Case No: 2301679/16

EMPLOYMENT TRIBUNALS

Claimant: Mr G Gawronski

Respondent: BDW Trading Ltd t/a Barratt Residential Asset Management

Heard at: **London South Employment Tribunal**
On: **19-21 June 2017**

Before: **Employment Judge Martin**
Ms B Leverton
Dr Fernandez

Representation
Claimant: In person
Respondent: Ms Musgrave - counsel

REASONS

1. Full reasons were given at the conclusion of the hearing. These reasons are given as requested by the Claimant.

2. By a claim form presented to the Tribunal on 2 September 2016 the Claimant brought claims of unfair dismissal, and that he had been dismissed because he made protected disclosures. The Respondent initially defended all claims but later conceded 'ordinary' unfair dismissal. It defended the claim that the principal reason for dismissal was because the Claimant had made protected disclosures.

3. The issues were set out by Judge Elliott in a case management hearing. These are the issues for the Tribunal to consider. Given the concession by the Respondent, the Tribunal is only considering the Claimant's claims of automatic unfair dismissal for making protected disclosures.

4. Public Interest Disclosure claim/s

    a. The Claimant relies on making a disclosure for the first tie in about February 2016 and raised it a number of times to his manager, Jennifer Bailey, Property Manager, Rob Manikon and to HR (Ms G Allen and Ms R Grewal) and also to the Health and Safety Executive on about 8 or 9 July 2016. The Claimant also says he made the disclosure in an email on 16 June 2016 to Ms Bailey. He says he disclosed that an estate operative William Neal has to work alone with Wheelie bins of up to 1200 kilograms, pushing and pulling them, when he says the safe weight limit is 500kgs.

b. In this was information disclosed which in the Claimant's reasonable belief tended to show that the health or safety of an individual, namely Mr William Neal had been put at risk by moving bins which were too heavy.

c. If so, did the Claimant reasonably believe that the disclosure was made in the public interest? The Claimant relies on the following as going to show the reasonable belief because if Mr Neal worked in these conditions and developed a back injury this could affect the NHS as a result of injury to him or give rise to a claim for benefits by being out of society.

d. It is accepted that the disclosure was made to the employer and to a prescribed person, the Health and Safety Executive.

5. Unfair dismissal complaints

a. Was the making of any proven protected disclosure the principal reason for the dismissal?

b. Has the Claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure?

c. Has the Respondent provided its reason for the dismissal namely misconduct?

d. If no, does the Tribunal accept the reason put forward by the Claimant or does it decide there was a different reason for the dismissal?

The hearing

6. The Tribunal heard from the Claimant on his own behalf and for the Respondent from Mr Rob Manikon (Property Manager), Ms Claire Medley (Property Manager) and Mr Mike Dowland (Head of Operations). There was a bundle of documents.

The law

7. ERA 1996 Act, s47B(1), a worker has the right not to be subjected to a detriment by any act "done on the ground that [he or she] has made a protected disclosure". ERA s103A, makes a dismissal automatically unfair where the reason or principal reason is that the employee has made a protected disclosure.

8. Disclosures qualifying for protection are defined by s43B, the material provisions being the following: In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show that the health or safety of an individual had been put at risk

9. Qualifying disclosures are protected where the disclosure is made in circumstances covered by ss43C-43H. These include where the disclosure is made in good faith to the employer (s43C) or to a prescribed person (s43F).

10. The Tribunal is given jurisdiction to consider complaints of PID-based detriments by s48(1A). Subsection (2) stipulates: on such a complaint it is for the employer to show the ground on which any act, or any deliberate failure to act, was done.

11. The PID regime came under valuable scrutiny from the EAT in Cavendish Munro Professional Risks Management Ltd-v-Geduld [2010] ICR 325. Giving judgment, Slade J stressed that the protection extends to disclosures of information, but not to mere allegations. Disclosing information means conveying facts.

12. In Fecitt-v-NHS Manchester [2012] IRLR 64, the Court of Appeal held that, for the purposes of a detriment claim, a Claimant is entitled to succeed if the Tribunal

finds that the PID materially influenced the employer's action.

13. The test is the same as that which applies in discrimination law. This, in the context of the PID jurisdiction, separates detriment claims from complaints for unfair dismissal under s103A: there, as we have stated, the question is whether the making of the disclosure is the reason, or at least the principal reason, for dismissal.

14. The question of the burden of proof in claims under the 1996 Act s103A was addressed by the Court of Appeal in Kuzel-v-Roche Products Ltd [2008] IRLR 530 CA. Giving the only substantial judgment, Mummery LJ made the following observations (paras 56-60):

"*The employer knows better than anyone else in the world why he dismissed the complainant. Thus, it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.*

I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

Having heard the evidence of both sides … it will then be for the [Employment Tribunal] to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences …

The [Employment Tribunal] must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the [Tribunal] that the reason was what he asserted it was, it is open to the [Tribunal] to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the [Tribunal] must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

… it may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side".

The facts

15. The Tribunal has come to the following findings of fact on the balance of probabilities having heard the evidence and considered the submissions. These findings are limited to those that are relevant to the issues and necessary to explain the decision reached. Even if evidence is not recorded below, all evidence has been heard and considered by the Tribunal in coming to its decision. Given that the Respondent had conceded ordinary unfair dismissal, the Tribunal has not gone into detail on the facts relating to this save for matters relating to remedy. The focus was on the outstanding claim that he was dismissed because he had made protected disclosures.

16. The Claimant was employed by the Respondent as a cleaner for just over two years. His employment was terminated on 27 July, 2016 by letter citing the reason as being gross misconduct. The letter purported to have been sent by Ms Medley, who heard the disciplinary hearing, however it was written and sent by Ms Grewel, and signed in Ms Medley's absence.

17. The Respondent is a large organisation with a dedicated HR department. The Claimant worked in maintenance of residential premises, including the cleaning of the underground car park and common areas. During his employment, the Claimant made several complaints relating to health and safety, particularly in relation to dust masks and the manual handling of bins in the car park. His case is that his manager, Ms Bailey, ignored his complaints and that ultimately he was dismissed because he made them. The Respondent's case is that they acted on the complaints made by the Claimant. For example, by undertaking a risk assessment and method statement, and purchasing dust masks for the Claimant.

18. It was not in dispute that on 30 June, 2016 there was an incident in the car park which resulted in Ms Bailey being sprayed with water by a hose used by the Claimant. The Claimant said it was an accident. Ms Bailey said it was done deliberately. This incident resulted in the Claimant being investigated and subsequently being disciplined for deliberately spraying Jennifer Bailey with water from the hose, resulting in her clothing and hair being soaked and her laptop being damaged. An investigation was carried out by Mr Rob Manikon who interviewed the Claimant, Ms Bailey and other witnesses and decided there was a case to answer and the matter should progress to a disciplinary hearing. Initially, the investigation covered whether the Claimant had unauthorised breaks from work, however, following the investigation this aspect was not pursued.

19. Mr Manikon initially interviewed the Claimant on 11 July, 2016 and on that date sent a letter to him, headed "Investigation Outcome". Despite the heading on the letter, it is apparent from the body of the letter that he confirmed that the issue of the Claimant's breaks would not be taken further, but that his suspension was extended as they needed to investigate further is the about the water incident. The Claimant suggested that this was the end of the investigation; however, it is clear and would have been clear to the Claimant, that Mr Manikon carried on his investigation. The Claimant was invited to the disciplinary hearing by letter dated 12 July, 2016, and in that letter, was sent the documents to be relied on at the hearing. In the bundle before the Tribunal there were other statements not listed in that letter, however Ms Medley said she did not have them either and the Tribunal accept this evidence.

20. The letter sets out the allegation against the Claimant clearly, included the disciplinary procedure, warned that dismissal may be a possible outcome and gave the Claimant the right to be accompanied.

21. Ms Medley heard the disciplinary hearing. She told the Tribunal that she found the disciplinary hearing challenging because of the Claimant's behaviour and that she was concerned about what he said about his working relationship with his line manager, Ms Bailey. Her view was that there was insufficient evidence to substantiate the allegation that the Claimant had deliberately sprayed water on Ms Bailey. Her view was that the Claimant should not be dismissed and that he should be returned to his role. However, because of her concerns about the working relationship with Ms Bailey she telephoned Ms Grewel (Head of HR) for advice, who recommended having a conference call with Mr Dowland, Head of Operations. The conference call comprised the Mr Dowland, Ms Medley and Ms Grewel and took place on 22 July, 2016.

22. Mr Dowland is in senior management and is not responsible for the day-to-day operations. He has 6 managers, including Mr Manikon and Ms Medley who report to him. The Tribunal is satisfied with the Respondent's evidence that the property managers would be the people to deal with matters such as the complaints that the Claimant made about health and safety issues. Mr Dowland says that he did not know of these complaints and was not told about them during the telephone conference call (even though Ms Grewel did know of them). This was confirmed by Ms Medley in the evidence she gave to the Tribunal.

23. Ms Medley's evidence was that although the Claimant mentioned raising health and safety issues and whistleblowing during the disciplinary interview, this was very brief and that she had told him that this was a separate matter, which should be dealt with at a different time and she did not know the substance of the complaints. The Tribunal is satisfied that this is what happened. Mr Dowland did not see the statements prepared during the investigation, or indeed the minutes of the disciplinary hearing.

24. The day after the conference call, Miss Medley went on annual leave for two weeks. Then for some reason, which the Tribunal still does not really understand, Mr Dowland and Ms Grewel made the decision as to whether the Claimant's employment should continue. Ms Medley's investigation was that although she did not feel that the incident with a water hose should lead to dismissal, she was concerned about the working relationship between the Claimant and Ms Bailey, which she felt she did not know enough about, but which Miss Grewal did. She was inexperienced in dealing with disciplinary matters and took the advice she was given.

25. The Tribunal heard evidence of a breakdown in working relationships between the Claimant and Ms Bailey. These included a poor PDR showing that development was needed, his refusal to work alongside colleagues and to follow instructions given by his employer, complaining about cleaning the car park after a dust mask was provided for him, refusing to accept explanations regarding his complaints about health and safety, sarcastic and disrespectful emails to Ms Bailey and his attitude and rudeness towards Miss Grewal. In general, it was considered that his attitude towards the Respondent was poor.

26. The Claimant also accepted that his relationship with Ms Bailey was difficult and it irretrievably broken down. His evidence was that if he had returned to work, he would have expected Ms Bailey and Mr Manikon to be disciplined and dismissed for what he termed their negligence in relation to health and safety issues. If that did not happen, then he said he would have resigned and claimed unfair constructive dismissal. He also made this position clear at his appeal hearing with Miss Grewal.

27. Considering these concerns about his attitude, behaviour and relationship with the Respondent, Miss Grewal, suggested three options during the conference call, one of which was dismissal. Mr Dowland ruled out the other two options and therefore made the decision that the Claimant's employment should terminate because of an irretrievable break down in relations with the Claimant. This decision was made on 22 July, 2016 and he left it for Miss Grewal to put the decision in place and draft a letter to the Claimant terminating his employment.

28. For reasons, which the Tribunal do not understand, Miss Grewal waited until 27 July, 2016 to write to the Claimant and even more inexplicably terminated the employment based on the incident with the water hose which Ms Medley had decided there was insufficient evidence to dismiss him for and further sent it in Ms Medley's name when Ms Medley was clear that there was insufficient evidence to dismiss on this basis. It was on this basis that the Respondent conceded unfair dismissal. The Claimant was given the right to appeal, which she took up, Miss Grewal heard the appeal, which she dismissed.

The Tribunal's conclusions

29. Having found the factual matrix is set out above; the Tribunal has come the following conclusions on the balance of probabilities. The Tribunal has first considered whether Mr Dowland, who made the decision to terminate the

Claimant's employment knew about the disclosures that the Claimant had made to the Respondent. At this stage, the Tribunal is taking the Claimant's case at its highest and considered this on the basis that the disclosures were in fact protected disclosures. If the Tribunal finds that there is a causal connection between the disclosures and the decision to terminate the Claimant's employment, the Tribunal will then consider the disclosures in detail and whether they in fact amount to a protected disclosure.

30. The Tribunal has found that Mr Dowland did not know of the protected disclosures that the Claimant made. The question for the Tribunal was whether he was told during the conference call about them. His evidence was that he was not, and this was corroborated by Ms Medley. Miss Grewal did not attend the Tribunal to give evidence. The Tribunal's finding is that the disclosures were not discussed during the conference call. The next question the Tribunal addressed was whether Miss Grewal, who did know about the disclosures, materially influenced the decision to dismiss.

31. The Tribunal found the Respondent's evidence generally credible particularly that of Ms Medley. Ms Medley was inexperienced in dealing with disciplinary matters and had not been provided the support and training, she needed to undertake this task. It is not surprising, therefore, given what the Claimant said during the disciplinary hearing and his general behaviour during the hearing that she sought advice from human resources and spoke to Ms Grewel. Whilst recognising that there was insufficient evidence to dismiss the Claimant for the incident with the water hose, Ms Medley also recognised that there were serious difficulties in the working relationship between the Claimant and Ms Bailey, which was acknowledged by the Claimant.

32. Miss Grewal then took the unusual decision to involve Mr Dowland and have a conference call to discuss the Claimant's behaviour and attitude before the disciplinary matter regarding the water hose had been formally concluded. The Tribunal would have expected that the disciplinary charges be dismissed based on the findings made by Miss Medley and then subsequent action taken to address the Claimant's attitude and behaviour. What is even more surprising, is that although the decision to terminate the Claimant's employment was based down the irretrievable breakdown of the working relationship, the letter terminating his employment does not refer to this, but purports to dismiss on grounds of gross misconduct following the incident with the water hose. Miss Grewal did not attend to give evidence to explain how this happened.

33. Having said this, and recognising the defects in the Respondents procedures for which they have rightly conceded unfair dismissal, the Tribunal finds that the Claimant has not shown that the reason for dismissal was principally because he made a protected disclosure. As we have found, protected disclosures were not discussed during the conference call, even though Miss Grewal knew of them. What was discussed was the Claimant's general attitude and behaviour which are exemplified in the communications, the Tribunal has seen from the Claimant to the Respondent, including the Claimant's email to Ms Bailey dated 16 June, 2016, the Claimant's email dated 19 June, 2016 and his email dated 9 July, 2016 to Ms Grewal.

34. The Tribunal finds that the reason for the Claimant's dismissal was the irretrievable breakdown relationship between him and the Respondent. The Claimant accepted that there was a breakdown in relationship and said that he would resign if he had to return to work and Ms Bailey and Mr Manikon were not dismissed.

35. The Tribunal therefore does not find that the principal reason to dismissal was because the Claimant made protected disclosures relation to health and safety

issues. Therefore, the Tribunal has not gone on to consider in detail whether the disclosures are protected disclosures. The Respondent accepted that they contain information but disputed the protected disclosures on the basis that the Claimant did not have a reasonable belief that there was a breach of health and safety, given the assurances made by the Respondent. Secondly, the Respondent disputed that the protected disclosures were protected on the grounds that they were not made in the public interest but were made for the Claimant's personal benefit only. During the Tribunal, the Claimant raised issues that the breaches might result in injury should put a burden on the NHS and the benefit system.

36. The Tribunal accepts that the Claimant did have concerns about health and safety issues and this is clearly something he feels strongly about. However, the Tribunal can see from the evidence that the guidelines (which are not statutory provisions) records that a risk assessment is done if the weight of the bins exceeds a certain amount. The Tribunal can also see that this was done by Ms Bailey in response to the Claimant's allegation. The Respondent also made enquiries of the Health and Safety Executive and were assured that they were compliant with current legislation. They told the Claimant this however the Claimant persisted in making his complaints. The Tribunal finds that the initial complaint was reasonable to bring, but finds that the subsequent complaints were not and at that time the Claimant did not have a reasonable belief given the assurances given by the Respondent and the documents relied on (which it appears he may have misunderstood) that health and safety legislation had been breached., This would therefore not bring the subsequent disclosures within the protection of the legislation.

37. The Tribunal finds that the Claimant is clearly concerned about health and safety issues and that his concerns were raised in good faith.

38. The Tribunal does not find that the Claimant was automatically unfairly dismissed for failure to work because he felt the Respondent had not supplied any or the correct dust masks. The Tribunal come to this conclusion because the undisputed evidence was that Ms Bailey did provide the Claimant with a mask and he was not disciplined when he did not work when the dust mask was not available – he was given different duties.

Remedy

39. The Claimant is entitled to a basic award of £796.59 as he was 44 at the date of termination of his employment and had completed two complete years' service. His average weekly salary was £265.53. The appropriate multiplier is 1.5 and the calculation is £265 x 2 x 1.5.

40. The Claimant secured alternative employment on or about 7 September, 2016 and permanent employment from mid-March 2017 (the Claimant was unable to give an exact date) initially the Claimant said his average salary from that employment was £23 net less than his current employment however he later produced a contract showing he earned more with his new employer than with the Respondent. The award was therefore adjusted to take this into account. The Tribunal finds that the Claimant mitigated his loss within a reasonable period. The Respondent says the Claimant has produced no evidence to show that he was unemployed in January and February 2017. Claimant's evidence on oath was that he was unemployed. The Tribunal accepts this evidence.

41. The Claimant's period of loss is from 27 July 2017 until he obtained new permanent employment in mid-March. The Claimant was unable to give an exact date and the Tribunal has assumed he started on 14 March, 2017. This is a period of 7 ½ months, equating to a net loss of £8,629.65 (based on a net salary

of £1,1150.62 pcm). In that period the Claimant earned 3,816.71. His net loss therefore is £4,812.94. The Claimant earns £23 per week less in his new employment than with the Respondent. The Tribunal awards the difference in pay for one year in the sum of £276. The Tribunal awards £400 for loss of statutory rights.

42. The total compensatory award is therefore £5,212.94.

43. To this the Tribunal adds 20% for failure to follow the ACAS code. The Tribunal finds that the Respondent failed to follow the ACAS code in two material respects. First, the reason given for dismissal in the letter dated 27th July was not the reason for dismissal. This is a failure to record a material fact an omits significant information ie why the Claimant was really dismissed. This means that the appeal is flawed as the Claimant was unable to challenge the real reason for dismissal. Secondly, the ACAS code provides that the person hearing the appeal has not been involved in previous stages. Whilst Miss Grewal was not a decision-maker, did not conduct the investigation of the disciplinary hearing she was clearly involved as she initiated, set up and participated in the conference call with Mr Dowland and Ms Medley. The Tribunal has taken into account the size of the and administrative resources of the Respondent. The Respondent is an organisation with ample resources and the Tribunal would have expected somebody completely uninvolved to have heard the appeal. The Tribunal finds these matters to be significant failures on the part of the Respondent to follow the ACAS code of practice and find that it is just and equitable to increase the compensation by 20%. (£1,042.58). The total compensatory award is therefore £6,255.52.

Costs

44. The Respondent made an application for costs based on the Claimant's unreasonable conduct. The basis of its application was that the Claimant had acted unreasonably in continuing with his claim following the Claimant's withdrawal from an agreement in principal to settle matters ono 2 June 2017. Its claim for costs is from that date. The Claimant was sent a letter dated 14 June 2017 marked 'Without prejudice save as to costs' putting forward a further (lesser) offer to settle by the close of that day, failing which it warned that it would be making an application for costs and setting out the basis for the application namely that the Claimant acted unreasonably in walking away from the settlement provisionally agreed which was far in excess of what a Tribunal could award and set out its calculations of a likely award for unfair dismissal. The Claimant rejected this offer.

45. I also heard from the Claimant both in response to the application made by the Respondents and also in relation to his means. There were two reasons given by the Claimant for why he walked away from the provisional agreement. The first was to do with formatting issues in relation to the paragraph numbers and the second was his requirement that the money be put into his bank account before he signed the document. It is noteworthy that these dealings were with the Respondent's solicitors who have their professional duties to their regulatory bodies. The Claimant accepts that the sum proposed is far in excess of any maximum that the Tribunal could have given him even though he was under the impression when he first came to the Tribunal that he could effectively get compensation three times, not just once.

46. The Tribunal agrees with the Respondent that this is unreasonable conduct. It is not surprising that they would only pay the Claimant once they had a signed agreement. The Claimant did not say in his submissions that he rejected the offer for any reason of principle in relation to his view on the Respondent's handling of health and safety issues. There is no good reason why he should

have walked away from this provisional agreement. He would have had more money and the Respondent's costs from 2 June would not have been incurred.

47. the Claimant has given evidence of his means. In summary, he has savings of £18,000. He has the same expenses which he had when working for the Respondent and he is now earning approximately £400 more per month than he did with the Respondent. The Tribunal therefore finds that the Claimant has the means to pay any award made. Having reached that conclusion, the Tribunal considered the schedule of costs provided by the Respondent. They are claiming £4,573.69 solicitor's fees and counsel fees of £3,700. They are not claiming VAT, photocopying charges or other sundries like that. The Tribunal has considered the schedule and whilst the hourly rate has not been given the Tribunal has been able to work this out from the document. The Tribunal has to consider not only whether the costs were reasonable but whether the costs are proportionate. The Tribunal finds that the amount of costs that is reasonable and proportionate to award is £5,500. This sum shall be offset from the compensatory and basic awards due to the Claimant.

Employment Judge Martin

Date 13 July 2017