# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondents** |
|---|---|---|
| Ms N Kemp | **v** | Alvar Financial Services Limited (1) |
| | | Mr A McGrath (2) |
| | | Mr M Leadbeater (3) |
| | | Ms A Richardson (4) |

**Heard at: Central London Employment Tribunal (by CVP) On: 24 January 2023**

**Before: Employment Judge Norris, sitting alone**

**Appearances**
For the Claimant: Ms L Bone, Counsel
For the Respondents: Mr M Humphreys, Counsel

# RESERVED JUDGMENT – INTERIM RELIEF HEARING

The Claimant's application for interim relief is refused.

# WRITTEN REASONS

## 1 Background

1.1 The Claimant was employed in the capacity of General Counsel by the First Respondent (formerly known as Intertrader Limited) until her resignation, effective 16 December 2022.

1.2 The Claimant entered ACAS Early Conciliation between 25 November and 19 December before lodging her claim, which includes a claim for constructive unfair dismissal, on 22 December 2022. She claims Interim Relief (IR) on the basis that her dismissal was because she had made a protected disclosure.

## 2. Interim relief hearing

2.1 As is usual with IR applications, I have had to take the case on the basis of what is before me. I had a 30-page statement from the Claimant and a 19-page statement from Mr Brian Molloy, a former colleague of the Claimant. For the Respondents I had a five-page statement from the Second Respondent and a 16-page statement from the Third Respondent. The Second Respondent had also produced a second

statement of four pages in relation to the Respondents' application to make redactions to some of the material before me. I had a bundle of 344 pages and a substantial bundle of authorities, as well as written submissions from each Counsel.

2.2 None of the witnesses gave oral evidence on oath so their evidence was not tested by the other part(ies) and the Respondents had not yet submitted an ET3.

2.3 Having commenced reading in to the bundle, I heard submissions before the lunch break as to the Respondents' application for the redaction of three monetary figures referred to in the claim and in the Claimant's witness statement. After lunch, for reasons which I gave at the time and do not repeat here, I gave my decision in favour of the redactions requested. It is important to note that the decision related to the three specified figures only and not to the surrounding text or any of the context which remained before me, and that it applied to this IR hearing only, though Mr Humphreys for the Respondents indicated that it may be renewed on a future occasion.

2.4 In light of the shortness of the remaining time, I heard further submissions from the parties as to the IR application itself and reserved my decision. As requested, I have endeavoured to provide this short decision swiftly and therefore, while I have considered all the evidence before me, I only address what is essential to determine the IR application.

2.5 At the conclusion of the IR hearing we agreed the following:

a) the Respondents' time for entering an ET3 is extended to 10 February 2023;

b) there will be a Preliminary Hearing (Case Management) on 14 March 2023. It has been listed for up to one day. The Claimant is to produce a draft list of issues by 24 February with a view to agreeing it by 3 March. The First Respondent is to produce an agenda by 24 February with a view to agreeing that by 3 March. The parties are to send these documents to the Employment Tribunal by 7 March 2023 and must include skeleton arguments or submissions on any specific applications that they are making.

## 3. Relevant law

3.1 Section 128 Employment Rights Act 1996 ("ERA") entitles a person to make an application for IR.

3.2 Section 129 sets out the procedure to be adopted by the Employment Tribunal before considering making such an order. Section 129(1) says that on hearing an employee's application for IR, if it appears to the Employment Tribunal that it is likely on determining the complaint to which the application relates, the Employment Tribunal will find that the reason or if more than one the principal reason for dismissal is one of those specified, interim relief may be granted.

3.3 The Claimant relies on section 103(A) ERA and the making of a protected disclosure, which she says led to treatment entitling her to resign and claim constructive dismissal. It was agreed that each of the following is relevant in the circumstances:

- Did the Claimant make a disclosure to the Second Respondent on 21 March 2022?
- Did she believe that the First Respondent was failing or was likely to fail to comply with a legal obligation to which it was subject or that a miscarriage of justice was likely to occur, in line with sections 43B(1)(b) or (c)?
- If so, was that belief objectively reasonable?
- Was it in the public interest?
- If the Claimant did make such a disclosure, did it cause the First Respondent to commit a fundamental breach of contract entitling the Claimant to resign with or without notice?
- If so, did the Claimant affirm the contract and/or did she resign in response to the breach?

3.4 I have to be satisfied that it is "likely" the full tribunal will find that all these elements are present, and in first *Taplin V Shipham Limited*[1] and more recently in *Robinson*[2] (HHJ Eady), the higher courts have said that this means "a pretty good chance of succeeding" not merely that the Claimant "could possibly win". It is a significantly higher degree of likelihood than that.

3.5 This is a high bar because there is a risk that the employer will be irretrievably prejudiced if it is required to treat the contract as continuing until the conclusion of the full hearing, without meeting the remit of the section.

3.6 The parties agreed that I have to take an impressionistic view of the evidence of the material set out before me. No evidence was given on oath and so I have had to form a summary assessment of the material in order to form a view as to whether the Claimant is likely to succeed in each relevant part of her claim.

## 4. Basis for the IR application

<u>The Claimant's position</u>

4.1 It is common ground that the Claimant, a solicitor, started work on 8 January 2020 for GVC Marketing Limited. Both GVC and the First Respondent were part of the Entain group of companies, Entain being a global gaming group. From 1 June 2020 onwards the Claimant says she was responsible for the First Respondent's legal function. She became its General Counsel and a statutory director on 3 December 2020 and transferred under TUPE to become its employee on 30 November 2021.

4.2 According to the particulars of claim, until 1 December 2021, the First Respondent was a wholly-owned subsidiary of Electraworks Limited, part of the Entain group. By way of a Share Sale and Purchase Agreement (SPA) dated 1 June 2021, a company called Raven Ventures International Limited purchased the share capital of the First Respondent and its wholly-owned subsidiary, Argon Financial Limited. Both the First Respondent and Argon are incorporated in Gibraltar. Raven is a wholly-owned subsidiary of AMPM Ventures Limited, the family investment holding company of the Second Respondent. The Third Respondent is a solicitor and has

[1] [1978] ICR 1068 EAT
[2] UKEAT/0283/17

been employed since around September 2018 as Entain's Group Legal Director. The Fourth Respondent is the First Respondent's Head of HR.

4.3 At the date of the SPA, the First Respondent was involved in defending a number of potentially high-value legal disputes. The Claimant has described these as "existential" to the First Respondent and that adjective was not disputed before me. Under the SPA, Entain was to provide Raven with an indemnity against judgment liabilities. In return, Entain was to conduct the First Respondent's defence, with the First Respondent and Argon being required to provide assistance in the form of access to evidence they held, including being able to harvest data relevant to the disputes in question. The Claimant was to spend at least 25% of her working time assisting with the conduct of the disputes (which in practical terms included advising on their strategic conduct and liaising with external counsel) and the First Respondent was to make her services available to Entain for that purpose; if she left the First Respondent's employment, Entain would have the opportunity to nominate a Seller Litigation Representative. If Raven failed to comply with its obligations under the SPA or failed to procure the compliance of the First Respondent or Argon, Entain was entitled to instigate action to reduce its indemnity.

4.4 The Claimant says that in early 2022 there were a number of outstanding requests from external counsel for information and documents in relation to a submission that was being prepared for one of the disputes. She says she passed on the requests to the First Respondent's Head of Compliance, Ms Garcia-White, and her team, expecting prompt responses, but received none, despite chasing by the Claimant herself and the external lawyers in the relevant matter. The Claimant also received no response to a request she sent to Mr Ward, a Senior Compliance Officer on Ms Garcia-White's team.

4.5 Against a background of a commercial dispute between Raven and Entain in connection with the SPA, and strained and at times acrimonious relations between the Second Respondent and Entain generally, the Claimant says she "began to consider that Ms Garcia-White's lack of engagement was non-coincidental and at worst encouraged by the Second and/or Third Respondents".

4.6 On 21 March 2022, the Claimant rang the Second Respondent. This is the call on which she says she made the protected disclosure that is the subject of the hearing before me. She says the purpose of the call was to discuss a recent proposal for her to transfer to Entain to assist with its further conduct of the disputes. She sought to reassure the Second Respondent that she would have no involvement in any potential dispute between Raven and Entain in connection with the SPA, that her role with Entain would be limited to working on the disputes already under way and that there would be an ethical wall maintained to those ends.

4.7 The Claimant says that she then told the Second Respondent she had continued to work on the disputes but that "various people had not been providing her with requested information and documents". The Second Respondent asked who was failing to meet the requests, and the Claimant said it was Ms Garcia-White. The Second Respondent suggested that Entain had only asked for "a couple of things" from the First Respondent, but the Claimant replied "No, they've asked for lots".

4.8 The Claimant says that this was a protected disclosure showing that the First Respondent and Raven were in breach of their obligations under the SPA and that such breach was likely to continue unless Ms Garcia-White remedied the situation. Further, the Claimant herself would be placed in breach of her duties to the First Respondent and a miscarriage of justice was likely to occur in relation to one of the matters in dispute that was the subject of the external lawyers' requests.

4.9 The Claimant says that starting on 23 March 2022, she began to be treated unfavourably by the Respondents. She says in summary that she was removed from the litigation, the Third Respondent solicited allegations against her, she was suspended on spurious charges of gross misconduct (to which I return below) and she was removed from the First Respondent's organisation charts. She says that this unfavourable treatment amounted to a repudiatory breach of contract by the First Respondent entitling her to resign and claim constructive dismissal. She did so on 16 September 2022, but agreed to remain an employee throughout her notice period.

<u>The Respondents' position</u>

4.10 The Second Respondent agrees that the Claimant rang him on 21 March 2022. He also agrees that there was a discussion about the Claimant working at Entain in future, though the specific details are perhaps not agreed and are not in any event relevant to my decision. Accordingly I need make no other findings in that regard. Specifically however in relation to the exchange about concerns relating to alleged failures by Ms Garcia-White and others to comply with requests for documentation, the Second Respondent said that no such exchange took place between him and the Claimant; the Claimant did not raise the alleged concerns or refer to Ms Garcia-White at all.

4.11 The Respondents say that the First Respondent was justified in suspending the Claimant on 25 March 2022 and setting out disciplinary allegations against her because, in summary:

a) On 21 March 2022, the Claimant had emailed a contract to a director, Mr Brown, seeking his signature. She did not convey a message that it was urgent and she had already approved the contract on behalf of the First Respondent. Mr Brown had not responded by the time, around 24 hours later, the Claimant signed the contract herself and returned it. The Respondents say that this gave rise to a conflict of interests in light of the fact that Entain was one of the parties to the contract and the Claimant's proposed move to Entain;

b) From 15 March 2022 onwards, there had been email correspondence with the FCA which caused the Respondents concern. On 15 March 2022, an Associate in the Enforcement and Market Oversight team of the FCA wrote to the First Respondent's Compliance team asking for contact details and noting "We have previously been in contact with [the Claimant] but unable to reach her recently". Ms Garcia-White responded on 17 March 2022, introducing herself, and on 18 March, the FCA wrote again saying that they

were at a "critical stage" in an investigation and needed to finalise a witness statement urgently. The author of this email said that they were waiting for a response from the Claimant but had not heard from her since January 2022. The message concluded, "we have on numerous occasions had no response for long periods of time and found it difficult to be in touch with someone at the firm";

c) Proceedings had been served on the Respondent in Gibraltar on 8 March 2022 by a former client of the business. The Third Respondent says in his witness statement that he was unhappy that the Claimant had not made anyone aware of the pending litigation prior to service of the papers.

Documentary evidence

4.12 Relevant evidence in the bundle before me includes:

- At 16.45 on 21 March 2022, the Claimant sent a WhatsApp message to Mr Ruiz, (former) Executive Chairman of the First Respondent, in which she asked to speak about the "disputes going forward". She went on "I have mentioned this to [the Second Respondent] but I also know you have background from our previous conversations. I was hoping to clarify with you what this might involve - and to reassure with what it wouldn't, in particular no intention to act against the firm or Raven, and activity to be to the greatest extent independent from the firm. I have no intention to prejudice the firm's or Raven's position – but this is an interesting professional opportunity for me as we have previously discussed…". In further exchanges, the Claimant and Mr Ruiz arranged to have a call the following day.

- At 15.43 on 22 March 2022, the Claimant emailed the Second Respondent (no subject) saying "Many thanks for speaking yesterday. I will follow up shortly". The Second Respondent emailed the Claimant at 15.56, subject "Update", saying, "Good to speak to you yesterday. As discussed, if you could please outline the work which you have been involved in during the last few months, especially with regard to the Entain litigation claims, that would be most appreciated".

**Discussion and Conclusions**

5.1 The parties agreed that it will be central to my decision in this matter that each of the factors set out above at paragraph 3.3 must be in place and that the Claimant has to show that she has a pretty good chance of succeeding in each of them, in order for her to be granted the relief sought.

5.2 I have considered whether I can conclude that the Claimant has a pretty good chance of showing that she made a protected disclosure to the Second Respondent on 21 March 2022, pursuant to section 43B(1)(b) or (c) ERA, and that this led to detrimental treatment towards her that was such as to justify her resignation. Since I have not heard oral evidence from either of the parties to the conversation and the evidence set out in their witness statements has not been tested, I have had to consider whether I draw sufficient inferences from the surrounding evidence as to what took place on that call to find such a "pretty good chance".

5.3 I have to consider whether it is likely on determining the claim that the Tribunal will be satisfied firstly that there was a public interest disclosure. That involves consideration of whether the conversation was limited, as the Respondents assert, to a discussion about the Claimant working with Entain in future or, as the Claimant asserts, also included the raising of her concerns about failures on behalf of the compliance team generally and/or Ms Garcia-White specifically to respond to requests for information.

5.4 I have considered the nature of the Claimant's qualifications, role and professional experience, the conversation that the Claimant says took place, and its significance, both generally and in particular as to what occurred subsequently. I note that the Claimant has had legal representation from an early stage and that she raised a grievance in May 2022 prior to handing in her notice in September 2022. Nonetheless, the Claimant did not make a written disclosure or (on the evidence before me) any notes prior to the conversation or contemporaneously, nor does it appear she followed up the 21 March conversation in writing or alluded to having made a protected disclosure in the course of that conversation until 19 November 2022. The reasons for the Claimant acting in the way she did, as to which I intend no criticism and make no findings, will clearly be a matter for evidence, properly tested under cross-examination, at the full Hearing, as will the Third Respondent's account of what the Second Respondent said to him immediately following the call on 21 March 2022. At this stage however I cannot say that the Claimant's conduct in the immediate aftermath of the conversation leads me to believe she has a pretty good chance of showing that she made a protected disclosure in the course thereof.

5.5 It is very likely that there will also need to be evidence heard as to the whereabouts of the Second Respondent during that call, given that the Claimant says it should, in common with other business calls, have been recorded automatically but the Second Respondent says it was not recorded because it was made to his mobile phone while he was in the gym. However, in any event, on the Claimant's own account in her witness statement for this hearing, the purpose of the call was "to let [the Second Respondent] know that I had been discussing the possibility of joining Entain to continue working on the disputes" and not specifically to make a protected disclosure. What was in her mind during the discussion that then unfolded will again be a matter of evidence.

5.6 It will also be a matter for evidence as to why the Claimant did not respond to the FCA's emails. While noting that she contends the Respondents have been selective in what they have put before the Tribunal, I cannot accept for the purposes of this determination the speculative submission, without having heard any oral evidence to this effect, that she may have been too busy or that it was not down to her to have responded, even though I note that in her witness statement for this hearing she said she was working "well in excess of full-time hours" on a workload that was "increasingly heavy".

5.7 Of themselves, the email exchanges extracted above at paragraph 4.12 do not suggest by their nature or their content that the Claimant has a pretty good chance of showing that she made a protected disclosure in her conversation with the

Second Respondent, and as I have said, there is a long period between the point when it was said to be made and the date when it was first raised in open *inter partes* correspondence. Therefore, it comes down to the inference that I am encouraged by the Claimant to draw from her suspension and the Respondents' treatment of her between that conversation and the termination of her employment.

5.8 Mr Molloy's evidence on behalf of the Claimant (again, not tested before me) suggests that he considers the Third Respondent's assertion is "so over-the-top as to appear contrived" that in failing to respond in a timely manner to the FCA, the Claimant had exposed the business "unacceptably". However, it is common ground that, like the Third Respondent, Mr Molloy was not privy to the call between the Second Respondent and the Company on 21 March. Their evidence, itself inferential, does not particularly assist me in this regard in drawing inferences as to what took place.

5.9 However, nor, it would appear, was Mr Molly aware that prior to the call in question, the Third Respondent had set up a process whereby he sat with another Director of the First Respondent (Mr Canessa) to monitor the Claimant's inbox because (he says) of concerns that the Claimant was no longer attending to her duties properly. Ms Bone raised as an aside that the legality of this process was questionable. I make no finding on that and nor do I make any findings as to whether the Third Respondent either had grounds for concern about the Claimant's performance or went about dealing with them in an appropriate manner. There is however an email string (or more than one) in the bundle which tends on the face of it to show that the Third Respondent did take this action and that he did so prior to the Claimant's conversation with the Second Respondent on 21 March.

5.10 I have noted Ms Bone's submissions that the allegations against the Claimant were "specious and opportunistic", coming "nowhere near" what would be necessary to justify suspension and made without an adequate investigations, then subsequently abandoned for "disingenuous reasons". I consider however that it would go too far for me to say that evidence "jumps off the page" to show that the Respondents had no good cause for concern, or, perhaps more to the point, could have had none, in light of the allegations which I have summarised above, even if those allegations did not withstand subsequent scrutiny and/or were ultimately not pursued. Accordingly my primary finding is that the Claimant has not shown she has a pretty good chance of showing the Respondent's actions after 21 March were because she had made a protected disclosure. Consequently, she cannot show that she has a pretty good chance of succeeding in a claim that a protected disclosure caused the First Respondent to commit a fundamental breach of contract entitling her to resign with or without notice.

5.11 I also consider that the Claimant has not shown that she has a pretty good chance of showing that the words she claims to have said in the discussion with the Second Respondent on 21 March 2022 – to the effect that she was not receiving co-operation from the Compliance Team and in particular from Ms Garcia-White – amounted to information that tended to show either of the limbs of sections 43B1(b) or (c), though that is of less importance in light of my primary finding above. I also

do not consider it necessary or desirable for me to go further in considering the other factors above.

5.12 Overall therefore, on the evidence that I have seen, I am not in a position to say that the Claimant has a pretty good chance of succeeding in showing that if she was dismissed, the reason or the principal reason for dismissal was the making of a protected disclosure. The application for interim relief is therefore refused.

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Employment Judge Norris
2 February 2023

Sent to the parties on:

03/02/2023

For the Tribunal: