Case No: 1800943/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr B Lucas

Respondent: Walsh Taylor Business and Corporate Recovery Specialists Ltd

HELD AT: **Leeds** **ON:** **15 and 16 October 2020**

BEFORE: Employment Judge Davies

REPRESENTATION:

Claimant: Dr J Brown (counsel)
Respondent: Mr B Frew (counsel)

JUDGMENT having been sent to the parties on 29 October 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction and Issues

1. These were claims of automatically unfair dismissal and breach of contract brought by the claimant, the claimant, against his former employer, Walsh Taylor Business and Corporate Recovery Specialists Ltd. The claimant was represented by Dr Brown (counsel) and the respondent by Mr Frew (counsel). I was provided with an agreed file of documents. A number of other documents were produced during the course of the hearing, which I admitted in evidence. I am bound to say that this seemed to me to reflect an inadequate approach to disclosure on the respondent's part.

2. I heard evidence from the claimant himself and from Ms Taylor, the owner of the respondent at the relevant time. Ms Taylor attended by CVP from Spain, but everybody else attended the hearing in person.

3. The issues for me to decide were as follows:

   3.1 Did the claimant make a protected disclosure? Did he disclose information that in his reasonable belief tended to show breach of a legal obligation or the taking of

action to conceal the breach of a legal obligation and in his reasonable belief was the disclosure made in the public interest?

3.2 If the claimant made a protected disclosure was that the reason or principal reason for his dismissal? the claimant had not worked for the respondent for two years so it is for him to prove the reason or principal reason for dismissal.

3.3 Did the respondent act in breach of contract by dismissing the claimant without notice or did it fail to pay him what he was entitled to during his notice period?

Findings of Fact

4. I found Ms Taylor's evidence fundamentally lacking in credibility. For example, she gave evidence about the salary agreed with the claimant. As set out below, her evidence was wholly implausible and inexplicably inconsistent with the written evidence, and what she said in her witness statement was contradicted by what she said in her oral evidence. That was just one example of how her answers changed in evidence as she went along and seemed to me to be constantly shifting sands. By contrast I found the claimant an impressive witness. He was measured, clear and consistent. His answers matched the documents, including those produced during the course of the hearing. What he said in his oral evidence was the same as what he said in his witness statement and he had said all along.

5. Against that background these are my findings about the events in question.

6. The respondent is a company dealing in corporate recovery and it is Ms Taylor's company. The claimant started work for the respondent on 5 August 2019 as its Operations Director. The claimant agreed a salary of £50,000, but on 28 August 2019 Ms Heath, who was another director, told him that he would need to provide an invoice for part of his salary so that he would be paid in part by a payslip and in part in respect of a separate invoice. That was to give the impression that he was earning £30,000 not £50,000. He was also asked to tell the recruitment consultant who had introduced him to the respondent that this was his salary.

7. On about 3 September 2019, he was pressured to sign a contract indicating that his salary was £30,000. This was being done so that the salary could be presented to the recruitment consultant as being £30,000 and that would reduce the fees payable by the respondent to the recruitment consultant. The claimant did produce an invoice for the balance in that month. He did tell the recruitment consultant that his salary was £30,000 and he did sign the contract indicating that it was £30,000.

8. In the first month of his employment he was paid in the way I have outlined. Thereafter he was paid by a payslip salary every month at the rate of £50,000.

9. Ms Taylor's evidence in her witness statement was that the agreement was for a salary of £30,000 and at the end of the claimant's probation it was increased to £50,000. Payslips were produced during a break in the proceedings and they matched the claimant's evidence. In her oral evidence Ms Taylor then said that she did pay the claimant the equivalent of a £50,000 salary from month two onwards and she said that she did it because she felt sorry for him because he had money troubles. She said that this was not in her witness statement because it was an oversight. That seemed to me completely implausible. Her witness statement was dealing explicitly with agreement about the salary, which was one of the key issues in this case, and what she said in it was completely different from what she said in her oral evidence. That is not a question

of oversight. Furthermore, the written documents were entirely consistent with the claimant's version of events. I noted as well that Ms Heath who was said to be involved in these events was not called by the respondent. I had no doubt that the claimant's account was correct.

10. The claimant expressed concern about these matters to Ms Taylor and Ms Heath. He did so on 28 August 2019 when he was first asked to produce the invoice. He said he was uncomfortable about being asked to report his salary as £30,000 to the recruitment consultant when that was not his salary. He was uncomfortable that his contract stated the wrong salary amount and he was uncomfortable at deceiving the recruitment consultant. He raised that concern on that date and, although he was not entirely clear about when he did so, I accept that he did raise a similar concern on one or more subsequent occasions. That was really because his contract was still wrong.

11. There was a separate issue going on at the respondent. In about July 2019 it had been discovered that one of the two insolvency practitioners at the respondent had ceased to act in more than 100 cases where there were still monies held in bank accounts. That was an issue for the respondent and on the evidence before me it was clearly a serious one. The evidence before me indicated that Ms Taylor asked numerous people what she should do about this. She seems to have asked every insolvency practitioner who happened to come into the respondent's premises, and she asked the claimant in his interview, at least in general terms, what he would do about this sort of situation.

12. Eventually she instructed an expert, Mr Armitage, to advise the respondent on how to handle the issue. Ms Taylor and Ms Heath met Mr Armitage on 27 August 2019. He was instructed as a result of that meeting to prepare a written report about the cases that had been closed but where there was still monies in bank accounts. His report was provided in mid-September and I was shown a copy of it.

13. When the claimant joined the respondent in August 2019, Ms Taylor told him about the issue with the bank accounts. She told him that it had been discovered when Ms Heath saw the bank statements and realised what had happened. Ms Taylor told the claimant that she had come back from Spain, where she lives a large amount of the time, to deal with it.

14. The claimant was not aware that Ms Taylor spoke to Mr Armitage, had a meeting with him or instructed him to prepare a report, nor indeed that Mr Armitage had produced a report. The claimant told me, and I accept, that he told Ms Taylor that this matter should be reported to the IPA, the regulatory body for insolvency practitioners. His evidence to me was that insolvency practitioners are officers of the court and are expected to deal with matters ethically. Any sanction against an insolvency practitioner made by the IPA would be placed on its website and publicly available.

15. The claimant raised his concern that this matter should have been referred to the IPA with Ms Taylor and Ms Heath more than once. He was told that they were dealing with it, although he was not told about Mr Armitage. The issue was not referred to the IPA.

16. The claimant started work on 5 August 2019. He passed his probation period and on 4 November 2019 Ms Taylor instructed her legal advisors to make a contractual change to his contract, noting that he had passed his probation period. The claimant was dismissed a month later.

17. The respondent's case is that he was dismissed because of serious conduct issues that arose, leaving them no option but to dismiss him. I heard evidence about four particular cases. I do not need to go into the detail of those four cases, but I find that the claimant

was not at fault in respect of those cases in the way the respondent suggests. Ms Taylor's evidence about these cases was very difficult to pin down. She was wholly lacking in clarity about what precisely the claimant was said to have done wrong, and particularly what it was that she had raised with him at the time. She appeared to be identifying alleged concerns with hindsight, having looked at other documents, contacted people and got various others who were not called to give evidence to write letters or emails. Furthermore, some of the matters that she was referring to had occurred before 4 November 2019, when the claimant successfully passed his probation. The claimant gave clear evidence about each of the four cases and gave me a clear explanation about what had happened, what his involvement was and why he had not done anything wrong. I preferred his evidence about those matters.

18. One of the four cases led to a telephone conversation between the claimant and Ms Taylor on 2 December 2019. The claimant called Ms Taylor and told her that the landlord of retail premises that were the subject of the case wanted to change the locks when the stock of the business was still in the premises. Ms Taylor was concerned that that stock would be at risk. I accept the claimant's evidence that she swore and put the phone down. Ms Taylor was not happy at this point and she thought that the claimant was at fault for not securing these assets.

19. In his evidence to me the claimant said that the legal position is that the landlord cannot both take possession and distrain the goods, meaning that if the landlord was changing the locks he was not entitled also to dispose of the assets. In that sense they were safe. It was clear from her evidence that Ms Taylor did not know whether that was the correct legal position. It was also clear that she had perhaps a more practical concern that if the assets were locked away in premises to which they could not gain access it would not be possible to get at the stock and sell it.

20. Ms Taylor telephoned Ms Heath to discuss what to do about this and also took legal advice. She terminated the claimant's email access at the same time. Not long afterwards, she texted the claimant and told him not to come into the office the next day but that she would text him a day or time later that day or tomorrow. She said that the particular job in question would not require any more input from him. The claimant asked whether he was suspended and got no answer. He was told that there was a list of matters that Ms Taylor wanted to discuss with him. He asked for the list and he was not provided with it.

21. The claimant went to a meeting on 5 December 2019. It was scheduled to start at 10am. The claimant was present, so was Ms Heath and Ms Taylor. Ms Taylor's evidence was that it lasted about an hour. In cross-examination she said that it started at 10am and lasted 50 to 60 minutes. She was shown an email from Ms Health that was sent after the meeting at 10:13am. At that point she said that the meeting had started early and that she remembered that the claimant had arrived half an hour early. Again, that was not said in her witness statement and it was not said originally in her oral evidence. It was another example of evidence seemingly simply being changed to fit the documents once they were drawn to Ms Taylor's attention.

22. I accepted the claimant's clear and consistent evidence that this was a short meeting of 10 to 20 minutes. I also accept his evidence that there was no discussion of any performance issues. He was simply told by Ms Taylor that things were not working and that she was letting him go. In reaching that finding I noted Ms Taylor's own acceptance that really she went into the meeting anticipating that she was going to dismiss the claimant. That is what happened.

23. After the meeting, the claimant requested a copy of his contract and it was sent through to him on the same day. He sent an email on 6 December 2019 saying that there had been no discussion, that he had not been given any reasons for his dismissal, and that he was assuming that the reason for the action that had been taken was the concerns he had previously raised about the issue with his salary and the issue with the bank accounts. These are the two matters he relies on as protected disclosures in this case.

24. That seems to have led to an email being sent to him on 11 December 2019, that was headed "Confirmation of termination" and set out as background some concerns about the particular case with the stock. There was also a passing reference to a concern about unexplained decreases in asset and fee values.

25. As I have indicated I am wholly satisfied that the meeting progressed in the way the claimant described. It was short, he was told he was dismissed and there was no discussion of any conduct issues. The discussion simply moved very quickly on to the question of notice and what should happen now. I return to that below.

26. I find that the email sent to the claimant on 11 December 2019 was an attempt after the event to suggest that something different had happened at the meeting, given that the claimant was suggesting that he had been dismissed for making a protected disclosure. In all those circumstances, I do not accept Ms Taylor's evidence that the reason for the claimant's dismissal was that there were serious concerns about his conduct.

27. I have to find on the evidence before me what the reason for dismissal was, and there are some further facts that are relevant to that. The respondent's two insolvency practitioners had become pregnant and by June of 2019 she had been told that both of them wanted to take a year's maternity leave. The respondent has to have an insolvency practitioner to operate. Ms Taylor agreed with two other insolvency practitioners to contract with her for 12 months to fulfil that role if required. However, when she gave evidence about this it was clear that it was as a backup to her primary plan, which was to sell the company or to sell its work. The work of the company was indeed sold in January 2020, a month after the claimant was dismissed. The two pregnant insolvency practitioners had left by that stage and Ms Heath ceased to be a director on 5 December 2019 when the claimant was dismissed. The sale of the business was finalised just a month later. Ms Taylor's evidence was that there were three potential buyers for the business, but that they did not want its staff.

28. The claimant did not give particularly forceful evidence about raising concerns about the salary issue or the bank statement issues, particularly after he had initially raised those matters in August or September. There was nothing in the evidence before me or in the claimant's evidence to suggest that his raising concerns about these matters was any ongoing cause of concern to Ms Taylor or to the respondent. There was nothing to suggest that the subject of his salary, the difference between the £30,000 and the £50,000, was a live issue at that stage. As far as the bank accounts are concerned, as I have indicated, unbeknown to the claimant it was in hand in the sense that an expert had been instructed and had provided a detailed report. During his probationary period, the claimant could have been dismissed with one week's notice. He had made the complaints that he relies on as protected disclosures before that point. He was not dismissed, he was confirmed in his employment. All of those circumstances point to his raising concerns about the salary and the bank statements not being the reason or principal reason for his dismissal.

29. The evidence about the pregnant employees, the need to do something with the business in those circumstances, the sale of the business only a month after the claimant was

dismissed and the indication that purchasers did not want the staff seems to me to provide the obvious explanation. I am not bound to accept the reason put forward by the claimant or by Ms Taylor and on the evidence before me I find that it is clear that the reason that the claimant was dismissed was that Ms Taylor was using a concern about this issue of stock as a pretext to dismiss the claimant so that the sale of the business could be facilitated.

30. That brings me to the question of notice and the meeting on 5 December 2019. The claimant was told that he was dismissed at that meeting and he was told that he should work his notice period dealing with closures. He said that this was clearly a demotion, his role was as Head of Operations and dealing with that one relatively menial aspect was not his job. He asked to be paid in lieu of his notice and the respondent refused. His keys and mobile phone were removed from him.

31. As indicated above, an email was sent to him at 10:12 that morning. It referred to his having made a request for more time to consider the situation and he was asked to come back by the end of the following day. He requested and was provided with a copy of his contract, which he had left in a drawer. His contract required notice of termination to be given in writing and was explicit that email was not good enough. His contract also required him to certify any sickness absence in accordance with the respondent's policy and made clear that payment of statutory sick pay was subject to that.

32. On 6 December 2019 the claimant did not raise any concern about the fact that he had not been given notice in writing. He did not say that he regarded himself as having being summarily dismissed. He submitted a fit note for two weeks running to 19 December 2019. On 11 December 2019, the respondent confirmed in an email that statutory sick pay would be paid to him if he was not fit and that is what happened.

33. On 20 December 2019 Ms Taylor requested a further fit note if the claimant was still unfit and the claimant provided a fit note that took him up to 20 January 2020. There was no further fit note in the evidence before me. There was correspondence between the claimant and Ms Heath about this in February and then further correspondence in March. On about 18 March 2020, the claimant emailed to say that he had not been able to obtain a further fit note. Partly he had not been able to see his doctor because his father had become unwell and he had then sadly lost his father. Subsequently he had not been able to get an appointment with his doctor because of the coronavirus issues. On 24 March 2020, Ms Heath indicated that she was sympathetic to his position and told him that once normality resumed, if he let her have the fit note, she would pay the monies owing. There was no evidence before me of any further fit note having been provided.

Legal principles

34. Protected disclosures are dealt with in s 43A to 43L of the Employment Rights Act 1996. By virtue of s 43B of those provisions, a qualifying disclosure means a 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 prescribed matters. Those include that a person has failed, is failing or is likely to fail to comply with a legal obligation to which he is subject. A qualifying disclosure made to a worker's employer is, by virtue of s 43C and 43A, a protected disclosure.

35. A qualifying disclosure must involve a disclosure of information. That may include the making of an allegation, if that allegation has sufficient factual content and specificity to be capable of tending to show one of the matters listed in s 43B(1): see *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 CA.

36. The worker must reasonably believe that the disclosure tends to show one or more of the prescribed matters. A reasonable belief means that the worker must subjectively hold that belief, but that it must be, in the Tribunal's view, objectively reasonable.

37. The proper approach to the requirement that the worker reasonably believes that the disclosure is made in the public interest was the subject of guidance from the Court of Appeal in *Chesterton Global Ltd v Nurmohamed* [2017] IRLR 837. The question depends on the character of the interest served, not simply on the numbers of people sharing the interest. Where the disclosure is of a breach of the worker's contract, it may still be reasonably believed to be in the public interest if a sufficiently large number of employees share that interest, although Tribunals should be cautious about reaching such a conclusion given that the purpose of the public interest requirement is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers. Where the disclosure relates to an interest that is personal in character, features that may make it reasonable to regard the disclosure as being in the public interest include: how many people's interests are served by the disclosure; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed and the identity of the alleged wrongdoer.

38. So far as unfair dismissal is concerned, the right not to be unfairly dismissed is set out in s 94 of the Employment Rights Act 1996. By virtue of s 103A of that Act, an employee who is dismissed is to be regarded as unfairly dismissed if the reason or principal reason for the dismissal is that the employee made a protected disclosure. The reason or principal reason for dismissal is a question of fact to be determined by a Tribunal as a matter of direct evidence or by inference from primary facts established by evidence. The reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge. It is ordinarily for the employer to show the reason or principal reason for the dismissal and the proper approach is set out in the case of *Kuzel v Roche Products Ltd* [2008] ICR 799 CA. In such cases, the Tribunal *may* uphold the claim if the employer is unable to show the ground on which the act was done, but it does not have to do so. It may find that the reason was not the reason advanced by the employer nor was it the protected disclosure, but was some other, different reason. Where the Claimant does not have the required two years' qualifying service to bring a complaint of ordinary unfair dismissal, he has the burden of proving on the balance of probabilities that the reason for dismissal was an automatically unfair one: see e.g. *Ross v Eddie Stobart Ltd* UKEAT 0068/13.

Application of the law to the facts

39. I turn to the issues to be decided, and my conclusions primarily flow from the detailed findings of fact.

40. I find that the claimant did not make a protected disclosure in respect of his salary. As far as the first question is concerned I have my doubts about whether he disclosed information. He was complaining about something that the respondent had done and knew about and that is not quite the same as disclosing information. However, it is possible that if he raised a concern about the impact of this in terms of regulators or probity that might be a disclosure of information. I am certainly satisfied that in his reasonable belief what he was talking about tended to show the breach of a legal

obligation. But I am not satisfied that in his reasonable belief this was in the public interest. He may in fact have believed it was, but I am not satisfied that objectively that was reasonable. This related to a single matter between the respondent and the recruitment consultant and concerned their private, contractual agreement. Having regard to the principles in the *Nurmohamed* case I find that it does not meet the threshold of being, in the claimant's reasonable belief, in the public interest.

41. I find that the claimant did make a protected disclosure in respect of the bank accounts. Again, I have some doubts about whether he was disclosing information in respect of the underlying issue itself, but I am satisfied that he added the further information that the IPA ought to be told and that this was an issue of probity. I am satisfied that in the claimant's reasonable belief this tended to show the breach or likely breach of a legal obligation, that is the obligation of the insolvency practitioners not to cease to act when there were monies still in bank accounts, and potentially not to deal with those monies having ceased to act. Furthermore, the obligation as officers of the court to report to the IPA may well have had the character of legal obligation too. I am further satisfied that in the claimant's reasonable belief this was in the public interest. I accept that he genuinely believed it was, and that was objectively reasonable. That is particularly because this concerned the proper handling of a large number of insolvencies, and because a sanction issued by the IPA would go on the publicly available website and that relates to a public interest in the probity of insolvency practitioners.

42. That brings me to the reason for dismissal. Even assuming that both of these matters amounted to protected disclosures, I find on the evidence before me that the reason or principal reason for dismissal was Ms Taylor's wish to get rid of staff to make a sale of the business easier. Those were the facts operating in her mind when deciding to dismiss and so there simply was not the causal link between any disclosure that the claimant might have made and his dismissal. I should add that that is an extremely shabby way to treat an employee. Ms Taylor runs a business where one would expect her to act with probity and transparency. Dressing up as a conduct dismissal what is in reality a dismissal to make a disposal of the business easier is not an appropriate way to behave. However, that is not the question for me. The question for me is whether protected disclosures were the reason or principal reason for the dismissal and for the reasons I have outlined I find that they were not.

43. I turn finally to the question of notice pay. The claimant says, first, that he was summarily dismissed. The facts do not support that. It is clear that he was told he was being dismissed on notice. There could well have been a constructive summary dismissal on 5 December 2019. I have no doubt that cancelling the claimant's email access, carrying out the meeting in the way it was done, and telling him that he must hand over his phone and keys and that he should just go home and work on a relatively menial task may well have amounted to a fundamental breach of contract. But the claimant did not resign in response, so there was no constructive dismissal. The claimant did not resign expressly and he continued to operate as if he were an employee, submitting fit notes and accepting statutory sick pay.

44. Therefore, I find that there was a dismissal on notice. That dismissal was not in accordance with the contract because it was not in writing, but I accept Mr Frew's submission that the claimant waived that breach. He asked for and received a copy of the contract the same day he was dismissed. He did not then insist upon being given written notice in accordance with it. On the contrary, he continued on the basis that he had been given notice and he put in fit notes and accepted the payment of statutory sick pay up to 20 January 2020. He corresponded with the respondent about his statutory

sick pay after that. After 20 January 2020, the claimant was not fit for work but was unable to provide a fit note. The payment of statutory sick pay was dependent upon his providing a fit note. He indicated that he would provide one and the respondent indicated that it would pay him the monies owed if he did so. However, there is no evidence before me that he ever provided the fit note. In those circumstances contractually, he was not entitled to be paid sick pay and there was no breach of contract in respect of notice pay.

Employment Judge Davies
26 November 2020

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