Case Number: 1600425/2016

EMPLOYMENT TRIBUNALS

Claimant: **Mr E Morris**

Respondent: **Carmarthenshire County Council**

Heard at: **Cardiff** **On: 6 – 10 February 2017**

Before: **Employment Judge S J Williams**
Members: **Mrs Thomas and Mrs George**

Representation:
Claimant: Mr Duffy (Counsel)
Respondent: Mr Walters (Counsel)

JUDGMENT

The unanimous judgment of the tribunal is that:

1. The claimant made protected disclosures to the respondent;
2. The claimant was dismissed by reason of redundancy and not because he made protected disclosures;
3. The claimant was unfairly dismissed;
4. If a fair procedure had been adopted there is a 50% chance that the claimant would nevertheless have been dismissed;
5. Detailed consideration of the remedy to which the claimant is entitled by virtue of the above findings will be restored before us if necessary.

REASONS

Introduction

1. In this case the claimant claims that he made protected disclosures to his employer and that his dismissal was automatically unfair because the making of those disclosures was the reason, or principal reason, for his

dismissal. Alternatively, the claimant claims that his dismissal was both substantively and procedurally unfair.

2. A claim that the claimant was subjected to a detriment by the respondent on the ground that he had made protected disclosures was not ultimately pursued by the claimant.

3. For the respondent the tribunal heard the evidence of Ian Jones, Robert Jones Young, Kirsty Nixon, Noelwyn Daniel, Helen Pugh, David Gilbert, John Aeron Rees, and Jake Morgan. For the claimant the tribunal heard the evidence of the claimant himself and Stephanie Thomas. All witnesses gave evidence in chief from prepared witness statements and were cross examined on those statements. Both counsel made oral submissions.

4. The tribunal was told at the outset that the parties had not succeeded in agreeing a list of issues to be determined by this tribunal, but by midday on the first day of hearing an agreed list was provided. The issues to be determined are as follows:

   (i) Did the claimant make protected disclosures? The only issue identified in this connection on the pleaded cases and by counsel at the outset was whether the claimant had a reasonable belief that the information he disclosed tended to show one or more of the matters set out in section 43B, subsection (1) (a-f) of the Employment Rights Act 1996. Despite this agreed position, Mr Walters sought to explore with the claimant in cross examination whether the content of the claimant's disclosures qualified for protection;

   (ii) What was the reason, or principal reason, for the claimant's dismissal? In particular, was the reason the making by the claimant of protected disclosures, redundancy, or some other substantial reason?

   (iii) If the claimant's dismissal was for a potentially fair reason, but not an automatically unfair reason, was the claimant's dismissal substantively and/or procedurally fair. In particular, did the prevailing circumstances amount to a redundancy or some other substantial reason and, if so, did the respondent act reasonably in treating that reason as a sufficient reason for dismissing the claimant. The specific issues raised are:

(a) Did the respondent act reasonably in identifying a pool of one person, the claimant, at risk of dismissal by reason of redundancy?

(b) Did the respondent consult adequately with the claimant personally and with his trade union?

(c) Did the respondent adequately consider alternatives to redundancy?

(d) Did the respondent adequately consider suitable alternative employment?

(iv) On the question of remedy, if the tribunal concludes that the dismissal of the claimant was unfair in any particular, was there a chance, assuming a fair procedure, that the claimant would nevertheless have been dismissed? If so, what was that chance, and when is a fair dismissal likely to have occurred?

The Law

5. The law relevant to the determination of the issues in this case is to be found in the Employment Rights Act 1996, which provides:

43B Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information of which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –

(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 obligations to which he is subject,

…...

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

…….

(c) is that the employee was redundant

……

(4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

103A Protected disclosure

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.

139 Redundancy

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

.....

(b) the fact that the requirements of [the] business –

(i) for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish.

The Facts

6. The tribunal found the following facts relevant to the determination of the issues in this case. The claimant was employed by the respondent from 5 December 1988 until the effective date of termination of his employment on 21 April 2016. His last position with the respondent was that of ski centre coordinator at Pembrey Country Park. At the date of his dismissal the claimant was employed at Grade J, spinal column point 42 plus 8%, for which the annual salary was £39,892.00.

7. Following informal discussions with, amongst others, Stephanie Thomas, the claimant first made allegations of malpractice by other officers of the council in the course of a meeting between the claimant, David Gilbert, director of regeneration, and Robert Jones-Young, deputy HR manager. At that meeting, which took place on 17 July 2014, the claimant raised a number of concerns which, the respondent accepts, tended to show that Rory Dickinson, the claimant's line manager, had committed a criminal offence, or offences, and had failed to comply with a legal obligation to which he was subject. The claimant's allegations also implicated Stephen Oliver, another officer of the council. As a result of this meeting the respondent's whistle-blowing procedure was invoked and Mr Noelwyn Daniel was appointed to be the relevant contact officer. The claimant said in evidence that he had been reluctant to become a whistle-blower but, in the light of the claim now being pursued, we did not consider that to be relevant.

8. The claimant met Noelwyn Daniel on 28 August 2014 and handed to him a typed document (B17 – 18 in our bundle) which set out in four sections information concerning the conduct of Mr Oliver which can be summarised as follows:

    (1) That Mr Dickinson personally profited from unauthorised bookings at the caravanning and camping site at Pembrey Country Park,
    (2) That Mr Dickinson personally profited from unauthorised commercial fishing during his working hours with the council and using council equipment,
    (3) That Mr Dickinson personally profited from the unauthorised disposal of council property including a boat engine, and
    (4) That Mr Dickinson failed to follow the respondent's code of conduct in the recruitment and appointment of staff and failed to disclose close personal associations with individuals who were appointed to roles within the authority.

9. The claimant met Mr Daniel again on 3 September 2014 and there was significant discussion between them on both occasions. Insofar as the claimant's typed documents did not clarify in every particular the

allegations he was making, we are quite satisfied on the evidence we heard that Mr Daniel was in no doubt about the content of the allegations. Mr Daniel in due course passed the information he had received to the respondent's internal audit department and the investigating officer, Helen Pugh. The respondent's whistle-blowing policy (D103 in our bundle, paragraph 39) provides:

> *Although you are not expected to prove the truth of an allegation, you will need to demonstrate to your Contact Officer that there are reasonable and sufficient grounds for your concern.*

It is evident from the manner in which Mr Daniel proceeded that he was satisfied that such reasonable and sufficient grounds existed.

10. It is pertinent to observe that the degree of care with which Mr Daniel performed his duties was not impressive. His evidence was that the claimant presented him with handwritten notes which he, Mr Daniel, subsequently typed up, retaining the first person narrative as in, for example, "I have received the following information…" Mr Daniel could not explain what had become of the handwritten notes which he had received which, on his evidence, appeared to have been lost. If Mr Daniel's evidence were correct then we would not expect such an officer to lose an important document which should clearly have been passed to those investigating. In the result, we have preferred the claimant's evidence that he himself typed up the document which he handed to Mr Daniel. Further, it is common ground that the claimant showed to Mr Daniel at least one photograph, and on the claimant's evidence several photographs, which were on his electronic tablet. We would expect an officer charged with collecting evidence to collect such photographic evidence also. Mr Daniel did not ask the claimant to transmit to him, whether on paper or electronically, the photographs which the claimant had.

11. During the autumn of 2014 Helen Pugh, audit and risk manager, conducted an investigation into the matters raised by the claimant. She analysed the information into eleven discrete allegations and ultimately submitted her findings to David Gilbert on 27 January 2015. Concerning the allegations relating to the caravanning and camping site and to the unauthorised disposal of council property, she found it impossible to establish conclusively whether there had or had not been any misappropriation of monies or other property because of the poor procedures and documentation held by the respondent in connection with these matters. Her findings led to a full review of procedures within the country park. Concerning the allegation of unauthorised commercial fishing, Helen Pugh found the information provided to her to be inadequate to establish the truth of the allegation. Concerning the

appointment of staff she recommended that those issues should be subject to a formal disciplinary investigation against Mr Dickinson.

12. The claimant had been provided on 24 December 2014 with feedback concerning the outcome of Helen Pugh's investigation.

13. It is quite apparent on the evidence we heard that, like Noelwyn Daniel, Helen Pugh was satisfied that there were reasonable and sufficient grounds for the claimant's concerns, that she took them with due seriousness and investigated them thoroughly so far as the deficiencies of the respondent's procedures permitted her to do so. Disciplinary proceedings were instituted against Rory Dickinson based, in part, on information provided by the claimant. Mr Dickinson was twice suspended and ultimately resigned shortly before a disciplinary hearing was to be held.

14. During the period of the claimant's employment the ski centre at Pembrey Country Park was located within the respondent's Countryside Division. For numerous years, going back at least to 2012, there had been discussions within the respondent concerning the future of the ski centre, its "delivery model" and management. In 2012 the respondent considered, but ultimately rejected, a formal tender from the claimant and a colleague to take over the running of the ski centre. In 2013, Eirian James, then senior manager for countryside initiated a proposed re-alignment which would have affected the claimant and the running of the ski centre. That proposed re-alignment did not proceed largely because Mr James fell ill shortly after his appointment in 2013 and subsequently sadly died. The future of the ski centre was then considered by Mr Ian Jones, head of leisure. In November 2013 Mr Jones issued a first draft of a proposed restructure, including the ski centre, for staff consultation. That proposal included the deletion of the claimant's post as manager of the ski centre, amongst other posts, and the creation of new posts. The claimant claimed to be eligible for matching and slotting into a new post in the structure, namely that of countryside development and commercial manager. In the respondent's view the claimant was not eligible for matching and slotting but was entitled to apply for the post. An interview was scheduled at which the claimant and one other would have competed for the post, save that that interview did not proceed and the re-structuring then contemplated did not take place for a combination of reasons which included the death of Mr James, the allegations made by the claimant concerning the conduct of Mr Dickinson and the investigation of Mr Dickinson himself. In the latter part of 2014 and early 2015 the respondent was concerned with the investigation by Helen Pugh into the allegations made by the claimant. Those matters have been dealt with above.

15. With effect from 1 April 2015 the Leisure Division transferred into the Communities Department under Mr Jake Morgan as its new director. Discussions continued concerning the future of the ski centre and on this occasion Mr Jones's proposal was the transfer of the centre from the Countryside Division into Sports and Leisure. The respondent's sports and leisure facilities were managed by three active facilities managers (AFMs), two of whom managed three facilities whereas the AFM (South) managed only two. It was proposed that responsibility for managing the ski centre be transferred to the AFM (South) and that the claimant's post be deleted. That proposal was authorised on 3 November 2015 in line with an officer's executive decision prepared by Mr Ian Jones which set out that the post of ski centre coordinator would no longer be required and would be deleted, resulting in the potential redundancy of one employee.

16. Those proposals were reviewed by Kirsty Nixon, a human resources officer, who became involved on 11 November 2015. It is not correct, as Ms Nixon says at paragraph 4 of her statement, that the officer's executive decision report "had identified a pool of one employee for the selection for redundancy". The report had identified one post to be deleted, but said nothing about the extent of the pool of employees to be considered for redundancy. Ms Nixon reviewed the existing ski centre staff in order to determine whether any other employee at that site should potentially be included within the selection pool and concluded that there were no broadly comparable posts within the ski centre. She then considered the three AFM roles to assess whether they should be included. That review led her to the conclusion that the active facilities managers required a wider knowledge base and that their role did not appear to be broadly comparable to the claimant's. Ms Nixon therefore advised that paragraph 33 of the respondents' redundancy policy and procedure "would apply for a pool of one".

17. Paragraph 33 of that procedure states:

> *There may be circumstances where the use of selection criteria is not appropriate, for example where one post only is affected, and in these cases departments are advised to move straight to seeking suitable alternative employment via the Redeployment Policy.*

18. The claimant was notified that he was at risk of redundancy and there followed three consultation meetings with him on 26 November 2015, 14 December 2015 and 26 January 2016. On 27 January 2016 the claimant was issued with notice of dismissal by reason of redundancy. On each occasion the claimant was accompanied by a trade union official.

19. By a letter of 8 February 2016 the claimant's trade union submitted a notice of appeal under four broad headings: business case; competitive posts; consultation and procedure. Under the heading "procedure" the letter of appeal stated that the claimant believed his dismissal was because of his involvement in whistle-blowing. The letter of appeal also raised questions about the proposed cost savings, about the pool of one and about the adequacy of consultation with the trade union.

20. To the claimant's complaint about the pool of one the respondent replied:

> *The fundamental point here is that the transfer of the ski centre to the Sports and Leisure Unit is not a re-structure. No new posts have been created, and there have been no amendments to the running of the ski centre nor the sports and leisure service. Similarly, there are no changes required to the existing job profiles or the job evaluated grades of the active facilities manager or the area sports and leisure manager.*

21. The respondent confirmed its business reasons for making the transfer, maintained that no consultation with the trade union was required and confirmed that the reason for the claimant's dismissal had nothing to do with his whistle-blowing.

22. The appeal was chaired by Mr John Aeron Rees on 17 March 2016. Mr Rees's findings in relation to the pool were set out as follows:

> *After revising the documentation submitted, we [sic] have established the active facilities manager has a wider and more diverse remit and magnitude compared to the ski centre coordinator post. The ski centre coordinator post is a more hands on position as heard by Mr Morris own verbal testimony.*
>
> *As a line of enquiry in preparation for this appeal meeting I requested sight of the job evaluation factor scores for both posts to help inform my decision on this point. The scores supported my assertions regarding the different demands for the positions which is (sic) reflected in the raw scores. Whilst both posts are grade J there are different demands.*

This same point is reiterated in Mr Rees's decision letter dated 23 March 2016 in which he adds:

> *I believe this enquiry has helped inform a robust decision on this key point.*

23. Mr Rees was here referring to his having called for scoring sheets for both the claimant's and the AFMs' posts. Those sheets were not originally included in our bundle but were produced on the third day, when Mr Rees was no longer present. It is common ground that they were not shown to the claimant before or at the appeal hearing and were not the subject of any discussion at the appeal hearing until Mr Rees mentioned them when he began to give his findings. The scores on those sheets present some difficulty, not only because Mr Rees did not have an opportunity to see them again when giving evidence but also because no one present in the tribunal could explain the system of computation which underlay the scores.

24. The figures on the document – which we take to be what Mr Rees referred to as "the raw scores" – show that eleven criteria were scored. All three AFMs scored identically under all eleven criteria. The claimant scored one point lower under three criteria, one point higher under three criteria, and equal with the AFMs under the remaining five criteria. The total bare score was 37 in each case. We do not know what the maximum score was, nor have we had explained to us what is meant by the figure denoted as the "latest score" which is 610 for the AFMs and 592 for the ski centre coordinator.

25. Based on that evidence it is not possible for us to find, as Mr Rees asserts in his decision letter, that *"the scores support my assertions regarding the different demands of the positions, and this is reflected in the raw scores. I believe this enquiry has helped inform a robust decision on this key point."* As Mr Duffy points out – arithmetically correctly – the "latest score" of the claimant is 97% of that of the AFMs. Naturally, we exercise considerable caution in the interpretation of this document because it was not satisfactorily explained to us. On its face, however, one part of it shows the claimant and the AFMs being scored identically and another part of it shows the claimant scoring 97% of the AFMs' score. Ms Nixon made no reference to these scores in her evidence and since they appear to have been produced only at the stage of the appeal, and then only for Mr Rees's eyes, we conclude that Ms Nixon did not consider them before coming to her conclusion that the two posts "did not appear to be broadly comparable". Mr Jake Morgan also repeated the respondent's view that the two posts differed significantly but could not explain why, in the light of that evidence, they were graded the same. He said that it was a good question. He did not consider the document containing the scores referred to above.

26. Separately from the transfer of the ski centre into Sports and Leisure Division, Mr Jones was also working in late 2015 and 2016 on a proposed new structure for the Countryside Division which envisaged some new posts. The proposed structure was spoken of, but according to

Mr Jones had not taken any very concrete form, when he wrote to his director, Mr Morgan, on 3 November 2015. It was discussed at a meeting the following day. Various approvals and, importantly, funding had to be secured before any such proposal could be taken forward. Several job profiles in connection with that proposed restructure were prepared in July 2016 with posts ultimately being advertised internally in January 2017 and externally in February. One post, that of events and facilities manager, was graded J, the same grade as the claimant's former post. Whilst no outcome can be predicted, it is clear on the evidence that the claimant would have been well qualified to apply for that post had it been available. Although the proposed restructure of the Countryside Division was proceeding, at least at the planning stage, whilst the process of consultation with the claimant was continuing and whilst he was working his notice, those proposals were not shared with the claimant.

27. A further post which was shared with the claimant was a fixed-term appointment initially due to last until March 2016 and therefore not of any interest to the claimant because his notice expired at the end of April 2016. Dependent upon the availability of funding, however, there was a possibility that that post would continue beyond March 2016. The claimant was not updated in subsequent consultation about whether funding was available for the continuation of that post.

Conclusions

28. The evidence in this case clearly points to the conclusion that the information disclosed by the claimant did, in his reasonable belief, tend to show that Mr Dickinson had committed a criminal offence or offences and/or that he had failed to comply with a legal obligation or obligations to which he was subject. The respondent was at all material times aware that that was the import of the disclosures made. Neither Mr Daniel nor Ms Pugh at any stage suggested that the claimant did not hold such a reasonable belief, nor did they suggest that the information disclosed was not worthy of investigation.

29. The claimant's disclosures predated the notification that he was at risk of redundancy by approximately 15 months. The proposal to delete the post of ski centre coordinator went back at least a further year to 2013. On that basis, it is not possible to find that the reason for the claimant's dismissal was that he had made protected disclosures. Furthermore, there was no suggestion of any animosity towards the claimant from Mr Gilbert, Mr Jones Young or from anyone else because he had made disclosures. Those disclosures were not the reason for his dismissal.

30. Consequent upon the respondent's business decision to transfer the ski centre from the Countryside Division into the Sports and Leisure Division

it was a logical conclusion that the post of ski centre coordinator would be deleted. Accordingly, the requirement of the respondent for employees to carry out work of the particular kind done by the claimant had diminished by one. Those circumstances gave rise to the redundancy of that post. That redundancy was the reason for the claimant's dismissal.

31. In view of the fact that one redundancy only was contemplated by the respondent there was no obligation to consult separately with the claimant's trade union.

32. The decision of the respondent that the claimant should be considered in a pool of one led inevitably to the conclusion that he would be selected for redundancy and that, in the absence of alternative employment, he would be dismissed. The evidence of the respondent concerning how it approached that question was not satisfactory. Prima facie the posts of AFM and ski centre coordinator were graded the same and scored almost identically according to the material which Mr Rees relied upon. The evidence simply does not support the proposition advanced by Mr Rees that those scores reinforced his view that the demands of the two positions were significantly different. The fact that Ms Nixon did not consider those scores must call into question her conclusion that the posts were not comparable.

33. Most importantly, Mr Rees recognised in his outcome letter that the question of the appropriateness of comparing the claimant with any other post holder was a "*key point*", and that it was important to reach a "*robust decision"* on that point. Not only does the material not appear to support Mr Rees's view, but the claimant was deprived of any opportunity either to rely on the scores as supporting his parity with the AFM, or to challenge those areas where he appears to be scored lower, or to contend, as he did in evidence, that the scores gave inadequate recognition to his budgetary role and to his creativity.

34. Had the respondent, and in particular Ms Nixon and Mr Rees, considered the implications of those scores, and had they heard the claimant's observations about them, there must be at least a question whether the respondent would have persisted in thinking that it was appropriate to consider the claimant in a pool of one person only. In our judgment the respondent did not act reasonably in assessing the evidence of the scores as it did, in concluding, as Mr Rees did, that *"the scores supported [his] assertions regarding the different demands for the positions",* and in failing to share this evidence, on which important reliance was placed by the respondent, with the claimant.

35. Whilst there was no immediately available and obviously suitable alternative post for the claimant, the respondent knew that it was proposing to restructure the Countryside Division and that posts might become available in that division within the foreseeable future. They also knew that finance had become available to extend beyond March 2016 the post which was considered with the claimant. This tribunal takes the view that the Respondent did not act reasonably in failing to share with the claimant its proposals for the future of the Countryside Division and to update him concerning the status of the temporary post. Had they done so, the claimant might have argued that the respondent should delay the deletion of his post, or should redeploy him temporarily so that he might have the opportunity of applying for a permanent post in the new Countryside structure as and when that became available. These are necessarily speculative considerations, but by failing to share those matters with the claimant the respondent effectively deprived him of the opportunity to argue that position.

36. If the claimant had been in a position to compete with the active facilities manager (south) for the position there can of course be no certainty that he would have been successful; at best, he would have had a chance of success. Given the evidence we have, imperfect though it is, that the two posts were graded identically and that they had been scored very close to identically, we can place that chance at no higher, but also no lower, than 50%.

37. Time on the final day of hearing did not permit full argument on the question of remedy, and if necessary that matter will be restored before us. Much of the underlying arithmetic is not disputed. It seems to us very unlikely in view of the claimant's long service with the respondent, his age and the prevailing conditions in the labour market in his area that he would have left his pensionable employment with the respondent if he had not been dismissed. The latter two considerations also militate in our judgment against the likelihood of his obtaining further pensionable employment.

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Employment Judge S J Williams
Dated: 24 February 2017

JUDGMENT SENT TO THE PARTIES ON

24 February 2017

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FOR THE STAFF OF THE TRIBUNAL OFFICE