EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Georgiou	**v**	Mears Housing Management Limited

Heard at: Bury St Edmunds **On:** 17-19 December 2018
In Chambers: 20 December 2018 & 31 January 2019

Before: Employment Judge Laidler

Members: Mrs L Daniels and Mr B Smith

Appearances

For the Claimant: Mr P O'Callaghan, Counsel

For the Respondent: Mr I MacCabe, Counsel

RESERVED JUDGMENT

1. The claimant was not disabled within the meaning of section 6 of the Equality Act 2010 and all claims of disability discrimination are dismissed.

2. The claimant did not make a qualifying disclosure within the meaning of section 43B of the Employment Rights Act 1996 (ERA)

3. The reason for the claimant's dismissal was redundancy, a potentially fair reason within s98(2)(c) ERA

4. The respondent acted unfairly in not affording the claimant an appeal hearing against the decision to dismiss in accordance with its policy.

5. The tribunal has concluded that the granting of an appeal hearing would have made no difference to the outcome and that the dismissal on the ground of redundancy would have still stood. Applying the principles set out in Polkey v A E Dayton & Sons Ltd 1988 ICR 142 as dismissal would have occurred in any event there will be no award of compensation.

6. There was no unauthorised deduction of £3899.53 accrued holiday pay due to the claimant as the purpose of the deduction was reimbursement of the respondent in respect of an overpayment of wages within the meaning of section 14(1) ERA 1996

RESERVED REASONS

1. This is the claim of Mr George Georgiou received on 23 March 2018. The issues were clarified at a preliminary hearing before Employment Judge McNeil QC on 10 July 2018. The following represents the issues as clarified on that occasion with additional comments made following the further clarification at the outset of this hearing.

The Issues

2. The issues between the parties which potentially fall to be determined by the tribunal are as follows:

3. *Public Interest Disclosure (PID)*

3.1 Were the communications from the claimant to the respondent of 4 and 5 January 2017 and / or 13 January 2017 qualifying disclosures and, if so, were they protected?

3.2 At submissions it was accepted that there were no disclosures of information on the 4 January 2017.

3.3 More specifically did the claimant's communications amount to information tending to show that:

a. a criminal offence had / or was being committed (s.43B(1)(a) Employment Rights Act 1996 ("ERA"))?

b. the respondent had failed or was failing to comply with any legal obligations to which it was subject, (s.43B(1)(b) ERA)? And / or

c. the health and safety of residents had been, was being, or was likely to be, endangered, (s.43B(1)(d) ERA)?

3.4 Did the claimant have a reasonable belief that the information disclosed tended to show that a relevant event had occurred or was occurring?

3.5 Were any such disclosures made in the public interest?

3.6 If the tribunal determines that the claimant did make protected qualifying disclosures on 4 and 5 January and / or 13 January 2017, was the claimant subject to the alleged detriments particularised at paragraphs 13 – 21 of his particulars of claim?

The claimant argued at this hearing that there was a continuing course of conduct and that the detriment claim was not out of time and if it were found to be would argue it had not been reasonably practicable to present within time. When submissions were heard a detriment claim relating to the 5 January meeting was no longer pursued but it was argued that the March meeting was a detriment. An argument that the failure to offer an appeal was another detriment was also not pursued. Counsel did not then pursue the argument that if the detriment claims were found to be out of time it had not been reasonably practicable to present them in time.

3.7 If the tribunal determines that the claimant was subject to the alleged detriments was the treatment applied to the claimant on the ground that the claimant had made one or more protected disclosures?

3.8 Was the reason or principal reason for the claimant's dismissal that the claimant had made one or more protected disclosures (s.103A ERA)?

4. *"Ordinary" Unfair Dismissal*

4.1 What was the reason or principal reason for the claimant's dismissal?

4.2 Was it a potentially fair reason within s.98(1) and (2) ERA? The respondent asserts that the reason was that the claimant was redundant.

4.3 If so, was the dismissal fair or unfair in accordance with ERA s.98(4) and, in particular, did the respondent in all respects act within 'band of reasonable responses'?

5. *Disability Discrimination*

5.1 Did the claimant at the material times have a disability within the meaning of s.6(1) of the Equality Act 2010? The claimant relies on a mental impairment namely depression.

5.2 If the claimant did have a disability at the material times, did the respondent fail to make reasonable adjustments by:

5.2.1 not attempting to rearrange an interview in order to accommodate the claimant's inability to attend?

5.2.2 failing to implement recommendations made by occupational health within their report of September 2017?

5.2.3 failing to make arrangements for the claimant to attend an interview by Skype or telephone or by taking any steps to arrange an interview on a date convenient to the claimant?

There was discussion about the PCP. The claimant's counsel stated it was the requirement to attend in person with regard to the restructuring. It was not clear how that was a PCP within the meaning of s20 of the Equality Act. On the second morning counsel stated that it was to attend the interview in person and the respondent going ahead without Occupational Health report. The substantial disadvantage was still not clear.

6. *Holiday Pay*

The respondent accepts that the claimant is entitled to 12 days' holiday pay in the sum of £3,342.46 gross, subject to its counterclaim. There is a dispute as to whether the claimant is entitled to 12 days or 14 days holiday pay. By submissions the figure had been agreed at £3899.53 for 14 days leave.

7. *Redundancy Pay*

Is any amount still owed to the claimant in respect of redundancy pay and, if so, how much? This was not pursued at this hearing.

8. *Remedy*

8.1 What are the claimant's financial losses?

8.2 Has the claimant taken reasonable steps to mitigate his losses?

8.3 If the claimant succeeds on his disability discrimination claim, what is the extent of his entitlement to compensations for injury to feelings?

9. *Counterclaim*

9.1 Did the claimant receive an overpayment of salary for the period 20 July 2017 to the date his employment terminated on 30 January 2018?

9.2 Did the claimant put a proposal to the respondent that he should receive ongoing sick pay beyond his contractual entitlement of six weeks?

9.3 In not responding to the claimant's proposal, if established, but in continuing to make payments to the claimant, did the respondent agree to make ongoing payments of sick pay to the claimant?

9.4 Did the claimant have a contractual entitlement to that pay?

9.5 If not, is the respondent entitled to claw back that pay?

9.6 Is the respondent's counterclaim out of time?

9.7 Was the claimant entitled to three months' notice pay?

9.8 It is noted that the amount counterclaimed by the respondent is said to be £16,969.44. Was there an overpayment in that amount and if so and if the claimant is liable to make repayment, how much does the claimant owe the respondent taking into account his own entitlement to holiday pay?

9.9 The counterclaim was withdrawn at the outset of this hearing the respondent accepting it was not within the jurisdiction of this tribunal. Its only relevance now was that the respondent still maintained that it was a defence to the holiday pay claim.

10. There was an issue as to whether conversations which took place between the claimant and the respondent on 5 January 2017 and 10 March 2017 amounted to protected conversations. The parties now agree that the full tribunal may hear evidence in relation to those alleged protected conversations and may make a determination as to whether those conversations were protected conversations or not.

11. Although therefore the wording of section 111A is that 'evidence of pre-termination negotiations is admissible in any proceedings on a complaint under section 111' it had been agreed that the tribunal would hear evidence about the fact of those discussions although it did not hear about the detail of what was discussed. This explains the findings of fact that had to be made about them which are set out below.

Evidence

12. The tribunal had a bundle of documents of approximately 460 pages and heard evidence from the following: -

The claimant, (who had produced a witness statement on disability as well as his statement on the substantive issues);

and for the Respondent

12.1 Demetrios Antoniou;

12.2 Paul Phillips;

12.2 John Taylor;

12.4 Ashley Gough;

12.5 Manpreet Dillon; and

12.6 Amarjit Bains.

13. From the evidence heard, the tribunal finds the following facts.

The Facts

Disability

14. The claimant claims he is disabled by virtue of depression. He was ordered at the preliminary hearing to provide an impact statement. This was seen by the tribunal and is dated 16 August 2018. He set out in the first three paragraphs the effects that the depression had upon him. This is a rather formulaic list and the tribunal has noted that it was used previously when the claimant made an application to the Department of Work and Pensions in or about January 2018. The first three paragraphs of his witness statement on disability stated as follows:

13.1 "In summary, I have severe depression. The psychological symptoms are:

a. daily thoughts of self-harm;
b. extreme low and dark mood;
c. feeling negative and hopeless;
d. low confidence and self-worth;
e. feeling upset – seeing sad things make me easily tearful;
f. inability to think straight, prioritise and make decision;
g. not enjoying and deriving pleasure out of life;
h. having little interest in everyday activities;
i. feeling anxious, angry and impatient."

13.2 "The physical symptoms are:

a. sleeplessness – I only get between 3 to 4 hours sleep per day;
b. lethargy, tiredness, irritableness and no energy;
c. rapid weight loss, (I have now lost over 2 stones in 3 months);
d. frequently catching colds and flu;
e. body particularly back in constant pain."

13.3 "The social symptoms are:

a. not having an interest in talking to people;
b. having arguments with people I love;
c. not wanting to leave the house to see friends and family;
d. not doing activities that I enjoyed such as playing football."

15. The claimant was not cross examined upon these and the tribunal accepts therefore that he did suffer from these effects, but he does not state the time when he was so suffering. From the medical evidence the tribunal has seen, it is satisfied that the full extent of all these symptoms did not appear until the middle of 2017.

16. The following are relevant extracts from the claimant's medical records which were released to the respondent and which the tribunal saw in the bundle.

17. 16 February 2016:

    17.1 Referral to Improving Access to Psychological Therapies Programme;

    17.2 Dyssomnia, tiredness and poor sleep.

18. 12 July 2016:

    18.1 Tired all the time;

    18.2 Restless at night, finds sleep difficult.

19. 13 March 2017:

    19.1 Anxious and low mood, feels unfair, not suicidal, work stress.

    19.2 The claimant was prescribed medication for sleep.

20. 3 June 2017:

    20.1 Stress at work;

    20.2 The claimant was signed off sick from 2 June to 11 June 2017.

21. 19 June 2017: Stress at work.

22. 17 July 2017:

    22.1 Low mood continues, sleep is poor, 4 hours of broken sleep and vivid dreams, feeling suicidal thoughts, no intent, head aches continue, sounds like tension type;

    22.2 Says he would be better if his work problem was resolved;

    22.3 Wants help now, is happy to go to therapy, feels he needs meds

    22.4 He was diagnosed by the GP with a depressive disorder.

    22.5 He was prescribed medication and declared not fit to work from 10 – 30 July 2017.

23. 27 July 2017: There was a review with the medication and the claimant was signed off from work from 27 July – 31 August 2017.

24. 4 September 2017:

24.1 There was a depression interim review at which the claimant described feeling low and saying he had been unsuccessful in contacting the well-being service;

24.2 His sleep was not great, and he was still stressed at work and speaking to Occupational Therapy;

24.3 His medication was increased.

25. 21 September 2017:

25.1 The claimant described feeling slow and groggy on some of the medication;

25.2 There was a medical review.

26. 26 October 2017: The depression diagnosis continued, and he was signed off from 2 October to 15 November and then 26 October to 26 November.

27. The last entry that is relevant is 18 December 2017 when it is noted that in relation to an elbow pain that the claimant had not been at work since June.

28. The claimant's General Practitioner wrote a letter, "to whom it may concern" on 27 July 2017 in which she stated:

> "I can confirm that George Georgiou detailed as above has a mental health impairment, (depression), which he has been consulting us about since March 2017. He had previously consulted with a GP in July 2016 with a stress related condition which was affecting his sleep.
>
> In summary, Mr Georgiou has a disability under the Equality Act 2010 and has a long term mental health impairment, (meaning lasting more than 12 months, or likely to do so), which has more than a minor adverse effect on his day to day living. I can also confirm that Mr Georgiou has been prescribed 'mirtazapine' for his depression and is not fit to return to work until September 2017, possibly longer. I would suggest he has input from an Occupational Health doctor arranged by his workplace."

29. The tribunal also saw an Occupational Health report following a telephone consultation with Dr Naresh Kumaar Purushothaman, Occupational Health Physician on 25 July 2017. In the initial report the doctor had stated that the claimant was unlikely to be considered disabled under the Equality Act 2010. The claimant took issue with that and having then read the General Practitioner's letter of July, Dr Naresh changed his view to state that the claimant was likely to be covered by the Equality Act 2010 but based that on the letter from the doctor. He had still concluded, however, that:

"I consider that the employee is unfit to undertake the substantive work role. However, he should be able to return to work after the resolution of perceived work issues through workplace mediation."

Relevant Provisions of the Equality Act 2010

30. Section 6(1):

> (1) A person (P) has a disability if—
>
> (a) P has a physical or mental impairment, and
>
> (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

31. Schedule 1, Part 1 to the Act also deals with determination of disability and provides:

> 2(1) The effect of an impairment is long-term if—
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected.
>
> (2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.
>
> (3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.
>
> (4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

32. The tribunal has considered the Guidance on the Definition of Disability, (2011). Section C deals with the meaning of long term. It is made clear at C4:

> "In assessing the likelihood of an effect lasting for 12 months, account should be taken of the circumstances at the time the alleged discrimination took place. Anything which occurs after that time will not be relevant in assessing this likelihood. Account should also be taken of both the typical length of such an effect on an individual, and any relevant factors specific to this individual, (for example, general state of health or age)."

33. That section of the Guidance also makes reference to the "recurring effects" provisions in paragraph 2(2) of Schedule 1, part 1of the Equality

Act. It is relevant to note that the claimant's representative never took the tribunal to those provisions and did not seek to argue the claimant's case based on them. The tribunal has however, considered the Guidance and the example given of a woman with two discrete episodes of depression where there was no evidence that the episodes were part of an underlying condition of depression which was likely to recur beyond the 12-month period.

Conclusions on disability

34. The submission on behalf of the claimant was that there had been a condition lasting more than 12 months as the claimant had sought medical attention in February 2016. The tribunal cannot accept those submissions. The medical records only show a mention of tiredness and poor sleep in February 2016. That is not depression. It is a big leap to state, as Counsel attempted to suggest that that indicated a condition of depression lasting from then to the time of the events complained of.

35. As already stated, the tribunal accepts that the claimant did suffer from the effects of depression, this being diagnosed in July 2017 at which point it was having adverse effect on his normal day to day activities as set out in paragraphs 1 – 3 of his statement on disability. The events with which this tribunal is concerned cover the period January 2017 to January 2018. The tribunal however, does not have evidence that at that time, the condition had lasted for 12 months, was likely to continue for more than 12 months or the rest of the claimant's life. It has taken account of the Guidance that it must assess the matter on the evidence available at that time and none has been produced that the effects were likely to continue for more than 12 months or recur throughout the claimant's life. No evidence has been produced that he had other episodes of depression on a recurring basis in his past life.

36. Whilst not disputing that the claimant was diagnosed with depression, this did not form a disability at the relevant time within the meaning of the Equality Act 2010.

The Facts continued.

37. The claimant commenced employment with the respondent on 5 May 2014 as Operations Manager. At that time, he was employed by Omega Lettings Limited with responsibility for the provision of Housing Management Services to Temporary Accommodation Tenants. Omega Lettings Limited had been founded by Zenon Antoniou in 1998 to provide private sector accommodation for use as temporary accommodation and housing by local authorities. Demetrios Antoniou joined the business in 2003 and his brother Harry in 2004. By 2014 Omega had become one of the largest private sector providers of temporary accommodation in the UK. When the claimant joined in May 2014 he reported to Demetrios and Harry although primarily to Harry. Their father knew the claimant's father

from many years previously. The claimant had extensive experience across a number of areas of the business and the Antonious believed was a good fit for the growing business.

38. Shortly, however, after the claimant joined, Omega was sold to Mears Group Plc on 15 October 2014. Whilst Harry and Dimitri Antoniou had sold their entire shareholding to Mears, they remained with the business as employees to ensure continuity for their customers and to facilitate integration of the company into the wider Mears group. In addition, they had agreed a three year sell out whereby the consideration for the business was paid 50% up front and the remaining 50% based on the performance of the business over the three year earn out period. Dimitri was employed as Chief Executive Officer and Harry as Chief Operating Officer. They reported to John Taylor and the claimant continued to report to them.

39. Towards the end of 2016 the Antoniou brothers had a discussion about their planned exit from the business with John Taylor. By that time, it was considered that Mears had a good understanding of the day to day running of Omega's business and had made connections with their customers. They understood that there were further changes planned in the year ahead which included rebranding and restructuring. They agreed they would step out of the day to day running of Omega from around December 2016 but would remain available for a number of months should anything arise that John Taylor or the rest of the Senior Manager team needed assistance with. As such, the claimant no longer reported into them and their employment ultimately terminated on 31 March 2017.

40. Knowing that he would be leaving the business in March, Dimitri had a conversation with the claimant in December 2016 by calling him into his office. He was aware that the claimant was not particularly happy in his role and was also aware that John Taylor had some concerns about the claimant's abilities in his work. Dimitri though wanted to offer the claimant the opportunity to arrange a meeting to discuss possible exit options if the claimant wanted him to do so. The tribunal found Dimitri Antoniou's evidence convincing. He is no longer employed by the company and the tribunal finds that he came and gave his honest recollection of how this discussion arose. It does not accept the claimant's evidence that the subsequent discussion about an exit package came as something out of the blue. The tribunal has also taken into account the whole context that this was an evolving business, it had been sold not long after the claimant had joined and it is in that context that it can understand why the Antoniou's felt that they wanted to see whether they could negotiate something that would be of benefit to the claimant but that also might assist the new owners. The claimant reverted back to Demetrios saying that he would like to hear what the company had to say.

41. Subsequently, Demetrios spoke to John Taylor who he understood subsequently asked Manpreet Dillon by then Director of Operations (having joined the respondent in July 2016) and the claimant's new line

manager and Ashley Gough HR Business Partner to discuss the possibility with the claimant. Mr Antoniou was not involved in that meeting in any way.

42. Prior to that meeting being arranged, there was a meeting between Mr Dillon and the claimant on 20 December 2016 about the claimant's salary review. There was a note of this meeting prepared by Mr Dillon and circulated to other senior directors on the same date, (page 162). There had been an agreement of a 2% increase and what Mr Dillon recorded was:

> "G became increasingly perturbed as we discussed this and stated that he felt the offer was not acceptable, an insult, lacked trust and respect and did not recognise the contribution he has made."

43. Mr Dillon set out that the key issues for the claimant were that people below him had received substantial rises over the last two years and the differential between them was not enough, that he felt that he was the hardest worker in the organisation and put more hours in than those around him and felt that his role was different to what he did 12 months ago.

44. Mr Dillon noted that he had discussed with the claimant what he needed from him over the next 12 months and advised that he would be given clear measures of success and milestones. These would relate to delivering and embedding organisational change and support changes in behaviour to support their growth. The note concluded,

> "George intimated that he was not willing to work above and beyond what was in his role profile and did not acknowledge the opportunities ahead."

The claimant's email 19 December 2016.

45. On the above date, the claimant sent to John Taylor copied to Demetrios Antoniou, an email having read Mr Antoniou's report circulated on 6 December 2016. The report was to the Omega Housing Board and is entitled 'Studio Flats - Management Project'. On the third page of the report, (page 145 of the bundle), it was noted by way of background:

> "The flats have all been converted using HMO (Housing of Multiple Occupation), rules and decent homes property standards. Each flat is completely self-contained with its own council tax banding and own utility supply."

46. In the claimant's email to Mr Taylor of 19 December he asked if when Mr Taylor was next in they could discuss the "Harringay LHA rates and rules governing the shared accommodation rate and one bed rate." He then sent a further email on 20 December (page 158), about a different matter but also asking if he could have Mr Taylor's and Mr Antoniou's thoughts on the previous email.

47. Mr Taylor did not specifically recall receiving those emails although he did not dispute that he did. To use his words, they were just "business as usual" and he did not recall any specific response to them. If they were of particular concern to the claimant, he would have expected him to have approached him when he was in the Enfield office, but he never did.

48. The tribunal heard detailed evidence from Demetrios Antoniou about the rules and he was very clear that in order for the property to get the council tax banding it has to be self-contained and that banding is something that is carried out by the local authority not by the respondent. He was taken in cross examination to press articles in the bundle and stated, as they clearly are, that these were generic and did not relate to the respondent's properties. He was satisfied that there were no concerns and that the local authority had given the appropriate banding. The council would not have given that council tax reference / banding if these were not separate self-contained units.

49. Following on from the indication he had been given by Demetrios Antoniou, Mr Taylor asked Mr Dillon and Mr Gough to meet with the claimant in the new year to discuss the claimant's issues and their concerns. This email was sent on 22 December 2016. From the evidence that was heard, the tribunal knows that the meeting took place on the 5 January 2017. The claimant was in fact invited to the meeting by way of a meeting request sent by Mr Dillon on 4 January 2017 at 18:20 hours and that meeting was scheduled for Thursday 5 January at 14:00 hours.

50. Emails were seen where the claimant was asking the point and purpose of the meeting and it was confirmed that they wished to meet about current performance and future plans.

51. The claimant had already sent an email to Graham Eden and Paul Phillips on 4 January at 17:01 hours which he said as follows:

> "Happy New Year.
>
> Further to providing you with my top five risks in October last year I'd like the opportunity to further discuss the risks I identified, (specifically risk reference 3 the HMO one), and their impact on the business and myself."

52. He then followed that up with an email at 18:56 hours to Paul Phillips only stating as follows:

> "Further to my earlier email and in line with the attached whistle blowing policy, I'd like to confidentially discuss the matters / make a disclosure associated with the risks I identified and emailed to both you and Graham Eden in October 2016; specifically, in relation to our managed HMO (Manlow) portfolio.
>
> I would like my anonymity fully respected / retained."

53. Whilst this had been relied upon as the first protected disclosure, after the evidence had been heard and during submissions, Counsel for the

claimant accepted that there was no disclosure of information on the 4th but maintained that the disclosure was in a telephone call with Mr Phillips on the 5th and the second disclosure to have been made when the claimant met with Mr Phillips in a hotel on 13 January.

Telephone conversation – claimant and Paul Phillips 5 January 2017

54. There is no dispute that there was a telephone conversation between the two on this day. The claimant states in his witness statement that he informed Mr Phillips of matters (a) through to (n) in paragraph 24 of his witness statement during what even he accepts was a telephone call that lasted no more than a few minutes. Mr Phillips was clear in evidence that the claimant did not go into that level of detail at that point and that the main discussion was around the fact the claimant wished to preserve his anonymity and discuss the way in which the whistle blowing policy worked. As Mr Phillips had been the writer of this it was clearly credible for that to be discussed with him. The tribunal does not accept that there would have been time to discuss all these points in detail. It finds that the claimant only summarised his concerns about there being two particular issues, one of health and safety and compliance and categorisation of properties. As the ultimate meeting took one and a half to two hours it is not credible that all those points were discussed on the telephone. The tribunal has concluded that he was not in the meaning of s43B providing 'information' in that telephone call.

55. It was left that the claimant would contact Mr Phillips if he wished to meet to discuss the matter and he duly did.

56. The tribunal is further satisfied that the only person Mr Phillips told about this discussion was Graham Eden his line manager which he was required to do under the policy. Indeed, the claimant does not in his grievance seek to criticise Paul Phillips going even further and stating,

> "I would also like to commend Paul for his professionalism and sensitivity in dealing with my disclosure."

57. In paragraph 20 of the claimant's witness statement dealing with his reading of the report he received on 6 December 2016, he states he became, "extremely agitated and concerned." The tribunal accepts, having heard the cross examination of the claimant that there is nothing in the documents that he then writes, (page 155 and 158), that conveys that extreme anxiety. When the claimant wrote to John Taylor, his words were, "when you're next in, please can we discuss" and that certainly did not convey the extreme distress and agitation that he now states he was feeling at that point in time. Even the next day's email does not express any urgency or concerns other than could he have their thoughts.

Performance review meeting on 5 January 2017.

58. The claimant duly attended the meeting with Mr Dillon and Mr Gough on 5 January 2017.

59. It must be remembered that this meeting arose following the discussion which the tribunal has accepted took place between Demetrios Antoniou and the claimant when the claimant agreed that he could raise with the other senior management the possibility of an exit package. The tribunal has seen the email from Ashley Gough to Mr Dillon of 4 January 2017 with a draft script to be used at the meeting. That makes it clear that the claimant would be reminded that the meeting was without prejudice and a protected conversation. The tribunal heard evidence from Mr Dillon. He had only joined the business in July 2016 when he was Director of Student Life and then as a Director of Operations from 21 November 2016. He was responsible for overseeing responsive repairs, property compliance and customer services. He had five direct reports including the claimant. The tribunal found that he was highly qualified and clearly was aware of the imminent departure of Harry and Demetrios Antoniou. He also was clear in his evidence to the tribunal that he had been involved in other protected conversations and was aware of the importance of stressing to the employee that what was discussed was to be 'without prejudice'. The tribunal does not find that this came as a "bolt out of the blue" for the claimant and it is satisfied that it was a protected conversation. As such it should be disregarded by the tribunal in its conclusions in relation to ordinary unfair dismissal within the meaning of section 111A of the Employment Rights Act 1996. If the tribunal were to find that the dismissal was automatically unfair under s 103A then the conversation could be considered as provided by section 111A (3).

60. What the claimant made very clear at that meeting was that he was not interested in pursuing such an exit and that having been made clear as stated in the script for the meeting, Mr Dillon discussed that the claimant did not appear to be particularly satisfied with his role,

> "and the wider structure and that this seems to be having an impact on your performance and behaviour. For example, despite my efforts to engage with you to shape your role and priorities I do not feel that you have co-operated to a meaningful extent. This has meant that I am not clearly sighted on your day to day activity and am not able to offer any support to you."

61. Whilst it was put to Mr Dillon that he could not have made any appropriate assessment of the claimant's abilities having only been in the role since November the tribunal is satisfied that he sat very near to the claimant and had been able to observe him in his day to day work. He had been particularly concerned, he explained, that the claimant appeared to delegate tasks to others and he was concerned about the claimant's commitment to the business going forward. These were matters he was perfectly entitled to investigate with the claimant.

Meeting of Paul Phillips and the claimant, 13 January 2017.

62. Following the telephone call the claimant had with Mr Phillips on the 5 January 2017, they agreed to meet. Mr Phillips had suggested the Welwyn Garden City office on the 10 January, but the claimant telephoned him on the 9th and asked if it could be at an external location. The Claimant suggested the West Lodge Park Hotel in Hertfordshire. The tribunal saw a calendar entry for that meeting in which the claimant had stated:

> "Thank you for the chat earlier; I would very much like to meet with you to progress a potential WB disclosure. [emphasis added]
>
> Please can we meet at the West Lodge Park Hotel…"

63. They duly met in a hotel on the above date to discuss the claimant's concerns. This was a meeting that lasted one and a half to two hours.

64. The tribunal is satisfied from Mr Phillips' evidence that when they met, the claimant repeated his request that the matters he wanted to disclose were kept confidential and that his anonymity be maintained throughout. He alleged there were fire safety breaches with respect to the Manlow portfolio and that the properties had been misclassified, as a result of which they qualified for a higher charge rate. The claimant, however, also informed Mr Phillips that Mears Group legal department had already looked into the classification of properties and was satisfied that there were no issues of non-compliance with the law and that he the claimant disagreed. He agreed to forward to Mr Phillips a copy of his correspondence with the legal department on that issue but did not do so.

65. There is no dispute that other documents were handed over, but Mr Phillips did not see anything within those that suggested there had been fire safety breaches and / or a deliberate misclassification of properties.

66. The tribunal is satisfied that Mr Phillips was very experienced as an audit manager and indeed had written the whistle blowing policy. He explained to the claimant there were two routes that he could follow to investigate the claimant's concerns. A standard compliance audit of the Respondent had already been scheduled for the second quarter of 2017 which would include HMOs and therefore the Manlow portfolio. He could bring that forward without alerting anyone that a specific disclosure had been made. Alternatively, he could carry out a standalone investigation on the specific points raised by the claimant by the standard whistle blowing process. The claimant said he wanted further time to gather evidence and consider which route he would prefer Mr Phillips to take and the tribunal is satisfied that he said he would be in touch again following a period of annual leave. He provided however, no further evidence and the next contact Mr Phillips had with him was on 28 February 2017 when the claimant called him to inform him that the Manlow portfolio had been handed back to the client and that he no longer wished to pursue the matters he had raised. Mr

Phillips still confirmed that the scheduled compliance audit would take place as planned, which it did in June 2017.

67. As has already been noted and this remained the case, Mr Phillips did not inform anyone within the respondent of the claimant's contact with him save for Graham Eden, his own line manager.

68. The tribunal has concluded that the claimant did not, at this meeting, provide information which in his reasonable belief was likely to show one of more of the matters falling within sub section (1) of s43B. In fact, the claimant even referred to the legal advice that the respondent had which confirmed they were satisfied with the classification of the properties. Whilst accepting that the employee does have to be right in their assertion to have the statutory protection on the facts before this tribunal it finds that this goes to the issue of reasonable belief, which it finds the claimant did not have.

Further meeting, claimant and Mr Dillon, 10 March 2017.

69. This meeting appears to have come about as a result of Demetrios Antoniou meeting the claimant in the lobby area of their office in Enfield around February / March 2017. They agreed that Mr Antoniou would prompt a further discussion about the claimant's potential exit from the business. He got the impression that the claimant felt any previous offer made to him was not sufficient and that a better offer could be made. Mr Antoniou passed this to Ashley Gough and John Taylor and left them to progress it. Although Mr Antoniou spoke directly with Mr Gough about arranging this meeting, Mr Gough had no further involvement and the meeting took place between the claimant and Mr Dillon only.

70. In his witness statement, Mr Dillon stated that as with the meeting on 5 January, at the meeting on 10 March, he still had no idea that the claimant had had any contact with the audit team or that he had any concerns regarding fraud and / or health and safety breaches as he has described. He stated however, in evidence that he became aware at the end of January, probably when the decision was made to hand the Manlow portfolio back to the client and emphasised that John Taylor had not discussed it with him before. It is only when considering all the evidence in coming to its decision that the tribunal has noted this inconsistency which was not picked up by Counsel during the hearing. The tribunal has reviewed Mr Taylor's evidence which is that he did not know until the claimant raised his grievance which was 18 March 2017. In that grievance in his time-line of events, the claimant notes that it was on 27 February that Mr Dillon emailed the staff to inform them that the Manlow portfolio would be handed back. As already noted it was the day after that the claimant contacted Mr Phillips to state that he was not pursuing the matter and did not require it to be investigated. The tribunal therefore believes that in his oral evidence, Mr Dillon fell into error in saying that he knew at the end of January as it does not appear possible

that he could have known then, the tribunal having already found that Mr Phillips had only told his boss, Mr Eden and no one else.

71. The tribunal is satisfied, as it was in relation to the January meeting, that at the beginning of the meeting on 10 March 2017, Mr Dillon made it clear that this was again a without prejudice / protected conversation. The tribunal has already found that it is satisfied that he had experience of such and as this was a follow-on discussion, has no reason to doubt his evidence that he would have again made this clear to the claimant. The claimant said words to the effect of '*what was on offer'* and Mr Dillon believed he was putting forward from experience what he considered would be a normal package. Mr Dillon's evidence was that the claimant laughed at this and said he was looking for something more substantial and in Mr Dillon's witness statement said that the claimant's expectations were in the hundreds of thousands of pounds and as a result no agreement was reached. Again, the tribunal is satisfied this was a protected conversation.

The claimant's grievance 18 March 2017.

72. This grievance was submitted to David Miles, the respondent's Chief Executive Officer, stating that he wished to complain of the,

> "unfair and despicable treatment I have been subjected to at work since I made a whistle blowing disclosure in January 2017".

He stated he had since that date been singled out for unfair and unjust treatment to the point that he could,

> "no longer tolerate suffering in silence".

73. He then set out a timeline of events and concluded that the,

> "unfair treatment and sustained campaign to remove me from the organisation has made my life hell and I have been advised for my own sanity / well-being to seriously consider taking constructive / unfair dismissal and pursuing legal action. My strong preference is to continue to work for Mears, sort this matter out amicably and not become embroiled in a lengthy legal wrangle".

74. As already alluded to, it was in this document that he commended Paul Phillips for his professionalism and sensitivity in dealing with his disclosure. He did not raise a criticism of him failing to investigate it. He still went on, however, to say that since alerting internal audit of his concerns, his employer had encouraged him to leave with financial inducements and he now feared that his employer,

> "will engineer a restructure / redundancy scenario by dismantling my roles and responsibilities to hasten my departure."

75. The grievance was dealt with by Ben Westran, Group Financial Controller and Company Secretary. He met with the claimant on 6 April 2017 and provided the claimant with his outcome on 5 May 2017. Having been satisfied that the two meetings about which the claimant complained, on 5 January and 10 March were 'without prejudice' conversations he could not investigate the matter further. He was however, satisfied that the invite to the meeting on 5 January had been sent prior to any initiation of a whistle blowing disclosure. The claimant was given notice of his right to appeal.

76. The claimant was unhappy with this decision and lodged an appeal on 10 May 2017, (page 225). In this appeal, he also stated that the unfair treatment and sustained campaign to remove him from the organisation continued as he had now received notification of the restructure and that his role was at risk, (email of 10 May 2017).

77. In the appeal letter, the claimant states that he would still like to continue working for the respondent, however the,

> "sustained unfair treatment that I am being subjected to coupled with the ongoing campaign to remove me from the organisation, I am left with little option other than to take legal advice unfortunately very well may culminate in an Employment Tribunal hearing".

78. The appeal was acknowledged by Jo Fry, Group HR Director, on 10 May and she informed the claimant she would meet with David Miles and the Chief Risk Officer, Paul Phillips, but pointed out to the claimant that the restructuring was ongoing and that would continue independently of this appeal.

79. In a further email on 11 May, (page 229), Ms Fry stated that the claimant's grievance had been determined and that his comments related to a fresh issue that was not part of the original complaint. The proposed restructure was ongoing and no decisions had been reached. She urged the claimant to engage fully in the consultation process.

80. The claimant chased this further on 8 August 2017 and Ms Fry replied by email of 9 August stating that she had made it clear in her correspondence of 10 and 11 May that they were not accepting his appeal as it raised new issues. She understood that he had now raised these separate new issues directly with the branch which would be addressed accordingly by them.

81. The claimant had submitted a letter to David Miles on 8 August (page 346), in which he asked him to take personal responsibility for dealing with his original appeal against the grievance outcome. He wished this to be treated as a separate grievance in relation to how Ben Westran dealt with the original grievance as well as how his grievance appeal had been dealt with.

82. This was responded to by Yvette Carter, Head of Commercial on 9 August 2017. She makes reference to Occupational Health advice and that his further comments had been passed to an HR advisor for their action.

Restructure.

83. The tribunal accepts the evidence of Mr Dillon that on taking up the role of Director of Operations he was aware that he would be expected to implement a programme of change to consolidate the existing social housing services business, ensure that Omega Lettings Limited was successfully rebranded as MHM and embedded as part of the wider Mears Group.

84. The need to restructure was identified back in 2016 and resulted in a briefing by John Taylor in relation to which he circulated slides on 1 November 2016. This was before the claimant raised his issues. Within these slides was one headed, 'How We Are Organised' and the first bullet point was that changes were being made in Enfield and the Omega Lettings business. The third bullet point stated, 'Change is Unsettling – Please Ask and Question'. It was therefore known to the staff, including the claimant, that change was an inevitable consequence of the sale of Omega to Mears.

85. As part of this change programme Mr Taylor had planned to appoint a Director of Operations reporting to him to take the lead on operational matters that the Antoniou brothers had previously led on. In the interim, however, Mr Taylor took on some of those responsibilities and met with the claimant to agree a revised job title and profile for him. This was confirmed in an email exchange on 8 November 2016, (page 133).

86. When Mr Dillon first became aware of the claimant, he felt that the claimant was committed to the business, he was encouraged that the claimant was a link with the past and he spent a lot of time talking about future and system development. Initially the claimant had given him lots of positive feedback as to how he saw the business moving forward. They worked closely on a number of issues and did spend a lot of time talking about the work and the portfolio. Mr Dillon then started realising that some of the feedback he received from others was a bit more mixed. The tribunal accepts as has already been stated that the claimant sat opposite Mr Dillon and he could see how other members of staff approached the claimant and how he would delegate work. Mr Dillon would ask for information from the claimant and he would inevitably ask more junior colleagues to obtain it. Mr Dillon found this disappointing as he was looking for managerial input.

87. On 13 April 2017, Mr Dillon had a one to one meeting with the claimant. Copies of the notes of that meeting were at page 209 of the bundle.

88. Mr Dillon subsequently discussed his proposals with the claimant for changes to property services and forwarded his paper for informal

consultation on 9 May 2017 (page 215). This proposed combining the roles of Business Manager and Head of Operations into a single role of Head of Customer Service in order to bring together Veco Development (MHM's housing management system), performance management, new business delivery and operational management. This also affected Rob Murphy (Business Manager) and Helen Western (Business Manager). Rob Murphy was based out of the Enfield office and Helen was home based but attended Enfield two or three days a week.

89. Mr Dillon had further discussions with the claimant and the rest of the team on 10 May 2017. The following day he emailed the claimant a copy of his proposals with structured charts and invited comments (page 215).

90. The claimant responded with extensive comments on 19 May 2017. In that document the claimant stated,

> "I have no doubts in my mind that my employer has singled me out for unfair treatment and has embarked on a sustained campaign to remove me from my post and the organisation. The business case document in its present form proposes to essentially dismantle and farm out the duties and responsibilities of my current post and to achieve the employer's objective of making me redundant."

He referred to the grievance he had submitted, but then set out his further comments on the situation.

91. Mr Dillon considered the claimant's comments together with others in the team and circulated a more detailed proposal on 6 June 2017 (pages 249 – 286). He revised his proposal to combine the Business Manager and Head of Operations role into a single role as Head of Customer Services. He decided to make these two roles redundant whilst creating two new posts, namely Head of Customer Services and Head of Portfolio Management.

92. Mr Dillon offered an opportunity for one-to-ones with anyone who wanted to discuss the proposals in greater detail. He indicated the intention to arrange interviews for the week commencing 19 June 2017 and asked that those at risk of redundancy advised which post they wished to be considered for by noon on 19 June 2017 (page 257).

93. On 8 June 2017, the claimant reported in as sick and continued to be signed off from work not returning.

94. The claimant responded to Mr Dillon's request for formal consultation document by email on 18 June. He stated,

> "I confirm that I fully intend to provide detailed comments, however, due to my ongoing ill health I am currently unable to do so".

He reminded Mr Dillon that his doctor had signed him off work for the next week.

95. Mr Dillon spoke to the claimant on 27 June during which time he advised him that he was experiencing depression and a chest infection. Mr Dillon wrote to him on 28 June inviting the claimant to a meeting, "to discuss your current welfare". The meeting was scheduled for 30 June and the letter stated the purpose was,

> "to discuss your current health status and see how we can assist you in returning to work including obtaining medical advice. Furthermore, it will give us a chance to catch up following your absence and address any other issues you may have regarding your health and well-being".

96. The claimant continued to provide fit notes which stated he had a stress related illness.

97. The meeting subsequently took place on 7 July 2017 and notes of this meeting were seen in the bundle at page 293. The claimant was accompanied by Roger Klein who the claimant explained to this tribunal was an ACAS 'companion'. That expression was not understood by the tribunal, but it appears he may be someone that ACAS had suggested rather than an employee of ACAS.

98. This meeting was described at the outset as a welfare meeting to see how the claimant was feeling and to discuss his plans to return to work and what the company could do to support him back to work. The claimant stated he did not know when he was going to return to work. Although his chest infection was better, he also confirmed that he was suffering from depression. The claimant accepted the offer to be referred to the respondent's Occupational Health Service provider and Mr Dillon confirmed that he would arrange the referral. The claimant questioned how much sick pay he was entitled to. He stated that his understanding was he was entitled to six weeks sick leave and that he had taken two. Mr Dillon stated he would confirm what the entitlement was.

99. The notes do record that the claimant stated he was a "disgruntled" employee and that he was feeling very aggrieved. He asked Mr Dillon whether he was aware he had made a serious disclosure. Mr Dillon stated the purpose of the meeting was to discuss the current absence due to sickness and how and when the claimant could return.

100. Mr Dillon stated that he found the claimant, "to be an honest and genuine person" however, the business was growing rapidly, and it was Mr Dillon's role to successfully deliver business and operational change.

101. The claimant went on to state that he considered that the restructuring was a "scam" and it was engineered to get rid of him.

102. Mr Dillon wrote to the claimant on 11 July 2017 (page 299), confirming that the claimant's entitlement to sick leave was six weeks as he had been in the organisation over 25 months. He attached a form for the claimant to

provide more details for an Occupational Health referral to be made on his behalf.

103. Mr Dillon went on to mention the consultation as follows:

> "Following the end of the formal consolidation of changes to MHM Operations we have delayed interviews for the new posts which were scheduled to take place week commencing 19 June 2017, expecting you to be able to participate in these following your return to work.
>
> The business needs for the changes articulated in the consultation paper are pressing and there are other colleagues that find themselves in the same positions as you where they are potentially at risk of deployment and possibly redundancy. Delaying the process further is no longer an option.
>
> Interviews have been arranged for the Head of Customer Service and Head of Portfolio Management roles for 18 July 2017 and will take place at the Wenter Centre.
>
> Can you please advise whether you are available at 1 pm and which roles you would like to be considered for?"

104. A further letter was sent on the 14 July 2017 dealing primarily with sick pay (page 300). Again however, Mr Dillon mentioned that the claimant might like to apply for the post of Head of Customer Service and Head of Portfolio Management which were due to take place on 24 July. He encouraged the claimant to contact him on his mobile telephone number to arrange an interview and to confirm what would be required within that interview.

105. Mr Dillon wrote again on 20 July 2017 (page 302). He referred to his previous correspondence and that the claimant had not expressed an interest in the new post being created because of the restructure. He again reminded the claimant that the interviews for the new post were scheduled to take place on Monday 24 July 2017 and urged the claimant to contact him if he would like to be considered.

106. On 21 July 2017 the claimant emailed Mr Dillon. Firstly, he required amendments to be made to the notes of the welfare meeting.

107. With regard to the restructure, the claimant stated,

> "I can confirm that I hold the employer fully responsible for my depression and current sickness absence due to me being singled out for unfair treatment and victimisation (e.g. discouraged to remain a Mears employee and offered money on two separate occasions to leave the organisation, the engineering of a sham restructure / redundancy takes for my departure) following various serious disclosures that I made."

108. With regard to the formal consultation, the claimant confirmed he had emailed on 18 June stating he intended to provide his comments but was unable to do so due to his ill health. He concluded,

"My continued depression and well-being is such that I cannot attend any interviews in relation to the restructure for the foreseeable future".

109. Mr Dillon decided that in the light of the claimant's comments, the interviews should proceed as planned and appointments were made to the new posts. Helen Western was ultimately appointed into the post of Head of Portfolio Management and Rob Murphy was appointed into the post of Head of Customer Services. Mr Dillon confirmed the position on 27 July 2017 (pages 338 – 339), in which letter the claimant was formally advised that his position was at risk of redundancy. They would however, continue to look for redeployment opportunities within the Group and the claimant was encouraged to apply for any suitable post that would suit his skills and experience.

110. Mr Dillon noted that the claimant had an Occupational Health appointment on 25 July and subject to the advice received,

"we would like to arrange an individual redundancy consultation meeting with you as soon as possible to discuss your situation and options."

He would be on leave until 21 August but Yvette Carter, Head of Commercial would be covering his work and the claimant was asked to contact Yvette accordingly. Otherwise a meeting would be arranged on Mr Dillon's return.

111. The claimant attended an Occupational Health appointment on 25 July but had not provided his consent to the release of the related report. Correspondence was entered into to encourage the claimant to consent for the reports released but it was not shared with the employer until 26 September 2017 (pages 324 – 332). The report contains within it the claimant's objections to it and the doctor's comments and amendments.

112. To start with it was concluded that whilst following a validated anxiety/depression assessment which confirmed evidence of severe anxiety/depression the Equality Act was unlikely to apply. The claimant was fit to attend management meetings with suggested adjustments to be made. The cause of the absence was identified as 'work related stress' and that once agreed actions were in place it was likely the stress should resolve and the claimant be able to return to work and provide reliable service.

113. The claimant did not agree with this assessment and in an addendum dated 26 July 2017 stated he wanted it changed to state that the Equality Act was likely to apply. He also wished the doctor to add the discussion they had had about the claimant's whistle blowing disclosure and his position that his employer had then discouraged him from staying at the respondent.

114. The Doctor's reply was seen on page 329. He confirmed his position about the Equality Act and that the claimant's comments with regard to the employment situation would be appended to the report.

115. The claimant raised 10 further issues on the 22 August 2017 (page 325) and the doctor gave detailed responses to these. He maintained his position about the applicability of the Equality Act and the claimant's fitness to attend meetings.

116. The last addendum is dated 26 September 2017 (page 325). Doctor Naresh had been sent a copy of the claimant's GP letter on 21 September 2017 and on the basis of him stating that 'his medical condition had been present since July 2016' he confirmed that the Equality Act was likely to apply. It appears only then did the claimant release a copy of the report.

117. The claimant emailed Mr Dillon on 8 August 2017 (a three-and-a-half-page document), he set out the history of the disclosures he had made, that he considered himself to be disabled within the meaning of the Equality Act 2010 and that the employer had failed to make reasonable adjustments to allow him to participate in the restructuring interviews. He concluded by stating that his GP had recommended he take some time away from work and intended to be away for two weeks 19 – 30 August 2017. He asked whether the employer was prepared to pay for that period as further sick leave.

118. Yvette Carter replied on Mr Dillon's behalf on 9 August 2017. She confirmed the company had no objection to him going away in the period suggested but it was not possible for the company to extend the sick leave period for that purpose. She noted that the claimant wished to raise a formal grievance in respect of a number of issues and was therefore unable to comment further but would arrange for the grievance to be passed to the HR adviser team.

119. On Mr Dillon's return he wrote to the claimant on 11 September at which point the employer still did not have the Occupational Health report. He again requested release of this report.

120. By letter of 14 September, the claimant was invited to an individual redundancy consultation meeting to be held on 26 September 2017.

121. Notes of that meeting were seen at page 357 of the bundle. The meeting concluded with Mr Dillon stating that a further meeting would be arranged once the Occupational Health report had been received.

122. By letter of 6 October 2017, Mr Dillon confirmed the Occupational Health report had been received and that he would like to meet the claimant again to discuss the contents and to agree the next steps.

123. That meeting took place on 19 October 2017 and notes of the meeting were seen at page 362.

124. With regard to the redundancy consultation, the claimant was provided with a current vacancy list but advised there was nothing of interest on it.

He added that it was not helpful to receive it if there were no suitable vacancies. Mr Dillon outlined the options which were:

124.1 to extend the consultation process to enable the claimant to identify alternative employment;

124.2 To end the consultation process and declare the claimant redundant on the basis there were no suitable alternatives available.

125. The claimant responded he was interested in mediation and returning to work but that there were no suitable roles for him. He also advised that the redundancy figures provided were incorrect as they did not include his car allowance. Mr Dillon confirmed this would not impact on the redundancy figures but would be included in the notice pay.

126. The meeting concluded with the claimant stating he was not able to make any decisions about the options and it was agreed that Mr Dillon would make a decision about the consultation process and write to the claimant.

127. By letter of 25 October 2017, Mr Dillon confirmed that the decision had been taken to terminate the claimant's employment on the grounds of redundancy. His employment would end on 30 January 2018. During the notice period Mears would continue to identify any available opportunities for the claimant that could suit his skills and experience and would encourage him to continue to review and apply for all vacancies which are posted regularly on the company's web site. He was asked if he was able to access the internet to contact Mr Dillon who would make arrangements either for him to use the office facilities or to receive a copy of the weekly list by post.

128. The claimant was advised that any role offered as an alternative to redundancy could be trialled for a period of four weeks to determine whether he was suitable for the role. If alternative employment had not been identified during the notice period, the claimant's employment would end on 30 January 2018.

129. Mr Dillon also confirmed they were willing to consider the option of mediation to resolve the claimant's concerns. This would be intended to facilitate his return to work but in the absence of the suitable role the expectation is that it may help the claimant to secure suitable alternative employment either within Mears or externally.

130. The claimant was advised of his right to appeal and did indeed submit his appeal on 31 October 2017 (page 371). This was passed to Amarjit Bains to consider on the respondent's behalf. She is a Contract Delivery Manager with no prior knowledge of the claimant.

131. The respondent's redundancy policy provides for a right of appeal at clauses 8 & 9:

"An employee may appeal against the decision to select them for redundancy, within 5 working days of being notified, as detailed in the letter giving notice of redundancy. The appeal should be made in writing, stating the grounds of the employee's appeal.

The appeal hearing will take place as soon as is reasonably practicable and HR will provide the outcome of the appeal in a written statement that is signed and dated."

132. Clause 9 provides for the right to be accompanied to that appeal meeting by a workplace colleague or trade union representative.

133. Ms Bains evidence about the policy was not convincing. Initially she said she 'probably' read through it but then stated the didn't consider the provisions about a meeting. She was 'just looking at the appeal'. She did not invite the claimant to a meeting but sent an outcome letter on 16 March rejecting the appeal. Her evidence to the tribunal was that in view of the detail the claimant had provided, she felt able to reach a fair conclusion on the points made without the need to have a meeting. In oral evidence, whilst eventually accepting that she did not have a hearing, she maintained her position that she did not need to have a hearing where all the points made by the claimant were clear to her. She acknowledged she had made 'assumptions' that she did not need a hearing when the grounds of appeal were clear.

134. Ms Bains made some initial enquiries in relation to the claimant's appeal in December 2017 (pages 377a – 379a). She then had a period of annual leave from 23 December to 11 January and on her return made further enquiries. She met with Mr Dillon and raised some queries with HR. it follows she did not meet with the claimant.

135. By letter of the 16 March 2018 Ms Bains provided the claimant with her decision to not uphold his appeal. She was satisfied there was a genuine redundancy situation, that this affected others and that the claimant had not been singled out. The process had not been a sham and a fair procedure had been followed.

Relevant law

136. The claimant states that he was treated detrimentally contrary to section 47B and dismissed contrary to section 103A ERA which provides that:

47B.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

S103A

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

137. A complaint of detriment must be brought within the following time period:

S48

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

138. To have this protections s43A & B must be satisfied:

43A Meaning of "protected disclosure".

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H

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.

139. Not only must 'information' be disclosed but it must in his reasonable belief tend to show one of the matters set out above.

140. The complaint is still one of unfair dismissal. The claimant seeks to assert that the dismissal was automatically unfair contrary to s103A, so he has an evidential burden to show that there is an issue to be considered by the tribunal and which is capable of establishing that automatically unfair reason. The respondent in this case counters that by asserting redundancy a potentially fair reason failing in s98 ERA.

141. The respondent relies on redundancy defined at section 139 ERA as follows:

139 Redundancy.

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

(a) the fact that his employer has ceased or intends to cease—

(i) to carry on the business for the purposes of which the employee was employed by him, or

(ii) to carry on that business in the place where the employee was so employed, or(b)the fact that the requirements of that business—

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish.

142. If redundancy is established in considering whether the employer acted fairly in treating a redundancy as a reason for dismissal the tribunal must consider whether selection criteria were objectively chosen and fairly applied, whether the employees were warned and consulted about the redundancy and whether alternative work was available.

Submissions

143. Both counsel gave written submissions which it is not proposed to repeat here but they also spoke orally.

Respondent

Protected conversations

144. They were and the tribunal should accept the evidence of the respondent. Nothing has been alleged that takes them outside of this privilege.

Protected disclosures

145. From the chronology it is clear that Mr Dillon and Mr Gough had no idea these had taken place when they had the meeting in January.

146. The meeting with Mr Phillips on the 30 January is very telling. Mr Phillips accepts the claimant gave him a lot of documents. He says though that he left the ball in the claimant's court and claimant then said on 28 February he did not want to pursue it. It was submitted that the claimant could not be correct in denying that when he makes no criticism of Mr Phillips but to the contrary thanks him for his professionalism. His grievance is about him and not about a failure to investigate his alleged disclosures. It was submitted he is not being 'entirely frank' and has created a 'false narrative' around the disclosures and meeting to advance his argument that his position was under threat. He and everyone knew restructuring was coming up.

147. It is not in the public interest. He is advancing his own private interests. He had no reasonable belief concerning the housing benefit issue as he told Mr Phillips that the lawyers had already looked at it and given it the all clear. He does not get round the objective belief part of the statute.

Detriments

148. The claims are out of time. The claimant had lawyers from 5 January and spoke to them and legal expenses insurers then and after each event. He threatened legal proceedings. He could have applied for Early Conciliation but did no do so. It is out of time and the claimant has not advanced a case why it was not reasonably practicable to issue in time.

Automatically unfair dismissal

149. The dismissal had nothing to do with disclosures. It was on the ground of redundancy. The role of the tribunal is limited to reviewing what occurred not what should have happened. It is clear there was a restructure for business reasons. It was not a capability or ill health dismissal.

150. Consultation started informally. The claimant put in his observations and Mr Dillon states they were taken into account. Everyone was invited in the final document to apply for a role but the claimant never applied. He was invited on another occasion to apply but didn't. Interviews were put back. Mr Dillon wrote to the claimant encouraging him to apply but the claimant didn't contact him. The claimant's eventual response was he couldn't attend interviews but still he didn't express any interest in a position.

151. The OH report was delayed by 2 months as the claimant refused to release it till it was changed. He engaged with the doctor with vigorous arguments. Originally the doctor said that the claimant was fit to attend meetings.

152. The claimant's case now that he could have attended an interview by Skype was never suggested by him at the time. The first time that appears is in the list of issues.

153. What the respondent was faced with at the time was the restructure affecting a lot of other people and the claimant would not say he wanted to be considered for another job. What was the respondent supposed to do? In its first draft the OH report stated the claimant could attend.

154. It was unreasonable for the respondent to have to wait any longer. It acted quite properly and there was nothing underhand. The job the claimant did had disappeared and the claimant was redundant. The refused alternative employment available.

155. The failure to give the claimant an appeal hearing made no difference to the final outcome. The claimant put forward a 4 page closely typed document and had said everything he could possibly say. Although Ms Bains accepted that it was wrong of her not to give the claimant a hearing it did not make it an unfair dismissal. If it did under Polkey it would have made no difference.

Holiday pay

156. S14(1) is a complete defence to this claim in view of the overpayment of wages.

Disability

157. The claimant was not diagnosed with depression until July. He had no treatment until February, only drugs. There is no clinical evidence of 'chronic depression'.

Claimant

Holiday pay/unauthorised deduction from wages.

158. It was argued that there is no provision to permit a deduction and that it is therefore unlawful.

159. The claimant accepts that he received an overpayment. The employer should however have paid the holiday pay when the claimant was dismissed. It did not raise the issue of an overpayment until the ET3. This is not a case where the respondent had identified it and invited the employee's comments. The claimant was faced with a significant counterclaim until this week.

160. When considering if s14 applies to extinguish the claim for annual leave the tribunal cannot ignore the fact that he asked for the payment in October 2017 and there was a failure of the respondent to engage with him. The claimant therefore had to claim it in these proceedings which opened the door to the respondent's counterclaim.

161. Section 14(1) applies it was submitted to a right of restitution where there had been overpayment and the right to recover it where there is no contractual provision to do so. Where the failure to pay annual leave and the respondent seeks to recover normal pay it was argued that the tribunal has a discretion to allow the claimant to recover the annual leave. The tribunal is not bound to apply s14 in the way the respondent argues. Counsel had no authority to support this proposition but relied on the way the respondent's case was put. He submitted that the respondent did not seek to rely on s14(1) and that they accepted at paragraph 73 of the ET3 that the claimant was entitled to the annual leave payment. It was submitted that s14 applies only if the respondent has identified the overpayment.

Protected disclosures

162. It was submitted that the claimant's case has 'developed'. His primary case that he made disclosures on 4 & 5 January and was then asked to leave the business on the 5th. He now accepts there was no disclosure of information on the 4th and relies on it being made on the telephone call on the 5 January.

163. The second disclosure was on the 13 January at the hotel.

Detriment claims

164. The claimant now only sought to argue that the 5 January and 10 March meetings were detriments and the failure to give an appeal hearing. The respondent stated that the appeal meeting had never been relied upon as a detriment and was not referred to in the Preliminary Hearing list of issues. Initially counsel for the claimant stated he would apply for leave to amend but that was not pursued, and neither was it being argued that it had not been reasonably practicable to bring the detriment claims in time.

165. Counsel then submitted that he did not pursue a detriment argument about the 5 January meeting. He acknowledged that the claims could only succeed if there was a causal link established between the disclosure and the meeting and the way the evidence had developed he did not think there was enough. The subsequent meeting in March was still relied upon as a detriment. The tribunal should accept the claimant's evidence that this came out of the blue and reject any suggestion of underperformance.

166. A decision was made very quickly in the restructure that it was the claimant who had to go. There was no proper consultation and the respondent failed to take account that the claimant was off sick. The claimant was referred to OH but the respondent pushed on failing to give the claimant an opportunity to make representations with regard to the other job roles. There was it was submitted a complete failure by the respondent.

Conclusions

167. The claimant was dismissed for redundancy a potentially fair reason for dismissal. From as earlier as 2016 there was a likelihood of a restructure. The Antoniou brothers left the business in March 2017. Manpreet Dillon had been appointed on the 21 November 2016 and was expected to make business changes. Although it seemed to be the claimant's case this was a sham, little if anything was put to the respondent's witnesses to that effect and no submissions made on that point. Indeed, little was said by the claimant's counsel about ordinary unfair dismissal.

168. As set out above there was consultation with the claimant and he contributed to that process. Seven posts were put at risk and five new posts created. Some of the claimant's observations were incorporated into a revised paper and circulated on the 6 June. One to one meetings were offered to anyone who wanted to discuss the proposals.

169. In view of the claimant's sickness absence a sickness review meeting was held with him on the 7 July. He made it clear he did not know when he was going to return to work and that he was suffering from depression. It as agreed there would be a referral to OH. The interviews for the new posts were delayed to enable the claimant to participate. Interviews

would now take place on 18 July for the roles of Head of Customer Service and Head of Portfolio Management. He was encouraged in various letters to express and interest. Further copies of job descriptions were sent to him. The claimant did not apply for any post and did not take part in interviews. As late in the process as the 19 October consultation meeting the claimant is noted as stating there were no suitable roles for him.

170. Although an OH report was commissioned it was not released to the respondent until September due the claimant seeking changes to it. The tribunal accepts that fairness also dictated that the respondent have regard to others in the process and it could not wait indefinitely. The claimant put forward no interest in alternative roles or how he could be interviewed if he could not attend in person.

171. The claimant appealed the outcome. Whilst he did draft a detailed appeal letter the respondent's own policy states he was entitled to a hearing. He was not given one. Ms Bain's did not think she needed one, but this did not take account that the claimant was entitled to be heard at one. She also did speak to Mr Dillon and Mr Gough and not the claimant. It is this one aspect which the tribunal has concluded rendered the dismissal unfair.

172. In considering however whether dismissal would have occurred in any event the tribunal has to conclude it would have done. The claimant was not interested in other roles. Even if he had been given an appeal hearing it would not have delayed the process and the outcome of dismissal would still have occurred. There would therefore be no award of compensation.

Disclosures

173. The tribunal has concluded that no information was disclosed in the telephone call on the 5 January. There was not long enough for the detail the claimant states he disclosed to have been raised. It is not credible to suggest, as he does in his witness statement, that so many matters were raised in a short call.

174. Whilst the tribunal accepts that information was disclosed at the meeting in the hotel on the 13 January the tribunal has concluded that the claimant did not at that time have a reasonable belief that this disclosed one or more the matters set out in section 43B. He specifically mentioned to Mr Phillips that the respondent lawyers had looked at these matters and were satisfied. Further the tribunal has concluded that the claimant did state to Mr Phillips on the 28 February that he did not wish to pursue this matter as the portfolio was being handed back.

175. In any event, as set out above the reason for the dismissal was redundancy and was not connected to any disclosures.

Accrued holiday pay

176. Section 14 of the ERA is clear that an exception to the prohibition of deductions from wages is 'the reimbursement of the employer in respect of

an overpayment of wages.' That is exactly what has occurred here. The submissions on behalf of the claimant were not understood. The tribunal has no 'discretion' it can exercise when that subsection applies which it does on the facts of this case.

177. It follows from these conclusions that the claimant is entitled to a finding of unfair dismissal but there will be no award of compensation as dismissal would have occurred in any event.

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Employment Judge Laidler

Date: 4 February 2019

Sent to the parties on: 6 February 2019

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For the Tribunal Office