EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr M Vellacott **v** **1) Astigan Limited**
2) Michael Carr

HEARING

Heard at: **Southampton (by hybrid in person/ video hearing)** **On 19, 20, 21, 22 October 2020**

Before: **Employment Judge Dawson, Mr Knight, Ms Sinclair**

Appearances

For the Claimant: **In person**

For the Respondent: **Mr Moretto, counsel**

JUDGMENT & ORDERS

The unanimous decisions of the tribunal are:

1. The claimant's application to add Ordnance Survey as a 3rd respondent is refused.

2. The claimant's application to amend his claim so as to pursue a claim of discrimination on the grounds of race against the 2nd respondent is refused.

3. The claimant's application to widen the list of issues to include the placing of the claimant on garden leave as a ground of discrimination against the first respondent is granted.

4. The claimant's claims against the 1st and 2nd respondents are dismissed.

5. It is recorded that the claimants application for reconsideration of paragraph 2 of this Judgment was not pursued by him.

REASONS

Summary

1. The tribunal determined that the claimant had not made protected disclosures as he alleged and that the treatment which the claimant complained of (being his dismissal and being placed on garden leave) was neither because of the disclosures which he alleged that he had made nor because of his race. In those circumstances the claims failed.

Full Reasons

2. In these reasons, except where stated references to the respondent are to the first respondent and references to Mr Carr or the 2nd respondent are to the 2nd respondent. Again, except where stated references to page numbers at the hearing bundle.

3. By a claim form presented on 26 January 2019 the claimant presented claims against both respondents alleging that he had been subject to discrimination on the grounds of race and unfairly dismissed due to making a protected disclosure. His particulars of claim also indicated that he had been subjected to a detriment as a result of making such a disclosure. The claim against the 2nd respondent was rejected due to lack of early conciliation.

4. At the hearing on 14 August 2019 the 2nd respondent was added as a party to the claim and amendments were permitted to the claim.

The Issues & Applications

5. At the outset of this hearing the tribunal spent time going through the issues with the claimant as set out in the Case Management Summary of 14 August 2019. The claimant made 3 applications. The first was to add Ordnance Survey as a 3rd respondent to the proceedings. The 2nd was to bring a claim of race discrimination against the 2nd respondent in the same terms as the claim against the first respondent to the extent that it was necessary to do so, the claimant contending that the claim was already pleaded against the 2nd respondent. The 3rd was to widen the list of issues so that the act of being placed on garden leave was alleged to be an act of race discrimination.

The Application to add Ordnance Survey as a Party

6. The claimant had made the same application in writing - to add Ordnance Survey as a respondent to the proceedings - which had already been determined by Employment Judge Rayner on 24 September 2020. She refused the application. The claimant has not appealed against the order of Judge Rayner nor has he applied to her to reconsider the decision.

7. The claimant asked us to reconsider the decision but we cannot reconsider a decision made by a different judge. We could hear the application again if the circumstances were different.

8. The claimants application is largely on the same basis as that made to Employment Judge Rayner, the main difference between the way he put his application before her and the way he puts it now is that he now contends that it is likely the first respondent is insolvent and he wishes Ordnance Survey to be liable for the damages if he is successful.

9. That argument, even if accurate, would not amount to a change in circumstances sufficient for us to reconsider the application to add Ordnance Survey as a respondent. Parent companies (which essentially the claimant asserts that Ordnance Survey is) cannot be joined to claims purely to attempt to enforce judgment against them. A claimant's claim, in cases such as this, is against his employer and any persons who are also liable under the Equality Act 2010 or the Employment Rights Act 1996. The claimant is not seeking to pierce the corporate veil.

10. In the circumstances there is no basis for us to hear the application again, much less come to a different decision to Employment Judge Rayner.

11. However, even if we had been prepared to hear the application again, considering the principles set out in the overriding objective and in *Selkent v Moore [1996] ICR 836* we would not have granted the application.

12. To add Ordnance Survey at this stage would require an adjournment of this hearing for the proceedings to be served upon it and for it to serve any evidence it wished to. The case would practically have to start again. It is far too late in the day to make that application and the wasted costs to the current respondents and the tribunal, both in terms of expense and resources, mean that it is not in the interests of justice to allow the application. It is refused.

<u>Application to Bring a Race Discrimination Claim against the Second Respondent</u>

13. We record, in these Reasons, the decision which we gave in respect of this application at the outset of the hearing when we refused the claimant's application. Between the close of submissions and delivery of judgment, the claimant sent further information which might have caused us to reconsider our decision. However, once we had given judgment and given that we had determined that the dismissal and detriment which the claimant suffered were not because of his race, the claimant, sensibly, did not pursue the application for reconsideration. The reasons we gave are as follows

14. Primarily, the claimant submitted that he had understood that the claims of race discrimination were always against both the 1st and 2nd respondents and, therefore, no amendment was needed. Counsel for the respondents submitted that they had understood that the discrimination claims were pursued only against the first respondent.

15. Unfortunately the tribunal file was not available to the tribunal in order to consider the correspondence relating to the application to amend the claim following which the 2nd respondent was added to the proceedings. The tribunal was sitting in Southampton and accessed the tribunal files by electronic means (the paper files being kept in Bristol). At the time when this application was determined at the start of the hearing, the servers were down and it was not possible to access the file. In those circumstances the tribunal relied upon the documentation in the hearing bundle which

was the only documentation which the parties referred to in any event. The final version of the Particulars of Claim is at page 19A of the bundle.

16. The race discrimination claim is set out in paragraphs 28 to 35 of the Particulars of Claim. In paragraph 35 the claimant says "In the circumstances, the claimant considers that he has been unlawfully discriminated by the directors of the First Respondent…". That would most naturally read as being a claim against the first respondent.

17. We accepted that paragraph 35 could be ambiguous as to who the claim is against but in paragraph 36 the claimant then asserts that he seeks "a declaration that he was unlawfully discriminated against by the First Respondent and potentially others, including members of the First Respondent's and OS's Board and ESE staff on the grounds of his nationality."

18. In our judgment that paragraph made clear that the claimant was not bringing a claim, at that stage, against the 2nd respondent on the basis of race. At best it indicates that he might, at some point in the future, seek to amend his claim to bring a claim against other people, including, perhaps, the 2nd respondent as a member of the first respondent's board. However, until he did so, it could not be reasonably believed that the claim was being presented against the 2nd respondent, any more that it could be believed that the claims were being brought against every member of the first respondent's board or Ordnance Survey's board or ESE's staff.

19. However, if there were any doubt, such doubt would appear to be laid to rest by the tracked changes version of the Particulars of Claim which are within the bundle of documents from pages 13 onwards. In paragraph 35 (which has become paragraph 36 in the finalised version) the particulars of claim read that the claimant seeks "a declaration that he was unlawfully discriminated against by the first ~~and second~~ respondent~~s~~ and potentially others, including members of the first respondent's and OS's Board and ESE staff on the grounds of his nationality."

20. We asked the claimant about the tracked changes version of the particulars of claim and he indicated that the deletions were a mistake made by his solicitors.

21. On the basis of those documents we did not agree with the claimant that he had, already, brought the race discrimination claim against the 2nd respondent.

22. Therefore, we considered this matter as an application to amend the claim to add a claim of race discrimination against the 2nd respondent.

23. Again, we considered it is far too late in the day to apply to amend the claim in that way. Firstly, an amendment at this stage would be significantly out of time and it would also be to the prejudice of the 2nd respondent who has proceeded to a hearing on the understanding that no claim is made against him personally, suddenly to find out that the claim, which the claimant values at around £11 million, is being made against him. We accepted the 2nd respondent submission of counsel for the respondents that it is not possible for him to make a reasoned decision about how he should proceed in those circumstances.

24. For those reasons that application was refused.

<u>The application to widen the list of issues</u>

25. We did, however, agree with the claimant that the list of issues should be widened so that it asserts that the decision by the first respondent to put the claimant on garden

leave was also attributable to his nationality as is pleaded at paragraph 34 of the particulars of claim. The respondents did not object to that.

The Issues

26. Subject to those points and what is set out in the next paragraph, it was agreed the issues remained as identified in paragraph 16, 17 and 18 of the Case Management Summary dated 14 August 2019.

27. The claimant no longer relies upon the disclosure set out at paragraph 16.1.2 of the Case Management Summary (indeed he states that he never did rely upon that disclosure). The respondent concedes that if the claimant made disclosures of information which tended to show that the health or safety of an individual has been, is being or is likely to be endangered, those disclosures were, in the reasonable belief of the claimant, in the public interest.

The Conduct of the Hearing

28. The case was conducted as a hybrid in person/video hearing. Some of the respondent's witnesses fell within the vulnerable category in relation to coronavirus and those witnesses gave evidence by video (they were Mr Carr, at the time Non—Executive Director and Chair of the board of directors of the respondent, Mr Jones, at the relevant time a director of the respondent and Mr Mosey, at the relevant time Chief Financial Officer of Ordnance Survey Limited and a director of the first respondent). The claimant and Mr Jude (a consultant of the respondent at the relevant time) gave evidence in person. Both the claimant and counsel for the respondent appeared in person and the tribunal was in person throughout.

29. Having discussed the issues with the parties the tribunal agreed a timetable with the parties based on rule 45 of the Employment Tribunal Rules of Procedure and Guidance Note 5 of the Presidential Guidance – General Case Management. The timetable was based primarily on the one which was set out in the Case Management Summary of 14 August 2019 but broken down so that the claimant was asked to provide a period for which he would seek to cross-examine each of the respondent's witnesses. The periods stated by the claimant were accepted by the tribunal and the timetable agreed enabled the tribunal to finish hearing the respondent's evidence by 11:30 on the 3rd day. The claimant found it difficult to stick to the time limits agreed by him despite the tribunal giving him reminders as to how much time was left and in respect of 3 of the 4 witnesses which the respondent called, the tribunal gave the claimant a small amount of extra time at the end of the agreed period to complete his questioning.

30. On the 3rd day of the hearing the claimant applied to adduce further documentation. Some of the extra documentation was not objected to, one document which contained photographs of a whiteboard was. For the reasons given at the time, the tribunal had regard to that documentation to the extent that it permitted the claimant to cross-examine the respondent's remaining witness about it but did not permit the claimant to be recalled to give evidence about them.

31. The claimant asked for some time between the respondent's submissions being given and making his own closing submissions. Although it was initially agreed that the claimant would have between 1:15pm and 2:15 PM, in the event the claimant sought and obtained an extension to that time so that he gave his submissions at 3 PM on the 3rd day of the hearing.

The Law

32. The law is found in different sections according to whether a person is asserting that they have been subjected to a detriment or unfairly dismissed. S.103A Employment Rights Act 1996 provides that

    (1) An employee who is dismissed shall be regarded for the purpose of this Par as unfairly dismissed if the reason (or, if more than one, the principal reason) is that the employee made a protected disclosure

33. S.47B Employment Rights Act 1996 deals with detriments on grounds of making protected disclosures and provides that:

    (2) 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 the worker has made a protected disclosure

    (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

    (a) by another worker of W's employer in the course of that other worker's employment, or

    (b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

    (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

    (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

34. Under section 43A of the Act a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

35. Under section 48(2) of the Act, on a complaint to an employment tribunal it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

<u>Disclosure of Information</u>

36. S43B Employment Rights Act 1996 provides

    (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, is occurring or is likely to occur,

    (d) that the health or 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, is being or is likely to be deliberately concealed

37. in *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436. The Court of Appeal held "The question in each case in relation to section 43B(1) (as it stood prior to amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]". Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as, for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). The statements in the solicitors' letter in *Cavendish Munro* did not meet that standard" (para 35).

Reasonable Belief

38. That test on belief in the public interest was set out the case of *Chesterton Global v Nuromohamed* where it was reiterated that the tribunal must ask

    (3) whether the worker believed at the time he was making the disclosure that it was in the public interest and,

    (4) if so, whether that belief was reasonable.

39. A similar two-stage test is to be applied when considering whether the claimant disclosed information which in his reasonable belief tended to show one of the matters in section 43 B(1) of the 1996 Act.

40. In respect of the claim of discrimination on the grounds of race, the following are relevant sections from the Equality Act 2010.

    13 Direct discrimination

    1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

41. Section 136 Equality Act 2010 deals with the reversal of the burden of proof and states

    (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

    (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

42. In every case the tribunal has to determine the reason why the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572). This is "the crucial question."

43. In Madarassy v Nomura International plc [2007] IRLR 246, the Court of Appeal held, at paragraphs 56-57,

> "The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.
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> 57 'Could conclude' in s.63A(2) must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by s.5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.

44. In Hewage v Grampian Health Board [2012] UKSC 37, the Supreme Court held "Furthermore, as Underhill J pointed out in *Martin v Devonshires Solicitors* [2011] ICR 352 (para 39) it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

45. In considering questions of causation, in Nagarajan v London Regional Transport [1999] IRLR 572, the House of Lords held that that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case was, 'why the complainant received less favourable treatment … Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?'

46. In deciding whether the claimant was treated unfavourably we have had regard to the decision in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 that, in respect of the definition of detriment,

> "As May LJ put it in De Souza v Automobile Association [1986] ICR 514, 522 g, the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.
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> But once this requirement is satisfied, the only other limitation that can be read into the word is that indicated by Brightman LJ. As he put it in Ministry of Defence v Jeremiah [1980] ICR 13, 30, one must take all the

circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment": Barclays Bank plc v Kapur (No 2) [1995] IRLR 87. But, contrary to the view that was expressed in Lord Chancellor v Coker [2001] ICR 507 on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence. (Paragraph 34 to 35).

Findings of Fact

47. The respondent was incorporated in February 2014 as a joint venture between Ordnance Survey Ltd and Elson Space Engineering Ltd (Elson). Elson had been developing an unmanned high altitude aircraft which Ordnance Survey sought to invest in with the aim of using the aircraft as a way of collecting geographical and aerial imagery. The aircraft was to fly at a height of around 20 km and was described in the hearing as being a pseudo-satellite.

48. The development of the aircraft took place from the UK but test flights had been carried out in, among other places, Australia. The intention was to launch the aeroplane from a high altitude balloon and a test flight in that respect took place in May 2017.

49. The test was unsuccessful and, following it, a report was prepared by Andrew Jude. He was engaged as Chief Pilot and lead compliance engineer. The report is a full one and sets out, in respect of the parachute which was supposed to enable safe termination of the flight, the ways in which it had failed (page 46). We observe that there appears to have been no attempt to hide or obfuscate the reasons for the failure. In a later report prepared for Ordnance Survey in July 2018 Mr Jude wrote "subsequently a BVLOS (beyond visual line of sight) operations manual supplement was drafted in the UK and added to the submission to CASA. The resulting permission to achieve BVLOS operation at high altitude was dependent on a low-level demonstration flight. The key requirement of this flight being proof of the flight termination in the form of a parachute deployment bringing the aircraft down, and a safe descent under parachute. At the time of writing no successful descent under parachute has been demonstrated" (Page 138)

50. On 27 October 2017 the Australian Civil Aviation Safety Authority (CASA) gave an approval for Elson to operate the aircraft beyond visual line of sight after it had been launched from Allambie Station ALA as a passive payload under a cluster of helium filled balloons. The approval was subject to conditions including that "the operator must ensure that the [aircraft] has a secondary or final failsafe system that can command immediate flight termination in the event of a complete loss of control and primary failsafe function." (Page 54) At least during the time when the claimant worked for the respondent neither Elson nor the respondent had managed to develop such a system.

51. In November 2017 some test flights were carried out but we find that they were using sub scale aircraft with only a 7m wingspan and did not breach the conditions which Elson had been given by CASA[1].

[1] After we had delivered the reasons the claimant asked what evidence we had based this finding on. In his cross examination of Mr Jones, the claimant put to him that there were a number of trials in November 2017. Mr Jones replied there were no trials in November, other than sub-scale trials at a very low altitude and within sight. Later, the claimant put to Mr Jones that there was a pressure on him to get a launch as soon as possible. Mr Jones replied "yes but not circumventing CASA" and said

52. For reasons which do not concern the tribunal, the relationship between Ordnance Survey and Elson broke down and it was decided that the venture would be operated solely by the respondent with investment from Ordnance Survey. The formal transfer of the business and staff from Elson to the respondent was due to take place on 1 August 2018.

53. As part of that transition the directors of the respondent decided to appoint a managing director whose role was, at least in part, to assist and manage the transition, develop and implement a business plan and, through that method, attract private investment into the project.

54. The respondent chose to appoint the claimant as managing director and, in order to implement his appointment quickly it was agreed that, initially, the claimant would be employed on a temporary Ordnance Survey contract until a full contract was entered into with the respondent. The intention in relation to the contract with the respondent was that it would be a 6 month fixed term contract with one month notice on either side and the claimant would be paid £100,000 per annum plus expenses. (Page 82).

55. Although the contract is not in the documents there is an email dated 1 June 2018 from Caroline Barnes, human resources manager of Ordnance Survey which states "you will note that the contract states that it is initially a one month fixed term contract. Subject to any fundamental changes, this will roll into a 6 month fixed term contract from 5 July 2018." (Page 92). The particulars of claim make clear that the claimant's employment was with the first respondent and the first respondent does not dispute that. There was a dispute at the hearing as to whether the claimant was employed on a six-month contract or was always employed on a one-month contract. We accept that it was the intention that claimant be employed on a six-month contract, but that was never implemented. It seems to us, however, that nothing turns on that since even on a six-month contract the notice period would have been one month. The claimant commenced employment on 4th June 2018.

56. The claimant's job description is page 78 the bundle.

57. The claimant has an impressive background in the aerospace industry as set out in his CV which appears at page 37 of the bundle.

58. From shortly after the claimant started to commence his duties there was friction between him and those with whom he had to work, including the board of directors and staff who were working for Elson - but who would transfer to the respondent.

59. Part of the hearing before us, as conducted by the claimant, was intended to persuade us of the fact that the claimant was only doing what the respondent had asked him to do. In the context of the issues which we have to decide, it is neither necessary nor appropriate for us to embark upon a review of that point. It may very well be, as the claimant says, that he was asked to perform those tasks which he was carrying out. However even if that is the case, we are satisfied that the performance of those tasks by the claimant caused friction. Concerns about the way in which the claimant went

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that the board would not have suggested to the claimant that he should go to Australia and do a high altitude balloon launch against the advice of CASA. In examination in chief, Mr. Jude was asked what a sub-scale plane was and told us that it was a scaled version of one quarter so that every measurement is one quarter of the original so that it had around a 7 m wingspan, like a model plane. Mr Jude was asked by the claimant about sub-structure flights and Mr Jude said that they took place with small model aeroplanes, there were numerous of those in Australia (he then said 2 or 3) but he doubted they were being flown at Alambie- they were being flown from where the pilot lived

about his role are set out in paragraphs 10 to 18 of the witness statement of Mr Jones. In essence that evidence was not challenged and we accept it. What is said by Mr Jones is supported by the following evidence.

a. Following notice of the termination of his contract, the claimant wrote what has been referred to as a deposition. It is a very lengthy document in which the claimant sets out the history of matters from his point of view. He records in that document that on 5th of July 2018 he received an unexpected call from Dr Costello who was working on the project. She asked "can you tell me what type of Managing Director you think you are and what you think your role is." It was put to the claimant in cross examination that Dr Costello raised the point because she felt that the claimant was undermining her. It is clear that she raised the point because she was unhappy, since in his own deposition the claimant records the incident under the heading "First Alarm Bell".

b. In the same section the claimant records that he had a call from Julian Spooner on 6 July because Dr Costello felt that he was crossing into her area of responsibility.

c. The claimant had also spoken to Julian Spooner about his desire to bring in a senior structural engineer in the future. That had left Mr Spooner feeling undermined as illustrated by that deposition.

d. In the claimant's witness statement at paragraph 42 he refers to a strained discussion with members of the technical team on 23rd July.

e. The claimant had told Mr Hammond and Dr Costello that they could not have a company credit card. He did so because that is what he had been told by somebody from Ordnance Survey. Mr Hammond and Dr Costello both considered that they had good reasons for having credit cards. The way that the claimant dealt with the matter left both of those employees, on his own admission, displaying visible angst and indignation. The respondent's criticism of the claimant in that respect is that in his role as managing director he should have explained to Ordnance Survey why those people needed credit cards and ensured they were obtained. That was done after the claimant was dismissed.

f. There is an email at page 206 of the bundle which relates to the intention of the respondent to engage Andrej Klos. After he had been offered the role he wrote to Mr Jones, a director of the respondent stating "I wasn't sure how appropriate it was to mention my reservations yesterday but on reflection (and in return for your honesty) I feel I should tell you that Mark was perhaps my only question mark about the upcoming job – something quite important to me considering he will be my line manager." That is independent evidence that the claimant's manner was such that it potentially put at least one person off working for the respondent. When the claimant is the managing director, that is something which should not be underestimated.

g. Mr Jones also explained to us in his evidence that he had been told by the staff due to transition from Elson that they could not work with the claimant. In his email of 2 August 2018 the claimant wrote "I was sorry to learn of the disquiet that I have generated with the ESE staff… and this resulted in 4 members of the ESE & Consultants Team stating that they would resign if I was not replaced." (Page 235)

60. In addition to those difficulties with staff, the claimant had also alienated members of the board of directors in pursuing a lease of unit 10 at an industrial unit in Bridgwater. Mr Carr told us and we accept, that the board of the respondent approved taking a lease in respect of unit 11 only. Despite what the board had told the claimant he continued to pursue a lease in respect of unit 10. The description of the situation was, in essence, that because the claimant passionately believed that it would be a good idea to pursue unit 10 as well as unit 11 he would not let the matter drop. Mr Carr says in his witness statement that he remembers saying to the claimant "if he sent another email on this subject I would be able to publish a book". Again, it does not matter for our purposes whether the claimant was right or not his view that it made business sense to take unit 10 as well as unit 11. What is apparent to us is that in the way he conducted this issue the claimant caused frustration to, at least, Mr Carr and Mr Jones. The same level of frustration is also revealed in paragraphs 7 and 8 of the witness statement of Mr Mosey where he states "… I therefore called and spoke to Mark on 19th July. During the call I asked Mark again not to raise the point of the 2 units. Mark however repeated what was his clear view that it was absolutely essential to have 2 units as the space would be needed. [8] Again, despite my advice given to Mark, the very next day Mark raised the matter again on the management call on 20th July. I found this very concerning I felt that Mark was simply not listening and nor was he managing his Board very well."

61. Thus we find that by 25 July 2018, members of the board of directors and, in particular, Mr Carr and Mr Jones (who appear to have been the most involved directors) had decided that the relationship with the claimant was not going to succeed.

62. It is necessary, at this stage, to go back in the chronology to a presentation which the claimant made to the Board of the respondent on 20th July.

63. The claimant presented a PowerPoint which, he says, contained a protected disclosure. That alleged protected disclosure appears on page 175 of the bundle. The claimant's evidence was that the disclosure appears in the 2nd and 4th bullet points on the slide. They are reasonably lengthy and state as follows "the strategy for experimental flight permissions was the reverse of that applied at other locations. The safety case was based on remaining clear of controlled airspace and operating in an area of minimal other traffic. This required strict monitoring and a comprehensive agreement with air traffic services. It is understood that 2 additional controllers were added on duty in Melbourne control at all times that a notice of flight had been applied." And " subsequently a BVLOS (beyond visual line of sight) operations manual supplement was drafted in the UK and added to the submission to CASA. The resulting permission to achieve BVLOS operation at high altitude was dependent on a low-level demonstration flight. The key requirement of this flight being proof of the flight termination in the form of a parachute deployment bringing the aircraft down, and a safe descent under parachute. At the time of writing no successful descent under parachute has been demonstrated. Also the current CASA approval is due to expire in October 2018."

64. It is noteworthy that in substance the 2nd bullet point quoted is simply copied and pasted from the report of Mr Jude to Ordnance Survey dated 11 July 2018. The claimant did not suggest that he verbally supplemented what was said in the PowerPoint at the presentation.

65. We do not find that those statements in the PowerPoint disclose information which tends to suggest that the health or safety of an individual has been, is being or is likely to be endangered. They simply set out a history of what has happened in the past from a regulatory point of view. No one reading that document would conclude that

somebody's health or safety either had been or was being or was likely to be endangered. Moreover having regard to the fact that the claimant did not refer to this alleged disclosure in either his deposition or his original solicitor's letter or his original claim form, we find that the claimant did not have a belief that the information set out in this PowerPoint slide showed those matters.

66. On 25th July 2018, Mr Carr contacted Paul Carpenter, HR business Partner for Ordnance Survey, to check the legal position under the contract and how much notice it was necessary to provide to the claimant. On the same day he also spoke to Mr Mosey, Chief Financial officer of Ordnance Survey and a director of the respondent to ask his opinion. Mr Mosey agreed that the claimant's employment should be terminated.

67. On 26 July 2018 Mr Jones agreed that if the board supported the view that the claimant's employment should be terminated he would step in as interim managing director.

68. A board meeting took place on 30th of July 2018 at which it was agreed that to continue with the claimant's employment would generate a risk that the respondent would lose potentially critical people from the business and therefore the claimant's employment would be terminated.

69. We have been particularly concerned in this case that the decisions taken by the respondent, at a board level, were not minuted. It is a matter of considerable surprise to us that in a company which is spending considerable public funds a decision could be taken to dismiss a managing director who is on a salary of £100,000 a year and the reason for the decision (indeed the decision itself) not be recorded. Likewise we have taken into account that although Mr Carr has referred to emails which he says shows the discussions he had above (paragraph 31 of his witness statement) those emails do not show what the reason for the calls with his colleagues was.

70. That is exactly the behaviour that one might expect if the Board was dismissing the claimant because he had raised matters which made him an inconvenience to the board, or to put it more colloquially because he was a whistle-blower. We are surprised that professionals at the level of the witnesses from whom we have heard would permit such a situation to exist.

71. That has caused us to pause significantly before we are willing to accept the respondent's evidence in this respect. Nevertheless, ultimately, we have accepted the respondent's evidence because it is clear to us that the respondent has not, at any point, sought to hide the difficulties with the flights and there is no evidence that it was seeking to carry out the test flights without complying with the CASA restrictions. We are satisfied that the respondent would not have dismissed the claimant for raising the matters which he had raised at that point. Moreover, we are satisfied that there were real issues with the claimant's management style and he had caused friction with colleagues and the board. In those circumstances we accept the respondent evidence in this respect and find that the reason for the dismissal was the claimant's behaviour and attitude.

72. The claimant says that such a dismissal was, if not because he had made a protected disclosure, because of his race. The claimant has dual British and Australian citizenship. He appeared to vacillate in the way in which he put his case between saying that his dismissal was because he was Australian per se and that his forthright and no-nonsense management style was because he was Australian and, therefore, he was discriminated against because of his race. In substance, his submissions

amounted to little more than an assertion that because he was Australian and dismissed while other people, English and Canadian, retained their employment and, in the case of the Canadian employee she was given facilities in Cambridge to work from, we should find that the reason for his dismissal (and also being placed on garden leave) was because of his race.

73. There is no evidence that the respondent or its directors or the staff of Elson who were to transfer to the respondent were motivated because of the claimant's Australian citizenship. There is nothing from which we could conclude that anybody who was involved in this case was hostile to the claimant because of his Australian citizenship. Indeed we accept the point made by the respondent that it was to its advantage that the claimant had familiarity with Australia given the need for investors and test flights to take place in Australia.

74. We are entirely satisfied that anybody who found themselves in the same position as the claimant, that is to say having alienated his board and his colleagues (albeit at that point they were still Elson staff) would have been treated in the same way as the claimant. That is the case whether they were English, Canadian or any other nationality.

75. The claimant has not put his case as one of indirect discrimination and it has not been suggested that there is a provision criterion or practice that the respondent's managing director must not have a forthright and no-nonsense management style. Likewise it has not been suggested that if there was such a provision criterion or practice Australians could not comply with it. In any event, the issue here is not a forthright and no-nonsense management style, people with such a style could still have operated within the respondent's business without alienating both the Board of directors and their colleagues. The problem was with the way that this claimant has conducted his relationships with others. Finally, in this respect, we note that although the claimant has Australian citizenship he was not born or raised there.

76. For completeness, as part of the claimant's race claim he then went on to assert that his race claim should succeed because English people are more easily offended than Australian people. We do not need to comment on that issue since it misses the point. The claimant was working with English people (and also people of other nationalities) but, as we have said, anybody who alienated those people in the way that the claimant did, whether those people were easily offended or not, would have been treated in the same way as the claimant was treated.

77. The claimant was told of his dismissal on 31 July 2018 by Mr Carr. It was agreed in that meeting that the claimant would, during his notice period, continue to develop the business plan of the respondent but that he would step down immediately as Managing Director and work for Mr Jones as the new managing director. The claimant agreed to that, as is evidenced by the fact that he removed his title as "Managing Director" from his email footers thereafter.

78. Within that meeting the claimant told Mr Carr about a CASA advice note which he had been given on 25 July by Mr Jude. Mr Jude found it on Elson's server. The advice note is headed "Response to proposal to operate HALE 150 in the vicinity of Alice Springs." In the introduction it states "Elson… have applied to CASA to operate the Elson HALE 150 aircraft in the vicinity of Alice Springs, Australia with a proposed start date of 22 February 2017." Thus the document is an old one. The document goes on to set out a number of reasons why CASA determined that the application did not present a robust safety case to allow operations as proposed in the planned area. It states "in summary, there are numerous risks that had not been sufficiently mitigated or can be sufficiently

managed for such an operation to be supported within a framework which provides an acceptable level of safety and equitable access to airspace for all parties." The document does not, however, suggest that the health or safety of any individual had been endangered in the past. Whilst, of course, if the respondent operated the aircraft in the vicinity of Alice Springs without dealing with those matters set out in the document it is likely that an individual's health or safety would be endangered, we have not seen any evidence that the respondent either did do such a thing or intended to do such a thing.

79. Simply forwarding the advice note to Mr Carr within the meeting of 31 July 2018 did not, in our view, disclose information which tended to show that the health or safety of an individual had been or was being or is likely to be endangered and in our judgment the claimant could not reasonably have believed (even if he genuinely believed) the information within the advice note showed such a thing.

80. As set out below, the claimant's behaviour after the meeting on 31 July 2018 suggests that either he had not understood that his remit during his notice period was limited to preparing the business plan or he had decided to pursue his own agenda.

81. On 1 August 2018 the claimant wrote to Silver Penny, a supplier to the respondent, referring to a business plan but going much further than simply seeking information to create a business plan. Indeed he sought to negotiate a relationship with them to the extent of saying "if we can successfully agree on a scope of works and deliverables for a programme of work during August, I would like to suggest that we could then enter into a PO during the month of September for a 2nd programme of work (circa £5000) that augments the first package, but is not so time budget plan timing critical."(sic page 229).

82. As a consequence of that email Mr Jones had to write to Silver Penny stating "without wishing to compromise anybody's position, I would like to point out that I have now taken over the role of Managing Director of [the respondent]. As such any future negotiations should include me and I will be the decision point for [the respondent]" (page 228).

83. On the same day (1st August) the claimant wrote to Dr Costello, Julian Spooner and Mr Jude stating "you will see from the email that I've also requested that Andy and yourself come prepared to give a short presentation to the OS Team on the state of play of the 1/4 and subscale flight demo programs, the ongoing modelling work, and if possible discussion on payload integration options for the subscale A and B platforms. It would also be good if Julian were able to provide a short presentation…" (Page 237) . It is difficult to see how this was within the remit of preparing a business plan.

84. As a consequence Mr Jones wrote to the claimant that evening stating "I believe you are stepping outside of your remit and I need to be convinced that what you are requesting is necessary. I do not think that the workshop you are proposing on 8th August is necessary at this time… I appreciate the sensitivity you must feel with regard to the current changes… You must appreciate that I have a job to do and that I must establish my authority, prioritise tasks and run my team as I see fit." (Pages 236 – 237).

85. Rather than taking a conciliatory approach in that respect, the claimant replied on 2 August 2018 sending a lengthy email in which he not only seeks to defend himself but also challenges Mr Jones. At one point he writes "I genuinely consider that it will take more than just a research program that you mentioned yesterday, where "we build a platform, throw it up, see if it works, and if so get a new investor on board"". Mr Jones

denies having said that but, the point is, it was no longer the claimants place to take such a stance. The claimant then, within the email, goes on to set out in detail what he sees as hurdles going forward. He talks about the fact that the respondent will be increasingly judged by the standards that CAA, CASA and other authorities are applying to the respondent's competitors. He reminds Mr Jones that he has given a presentation on this subject. He refers again to the advice note from CASA stating, not that it suggests anybody's health and safety has been endangered, but that it "is a good example of the type of requirements that the project will be facing from regulatory authorities in the future." He then goes on to refer in more detail to the CASA advice note and states "personally I think that disclosure of this advice, and the manner in which you mentioned it was circumvented, to the [respondents]'s board may have changed the board's opinion on our ability to rely on the existing Australian approval, which I understand is due to lapse in October anyway. I provided Mr Carr with a copy of this advice after he had notified me of my dismissal, of evidence of the likely regulatory hurdles [the respondent] will face in seeking regulatory approvals for the next high altitude demonstration program. Also that it reflected my understanding of where things are heading and was the primary reason I have been advocating to the board and staff involved in the project that we need to be preparing for a change in the culture of the [respondents'] project from an experimental to structured project development basis, and everything that entails for the type of aerospace companies we will be in competition with in the future."

86. We have not set out the entirety of that email but have considered the whole of it in considerable detail in deciding whether it, as the claimant alleges, discloses information which tends to suggest that the health or safety of a person has been or is being or is likely to be endangered.

87. We find that there is nothing in that email which discloses such information and the claimant did not believe (whether reasonably or otherwise) that it did. The claimant's purpose in sending that email was to justify his position and to explain to the respondent the hurdles it would face in the future. The fact that the respondent will face difficulty in obtaining regulatory approvals in the future (if that is the case) is not in any way the same as saying that persons safety has been or is likely to be endangered.

88. As result of sending the email Mr Jones spoke to Mr Carr and it was decided that the situation could not be allowed to continue and that the claimant should be placed on garden leave for the remainder of his notice period.

89. We are entirely satisfied that the decision to place the claimant on garden leave was nothing to do with any protected disclosures but because the claimant had refused to act within the remit which he had been given which was to prepare a business plan. The respondents did not understand the claimant to have been making allegations about health and safety and did not act because of any such allegations. We find that the respondent's decision to place the claimant on garden leave for the remainder of his notice period was both predictable and reasonable in the light of the way in which the claimant had behaved.

90. We are, therefore, entirely satisfied that the claimant's race had nothing to do with that decision. We find that a British (or Canadian) person who was in the same position as the claimant and who had acted in the same way as the claimant would have been treated in exactly the same way. Indeed any person whether they were an Australian citizen or otherwise would have been treated in the same way as the claimant.

Conclusions

91. We give our conclusions by reference to the list of issues which are within the Case Management Summary of 14 August 2019.

92. In respect of issue 16.1.1, the evidence is that the claimant did not make a disclosure in quite the terms set out in that issue. The precise terms are those which we have set out above but we accept that there was a disclosure in those terms.

93. In respect of issue 16.1.3 we accept that at the meeting on 31st of July 2018 the claimant emailed to Mr Carr the CASA advice note.

94. In respect of issue 16.1.4 we accept that an email 2nd of August 2019 was sent which referred to the circumvention of the CASA advice; the summary in 16.1.4 is a simplification and reference needs to be made to the full email for its effect.

95. In respect of issue 16.2 we do not find that any of those disclosures disclosed information which in the claimants reasonable belief tended to show that the health or safety of any individual had been put at risk, nor indeed that health and safety was being or was likely to be put at risk.

96. If we were wrong in this point, the respondent has conceded that the public interest test referred to in paragraph 16.3 the list of issues would be met and that the disclosure was made to the claimant's employer.

97. In respect of issue 16.5 we accept that the email of 2 August 2018, in its totality, was a material influence in the decision of Mr Carr to place the claimant on garden leave. It was part of the way in which the claimant had shown himself unwilling to only deal with the business plan and, in particular, take an unnecessarily challenging attitude to the role of Mr Jones as managing director. The question of whether, if we are wrong about whether or not the email of 2 August 2018 amounted to a protected disclosure, the protected disclosure was a material influence in the decision to place the claimant on garden leave is now a hypothetical question. It is particularly hypothetical since it is difficult for us to say what part of the email would amount to a protected disclosure and, therefore, determine whether that part of the email would have been a material influence in deciding to place the claimant on garden leave. We are, however, satisfied that in placing the claimant on garden leave the respondent did not understand the claimant to be raising concerns that the health or safety of an individual had been or was likely to be endangered and, therefore, was not materially influenced by any such concerns.

98. In respect of issue 16.6, the claimant has not produced sufficient evidence to raise the question of whether the reason for the claimant's dismissal was the protected disclosure allegedly made on 20th July 2018. In any event we are entirely satisfied that the presentation that the claimant made on 20 July 2018 had nothing to do with his dismissal. The reason for the claimant's dismissal was the way in which he had alienated his colleagues and the Board of the respondent by his behaviour which was unconnected to any alleged disclosures.

99. In respect of issue 17 whilst, of course, we accept that the claimant was dismissed and that the act of putting the claimant on garden leave would be reasonably seen as detriment by him since he wished to finish the business plan and be able to say to future employers that he had done so, the claimant has not proven facts from which we could conclude that the claimant's treatment was because of his race. A non-Australian citizen in the same position as the claimant would have been treated in exactly the same way as the claimant.

100. In those circumstances the claimant's claims against both respondents fail.

Employment Judge Dawson

Date: 15th December 2020

AMENDED JUDGMENT SENT TO PARTIES ON

12th January 2021

By Mr J McCormick

For the Tribunal office.

Notes

Public access to employment tribunal decisions

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

CVP

The hearing was conducted as a hybrid CVP/ in person hearing. It was held in public in accordance with the Employment Tribunal Rules.