EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr I Coowar	**v**	ERA Home Security Ltd

Heard at: Bury St Edmunds (by CVP)

On: 14, 15, 16, 17 and 18 December 2020
13 January 2021 (In chambers discussion, no parties in attendance)

Before: Employment Judge Laidler

Members: Ms J Schiebler and Mr SJ Holford

Appearances
For the Claimant: In person.
For the Respondent: Mr A Roberts, Counsel.

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals.

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was by Cloud Video Platform (V). A face to face hearing was not held because it was not practicable and no-one requested the same and all issues could be determined in a remote hearing.

RESERVED JUDGMENT

1. The claimant did not make protected disclosures within the meaning of section 43B Employment Rights Act 1996 (ERA)

2. The reason for the claimant's dismissal was not the making of a protected disclosure within the meaning of section 103A ERA

3. The claimant was not treated less favourably on the grounds of his race when dismissed contrary to section 13 Equality Act 2010

4. All claims brought by the claimant fail and are dismissed.

REASONS

1. This was the 5 day hearing of the claims brought by the claimant having been listed by Employment Judge Warren at a preliminary hearing conducted on 20 February 2020. Shortly before the hearing an Employment Judge determined it would be proportionate for there to be a CVP hearing on the first day at 10am and then for the rest of the first day to be a reading day for the Tribunal. Thereafter it was to proceed as a 'hybrid' hearing with the non – legal members on CVP and the judge, parties and witnesses present in the courtroom.

2. At the outset of the hearing Mr Roberts Counsel for the respondent explained he had been very unwell and had not returned to full health. It would be a 3 hour journey to attend in person which he would not be able to make. He felt well enough to conduct a hearing if it was conducted by CVP. He believed he may well have had Coronavirus virus although by the time he was tested the result was negative.

3. The claimant objected to the hearing proceeding entirely on CVP stating he had two young children in his home and did not have a designated room as an office. He would prefer to attend at the Bury St Edmunds Employment Tribunal, even if counsel was to be on CVP.

4. The Judge floated with the parties whether the hearing could be partially on CVP. For the respondent however it was submitted it would not be equitable and in accordance with the overriding objective for the claimant to be present in person and to cross examine the respondent's witnesses who would attend the hearing if their Counsel was not present.

5. The Tribunal took time to consider the position. In the break whilst considering it enquiries were made of the listing section and the earliest date on which the case could be re-listed would be the middle of April but that would depend on the parties' availability. Otherwise it would be later in the following year before the case could be heard if it was adjourned.

6. On returning the Tribunal advised the claimant of that position and he indicated that he did not wish the case to be postponed. He would endeavour to conduct his case via CVP even though his young children would be in the house. The hearing continued as an entirely remote hearing with the Claimant in particular coping satisfactorily. .

7. The Tribunal then read for the rest of the first day indicating that they would deal with the claimant's application to amend his claim which had been submitted on 19 October 2020 at 2pm the following day.

The claimant's application to amend

8. On 19 October 2020 the claimant had sent to the Employment Tribunal but not copied to the respondent a document that he called "My revised second revision Employment Tribunal submission". He stated he had made a few additions which he had highlighted in bold. Upon reading through his personal notes and having started writing his witness statement that week he had come to realise that he had missed some information which he had therefore added in this submission.

9. The correspondence was copied to the respondent by the tribunal who replied on 18 November 2020. They had only become aware of this application following receipt of an email from the claimant dated 17 November 2020 from which they understood that the claimant had made it. They emphasised that they had not been copied in on the original email. In the meantime, a Judge had directed that the claimant's application would be determined at the outset of the full merits hearing. The respondent however set out its grounds for contesting the application which were made again at this hearing by Counsel.

The nature of the application

10. The claimant wished to add to his Particulars of Claim the following:-

> "James Fisher's response at the time was that the load testing would be carried out the following year (2019) due to budget constraints."

This was referring to matters the claimant says he raised in April 2018.

> "In a meeting in the boardroom at Howe Green between the claimant and James Fisher in June 2019 (ahead of Sarah Bray entering the boardroom to discuss a separate issue) the claimant made a further protected disclosure which was in the public interest regarding the load testing of the Howe Green product range."

The claimant asserts that he told James Fisher that he would be notifying the responsible parties at Battersea Power Station, Heathrow and Crossrail projects that Howe Green did not have the necessary information on the load testing of the Howe Green product range which was used extensively across these projects and elsewhere. This was ahead of the scheduled load testing of the 1050 D 400 access cover which had been requested by Patrick Helegwa at MACE for the Battersea Power Station project. James Fisher's response to the claimant was, it was alleged by the claimant to "consider the consequences".

11. At the preliminary hearing before Employment Judge Warren on 20 February 2020 two disclosures were identified which were set out at paragraph 4.3 of the summary sent to the parties on 8 March 2020. The disclosures relied upon were as follows:-

(1) At a board meeting attended only by himself and Mr James Fisher, (Managing Director) in April 2018, he disclosed that the client's Crossrail, Battersea Power Station and Heathrow should be made aware that the respondent did not have load bearing and fire testing certification pursuant to CDM 2015 (Construction Design Management Regulations) Regulation 9 and BS EN 124 (British Standards European).

(2) He provided the same information in an email dated 22 July 2019 to Mr James Fisher, Mr Austin Stone (Technical Director) and Mr Chris George (Business Development Manager).

12. The ET1 was issued on 21 October 2019 the claimant having been dismissed on 30 July 2019.

13. The claimant told this Tribunal that although he had legal assistance with the drafting of his claim form he had not been able to afford to continue to instruct a solicitor. He had not read Employment Judge Warren's summary properly and only realised that he had missed this additional disclosure in October when he liaised with his solicitor. He believed that this additional disclosure took place on 12 or 13 June 2019 when James Fisher was in the office. He had made a separate application to the Employment Tribunal the night before (14 December 2020) for the CCTV footage of that night to show that Mr Fisher was in the office as opposed to just having a conversation with him on the phone.

14. In its letter of 18 November and at this hearing the respondent objected to the application stating that it had come nearly a year after the claimant had submitted his original claim. He must they argued have been aware of the alleged disclosure when submitting that which he did with the assistance of legal advice. The claimant had he wished to amend his claim had had ample opportunity to do so prior to October 2020 and in particular after having received the summary of Employment Judge Warren following the hearing in February 2020. At no time at that hearing did the claimant mention a potential disclosure in June 2019.

15. Counsel went further and suggested that the reason why this application has now been made was because upon disclosure the claimant has seen the weakness in his case. The second of his disclosures relied upon and set out in Employment Judge Warren's summary was the 22 July 2019. The disclosure of documents has however shown to the claimant that the decision to dismiss him was taken before that alleged disclosure was made. That decision was taken after the 18 June meeting with the claimant and at the meeting on 26 June with HR. It was suggested there is no coincidence in the fact that this alleged new disclosure is said to have occurred a week or so before the decision to dismiss. The claimant is appreciating the weakness of his claim in that he is otherwise having to rely upon a disclosure made in April 2018 over a year before he was dismissed.

16. The respondent further submitted that the balance of prejudice would be with the respondent. If the amendment were allowed and the claimant entitled to rely upon this disclosure it would be a wholesale change in the claimant's case. The protected disclosure relied upon would be a matter of days before the decision to dismiss. The respondent would want to advance arguments that the claimant did not reasonably believe what he was disclosing but that could involve new evidence and new documents. Cross examination would be in a completely different manner and expert evidence may be required because of the technical nature of what the claimant is relying upon. The respondent would not be able to do that within the course of this hearing. Even if the respondent was able to do so, cross examination would be much more extensive and the case would be likely to go part heard.

The Tribunal's conclusions on the amendment

17. The Tribunal must apply the guidance in Selkent Bus Company Limited v Moore [1996] IRLR 661 and consider the nature of the amendment, the applicability of time limits and the timing and manner of the application.

18. Counsel did not pursue an argument that this was out of time as the claimant was seeking to amend a case based on protected disclosure which had been brought in time. What however is most relevant to the Tribunal's deliberations is the timing and manner of the application as it is so late in the day. The claimant should have considered Employment Judge Warren's summary and responded to it if it did not include all the protected disclosures relied upon. The Tribunal finds it difficult to accept that the claimant did not put this in his original ET1 or raise it at the preliminary hearing. He did not need the disclosure of documents to remind him that he was relying upon a disclosure in June 2019 and Tribunal accepts the respondent's submissions that the documents disclosed would not have alerted him to that allegation. It should have been at the forefront of his mind as the most recent disclosure prior to his dismissal if it was genuinely one he relied upon.

19. The Tribunal accepts that the nature of the amendment would change the whole nature of the case as the claimant will be relying on a protected disclosure a few weeks before the respondent took the decision to dismiss. The nature of the respondent's cross examination would change and they would need more time to prepare for that if not to call further evidence. The case might have to be adjourned to accommodate that. From enquiries already made in relation to whether the case was suitable for a CVP hearing the Tribunal and the parties were aware that the earliest it could be re-listed would be April 2021 if all the parties could accommodate that date.

20. The Tribunal was therefore satisfied in all of the circumstances and applying the overriding objective together with the Selkent guidance that greater prejudice would be caused to the respondent than to the claimant by granting the application and the application was therefore refused.

21. In view of that decision the Tribunal did not need to consider the claimant's application for CCTV footage whilst reminding him that even if it showed Mr Fisher in the office it would not show what was being discussed.

22. The Tribunal heard from the claimant and from the following on behalf of the respondent:-

    (i) James Fisher;
    (ii) Darren Waters; and
    (iii) Nikki Purba;

23. A witness statement had been provided by Rajvinder Dhadwal but she had been unwell and no longer worked for the respondent, and the respondent had decided not to call her or rely upon her evidence.

24. The Tribunal had a bundle of documents running to 846 pages. The last document was a transcript of the appeal meeting. The Tribunal heard from Mr Waters that unbeknown to him the device used had stopped recording three quarters of the way through the hearing and it was only possible therefore to provide a transcript of what had actually been recorded. The claimant wished the whole of the transcript to be disregarded as it was incomplete. The Tribunal was satisfied there was a genuine reason why it had not been provided and both parties were prejudiced by the entirety of the meeting not being there but that it would remain in evidence.

The Issues

25. These were identified at a preliminary hearing conducted on 20 February 2020 by Employment Judge Warren as follows:-

> ***"Automatic Unfair Dismissal – Public Interest Disclosure***
>
> 4.1 Mr Coowar does not have sufficient service to claim unfair dismissal pursuant to s.98(4) of the Employment Rights Act 1996.
>
> 4.2 He claims that he was dismissed for whistleblowing, which if upheld would be automatically unfair dismissal and there is no requirement for 2 years' service. Questions of the fairness of procedures followed do not arise.
>
> 4.3 Mr Coowar relies upon the following as protected disclosures:
>
> 4.3.1 At a board meeting attended only by himself and Mr James Fisher, (Managing Director) in April 2018, he disclosed that the client's Crossrail, Battersea Power Station and Heathrow should be made aware that the respondent did not have load bearing and fire testing certification pursuant to CDM 2015 (Construction Design Management Regulations) Regulation 9 and BS EN 124, (British Standards European).

4.3.2 He provided the same information in an email dated 22 July 2019 to Mr James Fisher, Mr Austin Stone, (Technical Director) and Mr Chris George, (Business Development Manager).

4.4 He relies upon the same as being disclosure of information in the public interest which tended to show, Pursuant to s.43B of the Employment Rights Act 1996:

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

….

(d) That the health or safety of any individual has been, is being or is likely to be endangered ….

4.5 If the Tribunal finds that such disclosures were made, it must then ask itself whether the principal reason for which Mr Coowar was dismissed, was that he had made those protected disclosures, or one of them?

Direct Race Discrimination – s.13 of the Equality Act 2010

The claimant indicated at the preliminary hearing that he identifies himself as a person of colour from Mauritius. He confirmed at this hearing that he relies upon being a person of colour and not necessarily being from Mauritius. He does not allege victimisation in the technical sense as defined in the Equality Act 2010.

4.6 It is accepted that the respondent dismissed Mr Coowar. The question for the Tribunal will be whether in doing so, the respondent treated Mr Coowar less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

4.7 Mr Coowar relies upon two named comparators:

4.7.1 Mr Warren Tyce, who was disciplined for using at work a pen bearing a label, "I work with cunts";

4.7.2 Sarah Bray who, he says, continued to bring her young child to the respondent's premises, contrary to express instructions that she should not do so.

4.8 Mr Coowar says that both of these two individuals were dealt with more leniently than he was.

4.9 In the alternative, Mr Coowar relies upon a hypothetical comparator.

4.10 If Mr Coowar was treated less favourably than either the actual comparators were treated or a hypothetical comparator would have been treated, the Tribunal will then ask whether it was because of his race.

The respondent's position

4.11 The respondent sets out in its grounds of resistance its position that Mr Coowar had behaved in such a way as to destroy trust and confidence."

26. It was necessary for the Tribunal to remind the parties at various times throughout the hearing that it was not for this Tribunal to determine how the respondent should have run its business nor to assess who was correct about technical calculations. Such matters were certainly not within the remit of this Tribunal. The only matter for it to determine was the reason for the claimant's dismissal.

27. The claimant was reminded that as he did not have 2 years continuous service the burden of proof was on him to show on the balance of probabilities that the reason for his dismissal was an automatically unfair reason namely the raising of his protected disclosures. Or in the alternative that it was because of his race.

28. From the evidence heard the Tribunal finds the following facts.

The Facts

29. The respondent was established approximately 180 years ago as a manufacturer of locks, window and door hardware, security products such as Smart home alarms and Smart home solutions such as indoor/outdoor cameras and video doorbells. ERA's parent company is Tyman Plc. In March 2017 Tyman Plc acquired Howe Green which specialises in the manufacture of floor access covers.

30. James Fisher was originally employed by Bilco UK Limited as Technical Manager subsequently moving to the position of Managing Director in January 2013. Bilco provides specialist access products to the construction industry and was acquired by Tyman Plc in June 2016. From then James Fisher reported in to Darren Waters the CEO of ERA Group.

31. Subsequently Tyman Plc acquired another business – Profab Access in August 2018 which James Fisher included within his remit and the three businesses were branded as Access 360. The respondent has approximately 400 employees with James Fisher having responsibility for approximately 115 of them.

32. The Howe Green business is located in Ware, Hertfordshire and employed approximately 30-35 people. Some of those had been with Howe Green for many years. Howe Green specialises in the manufacture of floor access covers, wall access panels and ceiling hatches. The production activity is mainly the forming and fabrication of stainless steel sheet and aluminium extrusions. The product is a single metal cover in the floor that can be lifted out using supplied lifting keys to gain access to concealed

services underground. The company specialises in bespoke multiple covers in various forms to gain access to large openings used widely in retail, transport hubs and commercial offices.

33. James Fisher has a background in engineering and his employment from 1986-1999 was with a heavy engineering company servicing the steel and coal industries during which he completed an ONC and HNC in general engineering. He has now left the respondent's employment as of 30 June 2020 as the Managing Director role was being made redundant because of a change in focus in operations and consolidation of three different sites. Although offered a business development director role James Fisher decided to take redundancy. He starts a new managing director role elsewhere in the new year.

Respondent's Whistleblowing Policy

34. The Tribunal saw the respondent's policy in the bundle at page 53. This set out how the organisation encouraged an:

> "Open culture in all its dealings between employees and people with whom it comes in contact with. Effective and honest communication is essential if malpractice and wrongdoing is to be dealt with effectively."

The stated aim of the policy is to encourage employees to report suspected malpractice and/or wrongdoing as soon as possible using the procedure in the policy.

35. The policy then went on to set out what was meant by whistleblowing and the procedure for raising a concern. In the first instance the employee should raise the matter in writing with his or her line manager setting out in detail the nature of the disclosure. However, the policy also set out how if the employee felt that the internal channels would not or have not been a sufficient way of handling the concern or may be blocked as an alternative process they have a secure external whistleblowing hotline, Safecall. This is available 24 hours a day, 7 days a week, 365 days a year and is a company providing a confidential reporting line service to the respondent. Upon calling the employee would be provided with a unique personal identification number in the event that they needed to call back and also to ensure confidentiality. A full phone interview would take place when the Safecall advisor would make notes but the call is not otherwise recorded. They would then submit a report via secure email to Tyman who would advise the HR Director who would then act accordingly in line with the process of investigation and action. The telephone number of Safecall was provided in the policy.

36. The claimant was recruited by James Fisher as a Senior Mechanical Design Engineer commencing on 2 October 2017 at an annual salary of £50,000 per annum increased to £51,250 from 1 January 2019 following a group wide annual salary review. His role was to design and oversee the manufacture of the access covers, panels and other products.

Alleged disclosure in April 2018

37. In the preliminary hearing summary this disclosure was recorded as being at a board meeting. The Tribunal recognises that the claimant was not a board director and in fact in his witness statement refers to the meeting with Mr Fisher being in the boardroom. The Tribunal is satisfied that nothing turns on this and it may have been an error in the case management summary document.

38. The claimant puts this disclosure in his witness statement as the 27 April 2018. He recalls the time well because his first child A'dam was born on 24 April 2018 and he was meant to be on annual leave for two weeks supporting his wife.

39. Not long before this meeting on 16 April 2018 Mr Fisher had praised the claimant in an email of that date with regard to some beam pockets (page 191).

40. In the ET1 the claimant provided separate Particulars of Claim and all that he said about the alleged April disclosure was:

> "the claimant asserts he raised issues concerning the safety of Howe Green products in April 2018 but was overruled by James Fisher the Managing Director of Howe Green Limited".

The claimant accepted in cross examination that was not very specific.

41. In paragraph 28 of his witness statement the claimant states that James Fisher had said to him that MACE (the client) was putting pressure on Howe Green to deliver. The claimant says he then told James Fisher that:

> "Howe Green couldn't support the Battersea Power Station project due to the fact that beam pockets weren't tested and that MACE as well as Crossrail should be notified. In the event that James Fisher wasn't going to notify them then I was going to send out an email".

The claimant alleges that was his first protected disclosure. He does not allege in that paragraph that he referred to the actual regulations as set out in the case management summary where the issues were clarified.

42. The claimant further acknowledged in evidence that the first time he raised this discussion again was at his appeal after he had been dismissed. The claimant presented a lengthy document setting out the grounds of his appeal running to 17 pages. He acknowledged in evidence that he had by then researched whistleblowing and had some legal advice and when he refers to injury to feelings he did mean that in the legal technical sense. At the end of the appeal document the claimant set out how in addition to injury to feelings he was seeking financial compensation or re-instatement to his position and that failure to adhere to these points:

"will lead to me whistleblowing to key external stakeholders it cannot come across as pure coincidence that I whistle-blew to James and Chris and a week later I have been dismissed".

The claimant acknowledged that he refers to the April discussion but did not in this document allege that it was a protected disclosure. He also acknowledged that if he had believed he had been dismissed for something he said in April 2018 he would have said so in the appeal. In answer to further questions on this point the claimant stated that he did not think the dismissal had anything to do with the April 2018 discussion as he was dismissed in July 2019. Even after he had been dismissed the conversation in April 2018 did not occur to him.

43. Dealing then with what was actually said to James Fisher in April 2018 this related only to beam pockets. This is a steel component bolted to a vertical face of a concrete slab designed to hold a horizontal beam. It is like a joist hanger. The claimant accepted in evidence that he just told James Fisher that the beam pockets were not tested and were non-compliant. He does not however say in his witness statement that he said they were non-compliant.

44. There is no dispute that the beam pockets were subsequently tested by Vinci and found to be structurally sound. The respondent is not responsible for the concrete or the fixings only the beam pocket.

45. By email of 14 June 2018 the claimant advised colleagues that he had received a certificate that morning for the load testing of the beam pockets from Vinci Technology Centre and they are "structurally safe for the application and we now have UCAS certification that proves this".

46. A mediation meeting took place between the claimant and James Fisher on 12 June 2018 and a transcript of the meeting was seen in the bundle. The claimant was taken to page 266 of the bundle where he does refer to this meeting in April 2018. He discusses the fact he came in during his annual leave and that his wife had post-natal depression but there is nothing about the conversation becoming heated and about him having made a disclosure.

47. Again, at the appeal meeting on page 782 the claimant discusses coming in whilst he was meant to be on annual leave and again talks about his wife's post-natal depression but mentions nothing about having made a protected disclosure or indeed any discussion that became heated on that day in April 2018.

Second alleged protected disclosure

48. In an email of 22 July 2019 at 4.06pm the claimant wrote to James Fisher stating:

> "I designed the test rig to accommodate the other access covers. We currently do not have any test data for the following (and lists 5 different items)"

He then asks:

> "Can you please advise if you want me to conduct the load test?".

49. Mr Fisher replied on the same day at 19:52 stating:

> "Please can you prepare cost estimates".

The claimant's dismissal – 31 July 2019

50. By letter of 31 July 2019 Raj Dhadwal followed up the meeting she had had with the claimant confirming the termination of his employment. She set out that over the 22 months of his employment the relationship between the claimant and James Fisher, and between the claimant and the company had deteriorated to a point where there was no longer any trust and confidence between them. The claimant had raised concerns over the course of his employment including being overworked, underpaid and undervalued and questioned how the business operated its culture, ethos and values. The business believed it had done all it could to address the claimant's concerns by taking on for example consultants to help address the workload but the claimant was not happy with that seeming to have preferred a pay rise himself. They had tried to re-assure the claimant of his value to the business but that did not appear to have appeased the situation.

51. It was felt that the claimant had suffered a somewhat "fractious relationship" with some of the clients and that had put even more stress on the claimant in his role. They were now concerned that the levels of discontent were such that it may and could have a detrimental impact not only on relationships with clients but on the claimant's own health and welfare. The claimant's employment had been terminated with immediate effect, his last day of employment being 30 July 2019. He was to be paid up to that date, was paid one months' salary in lieu of notice and accrued holiday pay.

52. That there were difficulties in the relationship between the claimant and James Fisher were evident at the meeting on 17 January 2019. The claimant did not take issue with the transcript which appeared in the bundle starting at page 343. From this it could be seen that following the claimant's trip to Mauritius over the Christmas period (further details of which will be set out below) the claimant believed that:

> "Enough is enough now. I've got grounds for constructive dismissal."

53. He accepted in evidence that the relationship had broken down and he could have resigned then if he had wanted to. At that meeting it was also discussed how one of the clients did not want the claimant back on site. The claimant questioned Mr Fisher as to whether he had that in writing. Mr Fisher did not to which the claimant replied:

> "So how can I trust what you've just said there?"

It is clear that even at that point there were difficulties in the relationship.

54. Following the meeting there was correspondence between the claimant and Rajvinder Dhadwal on 25 January and 1 February 2019. The claimant ended his email of 25 January by stating that:

> "As you can appreciate I now have a case for constructive dismissal. The levels of stress placed upon me have now contributed to ill health this week."

55. In his further responses he stated that when he felt he could no longer work with James Fisher he would leave however he did not want an exit interview to be conducted as it would serve no purpose. It is quite clear and the claimant accepted in evidence that it was not a happy relationship at that stage but he questioned why it had taken 6 months then to dismiss him.

56. The respondent set out in its ET3 at paragraph 13 the matters that it relied upon in coming to the conclusion that there had been a breakdown in trust and confidence such that they had to terminate the claimant's employment. Having heard the evidence, the Tribunal is satisfied that these were indeed the matters that were in the minds of Mr Fisher and Mr Waters at the relevant time. The Tribunal will deal with each in turn.

<u>Email 5 June 2018 (page 229)</u>

57. This email concerned the claimant having worked a bank holiday weekend and how much time off in lieu (TOIL) he was entitled to. He was concerned that Mr Fisher had given him 2 days instead of 3. He then stated,

> "This isn't the first time that you have gone back on your word against me".

He mentioned 3 other incidents that had led him to that conclusion:-

(1) A pay rise following the claimant's 3 month review which had not been sanctioned by the company.

(2) Obtaining quotes for testing of the beam pockets.

(3) Dealing with recruitment consultants.

But the main concern was clearly the time off in lieu.

58. The claimant's contract of employment was seen at page 160 of the bundle and provided as follows with regard to salary and hours of work:-

> "4.3 Your salary will be reviewed annually and may be increased from time to time at the company's discretion without affecting the other terms of your employment, in line with the company's grading structure. There is no obligation to award an increase. There will be no review of the salary after notice has been given by either party to terminate your employment.
>
> …
>
> 5 Hours of work and rules
>
> 5.1 Your normal hours of work are 37.5 hours per week to be completed between 8.30am and 5.30pm Monday to Friday (as notified by your line manager from time to time) with an unpaid 30 minute lunch break.
>
> 5.2 You may be required to work such additional hours as may be necessary for the proper performance of your duties without extra remuneration."

59. The claimant accepted that whether or not he was to be paid TOIL was entirely at his manager's discretion.

60. By email of 16 May 2018 James Fisher raised with the claimant the client MACE. He said they would be chasing soon and asked:

> "Is there any chance you could look at this over the weekend and we look at TOIL?".

61. The claimant accepted in cross examination that Mr Fisher had not asked him to work all weekend or indeed the whole of the bank holiday. The Tribunal is satisfied that the request was in relation to that particular project.

62. On 29 May 2018 the claimant set out the work he had done on various different jobs over the entirety of the weekend and asked for 3 days off in lieu (page 241).

63. James Fisher was concerned that the claimant had not just worked on the Battersea Project as he had asked but on other projects also. In the light of that he authorised 2 days TOIL. When he received the claimant's email of 5 June 2018 (referred to above) he was concerned enough to talk to Nikki Purba HR Director who suggested that he meet with the claimant with HR present. That led to Raj Dhadwal arranging a mediation for the 12 June 2018.

64. As can be seen from the transcript, the claimant's focus was on the TOIL and his view that that was where the relationship had "completely just disintegrated and broken down" and it was the "straw that broke the camel's back".

The outcome of the meeting was that Mr Fisher agreed to increase the TOIL from 2 days to 3. Even at this hearing the claimant was not prepared to accept that that showed Mr Fisher being reasonable towards him stating that he thought he had only done that because he had "realised his mistake".

The claimant stating he felt exploited at the mediation meeting and that Mr Fisher did not care

65. From the transcript of the mediation meeting at which Raj Dhadwal was also present it can be seen that James Fisher was trying to understand what had happened between them and stated that he felt quite shocked to have received the claimant's email which felt a bit of a personal attack upon him when they had in the past been able to sit down and discuss matters. Despite a very long meeting where it was clear that Mr Fisher was trying to understand the claimant's position and accept where he may have mis-interpreted matters the claimant still maintained particularly over the issue of the TOIL that he felt "exploited" and that Mr Fisher did not care.

The claimant being rude to a recruitment agent

66. The claimant had been upset that a recruitment agency had put inappropriate candidates forward and in an email has said to the agency "Your incessant arguing with me over the phone I find very unprofessional". The claimant accepted that he did say that in his email. Mr Fisher found that to be rude having been said to a supplier to the business but the claimant would not accept this and neither would he accept in evidence that his response to Mr Fisher was rather sarcastic in tone as evidenced by the transcript. The fact that Mr Fisher later in the meeting apologised to the claimant when he understood that the quality of the people being put forward was not adequate for the claimant. He felt that Mr Fisher should not have said that without having the supporting documentation there. The tribunal is satisfied that Mr Fisher was prepared to compromise to support the relationship with the claimant but the claimant did not seem to be so prepared.

23 October 2018 maintaining respect for others

67. In an email of 23 October 2018 (page 300) the claimant had set out to seven colleagues the current list of matters on the engineering department's to do list. He concluded by stating that as could be seen there was some major projects with the engineering department which required a lot of time, work, resources and effort. He asked the others to remember that there was only him and Seni in the engineering department and that:

> "It is a shame that Howe Green being an engineering company only has two qualified engineers. If anyone thinks that they can do my work quicker, better

> and more efficient than me, then please do not hesitate to take over my responsibilities."

68. James Fisher had been included in the list of recipients of that email and replied to the claimant on the same day that it was important to remember that everyone was busy and stated he was not sure what had prompted that paragraph. He confirmed that setting out the work load was the right thing to do and he had tried to encourage that at contract review meetings. He would encourage however the claimant to do that at the end of each meeting moving forward. In cross examination the claimant did acknowledge that it could have been better written but would not accept that it was unprofessional. He acknowledged that he did not apologise when he wrote back to James Fisher. In his email he stated that it had come from the mornings production meeting and it had become increasingly frustrating "working with some people here who show no qualities of being professional in a work place yet their titles show otherwise". He would not tolerate people getting "gobby" with him when he was trying to help them out as much as possible. The email that he had sent was to remind them what he was doing for them and that "certain people make out like they run this place and behave otherwise when you are not here".

69. James Fisher replied that it was important departments remained able to talk to each other and "we must all maintain respect for others". The tribunal finds he could have taken a more draconian line with the claimant.

70. In a further email on 23 October at 11.01 (page 297) the claimant said to Mr Fisher that he believed he had "grossly misunderstood" what he had written in his email. He felt his department was:

> "Victimised for not working on orders when there is clearly a lack of resources and too much work. Hence, the initial email with the to do list."

<u>Email from Seni Ogunmilade on 2 November 2018 to HR</u>

71. On the above date the claimant's colleague and direct report wrote to HR asking for some support. He wished to report an incident that took place the day before between himself and the claimant. He recorded working at his desk when the claimant, his manager very suddenly became angry raising his voice asking what he was doing and if he was "pissing about" on WhatsApp. Seni stated that he was actually working on CAD model files. He said the claimant had failed to believe him and preceded to get louder even after being shown his laptop monitor. He continued "to shout at me in a manner that made me feel belittled and threatened". He was so upset that he had to remove himself from the room to calm down. He left the room for about 15 minutes and then discovered the claimant had been on his computer looking at his browser history. He then showed Seni sites that he said he had been on in the last two hours. Seni tried to explain he had visited websites only while waiting for the CAD software to become unfrozen as it is a frequent and prolific problem that the claimant had been made aware of throughout Seni's use of it. Seni felt he was not given a chance to

provide an explanation and the claimant kept cutting him off. As a result of this matter he had been put on a formal warning. He didn't want HR to take the matter any further but just wanted his view of the incident to be put on record and believed he had not been doing anything wrong. He did not want his employment to be terminated or at risk due to untrue claims and the claimant's quick temper.

72. In cross examination the claimant accepted that he did tell him not to "piss about" and he accepted this was unprofessional. He said when he went to look at the laptop screen Seni had been on YouTube. That is not mentioned in his witness statement.

5 November 2018 James Fisher spoke to the claimant after he noticed the claimant had posted unfavourable comments about management styles on LinkedIn

73. James Fisher discovered on LinkedIn that the claimant had posted a comment that:

> "A bad manager can take a good staff and destroy it, causing the best employees to flee and the remainder to lose all motivation" and "leaders who don't listen will eventually be surrounded by people who have nothing to say".

James Fisher could not help but feel the unfavourable comments were aimed at him. The tribunal accepts that when raised with the claimant on the telephone, the claimant acknowledged they were directed at James Fisher but the claimant did not remove the posts.

74. In an email of 5 November 2018 the claimant stated that James Fisher was not the only manager he had worked under and "Whatever I post on LinkedIn could also be referring to previous managers. I don't see why you have taken it so personally.". To this James Fisher replied on the same day that the claimant's initial reaction on their call was that it was directed at him so "this is a bit of a turnaround".

9 November 2018 James Fisher to HR about the claimant

75. On the above date James Fisher felt the need to write to HR about a meeting he had had with the claimant that morning. Once again the claimant had suggested he had not dealt with issues raised in his email of 23 October. James Fisher set out the ways in which he believed he had dealt with these matters. He concluded the email by stating to HR:-

> "I've asked Imran once again to ensure he improves his communication within the team and to understand that our customers will always determine the priorities within the business. We cannot get to a stage where colleagues feel intimidated by approaching the engineering department or any other department with a delivery query."

76. The claimant was prepared to accept that his behaviour had been unprofessional on one or two occasions for example in relation to Seni and

whether he was on YouTube or not but in his defence stated that it was due to pressure of work upon him.

December 2018 the project manager from Mitchellson Formworks the respondent's client on a large project at Battersea Power Station personally spoke to James Fisher to request that the claimant did not return to site as they did not like his attitude

77. The claimant went to Mauritius on 12 December 2018 at short notice because his father was ill and had to undergo heart by-pass surgery. James Fisher agreed he could take time off work.

78. During the claimant's absence James Fisher was contacted by the project manager from Michellson's to complain about the claimant's attitude and that he was not happy with the structural calculations presented. He requested that the claimant no longer attend site. Due to the claimant's absence and the pressure being put upon the company by the clients James Fisher had no other option but to bring in another engineer to oversee the Battersea Project on a temporary contractor basis.

Email 4 January 2019 the claimant referred to James Fisher as "the supposed MD of Howe Green" (page 340)

79. As stated above the claimant had been allowed leave at short notice in December 2018 following his father's ill health. His father had been rushed to hospital on 10 December and had a double by-pass on 13 December. The claimant had flown out on 12 December arriving in Mauritius on 13 December. The claimant's father was then discharged from hospital on the 18 December. The claimant was due to fly out from Mauritius on 30 December and return to UK on 31 December returning to work on 2 January 2019. However, on 27 December he found a small lump on his scrotum and underwent a local anaesthetic procedure on 3 January for this to be removed and for confirmation to be received the same day that it was benign.

80. The claimant had obtained his airline ticket on a promotional deal that he could only fly out after the peak season had ended. James Fisher really needed him back to deal with ongoing projects and had offered that the respondent would pay the cost of the ticket for him to fly home earlier than he was suggesting of 16 January 2019.

81. In the email that is being referred to the claimant whilst appreciating that he had been allowed time to go and visit his father took issue with Mr Fisher not being medically qualified and failing to remember that the claimant had stiches which required to be removed a week after his operation and to be examined again by his doctor prior to his return to the UK. He accused Mr Fisher of "shamefully" putting him under immense stress a day after the operation by shouting at him during a telephone call. He stated at the end of the email that:

> "I unfortunately need to mention that you need to accept your mistake regarding the current outstanding issue concerning the fire rating of the Howe Green covers for the Battersea Project".

82. He had explained how he had had to deal with immense stress from clients:-

> "Yet, you as my direct manager and supposed MD of Howe Green failed to act accordingly. Had my technical engineering advice been taken aboard then Howe Green would have had access covers tested to all three categories and I would not be in this mess where I am trying to find a separate engineering fire consultant capable of carrying out a fire rating simulation. Then you question that Michellson's are threatening to find another access cover supplier."

83. He concluded by stating that he would be back in the office on 16 January and that should Mr Fisher wish to discuss what he had written in the email he would request that Raj Dhadwal from HR was present. He would not accept in cross examination that he had adopted a combative tone.

<u>On 17 January 2019 Raj Dhadwal was present during the claimant's return to work meeting with James Fisher</u>

84. Again, at this meeting as he had done previously, the claimant indicated that he had grounds for constructive dismissal although he did not resign at this meeting. He stated raising a grievance would not have resolved anything. The claimant accepted that he did however mention at that meeting the question of a severance package. It is clear that even at this point the claimant himself was not content with the working relationship.

<u>Email of Seni Ogunmilade on 11 June 2019</u>

85. Seni, the claimant's direct report wrote to James Fisher and others on the above date copying this to the claimant about what he described as the "level of miscommunication, disrespect and harassment that Imran (the claimant) and I have received from Ramunas of Michellson". He forwarded an email from Ramunas dated 10 June 2019 where he had said to Seni that he wanted to reduce emails as much as possible, asked for the drawings to be updated and asked what the point was of sending a bundle of drawings if no one was interested in making changes. The claimant told this Tribunal that he was on annual leave at the time and believed that Seni was complaining about what was said in a phone call between him and Ramunas. He had supported Seni in saying that he had been shown disrespect in the phone call but accepted in cross examination that he could not say if there had been disrespect and could not legitimately support the complaint.

86. The claimant in evidence referred the Tribunal to page 581 where there was a picture and a text box with a question in it which is what he was saying was rude.

87. The claimant had a meeting with Austin Stone Technical Director and the claimant's then line manager on the 18 June 2019 with Abi Irawo HR advisor to discuss the allegation of disrespect and harassment towards the claimant and Seni from the client.

Decision to dismiss

88. On 26 June 2019 there was a meeting between James Fisher and Nikki Purba HR Director at which there was discussion regarding the issue between the claimant and the client Michellson, the claimant's lack of respect towards James Fisher and the lack of trust in the relationship. The decision was taken that they had no alternative but to terminate the claimant's employment due to the breakdown in the relationship between the company and him, and between the claimant and James Fisher.

89. In view of the complexity of projects going forward, particularly Battersea Power Station project they decided to commence a recruitment process for a contracting engineer to replace the claimant on a short-term contract basis prior to the claimant being notified that his contract of employment was to be terminated. On the 4 July 2019 James Fisher agreed the brief with Martin Veasey Partnership. In addition to asking them to find a contractor for a short term 3 month contract they also asked them to find a long-term full time Senior Mechanical Engineer.

90. The issues between the claimant and Ramunas continued and on 8 July 2019 Ramunas queried whether or not the claimant and his team were sending drawings with the latest revisions saying:

> "It would save a lot of time if you would tell the truth."

91. The claimant responded in an email on 8 July stating that it was unfair he was being branded a liar. This was sent to Ramunas' manager.

The claimant's comparators

92. In the ET1 claim form the claimant refers to two other members of staff, one of them a white male Warren Tyce being permitted to have an offensive pen and use of foul language but who was not dismissed and Sarah Bray a white female who had been reprimanded for her bullying conduct and previously been warned by James Fisher about bringing her child into the office.

Warren Tyce

93. It was the claimant's evidence that in or about October/November 2017 Warren Tyce, the Production Manager brought a pen into the morning's production meeting with the slogan "I work with cunts". The claimant who was new to the organisation at the time found this offensive and considered it to be gross misconduct. He also found Warren Tyce's behaviour with shop floor staff to be "horrific". The claimant further alleges

that at a morning production meeting in January 2018 James Fisher made reference to the pen and a forthcoming visit of Darren Waters CEO of the respondent and in February 2018 asking that he did not bring the pen in then.

94. The claimant referred to this pen in his appeal document (page 711). What he did not state was when James Fisher knew about it. The tribunal is satisfied from James Fisher's evidence that the first time he knew about it was as a result of the claimant's appeal. He did speak to Warren Tyce about and gave him a verbal warning having been assured the pen was no longer in the office.

Sarah Bray

95. Sarah Bray sometimes brought her young son Jacob into the Howe Green office. James Fisher had asked to be made aware when this occurred having told her she was not allowed to bring him in as he was not insured to be in the premises. The claimant alleges he told James Fisher on numerous occasions that Jacob had apparently had to use the toilet but was then seen running around the premises. The tribunal accepts that James Fisher did speak to Sarah Bray and accepted her explanation that her son had needed to go to the toilet.

96. The claimant alleges that both Sarah Bray and Warren Tyce as members of the Howe Green management leadership team were dealt with more leniently than him.

97. The claimant acknowledged however in evidence that he was not disciplined for bringing a child into work. He acknowledged that the scenarios between himself and these two comparators were different. He further acknowledged that he had produced no evidence to suggest that a hypothetical person not of colour who had the incidents of poor communication with others would have been treated differently.

Relevant Law

98. The claimant who did not have 2 years continuous service brings a complaint that he was unfairly dismissed within the provisions of s.103A of the Employment Rights Act 1996 (ERA) which provides:-

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

99. A protected disclosure means a qualifying disclosure as defined by s.43B ERA which provides as follows:-

> "**Disclosures qualifying for protection.**
>
> (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.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)."

100. It is now well established that as the claimant does not have the requisite qualifying service the burden of proof is upon him to prove that the reason or principal reason was the alleged disclosure (Kuzel v Roche Products Limited [2008] IRLR 530).

101. To come within the qualifying provisions the claimant must prove that he disclosed facts not mere allegations or expressions of opinion (Cavendish Munroe Professional Risk Management v Geduld [2010] IRLR 38 and Goode v Marks and Spencer plc UKEAT/0442/09).

102. The claimant must also prove that at the time of making the disclosure he believed he was making it in the public interest and that that belief was reasonable (Chesterton Global Limited v Nurmohamed [2018] 1 All ER

947. It is for the claimant to demonstrate that it was in fact made in the public interest (Parsons v Air Plus International Limited UKEAT/0111/17).

103. It was made clear at the case management discussion that the claimant relies upon his disclosures as showing that a person had failed, is failing or likely to fail to comply with any legal obligation to which he is subject and/or the health or safety of any individual has been, is being or is likely to be endangered. It is for him to show that at the time of making the disclosure he believed one of those qualifying matters and that his belief was reasonable.

104. The EAT made clear in Fincham v HM Prisons Service UKEAT/0925/01 that:-

> "There must in our view be some disclosure which actually identifies, albeit it not in strict legal language, the breach of legal obligation on which the employee is relying." (Paragraph 33)

105. Of course, as was set out in Babula v Waltham Forrest College [2017] IRLR 346 (CA) the claimant need not necessarily be correct.

106. The claimant also claims that he was subjected to direct race discrimination and s.13(1) of the Equality Act 2010 (EqA) provides as follows:-

> "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."

107. The claim of direct discrimination requires a comparison with how the respondent would treat others and the definition of the comparator is set out in s.23 EqA which provides that there must be:

> "no material difference between the circumstances relating to each case"

108. The comparator must be in the same position in all material respects as the claimant save only that he or she was not a member of the protected class (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285).

109. Section 136 of the Equality Act provides that the burden of proof is initially upon the claimant to establish a prima facie case. As was made clear in Madarassy v Nomura International [2007] IRLR 246 a difference in status and a difference in treatment is not sufficient. Something more must be shown.

Conclusions

110. The claimant has not established that he was dismissed for having raised a protected disclosure. Leaving to one side for a moment whether or not he even made a disclosure capable of protection under the ERA it is quite clear from all of the evidence heard that the reason why the employer

decided the relationship had to end was due to the total breakdown in trust and confidence between the claimant and the employer but also in particular with James Fisher. The respondent has shown by various examples which were raised with the claimant at the time that the claimant had difficulties in communication with not only his line manager but with clients to the extent where one major client did not even want the claimant on site. It was illustrative of the claimant's attitude to these matters that he still does not accept even during this hearing that there was anything wrong with his communication style. What is quite clear to the Tribunal is that the respondent did not have criticism of his technical ability and in fact that is clearly why the relationship lasted as long as it did. Had they not had that then the Tribunal is sure that the relationship would have ended sooner.

111. The only alleged disclosure which could have any relevance to the decision to dismiss was that made in April 2018 because the other disclosure relied upon is after the decision to dismiss had been taken. The Tribunal is satisfied there was not a protected disclosure within the meaning of the ERA.

112. Further, however, even if there was a disclosure made it was not sufficient to pass the legal test in that insufficient information was given and there is no reference to what the legal obligation was that is said to have been or likely to be breached. It does not satisfy the test set out in Cavendish.

113. It was quite clear from the claimant's evidence that prior to these proceedings it had never occurred to him that he had made a protected disclosure at that time. Further, he acknowledged that he did not think that was the reason for dismissal as it was so far back from it.

114. At the claimant's appeal when he raised numerous matters, although he raised a discussion in April 2018 he still did not allege that it was a protected disclosure. It is inconceivable that if the claimant had believed it was the start of matters leading to his dismissal that he would not have raised it at his appeal particularly bearing in mind that he acknowledged in this hearing that he had researched whistleblowing and had had legal advice.

115. The tribunal is satisfied that the decision to dismiss the claimant was taken by James Fisher in conjunction with Nicki Parbar at their meeting on the 26 June 2019. Whatever the status of the matters raised by the claimant on the 22 July 2019 they could not have caused the respondent to decide to dismiss as that decision had already been taken.

116. In relation to the claimant's complaint of race the circumstances of Warren Tyce and Sarah Bray are clearly substantially different and cannot be comparators within the meaning of the EqA. They are not in any way comparable to the claimant's situation where his employer had numerous examples of matters going to a breakdown of the employment relationship.

Indeed, the claimant accepted he had not identified any basis for suggesting a hypothetical comparator would have been treated differently.

117. The reason the claimant was dismissed was because of the breakdown in the relationship due to the way in which the claimant communicated not only with his line manager but with clients and colleagues. He has not demonstrated it was in any way whatsoever to do with making a protected disclosure and the claimant's claim therefore fails and is dismissed.

_____
Employment Judge Laidler

Date: 13 January 2021

Sent to the parties on: .12/02/2021...

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For the Tribunal Office