate. I think it is likely a tribunal would find that Mr Edwards thought an effective deadlock had been reached with the claimant refusing to consent to the occupational health referral unless she was returned to pay, but the respondent's position being that they needed that referral to assess whether and how the claimant could safely return to work. I consider it likely that a tribunal would accept that Mr Edwards legitimately thought that full guidance from occupational health would be needed given the background to the claimant's situation. That the claimant thought she had a contractual entitlement to return to work and/or be paid does not necessarily mean that that was not what Mr Edwards genuinely thought would be needed;

(b) Did not consider that the claimant had fully engaged on the question of returning to work and potentially having to have contact

with or engage with the individuals who she had complained about. The claimant did say that the only person she could not envisage working with was Ms Ellis-Jenkins. However, on what is available to me, I think it is likely the tribunal will find that Mr Edwards was seeking some commitment or observations from the claimant as to how she envisaged interacting with others such as Mr XY and Mr Webb. I think it is likely that the tribunal will find that Mr Edwards was troubled by the claimant asserting that she had not disrespected Mr XY historically and that the claimant saw one very central component of her returning to work and "moving on" was being able to, in effect, re-open Ms Block's upholding of the grievances against the claimant brought against her by Mr XY and Mr Webb. The Judge Sharp led tribunal had found in this regard that the was a foundation for Mr XY and Mr Webb's grievances and that no evidence had been provided to support a finding that their grievances were not properly conducted or investigated. I consider it likely the Tribunal will find that Mr Edwards was concerned about the potential for ongoing disruption and distress to individuals involved;

(c) Allied to the previous point, that Mr Edwards was concerned that the claimant was unlikely to move on from the earlier Employment Tribunal and that she was likely to seek to re-open or re-raise matters such as Mr XY and Mr Webb's grievances against her. In turn that would pose the risk of the claimant seeking to re-open her original complaints bearing in mind Mr XY's complaint against the claimant was that the claimant had repeatedly and persistently alleged that he had assaulted her. The two are therefore linked. The earlier tribunal had found that Mr XY and Mr Webb's feelings in their grievances were understandable. The claimant in her proposals was also, for example, seeking answers as to why Ms Jones did what she did in relation to the claimant and Mr Webb dating back to October 2018. I consider there is a good chance that this would be viewed by the tribunal as giving grounds for concern the claimant again seeking to revisit a historic matter;

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(d) I consider, again on what is currently before me, the Tribunal is also likely to conclude that Mr Edwards' was concerned as to the claimant's questioning of what HMRC's proposals were in relation to those parts of the earlier tribunal judgment where it had been found that the claimant had been subject to a detriment (but no discrimination found) and again whether the claimant was likely to be able to move on. In particular, the tribunal's findings at [116] that the respondent should have accepted as grievances the claimant's complaints on 1 November 2018 that she felt unsafe and harassed following the outcome of the disciplinary process against

Mr XY, that she felt victimised by Ms Ellis-Jenkins asking details of the alleged assault, and that she alleged harassment in Ms Jones asking the claimant about a physical move or mediation. The earlier tribunal had also found detriments in respect of it being suggested on 8 February 2019 that the claimant should be escorted on leaving the building and that the claimant had been asked to response to grievances against her before her complaint about the raising of those grievances was responded to. The earlier tribunal in that regard had made findings about why those things occurred but not that they were discrimination or victimisation. Moreover, the earlier tribunal said that it did not necessarily follow, that because it was said the respondent should not have refused the claimant permission to pursue the November grievances, that they were actually ultimately well founded grievances. On the evidence before me, I think it is likely that the respondent will show that Mr Edwards believed the claimant was seeking to pick at and pursue points where she felt there was a way to do so and he did not consider that conducive to finding a way to move on;

(d) Again, associated to this, on the material before me, I consider the tribunal is likely to find that Mr Edwards thought the claimant would be likely to continue to pursue complaints against or to managers, including senior managers, and that she may continue to do so in a way that was disrespectful or offensive;

(e) Finally, that Mr Edwards had concerns about whether the claimant did really wish to return, at least in a productive way. I think a Tribunal is likely to accept that Mr Edwards did not view the claimant's proposals as feasible as opposed to serving to increase his concerns. I do also not agree with the claimant's submissions in this regard that the respondent would have to show that there did not exist any possible feasible proposals that the claimant put forward or that all that was needed to find the relationship redeemable was an answer Mr Edwards found satisfactory from the task he gave the claimant to identify some proposals. I think the Tribunal is likely to find, on the information before me, that Mr Edwards did not view the proposals as feasible but in any event that the decision making was more nuanced that the claimant would in any event suggest. It is important to bear in mind here that I am undertaking a predictive assessment of the whistleblowing dismissal claim; not the claimant's free standing unfair dismissal claim.

31. In my assessment the tribunal is therefore likely to conclude that the principal reason for deciding to dismiss the claimant was not because of a protected disclosure or disclosures but because of the above mindset

being held by Mr Edwards. It is not likely to be enough for the claimant to assert that because Mr Edwards knew of some or all of her disclosures or because they are the background context to what has happened that this means they are the principal reason for dismissal. What matters is what was going on in Mr Edwards mind if he was the decision maker.

32. There are a series of authorities such as Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 which talk about how it can be permissible to separate out factors or consequences flowing from the making of the protected disclosures from the actual making of the protected disclosure itself, as long as those factors are genuinely separable. That assessment very much depends on an individual assessment on the evidence in the particular case. However, undertaking the predictive summary assessment that I must do on what is available to me, I consider it likely that the tribunal would draw that kind of distinction here.

33. I also consider it likely that the Tribunal will look at and be concerned with the heart of what Mr Edwards believed rather than undertaking the kind of forensic analysis that the claimant potentially seeks to undertake as to the wording used by Mr Edwards in his decision letter such as the expression “cumulative” and his consideration, after concluding there was a breakdown in trust and confidence, to go on to consider whether, in his view, there was a reasonable prospect of repairing it.

34. The claimant’s position is also that Mr Edwards was in effect acting on instruction from, or in concert with, senior managers in the respondent and that there was a pre-planned decision to dismiss her. The claimant says that Mr Edwards was clearly aware of her complaints to Ms Ciniewicz and Sir Jim Harra. The claimant referred to meeting notes from December 2018 where she says managers were early on saying her complaints did not meet the grievance test and they were taking legal advice about whether her allegations might be considered vexatious. The claimant also says that at a further meeting on 29 January 2019 managers were talking about potentially dismissing her if she did not return to work, that she should be told making persistent complaints could potentially be gross misconduct for which she could face dismissal. The claimant says that Mr Simons then wrote to her asking her to return to work in the office which was contrary to her fit note. She says that he then later deactivated her IT account and told her manager to manage her sickness absence unless she returned to work. The claimant says this was all part of a pre-determined plan to dismiss her for insubordination.

35. On a predictive summary assessment, and again on the evidence and information before me, I consider it is likely that the Tribunal is more likely to find that Mr Edwards was the decision maker. Some of what the

claimant identifies above are matters that the Judge Sharp led tribunal has already made findings of fact about in any event that the claimant would not be likely to be able to look behind. But in any event, on the evidence before me, I cannot say on what is before me that the claimant has a pretty good chance of establishing there was this pre-determined plan as against the possibility that Mr Simons and his colleagues were just discussing hypothetical future possibilities. Further, for a claimant to prove, in effect, a conspiracy to dismiss them, whilst certainly not impossible, generally involves a tribunal being asked to draw inferences from a variety of live witness testimonies and documents. It does not tend to be, and it is not in my judgment in the claimant's case, an assessment that can be easily be done at an interim relief hearing where there is no live witness evidence and the paperwork before the tribunal inherently limited. Bearing in mind the inherent nature of an interim relief hearing and the evidence currently available to me, the claimant cannot establish that she has a pretty good chance of establishing that the principal reason for her dismissal was because senior managers in HMRC had pre-planned that the claimant should be dismissed because she made one or more of her alleged protected disclosures.

36. For these reasons I am *not* satisfied that the claimant's case that the principal reason for her dismissal was the making of a protected disclosure or disclosures has a pretty good chance of succeeding before a tribunal. I do not make an interim relief order in favour of the claimant.

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Employment R Judge Harfield
Dated: 10 March 2021

JUDGMENT SENT TO THE PARTIES ON

11 March 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS