



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr J Rose

**Respondent:** All Answers Limited

**Heard at:** Nottingham      **On:** Monday 11 November 2019

**Before:** Employment Judge M Butler (sitting alone)

## Representatives

**Claimant:** In person

**Respondent:** Ms C Elvin, Consultant

# RESERVED JUDGMENT

The judgment of the Employment Tribunal Judge is that the Claimant's claim of automatically unfair dismissal is not well founded and is dismissed.

# REASONS

## Background

1. The Claimant submitted a claim form to the Tribunal on 29 December 2018. He claims he was automatically unfairly dismissed from his role as a Web Developer for the Respondent as a result of having raised protected disclosures contrary to section 103A of the Employment Rights Act 1996 (ERA). He says he raised a number of informal concerns during his employment with the Respondent relating to data protection issues. On 18 July 2018 he submitted a report highlighting potential data protection breaches and raised further concerns directly with his line manager, Mr T McLellan in a meeting on 18 October 2018. He then says that on 19 October 2018 he was called into a meeting with Mr McLellan and Mr D Dennehy, the Respondent's Chief Operating Officer, when he was advised he was being dismissed for poor attitude and performance. The Claimant then raised certain personal issues with Mr Dennehy who said there would be a further meeting on 23 October at which further consideration would be given to the dismissal.

At that meeting, the Claimant was criticised for poor performance and conduct and he was advised he was dismissed which dismissal was confirmed by letter received on 24 October. The Claimant appealed against that dismissal and the Respondent maintains the appeal was fixed for 9 November 2018 but the Claimant did not attend and he refused to attend when a further date for the appeal was arranged for 12 November.

2. The Respondent's account is that the decision to terminate the Claimant's employment was based on his performance in his role and the way he conducted himself generally within the office and also in regard to his relationships with his colleagues. The Respondent denies that any protected disclosure was made and the Claimant's dismissal was not related to any such disclosures. A P45 was sent to the Claimant stating the date of his dismissal as 19 October 2018.

### **The Issues**

3. As set out in the record of a closed telephone Preliminary Hearing heard by Regional Employment Judge Swann on 14 June 2019, the issues to be determined are:

3.1 Did the Claimant make a protected disclosure in any form to Mr McLellan and, specifically, at the meeting on 18 October 2018 pursuant to section 43B(a) and (b) of the ERA?

3.2 Was the Claimant dismissed as a result of raising those disclosures contrary to section 103A of the ERA.

3.3 Was the Claimant dismissed by reason of his alleged poor performance and conduct rather than as a result of the protected disclosures he says he made?

3.4 What was the correct date of the termination of the Claimant's employment?

### **The Law**

4. Section 103A ERA provides that:

"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."

5. Section 43B ERA provides that:

"A qualifying disclosure means any disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following:

(a) that a criminal offence has been committed, is being committed or is likely to be committed;

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

## The Evidence

6. There was an agreed bundle of documents running to 439 pages and page numbers in this judgment refer to pages in that bundle.

7. I heard oral evidence from the Claimant and for the Respondent from Mr D Spencer, Aftercare Manager, Mr S O'Brien, Senior Web Developer, Mr T McLellan, UE Team Manager, Mr D Dennehy, Chief Operating Officer and Ms K Bowers, Finance and HR Manager.

8. In relation to the issues before me, the evidence could not have been more contradictory, At the heart of this case is the central issue of whether the Claimant made a public interest disclosure to the Respondent. Put simply, the Claimant says he did and the Respondent, through its witnesses, says he did not. It is for the Claimant to establish that he made the disclosures and this fundamental question can only be answered by reviewing the evidence before me.

9. The Claimant's evidence was given in a confident manner. He says he commenced employment with the Respondent as a Junior Web Designer on 19 March 2018. His employment was subject to a six month probationary period but he was advised by Mr Dennehy after only 3 months that he had passed his probationary period (page 206) and was given a pay rise of £3,000 per annum (page 207). He was also enrolled in the Respondent's monthly bonus scheme.

10. In June 2018, the Claimant's then Manager, Ian Jones, stepped down from his role. The Claimant wished to be considered for that role and expressed his interest to Mr Dennehy. He submitted a report in relation to the Respondent's IT systems with recommendations as to how they could be improved and in what timescale (page 214). Nothing in that report amounts to a public interest disclosure. It makes a number of references to the system being potentially open to hacking but those comments do not amount to a public interest disclosure. The report was discussed at the Claimant's appraisal on 6 September 2018 and the Claimant says at paragraph 18 of his witness statement that he raised GDPR issues in his appraisal but did not mention them in his report.

11. The Claimant strongly denied that he reacted badly to the fact that Mr McLellan was appointed to the Manager's role or when Mr O'Brien reviewed his work, requested changes or gave feedback.

12. Mr Jones, who did not give evidence, made a note on the Claimant's behaviour with specific reference to an incident where one of the teams was trying to concentrate on some work and the Claimant was making a lot of noise (page 317). Mr Jones sent the Claimant an e-mail asking him to be quieter. He says the Claimant then came to see Mr Jones and asked him who told him to tell the Claimant to be quiet because he wanted to have a word with them. In his evidence, the Claimant firstly said he did not ask who it was because he wanted to have a word with them, and then, a few seconds later, admitted he did ask who it was but maintains that he did not say he wanted to have a word with them.

13. On 9 October 2018, the Claimant was pulled from a project he had been working on which he describes as "highly unreasonable". He then claims Mr McLellan took his company laptop away from him.

14. On 12 October 2018, the Claimant alleges Mr McLellan told his team that they were going to do some training. All of them would be responsible for choosing the field they wished to train in. The Claimant expressed an interest in developing his C# skills. Later that day, he says, Mr McLellan confirmed all training requests had been granted except for the Claimant's who was to undergo JavaScript training. The Claimant says this was as a result of him raising concerns about the legality of the Respondent's data handling and, in particular, his instruction from Mr McLellan on 8 October 2018 to remove a function of the system which allowed the deletion of personal data.

15. At a meeting with Mr McLellan on 18 October 2018, the Claimant says he raised concerns which amounted to protected disclosures directly with Mr McLellan and gave him evidence in documentary form of breaches of the GDPR by the Respondent. He says he took this evidence from his bag which "goes everywhere" with him. Mr McLellan denies that any of these concerns were raised with him or that he was given any documents. The Claimant failed to mention the handing of documents to Mr McLellan in his original claim form, only making reference to it in further and better particulars which he was ordered to provide. At paragraph 127 of his witness statement, he says that whilst preparing for the start of his new job he emptied his work bag in preparation and discovered the front sheet of the documents he had presented to Mr McLellan. In his evidence he said the reference to front sheet was a typographical error and should have referred to front sheets. The Claimant maintains that this is why he has only produced in the bundle three pages of the documents submitted to Mr McLellan which are a printout of details of researchers held on the Respondent's database. I note that the Claimant further makes no mention of handing documents to Mr McLellan in his letter to Ms Bowers regarding his appeal (page 295).

16. After the meeting with Mr McLellan, the Claimant requested details of HR contacts. Mr McLellan asked Ms Emily Brown to act as an independent third party although she is not an HR specialist. She gave the Claimant details of Ms Bowers's number and the Respondent's grievance procedure. The Claimant did not raise any issues in relation to the Respondent's data protection system.

17. On 19 October 2018 the Claimant was invited to a meeting with Mr Dennehy. When he went into his office Mr McLellan was also there. The minutes of the meeting, composed in response to the Claimant's appeal against his dismissal, are at page 248. The Claimant admits he became emotional during the meeting. He does not dispute the minutes in his witness statement. The Claimant says at paragraph 76 of his witness statement that Mr Dennehy told him he was terminating his contract of employment. The Claimant then became emotional and referred to the fact that his son was ill and had kept him awake for most of the previous night. Mr Dennehy then said they would take some advice and "we will pick this up Monday". The Claimant then says that there was no confirmation in this meeting that he had been dismissed and on the other hand said "he fired me with immediate effect". The Claimant alleges that he told Mr Dennehy (paragraph 81 of his statement) "this is nothing to do with my attitude, this is because of the concerns I raised with him" (pointing to Mr McLellan). This is entirely inconsistent with the Claimant's oral evidence where he says Mr Dennehy "didn't talk about my attitude".

18. The Claimant attended a further meeting on 22 October, accompanied by his sister, which Mr McLellan did not attend. He mainly accepts the minutes of that meeting at page 254 as being accurate.

19. After that meeting, Mr Dennehy wrote to the Claimant in a letter dated 24 October (page 259) which he e-mailed and posted to him.

20. The Claimant then appealed (page 265), was invited to an appeal hearing to be chaired by Ms Bowers (page 272) but that hearing did not go ahead because it seems the Claimant attended early and Ms Bowers may not have been exactly on time but says she attended at the designated time. The Claimant had, in response to a request by Ms Bowers, given further details of his grounds of appeal on 6 November (page 290). Ms Bowers interviewed a number of members of staff in readiness for the appeal hearing. The Claimant also submitted a statement dated 8 November which is at page 348.

21. The appeal hearing was rearranged for 14 November 2018 but the Claimant did not attend preferring to rely on his statement (page 348).

22. Ms Bowers provided copies of the relevant witness statement to the Claimant who did not attend the appeal hearing. Ms Bowers says she considered the matters and wrote to the Claimant on 15 November confirming his appeal was not upheld. Somewhat bizarrely, she sent two letters to him, the second of which includes an additional paragraph saying that legal advice had been taken and the procedure followed found to be compliant with the Respondent's policies.

23. I note that in information provided by the Claimant to Ms Bowers (page 290) the Claimant refers to his meeting with Mr McLellan on 18 October (page 295) but says nothing about handing him any documents.

24. The Claimant confirmed to me in answering my questions that his allegations against the Respondent were that it had contravened the GDPR by holding unnecessary data, holding it longer than it was necessary so it became outdated and did not delete data when asked to do so by the person concerned. He did not report these matters to the ICO.

25. Mr Spencer gave evidence and categorically stated that the Respondent's policy of a user plagiarising the research was adhered to, contrary to the Claimant's assertions.

26. Mr O'Brien said that data was generally archived after two years of inactivity and deleted after six years. Requests the Respondent receives to delete data are generally responded to by saying it will be archived and not accessible to employees. The majority of people making the request are happy with that and those who insist on deletion have their data deleted. He says the Respondent has 70,000 customers and 30,000 researcher records all in various stages from being active, idle or archived. He says the Claimant's concerns about data, especially with regard to the GDPR, are inaccurate.

27. Mr McLellan's evidence rebutted all the Claimant's allegations regarding protected disclosures. In answer to the allegation that there had been no reference to the Claimant's behaviours, he said he documented those behaviours with HR but accepted he never discussed them with the Claimant himself. In particular, he said the Claimant raised no concerns with him when they met on 8 October. In relation to the documents at pages 46 to 48 he said the Claimant gave him no documents at the meeting on 19 October.

He accepted he called Mr Dennehy on his day off because he was concerned the Claimant was going to complain about him and not because of his protected disclosures because none had been made. Further, he said that no documents were given to him by the Claimant at any time during the Claimant's employment.

28. Mr Dennehy confirmed the Claimant had passed his probationary period three months early based on his personal performance and that of the team he worked in. Whilst the Claimant made much of being in a position of trust because he was a key holder, Mr Dennehy said a number of other employees also held keys. He trusted all of the staff. In response to the Claimant's allegation that the £3,000 per annum increase in salary on passing his probation was not contractual, he said it was because it was included in the job offer and confirmed to the recruitment agency the Respondent used. He accepted the Claimant was never subjected to the Respondent's disciplinary procedure but there had been verbal comments from other staff members regarding the Claimant's negative attitude.

29. In relation to the events of 19 October, Mr Dennehy said he decided to terminate the Claimant's employment after discussions with Mr Jones and Mr McLellan. He spoke to HR for guidance who told him it was best to terminate the Claimant's employment immediately. He confirmed the Claimant was not accused of gross misconduct, was not suspended and there was no investigation prior to his dismissal.

30. Mr Dennehy said that at the meeting on 19 October the Claimant was emotional, crying and agitated. He said a number of times "you cannot do this". The Claimant also referred to his home life and was unhappy to proceed with the meeting with Mr McLellan there. As a result, Mr Dennehy decided to adjourn the meeting and reconvene the following Monday. Page 247 summarises what happened and he accepted that these minutes were composed after Ms Bowers requested them. The fact that they referred to no protected disclosures being made was because the Claimant had referred to them in his appeal documents.

31. At the meeting on 19 October, Mr Dennehy said he decided to adjourn the meeting and would reconvene the following Monday in light of what the Claimant had said about his home life.

32. The P45 at page 434 mistakenly refers to the effective date of termination of the Claimant's employment as 19 October. This was an administrative mistake. The meeting on 22 October was not to extract information from the Claimant regarding his protected disclosures because he had not made any. His policy was that, if the circumstances require it, he will dismiss an employee if it is a "short service contract".

33. The first time he was aware the Claimant was claiming unfair dismissal for making a protected disclosure was when he saw the Claimant's appeal documents. Mr Dennehy said that the Claimant passed his probation after three months after discussions with Mr Jones who said the Claimant lacked confidence and Mr Jones thought passing his probation would give him more confidence.

34. In response to my questions, Mr Dennehy said he did not hear any whispers about the Claimant's negativity or attitude in the first three months of his employment. This came later and he referred to the e-mail from Mr Jones asking the Claimant to refrain from making so much noise. He also overheard the Claimant having a conversation with Mr O'Brien which he thought was disrespectful.

35. The above witnesses of the Respondent gave their evidence in a considered manner, replying promptly to questions in cross-examination and with no hint of inconsistency.

36. Ms Bowers gave her evidence in an aggressive, loud and excitable manner, often questioning the Claimant and had to be advised that it was her position in the proceedings to answer questions.

37. She confirmed that her investigation began when she received his appeal. She did not remember why she issued two outcome letters. She added the paragraph in the second letter because the Claimant had given no new evidence to back up his claims.

38. In relation to researchers whose details were retained on the Respondent's system for more than six years, she said that some of them come back to work for the Respondent after many years of inactivity.

39. In relation to the evidence before me, I found the Claimant's evidence to be inconsistent in a number of respects. Firstly, the evidence in his witness statement was inconsistent with his oral evidence in relation to what was said at the meeting with Mr Dennehy on 19 October. On the one hand he said that his attitude was not mentioned at all and on the other that it was. Secondly, I do not accept the Claimant's evidence in relation to the documents given to Mr McLellan on 18 October. Mr McLellan said it would have been unusual for the Claimant to bring his bag to an internal meeting. The Claimant said he gave documents to Mr McLellan but in pulling them out of his bag, left behind three pages of documents (pages 46 to 48). The Claimant struck me as being extremely thorough in researching the allegations he makes and preparing supporting evidence. If his bag does indeed go everywhere with him, I find it hard to believe he would have left three pages of a document in that bag. His witness statement also refers to one sheet which, by the time of the hearing, became three. There is also an issue in the fact that his original claim form does not refer to these documents.

40. I appreciate the Claimant may perceive these issues as being relatively minor but they are not. They go to the crux of the issues before me, namely, whether he made protected disclosures. Inconsistency in his evidence affects the credibility of that evidence. This is material when viewed in the light of the consistency of the evidence of the Respondent's witnesses notwithstanding the manner in which Ms Bowers gave her evidence.

## Findings of Fact

41. I make these findings based on the evidence and in relation to the issues before me. The parties should note that, whether there are or were issues with the way in which the Respondent dealt with data, and regardless of whether the Claimant was ever put on notice about his behaviours, the issue remains whether he made protected disclosures:

41.1 The Claimant commenced employment with the Respondent on 19 March 2018 as a Junior Web Designer. He was subject to a probationary period of six months but was advised that he had passed his probation after three months and was given a £3,000 per annum salary increase.

41.2 In June 2018, the Claimant's then Manager, Mr Jones, stood down as his Manager. The Claimant made it clear to Mr Dennehy that he would like to be considered for the Manager's role and produced a report documenting how the Respondent's IT system could be improved. The Claimant was not ultimately considered for the role which was given to Mr McLellan. There were some issues with the Claimant's behaviours. In particular, he did not react well to criticism as evidenced by the incident when he was asked in an e-mail from Mr Jones to keep the noise down.

41.3 After receiving details of criteria for the Respondent's bonus scheme, the Claimant had a conversation with Mr McLellan after a team meeting on 18 October. Mr McLellan had asked for that meeting to be in private as he thought it was about the changes to the bonus scheme and, having received feedback from the Claimant in writing, did not wish to have the conversation in the meeting as it might unsettle the rest of the team. At this meeting with Mr McLellan, the Claimant made no references to the Respondent's systems and how they breached the GDPR. He gave no documents to Mr McLellan.

41.4 After that meeting, the Claimant asked Mr McLellan to put him in touch with the Respondent's HR Officer. Ms Bowen then gave the Claimant contact details for Ms Bowers. She also sent a copy of the Respondent's grievance procedure to the Claimant.

41.5 Following the meeting, Mr McLellan telephoned Mr Dennehy who had a day off. He was concerned that the Claimant was going to make a complaint about him.

41.6 Mr Dennehy resolved to meet with the Claimant the following day and, having taken advice, decided he would terminate the Claimant's contract with immediate effect and with payment in lieu of one week's notice. He invited the Claimant to a meeting without telling him what it was for and Mr McLellan was also in attendance. Mr Dennehy told the Claimant that his attitude was at times negative and he had decided to terminate his employment. The Claimant became emotional and agitated and threatened legal action. He referred to personal issues and Mr Dennehy decided to adjourn the meeting to reconvene on 22 October.



41.7 After the meeting on 22 October, Mr Dennehy wrote to the Claimant setting out the reasons for the dismissal and confirming it.

41.8 The Claimant was given a right of appeal which he exercised. In his appeal documentation, for the first time he attributed his dismissal to having made protected disclosures in relation to the Respondent's handling of data. Due to a mix up in relation to the timing of the appeal hearing, it seems the Claimant thought Ms Bowers was not going to attend and when she did attend he had left.

41.9 The appeal hearing was rearranged for 14 November but the Claimant elected not to attend and to make written submissions. Ms Bowers upheld the original dismissal decision.

## **Submissions**

42. For the Respondent, Ms Elvin said that if the Claimant had not been dismissed for making a public interest disclosure, his claim must be dismissed. Mr McLellan's evidence was clear that no public interest disclosure had been made to him by the Claimant. There was no record of any such disclosure being raised on 19 or 22 October and it was relevant that the Claimant did not raise them at these meetings. The reason he did not raise them was because he had not made any such disclosures.

43. It was logical to find that the Claimant did not take a bag with him to an internal meeting and only disclosed pages 46 to 48 of the bundle to the Respondent in these proceedings. He only raised disclosures in his appeal.

44. The Respondent's evidence contained examples of the Claimant's poor attitude. These included his unreasonable and destructive reaction to being asked to keep the noise down by Mr Jones; he disliked negative feedback and did not challenge Mr O'Brien's evidence in this regard; he did not wish to attend Java training despite Mr McLellan being perfectly entitled to make this decision; and he reacted badly to amendments in the bonus system.

45. The Claimant submitted that since there was no supporting evidence of alleged performance or attitude issues he must have been dismissed for making a public interest disclosure. He was not taken through the disciplinary procedure and documents had been retrospectively created. ACAS guidance was ignored. The documents at pages 46 to 48 were downloaded before 19 October when his access to the system was denied. He was left as a key holder despite the alleged issues the Respondents had with him and had passed his probation three months early due to his good performance.

## **Conclusions**

46. There were many matters raised in this case which had nothing to do with the issue before me. The only issue before me was whether the Claimant was dismissed for making a public interest disclosure. There is a clear disagreement on this issue.

47. The Claimant understandably feels aggrieved at being dismissed for having a poor attitude and poor performance when these matters were not raised with him. Further, the Respondent followed no formal procedure at all. He received no warnings and Mr Dennehy's minutes of the meeting on 19 October 2018 were compiled after the event. I accept that the manner in which the Claimant's dismissal was handled left much to be desired. Keeping accurate records is the starting point in any disciplinary or dismissal proceedings undertaken by an employer.

48. But the only way the Claimant can succeed in his claim is to establish that he was dismissed for making a public interest disclosure. I have heard much evidence, particularly from the Claimant, about data breaches by the Respondent. These include the retention of personal information long after it should have been deleted. It was accepted by the Respondent that there were issues with some of the data it held. However, it was satisfied, as was the ICO, that its "roadmapping" meant that there was no concern to the authorities. Other examples given by the Claimant were simply denied by the Respondent.

49. I take on board what the Claimant said in relation to alleged data breaches. However, that does not interfere in this case with the central issue, namely, whether the Claimant actually made a public interest disclosure or disclosures to the Respondent about the alleged breaches.

50. In reaching my conclusion on this issue, I refer to my findings of fact in which I did not accept the Claimant's evidence as to making these disclosures. Following the Court of Appeal judgment in **Smith v Hayle Town Council** [1978] ICR 996 CA, which was followed in two subsequent EAT judgments, the most recent of which being **Ross v Eddie Stobart Limited** EAT 0068/13, where an employee lacks the requisite two years' continuous service to claim ordinary unfair dismissal, he or she will acquire the burden of showing, on the balance of probabilities, that the reason for dismissal was an automatically unfair one.

51. Following the reasoning in these cases, by which I am bound, the Claimant must establish on the balance of probabilities that he made the disclosures he said he made. I have already commented on certain inconsistencies in his evidence. Most notably, the Claimant seems to have had two opportunities to raise with Mr Dennehy the fact that he was being singled out for dismissal after raising public interest disclosures with Mr McLellan yet he did not mention them. In fact, he made no reference to these until he submitted appeal documents to Ms Bowers. There was also the incident in which he alleged he did not give all of the documents he had to Mr McLellan but found them in his bag over two months later. Again, he made reference to attitude not being raised with him and then changing his evidence.

52. All of these matters of evidence lead me to conclude, on the balance of probabilities, that the Claimant's evidence regarding the making of alleged public interest disclosures does not satisfy the burden of proof upon him.

53. For the above reasons, I find that the claim is not well founded and is dismissed.

---

Employment Judge M Butler

Date 12 December 2019

JUDGMENT SENT TO THE PARTIES ON

.....

.....  
FOR THE TRIBUNAL OFFICE

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.