EMPLOYMENT TRIBUNALS

Claimant: Mr K Cook

Respondents: Gentoo Group Limited

Heard: Remotely (by video link) **On:** 8, 9, 10, 11 and 12 March 2021 (12 March 2021 in Chambers)

Before: Employment Judge S Shore
NLM – Mr R Dobson
NLM – Mr P Chapman

Appearances

For the claimant: Mr R Gibson, Solicitor
For the respondent: Mr T Sadiq, Counsel

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claim of unfair dismissal (contrary to section 94 of the Employment Rights Act 1996) was well-founded. The principal reason for his dismissal was redundancy. No basic award is therefore payable to the claimant, as he was paid an enhanced redundancy payment by the respondent.

2. Following the guidance in the case of Polkey, we find that there was a 100% chance that the claimant would have been fairly dismissed by 6 June 2020, which would have taken his service beyond his 55th birthday and triggered no loss of enhancement to his pension.

3. We find that there were three matters that we considered to constitute contributory conduct on the part of the claimant and which should reduce the compensatory award made in his favour:

    3.1. The claimant attempted to delay the consultation process, which we find should reduce his compensatory award by 15%;
    3.2. The claimant's conduct prior to his dismissal contributed to his dismissal by a factor of 25%;
    3.3. There should be a 50% reduction in the compensatory award because the claimant failed to report a regulatory failure at the end of quarter 3

(Q3) of the 2018/2019 financial year, which could have led to his dismissal (under the principle in **W Devis & Sons Ltd v Atkins**); so

3.4. The compensatory award made to the claimant should be reduced by a total of 90%.

4. The claimant's claim of automatic unfair dismissal for the reason or principal reason that he made a protected disclosure contrary to section 103A of the Employment Rights Act 1996 was not well founded. We find that the claimant made no protected disclosures.

5. The claimant's claims that he was subjected to detriment short of dismissal were not well founded. We find that the claimant made no protected disclosures.

6. The claimant's claim of age discrimination was not well founded and fails.

7. Directions will be sent under separate cover concerning the remedy hearing in this case.

REASONS

Introduction

1. The claimant was latterly employed as Head of Compliance (Property Services) by the respondent for a continuous period that included a TUPE transfer, from 1 March 1992 until 16 May 2019, which was the effective date of termination of his employment for the stated reason of redundancy. The claimant started early conciliation with ACAS on 23 July 2019 and obtained a conciliation certificate on 6 August 2019. The claimant's ET1 was presented on 7 August 2019. The respondent is a social housing landlord responsible for approximately 30,000 homes. It has approximately 1,100 employees.

2. The claimant presented claims of:

    2.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996).

    2.2. Automatic unfair dismissal for the reason or principal reason that he made a protected disclosure contrary to section 103A of the Employment Rights Act 1996.

    2.3. Detriment on the ground that he had made protected disclosures (contrary to section 47B of the Employment Rights Act 1996), specifically that the respondent:

        2.3.1. Directed unfair criticism at the claimant in a Senior Management Team (SMT) meeting on 4 March 2019;
        2.3.2. Directed the claimant not to raise certain issues of compliance immediately following the meeting on 4 March 2019;

2.3.3. Had, on or before 2 May 2019, proposed to the respondent's Appointments and Remuneration Committee that the claimant's redundancy be approved; and

2.3.4. Rejected the claimant's appeal against dismissal on 28 June 2019 and made unfair criticisms of the claimant in the appeal rejection letter.

2.4. Direct age discrimination (contrary to section 13 of the Equality Act 2010).

3. From the joint bundle, we note that the claims were case managed by Employment Judge Aspden on two occasions:

3.1. On 29 October 2019, a telephone preliminary hearing was held that made case management orders which were sent to the parties on 30 July 2019. The case was listed for a hearing on 14 to 20 July 2020 inclusive and further case management orders were made, including an order that this hearing be limited to liability, **Polkey**, and contributory fault. A list of issues was agreed.

3.2. On what should have been the first day of the final hearing, 14 July 2020, the final hearing was converted to a telephone preliminary hearing because of the pandemic. Witness statements had been exchanged, but the claimant sought and was granted permission to file an additional witness statement to rebut matters referred to in the respondent's witness statements. The order was sent to the parties on 15 July 2020.

Issues

4. The case management order of EJ Aspden dated 29 October 2019 set out the following issues:

Whether the claimant made a protected disclosure

1. *On 10 January 2019, 8 February 2019, 4 March 2019 and/or 16 May 2019, did the claimant disclose information that he reasonably believed tended to show that the respondent had failed, was failing or was likely to fail to comply with a legal obligation to which it was subject and/or that the health and safety of individuals had been, was being or was likely to have been endangered?*

2. *If so, did the claimant reasonably believe it was in the public interest to make the disclosure?*

Unfair dismissal

3. *If the claimant made one or more protected disclosures, was that the principal reason for dismissal?*

4. *If not, was the principal reason for the claimant's dismissal either:*

4.1. *That he was redundant, or*

4.2. *Some other substantial reason of a kind to justify the dismissal of an employee holding the position that the claimant held, namely that the team in which he worked was being disbanded?*

5. *If so, did the respondent act reasonably or unreasonably in treating that as a sufficient reason for dismissing the claimant?*

6. *If the claim is made out:*

6.1. *Is there a chance that the claimant would have been fairly dismissed in any event and, if so, what is the effect of that finding on any compensatory award?*

6.2. *Was the conduct of the claimant before dismissal such that it would be just and equitable to reduce the amount of the basic award and, if so, to what extent?*

6.3. *Did the claimant cause or contribute to his dismissal? If so, to what extent should the compensatory award be reduced?*

Age discrimination

7. *Did the respondent subject the claimant to a detriment by timing his dismissal so as to avoid a pension payout?*

8. *If so, in doing so, did the respondent treat the claimant less favourably, because of his age, than it treated Mr Wood or Mr Caine?*

9. *If so, was there any material difference between the circumstances relating to their cases?*

10. *If the respondent did treat the claimant less favourably because of his age, was the treatment a proportionate means of achieving a legitimate aim, namely the redundancy of the claimant's role in addition to saving the respondent's organisation the cost it would incur from a strain on the fund payment?*

Detriment

11. *Did the respondent subject the claimant to detriment by doing any of the following acts:*
    - 11.1. *Directing unfair criticism at him in a meeting on 4 March 2019;*
    - 11.2. *Directing him not to raise certain issues of compliance immediately following that meeting;*
    - 11.3. *On or before 2 May 2019, proposing to the respondent's Appointments and Remuneration Committee that his redundancy be approved; and*
    - 11.4. *On 28 June 2019, rejecting his appeal against dismissal and making unfair criticisms of the claimant in the appeal rejection letter?*

12. *If so, did the respondent do those acts on the ground that the claimant made a protected disclosure?*

Law

5. For the purposes of the unfair dismissal claim, the relevant section of the Employment Rights Act 1996 is section 98.

> *"Section 98 Employment Rights Act 1996*
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it-*
>
> *(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
>
> *(b) Relates to the conduct of the employee,*
>
> *(c) Is that the employee was redundant, or*
>
> *(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
>
> *(3) In subsection (2)(a)—*
>
> *(a)"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*
>
> *(b)"qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

(b) shall be determined in accordance with equity and the substantial merits of the case."

6. Section 103A of the Employment Rights Act 1996 states:

103A Protected disclosure.

"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."

7. A 'protected disclosure" is defined by section 43B of the Employment Rights Act 1996:

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)."

8. The right not to be subjected to detriment short of dismissal on the ground that a worker made a protected disclosure is contained in section 47B of the Employment Rights Act 1996:

Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

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

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

(b)by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

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

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

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a)from doing that thing, or

(b)from doing anything of that description.

(1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—

(a)the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and

(b) it is reasonable for the worker or agent to rely on the statement.

But this does not prevent the employer from being liable by reason of subsection (1B).

(2) This section does not apply where—

(a)the worker is an employee, and

(b)the detriment in question amounts to dismissal (within the meaning of Part X).

(3)For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K."

9. Direct age discrimination is defined in section 13 of the Equality Act 2010, the relevant parts of which are:

Direct discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

10. We were referred to a number of precedent cases by the representatives, which we have quoted in this decision where appropriate:

10.1. **Kilraine v Wandsworth LBC** [2018] EWCA Civ 1436;
10.2. **Chesterton Global Limited v Nurmohamed** [2017] EWCA Civ 979;
10.3. **Panayiotou v Kernaghan** UKEAT/0436/13/RN;
10.4. **NHS Manchester v Fecitt & Others** [2011] EWCA Civ 1190;
10.5. **Simpson v Cantor Fitzgerald Europe** [2020] EWCA Civ 1601;
10.6. **Woodcock v Cumbria Primary Care Trust** [2012] EWCA Civ 330;
10.7. **Royal Mail Group v Jhuti** [2019] UKSC 55;
10.8. **Cross v British Airways** [2005] IRLR 423 (EAT)**;**
10.9. **W Devis & Sons Ltd v Atkins [1977] A.C. 931**; and
10.10. **Polkey v AE Dayton Services Ltd** [1987] UKHL 8.

Housekeeping

11. The parties produced a joint bundle of 709 pages.

12. We had not finished reading the bundle when the hearing started at 10:00am on the first morning, so we adjourned the hearing until 13:30pm to complete our reading.

13. The claimant gave evidence in person and produced two witness statements: the first was dated 8 July 2020, and ran to 68 paragraphs. The second was a rebuttal statement produced with the leave of the Tribunal and was dated 22 July 2020. It ran to 25 paragraphs.

14. Evidence was given in person on behalf of the respondent by:

    14.1. Mrs Diane Carney, who is now Director of Property (Interim) for the respondent, but at all material times in this case was Director of Repairs & Maintenance (R&M) for the respondent. Her witness statement dated 9 February 2021 consisted of 56 paragraphs.

    14.2. Miss Laura Watson, the Senior HR Business Partner for the respondent. Her evidence covered the redundancy process as the dismissing officer and his line manager were no longer with the respondent. Her witness statement dated 7 July 2020 consisted of 50 paragraphs.

    14.3. Mrs Louise Bassett, Executive Director of Corporate Services for the respondent. Her witness statement dated 7 July 2020 consisted of 93 paragraphs. She was the appeals officer.

15. If we refer to pages in the bundle, the page number(s) will be in square brackets.

16. The claimant supplied a document dated 5 March 2021 titled "Opening Position Statement" that did what its title suggested that it would. He was cross examined briefly on the document. It included a summary of the statutory safety provisions relating to the claimant's alleged protected disclosures.

17. At the end of the evidence, we received written and heard closing submissions from Mr Gibson and Mr Sadiq. We considered our decision and gave an oral judgment and reasons. We did not have the facility to record the oral judgment, so this oral judgment and reasons is made from our notes and may differ in some respects to any written reasons that may be requested.

18. The hearing was conducted by video on the CVP application and ran intermittently, with some technical issues. I am grateful to all who attended the hearing for their patience and good humour in the face of the technical glitches.

Findings of Fact

19. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so we have dealt with the case on the basis of the documents produced to us. We make the following findings.

Background

20. The respondent is a social housing landlord that has charitable status. We heard in undisputed evidence that it is responsible for approximately 30,000 properties that

house approximately 60,000 people. The respondent is subject to a regulatory framework operated by the Social Housing Regulator.

21. We should put on record our preliminary finding that this is an unusual case because of the timings of a number of significant facts, which were not disputed:

    21.1. The claimant was born on 11 August 1964.
    21.2. He was a member of the respondent's pension scheme, the Local Government Pension Scheme ("LGPS"), although he had two pension pots. The first had been frozen by the claimant in 2011 to preserve his rights at a higher salary after his demotion (see below). He had started a new pot immediately after he had frozen the first pot.
    21.3. The claimant's pension was due to start at the age of 65, but if the claimant was made redundant and had attained the age of 55 at dismissal, he could access the benefits without any reduction for early access.
    21.4. On 24 April 2019, the respondent's Group Executive Team approved a restructure.
    21.5. On 2 May 2019, the respondent's Appointments and Remuneration Committee approved the restructure.
    21.6. On 3 May 2019, the claimant had a meeting with his line manager and a representative from the respondent's HR department at which he was notified that his position was at risk of redundancy.
    21.7. The claimant never returned to work after 3 May 2019 because of ill health.
    21.8. The claimant was entitled to 12 weeks' notice.
    21.9. On 11 August 2019, the claimant was 55 years old and would then have been entitled to unreduced pension terms if his employment was terminated on or after that date.
    21.10. If his employment was terminated before his 55th birthday, his entitlement to an unreduced pension evaporated.
    21.11. The cost of protecting the claimant's pension from reduction would have to be borne by the respondent from its own funds.
    21.12. We heard a number of figures about the cost and the value of the unreduced benefit, but find that the most likely figures were a reduction of £3,500 per annum in the claimant's annual pension and a cost of approximately £80,000 to the respondent of preserving the claimant's pension rights at an unreduced level.

22. We will return to the process used by the respondent in due course, but we feel that it is important to set the context of the case, as the claimant's entitlement to enhanced pension terms was clearly at the centre of this claim.

23. We find that the evidence of the respondent given by Laura Watson, who attended the meeting with the claimant on 3 May 2019 was credible on the balance of probabilities when she said that the claimant appeared to be measured and amicable at the meeting, when he thought the period of consultation plus his notice entitlement would take him past his 55th birthday and therefore guarantee him access to an unreduced pension. The claimant did not seek to rebut Miss Watson's evidence on the point.

24. We find that the claimant raised the issue of his approaching 55th birthday during the meeting on 3 May and said that if he was not granted his pension on an unreduced basis, he would have to "consider his position" because the evidence of both parties did not suggest any alternative narrative.

25. It is therefore our finding that if the claimant had been guaranteed an unreduced pension, we would not be hearing this case. It was undisputed that the claimant's line manager, Conan McKinley, telephoned the claimant on the afternoon of the meeting on 3 May and confirmed that his employment would end before his 55th birthday and that his pension would be reduced in line with the rules of the scheme. That conversation set in motion the events that have culminated in this hearing, but it is an important finding in our assessment of a **Polkey** reduction that the claimant seemed happy to accept redundancy subject to the confirmation of his pension position.

26. The claimant's period of continuous employment with the respondent began on 1 March 1992. He was transferred to the respondent from Sunderland City Council in 2001.

27. The claimant was promoted a number of times until he attained the position of Head of Repairs and Maintenance ("R&M"). He was demoted from that position following a disciplinary hearing on 8 and 9 November 2011. The outcome letter dated 5 January 2012 [160-166] noted that the claimant had been found to have committed four of the five disciplinary matters that had been put to him with regard to a disciplinary investigation and hearing he had conducted.

28. At this hearing, the claimant did not dispute the disciplinary findings that had been made against him. They were that he had:

    28.1. Lied to a colleague who questioned the whereabouts of a witness statement;
    28.2. Falsified evidence in the disciplinary hearing;
    28.3. Continued the deception by denying that the statement had been received; and
    28.4. Inappropriately challenged the colleague in relation to the allegations put at the hearing.

29. The disciplinary sanction imposed was a final written warning and demotion to a post with no employee management responsibility.

30. The relevance of the disciplinary issue to this hearing was that the claimant says he could and should have been considered for and offered the post of Head of R&M (which was available) as an alternative to redundancy in May 2019. The respondent's position was that the post was not a suitable alternative vacancy for the claimant because it carried employee management responsibilities for 300 staff and that the colleague who the claimant wronged in the 2011 disciplinary proceedings was still working in the department and harboured strong feelings about the way that the claimant had treated him. Also, the post was within the R&M

side of the business and the respondent said that the claimant had been overly critical of the department and its staff over a long period.

31. The claimant's position was that the disciplinary had been many years previously and he had worked his way back up the organisation. Our finding is that the respondent's position was only fully explained in its oral evidence, but that given the seriousness of the disciplinary matter, the seniority of his role, the number of staff who would have been directly under his management, the claimant's history of perceived antipathy towards R&M and the presence of the wronged member of staff in the department, the decision by the respondent that the Head of R&M post was not a suitable alternative was one that was in the band of reasonable responses.

32. It was not disputed that in 2016, the respondent commissioned a report from Savills, a national property agency, which recommended splitting the respondent's property function into two parts: Assets and Repair & Maintenance. The idea was to create an Assets part of the business that 'owned' the property assets and was the 'customer' on one side, and a Repair & Maintenance section that was the 'contractor' responsible for the upkeep of the property on the other. A former senior executive of Savills, Graham Gowland, was recruited to be Executive Director for Property Services of the respondent.

33. It was also not disputed that in October 2017, the Social Housing Regulator published a very critical report into the respondent [172-176. The report gave the respondent a grading of G3, which meant that it was non-compliant with the regulatory framework and required intensive regulatory engagement [173].

34. One of the matters that concerned the Regulator was that during a period of restructuring, the board had exercised weak governance and internal control when agreeing executive contracts and severance payments to outgoing executives [175].

Protected Disclosures

35. The respondent did not dispute, and neither do we, that the respondent is subject to a number of regulatory frameworks. Some relate to the management of the safety of matters such as gas, electricity, water, fire and some relate to the provision of social housing dwellings in general. Others relate to the regulatory framework under which a social housing provider operates. As we have stated above, the respondent is regulated by the Social Housing Regulator. We find that failure to comply with the various regulatory frameworks under which it operates could have very serious consequences for the tenants of the respondent in terms of their health and safety, and for the respondent itself, which ultimately could include imprisonment of officers and the closure of the organisation. We find that it almost does not need to be stated that failures could also have serious consequences for the claimant personally as Head of Compliance.

36. We find that there were Senior Management Team (SMT) meetings on a monthly basis between the Asset team of the respondent (managed at all relevant times by Conan McKinley) and its the Repairs & Maintenance team (managed at all relevant

times by Diane Carney). The meetings were chaired by Graham Gowland, Executive Director of the Property Services Division. The claimant usually attended, as did other senior managers in both of the respective teams. Three of the claimant's four alleged protected disclosures were made at SMT meetings on 10 January 2019, 8 February 2019 and 4 March 2019. The fourth was made in his grievance submitted on 16 May 2019.

37. Before analysing each of the disclosures individually, we would make the general point that the issue of whether or not a witness has made oral disclosures, as was alleged in this case, is fundamentally a question of which evidence a Tribunal prefers. It is therefore often the case that a Tribunal will look to documents to corroborate the accounts of the witnesses. A Tribunal will usually give greater weight to contemporaneous documents.

38. We would also make the preliminary point that in light of the claimant's evidence that the lives of tenants were at risk because of some of the failures he had highlighted in his disclosures, we find that this matter must have been at the very forefront of his mind. We also find that if the Head of Compliance had raised matters of safety that could potentially put lives at risk, it would be more likely than not that other members of the SMT would have taken serious notice of what they were told and would have acted upon it.

39. The final preliminary point that we make is that the claimant accepted that he could have gone straight to the Regulator with his concerns, but did not do so. He says he used the respondent's own whistleblowing procedure, but we find that he did not as he did not follow the process set out in the documents produced to us.

First alleged protected disclosure - 10 January 2019

40. It was not disputed that the claimant attended the SMT meeting on 10 January 2019 [197-198], which was chaired by Mr Gowland. Also, in attendance were Mrs Carney, Mr McKinley and other members of the SMT. It was agreed that the meeting lasted about 90 minutes, as was usual.

41. The claimant's evidence in chief was that he raised the following concerns about gas and electricity safety and smoke alarms:

    41.1. All the respondent's tenanted properties require an annual inspection of their gas installation and for a Landlords Gas Safety Report (LGSR) to be issued. The claimant said that Compliance had picked up that there were six properties managed by the respondent that had been inspected, but that there was no record of the inspection and no LGSR.

    41.2. Further, the respondent kept a record of the time that it took an inspector to complete an inspection of a tenanted property. This inspection should not have taken less than 45 minutes to complete. Some inspections were recorded as having taken less than 30 minutes, which the claimant suggested meant that the inspection was at least inadequate, if it had happened at all. Also, managers were not

signing LGSR certificates within 28 days and, if further correction was needed, were not signing the certificates at all.

41.3. The second disclosure, about electrical safety, was that the respondent was not testing enough of its housing stock and was acting in breach of its own programme, and that this created a significant and escalating risk to the respondent's 8-year programme, which was to carry out EAW tests on all of its domestic properties in the period.

41.4. The third disclosure concerned smoke detectors and the fact that the respondent had 2,497 properties with faulty smoke detectors of more than 10 years old. Compliance had told Group about 576 of these 12 months earlier, but nothing had been done.

42. Our finding on the balance of probabilities is that the claimant did not make the protected disclosures alleged at the meeting on 10 January 2019 for the following reasons:

42.1. The claimant's evidence in chief about when the gas breaches had occurred and what had already been done about them was vague and was not consistent with the evidence about the meeting on 10 January (which was at paragraph 24 of his first statement). We find the evidence in chief to have been vague to the point of being disingenuous.

42.2. There was no mention of the alleged disclosure in the minutes of the meeting in the terms that the claimant described in his witness statement. The sole mention of the issue was at paragraph 4.4 of the minutes, which said:

> *"Gas Servicing Report less than 15 minutes*
> *Investigation has concluded and reports issued, no significant problems identified"*

42.3. Whilst we find that the minutes of the meeting are far from verbatim, as a 90-minute meeting is recorded in just over a side of A4, we find it highly unlikely that if the Head of Compliance had raised three issues that he says impacted on the safety of residents and were reportable to the relevant regulatory agencies, it would not have been recorded.

42.4. Further, we find that at the next meeting of the SMT on 8 February 2019, which the claimant attended, the minutes of the meeting on 10 January 2019 were agreed as a true record. It is his case, therefore, that he reported two reportable regulatory breaches in January and said that they should be escalated to the Regulator (§24 of his first witness statement); did nothing about the failure of the SMT to minute his concerns or take any action between the two meetings; and then said nothing about the omission of any mention of the breaches in the February meeting as minuted.

42.5. Mr Gibson invited us to find that the claimant's case was corroborated by the note of Nigel Wilson's investigatory interview with Mrs Carney on 6 June 2019 [454-455] for the claimant's appeal. He said it "plainly shows he understood that [Mrs Carney] agreed that information about gas was disclosed." We do not agree with him. The note of the meeting [201] clearly shows that gas servicing was discussed and we have found that we preferred Mrs Carney's evidence on the point.

42.6. We find Mrs Carney's evidence at paragraph 34.1 of her witness statement to be more credible than the claimant's account. She said that the issue over the six properties was discovered in an audit carried out on 17 December 2018. The respondent contacted the tenants of the relevant properties affected. Two gave immediate access to members of the R&M team to carry out checks and the other four checks were completed by 16 January.

42.7. Mrs Carney's evidence is corroborated by a series of emails sent by the claimant, Vince Elliot (Head of R&M (Compliance)) and others around 18 December 2018 [182-186] that demonstrate the claimant knew of the issue as soon as it was discovered; was aware of the rectification measures put in place; and made no report or raised any concern at a breach of regulatory duty at the time.

42.8. We concur with Mrs Carney's assessment that that the issue recorded at paragraph 4.4 of the minutes was "business as usual" and in no way out of the ordinary.

42.9. Mr Gibson invited us to find that the fact that the claimant met with Mr McKinley on 24 January 2019 corroborates that claimant's claim, as they would not have had a meeting if there had not been a disclosure of information that had to be followed up. We do not accept this submission for two main reasons: firstly, whilst the claimant's evidence (§28 of his witness statement), may not have been challenged, that does not mean that we have to find it meets the standard of proof. We find the claimant's evidence regarding his alleged disclosures to be broadly unreliable for the reasons given elsewhere in these reasons. Secondly, we find that the disclosure was not made in the first instance.

42.10. Mr Gibson also invited us to find that the note of Mr Wilson's discussion with Mr Gowland on 10 June 2019 [459] was also corroborative of the claimant's case, but we again find that it says no more than appears in the minutes of the meeting and dismisses the idea that the claimant had suggested escalating the matter to the Regulator.

42.11. We applied the same rationale to the fact that the grievance outcome [527q] also mentions that the attendees recalled gas issues being discussed on 10 January 2019.

42.12. We do not find that the claimant met with Mr McKinley on 24 January 2021 and later sent him figures is corroborative of the assertion that

the claimant made protected disclosures on 10 January or any of the subsequent SMT meetings.

42.13. We find this incident to follow a pattern in the way that the claimant has set out his claim to us. We find he has retrospectively 're-interpreted' emails that could suggest breaches, which in turn could be considered as matters that were capable of being protected disclosures, if reported. He has then sought to imply that the matters were mentioned in meetings to create a claim of detriment and dismissal because he made protected disclosures in the meetings.

42.14. The way that the claimant presented the first alleged protected disclosure influenced our assessment of his credibility in a negative way on all his subsequent assertions that a protected disclosure had been made and of his credibility in general.

42.15. In respect of the alleged disclosure that managers were not signing LGSR's within 28 days, we find that the claimant did not meet the required standard of proof to show that the disclosure had been made because of the lack of a record in the minutes; his endorsement of the January minutes in the February meeting and the total failure to suggest that either this had been a protected disclosure, or that he had been subjected to detriment or dismissal because of it.

42.16. On the issue of the rate of EAW testing, we find that the disclosure was not made, because it is not minuted [197-198] at all. We accept Mrs Carney's evidence, that the point was not mentioned by the claimant, to be credible.

42.17. We repeat our finding that the minutes of the January SMT meeting do not record the claimant's alleged concerns; he accepted the minutes of the January meeting as accurate in the February meeting; and did nothing to complain or raise a whistleblowing report.

Second alleged protected disclosure - 8 February 2019

43. It was not disputed that the claimant attended the SMT meeting on 8 February 2019, which was chaired by Mr Gowland. Mrs Carney was also in attendance, together with other members of the SMT. It was not disputed that the meeting lasted 90 minutes, or that the minutes [209-211] were not verbatim.

44. It was not disputed that there had been a fire at one of the respondent's residential properties in January 2019. The claimant's evidence in chief (§30) said that he had asked Mrs Carney in an email dated 29 January 2019 [406] to confirm that repairs of the fire door at an adjacent property had been done to the required standard and were properly documented. We find that statement to be misleading, as the claimant was in correspondence with Scott Walker, not Mrs Carney; she was only copied in.

45. Mrs Carney advised the claimant that Mr Walker was unavailable and forwarded to email to Graeme Harding in the R&M team [405]. We find the claimant's statement that Mrs Carney "did not respond substantively" to be disingenuous.

46. The claimant's evidence in chief (§29) was that at the SMT meeting on 8 February 2019, he made a protected disclosure about fire safety doors fitted in the respondent's residential properties. His evidence in chief was that he "raised the issue of substandard repairs on fire doors and the lack of documentation to evidence those repairs a breach of the Regulatory Reform Order Fire and Safety 2005 Regulation".

47. It was accepted by both sides that the fire at Londonderry Tower in January was discussed at the meeting, but the respondent denies that the claimant made the protected disclosure relied upon. We find that the evidence did not show on the balance of probabilities that the claimant made the protected disclosure that he said he did.

48. Our first reason for making this finding is that the minutes do not record anything like the disclosure that the claimant alleges he made. The minute records that the claimant said "Londonderry Tower investigation will result in some positive changes to responsibilities with work ongoing". We also find his evidence not to be credible for the reasons already given in relation to the first disclosures. Additionally, we find the claimant's evidence in chief about the background to the second disclosure in his evidence in chief to be disingenuous, as set out above.

49. Further, we find that after the meeting, the claimant and Mr Harding engaged in more correspondence about the replacement of fire doors between 12 February and 19 February [405-404] in which the claimant made no mention of any regulatory or other serious breach.

50. The minutes of the following meeting of the SMT on 4 March 2019 were agreed as a true record. The claimant attended this meeting.

51. We therefore find that the claimant did not make a protected disclosure at the SMT meeting on 8 February 2019.

Third alleged protected disclosure - 4 March 2019

52. It is not disputed that the claimant attended the SMT meeting on 4 March 2019, which was chaired by Mr Gowland. Mrs Carney was also in attendance.

53. The claimant says that he started to raise his concerns about electrical testing and gas safety. He went on to say that what was said at this meeting was set out in his grievance [339], as follows:

> *"Both Vince and Diane accused me of not working as one gentoo stating I was continually criticising the Repairs and Maintenance teams. I was developing a silo approach to working and I was simply policing the teams and not supporting them. I was accused of withholding information challenging the managers and teams and Vince then stated I was bullying his staff to try to get the work*

completed. I was accused of being unprofessional as I had introduced Dictaphones to the meetings to record the conversations. I pointed out it was my role to report the facts and make sure the position was clearly understood along with the potential impact of the failure to achieve the required levels of safety for the customers.

Graham then stepped in and supported Diane and Vince and immediately banned the recording of meetings as he felt it was unprofessional and clearly stated that there would be no policing of the systems and processes and the group would work as one gentoo in line with the requirements of Nigel Wilson. Conan was also in attendance and did not say a word even though it was under his instruction that I was to record the meetings. This had been introduced as the minutes were continually challenged by the Repairs teams. In addition, the admin staff in attendance were sometimes unable to keep up with the conversations as they were not trained in shorthand and often were at a loss when technical issues were discussed. I was left under no illusion that the information I was providing was not welcome and was expected to be suppressed to protect the repairs team at this time."

54. We find that whilst the claimant's witness statement for these proceedings says he had started to raise concerns about electrical testing and gas safety, his grievance, which was written some 16 months earlier refers only to "various issues". Further, the skeleton argument filed on behalf of the claimant specifies that his disclosures on 4 March concerned LGSR certificates not being issued to tenants within 28 days and the electrical maintenance programme for 2,574 properties not being advanced. We regard the claimant's case as inconsistent on this point

55. We find that the minutes of the meeting contain no reference to the claimant's alleged disclosures. We find that the claimant never challenged the minutes of this meeting. We prefer Mrs Carney's evidence on this meeting as we found her to be more credible than the claimant for the reasons given above. We find that, on the balance of probabilities, the claimant made no protected disclosures at the meeting of the SMT of 4 March 2019.

Effect of findings above

56. It follows that as we find that no protected disclosers were made at the meetings on 10 January, 8 February or 2 March 2019, none of the following alleged detriments could have been as a result of protected disclosures:

    56.1. Directing unfair criticism at the claimant in a meeting on 4 March 2019;

    56.2. Directing the claimant not to raise certain issues of compliance immediately following that meeting; and

    56.3. On or before 2 May 2019, proposing to the respondent's Appointments and Remuneration Committee that the claimant's redundancy be approved.

Those claims therefore fail.

Fourth alleged protected disclosure – 16 May 2019

57. The fourth alleged protected disclosure was contained in the claimant's grievance dated 16 May 2019 [333-428]. The first paragraph of the grievance [333] states that "The reasons why I believe I am to be made redundant centres around customer safety and regulatory issues I have been raising for some time and have been escalating in an attempt to protect the customers of Gentoo and the group."

58. The grievance then lists the alleged faults in the respondent's redundancy process before returning to the issue of disclosures at page 339:

    58.1. The claimant gives a detailed account of the issues concerning gas safety that are set out above. He says that the disclosure was made at the SMT meeting on 10 January 2019 [339-342];

    58.2. The claimant refers to the issue of electrical safety that he says he raised at the SMT meeting on 10 January 2019 [342-347];

    58.3. The claimant referred to matters of fire safety [347-351];

    58.4. The claimant referred to a new matter of concern regarding water hygiene [351-352]. Essentially, the claimant said that he had disclosed that the respondent's water hygiene risk assessment programme had been behind programme (schedule) in late December 2018. The response of members of the R&M team had felt personal to the claimant.

59. Our note of the hearing indicates that it was conceded by Mr Sadiq in his closing submission that the claimant's grievance met the definition of a protected disclosure in section 43B of the Employment Rights Act 1996. We find that this was either an error in the note taken, or that Mr Sadiq mis-spoke, as his subsequent submissions and arguments sought to persuade us that the claimant's' grievance was not a protected disclosure

60. We have already found that the claimant did not make any disclosures regarding the matters set out at paragraphs 58.1 to 58.3 above until the grievance, so we have to look at those matters anew at 16 May 2019. The matter of water hygiene was entirely new as at 16 May.

61. A qualifying disclosure has to be a disclosure of information which, in the reasonable belief of the claimant is made in the public interest and tends to show one of the matters in section 43B(1)(a) to (f). The most recent analysis of what is meant by a 'disclosure of information' is contained in the case of **Kilraine v Wandsworth LBC**. In that case, Sales LJ (at §30) agreed with Langstaff J that section 43B(1) should "not be glossed to introduce it into a rigid dichotomy between 'information' on the one hand and 'allegations' on the other."

62. Sales LJ went on to state (§35) that 'information' must be grammatically construed with the qualifying phrase 'which tends to show'. To be a qualifying disclosure, a

statement has to have sufficient factual content and specificity such as is capable of tending to show that one of the matters in subsections (a) to (f) of section 43B(1).

63. We find that the claimant disclosed sufficient information in pages 339 to 352 of his grievance in respect of gas safety, electrical safety and fire safety contained sufficient information within more generalised allegations to be capable of being qualifying disclosures. All three made reference to specific breaches of regulatory obligations that have an impact on the health and safety of customers. We would comment that the way that the claimant puts his concerns in respect of these matters is how, with respect, he ought to have put them earlier in the process. We have to consider why he did not do so and what repercussions the failures have on his case.

64. We find that the disclosure about water hygiene, however, is much less clear. His grievance states that he complained that the respondent's water hygiene testing programme was behind its own target. The claimant then goes on to complain about how he was treated for raising this with the R&M team. We heard evidence that the claimant did not dispute that the target was to test 100% of residences. The respondent's undisputed evidence was that the industry standard was to test 10% of residences. The claimant did not link the failure of the programme to one of the matters in subsections (a) to (e). We therefore find that this disclosure was not one that contained sufficient information which tends to show one of the matters in the subsections (a) to (e).

65. Moving through section 43B, we then have to assess whether the three disclosures we have identified were, in the reasonable belief of the claimant, made in the public interest. In making our assessment, we were mindful of the guidance in **Ibrahim v HCA International** [2019] EWCA Civ 207 that the claimant's motivation for making the disclosure was not part of the section 43B test. Underhill LJ stated that "the necessary belief is simply that the disclosure was in the public interest" and that "the particular reasons why the worker believes so are not of the essence."

66. We also considered the submissions made by Mr Sadiq regarding the case of **Chesterton Global Ltd v Nurmohamed**. We find that the general circumstances of that case, which dealt with the issue of whether a disclosure concerning the alleged breach of a claimant's own contract of employment could be a protected disclosure, was only relevant to our decision in this case insofar as it establishes that:

    66.1. There is no 'bright line' between personal and public interest;
    66.2. The question is whether there is sufficient public interest;
    66.3. Parliament did not define 'public interest', so it is a matter of fact for the Tribunal to determine; and
    66.4. The mental element establishes a two-stage test:
        66.4.1. Did the claimant have a genuine belief at the time that the disclosure was in the public interest; and
        66.4.2. If so, did he have reasonable grounds for so believing?

67. We find that a proper interpretation of **Chesterton Global**, that the determination that, in law, a disclosure does not have to be either wholly in the public interest or

wholly from self-interest, does not prevent us from making a finding that it was only one of them. We find that in this case, the three matters of gas safety, electrical safety and fire safety could have been protected disclosures, but were, if fact made only in the claimant's self-interest. We make this finding because:

67.1. We have already found that the claimant has retrospectively interpreted documents and evidence to the picture he wished us to see of alleged protected disclosures in the SMT meetings in January, February and March 2019;
67.2. We have already found that the claimant did not make the disclosures he alleged in those three meetings;
67.3. The claimant did not escalate the disclosures, or the SMT's failure to act on them to the Executive Board;
67.4. This is not a case where reasonable belief arose on later contemplation by the claimant;
67.5. The claimant was Head of Compliance and gave extensive evidence of his knowledge of the relevant regulatory frameworks and legislation that applied to the matters he disclosed;
67.6. Despite the alleged seriousness of the disclosures, the claimant never utilised the respondent's own whistleblowing policy or made a direct disclosure to the relevant regulators; and
67.7. Given the seriousness of the allegations, we find it very unusual that the claimant did not raise his concerns in January, February or March 2019 in the way that he did in his grievance.

68. In making the finding above, we were mindful of the guidance provided by the case of **Simpson v Cantor Fitzgerald Europe** (§14, which quoted the findings of the Employment Tribunal at first instance in its paragraphs 77, 78 and 121).

69. There was some discussion and argument in the hearing about the timing of the delivery of documents on 16 May 2019. We find that the claimant has shown to the required standard of proof that he sent a copy of grievance (without appendices) to Mr Wilson at 10:59am on 16 May and that he sent it to Mr McKinley and Miss Watson at 11:03 (again, without appendices). He says that he went for a walk on 16 May at 12:30pm and returned at 2:30pm. When he returned, a letter dated 16 May 2019 confirming his redundancy [330-331] had been hand delivered to his home.

70. Miss Watson's oral evidence is that the redundancy letter had been written by her and signed off by Mr McKinley by 11:00am on 16 May. It had then been sent to a courier to be delivered to the claimant. It was not the respondent's practice at the time to require the courier to record the time of delivery of documents.

71. We find that as the respondent's letter to the claimant of 13 May 2019 [318-319] said that consultation on redundancy would conclude on 16 May, it was unfair of the respondent to conclude its consideration before 11:00am on that day, particularly as the claimant had a MED3 certificate covering his absence and had provided a letter from his doctor dated 10 May 2019 [306]. We find that the respondent's redundancy letter was delivered to the claimant between 12:30pm and 2:30pm. We therefore find that the respondent was in possession of the

claimant's grievance before he had been served with a copy of the redundancy letter.

72. However, that finding does not have a material effect on the claimant's claim that he was dismissed because he made a protected disclosure contrary to section 103A of the Employment Rights Act 1996 or that he was subjected to the fourth detriment he alleges: the refusal of his appeal against dismissal and the making of criticisms of the claimant in the refusal letter, because we have not found that he made a qualifying disclosure at any time.

Unfair dismissal

73. We have found above that the claimant was not dismissed for the sole or principal reason that he made protected disclosures. That leaves us with the task of determining whether the 'standard' dismissal was fair or unfair.

74. We would preface our specific findings with the comment that we felt the way that the respondent dealt with the claimant's redundancy was shoddy. We would also preface our specific findings by commenting that the claimant did not help himself by the way that he conducted himself in the process.

75. The respondent's case is that the claimant's dismissal was because his post had become redundant. We have rejected the claimant's claim that his dismissal was because he made protected disclosures.

76. We find that the respondent showed on the balance of probabilities that the principal reason for the claimant's dismissal was redundancy. We find that the dismissal was unfair. We make those findings because:

    76.1. It was not disputed that the client/contractor model was not working and that Mr Gowland had changed his position from being an advocate and instigator of the system to being set on changing it by the summer of 2018;
    76.2. We do not criticise the respondent for failing to call Mr Gowland to give evidence, as we were invited to do by Mr Gibson. There is no property in a witness and if the claimant thought that Mr Gowland had evidence that would assist his claim, he could have called him as a witness himself. The same goes for Mr McKinley.
    76.3. Mr Gowland had a serious health condition that caused him to have significant time off work. This was not disputed.
    76.4. Mr Gowland and the claimant had a good working relationship. This was not disputed.
    76.5. On 13 December 2018, Mrs Carney emailed Louise Bassett, Executive Director of Corporate Services for the respondent to complain about the claimant's behaviours [179-181]. We acknowledge that the claimant was never made aware of this email or the complaint until after his dismissal. Mrs Carney's email accused the claimant of bullying and said that she had attempted to raise the matter with Mr Gowland without success. She also raised an allegation that the claimant had

inaccurately reported matters to the respondent's Risk and Audit and Operations committees.

76.6. Mr Wilson joined the respondent on 2 January 2019 as Group Chief Executive. Mrs Carney sent him a copy of her email to Ms Bassett on 26 March 2019 [233-236]. Again, the claimant was not aware of this email at the time.

76.7. The following week, Mr Gowland advised Mr Wilson that Mrs Carney was planning to leave. This prompted a meeting between Mr Wilson and Mrs Carney on 5 April 2019. Mrs Carney's evidence was that Mr Wilson assured her that he would address the issues between the Compliance and R&M teams. Mr Gibson invited us to find this evidence as not credible. We do not agree with him. We find that the evidence of Mrs Carney was credible and was corroborated by the email she sent Mr Wilson [233-236].

76.8. Mr Gibson makes the fair point that there was no evidence that Mr Wilson ever did anything to repair the relationships between the Compliance and R&M teams or speak to the claimant personally. We considered those facts when making our findings.

76.9. We also considered Mr Gibson's submission that the outcome of the conversation between Mrs Carney and Mr Wilson was a reorganisation where only the claimant lost their job. The implication is that the redundancy process was a sham designed to remove the claimant from the organisation.

76.10. Ms Bassett's evidence, which was unchallenged, was that Mr Wilson met with Mr Gowland to discuss the situation and they concluded that the structure was not working and the client/contractor model had to be changed. We find that the model was changed, because it was not disputed evidence that it had been. We also find it unlikely that an organisation the size of the respondent would engage in a sham redundancy exercise and reorganisation merely to rid itself of the claimant and in order to keep Mrs Carney happy.

76.11. We find that Ms Bassett's evidence that Mr Gowland had not done anything about the reorganisation earlier because of his health and the issue of the G3 grading to be credible.

76.12. We find that the outcome of discussions in the Executive Team led to a restructure in which the claimant's post and two other posts (held by Messrs Wood and Caine) would be made redundant. We had two options to consider: either this was an elaborate sham or the respondent had come to a business decision to disband the Compliance team and move away from the client/contractor model. We find the second option to be the more likely.

76.13. Tribunals are reluctant to go behind commercial decisions made by employers unless there is evidence of malfeasance, such as the allegations made by the claimant in this case. Mr Gibson criticises the lack of paperwork about the decision and its rationale, but we find that the respondent produced enough by way of organograms and briefings to meet the standard of proof to show that the reorganisation was genuine.

76.14. We also reject the suggestion by Mr Gibson to the effect that he respondent was just "moving the deckchairs around". We reject his

suggestion because we find that the respondent had a corporate belief, led by Mr Wilson, that there was a pressing need to remove the client/contractor split, which was perceived to be at the heart of the difficulties in the relationship between Compliance and R&M. In making this finding, we accept the evidence of Ms Bassett (§§33-35 of her witness statement).

76.15. The Tribunal is not naïve enough to think that it is not possible that the whole exercise was a sham or that minutes of meetings may not reflect what was actually said, but we find the note of the Executive Team Meeting on 24 April 2019 [242-243] to be genuine. It approved the decision to implement the changes to the respondent's structure. To this point, we find that the respondent had acted lawfully and reasonably. We assess the respondent's behaviours under the principle set out in **Sainsbury's Stores Limited v Hitt**; were the employer's actions in a band of reasonable responses?

76.16. As we would have expected to see, the respondent has a detailed redundancy policy and procedure [76-96]. We find that the respondent failed to adhere to that policy in a number of ways that we shall deal with as they arise in the chronology of this part of the case.

76.17. The respondent's speed of action in implementing the redundancies was explained by Mr Wilson's desire to "get on with it" because there was another Regulator's assessment coming up and he was very keen to improve the previous G3 rating. We find that this may have been a factor, but was not as big a factor as the desire to avoid having to make a large payment to avoid the claimant losing pension rights that he would become entitled to on his 55th birthday. We make this finding because Ms Bassett went out of her way to stress the importance of saving money and avoiding "strain on the fund" payments in paragraphs 37 to 39 of her witness statement. This was in polar opposite contrast to Miss Wilson's oral evidence that the claimant's impending birthday had nothing to do with the speed of the process. We do not find Miss Wilson was credible on this point. It was also contrary to the indisputable fact that the respondent had anticipated the point being raised when it prepared a "121 talk sheet" for use at the meeting on 3 May [292-298]. The sheet anticipated that the claimant would ask about the pension and contained an answer to the question.

76.18. Our finding is corroborated by the unusual steps that the respondent took in the redundancy process. Ms Bassett's evidence in chief was that authorisation for redundancies had to come from the respondent's Appointments and Remuneration Committee and its Board.

76.19. The Executive Team took the proposed redundancies to the Appointments and Remuneration Committee on 2 May 2019. Mr Gowland presented the restructure plan [285-291], which was approved by the Committee. Ms Bassett's evidence was that the plan was deemed urgent, which authorised the Appointments and Remuneration Committee to finalise the reorganisation without reference to the Board.

76.20. We find that this was not a reasonable step of itself. The Board was due to meet on 22 May and we find that the only logical reason for utilising the urgent matters process was to avoid making the strain on

fund payment in respect of the claimant. We find that it was certain that a redundancy process that started after 22 May 2019, when added to the claimant's notice entitlement, would have taken the claimant beyond his 55th birthday on 11 August 2019.

76.21. We find that Mr Gowland made a presentation to staff, including members of the claimant's team, on 29 and 30 April. At the first of these sessions, Mr Gowland's presentation included a slide that showed the claimant's post as deleted. When the claimant attended the following day, the slide had disappeared. This evidence was not disputed. This was a very unfortunate error.

76.22. Mr McKinley was given the task of managing the claimant's redundancy procedure with the assistance of Miss Wilson. Mr McKinley is no longer with the respondent, so we only heard from the claimant and Miss Wilson about what happened.

76.23. It was not disputed that the claimant was given no notice of the meeting at which he was advised of his potential redundancy on 3 May 2019. It was also not disputed that Mr McKinley initially told the claimant that he was going to be made redundant, not that his position was at risk. This was another serious error that must have concerned the claimant, even though Miss Wilson's unchallenged evidence was that she quickly stepped in to reassure the claimant that the redundancy as under consideration and had not been finalised.

76.24. We find that the evidence of the respondent given by Laura Watson, who attended the meeting with the claimant at 8:45am on Friday 3 May 2019, was credible on the balance of probabilities when she said that the claimant appeared to be measured and amicable at the meeting, when he thought the period of consultation plus his notice entitlement would take him past his 55th birthday and therefore guarantee him access to an unreduced pension. The claimant did not seek to rebut Miss Watson's evidence on the point.

76.25. We find that the claimant raised the issue of his approaching 55th birthday during the meeting on 3 May and said that if he was not granted his pension on an unreduced basis, he would have to "consider his position" because the evidence of both parties did not suggest any alternative narrative.

76.26. It was undisputed that Mr McKinley, telephoned the claimant on the afternoon of the meeting on 3 May and confirmed that the claimant's employment would end before his 55th birthday and that his pension would not be enhanced line with the rules of the scheme. We find that that the claimant was happy to accept redundancy subject to the confirmation of his pension position. The evidence was not in dispute.

76.27. We understand that the claimant may have been upset by the possibility of his redundancy, especially given the fact that it was announced to the staff on 29 April (seemingly in error) and that Mr McKinley told him he would be made redundant before consultation started. That would have been a natural reaction.

76.28. However, we find that the claimant then sought to use various tactics to try and delay the redundancy process which amount to culpable conduct on his part. He failed to engage with the consultation process

in any meaningful way until he submitted his grievance on 16 May. We also find that the respondent made a number of mis-steps.

76.29. The claimant's potential redundancy was confirmed by letter of 3 May that was handed to him at the meeting [299-301]. That letter invited him to a consultation meeting on 8 May, which we heard was the earliest date that Mr McKinley could make after the May Day Bank Holiday and annual leave.

76.30. The claimant's evidence was that he had left the meeting by 9:00am and received a telephone call from Mr McKinley at 13:30pm in which he was told that the process would end on 8 May 2019 and he would not receive an unreduced pension entitlement. We accept the claimant's evidence on this point, as Mr McKinley was not produced to challenge it.

76.31. The claimant then says he began to feel "extremely unwell". He went to see his GP on Tuesday 7 May and obtained a MED3 certificate signing him off work for two weeks with a diagnosis of "Stress related problem". Tribunals often hear complaints from employers about the information (or lack of it) that GPs put on MED3 forms, but criticism of this form is justified. We find that the respondent was suspicious about the veracity of the claimant's assertion that he was ill, but did nothing to seek further information about his illness from him, his GP or any third party.

76.32. The oral evidence of Miss Watson was that a referral to OH could have been made immediately and a report obtained within days. She offered no credible explanation why this had not been done.

76.33. The meeting on 8 May 20189 was postponed. Miss Watson wrote to the claimant on 10 May 2019 [316-317] with some pension figures. Mr McKinley also wrote to the claimant on 10 May 2019 suggesting that a meeting take place on 13 May 2019. He also suggested that the claimant could engage in the redundancy consultation by attending with a colleague or trade union representative, friend or family member or arrange the meeting to take place at his home or a neutral venue. It was agreed that the claimant never answered this offer directly. We find that he had no reasonable excuse for not doing so. Mr McKinley ended his letter by advising the claimant that the respondent would be "forced to conclude consultation on Thursday 16 May."

76.34. The claimant's response to Mr McKinley's letter of 10 May was a letter dated 13 May 2019 [320] enclosing a letter from his GP dated 10 May 2019 [306]. The claimant gave no reasonable explanation why a letter from his GP dated 10 May was not sent to the respondent until 13 May, the day of the proposed meeting.

76.35. We find the letter itself to be of little assistance to the claimant's case. The doctor notes that the claimant had attended with symptoms of stress and anxiety. The doctor's opinion was that they were "concerned that the above may affect Kevin's ability to engage with the ongoing process at work." The respondent was asked to consider the points raised. We find that the letter does not say that the claimant was unable to attend a redundancy meeting and gave no opinion as to whether he was able to engage in the process in any other way.

76.36. The claimant's next act was to file his grievance, which with appendices ran to 96 pages. Mr Gibson submitted that we should not confuse the claimant's ability to write a grievance with his ability to attend a redundancy consultation meeting. We have not confused the two, but find that the claimant's failure to engage with the process was culpable given the fact that he could have taken a representative to the meeting, or held it at a neutral venue or sought other adjustments, but instead submitted a grievance on the day that he was told that decision would be made.

76.37. We find that there was no conscientious attempt by the respondent to seek suitable alternative employment for the claimant. Miss Watson's evidence in chief on the point was weak. She omitted to refer to the method that had been used to look for suitable alternatives and appeared to have rejected the possibility of roles that were put to her as alternatives in cross-examination, but which had not been put to the claimant at the time. Her argument that because the claimant did not engage in the redundancy consultation process, she and Mr Kinley had not been able to discuss alternative roles with him turns the responsibility for considering suitable alternative vacancies on its head. The employer in such situations is under an obligation to look for suitable alternatives and then offer them to the employee for consideration. The respondent failed in its legal obligation to do this. Specifically, it failed to consider the claimant for the role of Compliance Delivery Contract Manager.

76.38. The dismissal letter dated 16 May 2019 [330-331] repeats the allegation that the claimant had failed to engage with the process, but we note that the respondent had made no enquiries into whether the claimant was actually ill.

76.39. We make the finding that redundancy was the principal reason for dismissal because we find that the respondent had made a genuine business decision to move from the client/contractor model and that this involved the dissolution of the Compliance team. However, we find that the respondent also had had the claimant's relationships with his colleagues in mind from early in the process. The clearest example was the fourth paragraph of the letter dated 3 May confirming to the claimant that he was at risk of redundancy, which sought to explain the reasons for the decision to disband the Compliance team by stating that the separation of functions had created "silos, policing and duplication of effort." We therefore find that the respondent had a subsidiary reason for dismissal: some other substantial reason – being his working practices and relationships with colleagues. Some of the issues that constitute SOSR were the claimant's culpable behaviour. We will deal with that issue in more detail below.

76.40. The claimant lodged a detailed appeal letter on 13 June 2019 [460-461]. His appeal and grievance hearings were held together on 3 June 2019. The appeal was chaired by Ms Bassett. A Board member was also in attendance. We find that the appeal was a procedurally fair review of the dismissal, but did not rectify the faults we have identified in the process.

77. We conclude that the respondent demonstrated that the principal reason for dismissal was redundancy. We find that the claimant was advised of the risk of redundancy, but that there were numerous minor errors in the way that the procedure was handled and one major error. The major error was that the respondent failed in its duty to properly consider suitable alternative vacancies. The minor errors relate to the way that the claimant's sickness absence and ability to participate in the process was handled. We therefore find that the decision to dismiss was outside the band of reasonable responses. The respondent was unreasonable in treating the principal reason, redundancy, as sufficient reason for dismissal when taking equity and all the circumstances set out above into account. The dismissal was unfair.

78. On our findings above, we find that the clamant unreasonably sought to delay the process, which we find to be culpable conduct on his part that should be reflected in a reduction of his compensatory award of 15%.

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79. We repeat our finding that if the respondent had agreed to make a strain on fund payment as part of the claimant's redundancy package, he would have agreed to the offer made on 3 May 2019. We make that finding because we accept Miss Wilson's evidence on the point, as corroborated by her note of the meeting on that date.

80. We also repeat our finding that there was a genuine redundancy situation in respect of the claimant's post as Head of Compliance because of a restructure of the client/contractor model. It therefore follows that had a fair procedure been used, the consequent dismissal would have been fair. Whatever the misgivings the respondent had about the claimant's ill health, the fact was that his GP had seen fit to issue a MED3 certificate on 7 May that indicated he was unfit to attend work for two weeks.

81. We have already indicated our finding that it would have been a relatively quick process for the respondent to instruct its OH provider to assess the claimant's health and his ability to participate in the process. We find that the fact that the claimant was able to produce the grievance he did on 16 May and the failure of the letter dated 10 May 2019 from the claimant's GP to indicate that he was unable to participate in consultation leads us to a finding that the claimant would have been able to attend a final consultation meeting by 6 June 2019. At a meeting on that date, we find that there would have been a 100% possibility that he would have been fairly dismissed, as he would have rejected all and any alternative vacancies and would have taken the unreduced pension package that would have followed because he would have hit the benchmark of his 55th birthday before dismissal.

The claimant's conduct
Managerial behaviours

82. The claimant's pre-dismissal conduct was a major evidential factor in this case. The respondent's basic position was that the claimant exhibited inappropriate bullying behaviors as a matter of course over a long period, which were particularly

focused on members of the R&M team. The claimant's basic position was that he held a position as Head of Compliance, which required him to challenge the R&M team, which he did in an appropriate manner. The R&M team were overly sensitive to criticisms of their failures.

83. We note that the claimant was never made the subject of any disciplinary proceedings or any grievance after 2011. However, we find that his behaviours towards his colleagues in the R&M team as set out in the respondent's evidence showed a prolonged course of conduct on the part of the claimant that went beyond his explanation that he was unpopular because he called the R&M team out on their failures. We make that finding because we find the respondent's evidence on the point more credible than the claimant's. Particularly, we found Mrs Carney's evidence to be credible. Her evidence was corroborated by Ms Bassett, who said that Mr Gowland had told her that the claimant was difficult to work with.

84. Ms Bassett also gave credible evidence of the inappropriate behaviours of the claimant in early 2019. Her evidence was more credible than the claimant's rebuttal.

85. The most persuasive evidence concerning the claimant's conduct was Mrs Carney's email to Ms Basset dated 13 December 2018 [179]. There is no need to set out all the matters that Mrs Carney raises, but we regard them as being genuine. We also recognise the failure of Messrs Gowland or McKinley to exercise proper managerial control over the claimant or even to properly investigate the allegations made.

86. The claimant's response is that Mrs Carney was effectively trying to damage his reputation because he had raised several genuine and serious allegations about the efficacy of her team. We do not find that to be a credible explanation. The whole of the respondent's organisation was not performing to the standards that it should have, which was reflected in the Regulator's grading of G3.

87. We find the fact that Mrs Carney's evidence that she had called the claimant out on his behaviours at the SMT meeting on 4 March 2019 was corroborated by the minute of that meeting [224-226], albeit that the note was only that "Compliance team expectations/pressures were causing tension within the team."

88. As an industrial jury, the Tribunal had experience of situations where the behaviours of an individual may be inappropriate, but may not have reached a threshold where disciplinary proceedings were started. We find that this is where the respondent was in early 2019 with the claimant. However, the principle in contributory conduct as set out in section 123(6) of the ERA requires us to determine if the dismissal was to any extent caused or contributed to by any action of the complainant. We find that the actions of the claimant as set out in the respondent's evidence contributed to his dismissal and that it is just and equitable to reduce his compensatory award by a factor of 25%. This is in addition to the 15% reduction due to his delaying of the redundancy process.

Q3 Landlord Compliance KPIs 2018/2019

89. The respondent's case is that the claimant made a false, inaccurate and incorrect report about gas safety to the respondent's Risk & Audit Committee at its meeting on 15 March 2019 and that, as a result, we should regard this as conduct that should result in a percentage reduction in any compensatory award.

90. Mr Gibson's submission was that the threat by the respondent to raise the issue was leverage to try and deter the claimant from pursuing his claim and to discredit him.

91. We find that on 15 March 2019, in a report to the Risk and Audit Committee [231E] that he presented personally, the claimant reported 100% compliance for gas safety at the end of Q3 on 31 December 2018 (it was agreed that it was erroneously recorded as "Q2" in the note of the meeting). The note [231E] states:

> *KC advised the report was as read, informing the Committee that Gas Compliance was currently 100% compliant. KC further advised no properties would fall out of service from now until year end. With regards to stair lift compliance, KC explained the current position of 98.18% was an increase on the last quarter and was now within tolerances required for the contract. The Committee questioned whether there was time to complete the remaining works in the Water Hygiene Programme, before the year end. KC advised he was confident this would be achieved, as the current completion rate stood at 96%. Members queried whether funds had been received from the Government in relation to cladding works, with KC advising the refunding process was in progress.*

92. The claimant, in his evidence in chief (§33) said that he presented his report for Q3 to the committee on 15 March 2019 and that it was factually correct up to 31 December 2018. There was some confusion about whether the 7 properties referred to in the note included the six properties without LGSRs that were discovered in December 2018, but it was eventually agreed that they were not.

93. The claimant said (§33) in his first statement that after the SMT meeting on 4 March 2019, Mr Gowland had spoken to him privately and asked him to report the historic figures to 31 December 2018 to the Risk and Audit Committee and defer reporting the issue (with the six properties and LGSR certificates) to the year-end report, which was to be submitted in June 2019. The reason that Mr Gowland gave the claimant for the request was to give R&M chance to address the issue. We find the claimant's explanation to be unlikely to be accurate for the following reasons:

    93.1. We find it unlikely that any Head of Compliance would agree to make a false representation to the Risk & Audit Committee;
    93.2. We find it even more unlikely that the claimant would agree to do so, given that it was agreed evidence that Mrs Carney and Vince Elliott had criticised the claimant about his attitude and management practices. If he had in his hands the means to damage Mrs Carney, we find that he would have used it;

93.3. We find that the issue of the six properties without valid gas certificates had all been resolved by mid-January 2019 per the evidence of Mrs Carney;
93.4. We repeat the general findings about the claimant's credibility we have made above;
93.5. We find it unlikely that Mr Gowland would have made the request to claimant in the terms alleged by him. It was not disputed by the claimant that the omission was reported to the Regulator when it was discovered;
93.6. We do not know what happened to Mr Gowland and Mr McKinley as a result of the regulatory breach reported to the Regulator or their general management of the claimant, but we take note that both were gone from the respondent within a short period of the claimant's departure and the regulatory breach coming to light;
93.7. The claimant did not mention Mr Gowland's conversation of 4 March with him in his 22-page grievance;
93.8. When he was asked in his grievance/appeal hearing on 3 June 2019 why he had not why his Q3 report had raised no issues of non-compliance, [498], the claimant said he had been told "not to discuss". He did not say he had been told not to include the details in his report;
93.9. The claimant's evidence in chief that his report was factually correct is clearly wrong; and
93.10. The claimant's oral evidence was inconsistent on the point. He said in answer to one question that he had been talking about Q2. He then rowed back from that statement. He also said that the six properties were included, but Mrs Carney had not been cross-examined on that point, so we find he was wrong to raise it as a possibility.

94. Our conclusion is, therefore that whilst the claimant's conduct was not known until after his dismissal, the principle in **W Devis & Sons Ltd v Atkins** allows us to make a contributory conduct reduction in the compensatory award. We find that a just and equitable reduction would be 50%, as we find the regulatory failure to have been committed by the claimant and that there was at least a 50% chance of his dismissal as a result. This reduction is to be added to the other two reductions, making a total reduction to the compensatory award of 90%.

95. As we have found that the claimant was dismissed for the principal reason of redundancy and was paid a statutory redundancy payment (plus enhancement), we will make no basic award.

Age Discrimination

96. The claimant's claim is of direct age discrimination and he refers to two comparators: Messrs Wood and Caine, who were put at risk of redundancy. Both ended up remaining with the respondent, having accepted alternative posts, but not before one of them had been served with notice of dismissal. The claimant's evidence in chief that they were both younger than the claimant, was not challenged. Neither was the claimant's evidence of their dates of birth. At the date of the claimant's dismissal, Mr Caine was 49 and Mr Wood was 53. Therefore,

neither were at risk of losing enhanced pension rights because they were dismissed before their 55th birthdays.

97. Our finding above is that the respondent sought to time the claimant's dismissal so as to make sure his employment ended before his 55th birthday and that he therefore lost the benefit of enhanced pension terms that he would have benefitted from if his dismissal had post-dated his birthday. We find that to be a detriment.

98. Mr Sadiq submitted that Messrs Wood and Caine were not proper comparators because they engaged in the redundancy process (and were both found alternative posts), whereas the claimant did not.

99. The requirement for an actual comparator is that they must be in the same position in all material respects of the claimant save that they are not a member of the protected class.

100. Whilst we find that the comparators in this case were not a member of the protected class, we find that they are not proper comparators because they did very different jobs to the claimant; were situated in a different department; neither were dismissed for redundancy; and both engaged with the redundancy consultation process. The claimant did not engage with the process to a culpable degree and therefore we find that on an analysis of fact and degree, there were no direct comparators.

101. The claimant's case was put on no other basis than direct discrimination.

102. In the alternative, had we found that there were actual comparators, we would have found the detriment to be a proportionate means of achieving a legitimate aim.

Applying the Findings of Fact to the Law and Issues

103. Using the list of issues above, we make the following findings:

    103.1. The claimant made no protected disclosures.
    103.2. The principal reason for the claimant's dismissal was redundancy, although a subsidiary reason was the claimant's poor working relationships with colleagues.
    103.3. The respondent failed to properly consider suitable alternative employment.
    103.4. Dismissal was not within the range of reasonable responses and was unfair.
    103.5. The claimant was not treated less favourably than genuine comparators because of the protected characteristic of age.

104. The claimant's claim of unfair dismissal succeeds, but his compensation should be limited to an effective date of termination on 6 June 2019 and subjected to a reduction because of contributory conduct of 90%. No basic award is payable.

105. All the claimant's other claims fail.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
6 April 2021