EMPLOYMENT TRIBUNALS

Claimant Mr S Robinson

Respondent Pendennis Shipyard Limited

Heard at: Exeter **On:** 7 February 2020

Before:
Employment Judge Goraj

Representation
Claimant: in person (supported by his wife)
The Respondent: Ms R White, Counsel

RESERVED JUDGMENT

THE JUDGMENT OF THE TRIBUNAL IS THAT -

The claimant's application for interim relief pursuant to sections 100 (1) (a), 103A and 128 (1) of the Employment Rights Act 1996 is dismissed.

REASONS

INTRODUCTION

1. By a claim form which was presented to the Tribunals on 20 January 2020, the claimant brought a claim for unfair dismissal which also included a claim for interim relief. In "the claim details" which were attached to the claim form the claimant, who was employed by the respondent as a health and safety manager, contended that he had been unfairly dismissed including because (a) he had made protected public interest disclosures relating to alleged safety issues in respect of a fire on the premises and (b) also because he had raised safety concerns in relation to the Middle Point site. The claimant stated on his

claim form that his dates of employment with the respondent were from 23 November 2015 until 15 January 2020.

2. The claimant's claim was accepted by the Tribunal. The matter was listed for an urgent hearing on 7 February 2020 to determine the claimant's application for interim relief. Notice of the claimant's application for interim relief/ Notice of Hearing (and associated documentation) was served on the respondent by letter dated 23 January 2020. The respondent was given notice of its requirement to present a response to the claimant's claims by 20 February 2020. The parties were not issued with any further case management directions.

3. The claimant attended the interim relief hearing in person (assisted by his wife) The respondent instructed solicitors and Counsel to represent it in the proceedings who attended the interim relief hearing. The respondent had not had an opportunity to prepare a draft response.

The requirements of section 128 of the Act

4. It was agreed that the effective date of the claimant's employment was, for present purposes, 15 January 2020. It was further agreed with the parties that the requirements of section 128 of the Employment Rights Act 1996 ("the Act") had been fully complied with and that the Tribunal therefore had jurisdiction to determine the claimant's application for interim relief. The claimant had not obtained an ACAS Early Conciliation Certificate. The respondent accepted however that, in the light of the nature of the claimant's claims, such Certificate was not required.

Documents and associated matters

5. The parties brought to the Hearing their own bundle of documents together with a skeleton argument from the claimant and a chronology and list of names which had been prepared by the respondent's Counsel. The respondent's bundle was just under 300 pages and the claimant's bundle (which was divided into sections rather than paginated chronologically) was of similar size. The page numbers referred to below are pages numbers from the respondent's bundle (which is referred to as the bundle for simplicity) unless otherwise stated. Any additional documents from the claimant's bundle are referred to by the relevant section number and date.

6. The respondent also brought to the hearing a witness statement and proposed witness, the respondent's managing director Mr M Carr. The respondent's Counsel however acknowledged that it would be inappropriate, in the light of the provisions of Rule 95 Schedule 1 of the 2013 Rules of Procedure, to hear oral evidence. It was therefore agreed that the matter would be dealt with by way of documentation

and representations only and the witness statement was therefore returned to the respondent.

7. The claimant confirmed that for, the purposes of the application for interim relief, he contends that he has been unfairly dismissed by the respondent for making protected public interest disclosures (pursuant to sections 43B – C and 103A of the Act) and /or for carrying out his designated health and safety duties as the respondent's health and safety Manager for the purposes of section 100 (1) (a) of the Act.

8. In recognition of the summary nature of the process of interim relief, and the consequential limited pleadings, the parties/ the Tribunal worked together to clarify the claimant's claims (including how the claimant contended that he satisfied the constituent parts of section 43 B of the Act) and the respondent's responses.

9. The Tribunal also worked with the parties to clarify the key documents which were identified as the following documents (together with the additional documents identified in the representations of the parties set out below) namely: -

    (1) The claimant's letter of appointment and accompanying contract of employment - pages 20- 25 of the bundle.

    (2) The exchange of emails between the parties between 18 October and 21 October 2019 pages- 64-69 bundle.

    (3) The respondent's letter to the claimant dated 14 November 2019 containing proposed terms of settlement - pages 155 – 156 of the bundle.

    (4) The letter from the respondent to the claimant dated 4 December 2019 instructing him not to attend for work pending the outcome of a formal hearing - page 157 of the bundle.

    (5) The letter from the respondent to the claimant dated 5 December 2019 requiring him to attend a formal hearing together with associated documentation (including a copy of the respondent's Investigation Report) - pages 158 – 169 of the bundle.

    (6) The letter from the respondent to the claimant dated 15 January 2020 notifying him of his summary dismissal - pages 225 – 231 of the bundle.

    (7) The claimant's letter of appeal dated 15 January 2020 -pages 232-235 of the bundle.

10. This Judgment was reserved as there was insufficient time on 7 February 2020 for the Tribunal to reach its decision. The respondent confirmed that in the event that the claimant's claim for interim relief succeeded it was not prepared to reinstate or re-engage him. It was therefore agreed that in such circumstances, the Tribunal would make an order for Continuance of the Contract of Employment in accordance with the provisions of section 130 of the Act as the respondent did not wish to make any further representations concerning the terms of any such Order.

11. There was, as at 7 February 2020, an extant internal appeal. An appeal hearing had taken place but the claimant had not been notified of the outcome of his appeal against dismissal.

THE LAW

12. The Tribunal was not provided with any legal authorities by the parties.

13. The Tribunal clarified the law with the parties at the commencement of the Hearing including by sharing with the claimant in particular, the guidance contained and authorities referred to in the IDS Handbook Unfair Dismissal 2015 at (a) paragraphs 17.17 – 17.24 (in respect of interim relief – including in particular the authorities of Taplin v C Shippam Limited 1978 ICR 1068 EAT, Dandpat v University of Bath and anor EAT 04008/09, Raja v Secretary of State for Justice EAT 0364/09, and London City Airport Limited v Chacko 2013 IRLR 610 EAT), and (b) at pages 509 – 511 (in respect of the dismissal of health and safety representatives for the purposes of section 100 (1) (a) of the Act - including the authorities of Goodwin v Cabletel UK Limited 1998 ICR 112, EAT , Bass Taverns Limited v Burgess 1995 IRLR 596 CA (dismissal for trade union activities) and Ratcliffe v Green Corns Limited ET 2401758/06).

14. The Tribunal has also had regard to the guidance contained in His Highness Sheikh Khalid Bin Saqr Al Qasim v Robinson [2018] EAT 0203/17.

15. The Tribunal has reminded itself in particular of the following:-

    (1) A Tribunal will not normally hear oral evidence on an interim relief application.

    (2) The application has to be determined expeditiously and on a summary basis.

(3) The Tribunal has to do the best it can with such material as the parties have been able to deploy at short notice and to make as good an assessment as it is able to do so.

(4) The Tribunal has to be careful to avoid making findings of fact that might tie the hands of the Tribunal which is ultimately charged with the determination of the substantive merits of the case.

(5) The Tribunal is required to decide whether it is likely that the claimant will succeed at a full hearing of the unfair dismissal complaint. When considering the likelihood of the claimant succeeding at Tribunal the test to be applied is whether the claimant has a pretty good chance of success at the full hearing.

(6) When interim relief is sought in a claim relating to protected public interest disclosures (as in the present case) the claimant must show that it is likely that the Tribunal will find that he has made public interest disclosures for the purposes of section 43B – H of the Act (including that he has made qualifying disclosures for the purposes of section 43 B of the Act).

(7) When considering claims pursuant to section 100 (1) (a) of the Act a Tribunal should remind itself that the protection afforded to the manner in which a designated employee carries out health and safety activities should not be diluted too easily.

16. The alleged public interest disclosures and health and safety matters relate, in brief summary, to (a) issues arising following a fire in the crew mess on the ground floor of the respondent's premises at the Bridon Ropes Building ("the premises") on 16 October 2018 and in particular whether it was safe for the respondent/its clients to re-occupy/continue to re- occupy the premises following such fire and associated matters and (b) issues relating to safe access/ use of a separate site at Middle Point.

BACKGROUND INFORMATION

17. The following information is taken from the documentation as identified below in this Judgment for the purposes only of this interim relief application. The following information is therefore not intended and should not be regarded as findings of fact.

The Fire at the premises

18. It is recorded, in brief summary, in the respondent's Investigation Report (at pages 160 -167 of the bundle) that there was a fire in the

crew mess on the ground floor of the premises on the afternoon of 16 October 2019 (b) the fire was attended by the local Fire and Rescue services who provided a handover report which contained instructions/ guidance to the respondent including with regard to restricted access to contaminated areas and further checks to be undertaken (c) following further assessments the first floor and third floors were reoccupied on 17 October 2019 (d) the claimant was on annual leave on 16 October 2019 and did not return to the respondent until the morning of 18 October 2019 (e) following involvement in meetings/ discussions on 18 October 2019 regarding the fire, the claimant telephoned Mr Hills on the afternoon of 18 October 2019 during which he raised concerns about what may or may not have been done with regard to the electrics in the premises (PIDA1) (f) the claimant sent an email to Mr Hills (PIDA2) and there was a further exchange of emails (as referred to at paragraph 31 below) (g) the claimant was on annual leave the following week (h) whilst on leave there was an exchange of emails between employee AE and the claimant during which she sought confirmation as to whether the premises were safe and in response to which the claimant advised AE that he had requested information regarding the safety of the reoccupation of the premises which had not been forthcoming based on which he could only advise that it was not safe to reoccupy (PIDA 3) (i) there were further email / telephone exchanges between the respondent and the claimant on 21/ 22 October 2019 during which the respondent sought clarification of the position in the light of the contents of the claimant's email to AE and in response to which the claimant raised concerns regarding the structure and electrics in the premises (j) on the claimant's return to work on 23 October 2019 he was instructed to undertake further analysis / prepare a report regarding the reoccupation of the premises (k) following receipt of such information and the claimant's advice contained therein the premises were evacuated pending further chemical analysis and (l) on 11 November 2019 the respondent's Operations Board decided that it no longer had confidence in the claimant's ability to form part of the senior management team including in the light of the claimant's responses during and after major incidents.

The respondent's letter dated 14 November 2019

19. The respondent's letter dated 14 November 2019 at page 155 of the bundle stating that as discussed with him (a) they had concerns about his performance (b) that in the circumstances they considered that one option was to offer him a settlement agreement to bring the employment relationship to an end and (c) if they were unable to reach an agreement the respondent would address its concerns regarding the claimant's performance in accordance with the respondent's performance management procedure. The offer was not accepted by the claimant.

The respondent's letter dated 4 December 2019

20. The respondent wrote to the claimant on 4 December 2019 advising him that (a) a number of serious concerns had arisen in relation to his performance and in particular his response to the fire at the premises on 16 October 2019 as a result of which the respondent had undertaken an investigation (b) in consequence of such investigation the claimant was required to attend a formal hearing pending which he was not required to attend for work (page 157 of the bundle).

The respondent's letter dated 5 December 2019 (enclosing the investigation report)

21. The respondent wrote to the claimant by letter dated 5 December 2019 confirming the requirement to attend a formal hearing. The respondent confirmed in that letter the purpose of the formal hearing was to consider the concerns which it stated had been identified as a result of the claimant's handling of the fire on 16 October 2019 and the aftermath thereof as identified in that letter (pages 158- 159 of the bundle). The claimant was provided with the associated investigation report and attachments at pages 160-168 of the bundle.

The letter of dismissal dated 15 January 2020

22. Following a formal hearing on 6 January 2020 the respondent wrote to the claimant by letter dated 15 January 2020 in which the claimant was notified, in very brief summary, that the respondent had concluded that his actions and response to the fire on 16 October 2019 amounted to a serious failure to achieve the standard of skill and care that could be reasonably expected from him as the respondent's health and safety manager and that his lack of action amounted to gross negligence meriting summary dismissal (the letter page is 225- 231 of the bundle).

23. The Tribunal has given careful consideration to the matters addressed in the letter including (a) the detailed findings in the letter concerning the events between 16 October 2019 and 23 October 2019 relating to the fire and the alleged inadequacy of the claimant's responses/ steps taken by the claimant to ascertain the safety of the premises/ to alert the respondent's directors to his concerns (page 226 – 229 of the bundle (b) the respondent's reference to the claimant's contentions at the disciplinary hearing that he believed that the formal hearing had been convened because the claimant had raised concerns regarding the reoccupation of the premises and the safety of Middle Point and (c) the respondent's contention that the reason why the matter was being considered at a formal hearing was not because the claimant had raised concerns (and in response to which the respondent had evacuated the premises) but because the claimant had needed to be louder and speedier in raising his concerns/his failure to take

appropriate action to properly evaluate risks, highlight his concerns and ensure that appropriate action was taken (pages 229 -230 of the bundle).

The claimant's letter of appeal dated 15 January 2020

24. The claimant's letter of appeal dated 15 January 2020 is at pages 232 – 233 of the bundle. In brief summary, the claimant (a) challenged the procedural fairness of his dismissal (b) denied that he had been negligent in his response to the fire on the premises and (c) contended that the he believed that the hearing had been devised in response to his whistleblowing to Mr Hills/ Mr Allies on 18 October 2019 concerning the reoccupation of the premises and (d) that he was convinced that the decision to dismiss him was in relation to safety concerns which he had raised (including that concerns raised in relation to the safety of Middle Point had been a contentious issue), and was not based on the investigation report. The Tribunal has had regard in particular to paragraph 4 of the letter (pages 233 – 234 of the bundle) including with regard to his dealings with Mr Hill on 18 October 2019 regarding the reoccupation of the premises (including that the claimant stated that he had not been able to get information to demonstrate that the premises was safe to re- occupy – but this was not to say it was not safe to occupy).

THE ALLEGED PROTECTED PUBLIC INTEREST DISCLOSURES AND ASSOCIATED MATTERS

25. The Tribunal considered first the alleged protected public interest disclosures ("PIDAS") relied upon by the claimant which the claimant contended were, singularly and/or collectively, the principal reason for his dismissal pursuant to section 103 A of the Act. The claimant requested and was given time during the course of the hearing to clarify the protected public interest disclosures relied upon including, in particular the basis upon which he contended that they were qualifying disclosures for the purposes of section 43B of the Act. As explained below there is an overlap between some of the claimant's PIDAS, which accordingly are addressed together where indicated below. There is also an overlap between the alleged PIDAs and the claimant's claim pursuant to section 100 (1) (a) of the Act as also discussed below.

26. The Tribunal has summarised below the claimant's contentions together with the respondent's response thereto.

PIDAs 1 and 2

27. The Tribunal has considered PIDAs 1 and 2 together as the claimant contends that PIDA 2 was written confirmation of the verbal PIDA 1 which was made earlier that day :-

    (1) **PIDA 1 -** 18 October 2019 – alleged verbal disclosure of information by the claimant (by telephone at around 2pm) to the respondent (Mr Stephen Hills – the respondent 's Commercial Director).

    (2) **PIDA 2** - a subsequent email from the claimant to Mr Hills of the respondent dated 18 October 2019 timed at 15.52 – at pages 65 -66 of the bundle – allegedly confirming PIDA1.

PIDA 1

28. The claimant alleges that he "Raised (with Mr Hills) that there was not sufficient information available to determine that Bridon Ropes was safe to occupy. Specifically structure was unknown to be safe. Electrics were unknown to be safe and concerns raised regarding particulate in the air could cause health issues. Unable to assess the area was safe without information".

29. The claimant stated in the "Claim details" attached to his claim form, "At 14.00 I reported my concerns to Stephen Hills (Commercial Director), my direct report, regarding reoccupation of the building. I made clear to Stephen that I had not been able to get information to demonstrate that the building was safe to reoccupy. This is not to say it was not safe to occupy, but I sought assurance that whoever had made the decision to reoccupy had considered all the risks. The matter was left with Stephen as I was on annual leave from the end of that day."

PIDA 2

30.

    (1) Email to Mr Hills dated 18 October 2019 at pages 65-66 of the bundle in which the claimant stated as follows:-

    "Stephen I thought it prudent to put our previous conversation in writing.

    Are we happy to reoccupy Bridon after the fire? Is it safe?

    Are the electrics safe?

    Have residues from smoke been sufficiently removed?

One of the structured pillars has been fired damaged, has this been checked?

I would appreciate, given the magnitude of this incident, that you and Toby would allow me time to discuss this incident.

Simon Robinson
HSE department.

31. There was a subsequent exchange of emails between the claimant/the respondent on 18 and 21 October 2019 namely:-

    (1) An email from Toby Allies (at 18.13 page 65 of the bundle) to the claimant as follows:-

    " Hi Simon,

    I am happy to sit down next week with you and talk through any concerns.

    Kind regards

    Toby Allies
    Joint Managing Director
    Pendennis

    (2) An exchange of subsequent emails on 21 October 2019 also at page 65 of the bundle (which were copied to the claimant) between Mr Hills and Mr Allies in which Mr Hill's requested a copy of any notes/actions from Mr Allies' discussions with the claimant and Mr Allies informed Mr Hills that he understood that the claimant was away at that time and that he would catch up with the claimant as soon as he had returned.

32. The claimant also relied in support of his alleged public interest disclosures on the following documents: -

    (1) Section 14- paragraph 29 of the claimant's bundle – (extracts from the minutes of the disciplinary hearing on 6 January 2020).
    (2) Section 50 – paragraph 252 of the claimant's bundle (extracts from the minutes of the appeal hearing on 29 January 2020)
    (3) Section 29 - paragraph 4 of the claimant's bundle (extracts from the claimant's letter of appeal dated 15 January 2020).
    (4) Page 158 of the respondent's bundle – letter dated 5 December 2019 – inviting the claimant to a disciplinary hearing.
    (5) Section 11 – of the claimant's bundle – (the respondent's letter to AE on 30 October 2019 – in which it was stated that particulate sampling was undertaken on 22 October 2019.

(6) Section 9 of the claimant's bundle - email dated 24 October 2019 (also relating to levels of particulate).

33. The claimant contended that he had a reasonable belief that the above disclosures to his employer (Mr Hills of the respondent) constituted qualifying disclosures for the purposes of sections 43(1) (a) and/or (b) and/or (d) of the Act . The claimant relied upon the following statutory and associated provisions:-

(1) Section 2 (1)) of the Health and Safety at Work Act 1974 ("HSWA"). (general duty to ensure health and safety) (section 43 B (1) (a) and/or (b) of the Act).
(2) Section 2.2 of the HSWA (failure to provide a safe workplace) (section 43B (1) (a) and (b) of the Act.
(3) Regulation 3 of Management Regulations (failure to carry out a risk assessment) (section 43 B (1) (a) and/or (b) of the Act.
(4) Section 2.2 (c) of the HSWA (provision of information) (section 43 B (1) (a) and/or (b) of the Act.
(5) Endangering the health and safety of people by occupying a building when particulate level was unknown section 43 (B) (1) (d) of the Act.

34. The claimant contended that he had a genuine belief that the disclosure were made in the public interest in the light of the people accessing the building including apprentices, children and other visitors.

35. Causation for the purposes of section 103 A of the Act – the claimant contended that one of the reasons for his dismissal was that it was a big inconvenience/ embarrassment to the respondent to take people out of the building on 21 October 2019 (after people had previously been allowed to return on 17 October 2019) which re – evacuation had occurred as a result of his disclosures.

The respondent's response

36. PIDA 1 – there is a dispute of fact between the parties as to what was said by the claimant to Mr Hills on 18 October 2019 which can only be resolved by oral evidence.

37. PIDA 2 – is not a disclosure as it is a repeat of the information contained in PIDA1.

38. Section 43 B of the Act – the claimant would not, in any event, be able to satisfy the Tribunal that he had a reasonable belief that PIDA 1 or PIDA 2 tended to show an alleged breach of any of the statutory provisions identified at paragraph 33 above, as, on the claimant's own

account of PIDA 1 and PIDA 2 the claimant says that he was unable to say whether or not the premises were safe to occupy.

39. Causation for the purposes of section 103A of the Act - the claimant has not produced any evidence to support his contentions that the re-evacuation of the premises on or around 23 October 2019 was an embarrassment and/or inconvenience to the respondent. On the contrary:- (a) the respondent took appropriate action to evacuate the premises when concerns were raised by the claimant on his return to work on or around 23 October 2019 and (b) the reason why the respondent took action against the claimant under the disciplinary procedure was not because he had raised concerns but because the respondent believed that the claimant should have been louder and speedier in raising his concerns regarding the occupation of the premises as stated in the respondent's letter of dismissal dated 15 January 2020 (pages 225 – 231 of the bundle (bottom paragraph on page 229 and top paragraph on page 230 of the bundle).

PIDA 3

40. 21 October 2019 - an email from the claimant to AE (receptionist at the respondent) copied to Jill Carr (HR director), Mr Hills (commercial director) Mr Allies (joint Managing Director) - page 64 of the bundle (in response to an earlier email from AE).

41. This email exchange is set out below: -

(1) From AE to the claimant (copied to the people referred to above) at 9:44 on 21 October 2019 at 9:44 AM- subject-fire damage

" Dear Simon

Please could you confirm that my workplace i.e. the Bridon Building is now safe to work in following last week's fire?

Has all the soot now been removed, and has the air been tested and certified that it is safe to work in?

Has the building being assessed and certified as structurally sound?

Have all the " fire safety" items that were damaged in the fire, i.e. fire doors and intumescent fittings, been replaced?

I would appreciate an early reply as I am due to start work at 12:30 PM today but would like to anticipate where I will be located.

Thank you for your attention.

Kind regards

AE

Cc Toby Allies & Jill Carr

(2) From the claimant to AE (copied to the people referred to above) at 11.50 on 21 October 2019 (PIDA 3) - subject- fire damage.

"Alison

I have asked for information regarding the safety of reoccupation of the building, but this has not been forthcoming. Based on this I can only advise it is not safe to re-occupy.

I am currently on holiday, but would advise you to speak to Toby.

Regards

Simon"

42. The alleged PIDA3 is also set out in the 4th paragraph of the Claim Details attached to the claimant's claim form. The claimant further states in that paragraph that at 17.15 that day (21 October 2019) he received an email from Henk Wiekens (Joint Managing Director) , that employees working in Bridon Ropes were to be relocated and air test were to be conducted in the building, as the claimant had advised Mr Hills on Friday (18 October 2019). The claimant further stated that he had then received emails from Mr Carr (joint Managing Director) asking about the email sent to AE. The claimant also refers in the 5th paragraph of the Claim Details to subsequent telephone calls and email exchanges with Mr Carr on 22 October 2019 including that (a) Mr Carr seemed more concerned about the claimant's email to AE than health and safety concerns but also (b) that the respondent followed the claimant's recommendations throughout the next few days.

43. The claimant contended that he had a reasonable belief that the alleged disclosure (PIDA 3) was a qualifying disclosure as follows: -

(1) For the purposes of Section 43B (1) (d) of the Act – namely a belief that there was a danger to health and safety by re-occupying the premises without knowing whether it was safe.

(2) For the purposes of section 43 B (1) (a) and (b) of the Act namely, a belief that the respondent was in breach of (a) a duty to ensure health and safety of employees pursuant to section 2

(1) of HSWA (b) and/or a failure to provide information pursuant to section 2 (2) (c) of the HSWA and /or (c) a breach of Regulation 3 of the Management of Health and Safety Regulations.

44. The claimant contended that he had a genuine belief that the disclosures were made in the public interest for the reasons identified previously at paragraph 34 above.

45. Causation for the purposes of section 103 A of the Act - the claimant relies on the causation identified at paragraph 35 above and further the alleged publicity surrounding the re- evacuation of the premises.

The respondent's response

46. Disclosure of information - the respondent contended that the claimant's email to AE was not a disclosure of information for the purposes of section 43B of the Act because: - (a) it was a repetition of information previously provided and (b) the disclosure was made to AE who was a more junior employee.

47. Qualifying disclosure for the purposes of section 43 (B) of the Act - the respondent contended that the claimant could not have had a reasonable belief that the premises were not safe to occupy as he took no steps between the receipt of the email from AE on the morning of 21 October 2019 and his response to evacuate staff from the premises. If the claimant believed that the premises were not safe why did he not do more?

48. Causation for the purposes of section 103 A of the Act - the respondent relies on the contentions at paragraph 39 above.

PIDA 4

49. 23 October 2019 – verbal in a meeting (15.00) with Mr Allies and Mr Carr (the respondent's joint managing directors). The claimant contended that :- "Discussed that/ stated that Middle Point was not safe for our employees to occupy. Mike refused to discuss the matter any further.

50. The claimant clarified his position further during the Hearing namely, he contended that (a) when he stated that he wanted to discuss Middle Point (because it was not safe to use) the conversation became very heated and he was told that it was not a topic for conversation and (b) Mr Allies did not say anything other than that they were not going to talk about Middle Point as it was not the issue.

51. The claimant stated in the "Claim details" attached to his claim form :- (a) 6th paragraph – "On Wednesday 23 October , I returned to work following my annual leave. I convened a meeting with Toby and Mike to discuss safety concerns. I also wanted to discuss another area of the site (Middle Point) I had concerns about, but Mike refused to enter into discussion regarding Middle Point. I had discussed these concerns with other directors prior to this. We did discuss the situation relating to Bridon Ropes, but this was quite heated ….. and (b) final paragraph – " In summary, I believe I was dismissed for making several protective disclosures; due to the fact that I not only raised safety concerns, but corresponded with an employee in relation to a safety concern. I also believe that raising safety concerns in relation to Middle Point is also a factor in my dismissal".

52. The claimant also relied in support of PIDA 4 on documents in sections 1, 2 and 14 of his bundle (including the emails dated 8 and 9 October 2019 at section 41 of the claimant's bundle).

53. The claimant contended that the above alleged disclosure to the respondent was a qualifying disclosure for the purposes of section 43 B (1) (a) and/or (b) (general duty to ensure health and safety pursuant to HSWA) and/or (d) as the area was unsafe for our employees to occupy which was supported when an employee walked off the end of a unprotected edge (Section 41 of the claimant's bundle). The claimant further contended that he had concerns in particular concerning the lack of a pedestrian area and adequate lighting.

54. The claimant contended that he had a genuine belief that the disclosure was made in the public interest in the light of the employees and other people accessing the area (including as a car park).

55. Causation for the purposes of section 103A of the Act - the claimant contended that one of the reasons for his dismissal was the loss of face caused to the respondent by stopping people from using the Middle Point site.

The respondent's response

56. There is a factual dispute as to the nature and /or extent of any such discussion which can only be resolved by oral evidence. By way of example the Investigation Report records (a) that Mr Carr declined on 23 October 2019 to discuss Middle Point for the reasons stated at page 166 and (b) makes no reference to any heated discussion.

57. There is no evidence before the Tribunal to substantiate that the claimant, in any event, had a reasonable belief that Middle Point was not safe to occupy.

58. Causation for the purposes of section 103 A of the Act – the respondent's case is that the claimant's involvement in Middle Point played no part in the respondent's decision to dismiss the claimant which , in summary, was because of his alleged gross negligence in respect of his actions and responses to the fire on 16 October 2019 and associated matters as set out clearly in the detailed letter of dismissal dated 15 January 2020 (pages 226 – 231 in particular). Further, the respondent specifically refuted in the letter of dismissal (page 229) the claimant's contentions at the disciplinary hearing that Middle Point played any part in the decision to convene a disciplinary hearing.

PIDA 5

59. 9 October 2019 – email from the claimant to Mr Hills (and also copied to others in the respondent including Mr Allies) - contained in section 41 of the claimant's bundle.

60.

(1) "Dear Stephen

Prior to Monday's meeting I had been told that Middle Point was not my responsibility. I had understood that this area was owned by another company. I understood Ian Granville was the sole director of the company.

On Monday I was told that Middle Point was part of my responsibility , to which I replied the area is not safe to use. It was agreed that the area requires a risk assessment, which I will complete the end of the week. I also understand from Charlie that there are plans to install pavement and lighting, where and when I will clarify with Charlie. I would recommend that the area is not used until we are satisfied it is safe.

Simon Robinson
HSE Manager
HSE Department

61. There is a further document in section 41 of the claimant's bundle namely an HSE Incident report dated 8 October 2019 contained in an email from the claimant to Mr Hills and Mr Allies and others in which it is stated that an Incident occurred on 8 October 2019 namely " Walking back from Middle point car park in the dark, Tom fell off a two foot step and jarred his ankle".

62. The claimant contended that he had a reasonable belief that the alleged disclosure PIDA 5 was a qualifying disclosure as follows :-

(1) For the purposes of section 43 B (1) (d) of the Act - namely a belief that there had been a failure of a duty of care to assess the safety of people occupying the area. – no lighting in the area, no pedestrian segregation and no risk assessment.

(2) For the purposes of section 43 B (1) (a) and (b) of the Act – namely a failure to ensure the health and safety of people under section 2 (1) of the HSWA (b) failure to ensure safe egress from the workplace under section 2.2 of the HSWA and (c) failure to ensure a safe workplace (section 2.2 HSWA).

63. The claimant contended that he had a genuine belief that the disclosures were made in the public interest for the reasons identified previously in respect of PIDA 4 above.

64. Causation for the purposes of section 103A of the Act – the claimant relies upon the alleged causation identified above in respect of PIDA 4.

The respondent's response

65. The respondent relies on the above matters in respect of PIDA 4 where relevant.

66. The respondent accepts that the email dated 9 October 2019 was a disclosure for the purposes of section 43 B of the Act but says that :- (a) it has not been pleaded as a protected public interest disclosure and therefore requires a formal amendment and (b) in any event, because it has not been pleaded the respondent has not been able to take the respondent's instructions on this element of the claim.

THE CLAIMANT'S CLAIM PURSUANT TO SECTION 100 (1) (a) of the ACT

67. The respondent acknowledged that (a) the claimant was a designated health and safety representative for the purposes of 100 (1) (a) of Act and (b) the potential crossover between such complaints and the claimant's claim of protected public interest disclosure dismissal.

68. The parties made the following oral representations concerning the claimant's complaint pursuant to section 100 (1) (a) of the Act as summarised below.

The claimant's representations

69. In brief summary, the claimant contended as follows:-

The Fire at the premises

(1) The claimant was on leave at the time that the fire occurred (on 16 October 2019).

(2) On his return on 18 October 2019, information was not forthcoming about the safety of the building and he did his best, notwithstanding the lack of information which was available to him, to establish the safety of the premises.

(3) The premises had been reoccupied by the respondent's clients prior to a risk assessment being undertaken and prior to the claimant been informed that there had been a fire at the premises.

(4) The claimant assessed the building on his return on18 October 2019 and by the afternoon thereof had concluded that he did not know whether or not the premises were safe which concerns he immediately relayed to his line manager Mr Hills.

(5) The relevant information was not available until 17.15 on 21 October 2019. It took the respondent over a day to get people out of the premises and their health and safety was therefore at risk at that time. The evacuation of people from the premises was inconvenient to the respondent and took a lot of effort but was the safe thing to do in response to the information which was available at that time.

(6) The performance by the claimant of his duties as health and safety manager had led to a decision that the premises had to be evacuated. This caused an issue because the respondent's clients had to be evacuated having previously been told that it was safe to re-occupy the premises - which the claimant contends was a factor in his dismissal.

Middle Point

(7) The claimant considered that the Middle Point site was unsafe to use as the risks were not controlled.

(8) The Middle Point site was put into use without any discussion with the respondent's health and safety Department

(9) the claimant advised Mr Allies and Mr Hills on 9 October 2019 that the Middle Point site was not safe to use including because of concerns relating to lighting and a lack of pedestrian segregation.

(10) The claimant attempted to raise his concerns with Mr Carr and Mr Allies on 23 October 2019 but the respondent refused to discuss the matter further and the conversation became very heated.

(11) A decision was taken to continue to use Middle Point site whilst control measures were being implemented.

(12) The claimant contends that the subsequent actions required in respect of the Middle Point site resulted in loss of face by the members of the respondent's management team including that it made them look silly for not considering the safety implications of using the Middle Point site and for having to react further down the line.

The respondent's responses

Middle Point

70. There is a dispute of facts between the parties regarding the part, if any, which the claimant's involvement in Middle Point played in the decision to dismiss the claimant which can only be resolved by oral evidence at a full hearing.

71. It is, in any event, the respondent's case that the claimant's involvement in Middle Point played no part in the decision to dismiss him. It relies in particular on the following namely :- (a) that there is no reference to such matters in the respondent's letter dated 5 December 2019 (at page 158-159 bundle) setting out the allegations against the claimant and (b) the contents of the respondent's letter dated 15 January 2020 dismissing the claimant (pages-225 – 231 of the bundle) which sets out in detail its reasons for the claimant's dismissal, which it states were unrelated to Middle Point, and further expressly refutes the suggestion which had been made by the claimant at the disciplinary hearing that Middle Point had played any part in the decision to convene a disciplinary hearing (page 229- 230).

The reason for the claimant's dismissal

72. In summary the respondent contended that :-

(1) Whilst the respondent acknowledged that the authorities referred to at paragraph 13 above caution against the dilution of the protection afforded by section 100 (1) (a) of the Act to a designated health and safety representative they do not prevent an employer from dismissing an employee who is not performing his health and safety duties to the standard required.

(2) The respondent did not dismiss the claimant for carrying out / proposing to carry out his duties as a health and safety manager. The reason for the claimant's dismissal was that he was not performing his duties as health and safety manager to the standard required. Health and safety is an important function and an employer is entitled to manage an employee in such a role if they are not doing their job properly-this is an issue of performance.

(3) There is a dispute between the parties as to the reason for the claimant's dismissal which can only be determined following a proper consideration of all of the relevant documentation and oral evidence.

(4) The claimant was dismissed, in summary, because his actions/ lack of action and response to the fire at the respondent's premises on 16 October 2019 which amounted to a serious failure to achieve the standard of skill and care that could reasonably expected from him which constiuted gross misconduct. This is supported by the key documents before the Tribunal.

(5) The claimant was not dismissed for raising health and safety concerns in respect of the fire / its aftermath but for sitting on the fence (final paragraph at page 202 of the bundle) and for failing to be "louder and speedier" in raising his concerns (the letter of dismissal dated 15 January 2020-top paragraph at page 230).

(6) There was not a jot of evidence adduced before the Tribunal to support the claimant's contention that it was inconvenient or embarrassing for the respondent to get people out of the premises-the respondent evacuated people from the premises in response to the further information provided by the claimant.

THE CONCLUSIONS OF THE TRIBUNAL

THE CLAIMANT'S COMPLAINT PURSUANT TO SECTION 103 A OF THE ACT

73. The Tribunal has considered first whether, having regard to the evidence and guidance referred to above, the claimant has a pretty good chance that the Tribunal will decide at the full hearing of this matter that the reason/ principal reason for his dismissal was because he made one of more of the PIDAs identified above (including whether he has complied with the requirements of section 43 B – 43 C of the Act).

PIDA 1 and PIDA 2

74. The Tribunal has considered PIDA 1 and PIDA 2 together (unless otherwise indicated below).

75. Having given the matter careful consideration, the Tribunal is not satisfied, on the basis of the available evidence, that the claimant has a pretty good chance that the Tribunal will decide that the reason/ principal reason for his dismissal was because of PIDA 1 and/ or PIDA 2.

76. When reaching this conclusion the Tribunal has taken into account in particular the following matters:-

(1) Generally – The Tribunal has been provided with a substantial volume of documentation which it has not, having regard to the summary nature of the interim relief process, had a proper opportunity to consider and evaluate. Further, it is clear from the documentation which has been provided by the parties that there are considerable disputes of fact on key issues which will require determination by the Tribunal following an examination of the documentation and assessment of the oral evidence on cross examination. This general observation also applies to the remaining PIDAs and health and safety claims unless otherwise referred to below. The Tribunal has however done its best, where possible, to give its summary assessment (where possible, on the available evidence, as to whether there is a pretty good chance that the clamant will succeed at the full hearing with regard to any elements of the PIDA 1 / PIDA2 (or any other claims).

(2) PIDA 2 - the Tribunal is satisfied (having regard to the information contained in the email to the respondent dated 18 October 2019 – paragraph 30 above) that there is a pretty good chance that the claimant will succeed in satisfying the Tribunal that PIDA 2 constituted a “disclosure” for the purposes of section 43 B of the Act (including that the claimant believed such disclosure to be in the public interest having regard to the persons having access to the premises).

(3) The position is however different with regard to PIDA 1 (paragraph 28 above) as there is a dispute of fact between the parties as to what was said by the claimant to Mr Hills which can only be resolved by further consideration of the documentation and oral evidence at the substantive hearing.

(4) Further, the Tribunal is not satisfied, on the available evidence, that there is a pretty good chance that claimant will succeed in satisfying the Tribunal that PIDA 2 (or PIDA1 if it is a disclosure) are qualifying disclosures for the purposes of sections 43 (1) (a) and/or (b) and/or (d) of the Act including, in particular, that the claimant had, at the time such "disclosures" were made, a reasonable belief that the respondent was in breach of one or more of the provisions identified at paragraph 33 above. When reaching this conclusion, the Tribunal has had regard in particular to the fact that claimant is seeking clarification of the position/ requesting further discussion about the matters referred to in the email dated 18 October 2019 (paragraph 30 above) rather than asserting a positive case regarding any such concerns.

(5) Still further, the Tribunal is not satisfied, on the available evidence, that there is a pretty good chance that the Tribunal will determine that PIDA 1 or PIDA 2 (or either of them) were the principal reason for the claimant's dismissal.

(6) When reaching this conclusion the Tribunal has had regard in particular to the following matters:- (a) the respondent's immediate response to the claimant's email dated 18 October 2019 (paragraph 31 above) in which Mr Allies confirmed that he was happy to sit down with the claimant the following week and talk through any concerns (b) the claimant did not adduce any documentation to the Tribunal in support of his contention that the was dismissed by the respondent because of the inconvenience and embarrassment allegedly caused to the respondent by PIDA 1 / PIDA2 (as he says that they had required the respondent to re- evacuate the premises) and (c) the contents of the respondent's letter to the claimant dated 5 December 2019, the accompanying Investigation Report and subsequent letter of dismissal dated 15 January 2020 (d) whilst the respondent raises in such documents fundamental concerns regarding the claimant 's performance in relation to his handling/ response to the fire at the premises on 16 October 2019 the respondent is not critical of the claimant for raising such concerns, but rather because the claimant had "needed to be louder and speedier in raising your concerns" (page 230) and (e) the factual circumstances of the events between 16 October 2019 and beginning of November 2019 is complex and will require a detailed examination of the documentation and consideration of the oral evidence in order to determine the sequence of events and the respondent's reason/ principal

reason for the claimant's dismissal including, the claimant's culpability (if any) for such matters.

PIDA 3

77. The Tribunal has gone on to consider PIDA 3 (paragraph 41 above).

78. The Tribunal is satisfied that there is (notwithstanding the points raised by the respondent above) a pretty good chance that the Tribunal will determine that the email from the claimant to AE on 21 October 2019 was a disclosure for the purposes of section 43 B of the Act. When reaching this conclusion the Tribunal has had regard in particular to the information contained in the email and further that although the email was addressed to AE, a junior employee, it was also copied to the respondent's Joint Managing Director, Mr Allies and the respondent's HR director Jill Carr.

79. The Tribunal is not satisfy however, on the available evidence, that there is a pretty good chance that the Tribunal will determine that the claimant has satisfied the remaining elements of section 43 B of the Act namely, the reasonableness of the claimant's belief/ public interest nature of such belief at the time that the alleged disclosure was made on 21 October 2019 regarding the safety of the reoccupation of the premises (paragraphs 41 - 43 above) as the claimant to did not draw to the attention of the Tribunal any evidence that he had taken any steps to advise the respondent to evacuate any remaining staff from the premises at the time of his email to AE.

80. Further, the Tribunal is not satisfied on the available evidence that there is a pretty good chance that the Tribunal will, in any event, determine that PIDA 3 was the reason or principal reason for the claimant's dismissal for the purposes of section 103A of the Act. When reaching this conclusion, the Tribunal has taken into account that one of the alleged performance issues identified in the respondent's letter dated 5 December 2019 (page 225 of the bundle) and in the subsequent letter of dismissal dated 15 January 2020 (page 228 of the bundle) make direct reference to PIDA 3 and to the respondent's responses thereto. However, the Tribunal has also had regard to context in which PIDA3 is referred to in such documents together with the wider issues identified at paragraph 76 (b) – (e) above which will fall to be determined by the Tribunal after considering the relevant documentary and oral evidence.

PIDA 4 & 5

81. The Tribunal has gone on to consider PIDA 4 and PIDA 5, which both relate to the Middle Point site. The Tribunal has considered them in reverse order as PIDA 5 (the email to the respondent dated 9 October 2019 referred to at paragraphs 59 – 60 above) occurred first.

PIDA 5

82. The respondent accepted that PIDA5 was a disclosure for the purposes of Section 43 B of the Act but (a) contended that the claimant could not rely on it, without formal amendment as it is not referred to in the claimant's Details of Claim and (b) made no admissions as to whether it was a qualifying disclosure for the purposes of section 43 B of the Act (including as they had not had an opportunity to take instructions as it was only identified as an alleged protected disclosure during the hearing).

83. The Tribunal is satisfied, leaving aside any dispute as to whether a formal amendment is required to allow the claimant to pursue PIDA 5 (which is, in any event, likely to be allowed given the nature of the related issues contained in the claimant's Details of Claim and the absence of any jurisdictional time issues as the claimant was dismissed on 15 January 2020) that there is a pretty good chance, on the available evidence, that a Tribunal will determine that PIDA 5 was a protected public interest disclosure for the purposes of Section 43 B (1) (b) and (d) of the Act as contended by the claimant. When reaching this conclusion the Tribunal has regard in particular to PIDA 5 together with the contents of the incident report dated 8 October 2019 (paragraph 66 above) relating to the nature and circumstances of the injury on the Middle Point.

84. The Tribunal has considered the question of causation for the purposes of section 103A of the Act together with PIDA 4 below.

PIDA 4

85. The Tribunal has therefore finally, gone on to consider PIDA 4 (paragraph 49 above) namely the alleged verbal disclosure to Mr Allies and Mr Carr of the respondent on 23 October 2019 relating to safety of the Middle Point site.

86. Having given careful consideration to the available evidence the Tribunal is not satisfied that there is a pretty good chance that the Tribunal will determine that the claimant made the alleged disclosure. When reaching this conclusion the Tribunal has taken into account in particular that not only is the alleged disclosure denied by the respondent but there are also consistencies in the claimant's own

account of what he said (paragraphs 50 and 51 above) including (a) the degree of discussion with the respondent (if any) regarding the safety of the Middle Point site and (b) whether the alleged heated exchanges related to Middle Point or the premises. These matters can only be determined by the Tribunal at the full Hearing.

87. Further, the Tribunal is not, in any event, satisfied, on the available evidence, that there is a pretty good chance that the Tribunal will determine that PIDA 4 and /or PIDA 5 were the reason or principal reason for the claimant's dismissal for the purposes of section 103 A of the Act.

88. When reaching this conclusion the Tribunal has taken into account in particular that:- (a) the claimant has not adduced any evidence in support of his contention at paragraph 55 above that one of the reasons for his dismissal was because of the loss of face suffered by the respondent as a result of stopping people from using the Middle Point site (which he contended happened as a result of his PIDAS) (b) there is no reference to Middle Point in the respondent's letter dated 5 December 2019 (page 158 of the bundle), which set out the disciplinary allegations and (c) the stated reasons for the claimant's dismissal contained in the letter of dismissal dated 15 January 2020 (page 225 onwards) which relate exclusively to the claimant's alleged shortcomings and response to the fire at the premises on 16 October 2019 - the veracity of which will fall to be determined by the Tribunal considering the relevant documentary and oral evidence.

Conclusion on the PIDA claims

89. Having had regard to all of the above, the Tribunal is not satisfied that there is a pretty good chance that the Tribunal will determine that the claimant's claims (or any of them) pursuant to section 103 A of the Act succeed and the claimant's application for interim relief in respect of his alleged protected public interest claims is therefore dismissed.

CONCLUSIONS IN RESPECT OF THE CLAIMANT'S CLAIM PURSUANT TO SECTION 100 (1) (a) of the ACT

90. The Tribunal has finally gone on to consider the claimant's alternative claim pursuant to section 100 (1) (a) of the Act as summarised at paragraph 69 above. The claimant relies on essentially the same arguments relied upon in support of his claim pursuant to section 103 A of the Act.

91. As stated above, the respondent accepts that the claimant was a designated health and safety representative for the purposes of section 100 (1) (a) of the Act but denies that he was dismissed in contravention of such provisions.

92. When considering this element of the claimant's claims the Tribunal has given careful consideration to the authorities/ principles referred to at paragraph 13 and 15 (7) above including the approach adopted by the EAT in Goodwin v Cabletel UK Limited 1998 ICR , 112 in which it made it clear (in respect of the predecessor statutory provisions) that (a) the protection afforded to the manner in which a designated employee carries out health and safety activities should not be diluted by too easily by finding acts done for that purpose to be justification for dismissal and (b) that the key question is whether the manner in which the employee approached the health and safety issues took him outside the scope of the protected activities.

93. After giving careful consideration to all of the matters referred to above, the Tribunal is not however satisfied that the, on the available evidence, the claimant has a pretty good chance that the Tribunal will determine that the claimant was dismissed for carrying out or proposing to carry out his designated duties as a health and safety manager for the purposes of section 100 (1) (a) of the Act.

94. When reaching this conclusion, the Tribunal has taken into account in particular that (a) , as indicated already above with regard to the claimant's other claims, there are significant disputes of fact between the parties regarding key issues, including especially with regard to the claimant's responses and handling of the fire at the respondent's premises on 16 October 2019 which can only be properly determined by proper examination of the relevant documentary and associated oral evidence (b) the claimant has not drawn to the attention of the Tribunal any evidence in support of his contentions that the raising of health and safety matters and the subsequent re- evacuation of the premises/ Middle Point were the reason/ principal reason for his dismissal on the grounds that they caused inconvenience and embarrassment to the respondent and (c) the findings and conclusions contained in the respondent's letter of dismissal dated 15 January 2020 (pages 225 onwards) in which the reason for the claimant's dismissal is clearly stated to be that the respondent concluded that the claimant's actions and response to the fire at the premises on 16 October 2019 amounted to a serious failure to achieve the standard of care and skill to be reasonably expected of him as the Health and safety manager (page 230) the veracity of which can only be properly tested on further examination as indicated above.

95. Still further, the Tribunal is unable to assess on the available evidence / without further examination of the relevant documentary and oral evidence whether the claimant's dismissal contravened the provisions of section 100 (1) (a) of the Act, in that it diluted the protection afforded to him as a designated health and safety representative, or whether the

way in which the claimant approached such duties took the claimant outside the scope of the protected health and safety activities.

96. The claimant's application for interim relief pursuant to sections 100 (1) (a), 103 A and 128 (1) of the Act is therefore dismissed.

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Employment Judge Goraj
Date: 16 February 2020

As reasons for the Judgment were announced orally at the Hearing written reasons shall not be provided unless they are requested by a party within 14 days of the sending of this Judgment to the parties.

Online publication of judgments and reasons

The Employment Tribunal (ET) is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: https://www.gov.uk/employment-tribunal-decisions

The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness