Case No: 2301200/19

EMPLOYMENT TRIBUNALS

Claimant: **Thomas Smith**

Respondent: **Highscore Scaffolding Ltd**

Heard at: **Ashford Employment Tribunal**

On: **15 October 2019**

Before: **Employment Judge Martin**

Representation
Claimant: **Mr S Crawford – Counsel**
Respondent: **Mr Tapsell - Counsel**

RESERVED JUDGMENT

1. The Claimant did not suffer a detriment for making protected disclosures

2. The Claimant was not dismissed for making protected disclosures

3. The Respondent made unauthorised deductions from the Claimant's pay and shall pay to the Claimant £150.

4. The Claimant's claim for holiday pay was withdrawn and is dismissed.

RESERVED REASONS

1. By claim form presented to the Tribunal on 5 April 2019 Claimant made claims of whistleblowing, unfair dismissal, holiday pay and breach of contract. The Respondent defended the claims.

2. The Respondent is a small scaffolding company owned and managed by Mr Nicholas Cook who gave evidence at the Tribunal. The Claimant gave evidence on his own behalf and there was an agreed bundle of documents comprising approximately 150 pages.

3. Due to an administrative error it was not noted on the file that this claim was a whistleblowing detriment claim which would require members to sit on the Tribunal panel. Rather than come back on another day and incur further costs, both parties confirmed in writing in accordance with section 4 (3) Employment Tribunal's Act 1996 that they wished the claim to proceed with a judge alone.

4. The parties had agreed issues as follows:

    a. Was the online concern expressed to the HSE on 6 December, (PB128) a qualifying disclosure of information which in the reasonable belief of the Claimant tended to show that the health and safety of individuals working at David Wilson homes Preston Grange had been, was likely to be endangered?

    b. Was an email to the Respondent (P B60) on 6 December a qualifying disclosure of information which in the reasonable belief of the Claimant tended to show that the health and safety of individuals working at David Wilson homes Preston Grange had been, was likely to be endangered?

    c. Was the email to Mark Bailey (Regional Director of Barretts David Wilson Homes) (paragraph 22 of the Claimant's witness statement) a qualifying disclosure of information which in the reasonable belief of the Claimant tended to show either: a criminal offence had been committed (fraud); or a person is likely to fail with a legal obligation; or that the health and safety of individuals working at David Wilson homes Preston Grange had been, was likely to be endangered?

    d. Did the Claimant suffer the following detriments as a result of making these disclosures?

        - being sent to a different site of works-Peters village in Strood
        - having his works van removed

    e. What was the reason for dismissal?

    f. Was the dismissal materially influenced by any of the qualifying !

The relevant law

The PID claims

5. ERA 1996 Act, s47B(1), a worker has the right not to be subjected to a detriment by any act "done on the ground that [he or she] has made a protected disclosure". ERA

6. s103A, makes a dismissal automatically unfair where the reason or principal reason is that the employee has made a protected disclosure.

7. Disclosures qualifying for protection are defined by s43B, the material provisions being the following:

    a. **In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following – …**

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

8. Qualifying disclosures are protected where the disclosure is made in circumstances covered by ss43C-43H.

9. The Tribunal is given jurisdiction to consider complaints of PID-based detriments by s48(1A). Subsection (2) stipulates:

    On such a complaint it is for the employer to show the ground on which any act, or any deliberate failure to act, was done.

10. The PID regime came under valuable scrutiny from the EAT in *Cavendish Munro Professional Risks Management Ltd-v-Geduld* [2010] ICR 325. Giving judgment, Slade J stressed that the protection extends to disclosures of *information*, but not to mere allegations. Disclosing information means conveying facts.

11. In *Fecitt-v-NHS Manchester* [2012] IRLR 64, the Court of Appeal held that, for the purposes of a detriment claim, a claimant is entitled to succeed if the Tribunal finds that the PID materially influenced the employer's action.

12. The test is the same as that which applies in discrimination law. This, in the context of the PID jurisdiction, separates detriment claims from complaints for unfair dismissal under s103A: there, as we have stated, the question is whether the making of the disclosure is *the* reason, or at least the principal reason, for dismissal.

13. The question of the burden of proof in claims under the 1996 Act s103A was addressed by the Court of Appeal in *Kuzel-v-Roche Products Ltd* [2008] IRLR 530 CA. Giving the only substantial judgment, Mummery LJ made the following observations (paras 56-60):

> **The employer knows better than anyone else in the world why he dismissed the complainant. Thus, it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.**
>
> **I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
>
> **Having heard the evidence of both sides … it will then be for the [Employment Tribunal] to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences …**
>
> **The [Employment Tribunal] must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the [Tribunal] that the reason was what he asserted it was, it is open to the [Tribunal] to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the [Tribunal] *must* find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.**
>
> **… it may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side.**

The facts that the Tribunal found

14. The Tribunal has found the following facts on the balance of probabilities having heard the evidence and considered the documents taken to by both parties. The Tribunal has considered all matters raised even if they are not specifically recorded below. These reasons and findings are limited to those facts which are relevant to the issues and which are necessary to explain the decision reached.

15. The Respondent's ET3 states that the Claimant was dismissed duri9ng Mr Cook's oral evidence he resiled from this position. No application was made to amend the Response. The Respondent employs approximately eight members of staff. Scaffolders have various different qualifications: trainee; basic; advanced and supervisor SSSTS. The Claimant was qualified to advanced level which meant he was qualified to erect scaffolding which could support structures. Mr Cook was qualified to SSTS level.

16. On 13th December 2017 Mr Cook wrote a letter to the Claimant alleging that the Claimant had committed various acts of misconduct which included amongst other matters "allegations of giving drugs to another Highscore employee who was working on a scaffold at height; allegations of using threatening behaviour towards a Highscore employee and an allegation of physical violence to a Highscore employee over in an incident with a car. The Claimant was invited to a meeting at which he could bring a witness and the letter refers to the Respondent having a strict non-drugtaking and non-drinking policies and that breaking them will not be tolerated. It states that failure to adhere to the rule is a sackable offence.

17. However, despite this Mr Cook simply had a chat with the Claimant and nothing further was done. The Claimant continued working as a Foreman on-site. This is despite Mr Cook's evidence that he thought the Claimant had committed these matters. He described his company as being like a family and that he wanted to support the Claimant despite the allegations which were very serious.

18. There was evidence before the Tribunal that Mr Cook had been supportive to the Claimant by advancing wages when the Claimant was strapped for cash which is something the Claimant said he appreciated.

19. The Claimant commenced employment with the Respondent on 1 May 2017 as an employee. At the time that the events in relation to these proceedings occurred he was employed on the David Wilson Homes site. On 19 November 2018 Mr Michael Clifford an internal Health and Safety Officer with David Wilson Homes carried out an on-site safety assessment and found an untrained scaffolder LJ working unsafely. LJ was asked to leave the site and subsequently dismissed from the Respondent.

20. On site that day was the Claimant and another scaffolder called Sam. Sam was qualified to a basic level and was working near to LJ. The Claimant was working elsewhere on the site. The Claimant was de-facto foreman for the site and was the person that David Wilson Homes went to if there was any query. Mr Cook was not on site daily attending only once or twice a week to carry out safety checks and sign off paperwork.

21. As a result of this incident, David Wilson Homes did not want the Claimant to attend the site again. David Wilson Homes considered the Claimant to be responsible for the lack of supervision of LJ. The Claimant's position is that Sam was supervising LJ and that he should

not be held responsible. He considers that he was made a scapegoat by Mr Cook who was worried that his contractual relationship with David Wilson Homes might be jeopardised because of this incident.

22. This was denied by Mr Cook whose evidence was that he tried to stand up for the Claimant in a meeting he had with David Wilson Homes but that they take a very hard line and he found it difficult, if not impossible, to get across that the Claimant was not to blame. The upshot was that the Claimant could not return to that site. David Wilson Homes told the Respondent that there should be an SSSTS qualified scaffolder on site at all times. The Claimant's replacement was qualified to this level. No disciplinary action was taken against the Claimant who was moved to another site. The Claimant was very unhappy about this situation. There was no suggestion that the Claimant's employment with the Respondent was in jeopardy.

23. An issue then arose because the Claimant had been using a company van to get to the David Wilson Homes site. When the van was offered to the Claimant he was delighted. He sent a long message to Mr Cook on 4 December 2018 which included "**you giving me the van was best thing that happened to me over this rough time….I'm more loyal than ever now. I'm trying to get back on my feet and I try to never be a berden on you."** (sic)

24. There was a dispute as to the status of the van. The Claimant's evidence was that it was a contractual entitlement and that Mr Cook told him that he should sell his car because he had the van. This message to Mr Cook confirms that this was the case. Mr Cook on the other hand, told the Tribunal that the van was not a contractual entitlement but was given to him as he was the foreman on the David Wilson site and because he gave Sam a lift to work most days. Mr Cook's case is that the reason he wanted the van back was to give it to the foreman who replaced the Claimant on site.

25. This culminated with Mr Cook requesting the van be returned by email dated 9 December 2018 telling the Claimant was not to go to the Peters Village site (this was the replacement site the Claimant was sent to) the next day as there was no work available for him. Mr Cook told the Tribunal that the Peters Village site was fully staffed but as the Claimant could not work at David Wilson homes he also put the Claimant there.

26. The Claimant and Mr Cook communicated largely by WhatsApp and in the bundle was an exchange between them from 4 December through to 9th December. 9 December 2018 was a Sunday. These messages comprise messages from the Claimant to Mr Cook most of them being sent on 9 December 2018.

27. During the course of this exchange Mr Cook asked the Claimant to return the van saying at one stage "**Tommy you are part of the family but the van needs to go to John I am afraid you have a job with me still no probs sorry not got back to you since the accident been busy dealing with that**". This was dated Thursday, 6 December 2018.

28. The tone of the Claimant's messages to Mr Cook was terse to say the least. He asked for his contract of employment saying that "**by law I should have been given my contract within the first two months**" and goes on to say: **"by law you cannot deduct a penny from my wages without it being in writing"**. This was in relation to the deductions (which the Respondent has admitted were unlawful) which were made to pay back for a scaffolding screwdriver the Respondent bought on the Claimant's behalf. Essentially the Claimant was saying that without a van he could not get to work. He asked Mr Cook if Mr Cook had a plan, to which Mr Cook replied "**not got a plan the mo Tommy I may be able to help if you find a cheap car not sure how rich we are in the bank at the moment sounds silly but lots of scarfs (sic) to pay every week don't leave a lot"**. This was dated Saturday, 8 December 2018.

29. The Claimant then accused the Respondent of avoiding tax by use of self-employed persons. He sent a message which included a screenshot of something saying **"When may an employer withdraw the use of the company car?"** (Dated 9 December 2018). Mr Cook responded: **"Please stop sending texts you are now harassing me please have the van at the Texaco petrol station at 10 AM tomorrow morning in high street Herne Bay"**. The Claimant then accused Mr Cook of lying and speaking badly about personnel at David Wilson Homes. The Claimant then sent a further clip: "**The taxman cometh-don't get caught in the 'false self-employment' trap"** saying that HMRC needed to be informed. Mr Cook told the Tribunal that he felt that he was being harassed especially as this all took place on the Sunday when he was with his family.

30. The Claimant recorded a telephone conversation he had with Mr Cook. This was a long conversation with the transcript comprising 11 pages. This was dated 7 December 2018. In this conversation Mr Cook is recorded saying **"I give you a van to pick Sam up because he had a situation where that car was a piece of S****and it was letting you down and it was really knackered. And you said the car was knackered. I'm going to leave. I've been offered another job with another van, more money. I said I tell you what what I told you about the van"**.

31. The Claimant insisted that the van was "**my personal vehicle**" which Mr Cook was trying to take away and give to somebody else who has a vehicle. During this conversation Mr Cook says "**I lost a contract worth about £6 million. They will never give us another job again"**. This was in relation to David Wilson Homes and Mr Cooks belief that the incident had cost him the opportunity of working on future sites for them. The Claimant says "**that's not a result of me. I wasn't a supervisor there. I don't didn't have the supervising ticket**" to which Mr Cook replies "**who was the foreman there Tommy.**" Quite clearly tempers were raised and emotions high during this conversation. Mr Cook confirmed to the Claimant that he would not be able to work at the David Wilson site again which the Claimant thought was unfair, and Mr Cook said was their choice. Mr Cook is recorded as saying that he tried to stand up for the Claimant but David Wilson Homes would not have it.

32. There were numerous further emails sent on 9 December. The communications show both parties with an entrenched position with the

Claimant saying **that "I will be keeping the van as by law it can not be took away from me as you advised me to sell my personal vehicle and use the van for my personal vehicle**". Mr Cook was insisting the van was returned.

33. The Claimant was not due to work on Monday, 10 December 2018 as Mr Cook told him there was no work available for him. He was due to return the van at 10 am that morning. He did not do so. Eventually the van was returned by a garage coming to the Claimant's home and taking it back.

34. After that there was an email from the Claimant indicating that Mr Cook had blocked his phone number and asking if he was insured to drive the van. This was not replied to. On 14 December 2018 the Claimant sent an email "**I'm emailing to ask if I can have some clarification**". Mr Cook never contacted the Claimant to tell him to go on site and the Claimant never contacted Mr Cook to ask where he was working next. The Tribunal finds that reading the communications in context, the request for clarification was about whether he was insured to drive the van.

35. At the end of December 2018, the Claimant received a letter from the pension provider 'Nest' informing him that the Respondent was no longer making payments into that scheme. A P45 was issued on 7 December 2018 giving this date as the date the Claimant left the Respondent's employment.

36. Whilst all of this was happening, the Claimant raised a concern with Health and Safety Executive which he informed Mr Cook about on 6 December 2018 in an email. He said: **"hi Nick I raised a concern with HSE as to why I was removed from Preston I believe they miss judged my roll and think I am the supervisor. We both know there mistaken as I do not or ever have been on a supervisor course, SSSTS, I thought everybody knew that you was the supervisor. This is why maybe Michael Clifford wasn't satisfied in my response to LJ working unsafe. I had not had the adequate training for responding to a incident I have no knowledge about. It's confusing as there was a qualified scaffolder within 2m of the incidence and I was removed from site. Well something seems unsafe and I worry about the safety of the other contractors on site. Also can you please send me a copy of my contract I have never received one".**

37. The Claimant also raised this issue with Mr Bailey from David Wilson Homes who did not engage with the Claimant saying he was unable to assist as his employment was with the Respondent and that the Claimant needed to discuss his employment directly with them. There is evidence of the Claimant engaging further with Mr Bailey also on 7 December raising the same points with a similar response from Mr Bailey.

38. The online disclosure to the Health and Safety Executive states "**I was recently removed from the site because a scaffolder was working on safe. I believe my someone has misled David Wilson homes. By telling them I was a supervisor with a SSSTS. I don't hold such a ticket. Plus I've never done paperwork for scaffolding on this site. Why would I be removed from site because of someone working on safe 200 m away out of sight. Now I'm concerned there's been misleading information also there are drawings for the scaffold that isn't followed. Not one window tie been put in and no buttresses. And not one safety inspector has picked this up. There's far too many workmen**

on site as there is facilities on the site is a mess and overcrowded. I was summoned by Michael Clifford head safety inspector of Barratt homes and questioned me about the other employee working on safe. The employee was working with into the supervision of another scaffolder. So I'm confused about who or what they think my role was as I was no where near this incident and had no knowledge. I didn't know how to respond to the questioning of Michael Clifford so I was removed from site. I believe they think I hold an SS STS stop my employer is a supervisor. Are checks by safety inspectors being carried out correctly?"

The Tribunal's conclusions

1. The Tribunal first considered whether the disclosures relied on were protected disclosures. Disclosures relied on are the email to the Respondent of 6 December 2018 and the online concern expressed to the Health and Safety Executive on 6 December 2018.

2. The online concern to HSE is set out above. The Tribunal has no hesitation in saying this was a protected disclosure. Although it begins by talking about matters personal to the Claimant it goes on to disclose information about matters about health and safety on site which would be in the public interest such as window ties not being put in and there being no buttresses. This is information of health and safety breaches which amount to a protected disclosure. There was no evidence to suggest that Mr Cook or anyone else from the Respondent was aware of the specific content of this communication.

3. The only thing the Respondent knew of this is the email from the Claimant to Mr Cook on the same date, which is also set out above. This relates to the Claimant's personal situation of being removed from site and his view that this was unfair. There is reference to **"something seems unsafe and I worry about the safety of the other contractors on site**", but no information is given. This is an allegation only and therefore this communication is not a protected disclosure on the grounds that the first part is not in the public interest as it relates solely to the Claimant's particular situation and the reference to safety is an allegation only. The information put into the report to HSE is missing from this document.

4. In relation to the communications the Claimant had with Mr Bailey, these emails are between the Claimant and Mr Bailey only. They were not copied to Mr Cook. There was no evidence that Mr Cook or anyone from the Respondent was aware of these communications.

5. The Tribunal then considered whether the Claimant was dismissed by the Respondent or resigned by walking off site as put by the Respondent. There is no documentation to assist the Tribunal by way of any letter showing what the intention of the parties was. As noted above, the Claimant did not ask where he should be working and Mr Cook never notified the Claimant where to report for work after 10 December 2018 when he was told he was not required on site.

6. The Claimant's case is he was told he was not required and that this constituted a dismissal. The Respondent denies this, saying that scaffolders often walk of site to get a better job and referred the Tribunal to previous communication from the Claimant saying he had an offer of another job. The Claimant submitted that his email of 14 December 2018 asking for clarification was in relation to his employment status. However, as already the Tribunal concludes that this was in relation to whether he was insured to drive the van or not and did not relate to his employment status. There is no mention of his employment status at all. The only outstanding query was about the insurance.

7. There is nothing definitive to assist the Tribunal in coming to its decision about whether the Claimant was dismissed by the Respondent in the evidence. Both parties gave oral submissions. During the Respondent's submissions it was submitted that Mr Cook filled in the ET3 without legal advice and had made a mistake when he said that the Claimant had been dismissed by the Respondent and that the Respondent's position was that the Claimant walked off the job. This forms part of the consideration as to whether there was a dismissal or a resignation. The Tribunal does not accept that the word 'dismissal' gives rise to any ambiguity. The Respodnen5t accep5ted in its response that the Claimant was dismissed, there was no application to amend and in these circumstances the Tribunal find that when the Respondent said it agreed the Claimant had been dismissed it was clearly stating that it agreed it had dismissed the Claimant.

8. In the absence of any documentary evidence and taking into account the response, the Tribunal has considered the factual matrix and whether the conduct of the parties tend to indicate a dismissal or resignation.

9. The Tribunal find on balance that the Claimant was dismissed by Mr Cook who became irritated with the Claimant because he would not return the van and the quantity and nature of the communications on 9 December. However, the Tribunal finds that the Claimant was not dismissed because he made a protected disclosure. As set out above, Mr Cook was unaware of the disclosures the Claimant made to HSE or Mr Bailey and the email to Mr Cook did not amount to a protected disclosure. Given that the Claimant had less than two years' service, this means that his claim for unfair dismissal is dismissed.

10. Similarly, the Claimant's claim of detriment in having his van removed for making a protected disclosure is also dismissed.

11. Although not necessary for this judgment, for completeness the Tribunal finds that the Respondent was within its rights to ask for the return of the van which was company property.

12. The Respondent admitted made making unauthorised deductions of pay and judgement is therefore given for £150 as agreed. The Claimant withdrew his claim for holiday pay.

Employment Judge Martin

Date: 18 October 2019