EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs C Tanner	**v**	**Dixon International Group Ltd**

Heard at: Bury St Edmunds **On:** 13, 14 & 15 November 2017

Before: Employment Judge Laidler

Members: Mr D Hart
Ms L Daniels

Appearances

For the Claimant: Mr W Brown, Solicitor.
For the Respondent: Mr A Nicklin, Counsel.

JUDGMENT

1. **The tribunal is satisfied that the claimant was dismissed within the meaning of s.103A for the making of a protected disclosure and as such the dismissal is automatically unfair.**

2. **The respondent is to pay to the claimant the agreed sum of £3250 as compensation for that unfair dismissal.**

REASONS

1. The ET1 in this matter was received on 22 April 2017. The claimant brought claims of unfair dismissal and various monetary claims. In the list of issues agreed for this hearing there are no money claims these having been resolved between the parties. The claimant applied for Early Conciliation on 20 March 2017 and the certificate was issued on 20 April 2017.

2. In its response, the respondent denied all the claims.

3. There was a Preliminary Hearing on 13 July 2017 at which Judge Sigsworth ordered that by 27 July 2017 the claimant send to the respondent 'a properly amended claim form setting out the basis for and particulars of the protected disclosure detriment claim.'

4. Some particulars were filed on 2 August 2017 but the respondent argued that these did not comply with the order as there was no amended claim form and the details of the protected disclosure was still not clear. The correspondence culminated in an Unless Order being made by Judge Ord on 11 October 2017 that if by the 20 October 2017 the claimant had not complied with paragraph one of the order of the 13 July 2017 the complaints relating to alleged detriment would stand dismissed without further order.

5. Having heard submissions on this point at the beginning of this hearing the tribunal accepted the respondent's arguments that the detriment claim had indeed been dismissed pursuant to that Unless Order on 20 October 2017. The only complaint therefore before this tribunal was that of automatically unfair dismissal. The agreed list of issues on that matter was as follows:-

> "Dismissal
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> 1. The respondent admits that it dismissed the claimant on 13 March 2017. The respondent contends that misconduct was the reason for dismissal. The claimant contends that she was dismissed because she made an alleged protected disclosure.
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> 2. It is agreed that the claimant does not have sufficient continuous employment to bring a claim of ordinary unfair dismissal. The only unfair dismissal claim before the tribunal is a claim pursuant to section 103A of the Employment Rights Act 1996 ("the 1996 Act"). The reason or principle reason for the dismissal must be that the employee made a protected disclosure.
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> 3. The tribunal will need to determine the reason for dismissal.
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> Protected disclosure
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> 4. The claimant contends that she informed Melanie Malcolm-Brown ("MMB") that Natasha Malcolm-Brown ("NMB"), the respondent's Operations Director, had taken cocaine at the respondent's summer party on 16 July 2016. She contends this was disclosed on 12 December 2016, along with a disclosure that the same had taken place at an away day event, which the claimant did not attend, on 10 December 2016.
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> 5. The claimant relies on the alleged disclosure concerning events on 15 July 2016, made on 12 December 2016. The respondent accepts that the claimant informed MMB, on 12 December 2016, of alleged drug taking at the away day event on 10 December 2016, but

denies that anything was said regarding 15 July 2016 at that or any other time.

6. The matters for the tribunal to determine are:-

   a. Did the claimant suggest that NMB took cocaine at the summer party on 15 July 2016 in her conversation with MMB on 12 December 2016?

   b. If so, did that amount to a disclosure of information?

   c. Did the claimant reasonably believe that the disclosure was in the public interest when she made it?

   d. Did the claimant reasonably believe that the disclosure tended to show one or more of the criteria in section 43B(I) of the 1996 Act?

7. If the alleged disclosure is a qualifying disclosure, the respondent accepts it was made to the claimant's employer for the purposes of section 43C of the 1996 Act."

6. The tribunal took time to read the witness statements and then the witnesses were cross examined on these. The tribunal heard from Melanie and Charles Malcolm Brown, and the claimant. From the evidence heard the tribunal finds the following facts.

The Facts

7. The claimant commenced employment on 3 August 2015 as an administrative assistant. She was promoted on 1 September 2016 to the post of sales office manager with an increased salary of £26,000. Shortly after the claimant embarked upon a CIPD course in HR by distance learning paid for by the respondent and she was allowed some time off work in the week to enable her to do this. She completed some modules but then had to accept that she could not complete the course and took it no further. She was given some assistance in her new role from a family member of the Malcolm – Brown's but the tribunal accepts on only one occasion.

8. The respondent is a family run business with Charles being the Managing Director, Melanie his wife Deputy Managing director and Natasha their daughter Operations Director.

9. On the 15 July 2016, the respondent hosted an annual staff summer party. The claimant attended and gave evidence in her witness statement at paragraph 3 that she observed Natasha "under the influence of something as she seemed very loud and over the top. It was then I noticed very clearly some white powdery substance on her top lip beneath her nostrils."

She repeated this in cross examination. She made no disclosures about this at that time.

10. The tribunal found paragraph 4 of the claimant's witness statement most confusing. It states that she told Melanie "that I had seen Natasha… apparently talking cocaine" but then says "I never disclosed the things I witnessed regarding NMB at the garden party to MMB". In cross-examination the claimant accepted that the paragraph was confusing and that she had meant to say that she never disclosed seeing Natasha with power on her nose in July, but that when she made her disclose in December she did also state that Natasha was one of the people taking cocaine at the garden party in July.

11. The claimant was taken to replies given by her email of 24 June to the respondent's request for further information. It appeared the claimant was somewhat confused by the contents of this document, so time was given to her within this hearing to re-read her own document and remind herself what she had said in it. Paragraph 1 of these particulars answered a question raised about the July garden party. The claimant had answered "this was disclosed to Natasha's mother". In cross examination as stated above the claimant accepted that was only after the 10 December party when she made her disclosure on 12 December. She stated that the garden party was definitely mentioned but maybe not in great detail. That is where the four named individuals plus Natasha came from. The claimant however emphasised that she never disclosed what she actually saw at the July party. She said in cross examination "I never told her mother on 12 December what I saw at the garden party as told her what Miranda had told me about blood on Natasha's nose at the December party."

12. On 10 December, the second party took place at what has been described as the 'Pink House' hired for the occasion by the respondent. The claimant did not attend. In her witness statement at paragraph 6 the claimant stated that Miranda Sharp, a work colleague, told her on 12 December that Natasha had been snorting cocaine at this party and that blood was seen dripping from her nose. On receipt of that information the claimant decided it was "time for Natasha to get help" and therefore approached Melanie to tell her that her daughter had apparently been taking cocaine.

13. In her further and better particulars of 24 June 2017 the claimant at paragraph 1e) stated "I was not making a complaint, I was merely being a friend and informing MMB why NMB was behaving the way she was as she was at her wits end mentioning on a couple of occasions that she did not know what was wrong with her daughter". Then at g) in answer to a question posed by the respondent as to why the claimant believed that the disclosure was in the public interest she stated "I believe it was in the interest's of her parents and family to be able to get her that help she desperately needs. NMB lives on site and sometimes walks up to the factory and staff had commented on her doing this under the influence of

cocaine with machinery around". In relation to the December disclosure the claimant stated at paragraph 2e) the allegations were made orally as no malice was intended and 'I thought it to be a private family matter'.

14. The tribunal has found confusions and contradictions in the claimant's witness statement and further and better particulars which have shed some doubt on the reliability of her recollections about what was said and when. The claimant also refers to a meeting with Melanie on 9 December before her disclosure (paragraph 5 of her witness statement) when she stated that Melanie confided in her that she was worried about Natasha's behaviour. Melanie does not recall such a meeting, but is clear that she would not have discussed a family member with a member of staff and the tribunal accepts that evidence. In view of the tribunal's conclusions as to the contradictions in the claimant's evidence about the disclosure it prefers Melanie's evidence that this was not said.

15. The claimant in paragraph 6 said that after her disclosure to Melanie, Melanie went home and then she and Charles came back and approached Natasha in her cottage which was on-site. Charles then came over to the office and asked if he could speak to the claimant in his office and then thanked her for telling them but wished she had done so earlier. Charles said in evidence that that paragraph "does not make any memorable sense to me at all". The tribunal finds it more likely than not that the Malcolm-Brown's did come back to the factory to see Natasha in her cottage and that Charles did then meet with the claimant. The tribunal finds it highly likely that he did thank the claimant for bringing this to their attention. However, with regard to Natasha going to Nepal the tribunal accepts the evidence given by both of the respondent's witnesses that their contact with Nepal was through their charity and involved various trips that would need to be organised well in advance. It is more likely than not that any reference to Natasha going to Nepal was reference to an already planned trip rather than "being sent away" as alleged by the claimant.

16. The tribunal is satisfied that the respondent did then investigate the alleged drug taking and that nothing was revealed although the tribunal saw no further details of that investigation. The claimant then went on leave to South Africa and on her return in the New Year, in or about 24 February had a good appraisal by Melanie.

17. At page twelve of the bundle was an unsigned statement by Matthew Bell now known to be a nephew of the Malcom-Brown's in which he refers to a discussion with the claimant when she allegedly swore at him. Melanie was travelling at that time and emailed the claimant on 7 March about this matter. She also said she needed to talk to the claimant about damage caused by staff thinking that the claimant was watching them on CCTV camera which had not been agreed and should not be happening. She suggested they meet on Monday and discuss the best way forward. The claimant replied and did indeed apologise for her behaviour. She knew that the meeting was to discuss these matters.

18. When the claimant attended at the meeting on 13 March it became a disciplinary meeting. The claimant had no notice of this in advance nor the precise detail of the allegations against her.

19. The tribunal did not hear from Natasha. It must accept the claimant's evidence that when the claimant arrived for the meeting she was surprised when Natasha arrived and set up her laptop and waited for Melanie to then arrive. The tribunal accepts the evidence of the claimant that it was Natasha who took charge of the meeting, and indeed the minutes record that it is she who asked the claimant if she would like the meeting terminated and re-convened at a later date once Melanie had told her it was a disciplinary hearing.

20. The tribunal is satisfied that Melanie had a genuine reason for wishing to speak to the claimant on that day, as evidenced by her email of 7 March. It may not have been her intention, but the tribunal is satisfied that Natasha then took over the running of the meeting. The tribunal accepts there was a protected conversation early on from which the claimant concluded not unreasonably that the decision had already been taken to terminate her employment. There is no mention in the minutes of her having handed back her lap top and giving a colleague her password, but the claimant has explained to this tribunal that she had handed an expensive laptop back as she was no longer using it and shared passwords with a colleague in any event. The minutes do not appear to be an accurate record of what occurred. The tribunal asked Melanie if she had taken notes in with her and she stated she did have bullet points. The tribunal finds it more likely than not that those have been used to compile these minutes. It is satisfied that after Matt Bell was discussed nothing more was.

21. The tribunal has been assisted reaching these conclusions by emails written at the time. On the day of the meeting the claimant emailed at 17:46 hours to say that the action in dismissing her we unfair and stressed that she had not been informed that it was a disciplinary meeting to be conducted by Melanie and Natasha. She stated that the decision to dismiss had been made before the meeting. She specifically stated she believed she was being dismissed as a direct result of whistleblowing on Natasha and that "as HR I had a duty of care to employees".

22. The claimant was sent an outcome letter by Melanie which seemed to suggest that it was the claimant who had asked to be dismissed. The letter however states "You confirmed you did not wish to resign and asked for me to terminate your employment immediately and that you would then make a claim for unfair dismissal." The tribunal is satisfied there was a dismissal by the employer. This letter gave the claimant the right of appeal. The tribunal is further satisfied that having been dismissed at the meeting the claimant was escorted from the premises. It does not accept that the claimant had suggested she wanted to move to South Africa.

There may have been a discussion about property prices on her return from holiday but no more than that.

23. The claimant again wrote on 19 March refuting the contents of letter of 16 March and again stating she had no idea she was being called to a disciplinary hearing. She again stated the decision had been made before the meeting to dismiss her. She emphasised that she had a duty of care when Natasha's abuse of controlled substances became what she considered dangerous to her health and reported what she knew to Melanie. She again confirmed that she had been thanked by Charles for bringing it to their attention. The claimant in that letter seemed to suggest that she was no longer pursuing an appeal as her position was untenable, and it would be for a tribunal to decide a just outcome.

24. The respondent acknowledged that letter but took no further action, and certainly never asked the claimant if she was indeed withdrawing the appeal.

25. The claimant commenced early conciliation on 20 March.

26. With regard to the allegations about the claimant's use of CCTV footage Melanie stated in paragraph four of her statement that she had numerous staff complaints within days of the claimant gaining access to the CCTV that she was spying on them and ringing the factory telling people to get on with their jobs. In Charles' statement at paragraph ten he stated that their IT manager was willing to give a statement testifying to this particular instance of "dissembling" on the claimant's part, that members of staff swiftly "clocked the fact that she was watching all people in production and grossly exceeding her authority by seeing her PC screen and justifiably complained." The tribunal accepts the claimant's evidence that she was given access to CCTV by Melanie to monitor smoking breaks and that it was then taken away. The tribunal has not heard from the IT manager as to the process by which access was given and to what areas, neither has the tribunal heard any evidence of the detail of alleged employee complaints.

Relevant law

27. The claimant who had not accrued two year's service at the date of her dismissal relies upon s103A namely that 'the reason (or if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure'.

28. Reference must be made to section 43A as to the definition of a protected disclosure and is a 'qualifying disclosure' made in accordance with the following sections of that part. Section 43B provides that a 'qualifying disclosure' means any disclosure of information 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,

…

(d) that the health or safety of any individual has been, is being or is likely to be endangered'

The tribunals conclusions

29. The respondent does not dispute that on 12 December the claimant was disclosing information to Melanie. In paragraph 5 of the respondent's submissions it is accepted that when the claimant relayed what she had been told by Miranda Sharp that amounted to a "disclosure of information." It is suggested however by the respondent that this was not in the reasonable belief of the claimant in the public interest. The tribunal has taken account of the case of Chesterton Global Ltd and another v Nurmohamed [2017] EWCA Civ 979, and in particular paragraphs 29 and 30:

> 29: -
> "Third, the necessary belief is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks, as not uncommonly happens, to justify it after the event by reference to specific matters which the tribunal finds were not in his head at the time he made it. Of course, if he cannot give credible reasons for why he thought at the time that the disclosure was in the public interest, that may cast doubt on whether he really thought so at all; but the significance is evidential not substantive. Likewise, in principle a tribunal might find that the particular reasons why the worker believed the disclosure to be in the public interest did not reasonably justify his belief, but nevertheless find it to have been reasonable for different reasons which he had not articulated to himself at the time: all that matters is that his (subjective) belief was (objectively) reasonable."
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> 30: -
> "Fourth, while the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it: otherwise, as pointed out at paragraph 17 above, the new ss.49(6A) and 103(6A) would have no role. I am inclined to think that the belief does not in fact have to form any part of the worker's motivation – the phrase 'in the belief' is not the same as 'motivated by the belief'; but it is hard to see that the point will arise in practice, since where a worker believes that a disclosure is in the public interest it would be odd if that did not form at least some part of their motivation in making it."

30. Having applied those paragraphs to the facts of this case the tribunal has to find that the disclosure was in the public interest. The claimant even in documents sent in March was referring to her duty of care and to health and safety matters concerning Natasha living on-site and having access to

the factory premises where there was machinery. The tribunal is satisfied that it was in the reasonable belief of the claimant a matter in the public interest. It is further satisfied that within the meaning of section 43B the claimant was disclosing information which tended to show that a criminal offence had been committed (subsection (1)(a)) and/or that the health and safety of any individual had been endangered.

31. It was not put to the claimant that she had any other motive for making the disclosure, and so far as s.123(6A) is concerned the tribunal is satisfied the disclosure was made in good faith.

32. The claimant does not have two years service to bring a claim of ordinary unfair dismissal. The burden is therefore on her to show on the balance of probabilities that the reason for dismissal was an automatically unfair reason. The claimant has done this and the tribunal is satisfied that the claimant was dismissed due to making the disclosure. There was no other reason for the dismissal. In February Melanie had given the claimant a good appraisal. She called the claimant to a meeting to discuss some issues but never gave the claimant any notice of the detail of those or that it was a disciplinary hearing. That meeting was in effect hijacked by Natasha and turned into a disciplinary hearing. The disclosure that the claimant had made directly related to Natasha and others about alleged drug taking. The tribunal is satisfied that the principal reason for the dismissal was that the claimant had made her disclosure about Natasha.

33. The tribunal cannot find that there were any issues of causation or contribution which would suggest that any award to the claimant should be reduced. The detail of any disciplinary allegations had not been put to the claimant by the respondent and there is no evidence before this tribunal that if pursued they would have lead to a fair dismissal or indeed that dismissal would have been within the band of reasonable responses. The claimant's conduct did not contribute to her dismissal, it was the actions of the respondent that resulted in her dismissal which the tribunal is satisfied was automatically unfair as the principal reason for it was the making of the protected disclosure.

34. The respondent raised issues about the claimant's schedule of loss in that it included a claim for losses from the date of the dismissal to 24 July. At the preliminary hearing on 13 July it had been said the claimant was not working. The respondent sent a letter to Select Cambridge Assessment on 15 August to make a data subject access request and obtained information that the claimant had been a flexible worker for them from 10 April to 28 July. The claimant has found new permanent employment on 24 July. The claimant says to this tribunal she did not know she had to declare temporary earnings. The tribunal finds it unfortunate that the claimant had not understood the need to declare everything earned, and this was particularly made clear to her in the respondent's solicitor's correspondence. The fact is that she has now done so and the respondent is not disadvantaged as the claimant will have to give credit for those earnings.

35. The tribunal did not know whether an up to date schedule of loss has been prepared by the claimant, but suggested that the claimant and respondent discuss an updated schedule. This would include re-consideration by the claimant of the injury to feelings award as when the schedule of loss was produced it was on the basis there was also the detriment claim.

36. The parties having had a discussion it was agreed that the compensation payable to the claimant would be £3250.

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Employment Judge Laidler

Date: ……4 December 2017

Sent to the parties on: 4 December 2017

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For the Tribunal Office