EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr M Bonner	**v**	**Chepstow Plant International Limited**

Heard at: Bury St Edmunds **On:** 30 April – 3 May 2018

Before: Employment Judge Laidler

Members: Mrs M Prettyman and Mr B Smith

Appearances
For the Claimant: Mr A Rozycki, Counsel.
For the Respondent: Mr A Kember, Counsel.

RESERVED JUDGMENT

1. **The claimant made a protected disclosure on the 4 July 2016 but was not treated detrimentally for so doing.**

2. **The claimant did not make a protected disclosure on the 7 July 2016.**

3. **The claimant was not therefore treated detrimentally for having made such a disclosure and his claim of unfair dismissal contrary to section 47B Employment Rights Act 1996**

4. **Further and in any event the respondent has satisfied the tribunal that the reason for the termination of the claimant's engagement was his interference in an internal investigation and was not materially influenced by any protected disclosure.**

RESERVED REASONS

1. The claim form in this matter was issued on 30 November 2016. The claimant brought a complaint of unfair dismissal and asserted this was automatically unfair on the grounds that he had made a protected disclosure.

2. In its response the respondent denied the claim. Its primary position was that the Tribunal did not have jurisdiction to hear the claim because the claimant was not an employee or worker in accordance with s.43(K), s.230(1) and s.230(3) of the Employment Rights Act 1996 ('ERA') and that he did not therefore have protection of s.47B(1) and s.103A of the ERA. In addition, it was asserted the claimant had insufficient qualifying service to bring a claim for unfair dismissal, and that in any event his dismissal was not a reason related to him making any alleged protected disclosure.

3. A preliminary hearing took place before Employment Judge Bedeau on 31 July 2017. In a Reserved Judgment sent to the parties on 12 October 2017 the Tribunal held:-

   3.1 That the claimant was not an employee of the respondent.

   3.2 He was at all material times a worker, working for the respondent.

4. There was a further preliminary hearing/case management discussion by telephone on 30 October 2017. Two hearings were listed:-

   4.1 A preliminary hearing (on 15 and 16 February 2018) to determine the issue of whether or not the following amounted to one or more protected disclosures:-

   > "(1) The claimant's report of a near miss.
   >
   > (2) His report made to the Royal Society for the Protection of Birds (RSPB)"

   4.2 A full merit's hearing for 30 April – 3 May 2018.

5. By letter of 26 January 2018 the claimant conceded the point of whether the report made to the RSPB amounted to a protected disclosure. It was made following the termination of his work for the respondent and therefore the claimant accepted he could not have suffered a detriment as a result of making that specific disclosure. The remaining protected disclosure, being the near miss, issued by the claimant remained the only issue to be determined.

Other preliminary matters

<u>Handwriting experts</u>

6. By letter of 22 December 2017 the claimant sought the Tribunal's permission to rely upon a handwriting expert to address the matter of whether the signature on the Daily Briefing sheet of 5 July 2016 was the claimant's or not.

7. The respondent did not consider it necessary to instruct a handwriting expert as it considered the evidential position to be clear in this respect. They were not prepared to instruct a joint expert and submitted the claimant should be responsible for the costs of his own expert.

8. By letter of 24 January 2018 this Judge had it communicated to the parties that leave was given to the claimant to rely on a handwriting expert whose report had been disclosed to the respondent by 8 February 2018, and this report was to be at the claimant's cost.

9. In view of the claimant's concession about the disclosure to the RSPB the preliminary hearing scheduled for 15 and 16 February 2018 was postponed.

Witnesses

10. A further preliminary hearing was however listed for 29 March 2018 to deal with other issues that were arising.

11. This hearing took place before Employment Judge Bedeau. It dealt primarily with the claimant's application for witness orders in respect of; Mr Paul Somers, Mr Ian Garner, Mr Anthony Hearn and Mr Dean Ford. The Tribunal had to record however that counsel's instructions about the relevance of the evidence of the witnesses was limited and neither was it clear whether they had been approached to see whether they would give their evidence voluntarily. The order therefore that was made was that the claimant by no later than 6 April 2018 apply in writing for the said witness orders.

12. The respondent had by then obtained a handwriting expert report of Mrs Margaret Webb and leave was given to the respondent to rely upon it.

13. Witness orders were subsequently made by Employment Judge Bedeau against the four named individuals and also Mr David Roach, Mr Adam Conway and Mr Juby McCulloch. These were served on 25 April 2018.

The claimant's application to postpone 25 April 2018

14. By letter of the above date the claimant's solicitors applied to postpone this hearing. This was for the following reasons:-

    14.1 Mr Ian Garner's inability/failure to attend a hearing in the event that a witness order is granted which will unfairly prejudice the claimant's claim as Mr Garner is a key witness.

    14.2 The claimant seeking to obtain expert evidence in relation to Tarmac Safety Briefings notably dated 1 July 2016, 11 July 2016 and 15 July 2016 on the basis they are questionable documents which the claimant asserts have been tampered with.

15. This request was refused.

Further matters raised at the outset of this hearing

Documents

16. This related to a matter raised in the claimant's solicitors letter of 25 April 2018 when requesting a postponement. The claimant questions the veracity of a document at page 140 of the bundle headed "Morning Safety Brief" which is said to be a document of Tarmac and not the respondent. The claimant suggests on "closer inspection and when the zoom is altered on the documents to enlarge the date it would appear there are slight markings or discrepancies concerning the dates on the document as a result of which the veracity of the documents is being questioned by the claimant". The claimant explained he had not originally had reason to suspect or believe the documents may have been fabricated until the week commencing 16 April 2018 at the separate employment tribunal proceedings brought by Mr Keith McGill.

17. Although in the letter of 25 April the claimant had sought to obtain expert evidence to examine the disputed documents, at this hearing the application sought to rely upon the enlargements he had taken on his mobile phone.

18. For the respondent it was submitted that this matter arose far too late in the day when the document had been available it submitted for 5 months. If the Tribunal was minded to allow the documents in, then the respondent would need to seek a postponement to obtain expert evidence and there would be associated costs involved in not only obtaining that evidence but the costs of the postponement. In any event the respondent submitted that each side has already obtained expert evidence on the disputed signatures on another document.

The Tribunal's decision on these documents

19. The Tribunal conducted it's reading before it felt that it was in a position to give a decision on these documents. Its conclusion was that the enlargement relied upon by the claimant would not be permitted in evidence. If it was allowed in at this late stage the respondent would be quite justified in seeking a postponement to obtain its own expert evidence. It would not be proportionate to do so. The events with which these proceedings are concerned occurred in 2016 and a postponement request has already been refused as it was not in the interests of justice for the matter to be further delayed. That remains the case. Even without this document the claimant can still challenge and does indeed challenge the meeting on 5 July 2016 and has obtained expert evidence with regard to his signature.

The evidence of Alan Jenkinson

20. By letter of 26 April 2018 the solicitors for the respondent had advised of the inability of Mr Alun Jenkinson to attend the hearing due to medical reasons. Alun Jenkinson was the Site Manager and now a Regional Manager with the Respondent. He was responsible for the investigation of a disciplinary matter involving Keith McGill and Dai McCulloch. He had signed his witness statement which had been exchanged and they renewed their submission that the Tribunal admit his witness statement into evidence in his absence.

21. The Tribunal was satisfied that Mr Jenkinson had a valid medical reason for his non-attendance. His witness statement would be allowed in as evidence but that did not stop the parties making submissions about the weight, if any, to be given to it. His statement deals with the investigation of Mr Keith McGill and Mr Dai McCulloch and there are other witnesses for the Respondent who can also be asked about that. The Tribunal reminded the parties that it was not determining the fairness or otherwise of that investigation, and neither did it wish to become embroiled in the rights or wrongs of Mr Conway driving Mr McCulloch to Stanstead Airport.

22. Mr Juby McCulloch had flown from Scotland for the hearing and it was asked that consideration be given to his evidence being heard on the first day so that he could fly back on the same day. That was achieved.

23. The only date that Mr Steve Smith could attend was on the Thursday of this listed hearing. This was due to emergency surgery recently undergone by his wife and the fact he is her primary carer. That request was able to be accommodated.

24. The claimant had witnesses who could only attend on the second day of the hearing, but none had provided witness statements. Counsel needed to speak to them and then requested that they be interposed. On the first day of the hearing the Tribunal was advised that Mr Garner would not be attending (due to ill-health) but Paul Somers, Dean Ford and Anthony Hearn would be. Counsel did not know what evidence they could give and would need to take instructions. As it transpired they did attend on second day but only Mr Anthony Hearn was called to give evidence.

Schedule of loss

25. There was a schedule of loss in the bundle which included an element of £25,000 for “whistleblowing”, plus injury to feelings of £6,000. In addition, the claimant sought an uplift to the compensatory award of 25% for failure to follow the grievance procedure.

26. Counsel for the claimant was asked what the basis was for the claim for £25,000. He was on the first day unable to assist the Tribunal with that. He did however accept that if the claimant was not an employee (as had

already been found) there could be no question of the ACAS Code applying.

27. On the second day counsel for the claimant merely confirmed that the claimant sought £25,000 plus injury to feelings. The respondent made it clear that it challenged the basis on which that was put, as there can only be one award for injury to feelings.

28. The Tribunal read the witness statements and relevant documents on the first day of the hearing and then started the evidence in the afternoon. It had a bundle of documents consisting of 358 pages. It heard evidence from the following:-

    28.1 For the respondent:-

    1) Mr Juby McCulloch, Site Manager.

    2) Mr Adam Conway, Labourer/Trainee Machine Operator.

    3) Mr Robert Smith, Senior Operations Manager.

    4) Mr Steve Smith, Senior Environmental Health & Safety and Quality Manager.

    5) The Tribunal also had the statement of Mr Alun Jenkinson, Site Manager at the time but now a Regional Manager (statement signed and dated 11 April 2018).

    28.2 For the claimant:-

    1) The claimant himself.

    2) Mr Keith McGill, Plant/Machine Operator and Health & Safety Site Co-ordinator (previously an employee of the respondent).

    3) Mr Anthony Hearn, Dumper – Dozer Driver.

    4) Mr David Roach, Plant Operative.

29. In submissions counsel for the claimant argued that the Tribunal would find that the claimant and his witnesses gave candid and credible evidence and were not seeking to mislead. Their recollections were reliable in all of the circumstances. The Tribunal cannot accept that submission. It accepts however the submission advanced on behalf of the respondent, that it was their witnesses who were clear, coherent, consistent and helpful to the Tribunal. Specific examples will be given in the Tribunal's findings.

30. From the evidence heard the Tribunal finds the following facts.

The facts

31. The claimant worked for the respondent from 15 December 2015 to 1 August 2016 at the Tarmac Tyttenhanger Quarry, St Albans. He was engaged as a Dumper Driver. As has already been recorded an earlier Tribunal has found that he was not an employee but a worker of the respondent and as such can bring a claim that he was subjected to detriment for having raised a protected disclosure.

32. That the respondent was committed to aspects of health and safety, and in particular the reporting of "near misses" on the site is evidenced by an email Robert Smith sent to numerous members of staff on 20 June 2016. This was headed "Near Miss Reporting" and stated (the email is quoted in full): -

> "We do not seem to be getting near miss reports through!
>
> The level of near miss reporting has fallen right away with some sites having reported anything for weeks now. At one point we had this going well but this discipline has suddenly dropped off. Can each site please pick this back up. Near miss reporting is highly important for the business. We are endeavouring to build a safety culture with this and get our employees into a habit of reporting unsafe acts. To get the mindset right of our employee it is important the supervision/management and health and safety co-ordinators push this discipline.
>
> Let's get the mindset of the managers right first and then the workers will follow. Can we see a marked and sustained improvement with this discipline over the next few weeks."

33. All near miss forms were to be emailed to the Senior Environmental, Health & Safety and Quality Manager at Chepstow, Steve Smith. This is tracked on a spreadsheet stored on the respondent's system which reflects when near misses are reported and actioned. Steve Smith gave evidence that a near miss report is an identification of a hazard that could cause harm to someone or damage to property. The Tribunal accepts his evidence and that of Robert Smith that the respondent encourages workers to report near misses on site and that Steve Smith had been pushing this culture since he started with the company in 2013. His witness statement gave evidence that there were the following reported:-

2013 – 39 near misses
2014 – 126 near misses
2015 – 260 near misses
2016 – 570 near misses
2017 – 1,700 near misses

34. He submitted, which the Tribunal accepts, that the increase in the number of near misses being reported had resulted in a reduction in the number of non-injury incidents, and in the severity of injurious incidents. The

respondent is not looking to blame anyone when near misses are reported, but rather to share information within the respondent and the clients. It is considered to be a good learning exercise for everyone and the reporting of near misses is taken seriously.

35. If a near miss is identified it should be brought to the attention of the Site Supervisor or Manager. Quite often the Site Supervisor or Manager will actually complete the form on behalf of the individual as not all drivers are literate and may need assistance as appropriate.

36. The near miss forms are then emailed to Steve Smith who saves an electronic copy and signs them off to say when the near miss is completed. This is all tracked on a spreadsheet. The Tribunal saw one for the relevant period at page 122-124 of the bundle. The spreadsheet shows the date raised, as well as the date the near miss has been actioned. Not all near misses are reported or actioned immediately. Steve Smith gave an example of a site in the North where they received reports there were potholes on the road. That was not necessarily the company's responsibility, but they would try and take the initiative when materials are available to action the near miss. If, however, the near miss is in relation to a health and safety concern then this will be referred to the Site Manager straight away who will have a "safety conversation" with the person involved.

37. An example can be seen of how the respondent reacted to the incident reported on 27 June (at the top of p123). The report was of an operator 'complaining that conditions were unsafe due to bad weather and that he was being forced to work'. The action taken was recorded as taken on the same day:

> 'Site stand down conducted by RS. On questioning it became known that the operator did not know about the transmission retarder. Further training provided by P Jackson.'

38. If a near miss is passed to the client, Tarmac then the respondent would not necessarily know about it unless Tarmac contacted them. In any event, the respondent's employees are expected to raise any near misses directly with the respondent and not with Tarmac.

39. The Tribunal saw examples of documents entitled "High Impact Potential Form". These recorded various incidents in or around 26 June 2016. These included a 4x4 having "got bogged in wet slope" and a driver of an excavator catching the excavator bucket on the front of a parked Volvo causing some damage. It was put to Robert Smith that he was only in attendance on the site on the 5 July 2016 because of these previous accidents. The Tribunal accepts his evidence that these were not major accidents but rather bumps and scrapes.

<u>The claimant's near miss report 4 July 2016</u>

40. The respondent accepts at paragraph 10 of its detailed grounds of resistance that the claimant raised a near miss report on the 4 July 2016

which was handed to Juby McCulloch, the Site Foreman. In submissions counsel accepted that this was likely to satisfy the definition of a protected disclosure and the tribunal is satisfied it did. It was made to the employer and raising matters of a health and safety concern. It further pleads that the respondent took all reasonable steps to investigate it and that the claimant attended the Daily Site Safety Brief held on 5 July 2016 by Robert Smith, Area Manager at which this was discussed. It goes on:-

> "As part of this discussion the issue of drivers being called for stockpiling more than one at a time was raised and the workforce was asked to consider how improvements could be made. Robert Smith used the meeting to reinforce the site rules for stockpiling."

41. The near miss report appeared in the bundle at page 198. It is in the name of Juby McCulloch and dated 4 July 2016. In the section headed "What did you see?" is typed "TWO x ADT tipping on stockpile at same time when only 1 x ADT allowed. Also, dozer was not in attendance at time." The witnesses are recorded as the claimant and Adam Conway.

42. Under corrective actions needed is typed "Re-briefing to drivers on stockpile management". The corrective actions are noted as completed on the 5 July 2016 with "drivers re-briefed". It is recorded as having been entered on the management system on 14 July 2016. It is signed off by Steve Smith.

43. From Steve Smith's evidence which the Tribunal accepts it is known that he received this report, and that when he received it, it had all the information on it up to the corrective action that was needed. He then filled out the rest. On the spreadsheet which he keeps (seen at page 123). the wording it can be seen is taken directly from the form that he received.

<u>Daily Site Safety Brief – 5 July 2016</u>

44. The form completed by Juby McCulloch for this daily site brief (page 199) demonstrates Juby McCulloch had a daily meeting, and it shows that the near miss was raised. In the agenda next to "Incidents/Near Miss" the letter "Y" was circled to demonstrate that there was one to discuss and in issues raised was written "Trucks must not tip on tips unless dozer is present, the dozer was on his way, trucks did not wait".

45. The Tribunal heard from Juby McCulloch who confirmed that this was indeed the regular daily site meeting held by him. The data was written in the form himself and those who attended are supposed to sign to say that they have been at the meeting. He was aware that the claimant asserts the signature at the bottom purporting to be his, is not. He was taken to the expert report relied upon by the claimant and it was expressly put to him that this sheet had been fabricated by him for the purposes of these proceedings. He emphatically denied this and stated that he did not touch that sheet in any circumstances to fabricate it. It was put to him that it does not accurately record what happened at that meeting and he again

emphatically said "It was what happened". Mr McCulloch further gave evidence that he left the respondent's employment in October 2016 and had never been near any of these documents since he left the site.

46. It was further put to Mr McCulloch that the reason he had prepared the document was to show that there was a near miss raised on the 4 July that was acted upon at the meeting on 5 July. Mr McCulloch was clear that if a near miss report is submitted he conducts the talk at the briefing on the next day which is what he did.

47. The claimant whilst accepting that this document appeared to show a near miss that was very similar to his, said that it was not dealt with on the 5 July. The document is wrong. The document is not a true reflection of what happened. The claimant accepted the entire workforce was expected to go to the meeting and he would have attended. The proforma form was filled out every day. He would have signed but he did not sign this one. He did not remember the near miss being discussed that day. The document is wrong in saying that it was discussed. He did not remember exactly what they were briefed on, but all he knew was that the near miss was not discussed.

48. In looking at the other signatures he was not able to say if all of them were present or on site, but believed that some of them were on site. The claimant then asserted that this document had been deliberately altered to tie in with the respondent's case that the near miss was recorded as the day before. Someone from the respondent had done this, but he could not say who. The entry had to have been entered deliberately to tie in with the respondent's case that they had dealt with a near miss reported on 4 July. The claimant knew that was not his signature.

49. The document had a number of signatures at the bottom but also some names and/or signatures at the top of it. The tribunal accepts the respondents submissions that it was not a formal register and there could be many reasons why all who attended had not signed it.

50. Both the claimant and respondent obtained expert handwriting evidence on his signature and those reports were before this tribunal. The experts were not called to give oral evidence.

Report of Melanie Pugh for the Claimant

51. The claimant relied on the report of Melanie Pugh, Forensic Scientist dated the 15 March 2018. Her Summary of Findings stated:

> 'Based on the material examined, there is a moderate level of evidence to show that Michael Bonner **did not** produce the signature in his name on the Chepstow Plant International Ltd Daily Site Safety Brief dated 5/7/16'

52. The report explains the 'conclusion scale' which has 8 elements from very strong being 1 which 'supports the writings were made by the same

person' to 8 'very strong support the writings were not made by the same person'. The 'moderate' found by Ms Pugh fell at 6 that the 'writings were not made by the same person'.

53. Ms Pugh had some original documents showing the claimant's signature but the Daily Site Safety Brief for 5 July 2016, his driving licence, passport and and EE form were copies. She acknowledged in her report under Limitations:

> '1. The questioned signature is in copy form which means that the fine detail of the signature cannot be entirely determined.
>
> 2. The questioned signature is written in a short and simple style.'

Report of Margaret Webb for the Respondent

54. The respondent relied on the report of Margaret Webb, Certified Document Examiner dated the 28 March 2018. She did not agree with Melanie Pugh's conclusion because there were:

> 'severe limitations in the accurate examination of the questioned M. Bonner signature because of its quality. I would have reached an inconclusive opinion based on the quality of the copied signatures I have been sent.'

55. Ms Webb drew attention to the Limitations section in Ms Pugh's report and expressed the view that her report was 'short and incomplete' Ms Webb had found it 'impossible to examine the handwriting movements…' from the documents provided and found that the list of the claimant's signatures contained 'unreliable examples of signature'. She reached an inconclusive conclusion on the quality of the copied signatures sent.

56. When taken to Ms Pugh's report Juby McCulloch's evidence did not change and he was adamant that he had not tampered with the document or created the signature.

57. The Tribunal does not find the claimant's evidence to be credible and accepts the evidence of Juby McCulloch. The claimant goes from stating that his signature is not genuine to then stating that the whole document is fabricated, although not making any positive assertion as to who or how it was done. He is also able to say categorically that some matters were not discussed and others were, even thought the meeting took place over two years ago.

58. The expert reports obtained on behalf of both parties, are not conclusive one way or the other.

59. The claimant was not particularly assisted by the evidence of his witness, David Roach who stated for the first time in cross examination that his signature was not genuine either when he had never stated that before in his witness statement or anywhere.

60. All witnesses agree that this meeting took place as a daily meeting.

Tarmac Morning Safety Briefing

61. The Tribunal had in its bundle at page 140 a Tarmac Safety Briefing for the 1 July 2016. This recorded that it was discussed that two Chepstow dumpers were tipping next to each other on stockpile. It is this document that the claimant sought to challenge in his solicitor's application of 25 April 2018 and in relation to which the Tribunal refused leave to the claimant to produce new documents. It is suggested that the date on this document has in some way been altered the claimant asserting this was discussing the near miss he says he didn't report until the 7 July. The claimant in evidence stated that the document should have Tarmac's name on the top. He then said he did not know if it was a Tarmac document and he had obtained these through a third party. He was not suggesting that Tarmac had changed the documents, so it must have been changed by the respondent. It looked to him as if the date could have been the 11 July and he asserted the respondent must have changed the date. This had occurred to him at the hearing of Mr McGill's employment tribunal case the previous week. The claimant accepted the proposition put to him that every time a document created by the respondent or Tarmac contradicts with what he says is, his response is to say it had been tampered with, forged or interfered with and the claimant accepted that. The Tribunal finds this just not credible. It accepts that these are genuine documents that have not been interfered with. It cannot resolve the issue of what incident was being referred to at that meeting on the 1 July having not heard from anyone from Tarmac.

Radio call to Ian Garner

62. The claimant pleaded that due to his concerns on site he "initially made a radio call to resolve the issue principally to avoid the dumper drivers colliding into each other". Robert Smith accepted that a call was made to Ian Garner. The radio is used two-way for communication with operations and to report events. His evidence was, which the Tribunal accepts that everyone was actively encouraged to intervene if they saw anything unsafe. Mr Garner is an employee of the respondent and a lead driver, and health and safety co-ordinator. Mr Smith accepted he was aware of a radio call by the claimant alerting Mr Garner to an issue on the stockpile. Mr Garner acknowledged that but recognised that the way he was operating the tip was safe. The claimant was not an employee of the respondent so Mr Smith questioned how he would overrule the person responsible.

63. It was put to Mr Smith that the claimant perceived the situation to be dangerous and when he was contradicted by Mr Garner he took that via Mr McGill direct to Tarmac as it was not being dealt with by the

respondent. Mr Smith explained that there are circumstances in which the dumper trucks can topple over. The respondent had fitted a new device that warns the driver that they are putting the truck in a dangerous position. They are the first company to fit such and are trialling it on the Chepstow site. There was concern amongst some of the operatives that the respondent was trying out something new. That had, to a large extent, prompted Mr Robert Smith's talk to the staff on 5 July. He accepted the claimant was quite within his rights to raise an issue, but that he had interpreted the rules incorrectly.

64. It was suggested to Mr Smith that Juby McCulloch had then turned against the claimant. This Mr Smith disputed.

65. The Tribunal also heard from Juby McCulloch about this radio call, and it was put to him that he had instructed Ian Garner to ignore the claimant's call. He denied that emphatically stating Mr Garner was in charge of the tip and he decided which truck was to tip where.

66. The Tribunal accepts the evidence of the respondent in this respect.

67. It is the claimant's case in his ET1 that he then issued a near miss report on or around 7 July which he handed to Juby McCulloch. He asserts that Juby McCulloch disregarded the near miss and failed to raise the issue. He states he was therefore left with no alternative but to issue a near miss report directly to Tarmac via Keith McGill who attended the site safety meeting with Tarmac in his capacity as Health and Safety Site Co-ordinator. In paragraph 11 of the claimant's witness statement he says:-

> "I made a further qualified disclosure in the form of a near miss which handed to Keith McGill who in turn passed it onto Tarmac. I understand that Keith McGill also discussed the near miss at the safety meeting with Tarmac on or around 11 July 2016.

68. The Tribunal heard from Mr McGill. In paragraph 10 of his witness statement he said the same thing as the claimant, namely the claimant made a "further qualified disclosure in the form of a near miss which handed to me and which I in turn passed onto Tarmac and which I discussed at a safety meeting with Tarmac on or around 11 July 2016".

69. Mr McGill was cross examined on this evidence. He stated that the claimant wrote down what he had already given to Juby McCulloch. He tore a sheet from the near miss book but did not give Mr McGill the book. Mr McGill could not recall seeing the book or the claimant writing in it. They live on the same campsite and that is when the claimant gave him the form. He was not a hundred percent sure if the claimant gave him the yellow or the white report. He did not see the claimant rip it out of the book, he was just given the form. This would have been a Sunday when the claimant came back from his weekend away. Mr McGill decided to pass it onto Tarmac as the claimant had come to him, and said he would put it in the morning brief to Tarmac. The claimant had already gone to Juby McCulloch about it who had done nothing.

Tarmac Briefing 11 July 2016

70. The Tarmac Safety Briefing for the 11 July 2016 was seen in the bundle at page 148. There is nothing in it about a near miss. In the top right-hand box setting out matters to be discussed the near miss box has the “N” circled. The Tribunal is satisfied that nothing was raised then and nothing passed on to the respondent as there is nothing in the spreadsheet for that date.

71. Further, Juby McCulloch has no recollection of such a report of the 7 July. He deals with this in his witness statement. He believes the claimant was mistaken in relation to the date on which the near miss was reported. Had it been reported to him on the 11 July a form would have been completed by him and sent to Steve Smith in accordance with standard practice.

72. The Tribunal does not accept a near miss was raised at the Tarmac briefing on 11 July or direct with Tarmac in some other way.

73. Further, both Mr McGill and the claimant said that they could not contact Steve Smith about such matters. The Tribunal does not accept that evidence. Mr Smith has shown he was completely committed to near misses being reported to him, and from the evidence the Tribunal is satisfied that his telephone number was available on site had they wished to contact him.

74. Further, Robert Smith states quite clearly in his witness statement at paragraph 20 that there is no record of any other reports being made by the claimant other than that which had been recorded of 4 July.

Suspension of Keith McGill and Dai McCulloch

75. On 19 July 2016 Keith McGill and Dai McCulloch were suspended from site whilst an investigation was conducted following their refusal to partake in a “with cause” drug and alcohol test that had been requested by Juby McCulloch. As the most senior manager on site at the time Alun Jenkinson was placed in charge of undertaking the investigation. The claimant was on holiday.

76. The Tribunal accepts the evidence of Robert Smith that on or around 21 July he was advised by Alun Jenkinson that his internal investigation was being impeded by the claimant. He was told several workers had complained about the claimant’s involvement in discussions surrounding this matter. The Tribunal accepts that is what he was told at the time and that there was a genuine belief that the claimant was indeed interfering in this way. He may have been on holiday and not on the site but could still contact people by telephone. The Tribunal has no doubt that was the respondent’s genuine belief.

77. Alun Jenkinson and Robert Smith subsequently met with the claimant and asked him to refrain from getting involved in the investigation. It was explained to him that his behaviour was hindering the investigation as staff were refusing to speak to them. The claimant was offered the opportunity of temporarily transferring to another project to enable Alun Jenkinson to continue the investigation unhindered. The claimant said that he did not wish to work at another project. It is to be noted that in final submissions the claimant's representative did not make any argument that the claimant suffered any other detriment (for example by being asked to move to another location) but only pursued the ultimate termination of the arrangement as a detriment.

78. The claimant in cross examination accepted that he had this meeting with Robert Smith and Alun Jenkinson. He accepted they told him not to interfere in the investigation. He also accepted that they offered to move him to another site but he preferred to stay where he was.

79. The only reference in the claimant's witness statements to meetings with Robert Smith and Alun Jenkinson is at paragraph 17, and he refers to the meeting on 1 August. He does mention being offered work on another site, but he does not state that he raised anything about the near miss at that meeting, and the Tribunal does not find that he did.

80. Neither is it accepted that the claimant handed over his near miss book to the respondent.

<u>Conversation in car park with Adam Conway</u>

81. The Tribunal heard evidence from Adam Conway who worked for the respondent from 16 May 2016 until the 27 March 2018 as a labourer/trainee machine operator. He was paired with the claimant as one of the most experienced drivers on site at the time. This was part of the 'buddy system' that the respondent had in place. Mr Conway was one of the youngest and most inexperienced employees, but the Tribunal is satisfied that he came to the Tribunal and gave his evidence in the most honest and straightforward manner.

82. The claimant had decided that Juby McCulloch was spending company money in paying Adam Conway to take him to Stanstead airport when he flew back to Scotland at weekends and that this had not been approved by the respondent. Adam Conway was subsequently approached by the claimant, Keith McGill and Dai McCulloch in the site canteen as they had become aware that he was transporting Juby McCulloch to the airport outside of work hours. They publicly questioned him about the transfer and he believed it was an attempt to belittle him in front of colleagues. Mr Conway always understood that there was an agreement that had been approved by management that he be reimbursed for this work. He therefore informed them that he was paid through the company and the time that he was taking to transfer Juby McCulloch to the airport was being reflected in his timesheet.

83. After Keith McGill and Dai McCulloch were suspended Adam Conway was asked to call Keith McGill. He was then approached by the claimant who informed him that Dai McCulloch would be contacting him. He was contacted by him by telephone and told that Keith McGill and Dai McCulloch were going to be building a case against Juby McCulloch and would be asking Adam Conway for a statement surrounding his taking Juby McCulloch to the airport. He was approached by the claimant, Keith McGill and Dai McCulloch by telephone and in person to get him to provide evidence to support their challenge of their suspension.

84. On 29 July 2016 the claimant approached Adam Conway in the car park. Unbeknown to Mr Conway the claimant recorded the conversation that they had. In the conversation the tribunal accepts that Mr Conway is stating that he did not want to get involved. The claimant states that they had to get the truth out to discredit Juby McCulloch and that "it's corruption mate, it's err … it's misuse of company funds". The tribunal is satisfied that Mr Conway was trying to get away from him and that the claimant was pressurising a much younger employee who is saying he clearly did not want to get involved. Mr Conway told the Tribunal that he believed at that point he still had some work to do and that his radio was going. In his answers in appearing to agree with the claimant the Tribunal is satisfied this was his way of responding to someone who was intimidating him, who he wanted to get away from without causing a scene or confrontation.

85. The very next day Mr Conway raised a grievance and met with Alun Jenkinson to discuss it. Although it was not a formal written grievance there was a meeting to discuss it and he made it clear in his meeting that he did not want to get involved.

86. On 1 August 2016 the claimant was advised that whilst the investigation into his two colleagues was continuing he was not allowed onto the site.

87. The claimant submitted a grievance on 15 August 2016. He asserted he believed the respondent had failed to observe its statutory duties and the Health and Safety at Work Act, the management of health and safety at work and the "Whistleblowers Act".

88. By letter of 30 August 2016 the claimant was advised that his letter had been considered, emphasising that the respondent took matters concerning health and safety very seriously. It refuted the suggestion he had been victimised or harassed for having raised such. They had terminated the contract:

> "In view of the fact that you were threatening and intimidating company employees who were acting as witnesses as part of an internal company investigation. We asked you to refrain from discussing the investigation with the company's operators, but despite our request you continued to share your views and intimidate some of the company's employees. Such behaviour is entirely unacceptable and not in keeping with the company's ethos. We therefore took the decision to continue to engage you as a self-employed contractor".

Statement of David Roach

89. It was suggested that a draft statement exhibited to Mr Roach's statement had been fabricated but the Tribunal does not accept that position. Robert Smith it accepts had typed up his recollection of his discussion with Mr Roach as a statement. He had wanted him to sign it but it never was. The tribunal does not accept that he offered Mr Roach a cash incentive to sign it. Mr Roach was an individual living on the campsite with the claimant. When Mr Smith came to the site in October Juby McCulloch told him that David Roach wanted to speak to him. He drove in his 4x4 to the area where Mr Roach was working on his own. He was extremely nervous about talking to Mr Smith but felt the truth needed to come out and spoke to him about drinking and drug taking on site. He did not want to put that into a statement but wanted to talk to him. Because of his position Robert Smith felt he had to type exactly what had been said to him. He left that with Juby McCulloch as a transcript and said that he knew David Roach did not want to sign it but that he should do the right thing and sign. He did not do so. Mr Smith then sent the typewritten document to the solicitors which is how it came to be in evidence. The Tribunal is satisfied that Mr Smith would not have made up this statement, that it was a written account of what he was told.

Relevant Law

90. The claim that is brought is one of detriment under s.47B Employment Rights Act 1996. It must therefore be established there was a protected disclosure within the meaning of s.43B. That section provides:-

43B Disclosures qualifying for protection.

(1) In this Part 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,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

91. The disclosure is to be made to the employer within section 43C 'or other responsible person' within the meaning of that section. The subsequent sections provide for other methods of disclosure but none are relied upon in the circumstances of this case.

92. Guidance was given in Fecitt and others & Public Concern at Work v NHS Manchester [2012] IRLR 64 as to the application of these provisions. The Court of Appeal stated:

> 'With regard to the causal link between making a protected disclosure and suffering detriment, s.47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower. If Parliament had wanted the test for the standard of proof in s.47B to be the same as for unfair dismissal, it could have used precisely the same statutory language. *Igen* is not strictly applicable since it has an EU context. However, the reasoning which informed the analysis in that case is that unlawful discriminatory considerations should not be tolerated and ought not to have any influence on an employer's decisions. That principle is equally applicable where the objective is to protect whistleblowers, particularly given the public interest in ensuring that they are not discouraged from coming forward to highlight potential wrongdoing. This creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, that is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law.'

Submissions

93. The representatives relied upon the skeleton arguments that they had prepared for the preliminary hearing back in February and then spoke to them orally.

Oral submissions on behalf of the Claimant

94. The claimant remains adamant that he reported a near miss to Juby McCulloch on the 7 July. His case has been clear and consistent throughout on that. His instruction to Ian Garner was ignored.

95. With regard to the Near Miss report that was entered on the spreadsheet for the 4 July the respondent will say it is straightforward and that this is when it was reported to Juby McCulloch. However, the documents have not been backed up by the original near miss report the claimant hand wrote. There has been no explanation why that is.

96. Counsel accepted that it would be disingenuous of him to suggest that the near miss report seen at p198 did not find its way onto the spreadsheet, this was however under the control of Juby McCulloch. The procedure

depends on him getting it right. Steve Smith accepted that he does not go behind the data on the report to him. There is scope on the facts for the data that makes its way onto the spreadsheet to not necessarily represent the correct position as that is within the custody and control of whoever completes the near miss report. This leads to the question, did Juby McCulloch get the date right on the report he submitted? That cannot be answered by just looking at those two documents together.

97. The Morning Safety Briefing document is a Tarmac document. Counsel was not going to advance a positive case that they falsified it as he accepted the tribunal does not have evidence of that. However, the briefing document for the 1 July 2016 is ‘curious’. It refers to what appears to be the Chepstow near miss. There is a dispute as to whether these documents went to the respondent. The claimant’s case is that they do. There is an irresistible conclusion that it refers to the near miss which the claimant reported. There is however no entry on the spreadsheet for the 1 July.

98. Counsel accepted it was difficult to see what conclusion the tribunal could draw from p140. However, he submitted it put into question the veracity of the documents produced by the respondent. He was not suggesting it was anyone’s fault that it did not find its way onto the spreadsheet but it appeared to back up the position, which he acknowledged could not be conclusive, that Mr McGill handed the near miss report to Tarmac on the 11th July. On the balance of probability and looking at the date, as the 1st is not dissimilar to the 11th the tribunal can conclude that this document is probative of a determination that Mr McGill communicated the near miss to Tarmac on the 11 July. He accepted that was not conclusive.

99. The claimant’s position is that the dates have been changed. Counsel accepted that they can’t show that.

100. The following could however be deduced:

100.1 that not all near miss reports appear on the spreadsheet.

100.2 That the near miss report of the 4 July 2016 is not reliable

100.3 The narrative on the Tarmac briefing of the 1 July is consistent with what the claimant reported

100.4 On the balance of probability, the tribunal can accept that the claimant is right that he made a report to Tarmac on the 7 July and that it was ignored.

101. Dealing with the safety briefing on the 5 July the respondent is keen to point out that the near miss was dealt with on the 5 July. There are two witnesses who categorically dispute their signature on that document. It is significant that included Mr Roach and not just the claimant. His evidence was powerful as he emphasised he ‘swore on his kid’s life’ that it was not his signature.

102. The claimant asserts that this document is convenient to the respondent as it corroborates that they dealt with the near miss the next day after it was reported, as they state, on the 4th. The claimant paid for expert evidence which it is accepted is not conclusive but states there is 'moderate' level of evidence it is not his signature. There are legitimate concerns although it was accepted there may not be evidence as to how this document was created.

103. The claimant relies predominantly on the termination of his contract as the detriment. The suggestion he moved site was not really looked at in evidence and Counsel stated he was not going to ask the tribunal to make a determination of detriment in relation to that.

104. Has the respondent proven the termination was not on the grounds of protected disclosure? The representatives are agreed on the test as set out in Fecitt. Has the respondent given a full picture and is it really the case that in view of what the claimant said to Andy Conway the respondent moved straight to termination. That it was submitted is not the full picture. It might be a partial picture. There must have been something else for the respondent to jump to that conclusion rather than move the claimant to another site.

105. It was submitted that the respondent's case has slightly shifted. In Alun Jenkinson's statement there was a suggestion that the termination was because the claimant was interfering with the investigation by contacting numerous employees. He appears to be the only person who has direct evidence of contact with those employees that the claimant is meant to have contacted. If it was so serious where are those people and who are they. Whilst accepting Mr Jenkinson's valid reason for not attending to give evidence he was the only one with that direct knowledge. Robert Smith didn't have and seems to have abandoned the suggestion there were other employees who were intimidated.

106. It is arguable that the claimant should not have contacted Adam Conway. He was however entitled to have a conversation with him. There is no evidence he was putting pressure on him or bullying him. It does not appear that the claimant was interfering. He was asking Adam Conway to tell the truth. That is not pressure. The transcript does not give evidence of interference. There must have been something else on the respondent's mind.

107. The respondent has not discharged the burden of proof on it of showing that the termination was not on the grounds of the protected disclosure.

Oral submissions on behalf of the respondent

108. It was submitted there must be a causative link between the protected disclosure and the alleged detriment. It must materially influence the treatment of the worker. The respondent submitted that had not been

made out. It was accepted that the burden falls on the respondent to show the grounds why the relationship was terminated. Even however if the respondent does not discharge that burden it does not mean that the claimant automatically succeeds in his claim. It is still a matter for the tribunal to assess.

109. Counsel question whether it was probable that the respondent treated the claimant to his detriment because he made a near miss report. It is not if the background is looked at. The respondent took the claimant through induction, health and safety and courses on the importance of near miss reporting. The respondent takes health and safety seriously. The email of Robert Smith to the staff demonstrates active encouragement to report near misses. Steve Smith was also concerned about the level of reporting and it did increase. It was seen as a positive thing to do.

110. It has been seen how when there was a report on 27 June the men were stood down. That is important and an indication of even an anonymous report being acted upon.

111. The respondent's witnesses were clear, coherent, consistent and helpful. They were doing their best to help the tribunal. The claimants witness not so. The claimant was it was submitted irreparably damaged by cross examination. Mr McGill showed a number of inconsistencies. Mr Roach's attitude and demeanour showed he did not want to be here and was evasive. Where there was a conflict the tribunal should prefer the evidence of the respondent.

112. The tribunal must be conscious that there is a big difference between evidence and speculation. The claimant invites it to speculate with not one shed of evidence to support the date he gives of his report. On the other hand there is a volume of evidence to support the respondent's contentions.

113. The claimant's case is based on a huge conspiracy theory involving the respondent, its employee and Tarmac to a certain extent, to cover up a near miss report on the 7 July and to do everything including fabricating documents in pursuit of that. There is no evidence as to why it would do that. No reason is advanced by the claimant.

114. When documents were put to the claimant and his witnesses they made no concessions but at every stage alleged the document to be wrong, forged or tampered with in a way that cannot be identified. It stretches credibility 'beyond breaking point' it was submitted. The claimant cannot explain the respondent's documents save to say that they cover up something.

115. The documents should be taken at face value. They show the chain of events. The claimant reported a near miss on the 4th July which was dealt with on the 5th and Steve Smith's signature is on the spreadsheet signing that incident off.

116. With regard to the meeting on the 5 July it is accepted that perhaps not every signature was there but it is not a formal register. It is not difficult to envisage circumstances where on a busy site not everyone signs or not in the correct box. That does not mean that the document was created. There is a correlation between the documents for example between p143 the Tarmac briefing of the 5 July and the staff briefing on the same date.

117. The claimant asserts that the Tarmac briefing note of the 1 July should be the 11th to coincide with his alleged report to Mr McGill. There is no basis for concluding that. It is not the respondent's case that there was a near miss earlier than the 4 July. The respondent cannot really explain the document for the 1 July as it is not its document. That does not detract from the respondent's position that the claimant made a disclosure of a near miss on the 4 July which was dealt with on the 5th.

118. The expert handwriting evidence is not conclusive. Even the claimant's evidence only gives 'moderate support' to it not being his signature. There were limitations to the examination as stated in the respondent's report. The evidence is inconclusive with both experts recognising the limitations of the signatures provided.

119. The only detriment now relied upon is the termination of the contract the claimant had with the respondent. It is for the respondent to show the reason for the termination and it has done that. There were concerns expressed by Alun Jenkinson that the claimant was interfering with his investigation. The claimant was called to a meeting and told that. He accepted he was told not to interfere. The claimant then had a conversation with Adam Conway and it is clear he was putting pressure on him. Adam Conway raised a grievance the next day. The respondent had told the claimant not to interfere but he continued to do so. His termination had nothing to do with the protected disclosure.

120. It was suggested that Juby McCulloch in some way covered up the report on the 7 July and/or was instrumental in the claimant's termination. Robert Smith terminated it and Juby McCulloch had no involvement in that.

The Tribunal's conclusions

121. The claimant relies upon making a protected disclosure on 7 July. The Tribunal accepts the respondent's submissions that that case must fail as the Tribunal does not find there was such a disclosure. From its findings of fact, it is satisfied no disclosure was made by the claimant on that date. A disclosure was made on the 4 July and dealt with by the respondent on the 5th but the claimant was not subjected to any detriment arising from raising that.

122. The Tribunal has also concluded that no disclosure was made by the claimant to either the respondent or to Tarmac on 11 July. There is no evidence in the documents to support the contention it was raised at the Tarmac meeting on the 11 July. To suggest without any evidence that

the meeting summary of the 1 July should read the 11th cannot be accepted and is without foundation.

123. The claimant's engagement was terminated for interference in the investigation. All the respondent's witnesses have shown how committed the respondent is to the reporting of near misses, and Robert Smith actively encouraged reporting. The claimant does not point to anyone else that was treated detrimentally for raising these. The claimant only made one report. His conspiracy of fabricated documents by the respondent is now so wide as to lack all credibility. It is all conjecture against unnamed people at the respondent and Tarmac and cannot be accepted.

124. With regards to the issue with Adam Conway and whether he was taking Juby McCulloch to the airport, this was none of the claimant's business and was in fact an arrangement approved by the respondent. The tribunal has concluded from Adam Conway's evidence that he had felt intimidated by the claimant. He raised a grievance about that.

125. The engagement of the claimant was terminated as, having been asked not to interfere in an internal investigation, he continued to do so. It was not due to anything to do with a protected disclosure. His claim therefore fails and is dismissed.

Employment Judge Laidler

Date: ……11 July 2018………………..

Sent to the parties on: ....

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For the Tribunal Office