EMPLOYMENT TRIBUNALS

Claimant: Mrs H L Price

Respondent: E S P Technologies (UK) Limited

Heard at: Manchester **On:** 15-17 July 2019

Before: Employment Judge Warren
Mr D Wilson
Mr A J Gill

REPRESENTATION:

Claimant: In person
Respondent: Mr M Howson, Consultant

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was unfairly dismissed and her claim succeeds.

2. The claimant was dismissed in breach of contract without notice and this claim succeeds.

3. The claim that she was dismissed for making a public interest disclosure does not succeed and is dismissed.

REASONS

Background

1. By an ET1 received in the Employment Tribunal on 31 May 2018 the claimant, Helena Price, alleged that she had been unfairly dismissed, dismissed and suffered detriment because she had made two public interest disclosures and had been dismissed in breach of contract.

2. The respondent, is a privately owned company with two shareholders, being Mr D Sisson (60% shareholder) and his partner, Ms Sheila Such (40%). The respondent denied that the claimant had been unfairly dismissed, asserting that she had been dismissed for misconduct and in fact for gross misconduct, which enabled them to dismiss without notice thus denying the breach of contract claim as well. Initially it was denied that there had been public interest disclosures at all but at the end of the evidence Mr Howson on behalf of the respondent conceded that in the light of the evidence heard, in particular from the company accountant, the public interest disclosure in relation to the payment of dividends in the company was made out. What was then denied was that the other public interest disclosure in relation to an employee was actually a public interest disclosure and further that there was any causal link between either disclosure and the claimant's dismissal. The respondent argued that the dismissal followed a fair procedure which led to the dismissal on the grounds of the claimant's disclosures of confidential material to a third party in the course of a management buyout process and in direct contravention of an instruction given to her not to send any further information.

The Evidence

3. The Tribunal heard from the following witnesses on behalf of the respondent:

- Mr D Sisson, Managing Director and major shareholder;
- Angela Hilton, Chartered Accountant (and partner in the firm of accountants responsible for the respondent's accounts);
- Mr Lee Michael Wojtkiw, Director at Camlee, the respondent's representatives in connection with the management buyout.

4. The Tribunal had a statement from Cheryl Shaw which they read by way of background information. There was no direct evidence in the statement that was relevant to the hearing of the issues.

5. On behalf of the claimant, the claimant herself gave evidence in her own regard and called Mr P Whitney, Director of Halliday Group Limited, the claimant's representatives in the management buyout.

6. We had a bundle of documents exceeding 500 pages of which ten photographs were removed at the outset. The photographs were of the claimant, they had been placed in the bundle by the respondent but Mr Howson was unable to explain their relevance to the Tribunal. They had been downloaded from the client's phone, the number for which had originally been a private number to her which she had transferred to the company account. As Mr Howson could see no relevance it seemed pointless leaving them in the bundle and they were removed before the public were given access to the bundle.

7. All of the witnesses had made statements upon which they relied for their primary evidence. They were all cross examined. References to the bundle are by page number in this Judgment. The bundle was agreed.

8. Mr Howson made the point that this case would be won or lost on the evidence which the Tribunal preferred, there being a direct conflict in particular between Mr Sisson's evidence and that of the claimant.

9. We found having heard all of the evidence and considered the answers given in cross examination that we preferred the evidence of the claimant and Mr Whitney for the following reasons. Firstly, Mr Howson in his closing speech confirmed that he considered Mr Whitney to be credible and cogent. We agreed with him. Mr Whitney had not been present during the hearing of the rest of the evidence in the case, and his evidence was therefore untainted by anything that may have been said in the hearing. (It should be said that that was the position with Mr Wojtkiw as well).

10. We noted that Mr Sisson insisted that the claimant and her management buyout (MBO) partner had approached him with regard to a potential buy out.. Ms Hilton (his witness), Mr Whitney and the claimant gave evidence that Mr Sisson had actually approached her and her MBO partner with a view to a management buyout, and that her promotion to Finance Director (for which she had no qualification at all) had been a move by him to establish if she was competent to run the business and to give her credibility in obtaining finance. Mr Whitney also volunteered that at the time the claimant had told him that she had to obtain authority from Mr Sisson for his accountant, Ms Hilton, to unlock the management accounts for her to export them to him. We therefore found that Mr Sisson's assertion supported by Ms Hilton, that the claimant could access the accounts without authority and could export the accounts without his authority or hers in practice, was less credible. We found as a fact that the claimant could not access the management accounts without Mr Sisson's specific authority and the input of Ms Hilton. (This was in fact confirmed in cross examination by Mr Sisson).

The Facts

11. The claimant was employed by the respondent company from 12 January 2015 originally as an Accounts Administrator undertaking some Human Resource work. She had no qualifications in finance.

12. In July 2016 Mr Sisson, who was 60% shareholder in the business and the Managing Director, decided to appoint a management team and to take a step back from the business. He "promoted" four people to form a management team, one of whom was the claimant whom he appointed as Finance Director, doubling her salary from £20,000 a year to £40,000 a year.

13. Mr Sisson had taken steps to sell the business about a year earlier but previous offers had not met his requirements and the company was not at the time being actively marketed. Mr Sisson, at the end of 2016/early 2017, approached the claimant and Mr Ward (a fellow management team member) offering them the opportunity to engage in a management buyout. It is apparent that the promotions that had been given to these two increased their credibility in seeking finance for such a transaction.

14. In March 2017 a non-disclosure agreement was signed the MBO team consisting of the claimant and Mr Ward along with Mr Sisson; this incorporated and placed the same restrictions on any of the parties' representatives. In fact, both the

solicitors and accountants were in any event bound by their own professional standards.

15. Mr Whitney from Hallidays was instructed by the MBO team. Mr Wojtkiw of Camlee was instructed by Mr Sisson. Both were highly experienced in the sale and purchase of commercial entities, including in Mr Whitney's case, MBOs.

16. Mr Sisson insisted from the outset that negotiations would be kept separate from day-to-day work. This was an agreement breached by all of the parties. The claimant, in seeking authority to disclose documentation during office hours (which Mr Sisson did not object to), and Mr Sisson by calling a direct meeting in the office on 4 December 2017.

17. The claimant described herself as terrified. The negotiations were dealing with figures of well over £1million being paid to the shareholders, Mr Sisson and his partner.

18. Mr Whitney confirmed in his evidence that the offer required from the MBO to Mr Sisson had to be credit based i.e. showing how the deal was to be financed. Mr Wojtkiw in his evidence made no mention of this. His view was that the finance would be resolved at a later stage of the negotiations. It explained the events which followed. Because the offer required a credible financial package, the MBO, through Hallidays, had to satisfy the banks lending the money that the company had a credible sound financial status. The banks, through Hallidays, requested more than the standard management information pack made available by Camlee. Hallidays asked the claimant and her MBO partner to furnish further details. The standard management pack contained the company accounts to the end of June 2017. The claimant, despite being called a Finance Director, in fact was simply continuing with her job as Account Administrator. She did not have access to the material that a true Finance Director would have had. She had to ask Mr Sisson to authorise access to the management information, which she obtained through Miss Hilton, the accountant. She obtained that authorisation in person in the office when she heard Mr Sisson say to her to "give them what they want", and with that in mind she obtained specifically the September management information this way and sent it to Hallidays. Although she may have been able to view the material online, she was unable to export it to send it to Hallidays without the express intervention of Miss Hilton. This material was requested on 26 October 2017. Before that, however, on 3 October 2017 (page 544) Miss Hilton, after discussion with Camlee, indicated that the latest information required by Hallidays (although she gives no indication of which information that was) would not be provided until there was a valuation and an indicative offer.

19. It was unclear to the Tribunal why Miss Hilton had intervened between two professional negotiating teams. All of the information released on Mr Sisson's say so was sent by the claimant to Hallidays. The rest of the information requested by Hallidays was for the most part delivered by Mr Ward (the claimant dealing with financial information only) (pages 252 and 253). Mr Sisson had confirmed that the claimant could not have access to that material without him consenting and Miss Hilton releasing it. Miss Hilton alleged that the claimant had access to the material and could print it or export it but could not alter it, and in that way the account was locked. We preferred the account of the claimant as confirmed by Mr Sisson that in

order to access to export any material she would require Mr Sisson contacting Miss Hilton to enable it to be unlocked.

20. The letter sent by Miss Hilton on 3 October 2017 by way of email stated that no further material would be provided to Hallidays until such time as a valuation and indicative offer were received. Hallidays supplied an indicative offer and valuation on 26 October 2017. On the same date, the claimant sent Hallidays the management information for September.

21. Hallidays had particular concern with regard to the management information because it had been noted that over the previous months Mr Sisson had paid himself and his partner very substantial dividends (a total of £900,000 was to be accounted for in that way in that financial year). They had noted it particularly in July and August management information which the claimant had already supplied to them some time before and which clearly showed substantial dividend drawings. They received the September management information (obtained by the claimant with the consent of Mr Sisson and Miss Hilton) on 26 October. This would have been after or at the time that the indicative offer and valuation were sent to Camlee.

22. As far as the claimant was concerned, the email of 3 October simply prevented further information being released until after the indicative offer had been sent. That was the Employment Tribunal's interpretation of the email as well. Hallidays noted from the management accounts that in September more dividend was drawn than net profit made. This raised an alert with them because Mr Whitney indicated that it could affect the value of the company at the date when the claimant and her business partner were to complete the purchase, and they noted it was something to keep an eye on.

23. Miss Hilton agreed that from the claimant's perspective it looked in September as though the two shareholders had drawn down more than the company had earned. In fact the bigger picture was that there was sufficient in reserves for them to do so and that this was a planned arrangement and not therefore in breach of any financial regulations.

24. Although Miss Hilton passed that information to Mr Sisson and his partner in the expectation that he would send it to the claimant in effect by way of reassurance, it is clear that that did not happen and the claimant did not know therefore at any point that the dividend drawn down was perfectly appropriate. It is fair to say that nobody else other than the accountant and Mr Sisson and his partner would have been aware of that.

25. The claimant delivered additional financial information to Hallidays after the valuation and indicative offer had been supplied to Camlee on 26 October 2017, and indeed had received a positive and encouraging response from the respondent in connection with the offer (page 247).

26. On 3 November 2017 Camlee confirmed that Mr Sisson was happy to proceed to heads of terms subject to five conditions, which basically dealt with the details around deferred payments and a relatively small increase in the initial down payment. For the first time in the procedure it was confirmed that there was an additional external offer which needed to be matched.

27. On 20 November a further indicative offer was made and a query raised about the level of dividends being drawn by Mr Sisson which on the face of it exceeded a net income in the September management information. Hallidays was concerned about the net asset value of the company because of these withdrawals and advised their clients that they would keep an eye on it.

28. The claimant genuinely believed that the drawings were being made in excess of income and Miss Hilton confirmed in her evidence that it did in deed look like that.

29. When it was subsequently raised as a whistle-blow by the claimant's solicitor on 15 December 2017, Miss Hilton was able to advise Mr Sisson and his partner that the drawings were fine in a letter which was not, as she expected, forwarded to the claimant or her solicitors.

30. On 21 November 2017 Mr Sisson met Camlee and was given details both of the external offer and the revised MBO offer. He went on holiday to consider them with his partner. Whilst he was away Hallidays asked to undertake an audit on behalf of the MBO's lenders. Mr Whitney explained that because this was a credit based indicative offer, finance had to be lined up in advance of the offer or thereabouts so that the offer was credible. Mr Wojtkiw had explained that normally the details of finances are only dealt with after an indicative offer has been made. He did not mention the requirement for this to be a credit based indicative offer which basically required the claimant and her partner to have credible finance in place before the offer was made. In order to obtain that it was required that they supply additional material to the Bank (in this case National Westminster) both in relation to the company and their own financial situation. It was this that led to her asking Mr Sisson for access to additional management information and to him replying "give them what they want", and indeed facilitating access both in June and later when further management information was required.

31. Mr Sisson and his partner decided to go on holiday to consider the offers. Whilst away he was asked by the claimant whether Hallidays could undertake an audit on behalf of their lenders. Mr Sisson refused and said he would discuss it on his return.

32. On his return on 4 December 2017 Mr Sisson rejected both offers and took the business off the market. Despite insisting that all negotiations be kept separate from day-to-day work, and that all negotiations be dealt with between Camlee and Hallidays, he chose on 4 December to set up a meeting to discuss the decision of himself and his partner, in the office, with the claimant and her MBO partner. At page 256 the claimant produced minutes. Mr Sisson denied that the conversation had gone that way but we found the claimant to be entirely credible on the issue. The meeting became heated and the management buyout were advised that he company was no longer for sale and that the reason was "personal".

33. The MBO partnership was disconcerted by this because they felt as though they had been led into spending considerable sums of money in preparation for a buyout which, as of 3 November, they had believed was looking very encouraging.

34. On 7 December 2017 the parties met again at the behest of Mr Sisson and he indicated that he intended to be in the office a lot more. He dropped a strong hint that the claimant and her partner's jobs may not be secure.

35. The claimant went to work on 11 December 2017 and was suspended. Mr Sisson refused to say why. He sought her keys and mobile phone with laptop and she refused to give them. She was concerned because her mobile phone contained personal material as it had originally been her personal number which was subsequently transferred onto a company phone. Later that day she received a written invitation to an investigatory meeting to take place the following day. The letter did not indicate why she had been suspended or what the investigation was to cover. She immediately instructed a solicitor who emailed the respondent indicating that she could not attend because she was not well enough and challenging both the suspension and the investigatory meeting on the basis that nothing was known about it. Her solicitor did not get a response until after a follow-up email on 15 December was responded to a week later. In the meantime Mr Sisson chose to go ahead with the investigatory meeting the day after the suspension in the absence of the claimant.

36. Eventually, on 2 January 2018, the claimant was invited to a disciplinary hearing to take place three days later on 5 January 2018. She was presented with a list of 13 allegations, none of which had been mentioned beforehand. The disciplinary process was undertaken by HR Face2Face – a part of the Peninsula Group, who represented the respondent at the hearing. The respondent chose not to call the investigation officer, the disciplinary officer or the appeal officer at this Hearing. Mr Sisson in his evidence said the decision taken to dismiss and to uphold the dismissal on appeal was his based on the information and advice from HR Face2Face. The reports of both the disciplinary and appeal officers did recommend dismissal.

37. At the disciplinary hearing on 5 January 2018, of the 13 allegations only two were upheld: an allegation of bullying staff and an allegation of “insider dealing”, both of which were found to be gross misconduct.

38. The claimant was called back into a reconvened disciplinary meeting on 22 January 2018 and dismissed without notice. All of this was undertaken by HR Face2Face not by Mr Sisson.

39. On appeal, the allegation of bullying was discounted totally and described as defamatory. The allegation of disclosing company material to a third party i.e. Hallidays was upheld. Mr Sisson concluded that was still gross misconduct (as recommended by HR Face2Face) and upheld his original decision to dismiss.

40. The appeal was heard by a separate employee from HR Face2Face on 7 January 2018. Before the appeal Angela Hilton wrote to the consultant saying that the information was all provided to enable the MBO to prepare a valuation and proposal and that on 3 October she had written to indicate that no further information should be released until such time as the indicative offer and valuation had been received from the MBO. She did not mention in that email that the indicative offer was required to set out how it was being funded, which required some due diligence, as explained by Mr Whitney. The appeal officer appeared not to have investigated this further, or to check when the indicative offer was made, or in any way to consider the time line of the various emails and authorities. If they had they could easily have established that the claimant had in fact complied to the letter with her side of the MBO agreements and stipulations, even as altered with time. There is no evidence of any real detailed investigation into the claimant's assertions with regard

to the disclosures that she made to Hallidays. There is no evidence from Mr Sisson, the email from Miss Hilton is contradictory at best, and there was no analysis of the dates when the material was sent. The clear evidence before the Tribunal was that Mr Sisson had authorised her to reveal 'whatever was required' i.e. whatever Hallidays asked for, that he was encouraging the deal with regard to the first offer and that the material sent by the claimant (the September management accounts) had been made available to her before 3 October, when she was told that nothing further was to be disclosed, and the balance of the material was obtained and sent by her to her advisors after 26 October in compliance with the email of 3 October, because by then an indicative offer had been made. Miss Hilton agreed.

41. In September 2017 the claimant had been approached by Mr Sisson and Ms Such whilst they were in St Ives on holiday, saying they wanted Sian Buckingham, the Office Manager, out of the company as soon as she returned from sick leave and that the claimant was to do "whatever it takes to accomplish this". The claimant was told to speak to Mentor, the then HR advisers to the company, with regards to the quickest way possible and to provide Mr Sisson with the answer, and at some point the contract was transferred to Peninsula to advise. The claimant was given advice to hold a meeting with Sian Buckingham to advise her that she was redundant. The claimant did not consider Sian Buckingham to be genuinely redundant and refused September accounts ahead of the email banning further distribution on do this. Instead, on Mr Sisson's return Sian Buckingham had a private discussion with Mr Sisson and exited the company with a package; she was not dismissed. The claimant saw similarities on the way that she was treated once the management buyout had failed, and advised her solicitors of the circumstances of Sian Buckingham's leaving.

42. On 15 December 2017 the claimant's solicitors sent what they described as a whistle-blowing letter in which they accused Mr Sisson of manoeuvring Sian Buckingham out of the business unlawfully and also of taking dividends in excess of net profit. These were investigated after the claimant's dismissal and were not upheld. They were again investigated by HR Face2Face, with the same outcome.

The Law

43. Section 98 of the Employment Rights Act 1996 provides:

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal; and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;

(b) relates to the conduct of the employee.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case.

44. It is for the employer to show the reason for dismissal and that it was a potentially fair one. The burden is on the employer to show that it had a genuine belief in the misconduct alleged (**British Home Stores v Burchell [1978] IRLR 379**). The Tribunal must also consider whether that belief is based on reasonable grounds after having carried out a reasonable investigation, but in answering these two questions the burden of proof is neutral.

45. In the words of the guidance offered in **Iceland Frozen Foods v Jones [1982] IRLR 439**:

(a) The starting point should always be the words of section 98(4) themselves.

(b) In applying the section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether they consider the dismissal to be fair.

(c) In judging the reasonableness of the dismissal the Tribunal must not substitute its decision as to what is the right course to adopt for that of the employer.

(d) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, another quite reasonably take another.

(e) The function of the Tribunal is to determine the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

(f) The correct approach is to consider together all of the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances.

46. The Court of Appeal in **Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 3** concluded that the band of reasonable responses test applies as much to the

question of whether the investigation was reasonable in all of the circumstances as it does to the reasonableness of the decision to dismiss.

47. In **A v B [2003] IRLR 405** the EAT concluded that when considering the reasonableness of an investigation it is relevant to consider the gravity of the charges and the consequences to the employee if proved. Serious allegations of criminal misbehaviour must always be the subject of the most careful and conscientious investigation.

48. The Tribunal has considered the provisions of the ACAS Code of Practice in Disciplinary and Grievance Procedures.

49. In this case as it is conceded that the claimant made a protected disclosure which met the criteria in section 43B(1) the issue to then be resolved is whether or not she has suffered some identifiable detriment and/or been dismissed. The issues to be decided is whether the act of dismissal carried out by the employer was on the ground that the applicant had made the identified protected disclosure. “On the ground that” means “caused or influenced by”. The “but for” test is considered to be too narrow.

50. In brief, therefore, the Employment Rights Act 1996 as amended by the Public Interest Disclosure Act 1998 and further amended most recently by the Enterprise and Regulatory Reform Act 2013 provides, so far as relevant, as follows:

51. Section 47B(1):

> “A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that he has made a protected disclosure.”

52. Section 103A:

> “An employee who is dismissed shall be regarded 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.”

53. Section 43A: In this Act a protected disclosure means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C-43H.

54. Section 43B(1): In this part a qualifying disclosure means any disclosure of information which in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:

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

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

(c) that a miscarriage of justice has occurred or is likely to occur;

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

(e) that the environment has been, is being or is likely to be damaged; or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.

55. Section 43C:

"A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –

(a) to his employer; etc."

56. The statutory provision should be given a purposive interpretation to advance so far as possible the aim of encouraging responsible whistle-blowing (the cases of **Hibbins v Hesters Way Neighbourhood Project [2009] IRLR 198** and **BP PLC v Elstone & Another [2010] IRLR 558**).

57. Under section 47B(2) of the Employment Rights Act 1996 an ex-employee cannot complaint about dismissal as a detriment but only as unfair dismissal.

58. In determining the principal reason for dismissal the Employment Tribunal should examine the role of the dismissing officer, as it had found it to be by its primary findings of fact, and where necessary in order to consider his role and what went through his mind draw inferences from those primary findings of fact (**Redcar v Cleveland Borough Council v Scanlon UKEAT/0088/08**).

59. Where the claimant has made multiple disclosures section 103A does not require the contributions of each of them to be the reason for dismissal to be considered separately and in isolation. Where the Employment Tribunal finds that they operated cumulatively the question must be whether the cumulative impact was the principal reason for dismissal (**El-Megrisi v Azad University (IR) in Oxford UKEAT/0448/08**).

<u>The burden of proof in detriment cases</u>

60. The Employment Rights Act provides, so far as is relevant in this case, that it is for the employer to show the ground on which any act or any deliberate failure to act was done. In **Fecitt v NHS Manchester [2012] IRLR 64** the Court of Appeal held that the test under section 47B is whether the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's action or deliberate to act.

61. In **Kuzel v Roche Products Limited [2008] IRLR 530** the Court of Appeal held that the protected disclosure provisions must be construed in the overall context of unfair dismissal law. The statutory structure of unfair dismissal law is so different from that of the discrimination legislation that an attempt to transplant the burden of proof provisions about discrimination risks complicating rather than clarifying concepts. On some issues the Employment Rights Act is completely silent as to the burden of proof. In the absence of express statutory provision the general rules

apply. They are that the person bringing the claim must prove it and a person asserting a fact must produce some evidence for it. The burden of proving a reason for dismissal is on the employer. Where the employee complains under section 103A of unfair dismissal by reason of a protected disclosure and the employer advances another reason for dismissal, it is for the employee to prove the section 103A reason.

62. However, the employee who advances a positive case that the reason was a section 103A one must raise a prima facie case by showing that there is a real issue as to whether the reason put forward by the employer is the true one.

63. When it is heard the evidence as to reason from both sides the Tribunal will consider it and make findings of fact and reasonable inferences from the primary facts. It must then decide the reason on the basis that it is for the employer to show what it was. If the employer proved its potentially fair reason then the claim under section 103A ends there; if not then though Tribunal may find that it was a section 103A one, it is not bound to do so. It may find the reason to have been one not advanced by either party.

Conclusions

64. We considered the alleged public interest disclosure made in relation to Sian Buckingham. The claimant believed, that Mr Sisson was determined to have her out of the company, in her case because of the failed buyout. She believed that Mr Sisson's actions were remarkably similar his actions in relation to Sian Buckingham. There is no doubt that Mr Sisson attempted to have Sian removed from the company, but at the end of the day she left willingly have signed a compromise agreement. The claimant's circumstances were not therefore similar. There was no public interest in raising such a matter with Mr Sisson. We do not consider that the solicitor's letter to Mr Sisson was a public interest disclosure. We agree with the claimant, however, that Mr Sisson clearly in Sian Buckingham's case was determined to have her out of the company and we preferred the claimant's evidence in this regard to his.

65. The way in which Mr Sisson approached the claimant within days of the failure of the management buyout was, at the outset, similar. In particular we note that on the day she was suspended he would not and did not tell her why she was being suspended. A reasonable employer with any evidence at all would have told her. He further sought to remove all her electronic equipment, her keys, etc., again without telling her why she was being suspended, dropping a very strong hint that he did not think she would be coming back to work.

66. Mr Howson submitted in his closing speech that the respondent, who had used HR Face2Face and Peninsula throughout the procedure in this case, had complied with the ACAS guidelines and carried out a fair procedure. The claimant submitted that it was unfair in that her dismissal was predisposed and she was given no opportunity in reality to contribute to the initial investigation.

67. The ACAS guidelines suggest that if there is to be an investigation meeting the claimant should be given sufficient time to prepare for it. If there is to be a suspension the claimant should know why they have been suspended and the respondent should consider other options first, such as moving the claimant to another site or allowing her to work from home.

68. We heard no evidence at all that anything was considered prior to the suspension itself. On her suspension she was not given any reason, and in fact she was refused the reason when she asked for it. This plays into our findings later in the case. She was then invited to an investigation meeting within 24 hours of her suspension but again without being told why she was being called to an investigation, ensuring that even if she had attended she would have been completely ill prepared for the meeting.

69. It is not at all clear to the Tribunal what steps had been taken to investigate whatever it was that the respondent considered at that stage that she may have done.

70. The respondent in any event received an email from the claimant's solicitor explaining why she could not attend and that she was not well as a result of what had happened the day before. Regardless of that the respondent chose to continue with the meeting without her being there.

71. We learned later from the appeal that witness statements were not taken from witnesses by HR Face2Face for the investigation meeting with the claimant or for the disciplinary hearing, and decisions were made to proceed to a disciplinary hearing without any evidence in writing about the allegation of bullying. The Tribunal noted that the allegation came from Mr Sisson's stepdaughter, the daughter of his partner both in and out of the business - the 40% shareholder.

72. It took a month for the respondent to decide what allegations there were against the claimant. It is telling that of the 13 allegations raised following an investigation by HR Face2Face, only two were upheld at the disciplinary hearing and one of those fell away at the appeal hearing.

73. The reports from HR Face2Face were lengthy but contained little cogent evidence. The recommendations of the consultants were followed to the letter by the respondent. It was clear to the Tribunal when looking at the case overall and the evidence that we had heard that HR Face2Face had, as the claimant had with Sian Buckingham, been given a mission to dismiss the claimant.

74. The claimant throughout protested her innocence with regard to the disclosure of material from the company to Hallidays in relation to the management buyout. She said that Mr Sisson had not wanted company phones and company emails being used in the process, although accepted that it had happened on occasion by all of them. As a result, of this restriction however, most of Mr Sisson's contribution to the negotiations with the claimant had been verbal with nothing recorded in writing. There was nothing therefore to confirm the claimant's assertion that Mr Sisson gave her permission to access the management information, other than her word, and that of her advisor, who confirmed making the requests for the information, which he considered did not breach the none disclosure agreement, because he was a party to it. We found their accounts entirely credible.

75. That being the case it has to be said that the investigation was flawed, and that Mr Sisson could not hold a reasonable belief that the claimant was guilty of gross misconduct by disclosing information to her advisors. If the situation had been properly investigated he would have known (as he personally knew anyway) that she had not disclosed material to her advisors in breach of the 3 October email.

76. We then considered what was the reason for the dismissal if not a genuinely held belief in gross misconduct.

77. It is an agreed fact that the claimant made a protected public interest disclosure about the level of drawings from the company assets by the shareholders. It was a genuinely held reasonable belief that the shareholders were drawing in excess of net profits. In fact the drawings were probably legitimate and from reserves.

78. There was clear evidence that Mr Sisson took exception to the disclosure that he had withdrawn more funds than he should from the company, information to which the claimant would not have had access but for the MBO, which was made after the claimant had been suspended (on spurious grounds of alleged bullying of the 40% shareholder's daughter, not only rejected on appeal, but also described as potentially defamatory)

79. As the disclosure was made after the claimant's suspension, about which we accept her evidence, that she knew at that point she would be dismissed, we do not find the reason for the dismissal to be the disclosure. The only evidence we found of a possible reason was Mr Sisson's comments in the last meeting before the suspension that his reasons for rejecting the MBO were 'personal'. The claimant was in a similar position to Sian Buckingham – Mr Sisson no longer wanted her to work for the company, and he would find a reason to dismiss her. He did so.

80. As such we find that there was no potentially fair reason for the dismissal, the procedure for which was inherently unfair when compared with ACAS guidelines. By way of example no effective evidence gathering, no explanation for suspension, no fair investigatory interview, no witness statements supplied in advance of the disciplinary hearing and no real account taken of her explanation.

81. We do not find that the claimant contributed in any way to her dismissal by her own conduct as she followed the instructions given to her by Mr Sisson and Ms Hilton 'to the letter'.

82. Had a fair procedure been followed, the outcome would have been the same as Mr Sisson was determined to dismiss her. We saw no evidence of any change of heart, or reconsideration by him as a result of the thirteen allegations being reduced to one, or of any analysis by him of the evidence supplied on which he made the decision to dismiss. He told the claimant to give her advisors what they wanted and in evidence accepted that she could not access the accounts to send them to her advisors without his authority to Ms Hilton. He accepted that Ms Hilton's email could be read to bar any further disclosure before an indicative offer and that the claimant sent the additional material to her advisors on or after the day the indicative offer had been made. We note that the other member of the MBO was dismissed for the same reason – a second opportunity to consider the evidence against them both.

83. We find that the claimant was not guilty of any misconduct, let alone gross misconduct and find the respondent to be in breach of her contract by dismissing her without giving her notice.

84. In conclusion therefore we find that the claimant was unfairly dismissed. We do not find that she was automatically unfairly dismissed for making a public interest disclosure, as the decision to dismiss was taken before the disclosure was made, and that the respondent dismissed her in breach of her contract.

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Employment Judge Warren

Date 16 December 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON

18 December 2019
FOR THE TRIBUNAL OFFICE