THE EMPLOYMENT TRIBUNALS

Claimant: **Mr M Flinn**

Respondent: **Lynch Healthcare Limited**

Heard at: **North Shields Hearing Centre** **On:** **17 and 18 July 2019**

Before: **Employment Judge Morris (sitting alone)**

Representation:

Claimant: **Mr J Morgan of Counsel**
Respondent: **Ms R Mellor of Counsel**

RESERVED JUDGMENT

The judgment of the Employment Tribunal is as follows:

1. The claimant's complaint that his dismissal by the respondent was unfair, being contrary to sections 94 and 103A of the Employment Rights Act 1996, is not well-founded and is dismissed.

REASONS

Representation and evidence

1. The claimant was represented by Mr J Morgan of Counsel who called the claimant to give evidence.

2. The respondent was represented by Ms R Mellor of Counsel who called two employees of the respondent to give evidence on its behalf as follows: Mr D Robson, Engineer; Mr D Lynch, Managing Director.
[*Note: In these Reasons references to "Mr Lynch" are references to Mr David Lynch unless there is express reference to Mr Gary Lynch.*]

3. The Tribunal also had before it an agreed bundle of documents, which was added to at the commencement of the hearing, comprising some 372 pages.

The claimant's complaint

4. The claimant's complaint is that his dismissal by the respondent was unfair, being contrary to sections 94 and 103A of the Employment Rights Act 1996 ("the 1996 Act") as the reason for his dismissal (or if more than one, the principal reason) was that he made a protected disclosure.

The issues

5 The issues to be determined by the Tribunal are as follows:

5.1 Did the claimant make a "qualifying disclosure" within the meaning of section 43B of the 1996 Act in that he disclosed information and, in his reasonable belief he did so in the public interest and it tended show (so far as is relevant to the claimant's assertions in this case) that

5.1.1 a person had failed, was failing or was likely to fail to comply with any legal obligation to which he was subject,

5.1.2 the health or safety of any individual had been, was being or was likely to be endangered, or

5.1.3 that information tending to show either of the above matters had been, or was likely to be deliberately concealed?

5.2 If so, was that disclosure a "protected disclosure" in that (in this case) it was made to the respondent?

5.3 If so, the claimant not having at least two years' continuous employment, does the claimant show that the disclosure was the reason (or if more than one, the principal reason) for his dismissal?

Consideration and findings of fact

6 Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law, some of which was referred to by the representatives (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), the Tribunal records the following facts either as agreed between the parties or found by the Tribunal on the balance of probabilities.

6.1 The respondent is a small to medium sized business, working mainly in the North East of England but also nationally. It installs hoists and other healthcare equipment. So far as is relevant to these proceedings, its engineers fix hoists and gantry points to ceilings in homes or other buildings, such as schools, in order that a person can be lifted, for example, in and out of bed or from a wheelchair to a chair. This often involves drilling into the ceiling of the property and, if the ceiling is covered with a textured coating, that coating might contain asbestos. That being so the Control of Asbestos Regulations 2012 ("the Regulations") can be applicable to its work.

6.2 It is appropriate that I interject here a brief reference to the applicability of the Regulations so far as is relevant to these proceedings. First, the parties are agreed that Regulation 4 does not apply as that relates to non-domestic premises. Further, that the effect Regulation 5 is to provide an employer with alternative courses of action if they are to undertake work that is liable to expose employees to asbestos. Those alternative are either that the employer has carried out an assessment (which for the purposes of these proceedings can be taken to mean having obtained an asbestos report from an appropriate laboratory) or, if there is doubt as to whether asbestos is present, the employer must assume that it is present and must observe the applicable provisions of the Regulations. In this regard, I accept the evidence of Mr Robson that he approached every job where there was a decorative ceiling coating as if asbestos was present and took all relevant precautions in accordance with a safe system of work (ie. he always adopted the second alternative) and that even if a sample of the coating had been tested in a laboratory that reported the presence of asbestos they would still carry out the same system of work.

6.3 The respondent's witnesses were questioned at length about compliance with the Regulations and their own Health and Safety Policy (91) and it is right that Mr Robson conceded that that Policy needed to be updated as might the standard Risk Assessment and Method Statement documents in that, although reference is made to implementing a system of work, they did not provide any detail such as the matters referred to below about dampening a ceiling, hoovering up falling dust, etc. As I pointed out to counsel at one stage, however, these proceedings were not a prosecution by reference to health and safety legislation and I accept Mr Robson's evidence as to the safe system of work that he had in mind when preparing the Risk Assessment Record and that he implements that system, as do all of the respondent's other engineers, whenever they come across this situation.

6.4 I also accept Mr Robson's evidence that although the Approved Code of Practice and guidance ("the Code") published by the Health and Safety Executive in respect of the Regulations (124) requires, in respect of Regulation 7, that employees must be informed of the contents of the plan of work and be instructed on the work methods and controls to use (172), he had not actually shown the claimant the documentation but had certainly discussed the content with him. In any event, as he said, the claimant had not undertaken any work on either of the properties at Kingsland Close or Pennine Way (referred to below) and if he was not there, Mr Robson could not talk him through the documents. They had never got to that point. The Kingsland Close job had not been done due to missing parts and, as to Pennine Way, before Mr Robson had got the tools out of the van the claimant had left the job.

6.5 The claimant commenced his employment with the respondent on 28 August 2018 on the basis of a recommendation from one of the respondent's contractors. He was employed as an Installation/Service Engineer. His employment ended on 21 September 20 when he was summarily dismissed by Mr Lynch.

6.6 The claimant had previously undertaken not dissimilar work as an engineer in relation to domestic and non-domestic properties. When his employment with the respondent commenced he was already what the parties referred to as being "Category B trained", meaning that he had undergone training in non-licensable asbestos work. That said, the Code provides that drilling textured coatings for installation fixtures/fittings will not normally be non-licensable work. At the time, Mr Robson had not undergone Category B training but he had undergone relevant training including an asbestos awareness course. The manufacturers of the equipment the respondent used had also put him through a quite intensive training course that had included classroom training in respect of the equipment and how it fitted together, and the risks of drilling into Artex. He had also undergone on-the-job training with engineers employed by the manufacturers who had done the job for 20 years. During this training he had used all types of fixes including drilling into ceilings and walls. As mentioned above, I accept Mr Robson's evidence that he approached every job as if asbestos was present and took all relevant precautions and that even if a sample had been tested in the laboratory that reported the presence of asbestos they would still carry out the same system of work.

6.7 The claimant predominantly worked as 'second man' alongside Mr Robson who was responsible for training him or, occasionally, with another engineer.

6.8 Mr Robson found the claimant difficult to work with due to his negative personality and wanting to do things his way and, rather than listening and learning, he questioned everything to the point of being obstructive. As Mr Robson put it, "If I explained once I explained a thousand times". Examples included as follows:

6.8.1 The claimant would not accept the type of fixing Mr Robson intended to use for a particular wall leg they were installing and suggested a different fastener. Mr Robson therefore took off the leg and put in the fastener just to show that it would not work, which it did not.

6.8.2 The installation of a hoist in a school required cutting the skirting board with a particular tool. The claimant refused to do the cutting saying that he needed anti-vibration gloves but that was not necessary for the amount of cutting required.

6.8.3 The claimant said that the ear defenders were not good enough and requested a top spec. pair but they were not required as only a saw and multi-tool were used and not repetitively or for long periods. Mr Robson gave the claimant a pair of military grade earplugs that he had from his time working with helicopters but he never saw the claimant wear them.

6.8.4 The claimant had objected to trackers being installed on the vans that they use, for the some reason considering that the respondent was "stealing time" of him if he finished a job early.

6.8.5 The claimant initially objected to working away from home during the week commencing 3 September 2018 as he did not have childcare for one of the days. Mr Robson told him that he could leave early but he would have to use his own car. He had spoken to Mr Lynch about this who had confirmed Mr Robson's stance.

6.9 Mr Robson had raised the claimant's attitude with him and he responded positively but he had not changed.

6.10 Mr Lynch had been aware that the claimant was a very awkward individual and that Mr Robson was struggling to work with him. He had also been made aware of an incident on 6 September 2018 when the claimant was reluctant to do a product assessment appointment. He was asked to assist Ms Evelyn Lynch to lift chairs in and out of a van due to her recent operation and his attitude towards her and other members of staff was very negative and he felt this was an unnecessary use of time. Mr Robson had spoken to Mr Lynch a few times about the claimant. On 10 September, Mr Lynch sent Mr Robson a Whatsapp message to say that he wanted to speak to him about the claimant (365). They had met and had spoken about the claimant's negative and questioning attitude and issues relating to specific jobs. After the meeting, they had had a few telephone conversations about the claimant's attitude and behaviour, which was not improving.

6.11 Two particular jobs that were assigned to Mr Robson and the claimant are central to these proceedings. The first was at Kingsland Close, Northampton. Mr Robson and the claimant had attended the property on 31 August, which was his third day at work for the respondent. A number of documents had been produced in preparation for this job (a Hoist Site Survey (49), a Risk Assessment Record (50) and a Method Statement (53)) none of which make any reference to a risk of asbestos.

6.12 The claimant's evidence was that when they arrived at Kingsland Close he noticed the decorative coating on the ceiling and questioned the occupant to try to ascertain when the coating had been applied. He said that Mr Robson had said that he should telephone Mr Lynch, which he had done informing him that they would need to see an asbestos report before knowing how to proceed with the installation. Mr Lynch had agreed and the claimant and Mr Robson left the property. Mr Robson gave a very different account being that when they arrived, although they did notice that there was a decorative coating on the ceiling and, potentially an asbestos risk, Mr Robson had already realised as soon as they had arrived that they could not complete the job because they did not have the necessary supports/struts so had to leave. He denied having told the claimant to telephone Mr Lynch I put forward two reasons. First, that Mr Robson would not have troubled Mr Lynch over such a relatively minor matter; the only person he would have telephoned would be Mr Currah in order to change the parts list to add the necessary struts. Secondly, he would not have told the claimant to telephone Mr Lynch as a new recruit only three days into his employment. I accept Mr Robson's explanation and reasoning and, on balance therefore, prefer his account of these

matters, which is corroborated at least to an extent by the evidence of Mr Lynch who denied having spoken to the claimant on this day or, indeed, at any time prior to their meeting on 21 September. Mr Robson returned to the property on 10 September with the claimant. The job could not be completed then either as he had not taken the correct fittings. Mr Robson had therefore returned on his own on 13 September 2018 when he had done the work.

6.13 Even by reference to the claimant's account, however, he accepted that as, when he telephoned Mr Lynch and he had agreed that he and Mr Robson should leave the property pending receipt of an asbestos report there had been no wrongdoing and, as such, the claimant could not disclose any wrongdoing because none had occurred. He also accepted that when he had learned that Mr Robson had returned to the property and undertaken work on 13 September he had not approached Mr Lynch to raise the point that he had done so in breach of the Regulations.

6.14 On 14 September 2018 the claimant was asked to deliver some shower chairs to an important customer in Whickham, some 30 minutes' or so drive away. Although he did eventually deliver the chairs he did so with bad grace. His own evidence was that he had heaved a heavy sigh whereas Mr Robson's evidence was that the office staff had telephoned him as they felt intimidated by the claimant's behaviour who had walked out of the office slamming the door and one member of staff had been frightened. Mr Lynch had been made aware of this and it was a key influence in him deciding to meet with the claimant on 21 September, which in his mind was a meeting to dismiss him as he could not see it going any other way due to the claimant's ongoing behaviour and the concerns being reported to him on a regular basis. It was put to Mr Lynch (an equivalent point being raised in submissions on behalf of the appellant) that matters could not have been serious as, if they had been, he would have dismissed the claimant immediately at that time but I accept the evidence of Mr Lynch that he did not move immediately to dismiss the claimant because of this on 14 September as he wanted to think things over and made his decision to dismiss the claimant over that weekend.

6.15 The second job central to these proceedings was the installation of a hoist at Pennine Way, Kettering on 20 September. Early that week Mr Robson was contacted by Mr Lynch who asked him to tell the claimant that he wished to meet with him on 21 September, which Mr Robson did on 19 September. The claimant had asked Mr Robson if he knew what the meeting was about but Mr Robson had said that he did not. Although the claimant denied that he had been informed of the meeting on 21 September, I accept Mr Robson's evidence that, at Mr Lynch's request, he did tell the claimant. His oral evidence that he had done so on the "same night as we had a pint in the pub" and when the claimant asked him what the meeting was about he had said that he "didn't have a clue" had a very clear ring of truth.

6.16 As with the job at Kingsland Close, a Hoist Site Survey had been produced (68) and Mr Robson had completed a Risk Assessment (69) and a Method Statement (72) based on that survey. The claimant's evidence was that he had not seen these documents and Mr Robson could not say whether or not he had seen them in respect of this specific job but he was satisfied that the claimant knew that they did have such documents in place as he had gone over them with the claimant numerous times. In producing the Risk Assessment and Method Statement, Mr Robson had noticed on the survey that there was a slight risk of asbestos due to the Artex ceiling and, therefore, noted on the Risk Assessment that a low risk had been identified in the survey and that the action needed was to implement a safe system of working to manage the low risk and for the engineers to wear dust masks at all times and hoover any dust during the work. The particular safe system of working was a matter for the responsible engineer on site and could vary. Windows would be kept open and dust masks would be worn. Specific methods might involve dampening the ceiling and hoovering any falling dust caused by the drilling, applying shaving foam where the holes are to be drilled or, if there is high risk, using a method that does not require drilling. Whatever the method, if it is believed that release of asbestos fibres has occurred or could occur the works will be halted.

6.17 When Mr Robson and the claimant arrived at the property they had seen the Artex on the ceiling and the claimant had mentioned this in front of the occupier. Mr Robson ushered the claimant outside so as not to alarm the occupier. He reassured the claimant that it was fine as they could take precautions. There were masks and he was going to dampen the area and hoover any dust particles as he drilled. The room was also well ventilated. The claimant did not want to continue the job, however, and went to make 'phone calls. Mr Robson commenced the work and when he came out to the van to cut the track he found the claimant sitting in it. He told the claimant he was going to finish the job.

6.18 Mr Robson then received a call from Mr Gary Lynch who told him that the claimant had telephoned him to say that there was a risk of asbestos. He had replied that he should go through Mr Robson but if the job was unsafe, don't continue. Mr Gary Lynch asked Mr Robson if the job was safe and he confirmed that it was. Mr Robson then received a call from Mr Martyn Currah to say that he too had received a call from the claimant having a go at Mr Robson, and he asked what going on. Mr Robson confirmed that the job was safe and there was no reason not to continue. Mr Robson then received a third call, this time from another engineer, Mr Jack Grieves, who similarly said that he had received a call from the claimant who had complained about Mr Robson carrying out the task and told Mr Grieves that he should not trust Mr Robson as he was unreliable and a hazard to the team. When Mr Robson finished, he had brushed himself down and hoovered himself. He and the claimant then drove home more or less in silence. Taking the 'phone calls and working alone meant that the job took longer than anticipated and Mr Robson was not home in time to see his son play football as he had intended.

6.19 The claimant's evidence was that he had raised the need for an asbestos report because the only way to work safely was to know what they were working with. Having mentioned this to Mr Robson he had then telephoned, in turn, Mr Gary Lynch, Mr Currah and Mr Grieves. He told them all that there was a risk of asbestos and a report should be obtained. In oral evidence, however, the claimant accepted that the Regulations offer the alternatives referred to above and, therefore, a report was not an absolute requirement. Nevertheless, he maintained that the breach of the legal obligation was tampering with asbestos without a safe working process and the respondent not providing a safe working environment: for example, the type of mask was not sufficient and the filter on the vacuum was not suitable. Training, experience and control methods are required. He had told Mr Robson that there was no safe process and therefore they could not deal with the potential asbestos in a safe way although he had not gone into the details that he had now provided to the Tribunal.

6.20 Having delivered the claimant home, Mr Robson telephoned Mr Lynch and told him that he could no longer work with the claimant due to the way he had behaved. Also, later on 20 September Mr Lynch spoke to Mr Currah who told him of his conversation with the claimant that day and how he had been critical of Mr Robson. Mr Lynch's evidence was that Mr Currah had not that he had said anything about needing an asbestos report as asbestos could only be identified by a laboratory or that Mr Robson had only attended an asbestos awareness course.

6.21 The following morning Mr Lynch sent Mr Robson a Whatsapp message asking if the claimant was due to be on call this weekend and when he had replied that he thought so, Mr Lynch asked whether Mr Robson could sort cover if he met with the claimant and "let him go". Mr Robson confirmed that he would be on call (366).

6.22 When the claimant came into the meeting, Mr Lynch first raised with him the occasion when he would not deliver the shower chairs then explained that he had had a meeting with Mr Robson and that the claimant never listened to Mr Robson and always wanted to do jobs his way and was not flexible about working away. He was putting up barriers. The claimant had wanted to talk about Pennine Way but Mr Lynch stopped him saying that he would cover that but the key point was that he had sat in the van the previous day; the meeting was about his performance, conduct and bad attitude. He informed the claimant that Mr Robson had been annoyed with the way he had acted the day before. As Mr Lynch considered the claimant to be still in his probationary period he considered that he could dismiss him without following a full procedure, which he then did.

6.23 The claimant's account of the events of 21 September is starkly different. His evidence is that a meeting with Mr Lynch had not been prearranged. Instead, on walking into the office that morning he went straight to see Mr Lynch and told him that he needed to talk about what had happened at Pennine Way, which he said was completely unacceptable. They went into a private room and Mr Lynch told him that Mr Currah had already told him what had happened and he wanted to hear the claimant's version. The

claimant had explained that he had noticed the textured ceiling and told Mr Robson that they could not proceed due to the possibility of it containing asbestos but he had gone ahead irrespective and broken the law and endangered people by blindly completing the job without the proper precautions, training and care. Mr Lynch then told the claimant that he had decided to terminate his employment as he was putting up too many barriers to completing jobs.

6.24 Such conflicts of evidence are always difficult for any tribunal especially if, as in this case, there are no witnesses to the events and no contemporaneous documents. On balance, however, I preferred the evidence of Mr Lynch, which, as he said himself, was supported by the "timeline". He had met with Mr Robson on 10 September (as is confirmed by the messages between them – 365) and they had spoken about the claimant's negative and questioning attitude and issues relating to specific jobs, and had had a few telephone conversations both before then and thereafter. Then, on Friday 14 September incident relating to the shower chairs happened, which was a key influence in him deciding, over the weekend, to meet the claimant the likely outcome of which was that he would dismiss him. Having reflected over the weekend and decided to meet the claimant on Friday 21 September, on the following Monday or Tuesday he had asked Mr Robson to tell the claimant of the meeting, which he had done on the Wednesday. The night before the meeting, Mr Robson telephoned Mr Lynch and told him that he could no longer work with the claimant due to the way he had behaved that day and then, later on 20 September Mr Lynch spoke to Mr Currah who told him of his conversation with the claimant that day and how he had been critical of Mr Robson. Then, on the Friday, Mr Lynch had sent Mr Robson the Whatsapp messages (366) including the reference to letting the claimant go. I understand the submission made on behalf of the claimant that as in that exchange of messages, Mr Lynch states "if" he met the claimant and let him go there is a flavour of him not having made the decision to dismiss at that time. I accept Mr Lynch's evidence, however, that he had decided to dismiss the claimant and consider that his use of the word "if" was little more than acknowledging that at the time of writing the message he had not dismissed the claimant and the possibility that something could have occurred at the meeting to dissuade him from doing so. On a particular point in this regard is that, as mentioned above, the claimant maintained that on the morning of Friday 21 September he went into the office and went straight to see Mr Lynch who had not previously arranged the meeting with him, but I accept the evidence of Mr Robson and Mr Lynch that earlier in the week he had decided to have a meeting with the claimant on that day and had asked Mr Robson to convey this to the claimant, which he had done causing him to ask Mr Robson if he knew what the meeting was about.

6.25 On 18 November 2018 the claimant sent Mr Lynch an email stating that he believed that his dismissal was "as a result of raising the asbestos issue as a major health and safety concern" to which he said that Mr Lynch had responded by telling him that he was putting up barriers to complete work.

The claimant's email continued that his dismissal was unlawful under whistleblowing legislation and that if the matter could not be resolved by him getting compensation he would proceed to an employment tribunal (86). Although I accept that it might be inferred from the claimant's email that he raised the asbestos issue with Mr Lynch at their meeting on 21 September I note that he does not expressly state that but only that he had raised the issue, which could be a reference to sometime earlier.

6.26 Mr Lynch passed the letter to a HR consultant recently retained by the respondent, Miss L Kennedy of Oculus HR, who responded to the claimant by email of 21 November 2018 (85). She explained that the reason for the his dismissal was not due to him having raised health and safety concerns but was because he lacked flexibility in his approach and the respondent had received a customer complaint about his workmanship. Although not referred to in Mr Lynch's witness statement, when he was questioned about this matter of the complaint he explained that it had occurred on the morning of 14 September, which was why the claimant had returned to the office early and, therefore, had been available to deliver the shower chairs on that day.

Submissions

7 After the evidence had been concluded, the parties' representatives made oral submissions, which addressed the matters that had been identified as the issues in this case in the context of relevant statutory and case law. It is not necessary for the Tribunal to set out those submissions in detail here because they are a matter of record and the salient points will be obvious from the findings and conclusions below. Suffice it to say that the Tribunal fully considered all the submissions made together with the statutory and case law referred to, and the parties can be assured that they were all taken into account in coming to my decision. That said, the key points in the representatives' submissions are set out below.

8 The claimant's representative made submissions including as follows:

Information

8.1 The Tribunal is entitled to look at the claimant's disclosures in respect of Kingsland Close and Pennine Way individually and cumulatively.

8.2 Applying the decision of the Court of Appeal in <u>Kilraine v London Borough of Wandsworth</u> [2018] EWCA Civ 1436, the disclosure must be looked at in context. So when, in relation to the job at Kingsland Close, the claimant informed Mr Lynch that he would need to see an asbestos report the context was that he had undergone Category B training in working with asbestos and was indicating to Mr Lynch that it was not safe to proceed. That was a disclosure of information.

8.3 Similarly, when the claimant telephoned Mr Currah and explained his suspicion of the textured decorative coating on the ceiling at Pennine Way,

it was incredible that that was anything other than the conveying of information.

8.4 Likewise, the claimant had been very specific telling Mr Lynch at their meeting on 21 September what had happened at Pennine Way as to the textured ceiling coating possibly containing asbestos meaning that they could not proceed without an asbestos report, and that Mr Roberts had gone ahead anyway thus breaking the law and endangering people. The claimant did not quote the law but he is not expected to.

Subject matter

8.5 The claimant relies upon three relevant failures. The third relating to the deliberate concealing of information is unlikely to trouble the Tribunal but the first two regarding a breach of a legal obligation and danger to health and safety are important. The claimant's allegation need only be that there is likely to be wrong doing. When the claimant stated that an asbestos report was needed that was sufficient and that if the work proceeded without it he believed the respondent would fall into error. Subjectively, the claimant had the belief and it was reasonable given his training and the respondent's lackadaisical approach to providing him with a Risk Assessment or Method Statement, and not following the Regulations; the respondent having admitted its failure to comply.

Public interest

8.6 This element was beyond doubt. The respondent's work was in the community in people's homes and there was potential asbestos dust. The breach of a legal obligation and danger to health and safety was clear.

The cause of the dismissal

8.7 The evidence of the respondent's witnesses was that there were a number of instances of the claimant's bad attitude meaning that he was a bad employee but there was no direct evidence of the matters being raised with the claimant. Mr Lynch had said that the issues occurred before their meeting but he did not dismiss the claimant then. If these were live issues it was surprising that claimant was not dismissed before; particularly given the respondent's evidence that on 14 September the claimant's conduct was intimidating yet after that the respondent sent him into people's homes.

8.8 The incident on 20 September was the last thing in time before the claimant's dismissal the following day. The likely cause was that the claimant raised Kingsland Close then told Mr Currah that a report was needed, and then told Mr Lynch on 21 September what had happened the previous day. The respondent was not happy with this.

8.9 The claimant's evidence is to be preferred as to what happened on 21 September. It is telling that the meeting was supposedly prearranged but there was no notetaker, no HR presence and no written confirmation. The

claimant was the first to put anything in writing (86) setting out what had happened. Why would he do that if it was inaccurate? The letter from Ms Kennedy (85) of 21 September referring to a customer complaint is inconsistent with Mr Lynch's evidence and the respondent's pleaded case; then, bizarrely, there is a reference to the claimant's "dishonesty", which represents shifting sands from the respondent as to its case. It smacks of the respondent trying to come up with an explanation as to why the claimant was dismissed other than for making protected disclosures.

8.10 The Whatsapp messages (366) give a flavour of the decision not having been made. The claimant says he raised the disclosures then he was dismissed. If the decision to dismiss was taken before the meeting it was caused by the cumulative effect of what happened at Kingsland Close and the claimant's disclosure to Mr Currah, which he referred Mr Lynch.

9 The respondent's representative made submissions including as follows:

9.1 It was agreed that account could be taken of cumulative effect but if matters relating to Kingsland Close did not amount to a protected disclosure, it does not become one if taken with something else.

9.2 The respondent's evidence should be accepted where there was a discrepancy. Both its witnesses had conceded matters where necessary and the Tribunal should bear in mind Mr Lynch evidence showing that he is passionate about the company and its business, and his evidence as to the way others have abandoned jobs in face of risk.

9.3 Kingsland Close being a protected disclosure is dead in the water. Although it is agreed that the claimant need only show that wrongdoing is "likely", the information nevertheless has to show wrongdoing. The claimant had agreed that there had been no wrongdoing at that time and he did not know that Mr Robson had returned to do the job until these proceedings. Saying that an asbestos report was needed before starting the work does not amount to saying that if there is no report there is a likely breach, and the claimant did not say afterwards that there was no report and Mr Robson completed the work. Even if the claimant's evidence was accepted that he had said that a report was needed that does not discharge the need for wrongdoing. In the original claim form (ET1) Kingsland Close does not feature at all, only Pennine Way (8).

9.4 As to Pennine Way the respondent accepts that the claimant noted the ceiling but saying that a report is needed does not discharge their being wrongdoing. The claimant had accepted that Regulation 5 of the Regulations does not require production of a report and that there was no breach of a legal obligation. The claimant had received relevant training: can he reasonably believe that by saying a report was needed that was a reasonable belief? The necessary equipment must have been available because Mr Robson did the job and said what he had used.

9.5 The big problem for the claimant is what he disclosed to Mr Lynch. He was not clear as to what he says is the wrongdoing. It was questioned whether

the content of paragraph 40 of the claimant's witness statement was sufficiently specific but, more importantly, the Tribunal has to be satisfied that something was said that amounted to a qualifying disclosure. The claimant said that this paragraph was a summary and that he had given more information to Mr Lynch at the time but he had put in his ET1, Further Particulars and his witness statement and still had not given the full version of the events that he now asserts. He has not met the burden. The claimant had not satisfied that he had a reasonable belief and, objectively applying context, whether a report was necessary.

9.6 The claimant suspects that Mr Currah passed on the disclosure to Mr Lynch but there is insufficient evidence of that or that what he said was clear and precise enough or sufficiently specific to amount to passing on a disclosure.

9.7 One of the pieces of corroborating evidence tips the balance in favour of the respondent, being the text messages (366). The claimant says that he requested a meeting with Mr Lynch but the texts do not bear that out. The claimant accepted in his witness statement (paragraph 39) that Mr Lynch had already decided to dismiss him. Mr Lynch had wanted the meeting and his decision to dismiss the claimant had been taken before the claimant had said anything to him about Pennine Way. As to what was said at the meeting (the dichotomy between the claimant and Mr Lynch), the Tribunal should prefer the evidence of Mr Lynch primarily because it fits with him having decided to call the meeting. The claimant had not said what he now asserts but Mr Lynch did raise with him his conduct on 14 September and the barriers that the claimant had put up in connection with his work.

9.8 The Tribunal should prefer the respondent's evidence because of the pictures that the claimant and Mr Robson both painted about the two of them butting heads. It is clear from the claimant's witness statement (paragraphs 6, 7, 11, 12 and 22) that there were issues between them. This is echoed by Mr Robson in his witness statement. The reasons are shown; the claimant was not a team player. The text messages of 10 September are evidence that there was a meeting that day.

9.9 Even if the claimant makes out that there was a disclosure, that was not the reason for his dismissal. There had been no process but the claimant was only a few weeks into his employment.

The law

10 The principal statutory provisions that are relevant to the issues in this case are contained within the 1996 Act and are set out below:

10.1 Unfair dismissal

94(1) An employee has the right not to be unfairly dismissed by his employer."

10.2 Protected disclosure

103A 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.

10.3 Meaning of "protected disclosure"

43A 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.

10.4 Disclosures qualifying for protection

43B (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—

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

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

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.

Application of the facts and the law to determine the issues

11 The above are the salient facts and submissions relevant to and upon which the Tribunal based its Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

12 I have noted above the difficulty for any tribunal in seeking to make findings and draw conclusions in a case such as this where there is such a dearth of corroborative evidence. That said, the evidence of the respondent's witnesses is corroborative although I am obviously alert to the possibility that they have 'got their heads together' and concocted an elaborate fiction to demonstrate that the claimant was not dismissed for having made a protected disclosure. I was satisfied, however, that there was no suggestion of that in their evidence or, particularly, when each of them was being competently cross-examined by the claimant's representative. In this regard, one of the difficulties for the claimant is that he has been unable to provide any supportive evidence in relation to his

account of events. This is particularly important in this case because, as mentioned above, as the claimant does not have at least two years' continuous employment that is necessary to bring an 'ordinary' complaint of unfair dismissal, it is for him to show, on balance of probabilities, that the disclosure(s) that he asserts he made was the reason (or if more than one, the principal reason) for his dismissal: see Smith v Hayle Town Council [1978] ICR 996 and Ross v Eddie Stobbart Limited EAT 0068/13.

13 As would be expected, the representatives were agreed as to the particular elements that need to be established in a public interest disclosure claim. The first question is whether the claimant disclosed any information at all. In that regard, I accept that the previous dichotomy between disclosure of facts and allegations has been clarified in the decision in Kilraine in respect of which both representatives agreed that the provision of information must be considered in context.

14 In this case the claimant relies upon the provision of information when he attended two particular jobs at Kingsland Close and Pennine Way. As to the first, I have explained above the reasons why I preferred the evidence of Mr Robson. In particular, first, that he and the claimant had not attended to the work, not because of the coating on the ceiling but because he had failed to take the necessary struts; secondly, in any event he would not have troubled the managing director over a relatively minor matter and would not have told the claimant to telephone him on the third day of his new employment. I accept that Mr Robson had immediately realised on arriving at Kingsland Close that the work could not be done and, as such, that there was no reason why he would have told the claimant to telephone Mr Lynch or the claimant would have done so on his own initiative. Also, Mr Lynch confirmed that he had not received a telephone call from the claimant.

15 For these reasons, I find that the claimant did not disclose any information in relation to Kingsland Close. I note also that the claimant did not mention Kingsland Close at all in his claim form (ET1); neither did he suggest in his witness statement or evidence that he had raised Kingsland Close at the meeting with Mr Lynch on 21 September 2018.

16 As to the job at Pennine Way, it is clear from the evidence of both the claimant and Mr Robson that the claimant made the telephone calls that he said he made to Mr Gary Lynch, Mr Currah and Mr Grieves. The claimant's evidence apart, there is no direct evidence as to what the claimant said during those telephone calls but when telephoning Mr Robson, Mr Gary Lynch told him that the claimant had said there was a risk of asbestos at the job, Mr Robson had confirmed to Mr Currah that the job was safe and there was no reason not to continue and Mr Grieves had told Mr Robson that the claimant had said that he was a hazard to the team. On these bases alone, I accept the claimant's evidence that he told these three individuals that there was a risk of asbestos and a report should be obtained. As such, I find that in the case of Pennine Way he did disclose information.

17 Moving on, the next issue is whether the information disclosed was a "qualifying disclosure" as defined in section 43B of the 1996 Act in that, in the reasonable

belief of the claimant it was made in the public interest and tends to show one of the six categories in section 43B(1), that are referred to as the "relevant failures". The claimant relies upon subsections (b), (d) and (f) although his representative accepted that the last mentioned, the deliberate concealing of information, was unlikely to trouble the Tribunal. I do not find that that relevant failure is made out: no evidence was presented to me that there had been, was being or was likely to be a deliberate concealment of any of the other relevant failures. Thus, I need to consider the assertions that the information disclosed tends to show that a person had failed, was failing or was likely to fail to comply with any legal obligation or that the health or safety of any individual had been endangered, was being or was likely to be endangered.

18 I first return to the asserted disclosure in relation to Kingsland Close. If my above decision that the claimant did not disclose any information had been to the contrary, the claimant accepted that, if his account were correct, when he telephoned Mr Lynch he had agreed that they should leave the property until an asbestos report had been obtained and, therefore, there had been no wrongdoing on the part of either Mr Robson or the respondent generally that he could have disclosed. That is important as each of the relevant failures involves some form of malpractice or wrongdoing. Also in this regard although Mr Robson returned to the Kingsland Close property and attended to the work required, the claimant had not then disclosed any information in that respect. Thus, even on the basis of the appellant's account I am not satisfied that there was disclosed information tending to show a breach of any legal obligation or that health and safety was being endangered as more fully set out above.

19 As to the disclosure in respect of Pennine Way, I first remind myself that in the decision in Kilraine it was stated as follows:

> "If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

20 In his oral evidence, the claimant accepted that while he had told Mr Robson that there was no safe process and therefore they could not deal with the potential asbestos in a safe way, he had not gone into the details that he had now provided to the Tribunal. A question arises, therefore, as to whether what he said to Mr Robson had "sufficient factual content and specificity such that it is capable tending to show that listed matter".

21 Considering what I have found above, however, the claimant has satisfied me, on balance of probabilities, that the information he did disclose to Mr Robson and the other three individuals (in the context of him having undergone Category B training in working with asbestos, having had recent practical experience of such work and not having specifically been shown either the Risk Assessment or the Method Statement) did tend to show each of the two remaining relevant failures upon which the claimant relies; including, first, that when he spoke to Mr Robson if he continued with the work he was likely to fail to comply with a legal obligation or health and safety was likely to be endangered and, secondly, that given that at

the time the claimant made his telephone calls to the other individuals Mr Robson was actually undertaking the work, he was at that time failing to comply with a legal obligation and the health or safety of any individual was being endangered. It is irrelevant that the claimant might not have actually used strict legal language or referred expressly to the Regulations or the health and safety legislation generally. It is sufficient that he identified (which I am satisfied he did) that there was a breach of a legal obligation; likewise that health and safety was endangered.

22 It is not sufficient, however, for there simply to be a disclosure. It must, in the reasonable belief of the claimant have been made in the public interest.

23 First, I have no hesitation in finding that disclosing risks associated with asbestos constitutes being in the public interest; not least that in these circumstances that the work being undertaken was for the benefit of and in the houses of vulnerable people. Secondly, the threshold of belief in this respect is relatively low as the test is essentially subjective (ie. it is the belief of the claimant) albeit with an overlay of objectivity in that it must have been his reasonable belief. On behalf of the respondent it was suggested that as the claimant had received relevant training he could not have reasonably believed that an asbestos report was needed. I accept that with his training and experience the claimant would have to establish a higher standard of reasonable belief than someone without such training and experience (Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4) but I am nevertheless satisfied that his disclosure in respect of Pennine Way was, in his reasonable belief, made in the public interest. In that regard I do not overlook the fact that the claimant accepted in oral evidence that Regulation 5 offers alternatives when faced with a possible exposure to asbestos but I accept that it was his reasonable belief that despite the reassurances offered by Mr Robson he was intent on proceeding without a safe working process being in place. As such, in the claimant's reasonable belief, the second alternative did not apply and, in accordance with the first alternative, an asbestos report was necessary.

24 Again I apply the decision in Kilraine. The claimant has satisfied me that he subjectively believed that the information he disclosed did tend show one of the listed matters and, given my above finding that it had sufficient factual content and specificity, his belief was a reasonable belief.

25 Thus, the information disclosed by the claimant in respect of Pennine Way was a "qualifying disclosure" and there was no suggestion that if it was such a disclosure it was other than a "protected disclosure" in that the claimant made it to senior employees of the respondent and therefore to the respondent itself.

26 In light of the above I come to what was recognised throughout the hearing as being the principal issue in this case of whether the claimant making a protected disclosure brought about his dismissal.

27 I have explained above that, on balance, I preferred the evidence of Mr Lynch as to what occurred between him and the claimant at their meeting on 21 September, which I agree was supported by the "timeline" to which he referred. Key events that I have found occurred in that timeline are set out above and need

not be restated here except to repeat that for the reasons set out above I accept the evidence of the respondent's witnesses as to three key points: Mr Lynch asked Mr Robson to tell the claimant of the meeting on 21 September, which he had done in the pub on the Wednesday night rather than the claimant initiating the meeting when he arrived at the office that morning; prior to the meeting Mr Lynch had decided that the likely outcome was the claimant's dismissal (366); at the meeting, Mr Lynch first raised his concerns with regard to the claimant rather than the claimant first raising his concerns regarding Pennine Way.

28 I have considered whether even if that timeline is correct the real reason for the claimant's dismissal was not simply his conduct but it was, indeed, that he had made the protected disclosures relating to the presence of asbestos at Pennine Way and the risks associated therewith. While I consider it to be more likely than not that in their respective conversations with Mr Lynch, Mr Robson and Mr Currah both mentioned the context of the claimant stating to them that an asbestos report was required, there is no evidence that either of them told Mr Lynch that the claimant had also stated that in the absence of such a report the respondent would be in breach of the Regulations and health and safety law generally, and I accept that in those respective conversations Mr Robson focused on the claimant's conduct during the course of that day (particularly sitting in the van and refusing to assist in the work that he was employed to do) while Mr Currah principally reported on the claimant having been critical of Mr Robson.

29 In the above circumstances, I find that the claimant has failed to discharge the burden of proof upon him to satisfy me, on balance of probabilities, that his making of that disclosure was the reason (or if more than one, the principal reason) for his dismissal.

30 That being so, in summary and conclusion, the claimant's complaint that his dismissal by the respondent was unfair, being contrary to sections 94 and 103A of the Employment Rights Act 1996, is not well-founded and is dismissed.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 8 August 2019

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