EMPLOYMENT TRIBUNALS

Claimant: Mr S Stanton

Respondent: Overbury Plc

Heard at: London Central **On:** 17, 18 & 22 July 2019

Before: Employment Judge Khan

Representation
Claimant: E Hammer, Solicitor
Respondent: J Lewis, Counsel

RESERVED JUDGMENT

The judgment of the tribunal is that the respondent did not unfairly dismiss the claimant and this claim is dismissed.

REASONS

1. By an ET1 presented on 21 November 2018, the claimant complains that he was automatically unfairly dismissed by reason that he made a protected disclosure. The respondent resists this claim.

2. The claimant applied to amend his claim to rely on additional information in respect of the three alleged protected disclosures. The respondent resisted this application. I agreed to this application having considered the balance of hardship and the interests of justice.

The Issues

3. The issues on liability that I was required to determine are set out below:

   3.1 Did the claimant make any or all of the disclosures upon which he relies?

   3.2 If so, when were those disclosures made and to whom were they made?

The claimant particularised the three alleged protected disclosures on 26 April 2019 ("further particulars"), as ordered by the tribunal. These particulars as amended (as highlighted) are as follows:

3.2.1 On 2 May 2018 he told Andrius Vaitkus that a welder was operating in an exclusion zone on floor 8 and was spraying molten metal on the floors of 6 and 7, and it was dangerous ("the First Disclosure").

3.2.2 On 19 July 2018 he mentioned to Peter McKinley and George Holmes the time when he had had to remove a Leyton's operative and there had been numerous other health and safety issues with Leyton's that he was aware of ("the Second Disclosure").

There is a dispute on the facts in that the respondent does not accept that the claimant referred to the time when he had to remove the operative.

3.2.2 On 23 July 2018 he asked Mr Vaitkus why Leyton's had been allowed to be on site despite numerous health and safety breaches being raised, including his (i.e. on 2 May 2018). The claimant says that it is likely that Adam Knight overheard this ("the Third Disclosure").

3.3 Are these disclosures qualifying disclosures within the meaning of section 43B of the Employment Rights Act 1996 ("ERA")?

3.3.2 The claimant relies on section 43B(1)(d) ERA in relation to the First and Second Disclosures.

3.3.3 He relies on section 43B(1)(b) ERA in relation to the Third Disclosure i.e. the legal obligation to keep a construction site safe under the Health and Safety at Work Act 1974 ("HASAW").

3.3.4 The respondent conceded that the First Disclosure was a qualifying disclosure. It made no other concessions.

3.4 If so, are these disclosures protected disclosures within any of sections 43C to 43H ERA?

3.4.1 The claimant says that all three disclosures were made to his employer, for the purposes of section 43C(1)(a) ERA.

3.4.2 He also says that he had a reasonable belief that the First Disclosure was made to a person with legal responsibility for the relevant failure, for the purposes of section 43C(1)(b)(ii) ERA.

3.5 If so, was the claimant dismissed for the reason that he made those protected disclosures?

Procedure

4. I heard evidence from the claimant as well as Natalie Malupa, his partner. For the respondent, I heard from: David Howell, Contracts Manager; Adam Knight, Project Manager; Neil Solomon, Senior Project Manager; and Tim Charlton-Hunt, Construction Director.

5. I agreed to admit part of the witness evidence of Mr Knight against the objection of the claimant. This statement was produced following exchange of statements. It contained evidence adduced to address new matters raised by the claimant in his statement that were relevant to the issues and which Mr Knight was best placed to address. I allowed this part of the statement to be admitted finding that this was necessary to avoid prejudice to the respondent. I did not agree to admit the remainder of Mr Knight's statement which was either less relevant or which the respondent could have adduced prior to exchange of statements.

6. There was a hearing bundle which exceeded 450 pages. I read the pages in the bundle to which I was referred.

7. I also agreed to admit into evidence additional documents produced by both parties during the course of the hearing, including a short supplementary bundle for the claimant.

8. I also considered written submissions from both parties and a bundle of authorities produced by the respondent.

9. There were only three days available for this hearing which had been listed for four. As the original listing was based on two and a half days of evidence on liability, I concluded that it would be possible to deal with all the evidence on liability and closing submissions, in the time available, and I directed that the hearing dealt with liability only.

The Facts

10. Having considered all the evidence I make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

11. The respondent specialises in office fit-outs and refurbishment.

12. The claimant commenced employment with the respondent on 8 January 2018 as a Construction Manager.

13. He was deployed to work on Project Roman, a £77 million fit-out project of a 13-floor commercial building close to Fenchurch Street in the City of London. He started working on site from around 22 January 2018. He was one of several construction managers each responsible for specific areas of the building. He was line managed by Neil Solomon, Senior Project Manager. He reported to Adam Knight, Project Manager. The project team was managed by David Howell, Contracts Manager.

14. The claimant was responsible for the completion of works on levels 6 – 8 as well as the communication rooms i.e. Main Electrical Room ("MER") /

Secondary Electrical Room ("SER"). Robin Perry, Senior Technical services Manager, was also responsible for these rooms. Completion of the communication rooms was important as it enabled the client to set up its IT network on the floor and in turn enabled the respondent to complete work on that floor.

15. The respondent's staff handbook referred to a Whistleblowing Policy which provided that a disclosure should be made to the team Managing Director ("MD") or company MD. There was also a separate Whistleblowing Policy which provided "If possible you should first discuss any matter with your immediate line manager" and alternatively, where there an issue with the speed or conduct of any ensuing investigation, the matter can be referred to the MD, who was the designated Whistleblowing Officer. It is not clear which policy took precedence. However, both policies stipulated that a disclosure should be made to someone higher up in the hierarchy of responsibility.

16. Site walks or "walkarounds" were completed every Monday from 1.30pm. All construction managers, including the claimant, were required to take part. These were led by Mr Knight. They enabled the team to discuss health and safety issues, review progress on site and plan the week ahead.

17. Although this was not a contractual requirement, construction managers were also expected to work occasionally on Saturdays. This was especially important when a project was nearing completion to ensure a timely handover to the client. This also ensured health and safety oversight of trades' workers on site. The claimant did not work any weekends in the seven months he worked on this project.

18. The stage 1 works on level 6 were handed over to the client on schedule. Level 8 was handed over three days late because a subcontractor had misread a delivery note and had run out of materials. Mr Perry had worked several weekends in the run up to handover and it is likely this additional work was instrumental in achieving a successful handover. The claimant did not work any of these weekends. He felt that this was not required.

19. The issue of weekend working was first raised with the claimant by Mr Howell during a walkaround on 30 April 2018. Mr Howell told the claimant that his failure to work weekends had been noted by his colleagues and this could cause problems and impact on the rest of the team. The claimant explained that his availability was limited because he played squash competitively. He therefore required more notice to work weekends.

20. As a result of this discussion the respondent introduced a weekend rota in May 2018. Swapping of dates between managers was allowed. The claimant was originally rostered to work on 19 May 2018. He swapped this and other dates with colleagues which meant that he was not due to work any weekends until 3 November 2018. I accept that this was likely to have caused resentment amongst colleagues.

21. At around this time Mr Howell asked Peter McKinley, another construction manager, to work with the claimant to bring him more into the team. Mr McKinley reported back that the claimant declined his offer of help. Although

the claimant disputes this, I find that Mr McKinley did offer to support the claimant as he was instructed to do this by Mr Howell. In addition to the weekend working issue, Mr Howell was aware that the claimant did not attend social events with colleagues after work. He was concerned that the claimant was not fitting in with his team and about the impact of this on team cohesion.

The First Disclosure / Red carding incident on 2 May 2018

22. Leyton's was one of the subcontractors working on the project. On 2 May 2018 the claimant saw one of its operatives welding in an exclusion zone on the eighth floor, at the edge of a two-storey drop. He saw molten metal fall onto the sixth floor, to the right of where he stood. He shouted at the operative to stop and to step back inside the handrail. He then telephoned Andrius Vaitkus, another construction manager, who was responsible for the staircase works to report this. Mr Vaitkus arrived on site and then telephoned Ahmed, a Leyton's supervisor. When they were both on site, the claimant described what he had seen. The claimant says that his disclosure was as follows: "I told Andreas that a welder was operating in an exclusion zone on floor 8 and was spraying molten metal on the floors of 6 and 7, and it was dangerous." He says that he made this disclosure twice, by telephone and face to face, to Mr Vaitkus.

23. This is the First Disclosure relied on by the claimant in which he says he conveyed information which tended to show that there was a risk to the health and safety of the operative as well as other subcontractors working on the sixth and seventh floors, delivery workers and the client's workforce from the molten metal. He also says that this created a fire hazard which put the public at risk of harm. The claimant says that he believed that Mr Vaitkus was legally responsible for the operative's work as he had responsibility for the staircase works.

24. The respondent accepts that this was a qualifying disclosure on the basis that the claimant disclosed a dangerous practice by the operator and this was in the public interest.

25. Mr Vaitkus reported this incident to Mr Knight and Mr Solomon when he told them that the claimant had been the one to raise the alarm. They spoke to a director of Leyton's who decided to remove the operative from site. The claimant and the respondent's witnesses referred to this as "red carding" by which they meant that the operative's actions warranted and resulted in his immediate site removal. Leyton's also agreed to revise its risk assessment and method statement ("RAMS") for this work.

26. Mr Knight spoke to Mr Howell, who was responsible for overseeing the entire project, about this near miss incident when he confirmed that the operative had been removed from site and the RAMS had been revised by Leyton's. Mr Howell was satisfied that both his managers on site and the subcontractor had taken appropriate action to address this incident and felt that this issue had been resolved. Mr Solomon also spoke to Mr Howell about this incident. This was a brief exchange as Mr Howell told him he was already aware of this issue. I accept the respondent's evidence that neither Mr Knight nor Mr Solomon told Mr Howell that the claimant had made the

disclosure. As far as they were concerned the claimant had done his job, action had been taken and the incident resolved, and they had passed on all necessary details to Mr Howell. The fact that the claimant had reported the issue to Mr Vaitkus in the first place was not a significant detail as far as they were concerned. As Mr Howell noted, this was a £77 million project with up to 350 people working on site.

27. This incident was discussed at the weekly subcontractor meeting on 4 May 2018. Although the claimant says that Mr Knight asked him to explain this incident to the subcontractors present, I accept Mr Knight's evidence that he provided this feedback because of his seniority. The minute of this meeting noted "A welder working in an unsafe manner was stopped and immediately removed from site". There was no record of any statement made by the claimant in relation to this incident. I also accepted the respondent's evidence that Mr Knight did not show these minutes to Mr Howell. This was a near miss which had been dealt with and resolved. There was no reason for Mr Howell to see these minutes. Even had he reviewed these minutes it would not have revealed the claimant's disclosure.

28. I therefore find that Mr Howell was not aware that the claimant made the First Disclosure.

Performance and Development Plan ("PDP")

29. The claimant had a PDP meeting with Mr Solomon and Mr Howell on 15 May 2018. They did not raise any issues about weekend working or about the claimant's performance. Mr Howell decided instead to encourage and motivate the claimant by giving him the additional responsibility of managing the handover of the Audio Visual ("AV") room. When, turning to objectives, the claimant suggested studying for a NEBOSH diploma Mr Howell replied "Do you want to be the health and safety guy?" I accept Mr Howell's evidence that he made this comment because this qualification was aimed at health and safety officers and was not directly relevant to the claimant's job. Ms Malupa's evidence was that this was "one of the most recognised and respected professional qualifications for health and safety practitioners". She had been studying for this diploma in her role as an environmental health officer and she had encouraged him to look into it. No formal record of this meeting was produced. The only record was a note made by Mr Solomon which was very positive about the claimant.

30. On 18 May 2018, the claimant was absent from work for the whole day because he had a dentist's appointment at 9.35 am. He told his colleague Mr Perry but did not inform his managers of this appointment as might have been expected. This was a potentially critical day as it was the last Friday before one of the communication rooms was due to be handed over to the client. Mr Knight emailed the claimant to instruct him that he was required to tell his managers if he would be absent for the day and to avoid booking appointments on critical dates in future. Mr Knight felt that the claimant was not showing enough commitment to his work although he did not spell this out to the claimant at the time.

31. The claimant was on holiday between 28 June – 10 July 2018. Before he went on leave Mr Howell told him "You're doing really well, I can see the

impact of your work. Keep it up." I accept Mr Howell's evidence that he made this comment to motivate the claimant.

32. It is accepted that the respondent had not raised any performance issues with the claimant by this date. The claimant therefore had good reason to believe that his employer was satisfied with his performance notwithstanding the concerns about his reluctance to work on weekends.

33. The respondent held an annual conference in central London on 12 July 2018. The claimant attended this event and left early because of a personal commitment. Mr Howell understood, incorrectly, that the claimant had not attended this event at all.

34. In mid-July 2018 Brad Bladen, Commissioning Manager, advised Mr Howell that the stage 2 handover of the communications rooms was not going well. A list of outstanding issues was compiled on 17 July 2018. This included a heat load test. The claimant was responsible for ensuring that the rooms were fire-stopped.

35. Mr Howell called a meeting on 19 July 2018 with all managers involved in these rooms, including the claimant, together with key subcontractors. The claimant was instructed to produce a new checklist and programme to ensure that all outstanding work was completed on time.

The Second Disclosure on 19 July 2018

36. On the same morning, there was a major accident on site when a staircase collapsed.

37. This was within Mr Vaitkus's area of responsibility. The claimant is alleged to have asked him "What have you fucked up now?" at around 9.20am. Although the claimant denies making this comment or even speaking to Mr Vaitkus on this occasion, I find that it is likely that he did say this. As the claimant wrote subsequently:

> "I did not make any inflammatory comments about the situation however perhaps in my shock at hearing the severity of the incident any comments I did make may have been mis-construed".

I also find that this alleged conduct is consistent with the complaint that George Holmes, Trainee Construction Manager, made about the claimant, which is referred to below.

38. The police and Health and Safety Executive ("HSE") attended the site to investigate. Although the claimant and his colleagues were not aware of all of the details of this incident they knew that Leyton's were involved.

39. At around 3.00 pm, the claimant discussed this incident with Mr McKinley and Mr Holmes. He asked them why Leyton's were still on site. He mentioned that there had been numerous other health and safety issues with Leyton's. He did not say what these were. In his evidence, the claimant said that his colleagues were already aware of these issues. He therefore felt that he was not disclosing any new information to them.

40. Although the claimant says that he also referred to the red carding incident during this exchange, I do not find that he did. In his evidence, the claimant said "it would have naturally been part of the conversation". He was therefore uncertain whether he said this. It is notable that this detail was not in the claimant's further particulars that he provided in July 2018.

41. This is the Second Disclosure relied on by the claimant in which he says he conveyed information which tended to show that there had been an actual risk to health and safety and a potential risk to health and safety if Leyton's continued to work on the project.

42. The respondent compiled health and safety league tables for its subcontractors. Looking at the tables from June – August 2018, whilst it is clear that Leyton's was consistently placed towards the foot of each monthly table out of 14 or 15 subcontractors, in each of these months their combined score was within the "Good" range.

43. I accept Mr Howell's evidence that he was not made aware of the Second Disclosure. The claimant had not disclosed any new information to Mr McKinley and Mr Holmes, and there was no apparent reason for them to have conveyed their discussion with the claimant to any of their managers, including Mr Howell.

The Third Disclosure on 23 July 2018

44. On 23 July 2018 the claimant asked Mr Vaitkus why Leyton's had been allowed on site despite numerous health and safety breaches being raised, including the incident on 2 May 2018.

45. This is the Third Disclosure relied on by the claimant in which he says that he conveyed information which tended to show that the respondent was breaching health and safety law i.e. the legal obligation to keep a construction site safe under HASAW.

46. This exchange took place at around 7.30 – 8.00 am. The claimant had been on a charity walk on 20 July 2018 and this was his first day back on site since the accident. He agreed that he had put this question to Mr Vaitkus because he wanted to know whether a decision had been made about allowing Leyton's to continue working on the project. During this discussion the claimant also speculated about the HSE investigation process based on what Ms Malupa had told him. He does not rely on this as being a part of the Third Disclosure.

47. Although the claimant says that it is likely that this discussion was overheard by Mr Knight, I prefer Mr Knight's evidence to the contrary. In his evidence the claimant was not certain whether Mr Knight in the office. I also take account of the fact that the claimant made no reference to Mr Knight in his further particulars.

48. The claimant accepted that by this date there were no Leyton operatives working on site, only supervisors who were assisting with the HSE investigation.

49. I accept Mr Howell's evidence that he was not made aware of the Third Disclosure. The claimant had not disclosed any new information to Mr Vaitkus and there was no reason for Mr Vaitkus to have relayed the claimant's query to any of his managers, including Mr Howell.

Walkaround on 23 July 2018

50. The claimant did not take part in the walkaround on 23 July 2018. This was the first time that he had missed one.

51. There is a dispute on the facts of where the claimant was when this walkaround began. Although the claimant says that he was not at his desk or in the office at around 1.30 pm, when the walkaround began, and this is why he did not take part, I do not find this to be the case. The claimant was unable to recall precisely where he was but says that he was most likely on site dealing with the SER stage 2 handover. However, Mr Howell, Mr Solomon and Mr Knight all saw the claimant in the office. Mr Howell saw the claimant arrive at his desk as colleagues were gathering for the walkaround and observed that the claimant remained at his desk and ate his lunch. Mr Knight also saw that the claimant sat at his desk working on his computer. Mr Knight assumed the claimant would catch up with them on the walkaround and recalled making a comment to this effect to colleagues as they waited by the lift. I do not find that the apparent inconsistency between Mr Howell and Mr Knight undermines their consistent recollection that the claimant was seated at his desk when the walkaround began. Mr Solomon also recalled that the claimant was in the office at this time.

52. The claimant knew that walkarounds took place at 1.30 pm every Monday. He knew that he was required to attend. It was likely that health and safety would be discussed as this was the first site walk since the accident. I find that the claimant was at his desk at 1.30 pm and he remained at his desk instead of attending the walkaround. He was under pressure to complete the checklist and programme for the SER stage 2 handover. He therefore prioritised this work instead of taking part in the walkaround with his team. In putting his own work first he was not showing his commitment to his team or to the health and safety issues that arose from the staircase accident.

53. The claimant also says that no one called him to prompt him to attend the walkaround. As I have found that he was in the office when the walkaround started, this should not have been necessary. He knew that he was required to take part and if he had decided to join the walkaround later he could have telephoned one of his colleagues to ascertain their whereabouts on site.

54. It is agreed that the claimant was at his desk when the walkaround ended. When Mr Knight returned to the office he reminded the claimant that he was required to attend them. The claimant explained that he had been "too busy". Mr Knight reported this to Mr Howell. Mr Howell says that "It was at this point that I realised that Stefan was probably never going to be the right fit".

55. On the same date, Mr Howell spoke to Mr Holmes about a complaint that the claimant had bullied, belittled and undermined him. Although there were no contemporaneous documents, I find that it is likely that Mr Holmes made

such a complaint and that this complaint was genuine. I was taken to an email dated 17 October 2018, in which Mr Holmes complained that the claimant had bullied and belittled him, and he referred to an incident in a lift when the claimant had called him a "fucking mug" in front of subcontractors. I was also taken to some WhatsApp conversations between the claimant and another colleague in which both made derogatory comments about Mr Holmes. I was also taken to some feedback provided by Mr Perry in which he referred to the claimant's "Bullying of his subordinates".

Meeting on 24 July 2018

56. Mr Howell met with the claimant the next day. The claimant understood that the purpose of this meeting was to discuss his progress on the SER handover. Mr Howell had scheduled this meeting to talk about this issue as well as the claimant's performance and conduct as he was due to go on leave. He had made a note of these issues ahead of this meeting, which included: "No weekends…George [Holmes]. Neglected 6,7,8".

57. Mr Howell told the claimant that his focus on the SER handover meant that he had neglected his other areas of responsibility and his colleagues had been expected to cover him. Mr Howell also raised the issue of weekend working because the claimant had not worked any weekends to date and the work on his floors was delayed. He told the claimant that he was not showing the required level of commitment and this was likely to impact on his bonus. He then queried the claimant's commitment by asking him whether he intended to stay in the business for more than a year. The claimant said that he did.

58. Mr Howell questioned the claimant about his alleged comment to Mr Vaitkus on 19 July 2018. He agreed that he told the claimant that "you are putting yourself on the other side of the table". The claimant relies on this as evidence that Mr Howell was aware of his three disclosures on the basis that Mr Howell was complaining that the claimant had put health and safety above his loyalty to the respondent. I prefer Mr Howell's evidence that he was commenting that the claimant lacked empathy in relation to Mr Vaitkus who had been in shock in the immediate aftermath of the accident. Mr Howell's evidence is consistent with his email to Tim Charlton-Hunt, Construction Director, sent later that day, in which he referred to the claimant's lack of empathy towards his colleagues on 19 July 2018. I also take account of the claimant's email to Mr Howell sent on the same day (the relevant content of which has been referred to above at paragraph 37) from which I find that he understood that this was the context for Mr Howell's comment. It is also notable that the claimant made no reference to health and safety or to Leyton's in this email or to anything else that referred to the three disclosures he relies on. I have already found that Mr Howell was not aware of the claimant's disclosures.

59. Although the claimant denied this, I find that Mr Howell spoke to the claimant about Mr Holmes. Mr Howell had spoken with Mr Holmes the previous day. Mr Howell had identified this as one of the topics for discussion in his note for the meeting. He had a clear recollection of what was said at his meeting with the claimant. He asked the claimant to treat Mr Holmes respectfully and deliberately chose not to refer to bullying to as he felt that this would be

inflammatory and he recalled that the claimant defended his actions and alluded to the lift incident.

60. Mr Howell also brought up the claimant's failure to take part in the walkaround the day before. The claimant denied being in the office even when Mr Howell told him that he had seen him at his desk. He felt that the claimant had lied to him.

61. Mr Howell emailed the claimant with a list of "key deliverables" including fire load testing. The claimant was told that he would no longer be responsible for the AV room. A follow up meeting was arranged for 22 August 2018.

62. The claimant emailed Mr Howell later that day to respond to some of the issues that had been raised at their meeting. He denied that he had used inflammatory language with Mr Vaitkus. He reiterated that he had not been in the office at the start of the walkaround. He explained that he had swapped his rostered weekends in July and August 2018 because of a charity walk and his impending house move. He wrote "I do however need to feel that my employer is also supportive of my personal life". The claimant had failed to appreciate how seriously Mr Howell viewed the performance and conduct issues that had been raised with him. I find that this email prompted Mr Howell to set the wheels in motion to dismiss the claimant. I accept Mr Howell's evidence that on receipt of this email he concluded that the claimant had refused to apologise for his comment to Mr Vaitkus, he had lied about not being in the office for the walkaround and he was avoiding the weekend rota. Mr Howell also felt that the claimant had missed the opportunity to take responsibility and show greater commitment.

63. In an email to Mr Charlton-Hunt, Mr Howell cited the claimant's lack of teamwork, his refusal to work on weekends, his refusal to go on the walkaround and his failure to form good relationships with colleagues and consultants, as well as his lack of empathy,. He concluded "I would like to terminate his contract if we are within the permitted period? (Albeit I need him to complete SER's first – end August.)" Mr Charlton-Hunt agreed to dismiss the claimant. He had already discussed the claimant with Mr Howell and he trusted him to make the right decision. Mr Howell then wrote to his HR adviser later to say that he would not sign off on the claimant's probation, if applicable, and he wanted to let the claimant go when he met him on 22 August 2018. He noted "This guy is not Overbury".

64. The heat load test was completed on 17 August 2018 although this had been delayed on the day and required additional staff because the claimant had failed to complete the fire-stopping on time. The respondent had also only been able to meet this deadline because Mr Perry had worked on weekends to facilitate this. Mr Perry had worked a total of six weekends by this date.

65. At around this time, the claimant was rostered to complete the handover from the day shift to the night manager. He instead asked another colleague to do this handover to avoid staying later at work. There is a dispute about whether the claimant briefed this colleague about any issues that needed to be handed over to the night manager. I make no findings on this other than to conclude that the claimant was again failing to show commitment to his

work and was relying on another colleague to cover him.

Dismissal on 22 August 2018

66. The claimant was dismissed by Mr Howell at a meeting on 22 August 2018. He was given no warning about this nor was he given an opportunity to be accompanied at this meeting. It was a short meeting because Mr Howell had already made up his mind. The claimant was told that his employment would end with immediate effect and he would be paid until the end of September 2018 which exceeded his contractual right to one month's notice.

67. The claimant complained immediately about his dismissal to HR and was referred to John Baker, Managing Director, who delegated this to Mr Charlton-Hunt. Mr Charlton-Hunt telephoned the claimant when he explained that he had been dismissed because of lack of teamworking and he referred to weekend working, and because of poor performance, and he cited the fire-stopping issue. He agreed to put these reasons in writing. Mr Charlton-Hunt canvassed Mr Howell who wrote to him the next day to summarise his concerns about the claimant's performance in which he referred to several issues including weekend working, the walkaround and bullying of Mr Holmes. This also included feedback from Mr Perry and Mr Bladon which was critical of the claimant's performance and conduct. Mr Charlton-Hunt emailed the claimant later that day to confirm that he had been dismissed because of poor performance and a lack of commitment to achieve set tasks.

68. The claimant wrote to appeal his dismissal in which he complained that one of the reasons for this was that he raised health and safety complaints. He was told that he had no right of appeal.

69. The respondent did not therefore apply its Disciplinary Policy to the claimant in relation to his dismissal. As its staff handbook provided, this was not required for employees with less than two years' service.

70. Interviews with the HSE had been scheduled on 23 August 2018. The claimant says that he was dismissed on 22 August 2018 to avoid him speaking to the HSE. I accept Mr Howell's evidence that he was not aware of the date of the HSE interviews when he decided to dismiss the claimant on 24 July 2018 and when he also scheduled the dismissal meeting for 23 August 2018. I also accept that the claimant was not required to work his notice because of the expectation that he would have been demotivated during this period. The claimant was not due to be interviewed by the HSE as he had had no direct involvement with the part of the project in which the accident had occurred. He had not, in any event, taken the opportunity to report any concerns he had about Leyton's to the HSE investigators who had been on site, or his managers, or the MD, between 19 July – 22 August 2018.

Relevant Legal Principles

Protected disclosure

71. For there to be a protected disclosure, a worker must make a qualifying disclosure, as defined by section 43B ERA, and do so in accordance with sections 43C – 43H ERA.

72. 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 six prescribed categories of relevant failure, including:

> (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 and safety of any individual has been, is being or is likely to be endangered

73. Section 43L(3) ERA provides that where the information is already known to the recipient, the reference to the disclosure of information shall be treated as a reference to bringing the information to the attention of the recipient.

74. A qualifying disclosure must accordingly have the following elements:

    74.1 It is a disclosure (taking account of section 43L(3), if relevant).

    74.2 It conveys information. This requires the communication of sufficient factual content or specificity to be capable of tending to show a relevant failure (see Kilraine v Wandsworth LBC [2018] ICR 1850, CA). Where the failure is said to relate to a legal obligation, save in cases where the breach is patent (see Bolton School v Evans [2006] IRLR 500, EAT), the worker is required to have disclosed sufficient information to enable the employer to understand the complaint at the time the disclosure is made (see Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06).

    74.3 The worker has a reasonable belief that this information tends to show a relevant failure. This has both a subjective and objective element so that the worker must have a subjective belief and this belief must be reasonable (see Kilraine). In considering this the tribunal must take account of the individual characteristics of the worker (see Korashi v Abertawe Bro Morgannwg Local Health Board [2012] IRLR 4, EAT). In making an assessment as to the reasonableness of the worker's belief that a legal obligation has not been complied with a tribunal must firstly identify the source of the legal obligation that the worker believes has been breached (see Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT).

74.4 The worker also has a reasonable belief that the disclosure is made in the public interest. A tribunal must first ask whether the worker believed that the disclosure was in the public interest, at the time that it was made, and if so, whether that belief was reasonably held (see Chesterton Global Ltd v Nurmohamed [2017] IRLR 837, CA). There is no legal definition of "public interest" in this context. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case. Relevant factors could include: the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer (see Chesterton).

75. Whether the information amounts to a disclosure and whether the worker had a reasonable belief that this information tended to show a relevant failure must be considered separately by a tribunal but these issues are likely to be closely aligned (see Kilraine). If a statement has sufficient factual content and specificity such that it is capable of tending to show a relevant failure then it is likely that the worker's subjective belief in the same will be reasonable. Equally, if the statement lacks the requisite detail then it is likely that the subjective belief will not be reasonably held.

76. A qualifying disclosure is protected if it is made to the employer (section 43C(1)(a) ERA) or some other responsible person who in the worker's reasonable belief has legal responsibility for the relevant failure (section 43C(1)(b)(ii) ERA).

77. Where the recipient of the disclosure is said to be some other responsible person, it is necessary for the tribunal to consider whether the worker subjectively believed that the relevant failure related solely or mainly to a matter for which that recipient had legal responsibility and whether any such belief was reasonable (see Premier Mortgage Connections Ltd v Miller UKEAT/0113/07/JOJ).

Dismissal

78. As the claimant does not have the requisite qualifying service i.e. two years of continuous employment to bring a claim for ordinary unfair dismissal the burden is on him to show that the reason or principal reason for his dismissal was that he made a protected disclosure (see Ross v Eddie Stobart Ltd UKEAT/0068/13/RN).

79. The focus of the tribunal's enquiry must be the factors that operated on the employer's mind so as to cause him to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, Cairns LJ said, at p. 330 B-C:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

This guidance was approved by Underhill LJ in Beatt v Croydon Health Services NHS Trust [2017] IRLR 748:

> "As I observed in ***Hazel v Manchester College*** [2014] EWCA Civ 72, [2014] ICR 989, (see para. 23, at p. 1000 F-H), Cairns LJ's precise wording was directed to the particular issue before the Court, and it may not be perfectly apt in every case; but the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it sometimes put, what 'motivates' them to do so…"

80. Although the focus is on the mental processes of the person who made the decision to dismiss, there may be exceptional circumstances in which manipulation by another manager, which is motivated by a proscribed reason, can be ascribed to the employer (see Cooperative Group Limited v Baddeley [2014] EWCA Civ 658, CA; Royal Mail Group Ltd v Jhuti [2018] ICR 982, CA).

Conclusions

Issues 3.1 – 3.4: Did the claimant make any or all of the protected disclosures upon which he relies?

The First Disclosure

81. It is accepted that the claimant told Mr Vaitkus that a welder was operating in an exclusion zone on floor 8 and was spraying molten metal on the floors of 6 and 7, and this was dangerous. The respondent conceded that this was a qualifying disclosure. It is therefore accepted that the information disclosed by the claimant tended to show that the health and safety of the Leyton's operative was at risk and the claimant had a reasonable belief that his disclosure tended to convey this information and it was made in the public interest.

82. I am therefore required to determine whether this qualifying disclosure is protected in that it was made in accordance with sections 43C – 43H ERA. The claimant says that he made his disclosure in accordance with sections 43C(1)(a) & (b) ERA.

83. Turning firstly to section 43C(1)(a), the claimant says that in conveying his disclosure to Mr Vaitkus he made a disclosure to his employer. I agree, for the following reasons:

    83.1 Mr Lewis, for the respondent, says that "employer" for these purposes cannot sensibly encompass someone on the same level of seniority as the person making the disclosure. I do not agree. The question must depend on the relevant facts of each case.

    83.2 The starting point is that Mr Vaitkus was an employee of the respondent's and the disclosure was made to him in the course of this employment. The claimant and Mr Vaitkus worked on a project that was by necessity compartmentalised into separate areas of responsibility. Mr Vaitkus not only occupied a managerial position but he was responsible for overseeing that part of the project which was affected by the operative's dangerous practice. All of these elements do in my view put Mr Vaitkus in the place of employer for the purposes of the statutory scheme.

83.3 Whilst the claimant could have escalated this issue to Mr Solomon or Mr Knight, Mr Howell, or even the MD, I do not find in the circumstances that this was required for there to have been a protected disclosure. It was sufficient for him to have made his disclosure to Mr Vaitkus.

84. The claimant also relies on section 43C(1)(b).

84.1 This alternative means of disclosure was originally pleaded by reference to Mr Vaitkus. However, in closing submissions, Mr Hammer, for the claimant, invited me to find that the disclosure was made in this way to Ahmed, the Leyton's supervisor (under section 43C(1)(b)(i)). As this was not how the claimant had put his case and no application to amend was made by the claimant I make no findings on this.

84.2 For completeness, had I been so required, I would not have found that this was a protected disclosure with reference to Mr Vaitkus under section 43C(1)(b)(ii). This is because whilst I would have found that the claimant had a subjective belief that Mr Vaitkus was legally responsible for Leyton's actions, no doubt informed by his discussions with Ms Malupa, I would not have concluded that this belief was reasonably held, as it should have been obvious to the claimant that Mr Vaitkus was not himself legally responsible for any dangerous practices by Leyton's.

The Second Disclosure

85. I have found that the information disclosed by the claimant to Mr McKinley and Mr Holmes was that there had been numerous other health and safety issues with Leyton's that he was aware of. The claimant agreed that he did not provide any further details as he felt that his colleagues were already aware of these issues. I have also found that the claimant did not on this occasion refer to the red carding incident.

86. The claimant says that the information he disclosed tended to show that there was a risk to health and safety if Leyton's continued to work on the project.

87. I do not find that this was a qualifying disclosure for the following reasons:

87.1 Applying the guidance in Kilraine I do not find that this was a disclosure of information which tended to show that there was a risk to the health and safety of workers on site if Leyton's continued to work on the project. This information lacked sufficient factual content and specificity to amount to a qualifying disclosure. The claimant did not refer to any potential or actual hazard posed by Leyton's he was only alluding to previous health and safety breaches by Leyton's which he failed to specify.

87.2 I find that the claimant had a subjective belief that his disclosure tended to show that there was a risk to health and safety. He had witnessed the red carding incident. He knew that Leyton's had been

involved in the staircase accident. Although it was too early to know whether the cause of this accident was attributable to any culpable health and safety breach by Leyton's, he assumed that this was the case. He felt that Leyton's were unsafe and they posed to a risk to the health and safety of workers on the site. He did not provide any details to his colleagues as he assumed that they were already aware of this.

87.3 However, I do not find that this belief was reasonably held. There was no evidence that the claimant had discussed Leyton's with Mr McKinley and Mr Holmes before or that they were aware of the red carding incident. As I have already noted, the subcontractor league tables did not indicate that there were any health and safety issues with Leyton's. There was no other evidence I was taken to from which I am able to conclude that these colleagues were aware of any previous health and safety issues with Leyton's. The claimant did not disclose any specific information which established a link between the staircase incident and any previous health and safety issues. As I have already found, this information failed to specify how Leyton's posed a health and safety hazard. It is evident that the claimant believed that Leyton's posed a health and safety risk, however, the information he disclosed did not tend to show that there was such a risk.

The Third Disclosure

88. The information disclosed by the claimant was that he asked Mr Vaitkus why Leyton's had been allowed to be on site despite numerous health and safety breaches being raised, including the red carding incident.

89. The claimant says that this was a disclosure of information which tended to show that the respondent was breaching its legal obligation under HASAW to keep the construction site safe by continuing to allow Leyton's to work on site.

90. I do not find that this was a qualifying disclosure for the following reasons:

90.1 Applying the guidance in Kilraine I do not find that this was a disclosure of information which tended to show that the respondent had breached its obligations under HASAW. This information lacked sufficient factual content and specificity to amount to a qualifying disclosure. The information disclosed did not refer any legal obligation. Nor was any breach patent. This was not a complaint that the respondent was breaching its legal duty. It was an enquiry about a decision that had yet to be made and was made to another colleague who was unlikely to have any input in this decision. I do not find that in these circumstances Mr Vaitkus would have understood that the claimant was complaining that the respondent was failing to comply with HASAW by reference to the ongoing engagement of Leyton's.

90.2 I find, for the same reason given above at paragraph 87.2, that the claimant had a subjective belief that his disclosure tended to show that that the respondent was in breach of HASAW. He had a fixed belief that Leyton's posed a health and safety risk and that by continuing to engage Leyton's the respondent was breaching its duty to provide a

safe workplace. This was to a large extent informed by his discussions with Ms Malupa.

90.3 However, I do not find that this subjective belief was reasonably held. I have already concluded that the claimant conveyed no information which tended to show that the respondent was in breach of HASAW by reference to the ongoing engagement of Leyton's. The claimant's query to Mr Vaitkus was speculative. At this stage, he did not know whether Leyton's were culpable for the staircase accident. The respondent had yet to make a decision about retaining Leyton's services. He was also aware that work by this subcontractor had been suspended.

<u>Issue 3.5:</u> Was the claimant dismissed for the reason that he made this protected disclosure?

91. Having found that the claimant's First Disclosure was a protected disclosure, I do not find that this was the reason or principal reason for his dismissal for the following reasons:

91.1 Mr Howell was not aware of the First Disclosure. Although Mr Knight and Mr Solomon both knew that the claimant had been the one to report the incident to Mr Vaitkus, I have found that neither relayed this disclosure to Mr Howell.

91.2 It is accepted that neither Mr Knight nor Mr Solomon played any direct or indirect part in the decision to dismiss the claimant. This was Mr Howell's decision.

91.3 Had I found that Mr Howell was aware of the First Disclosure and therefore capable of dismissing the claimant because of this, I would not have concluded that this was the reason or principal reason for the claimant's dismissal. I would have found that Mr Howell dismissed the claimant because he believed that the claimant was not fitting in with his team or demonstrating the required level of commitment to the project. Mr Howell had formed this view because he believed that the claimant had deliberately avoided working weekends, he had shown a lack of empathy towards Mr Vaitkus on 19 July 2018, he had refused to participate in the walkaround on 23 July 2018 and then lied about his whereabouts on this occasion, and he had bullied Mr Holmes. It was for these reasons that Mr Howell had concluded that the claimant "is not Overbury".

Employment Judge Khan

Date : 10/12/2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.11/12/2019

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FOR EMPLOYMENT TRIBUNALS