EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr J McCreanney		The Parts Alliance Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham **ON** 10, 11, 12 & 13 July 2017

EMPLOYMENT JUDGE Lloyd

Representation
For the Claimant: Mr A Bausfield, Counsel (for 10 July)/In person
For the Respondent: Mr J Searle, Counsel

JUDGMENT

1) The tribunal has jurisdiction to hear both the claimant's unfair dismissal claims; namely under s.103A ERA and ss. 94-98 ERA.

2) The judgment of the tribunal is that the claimant's claims are not well founded and they are dismissed in their entirety.

3) Judgment having been sent to the parties on 25th July 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

THE REASONS BEGIN ON PAGE 2

REASONS

Background

1.1 The claimant began employment with Policy Best Limited t/a CPA on 1st November 2013. Subsequently, by agreement he transferred his employment to the respondent, on 1st April 2015.

1.2 In September 2016 he was dismissed. The respondent contends that the dismissal was for the reason of redundancy which took effect from 30th September 2016. On the basis, only of a period of employment from 1st April 2015 to 30th September 2016, the claimant does not establish the 2 years' continuous service required under s.108 ERA, to bring an ordinary unfair dismissal claim under ss.94-98.

1.3 However, the parties had agreed at the date of his transfer to the respondent that his service with Policy Best Ltd and the respondent would together have continuity without break. Moreover, that position was not hitherto disputed in the context of these proceedings. On that basis, the claimant's continuous employment ran from 1st November 2013 to 30 September 2016.

1.4 In his submissions, Mr Searle for the respondent, argues that the continuity issue is still a live one; and he invites the tribunal's determination.

1.5 The claimant has brought a second unfair dismissal claim in his ET1; under s.103A ERA. There is no dispute that the claimant may pursue his claim of automatically unfair dismissal under s.103A ERA, since no service qualification is required.

1.6 I find that the claimant's employment is continuous from 1st November 2013 until 30th September 2016. My initial point of reference, as was Mr Searle's, was page 34 of the bundle, namely the statement of main terms and conditions of employment with the respondent when he took up that post on 1st April 2015. At the very top of the statement is the provision: *"Your employment with CPA will count as part of your period of continuous employment"*.

1.7 That is the contractual agreement. I have proceeded to address the issue of whether, in jurisdictional terms it is proper for me to adopt that agreement on continuity in determining whether s.108 is satisfied.

1.8 I have concluded that s.108 is indeed satisfied and that this tribunal has jurisdiction to hear the claimant's claim under ss.94-98 ERA.

1.9 I so conclude for these reasons.

1.10 This is not a TUPE case as such. The claimant did suggest it might be in his correspondence and in his pleadings. However, this is not a transfer of an undertaking in the TUPE sense. There is though a sustainable evidential basis for the finding that Policy Best Limited t/a CPA and the respondent must be treated as "associated employers" for the purposes of the continuity rules. For practical employment law purposes, employers associated with each other are treated as though they are one and the same. The definition of 'associated

employer' is therefore especially important for continuity of employment. I find that the respondent and CPA were associated employers for the purposes of the statutory continuity provisions

s.231ERA - Associated employers.

For the purposes of this Act any two employers shall be treated as associated if—
(a)one is a company of which the other (directly or indirectly) has control, or
(b)both are companies of which a third person (directly or indirectly) has control;
and "associated employer" shall be construed accordingly.

1.11 I find therefore that the tribunal has jurisdiction to hear both of the claimant's unfair dismissal claims; namely that under s.103A of the Employment Rights Act 1996 ("ERA") and also an ordinary unfair dismissal claim under s.94 to 98 of the ERA.

Issues

2.1 The claimant brought these complaints: unfair dismissal because the principal reason for his dismissal was that he made a protected disclosure and/or unfair dismissal in the ordinary or general sense.

2.2 He contended various acts between April to August 2016 which he said were an attempt to manage him out of the business. He had clarified at case management stage that these were not raised as complaints of detriment because he made protected disclosures. Rather, they were relied upon as evidence that Mr Dineen, his line manager, was hostile to him because he made a disclosure and was motivated to dismiss him for it.

2.3 He claimed he had disclosed documents to the respondent which, he said, demonstrated particular conduct by Mr Dineen in response to his protected disclosure:

a) on 3 March 2016, he made the comments now set out at paragraph 23 of the claimant's witness statement; *"take your fucking head out of your ass…"*
b) he raised performance issues with him
c) he removed his company credit card
d) he attempted to manage the claimant's team directly and in such a way as to undermine the claimant
e) he set him impossible tasks.
f) he changed his job description.

2.4 With regard to the unfair dismissal claim because of public interest disclosure. It is not in dispute that the claimant sent an e mail on 3 March 2016 to Ms Walls (a member of the respondent's HR team) in which he asserted, among other things, that

"Paul….is forcing us all to sell something that does not exist. Selling (Servicesure Subscriptions) like this is not ethical and we should not do it, I am trying to recruit train and maintain a team of 'Trusted Advisors' so naturally this crosses a red line for me."

2.5 The claimant contends that he spoke to Mr S Mc Cann, the chief operating officer by telephone on 17 March 2016 during which call he broadly repeated the content of his e mail and referred to it. In either or both of the above communications, (but specifically on 3 March 2016) was information disclosed which in the claimant's reasonable belief tended to show one of the following?

a) A criminal offence had been committed by the respondent who was guilty of theft or obtaining money by deception by selling a product that they could not provide

b) The respondent had failed to comply with a legal obligation to provide the service set out in their contracts with customers and an obligation of integrity in their dealings

c) A miscarriage of justice had occurred in that the customers were paying for a service that the respondent could not provide *and/or* that information relating to the above was being concealed from customers by the respondent.

d) If so, did the claimant reasonably believe that the disclosure was made in the public interest? The claimant relies on the garages / customers as members of the public who were affected by what he considered to be mis-selling and therefore they had an interest in him disclosing and stopping the practice.

e) Was the making of any proven protected disclosure the principal reason for the claimant's dismissal?

f) Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosure(s)?

g) Has the respondent proved its reason for the dismissal, namely, redundancy?

h) If not, does the tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for the dismissal?

2.6 With regard to the unfair dismissal claim:

a) What was the reason for the dismissal? The respondent asserts that it was redundancy which is a potentially fair reason for dismissal pursuant to section 98(2) Employment Rights Act 1996.

b) Was the dismissal fair within the meaning set out in section 98(4) of the Employment Rights Act1996? The burden of proof is neutral here but it helps to know the claimant's challenges to the fairness of the dismissal in advance and they are identified as follows:

c) Was there no genuine redundancy situation /was the redundancy a sham / had the respondent's need for employees to undertake work of a particular kind ceased or diminished?

d) Was the decision to dismiss the claimant was pre-judged / taken in advance of the redundancy consultation process it was inappropriate for Ms Warren to be involved whether as decision-maker or the individual conducting the

consultations given that she had offered the claimant voluntary redundancy and indicated he would be subject to a disciplinary process and conducted the disciplinary process (which resulted in no disciplinary action) the respondent failed to make reasonable efforts to find the claimant suitable alternative employment.

e) Has the respondent proven that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

Analysis; Law, Findings and Conclusions

3.1 I have taken as my statutory starting point, the terms of s.103A ERA and s.94; with s.98(2) and the general principles of fairness in dismissal at s.98(4) ERA.

s.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

3.2 The respondent relies on s.98(2)(c) in relation to the reason for dismissal; namely redundancy. The burden of proof lies with the respondent to show a fair reason for the claimant's dismissal.

3.3 Section 98(4) provides:

…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.

3.4 My conclusion is that the claimant's two unfair dismissal claims are not well founded. I dismiss them in their entirety.

3.5 I have in my analysis of evidence and law considered the two statutory prongs of the claimant's claims.

3.6 The provision at s.103A… "if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure" is an important form of words. It was the phrase which Mr Searle referred to specifically in his submissions on the alleged public interest disclosure dismissal. The nature of the test, in terms of whether there is a causative link between a whistleblowing event and a subsequent dismissal, is whether the reason or principal reason was the fact of the whistleblowing having occurred. I do consider that it is necessary to recount the factual matrix in detail, since there is little if anything between the parties in terms of what is the factual matrix and chronology is in this case. The respondent very helpfully prepared a chronology of events for this tribunal of some 2½ pages. I have had that before me and I have frequently referred to it during the

case, during the submissions of the parties. I have made various reference to it during my deliberations. I find that the chronology document sets out the relevant facts and events that are germane to my consideration and conclusions in this case. I do not find that the reason or principal reason for the claimant's dismissal was his disclosure of 3 March 2016. I do not dispute it was a protected disclosure as defined at s.43B ERA. However, it was not the reason for the claimant's dismissal. I do not accept that the conversation with Mr McCann on 17 March was a protected disclosure at all.

3.7 The second prong of the claimant's case is the more generic or ordinary unfair dismissal claim; under s.94-s.98 ERA. The claimant says that the respondent has failed to show that the reason or principal reason for my dismissal on 30th September was redundancy. The crux of his case is that the declaration of his redundancy and the termination of his employment as a consequence was a sham. He contends there was not a redundancy situation. The respondent has failed to show a potentially fair reason for dismissal pursuant to s.98(2) of the Employment Rights Act 1996.

3.8 The two prongs of the claimant's claim are on one level a curious mix. They are at once both interrelated and freestanding; being inter-dependent on each other in a number of fundamental respects. But at the same time, the two claims are also pleaded quite independently; and I have considered them independently in making my judgment.

3.9 Underlying what the claimant says to this tribunal overall, is the contention that he was dismissed through a sham redundancy because in turn the respondent wanted to dismiss him for the whistleblowing disclosure on 3rd March 2016. Even so, I have considered the redundancy unfair dismissal claim as a freestanding claim. If this tribunal concludes that there was not a genuine redundancy satisfying the terms of s.139(1) ERA and/or if the dismissal was procedurally unfair then the claimant would succeed.

3.10 turning to s.103A, the EAT decision in Eiger Securities LLP -v- Korshunova [2017] IRLR 115 is I find helpful. Mr Searle referred to paragraph 4 of the head note:

"The tribunal had erred in that they had applied the wrong text in deciding that the claimant's dismissal was unfair under s.103A. Different tests were to be applied under s.103A and s.47B(1). For a claim under s.103A to succeed the tribunal had to be satisfied that the reason or the principal reason was the protected disclosure whereas for a claim under s.47B(1) to be made out the tribunal had to be satisfied that the protected disclosure materially influenced the employer's detrimental treatment of the claimant…"

3.11 For a claim under s.103A to succeed the tribunal has to be satisfied that the reason or principal reason was the protected disclosure.

3.12 The EAT in Eiger went on to say:

"*The tribunal had not followed the correct approach and accordingly their finding that the dismissal of the claimant was unfair under s.103 because she made a protected disclosure that would be set aside".*

3.13 My finding is that I cannot conclude on the evidence that the reason or principal reason for his dismissal on 30th September 2016 was the protected disclosure in his email to Victoria Walls of 3rd March 2016 (page 134 of the bundle). That and that alone is the public interest disclosure on which we must focus in this case. That email was referred by Victoria Walls to Jo Warren the group HR Director and in turn she considered the matter with Paul Denine; an action on which the claimant has taken some significant exception.

3.14 The events related to the tribunal in evidence had been played out against the background of Mr Dineen's project known as the Tool Hire Club (THC). The witness evidence and the documents have given very detailed accounts of what that scheme is and how the subscription arrangements and the direct debit arrangements operated. The THC scheme was in simple terms a scheme whereby subscribers were able, for a small added subscription to their annual payment to the respondent's *Servicesure Auto Centre Network*, to hire sometimes very complex and expensive tools for the purpose of carrying out motor repairs.

3.15 This was predicated on the basis that as members of the respondent's network they would purchase parts from the respondent; who would derive quite considerable business from that. In business terms, everyone benefited.

3.16 There was considerable controversy in evidence as to whether the fact that this scheme never got off the ground but arrangements were being put in place to charge the extra subscription, gave rise to fraud, dishonesty, mis-selling or misrepresentation by the respondent. That was the centrepiece of the claimant's criticism.

3.17 This is not a criminal court of inquiry and I do not in legal terms engage any allegations of criminality. However, my finding on the facts before me does not lead me to conclude that this was mis-selling or anything like it. It was certainly not fraudulent. The situation was as Mr Searle put it in submissions, lining up existing customers and clients to subscribe to this scheme so as to give them added benefits which were also business efficient for the respondent. The scheme was Mr Denine's scheme and something of a "pet scheme" of his. That should attract no criticism of him; he was doing his job to the best of the respondent's advantage. The THC scheme was conceived in the first place because of requests made by the supervising panel of garage owners and operators; who recognised advantages for the members in having an easily accessible parts and tools service.

3.18 This scheme gave the opportunity for very often small operators to hire at a reasonable and discounted cost but also to purchase parts from the respondent. It was a scheme that was beneficial to everyone not least the garage owners There was no evidence of misappropriation of funds or wrongful deduction of added subscriptions. Simply the problem became that the THC never got off the

ground because the main provider went into administration suddenly and unexpectedly. The expected launch date of 4 April 2016 was never realised.

3.19 There was I discerned from the evidence, some friction between the claimant and Mr Dineen in these circumstances; and also, I discern some employee rivalry. I also noted an email chain which included an email from Paul Dineen to the claimant in which Mr Dineen had - and there is no nice term for it - verbally "slapped down" the claimant *("Jason out of order mate not your call")* for an email he had sent to Damian Parkes authorising the old £30.00 membership rate. I did not find the rebuke unfair; though it was firm and to the point. But, Mr Dineen was the claimant's line manager and had the right of reasonable instruction to his staff.

3.20 The claimant has asserted that following the disclosure he was managed out of the business. The "sham" redundancy dismissal of 30 September 2016 was the culmination of that process. for the benefit of the claimant. Neither was the dismissal procedure fair, he implies.

3.21 I find no criticism procedurally. Further, I find that there was a genuine redundancy. It is not for this tribunal, looking at a business decision made by an employer for restructuring and redundancy, forensically to look behind anything but the basic objective business rationale. This tribunal should not subjectively unpick the components of a business decision to refine and reorganise for efficiency and overhead costs advantage. It is well settled in redundancy case law, that if the employer can demonstrate an objective business rationale for its decision that there is a reduced need for employees to do work of a particular kind, there is a probably a genuine redundancy for the purposes of s.139.

3.22 The tribunal shall then look at whether that redundancy has been executed fairly in procedural terms. It was so executed, in my finding.

3.23 The crux of my decision on the redundancy claim is that contrary to the contention made by the claimant, this was a genuine redundancy and it was a genuine redundancy borne of the rationale of a need for aggressive costs saving in a highly competitive industry. It is noted - and this finding was not only relevant to the continuity of employment point, but it is also relevant here - this cluster of companies were a connected constellation of different businesses connected with the motoring and motoring parts trade; but owned by a common set of entrepreneurial investors. The investors aimed to maximize their profits. Part of that aim was an ongoing, sometimes aggressive, zeal for cutting costs. That is a business decision for the purposes of this case.

3.24 I find that the respondent has made out a genuine and objective case for having concluded there was a duplication in the layers of management as between the claimant's role and Mr Dineen's role. The layer was seen as one which could be stripped out for business efficacy. However harsh, bullish and aggressive it may seem on one level, in business terms it was legally a decision

which the respondent was entitled to take. The claimant made a number of suggestions. Those suggestions in large part equated to "it should be Mr Dineen and not me". The respondent did give alternatives some consideration. However, from a business perspective the outcome was clear. Mr Dineed is a man with some 38 years' experience in the parts trade. On all the evidence, he gets on very well with the network of garages. He is a man of that industry, and has been steeped in the industry for almost 40 years. He has a good relationship with those he works with within the respondent. The business advantage of retaining Mr Dineen over the much less experienced claimant could fairly be seen.

3.25 I make no adverse findings on this issue as such, but it was clear that before 3rd March there were controversies and issues which related to the claimant's performance, capability and suitability; in terms of his management style. It was not fanciful for Mr Searle to say in his submissions that one of the main motivating factors behind the 3rd March email being penned and sent by the claimant was that later that day later, on 3rd March, the claimant was facing a company meeting; the main agenda item being the resignation of two of his staff within very close succession. There were accusations critical of the claimant's management style. There were other matters raised, associated with the claimant's expenses and the use of company credit and petrol cards.

3.26 The disclosure was made on 3rd March 2016. The claimant's dismissal was on 30 September 2016. The redundancy decision was not made until about 1 August or thereabouts. Initially the claimant did not raise the accusation of protected disclosure. It was only on the second consultation meeting on 6 September that he did. Mr Searle has described that as *"a bit of a try on"*. There are evidential grounds for that suggestion I believe.

3.27 In simple terms, I infer that if the respondent had wanted to get rid of the claimant because of his disclosure on 3 March 2016, they could and would have done it a lot earlier than September; 6 months after the protected disclosure had been made. The respondent did not in truth contemplate any such breach of s.103A ERA. The claimant does not succeed under that provision. Neither does he succeed under s.94 to s.98 ERA.

Conclusion; summary

4.1 The reason or principal reason for the claimant's dismissal was that he was redundant in a pool on one. His redundancy was fairly selected and managed. There is nothing unlawful about a pool of one *per se*. The employer shall show a logical and objective basis for one person being selected for the pool. I am satisfied that the respondent has in this case. The claimant was the sole National Sales Manager. Unfortunately for the claimant that role was no longer seen as viable or cost efficient in the business structure; and would be "stripped out".

4.2 He was not dismissed for his disclosure on 3 March 2016.

4.3 For all these reasons I conclude that the two unfair dismissal claims advanced by the claimant are not well-founded and I dismiss them in their entirety.

Employment Judge Lloyd
Dated: 28 July 2017

REASONS SENT TO THE PARTIES ON 31 July 2017