EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109375/2019

Held in Glasgow on 3, 4 & 5 November 2020 with Members Meeting on 20 November 2020

Employment Judge McManus
Tribunal Member Taylor
Tribunal Member Brown

Mr T Connelly	**Claimant** **Represented by** **Mr A Dorans -** **Member of** **Parliament**
Brightwork Limited	**Respondent** **Represented by:** **Mr K Gibson -** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the claimant's claim under Section 47B of the Employment Rights Act 1996 is unsuccessful and is dismissed.

REASONS

Introduction

1. There have been a number of previous hearings in this case. Two Judgments have been issued. EJ Whitcombe's Judgment dated 22 April 2020 was that the claimant was not an employee of the respondent. That was an oral Judgment with no written reasons requested. That Judgment was not appealed. Accordingly, it cannot now be disputed that the nature of the relationship between the claimant and the respondent was that of the claimant being a worker and not an employment relationship. The claimant then does not have

the legislative protection rights of being an employee of the respondent, e.g. in respect of unfair dismissal, as further set out below.

2. EJ Kemp's Judgment dated 15 June 2020 was to refuse an amendment application (including proposed amendment to bring in Wm Grant & Sons as an additional respondent). That Judgment sets out written reasons. That Judgment was not appealed.

3. Notes have been issued following Preliminary Hearings ('PHs) in this case. The Note issued followed the PH which took place on 15 June 2020 helpfully sets out the background position. That Note is included in the bundle of papers relied upon by parties in this hearing, at pages 52 – 56.

4. The claimant's sole claim remaining before this Tribunal is the claimant's claim against Brightwork Ltd that he suffered a detriment as a result of having made a protected disclosure. That is a claim made reliant on section 47B of the Employment Rights Act 1996 ('the ERA'). The Note issued following the preliminary hearing which took place on 15 June 2020 ('the PH Note of June 2020') summarises the parties' positions at paragraphs 3- 6. Both parties' representatives confirmed their positions in preliminary discussions on 3 November and these are summarised below.

5. Following EJ Whitcombe's Judgment in this case, it is now not in dispute that the claimant is a worker and was not an employee of the respondent. There are important legal differences between a person who has worker status and a person who has employee status. As a worker, and not an employee, the unfair dismissal protection legislation in section 94 of the Employment Rights Act 1996 did not apply to the claimant's relationship with the respondent. As a worker, and not an employee, section 100 of the Employment Rights Act 1996 did not apply to the claimant's relationship with the respondent. That section 100 sets out provisions for a dismissal being an unfair dismissal in certain circumstances and where an employee is dismissed because they have raised health and safety concerns. The claimant did not have the protection of that legislation in his relationship with the respondent because he was not an employee of the respondent. The respondent is an agency and in this case the hirer or client of

that agency for whom the claimant was assigned to work at the material time was Wm Grant & Sons.

6. Some parts of the Employment Rights Act 1996 do apply to those who have worker status rather than employee status. That includes some provisions in respect of making protected disclosures (commonly known as 'whistleblowing'). The claimant claims that he made a protected disclosure in respect of health and safety matters and that his assignation by the respondent to the hirer was terminated as a result of him having made that qualifying disclosure. That is the claimant's claim which is before this Tribunal. The claimant claims that he suffered a detriment because he raised health and safety concerns. The claimant does not claim that he suffered any other detriment other than the termination of his assignation to Wm Grant & Sons.

7. The only respondent in this case is Brightwork Ltd. The respondent in this claim can only be liable for the acts or failures of those acting on behalf of Brightwork Ltd.

8. The Tribunal requires to make findings in fact, to apply those facts to the relevant legislation and to determine the issues before it. The claimant's case is that his assignation to Wm Grant & Sons was terminated because he made protected disclosures. The termination of that assignation is the only detriment which the claimant relies on as having been suffered as a result of him having allegedly made those protected disclosures.

9. This hearing took place during the Covid 19 pandemic. Proceedings were dealt with taking into account the Practice Direction – Fixing and Conduct of Remote Hearings issued by the President Judge Shona Simon on 11 June 2020 and the Remote Hearings Practical Guidance referred to in that Practice Direction.

10. In order to comply with social distancing measures, the hearing on 3 November commenced as a hybrid hearing, i.e. in part an in-person hearing and in-part a hearing via the cloud video platform used for video Tribunal hearings ('CVP'). EJ McManus, the claimant, the claimant's representative and the respondent's representative were initially present in a hearing room in the Glasgow Tribunal Centre ('GTC'). Both non-legal members of the Employment Tribunal decision

making panel attended via the cloud video platform used for video Tribunal hearings ('CVP').

11. Some useful preliminary discussions were able to take place on 3 November. Clarity was able to be given on each party's position and there was agreement on the issues which fall to be determined by the Tribunal in this case, based on those which had been identified previously and set out in the PH Note of June 2020. These discussions were agreed by all to have been particularly useful, given that the claimant's representative had only very recently become involved in this case. The claimant's representative had received the papers on the morning of 3 November, having only agreed to be the claimant's representative in this matter on the Saturday before that. A postponement application had been made by the claimant's representative on 2 November. That application was refused by EJ McManus on the basis that this case had been ongoing since mid-2019, the claimant had had the opportunity to instruct a representative prior to the day before this Final Hearing and the respondent's representative had objected to the postponement request. In discussions on 3 November, it was agreed that it was in the interests of all for this Final Hearing to proceed within these allocated dates.

12. As those preliminary discussions progressed, difficulties became apparent in proceeding with this case as a hybrid hearing. In particular, the allocated room in GTC only had three microphones. This was not enough for there to be a microphone for use by the Employment Judge, the witness and both parties' representatives. The hearing could not proceed in its initial hybrid format for that reason. Following some investigations to find a suitable solution, it was agreed that this hearing would proceed as an entirely CVP hearing. The Tribunal is very grateful to the claimant's representative for allowing the claimant access to the technology facilities to enable this hearing to proceed using the CVP platform. The hearing on 3 November was then a hybrid hearing, and the hearing on 4 & 5 November were CVP hearings.

13. These proceedings were conducted remotely with regard to Presidential Guidance issued in response to the restrictions in place due to the Covid-19 pandemic. The President of the Employment Tribunal (Scotland) has issued:-

- Presidential Guidance in Connection with the Conduct of Employment Tribunal Proceedings during the Covid-19 Pandemic (being Joint Presidential Guidance issued with the President of the Employment Tribunals (England and Wales),

- FAQs about the Covid-19 pandemic (being a document issued jointly with the President of the Employment Tribunals (England and Wales),

- Practice Direction on the Fixing and Conduct of Remote Hearings

In order to progress the case in accordance with the overriding objective set out in Rule 2 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 ('the Rules') in the circumstances and with regard to the papers before the Tribunal and the case file, it was appropriate for the hearing to be heard remotely.

14. All documents relied upon by parties were included in a Joint Bundle. The numbers in brackets in this judgement refer to the page number of that document in the Joint Bundle.

15. The claimant gave evidence himself. No other witnesses were called for the claimant. For the respondent's case, evidence was heard from Paula Lang (an Experience Manager with the Respondent, with responsibility for the relationship with Wm Grant & Sons). All evidence was heard on oath.

Issues for Determination

16. In preliminary discussions on 3 November it was agreed that the issues for determination by this Tribunal in this case are:-

- Did the claimant make a qualifying disclosure (with reference to section 43B of the ERA and subsequent sections)?

- If so, to whom was that qualifying disclosure made?

- If so, when was that qualifying disclosure made?

- If so, was the claimant's assignation with the hirer terminated as a result of him having made that qualifying disclosure (that being the only detriment relied upon by the claimant as arising)?

- If so, what loss did the claimant sustain as a result of that termination?

- Did the claimant appropriately mitigate any such loss?

17. The Tribunal made findings in fact on the basis of the evidence before it and applied the relevant law to determine the issues. The central finding in fact was determination of the question 'who terminated the claimant's assignation to Wm Grant & Sons?'

Relevant law

18. The claimant is a 'worker' as defined in the Employment Rights Act 1996 ('the ERA') section 43K.

19. A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that he has made a protected disclosure (the ERA section 47B). It is noted that this reference to 'employer' in section 47B may be confusing, but does not refer to any requirement for an employment relationship to be present i.e. for employee status rather than worker status.

20. In order for a disclosure to be a protected disclosure, it must satisfy the provisions of Part IVA of the ERA. The meaning of 'protected disclosure' is with reference to the definition of 'qualifying disclosure' in section 43A and subsequent sections in that Part IVA. The claimant relies upon section 43B(1)(d), which provides that any disclosure which in the reasonable belief of the worker is made in the public interest and tends to show that the health and safety of any individual has been, is being or is likely to be endangered, is a qualifying disclosure. The disclosure must be made in accordance with one of six specified methods of disclosure set out in sections 43C to 43G.

21. In the event of success, remedy is governed by the terms of section 49 ERA. The Claimant would be entitled to a declaration of breach of section 48 (1A) and

to an award of compensation. The relevant provisions as regards compensation are section 49 (2), (3) (4) [mitigation] and (6) [statutory limit on award].

22. This case was dealt with in terms of the Tribunal's overriding objective as set out in Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('The Procedure Rules'), being:-

"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly.

Dealing with a case fairly and justly includes, so far as practicable -

(a) ensuring that the parties are on an equal footing;

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;

(c) avoiding unnecessary formality and seeking flexibility in the proceedings;

(d) avoiding delay, so far as compatible with proper consideration of the issues; and

(e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal."

Findings in Fact

23. The Tribunal made findings in respect of facts which were material to the issues for determination by this Tribunal. The following material facts were admitted or found by the Tribunal to be proven.

24. The respondent is an agency. Workers are sourced and matched by the respondent to their hirer clients, including Wm Grant & Sons, and then assigned to work for that hirer client. The respondent normally assigned workers to Wm

Grant & Sons for any period of up to a normal maximum of 36 weeks, with a possible extension of any number of weeks, up to a total of 48 weeks.

25. The claimant was a temporary worker under such an assignment arrangement. The claimant had a contractual agreement with the respondent. That agreement was a contract for services (at 71 – 76). Paragraph 6 of that contract (at 74) sets out the provisions in respect of termination, including at 6.3, as follows:-

"Continuation of any Assignment is always subject to the client's continuing need. If the client ends or changes its agreement with us or that agreement is ended, for any reason, your Assignment will also cease with immediate effect, without further liability from us to you except for payment for work done to the date that the Assignment ends."

26. That paragraph 6.3 allowed the respondent to terminate the claimant's assignation if asked to do so by any client.

27. The claimant had been assigned to the respondent's client Wm Grant & Sons on a number of occasions since 2013. The claimant was assigned as a Warehouse Worker by the respondent to Wm Grant & Sons at their premises in Grangestone Industrial Estate, Girvan. The claimant worked in the distillery warehouse there. The claimant's last assignment by the respondent to work at Wm Grant & Sons began on 2 July 2018 and ended on 26 April 2019 (a period of 41 weeks). During that assignment period the claimant reported to Charles McClure of Wm Grant & Sons (Warehouse Team Manager). The claimant's point of contact at the respondent was Paula Lang. Paula Lang is an employee of the respondent. She is responsible for sourcing and placing suitable workers to Wm Grant & Sons on behalf of the respondent.

28. The claimant's work in Wm Grant & Son's warehouse involved some manual handling. The claimant spoke to Charles McClure about some health and safety concerns he had about working in the warehouse. The claimant was concerned about risk of injury. In February 2019, the claimant injured his thumb while working moving casks in Wm Grant & Sons. He was attended to by an onsite First Aider and sent to hospital for further assessment. The claimant did not

take time off work following this injury as he believed that if he did he would lose his position at Wm Grant & Sons.

29. On 8 February 2019 the claimant spoke to Janice McGeehan (on-site Health & Safety Rep within Wm Grant & Sons). Janice McGeehan is not an employee of the respondent. The claimant spoke to Janice McGeehan because he understood that she had responsibility for some health and safety matters and he had concerns about certain working practices within the warehouse at Wm Grant & Sons, in particular in relation to the manual movement of casks. The claimant understands that Ms McGeehan then spoke to Charles McClure about those matters. Charles McClure came to speak to the claimant about this on 27 February 2019. The claimant understood from Charles McClure that he was not happy about the claimant having raised health and safety concerns with Janice McGeehan. Charles McClure told the claimant that he could then attend Team Meetings which covered health and safety matters. The claimant had not previously been allowed to attend those meetings. At the following Team meeting, where the claimant was present, Charles McClure informed those attending that there would no longer be manual movement of casks in the warehouse.

30. On 28 February 2019, Charles McClure sent an email to Paula Lang with subject heading 'Tommy Connelly' (the claimant). That email (at 87B) stated':-

"Can you confirm how many weeks Tommy Connelly has been working with us?"

31. Paula Lang replied to Charles McClure on 1 March. That email (at 87B) stated:-

"Good morning Charlie. I hope you are well. Tommy has worked 33 weeks from July 18 to date, prior to that he worked 43 weeks up to Dec 17."

32. On 6 March 2019 Charles McClure replied to Paula Lang. That email (at 87A) stated:-

"Hi Paula.

Thank you for the update.

As you know we still like to continue with the 41 weeks therefore, if my calculations are correct Tommy's final week would be 22nd April. Can you confirm this please and I will then update Tommy?"

33. Paula Lang replied to Charles McClure on 6 March. The substantive part of that email (at 87A) stated:-

"Your calculations are correct and the final week for Tommy would be 22nd April 2019.

Will you be looking for someone to replace Tommy?"

34. Charles McClure replied to Paula Lang on 6 March. That email (at 87A) stated:-

"Our aim is to not replace Tommy and if we can let him go earlier then we shall, however, I will keep him and you informed."

35. On 15 March 2019, Charles McClure informed the claimant that his assignation to Wm Grant & Sons was coming to an end in week commencing 22 April 2019. That was the claimant's first notification that that assignation was coming to an end. The claimant took a note of that conversation. That note is at (84) and states:-

"Charles came down to W/H to tell me I was getting paid of W/C 22 April, as I couldn't legally be on site after this date."

36. The claimant was on holiday from 16 March. On 25 March 2019 the claimant spoke to Paula Lang. That telephone call is recorded by Paula Lang in the respondent's communications record system ('Universe') (at 108) as follows:-

"Paula Lang Monday 25 March.

Spoke with Tommy, he had advised me that WM Grant have advised him that he will finish up week commencing 22 April. I explained to Tommy that once he has received his final pay I will process holiday balance & P45'."

37. In that call Paula Lang told the claimant that the job had 'come to a natural end'. The claimant told Paula Lang that he believed that it was being ended because he had raised health and safety concerns.

38. On 16 April 2019 the claimant called the respondent (as shown in the screenshot (page 100) showing phone records). He did not speak to Paula Lang on that date. Paula Lang was absent on that date, as shown in the respondent's record (page 88).

39. On 25 April 2019 the claimant saw a whiteboard in Wm Grant & Sons warehouse. The same photograph of that whiteboard is at documents (90) and (77). This photograph shows that that whiteboard had the following written on it:-

"We are looking to replace Tommy with Ben Ingram. Do you have any concerns?

Charlie"

40. On 25 April 2019, the claimant called Karen Coyle (HR Manager with Wm Grant & Sons). Karen Coyle asked the claimant to contact Paula Lang at Brightwork. On 26 April Karen Coyle, contacted Paula Lang. That telephone call is recorded by Paula Lang in the Universe system (@88A). That note states:-

"26/4 Karen Coyle called to let me know that Tommy Connelly had raised some concerns with her. On discussing this it was agreed that it was Brightwork who should deal with his complaint. Karen and I agreed that once I was in receipt of all information we would catch up and discuss findings."

41. Also on 26 April 2019, Paula Lang spoke to the claimant. Her record of that call was recorded in the Universe system on at 15.50 on 30 April 2019. That note (page108) states:-

"26/4 Spoke with Tommy with regards to some issues he had on site with Wm Grant Girvan, he mentioned Discrimination, victimisation, violation of a H&S Act and he had a verbal threat against him."

42. On 29 April 2019, Paula Lang spoke to the claimant. Her record of that call was recorded in the Universe system at 15.51 on 30 April 2019. That note (page108) states:-

"29/4 Spoke with Tommy today and took more information from him to act on his complaint against William Grant. Took numerous notes from Tommy, he advised me that he had info in writing that he would send over to me."

43. Following that phone call, also on 29 April 2019, the claimant sent an email to Paula Lang (page 89). That email had no written content but had several attachments. Those attachments are included in the documents before the Tribunal (page 90 – 100). Those attachments include the photograph of the whiteboard in Wm Grant & Sons warehouse (at 90). Those attachments to that email were sent by the claimant to support his position in his conversation with Paula Lang on 26 April 2019, when he told her about his concerns at Wm Grant & Sons. Paula Lang received those attachments and used the information in them to prepare what is set out as a statement for the claimant (page 101 – 104).

44. Paula Lang spoke to the claimant on the phone on 30 April 2019. Paula Lang's record of that phone call was recorded in the Universe system (page 108) as follows:-

"Spoke with Tommy today to inform him that I had received the paperwork that he had sent to me. I advised him that it had all been typed up and uploaded to his file. I also advised Tommy that I had left a voicemail message for Karen Coyle asking that she call me back to allow us to discuss this further. I also advised Tommy that once it has been discussed with Wm Grant it is then up to them to do an internal investigation of which I do not know if I will find out the result due to data protection. I also advised Tommy that I would speak to my colleagues to see if they had any work for him. Tommy thanked me for all of my help and said that he felt better for having spoken to me and Karen Coyle, WM Grant HR manager."

45. On 30 April 2019 a Director of the Respondent, David MacKay, spoke to Karen Coyle of Wm Grant & Sons' HR department. That conversation was noted by Paula Lang in the respondent's communications record as follows (page 88A):-

"Paula Lang on Tuesday 30th April 2019 17:13

David Spoke with Karen Coyle today and informed her of concerns raised by Tommy Connelly. After reading through all points it was agreed that I, Paula would email a copy of information to Karen."

46. On 20 May 2019, Paula Lang informed the claimant about the possibility of another assignment. The claimant was asked if he was interested in that position. That conversation is recorded in the Universe system (page 108) as follows:-

"Paula Lang on Monday 20th May 2019 11:02

Tommy called to see about his holiday accrual, I advised him that I am just back from annual leave and requested it on Friday, so all being well he should have it in his bank account on Friday. As it stands just now Tommy has not secured other employment, due to this I discussed the role at LLG and asked him if he would consider it, he will get back to me."

47. Paula Lang's reference to "LLG" is a reference to "Loch Lomond Group", a client of the respondent. The assignation referred to is one where Paula Lang had authority to match the claimant and assign him without the claimant being required to be interviewed by that client.

48. The claimant confirmed his interest in the LLG role to Paula Lang. On 20 June 2019, Paula Lang telephoned the claimant. That conversation is recorded by Paula Lang in the respondent's record of communications (page 108) as follows:-

"Paula Lang on Thursday 20th June 2019 16:50

Spoke with Tommy as he is still interested in the spirit supply role at Loch Lomond Group I have asked him to send me a copy of his CV as the client is wanting to have a look at it. Tommy out just now but will email me a copy when he returns home."

49. On 26 June 2019 the claimant spoke to the respondent's John Craig. That conversation is recorded in the Universe system (@109) as follows:-

"John Craig on Wednesday 26th June 2019 10:19

Tommy called today to say he wants to withdraw from any roles he might be considered for, due to what happened at William Grants, he advised that he's feeling down about it all and he has been to see his doctor, and is currently signed off as not fit for work. he said he would contact Paula to let her know."

50. On 28 June 2019. The claimant spoke to Paula Lang. That telephone call is recorded in the Universe system (page 109) as follows:-

"Paula Lang on Friday 28th June 2019 12:50

spoke with Tommy and he has decided not to go forward for the role at LLG, he advised me that he has been signed off sick by his doctor. Tommy also said that he had not been contacted by William Grant with regards to the issues he raised. I informed Tommy that I do not have any access to this due to Data protection."

51. The claimant's average net pay from the respondent during his assignment to Wm Grant & Sons was £1,900 p/m. The claimant was unfit for work by 26 June 2020 (page 109).

52. The claimant obtained a new role at Barngany Farm Partnership, commencing in October 2019 (payslips at 149). That is part time, working 3 days a week. The claimant's average net pay from that employment is approx. £1000 p/m. Since around August 2020, the part time work has suited the claimant for reasons connected to family issues.

53. The claimant's assignation to William Grant and Sons was terminated because Charles McClure on behalf of William Grant and Sons told the respondent that it should end. Charles McClure informed Brightwork of that decision on 6 March 2019 and informed the claimant on 15 March 2019. The claimant first raised health and safety concerns with Brightwork (as opposed to WM Grant & Sons) on 26 April 2019, which was after that decision to terminate his assignation in the week commencing 21 April had been made.

54. The claimant's assignation by Brightwork to Wm Grant and Sons terminated on 26 April 2019 at the request of the client. Wm Grant and Sons normally terminated such assignations when the assigned worked had worked between

36 & 48 weeks. Termination of the contract by the hirer client is permissible in terms of paragraph 6.2 of the contract for services between the respondent & the claimant.

Claimant's Representative's Submissions

55. The Tribunal was grateful to the claimant's representative for providing representation to the claimant at very short notice. The claimant's representative spoke to written submissions. In those written submissions, the claimant's representative stated that the claimant wished to record the help and assistance provided by EJ McManus and that the claimant had specifically asked his representative to thank EJ McManus and all of the listing team for their help and the fairness with which he has been dealt with over the course of these proceedings. (The 'help' given by EJ McManus was to ask questions of the claimant in examination in chief and was done in accordance with the overriding objective in rule 2 of the Employment Tribunal Rules of Procedure and was not objected to by the respondent's representative.)

56. The claimant's representative made reference to various matters on which evidence had been heard. Those submissions referred to the claimant suffering from depression, anxiety and stress. There was no medical evidence before the Tribunal on any such diagnosis. It was the claimant's representative's submission that the key question for the Tribunal to consider was "*Had Mr Connolly not raised issues of concern regarding his and his colleagues health and safety, would he still be placed by Brightwork in employment at William Grants?*" It was the claimant's representative's submission that the answer to that question would be '*yes*', as the requirement for the role he carried out continued. The claimant's representative asked that, having considered all the circumstances of this case, the Tribunal find the evidence given by the claimant to be genuine and honest.

57. Throughout his submissions the claimant's representative referred to the claimant's 'employment' and 'unfair dismissal'. He asked that the Tribunal '*find in the claimant's favour by finding that the claimant was unfairly dismissed from his employment for no other reason than making a protected disclosure in*

raising health and safety concerns during his work placement by Brightwork at Grants and that for these reasons, his dismissal was automatically unfair'.

Respondent's Representatives' Submissions

58. The respondent's representative spoke to comprehensive written submissions, asking the Tribunal to make certain findings in fact and referring to a number of authorities.

59. It was his submission that, with regard to ERA *section 43B, and* Cavendish *Munro Professional Risks Management Ltd v Geduld [2010] ICR 325*, the claimant did not make a protected disclosure. He submitted that the claimant gave his opinion rather than conveyed information. He submitted that the claimant had failed to show that his alleged complaints were made in circumstances where he had *a* reasonable belief that his disclosure was made in the public interest, the matters he complained about being really matters personal to him. He referred to the IDS Employment Handbook at paragraph 3.37. He submitted that the claimant did not make a qualifying disclosure.

60. In respect of causation, it was the respondent's representative's submission that the question for the Tribunal is '*was the claimant subjected to detriment on the ground that he had made a protected disclosure'.* He submitted that, with reference to ERA section 48(2), for the claim to succeed, any detriment found has to be on the ground of the fact that the claimant made a protected disclosure for him to succeed, and it is for the respondent to show the ground on which they acted. Submissions were made on the burden of proof.

61. It was submitted that the detriment to the claimant must arise from a deliberate act or failure to act by the employer, other worker or agent of the employer. Reliance was placed on *Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065,* where the Judicial Committee of the House of Lords held that '*for there to be detriment under Section 47B "on the ground that the worker has made a protected disclosure" the protected disclosure has to be causative in the sense of being "the real reason, the core reason, the causa causans, the motive for the treatment complained of*"'. He submitted that the question is '*was*

the motive for the detriment consciously or unconsciously connected to the fact of the protected disclosure.'

62. It was noted in those submissions that in *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372* liability under section 47B was held to arise if the protected disclosure was a material factor in the employer's decision to subject the claimant to detriment. It was noted that reference was there made to *Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] EWCA Civ 142, [2005] 3 All E.R. 812*.

63. It was submitted that the claimant did not satisfy the requirements for a successful claim under section 47B(1) because:

    1. the claimant did not make a qualifying protected disclosure

    2. the claimant did not suffer a detriment by the respondent because the respondent did not terminate the assignment, Wm Grant did.

    3. the employer, worker or agent must have subjected the claimant to that detriment by some act, or deliberate failure to act and there was no detriment by an act by the respondent.

    4. the act or deliberate failure to act must have been done on the ground that the claimant made a protected disclosure. There was no protected disclosure and so no basis to subject the claimant to detriment. Even if there was a protected disclosure as the claimant alleges (which was denied) the reason the assignment with Wm Grant ended was because that Hirer told the respondent it was to end. The detriment relied on has no connection to the alleged disclosure, if it is a protected disclosure.

64. In summary, it was the respondent's primary position that there is nothing which could amount to a protected disclosure made to the respondent at a time before the claimant's assignment ended on 26 April 2019, so there can be no causal connection between the end of the assignment and any disclosure.

65. It was submitted that rather than any protected disclosure being a reason for the end of the assignment, the reason for the end of the assignment was that the hirer decided that it did not want the assignment to continue after w/c 22

April 2019 and the hirer told the respondent so. Even if the Tribunal were to find that a protected disclosure had been made (which the respondent denied), the reason for the end of the assignment was because the hirer decided that it did not want the claimant's assignment to continue, and not any protected disclosure made.

66. Reliance was placed on the documentary evidence before the Tribunal, as spoken to by Paula Lang. The Tribunal was asked to find that the assignment was ended after w/c 22 April 2019 on the instruction of the hirer, as vouched by the emails (at pages 87A to C).

67. It was submitted that the claimant had not established that he made any protected disclosure to the respondent at any time at all. It was submitted that his disclosures which are potentially protected disclosures are those made to Paula Lang on 26 April 2019 (page 108) and expanded on when he sent the further email (page 89) with enclosures (page 90 to 100), which the claimant then discussed further with Paula Lang on 29 or 30 April 2019 so that she could compile the document called a statement (page 101 – 104). It was submitted that even taking the claimant's case at its highest, the claimant has not proved that the disclosures were made by him in the reasonable belief that they were made in the public interest. The respondent's representative asked that the claimant's case be dismissed on the merits.

68. Further submissions were made on remedy, in the event of the claim being successful. It was submitted that the claimant had failed to mitigate by not accepting work at LLG around 20 May 2019 and again in June 2019, and by not continuing to seek full time work. It was submitted that if loss does not end around May 2019, as is R's primary position, the claimant at best should only be permitted compensation in respect of around 3 months' loss from the end of his role on 26 April 2019.

Comments on evidence

69. The claimant was open and candid in his evidence, accepting a number of matters which were put to him in cross examination. At all times he sought to answer questions put to him in a full and open way, without seeking to avoid

any question put to him. He made concessions even when not helpful to his position and did not seek to exaggerate his claim e.g. he freely admitted that due to family circumstances it suited him to now work only 3 days a week. For these reasons, the Tribunal found him to be a generally credible witness. There were some occasions when the claimant's evidence was that he could not recall certain details put to him e.g. conversation on 16 April re who he spoke to, or any detail of his conversation with Karen Coyle. The Tribunal considered that to be entirely reasonable given the time which has elapsed since the events. For those reasons, the Tribunal found the claimant to be generally credible, although not entirely reliable in his recollection of some matters. This was important in respect of the Tribunal's consideration as to whether there had been a qualifying disclosure by the claimant to the respondent. The claimant was not able to give any detail of any conversations where he raised health & safety matters with Paula Lang prior to 26 April 2019. The Tribunal did accept the claimant's evidence that on 25 March 2019 he had said to Paula Lang that he felt that the reason his assignation was ending was because he had raised health & safety matters with Wm Grant, although that was not recorded in Paula Lang's note in the Universe system of that phone call. It appeared to the Tribunal to be credible and entirely consistent with the time line of events for the claimant to have said that then. That finding in fact is not a finding in fact that the claimant raised health and safety concerns with Paula Lang on 25 March, only that he said then that he believed that his work at WM Grant was coming to an end because of his actions in raising health & safety concerns with Wm Grant. To that extent, the evidence of the claimant was preferred over that of Paula Lang.

70. The claimant's position was that the only person within the respondent's organisation he had made a protected disclosure to was Paula Lang and that that was in respect of raising concerns about health and safety matters. The Tribunal could not conclude on the evidence before it that the claimant had raised health and safety concerns with Paula Lang prior to 26 April 2019. The claimant's evidence was that he had raised health and safety concerns with Paula Lang on a number of occasions over the years, but he did not give any specifics of what concerns were raised, or detail what was said. On the

contrary, after 26 April 2019, the claimant took his own handwritten notes of having spoken to Paula Lang, and Paula Lang recorded in the Universe system that those concerns had been raised. The claimant's position in his claim form to the Tribunal in this matter (his ET1) was that he had first raised health and safety concerns with Paula Lang on 26 April 2019. There was no documentary evidence spoken to at the Tribunal supporting the claimant's position that he had raised health and safety concerns with Paula Lang (or anyone at Brightwork) prior to 26 April 2019. It was the claimant's position that the only person at Brightwork he raised these concerns with was Paula Lang. For all these reasons, although the claimant was generally found to be credible, the Tribunal could not make a finding in fact, on the evidence before it and on the balance of probabilities, that the claimant had raised health and safety concerns with Paula Lang prior to 26 April 2019.

71. A factor in the Tribunal's assessment of the generally credibility of the claimant was his position that he was content that, having raised his concerns about certain matters with Janice McGeehan, some practices within Wm Grant & Sons had changed.

72. The Tribunal found Paula Lang to be guarded when giving her evidence. She answered with short replies, consistently without giving an explanation of her position unless prompted to do so. When pointed to a particular document in examination in chief, she was quick to say that it was an accurate record, even when she was not a witness to what that document was purporting to be recording, and so could not properly speak to the accuracy of that record. An example of this was when Paula Lang was directed to the record of conversation between John Craig & the claimant on 26 June 2019 (at 109) which records a conversation to which Paula Lang was not a party. When Paula Lang was asked in examination in chief if she had any knowledge before 26 April 2019 that the claimant had any concerns about any aspect of work at Wm Grant, she quickly replied 'No'. Paula Lang later admitted that the claimant had raised issues in relation to his pay, which she had remedied. It was also of note that Paula Lang was quick to say that she had not seen the photograph of the whiteboard (at 90), despite it being her earlier evidence that she has received and considered all of the attachments to the email sent to her from the claimant (at 89) and

confirming that that email included the attachments which are in the productions at 90 -100 and includes the photograph of the whiteboard at 90 For these reasons, the Tribunal found Paula Lang to not be entirely credible or reliable in her evidence.

73. It was not argued that the notes from the respondent's Universe system, which was said to be their record of communications, were inaccurate or were not taken contemporaneously. The content of those notes from that system were then taken by the Tribunal to be as were made at the time.

74. The respondent did not dispute that the claimant had raised concerns about health and safety in certain working practices in the warehouses with Janice McGeehan at Wm Grant & Sons. It was not disputed by the respondent that those concerns were acted upon by Janice McGeehan (on behalf of Wm Grant & Sons). It was the claimant's position that that intervention had led to changes in working practices, in particular re. no more manual movement of casks. It was the claimant's position that Charles McClure was not happy that the claimant had raised those concerns with Janice McGeehan.

75. In relation to the timeline of events, the Tribunal noted that Charles McClure contacted Paula Lang to enquire as to the number of weeks the claimant had worked on the day after the team meeting when Charles McClure informed that no further manual movement of casks was to take place. The Tribunal did not however have the benefit of hearing evidence from Charles McClure as to his reasons for contacting Paula Lang about the claimant then.

76. The claimant freely admitted that it was Charles McClure who had made the decision to end his assignation to Wm Grant & Sons (described by the claimant as his 'dismissal'). That accorded with the respondent's position. It was then not in dispute that it was an employee of Wm Grant & Sons (Charles McClure) and not the respondent, who ended the claimant's assignation in April 2019.

77. There was no evidence before the Tribunal that there was any requirement on the respondent for them to make any enquiries with the hirer as to their reasons for terminating a worker's assignment to them.

Decision

78. The only respondent in this case is Brightwork Ltd. The first question which the Tribunal had to make a determinative finding in fact on was 'Did the respondent make the decision to terminate the claimant's assignation to Wm Grant & Sons?' There was no dispute that the answer to this question is 'No'. It was freely admitted by the claimant in his evidence that it was Charles McClure who had made that decision. That was also Paula Lang's evidence. The respondent acted on the instruction of their hirer client to terminate the assignation. The Tribunal cannot properly make findings in fact on what were Charles McClure's reasons for deciding that the claimant's assignation to Wm Grant & Sons should come to an end, where Wm Grant and Sons are not a party to this claim and so no evidence was heard from Charles McClure.

79. What is central to the claim which is before this Tribunal, and what is determinative of the success of that claim, is that the party against whom the claim is brought, being the respondent (Brightwork Ltd) did not make the decision to terminate the assignation. Brightwork can then not be held liable or to blame for any unlawful reasons for that decision. For the avoidance of any doubt, the Tribunal does not here make any findings in fact as to what was the reason for the termination of that assignation. It would be improper for the Tribunal to make such a finding without Wm Grant & Sons having the opportunity to present their position as to their reason(s).

80. On the findings in fact, the first time the claimant raised health & safety concerns with Brightwork (as opposed to Wm Grant & Sons) was on 26 April 2019. On the evidence, it was clear that that date was after the decision had been made to terminate the claimant's assignation in the week commencing 21 April 2019. That decision was notified to Brightwork by Charles McClure on 6 March 2019 and so must have been made by that date. On these findings in fact, the termination of the claimant's assignment to Wm Grant & Sons on 26 April 2019 was not because the claimant had made any protected disclosure to Brightwork. Even if the Tribunal had found that in the claimant's conversation with Paula Lang on 26 April 2019, he had made a disclosure which was a qualifying disclosure, that would have been after the date when the decision was made to

terminate his assignation and so could not have been the reason for that decision.

81. The respondent did not terminate the claimant's assignation to Wm Grant & Sons because the claimant had raised any health and safety concerns. That assignation was terminated at the hirer's request. That is allowed in terms of the contract of service at paragraph 6. The only detriment alleged by the claimant to have arisen from making a protected disclosure was the termination of that assignation. The claimant was not subjected to that detriment by the respondent on the ground that he had made a protected disclosure.

82. With regard then to the issues for determination by this Tribunal, given the findings in fact, the first issue for determination was -

- *was the claimant's assignation with the hirer terminated by the respondent as a result of him having made a qualifying disclosure (that being the only detriment relied upon by the claimant as arising)?*

83. The answer to that question, for the reasons set out above, is 'No'. Therefore, the claim is unsuccessful, as it falls on the facts on determination of that first issue. In these circumstances, the Tribunal did not then require to determine whether the claimant had made a qualifying protected disclosure to Brightwork, with regard to the provisions of section 43B of ERA. It is outwith the remit of this Tribunal to consider whether the claimant made a protected disclosure to Wm Grant & Co.

Employment Judge: Claire McManus

Date of Judgment: 30th November 2020

Entered in Register: 14th December 2020

Copied to parties