EMPLOYMENT TRIBUNALS

Claimant: **Mr R Talman**

Respondent: **Airbus Operations Limited**

Heard at: **Cardiff (via CVP)** **On: 6, 7, 10, 11, 12 (in chambers) and 13 May 2021**

Before: **Employment Judge S Jenkins**
Members: **Mrs L Bishop**
Mrs M Walters

Representation:
Claimant: Mr G Pollitt (Counsel)
Respondent: Mr A Alemoru

JUDGMENT having been sent to the parties on 14 May 2021 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was to consider the Claimant's claims of unfair dismissal, pursuant to both Section 94(1) Employment Rights Act 1996 ("ERA") and Section 103A ERA. We heard evidence from Mr Martin Bolton, Fast Track Leader – Industry; Mr Alan Jones, Process Manager; and Mr Brian Agnew, CDT Leader; on behalf of the Respondent, and from the Claimant on his own behalf. We considered the documents in the bundle spanning 1,089 pages and some supplemental documents to which our attention was drawn. We viewed, or in effect listened to, a recording, made covertly by the Claimant of a meeting with some of the Respondent's managers. We also considered the parties' written and oral submissions.

Issues

2. Then Regional Employment Judge Clarke confirmed, in a summary issued following a Preliminary Hearing on 26 July 2018, that the issues set out in the parties' agreed Agenda for that hearing were to be adopted, and that was confirmed at a further Preliminary Hearing before then Employment Judge Sian Davies on 29 March 2019. They were:

Section 103A ERA 1996 – automatically unfair dismissal on the grounds of making a protected disclosure:

- Did the Claimant make a qualifying disclosure pursuant to Section 43B ERA 1996?
- Was the making of the disclosure the reason (or principal reason) for the dismissal?
- Was the disclosure in question a protected disclosure within the meaning of the ERA 1996?

Section 47B ERA 1996 – detriment on the grounds of making a protected disclosure:

- Did the Claimant make a qualifying disclosure pursuant to Section 43B ERA 1996?
- Was the disclosure in question a protected disclosure within the meaning of the ERA 1996?
- Was the Claimant subjected to the detriments relied upon in paragraph 43 (a) – (c) of the Particulars of Claim on the ground that he made a protected disclosure?

Section 94(1) ERA 1996 – Unfair dismissal:

- What was the principal reason for the Claimant's dismissal?
- Was it a fair reason to dismiss?
- Did the company act reasonably in treating that as the reason to dismiss including a reasonable held belief: on reasonable grounds: after reasonable investigation (Burchell test) and did the decision fall within the band of reasonable responses?
- Was a fair procedure followed which complied with the ACAS code of practice and the companies own internal procedures?
- If there is a procedural defect would it have made any difference if the correct procedure had been followed (Polkey)?
- If the dismissal was unfair did the Claimant cause or contribute to his own dismissal (contributory fault)?
- Has the Claimant mitigated his loss?
- If the dismissal is unfair what remedy is appropriate?

Wrongful Dismissal:

- Did the Claimant commit a repudiatory breach of contract entitling the Respondent to summarily dismiss without notice?

3. Further clarification of the issues was made at the outset of the hearing. We identified that the first bullet points of the sections dealing with the Section 103A claim and the Section 47B claim were the same and would be dealt with as an initial point.

4. We also identified that there was a time point to be considered in relation to the Section 47B claim, as it appeared, on the face of it, that that claim had been brought outside the time limit specified in Section 48 ERA. We therefore needed to consider whether it had been reasonably practicable for the claim to have been brought in time and, if not, whether it had been brought within a further reasonable period.

5. We also noted that if any of the Claimant's claims were successful we would need to consider what compensation to award, which would be dealt with, if necessary, at a subsequent hearing.

6. Mr Pollitt, on the Claimant's behalf, also confirmed that the Claimant was maintaining that, if his claims were successful, his compensation should be increased due to an asserted failure by the Respondent to comply with the terms of the ACAS Code. That issue was identified in the Claimant's claim form but had not been included in the List of Issues within the Case Management Agenda.

Law

7. Much of the applicable law was encapsulated within the List of Issues, but we bore in mind the following specific points.

Protected disclosure

8. In deciding whether a disclosure is protected by law, a Tribunal has to have regard to

- Whether there has been a disclosure of information.
- The subject matter of disclosure in accordance with Section 43B ERA 1996, asserted by the Claimant in this case to be health and safety endangerment and breach of legal obligation.
- Whether the Claimant had a reasonable belief that the information tended to show one of the relevant failures in Section 43B ERA 1996.
- Whether the Claimant had a reasonable belief that the disclosure was in the public interest.

9. With regard to disclosure of information, the Employment Appeal Tribunal ("EAT"), in Cavendish Munro Professional Risks Management Limited -v- Geduld [2010] ICR 325, drew a distinction between the making of an allegation, which would not be said to disclose information, and the giving of information in the sense of conveying facts. However, the Court of Appeal in Kilraine -v- London Borough of Wandsworth [2018] ICR 1850, noted that the two categories are not mutually exclusive, and that the key guidance from Geduld was that a statement which was devoid of specific factual content could not be said to be a disclosure of information.

10. With regard to reasonable belief, we needed to be satisfied that the information tended to show a relevant failure in the reasonable belief of the worker, i.e. in this case the Claimant. The EAT, in Korashi -v- Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, directed that that involved applying an objective standard to the personal circumstances of the discloser. The EAT also noted, in Darnton -v- University of Surrey [2003] ICR 615, that the claimant does not need to be factually correct and need only demonstrate that they have a reasonable belief.

11. With regard to public interest, we were mindful of the guidance provided by the Court of Appeal, in Chesterton Global Limited -v- Nurmohamed [2017] EWCA Civ 979, that noted that the following matters would be relevant:

- The numbers in the group whose interests the disclosure served.
- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed.
- The nature of the wrongdoing disclosed.
- The identity of the alleged wrongdoer.

Section 47B claim

12. If we were satisfied that a protected disclosure had been made we would have to consider whether a detriment had arisen. The issue of detriment has arisen regularly in relation to claims under anti-discrimination legislation, and we noted that the Court of Appeal, in Ministry of Defence -v- Jeremiah [1980] ICR 13, confirmed that it meant "putting under a disadvantage", and, in Shamoon -v- Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, that it involved "a disadvantage of some kind".

Section 47B and Section 103A claims

13. We noted that both the claims arising from alleged protected disclosures involved an element of causation. The claim under Section 47B relates to

detriment "on the ground" of the disclosure, and the claim under Section 103A involves the "reason or principal reason" for the dismissal.

14. With regard to claims under Section 47B, the Court of Appeal. in NHS Manchester -v- Fecitt [2012] IRLR 64, noted that causation involved something which materially influenced the treatment, and, in Section 103A claims, the Supreme Court, in the case of Royal Mail Limited -v- Jhuti [2019] UK SC 55, indicated that ordinarily Tribunals would look no further than the reasons of the decision maker, but that where the reason was hidden from the decision maker they could look behind that invention.

Section 94 claim

15. If we considered that the reason for the Claimant's dismissal was the protected disclosure then his claim under Section 103A would succeed. If not, we would still need to consider his claim pursuant to Section 94 ERA. In that regard we noted that first we would have to be satisfied that the Respondent had demonstrated its reason for dismissal and that it was a potentially fair one falling within Section 98(1) or (2) ERA. We noted that the Court of Appeal, in the case of Abernethy -v- Mott Hay and Anderson [1974] ICR 323, noted that the reason was the set of facts which led to the decision to dismiss.

16. If the Respondent satisfied us that dismissal was for a potentially fair reason we would then have to consider whether dismissal for that reason was fair in all the circumstances, applying Section 98(4) ERA where the burden of proof was neutral.

17. The Respondent in this case advanced two potential reasons. The first was conduct, in which case the test set out in the case of British Home Stores Limited -v- Burchell [1978] IRLR 379, as set out in the List of Issues, would be relevant. The second was that of some other substantial reason justifying the dismissal of the Claimant ("SOSR").

18. In either case we were conscious that our role was not to step into the shoes of the Respondent but to consider whether the decision fell within the range of reasonable responses that a reasonable employer might adopt in the circumstances. That test would also apply to the scope of the investigation undertaken by the Respondent.

19. If our conclusion was that the reason for dismissal was SOSR then, whether fair or not, the Claimant would be entitled to statutory notice, in his case due to his length of service of 12 weeks, pursuant to Section 86 ERA, Section 86(6) noting that entitlement to notice does not arise where termination arises by reason of conduct, but does in relation to other reasons.

20. With regard to the wrongful dismissal claim, as noted in the List of Issues, the Claimant was summarily dismissed i.e. without notice. The question for us therefore was whether the Claimant had committed a repudiatory breach of contract, i.e. an act of gross misconduct, such as to justify the Respondent treating the contract as at an end and summarily dismissing the Claimant. The EAT, in the case of Sandwell and West Birmingham Hospitals NHS Trust -v- Westwood **(**UKEAT/0032/09), indicated that the Tribunal must consider both the character of the conduct and whether it was reasonable for the employer to regard that conduct as gross misconduct. That is an objective test on the facts of the case considered on the balance of probability.

Time limits

21. With regard to time limits, we noted that this was only relevant to the Section 47B claims, the other claims having clearly been brought in time. The issue of reasonable practicability includes an assessment of the Claimant's ignorance of rights but any ignorance must be reasonable. Lord Scarman, in Dedman -v- British Building and Engineering Appliances Limited [1974] ICR 53, noted that a Tribunal must ask the questions of "What were his opportunities for finding out that he had rights? Did he take them? If not, why not?". We also noted that the Court of Appeal, in Porter -v- Bandridge Limited [1978] ICR 943, noted that the test was not whether the Claimant knew of his or her rights, but whether he or she ought to have known of them.

22. Where a claimant is generally aware of their rights, ignorance of the time limit will rarely be acceptable as a reason for delay. The EAT, in Trevelyans (Birmingham) Limited -v- Norton [1991] ICR 488, noted that when a Claimant knows of their right to claim they are under an obligation to seek information and advice about how to enforce that right.

23. Where any delay arises through ignorance or fault of a skilled adviser, it will have been reasonably practicable for the claims to have been brought in time. A skilled adviser can include solicitors but also can include trade union representatives.

24. If we considered that it had been reasonably practicable for the claim to have been brought in time then it would fail. If however we considered that it had not been reasonably practicable we would still need to consider whether it had been submitted within such further period as we felt was reasonable in the circumstances.

Findings

25. Our findings, on the balance of probability where there was any dispute, were as follows.

26. The Claimant was employed by the Respondent from September 2004, initially as an Apprentice and then as an Aircraft Fitter. He was engaged in the manufacture of wings at the Respondent's factory in Broughton where approximately 7,000 people were employed. At the time of the Claimant's dismissal and the matters leading to it, the Claimant was employed in one of the Respondent's factories producing wings for the A330 aircraft.

27. Prior to 2017 no issues had arisen with the Claimant's conduct. Just prior to that, at the end of 2016, the Claimant had applied for promotion to the role of Process Manager. He was unsuccessful, but one of his colleagues, Mr Lee Haselden, was successful, and by 2017 he was the Claimant's Line Manager.

28. In terms of production processes, prior to 2017 in the A330 factory, processes were learned by employees from training provided by other, more experienced, employees. In 2017, a new formal process called TICON was introduced. The process appeared to have had a deleterious impact on production and ultimately was shelved with the previous processes being reintroduced.

29. From the end of January 2017, the Claimant, on several occasions, raised concerns with his managers, principally Mr Haselden, but also on occasions involving Mr Cornelius Waedelich, Head of Business for A330, and also Mr Haselden's Line Manager, and others. These concerns involved a number of issues that had arisen from the application of the TICON processes, principally involving the production of oversize holes and damage to panels in the form of scarring and delamination.

30. The Claimant also raised concerns about a process known as "hoover buddying". The process of drilling panels created chrome dust and the buddying process involved another employee standing alongside the employee carrying out the drilling with a vacuum cleaner to collect the dust, thus minimising any risk to the drilling employee of inhaling any of the dust. The Claimant raised concerns that the operators were being discouraged from using hoover buddies as that impacted on the speed of production.

31. We noted the Claimant's evidence that he was not aware that what he was doing was raising concerns on a whistleblowing basis until after he was dismissed, and we accepted that. In that context, we also noted the evidence of Mr Agnew, and indeed the evidence of Mr Jones and Mr Bolton at earlier stages, which we accepted, was that they were unaware of any of

the specifics relating to the Claimant's concerns, only that they understood that complaints had been raised by the Claimant. They were not the direct recipients of any of the Claimant's claimed disclosures.

32. We heard no evidence of the relationship between the Claimant and Mr Haselden prior to 2017, but by the time the second quarter of 2017 was reached it certainly seemed to be a poor one.

33. An incident occurred on 8 April 2017 when the Claimant brought to Mr Haselden's attention concerns over three panels. Mr Haselden agreed that one was defective but directed the Claimant to continue to work on the other two, but the Claimant refused. Mr Haselden contended that the Claimant behaved aggressively in this discussion. The Claimant disputed that, but a contractor, working nearby, noted that the Claimant had been aggressive and had been "bordering on ranting".

34. We were satisfied that this event did occur as contended by Mr Haselden. The contractor largely supported his version of events, when questioned on it in June as part of an investigation into a dignity at work complaint brought by the Claimant, when questioned on it again in July 2017 as part of a grievance raised by Mr Haselden, and again when questioned by Mr Bolton in the disciplinary hearing relating to the Claimant. We were also satisfied that the Claimant's behaviour on this occasion did involve insubordinate and aggressive behaviour.

35. A further incident occurred on 10 April 2017 when Mr Haselden asked the Claimant to act as a hoover buddy for one of his colleagues. The Claimant was reluctant to do that, pointing out that other employees were in a better position to do it and questioned why it should be him. Mr Haselden continued to insist that the Claimant should do the task as requested and then spoke to Mr Jones, another Process Manager in the area, and one we perceived as being more experienced. Mr Jones told Mr Haselden to repeat the instruction to the Claimant and to inform him that it was a reasonable management request, which he did, and there was still reluctance on the Claimant's part to undertake the task. The Claimant in his evidence emphasised that he never refused to do the task, but simply asked why it should be him, but regardless of that, it seemed that the Claimant did not comply with Mr Haselden's instructions.

36. That led to a meeting between Mr Jones and the Claimant, accompanied by a representative from Human Resources and a Trade Union Representative, and to Mr Jones deciding that the Claimant should be suspended, although that suspension was very promptly rescinded. No further action was taken, although we observed that the Claimant appeared to have been insubordinate in his refusal, whatever his justification.

37. The Claimant raised a grievance and a dignity at work complaint on 11 May 2017, essentially about his concerns about his treatment by Mr Haselden. He took advice from a Trade Union Representative who informed him that the grievance should be delivered to the Claimant's manager, i.e. Mr Haselden. The grievance policy in fact stipulated that it be sent to an "appropriate" manager or an HR Business Partner, and we felt that Mr Haselden was not an appropriate manager, bearing in mind that the grievance was about him, but we accepted that the Claimant followed the advice of his Trade Union in seeking to hand the grievance to Mr Haselden.

38. The Claimant attempted to hand the grievance to Mr Haselden in the Production Office and to get him to sign for it. The Claimant did this in the presence of a colleague to act as a witness to the presentation of the grievance, but there were also several other employees present. The Claimant made no attempt to hand over the grievance in a private manner although we understood that meeting rooms had been available.

39. Mr Haselden was taken aback by the request and refused, indicating that he would seek HR advice before signing it. Mr Jones intervened and supported that approach, and the Claimant ultimately handed both the grievance and the dignity at work complaint to Mr Waedelich, he being the correct person to whom the latter was to be delivered, as provided for in the Respondent's policy.

40. The Claimant's grievance involved seven scenarios where he contended Mr Haselden's behaviour had affected his dignity at work. These included concerns around overtime and requests for absence, but also referred to the incident on 8 April and to his suspension on 10 April. Essentially, the Claimant contended that he had been bullied and harassed by Mr Haselden.

41. The Claimant's complaint was investigated by Mr David Hughes, Integration Manager. He reported his conclusions on 27 June 2017, which were that, in relation to some elements, Mr Haselden's conduct had been less than expected, but not to a point where he considered it inappropriate behaviour. Mr Hughes did not consider that the Claimant had been the subject of bullying or harassment. He recommended that Mr Haselden undergo training but did not recommend disciplinary action.

42. The Claimant appealed the outcome but ultimately that appeal was not upheld.

43. As part of his response to the Claimant's grievance against him however, Mr Haselden filed his own complaint regarding the Claimant's behaviour towards him. Essentially complaining that he was being upwardly bullied by the Claimant, raising eleven scenarios in which he asserted that had

happened. The complaint was then dealt with by the Respondent under its Dignity at Work Procedure, and was investigated by Mr Lee Hunt, Project Management Business Partner.

44. Mr Hunt carried out his investigation into the eleven scenarios raised by Mr Haselden and concluded, in relation to three of them, that there was a disciplinary case to answer. That led to the Claimant being invited to a disciplinary hearing with Mr Bolton on 28 September 2017. The disciplinary offences were recorded as:

- "*Acting in an insubordinate, aggressive and abusive manner towards Lee Haselden on Saturday 8 April in the Process Manager's office when discussing the black panels.*
- *Acting in an insubordinate, abusive and threatening manner following an incident between you and Lee Haselden on 10 April.*
- *Acting in such a way as to cause embarrassment and distress to Lee Haselden by publicly announcing that you were submitting a grievance against him.*
- *Whether or not, in the event that you were found to have committed the behaviour alleged in incidents above, that amounts to a course of unwanted conduct which had the purpose or effect of violating the recipients dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for Lee Haselden, which would therefore amount to bullying*."

45. Mr Hunt's report was enclosed, and the Claimant was warned that a possible outcome of the hearing could be his summary dismissal. He was also reminded of his right to be accompanied by a trade union representative or work colleague.

46. The hearing took place as scheduled, with Mr Bolton being accompanied by an HR Business Partner, and the Claimant being accompanied by a Senior Trade Union Convener. The disciplinary allegations were discussed. The Claimant maintained his denial of the allegations but, with regard to the incident relating to the handing over of the grievance, he commented that had he known at the time that he was causing embarrassment to Mr Haselden he would have apologised.

47. Mr Bolton concluded the meeting by saying that he needed to go away and consider some of the points further. He also observed that the most severe sanction if he upheld the allegations would be dismissal, but that if he decided not to dismiss he was 99% sure that the Claimant would not be returning to his previous location. He asked the Claimant for his thoughts on that, and the Claimant replied that he would go where he had to and that he would do anything to save his job.

48. We observed that transfers between departments and factories was a regular occurrence within the Respondent's organisation, and that a transfer was specifically identified as a possible alternative sanction to dismissal within the Respondent's disciplinary procedure.

49. Following the hearing, Mr Bolton undertook further investigations, which included speaking to the contractor about the events of 8 April 2017. He then reconvened the disciplinary hearing on 9 October 2017 for him to deliver his conclusions to the Claimant. He did not provide any documentation relating to his further investigations to the Claimant in advance of the meeting.

50. Mr Bolton's conclusions were that the allegation relating to the events of 10 April was not upheld, but that the allegations relating to the events of 8 April and 11 May were upheld. He concluded that the Claimant had not intended to bully Mr Haselden, but that his behaviour had fallen well short of the Respondent's expectations. He confirmed that he had decided not to dismiss the Claimant, but to issue a final written warning to last for 12 months. He also indicated that he had decided that the Claimant would be moved to work in the A380 factory. He confirmed the Claimant's ability to appeal his decision.

51. Mr Bolton confirmed his decision in a letter to the Claimant dated 19 October 2017. In this, he noted that the accepted allegations constituted gross misconduct which could lead to summary dismissal, but that he had taken account of various mitigating factors, including the Claimant's length of service and previous good record, the fact that the Claimant had not been given feedback on his behaviours in order to address them, and that the Claimant had indicated that had he been given the opportunity to do so he would have apologised to Mr Haselden. Mr Bolton confirmed his decision to issue a final written warning with a transfer of department.

52. The Claimant submitted a detailed appeal, and Mr Agnew was allocated to hear it. He wrote to the Claimant on 8 November 2017, inviting him to an appeal hearing on 13 November. In the letter, Mr Agnew confirmed that in the event that the sanction was upheld then consideration would have to be given to whether the Claimant agreed to be transferred and, if not, what the implications of that would be.

53. The Claimant raised a concern that Mr Agnew should not hear his appeal as he was the overall manager of the A330 area and therefore had knowledge of the circumstances of his case. The Respondent disagreed with that and we saw no reason why Mr Agnew should not have been allocated to hear the appeal, being the manager with overall responsibility for the area and having no more than background knowledge that issues had arisen.

54. The hearing dealt with the content of the Claimant's appeal and a discussion about the move took place. Mr Agnew confirmed that A380 had been chosen for the Claimant as it involved the same type of work. The Claimant commented that he was not mentally able to move because of the way the business had made him feel, to which Mr Agnew responded that the Respondent would provide further occupational health support.

55. We observed that, by this time, the Claimant was being treated for anxiety and depression and had been absent for much of the Summer, only returning briefly before the disciplinary process took place. He had also had appointments with Occupational Health on 30 October 2017 and 13 November 2017, the latter on the morning of the appeal hearing, for parts of which the person who would be the A380 manager if the Claimant transferred was also in attendance, in line with the Respondent's usual procedure.

56. In both meetings the Claimant was confirmed as unfit for work, but that, with suitable support, he could return on a phased basis to begin with. In the Occupational Health Report issued following the second meeting, the Adviser noted that the Claimant was concerned about moving to A380 because there was little overtime there. The A380 Manager reported similarly that the Claimant had confirmed that he did not want to move to A380, also noting the overtime issue, and also that the Claimant had said that he did not know anyone in A380 and that the A380 management did not know his issues. We also noted that the Claimant made reference to a lack of overtime in A380 in text exchanges with a colleague at the time. The Claimant commented further that he did not feel he could move because he felt as though he could not trust anyone. He also referred to specific restrictions on his work in A330 due to a hip condition.

57. Mr Agnew adjourned the hearing for him to undertake some further investigations. Having undertaken those investigations, which included speaking to the Claimant's Trade Union Representative regarding the advice given to the Claimant about handing in the grievance, Mr Agnew reconvened the hearing on 17 November 2017 to inform the Claimant of his decision. Like Mr Bolton, Mr Agnew did not provide the Claimant with copies of the statements gathered from his further investigation.

58. Mr Agnew provided his responses to the points raised by the Claimant in his appeal and ultimately confirmed that he was satisfied that Mr Bolton's decision had been reasonable, including the move from A330. He noted that it was clear from the Occupational Health Report, and the information provided by the A380 Manager, that the Claimant would not move to A380, although we observed that Mr Agnew did not put the move to the Claimant

as an ultimatum, i.e. that if he did not move he would be dismissed. The Claimant commented that he was not well enough to move.

59. Mr Agnew concluded by saying that in the circumstances he believed that dismissal for gross misconduct was reasonable, and in addition that he thought the employment relationship had been broken by the Claimant's behaviour. He confirmed that the Claimant was dismissed with immediate effect without notice. He confirmed that decision in a subsequent letter.

60. In terms of other facts relevant to our decision, we noted that the Claimant was not entirely clear as to when he first took legal advice, indicating at one stage that it was March 2018, which we did not consider was accurate, as contact with ACAS for the purposes of Early Conciliation was made in early February 2018, but at one stage he said that it was earlier than that, and we concluded that the Claimant had received advice before contacting ACAS.

61. We also noted that the Claimant had had advice from Trade Union Representatives, which included full time officials, during the disciplinary processes, and that that advice continued after he was dismissed. We also noted that the Claimant took advice from his father and undertook internet research on his position

Conclusions

62. Applying our findings and the applicable law to the issues identified at the outset, our conclusions were as follows.

Protected disclosure

63. With regard to the question of whether the Claimant had made protected disclosures, falling within the scope of Section 43B ERA, we noted that the Respondent had confirmed that it accepted that the concerns raised by the Claimant about the use of hoover buddies did amount to protected disclosures, but disputed that the concerns raised about panels fell within the definition. The Respondent contended that the issues revolved around manufacturing processes and quality, and could not reasonably have involved a belief that health and safety was being endangered or that there had been a breach of legal obligation. However, the Respondent did not lead any evidence before us about that, or indeed any rebuttal to the Claimant's evidence about the concerns he asserted he had raised.

64. With regard to the panels, we were satisfied that, notwithstanding that the concerns were raised verbally by the Claimant, and generally involved concerns about manufacturing processes and quality, they did convey information which also involved concerns about the health and safety of

individuals, i.e. airline passengers, as the Claimant had identified that the flaws potentially made the wings unsafe.

65. We then had to consider whether the Claimant's belief that health and safety was being endangered was reasonable. As we have noted he did not need to be correct and we noted the comments of the Respondents witnesses that there were several manufacturing stages to go through such that any identified defect would ultimately not have led to any health and safety issues, such that he may well therefore not have been right in his assertions. However, we noted that we needed to consider the issue from the perspective of the reasonable belief of the Claimant himself in his circumstances. He would not have had the knowledge that the Respondent's managers had of the subsequent stages of the process, and therefore we were satisfied that the Claimant had had a reasonable belief that the health and safety of individuals was potentially being endangered.

66. With regard to the question of whether the Claimant reasonably believed that the disclosures he was making were in the public interest, we noted the guidance of the Chesterton case, and concluded that concerns about the impact of dust on a worker, or about flight safety, were very clearly matters of public interest, that the Claimant clearly believed they were, and that that belief had been reasonable.

67. We then moved to consider the Claimant's two specific whistleblowing claims, detriment under Section 47B ERA and unfair dismissal under Section 103A ERA.

Section 47B claim

68. With regard to the detriment claim, we had first to consider the preliminary issue of whether the claim had been brought in time. In fact, it was clear that it had not, whether by reference to two separate acts of the suspension in April 2017 and the final written warning and move in October 2017, or by reference to them both being part of a series of acts.

69. We noted Mr Pollitt's argument, which he described as "novel", that whilst dismissal is expressly held not to be capable of being a dismissal by the application of Section 47B(2) ERA, dismissal could nevertheless be classed as a similar act to the final written warning and the transfer, and therefore could be considered to be in time applying Section 48 ERA. However, we felt that that would fly in the face of the express provision of Section 47B(2), that dismissals are distinct from detriments, and therefore we did not accept that argument. The question for us therefore was whether it had been reasonably practicable for the claim to have been brought in time, in the form of contact with ACAS for the purposes of Early Conciliation.

70. As we have noted above, the Claimant was not aware that what he was doing was raising concerns on a whistleblowing basis until after he was dismissed, and we accepted that. However, as we have also noted, the Claimant was not entirely clear as to when he first took legal advice on his claims, but we considered that he did so before making contact with ACAS for the purposes of Early Conciliation in early February 2018.

71. As we have also noted, that the Claimant had had advice from Trade Union Representatives, which included full time officials, during the disciplinary processes, and that that advice continued after he was dismissed. We also noted that the Claimant took advice from his father and undertook internet research on his position. We also noted that the Claimant had been someone who was assiduous in advancing his position during the internal processes, producing detailed and comprehensive documents at all stages.

72. As noted in Porter -v- Bandridge, the test is not whether a claimant knew of their rights, but whether they ought to have known of them, and as pointed out in the Dedman case the question must be asked as to what were the Claimant's opportunities for finding out that he had rights.

73. In our view, from his own efforts and those of those advising him, the Claimant ought reasonably to have known about his rights within the primary time limit, which would have expired on 16 January 2018. We therefore considered that it had been reasonably practicable for him to have progressed his detriment claim in time, and as he had not, the claim fell to be dismissed.

Section 103A claim

74. We then moved to consider the Claimant's remaining whistleblowing claim of unfair dismissal pursuant to Section 103A ERA. As we had concluded that protected disclosures had been made, the key question for us was whether they were the reason or principal reason for his dismissal, i.e. whether the dismissal was caused or principally caused by the disclosures.

75. We noted that the evidence of Mr Agnew, and indeed the evidence of Mr Jones and Mr Bolton at earlier stages, was that they were unaware of any of the specifics relating to the Claimant's concerns, only that they understood that complaints had been raised by the Claimant. They were not the direct recipients of any of the Claimant's claimed disclosures.

76. We noted that the Claimant contended that the three individuals would have been told by those to whom he raised his concerns that he had done so, but we saw no evidence to suggest that that had happened, and certainly Mr Agnew, as a particularly senior manager, would not have needed to be informed in any detail about operational matters, and he confirmed in his

evidence that it was his practice to let his managers, indeed it seemed to us, to expect his managers, to deal with such matters without reference to him.

77. We noted also that the Claimant felt that the three managers would have been aware of his concerns by virtue of the documents they considered during the processes. Whilst we have already concluded that the Claimant's detriment claim should be dismissed, we noted that that could not be said of Mr Jones in relation to the events of 10 April 2017, as the Claimant's grievance was not raised until 11 May 2017.

78. Even in relation to Mr Bolton and Mr Agnew, we did not see that the Claimant's disclosures were, in any sense, evident from the documents. The only reference to health and safety in the Claimant's six page grievance is at the start where he refers to having highlighted the lack of awareness to certain health and safety measures, which, applying Cavendish Munro -v- Geduld, could not itself amount to a disclosure of information.

79. We did not consider there was anything within the documentation produced at any stage of the internal processes which would have led a reader to conclude that the Claimant had made protected disclosures, and we noted that neither the Claimant nor any of his Trade Union Representatives made any reference to a connection of the disciplinary action against him with any prior disclosures. Nor did we consider that there was any hidden influence on the part of Mr Haselden or anyone else which caused or influenced the dismissal decision.

80. We also noted that Mr Bolton did not actually dismiss the Claimant and, had he been motivated to act against him because of any protected disclosure, then he would have done so. Similarly, Mr Agnew's initial approach was to confirm Mr Bolton's decision, i.e. not to dismiss. He only dismissed the Claimant due to what he considered to be a refusal to move departments.

81. Overall therefore, we were not satisfied that the Claimant's disclosures were the reason for his dismissal, and his claim under Section 103A failed. We observed in passing that had we allowed the Claimant's detriment claim to proceed it would also have failed for the same reason.

Wrongful dismissal

82. Before turning to the ordinary unfair dismissal claim, we considered the Claimant's wrongful dismissal claim. We noted in that regard that we were to assess objectively whether, on balance of probability, the Claimant had committed an act or acts of gross misconduct in relation to the incidents of 8 April 2017 and 11 May 2017. We noted the direction provided by the Westwood case that we needed to consider the character of the conduct

and whether it was reasonable for the Respondent to regard the conduct as gross misconduct.

83. With regard to the events of 8 April 2017, we noted that the Claimant made much of the fact that Mr Haselden had said that the Claimant had sworn during this exchange, which he had denied and which the witness, the contractor, had not confirmed, albeit he had not been directly asked about that. We observed that it was likely that the contractor did not reference swearing as it would have been fairly commonplace in the workplace and therefore not something which would necessarily be remarkable. Regardless of whether swearing was involved or not, as we have noted above, we concluded on balance the Claimant had acted in a way which involved elements of insubordination and aggression.

84. With regard to the events of 11 May 2017, whilst we noted that the Claimant had been advised by his Trade Union to give the grievance to Mr Haselden as his Manager, the choice of when and how to do that was the Claimant's alone. We did not consider that the Claimant went out of his way to hand over the grievance in a way which caused embarrassment to Mr Haselden, as there were more embarrassing ways in which he could have done so, for example at larger team meetings. Nevertheless, we considered that the Claimant was aware, or certainly should have been aware, that handing the grievance over to Mr Haselden and insisting he sign it in a busy office could cause him some embarrassment.

85. The question for us then to consider was whether those acts of misconduct, either individually or collectively, amounted to gross misconduct, i.e. fundamentally breached the employment contract, but we did not consider that they did.

86. We noted, in relation to the 8 April 2017 incident, that Mr Haselden had not taken any action in response to it, whereas he had taken action, along with Mr Jones, in relation to the not dissimilar events of 10 April 2017. We therefore concluded that, whatever the level of insubordination and/or aggression, Mr Haselden had not, at the time, considered the event to be so serious as to justify action, let alone dismissal.

87. With regard to the event of 11 May 2017, whilst we have noted that embarrassment was caused to Mr Haselden by the Claimant's actions, we did not consider that that was significant enough to lead to a conclusion of gross misconduct. We noted the Claimant's unprompted indication in the disciplinary hearing before Mr Bolton that he would apologise for any embarrassment caused.

88. Overall therefore, we did not conclude that the two incidents, individually or collectively, were so serious as to fundamentally breach the contract and

we concluded therefore that the Claimant had been wrongfully dismissed. In that regard, any dismissal should have been with notice, which, in the Claimant's case, due to his length of service, was the maximum statutory amount of 12 weeks.

Section 94 claim

89. Turning to the Claimant's ordinary unfair dismissal claim, we first had to consider the reason for dismissal and whether it was potentially fair. We noted that the Respondent had advanced two reasons for the Claimant's dismissal; conduct and some other substantial reason, both of which are potentially fair reasons. We also noted that, applying the long established guidance provided by the Abernethy case, the reason for dismissal is the set of facts which led the employer to dismiss the employee.

90. We therefore looked closely at Mr Agnew's conclusions in his letter rejecting the Claimant's appeal, because it was that letter which confirmed the dismissal. Mr Agnew commenced by saying that Mr Bolton had correctly assessed the Claimant's actions as amounting to gross misconduct and went on to say, in the circumstances of the Claimant's apparent refusal to move to A380, that dismissal for gross misconduct was reasonable. However, he went on immediately to say that, in addition, he believed that the employment relationship was broken and that that had arisen from the Claimant's behaviour and his unsubstantiated accusations against management.

91. We noted that the Respondent's Disciplinary Policy expressly provided that a disciplinary sanction cannot be increased on appeal, albeit we also noted that Mr Agnew had felt that, as the sanction imposed by Mr Bolton had been a combined one, i.e. a final written warning and a move, if one element fell away, the sanction could be readdressed.

92. Overall however, we concluded that the set of facts which primarily led Mr Agnew to dismiss the Claimant were his apparent refusal to move to A380 and what Mr Agnew perceived as a breakdown in the employment relationship, i.e. that the reason for dismissal was some other substantial reason and not conduct.

93. We then considered whether dismissal for that reason was fair in all the circumstances, and concluded that it was not.

94. We noted that the Claimant had indicated that he did not wish to move to A380, albeit that his reasons for not wanting to move varied. We also noted that, at that stage, the Claimant was signed off work and was suffering from, and being treated for, anxiety and depression, although the occupational

health advice did not indicate that, due to his illness, the Claimant could not move to A380.

95. Acutely, we noted that at no time did Mr Agnew make it explicitly clear to the Claimant that, in the event that he refused to move to A380, the alternative was dismissal. Mr Agnew therefore did not give any time for the Claimant to absorb the implications of that, and to discuss it with his Trade Union and his family. Nor did Mr Agnew give the Claimant any indication that the move would take place following his return to being fit to work, which we anticipated would ultimately have been the Respondent's position.

96. We considered that a reasonable employer acting reasonably in the circumstances would have made the position more starkly clear to the Claimant and, particularly when the Claimant was suffering with stress and anxiety which may have impacted on his ability to take a dispassionate approach to matters, would have given the Claimant time to confirm his position in light of such a stark clarification. We therefore concluded that the decision to dismiss was outside the range of reasonable responses in the circumstances and therefore that the dismissal was unfair.

Adjustments to compensation

97. Turning to remedy matters, in considering the overarching principles and not detailed calculations, we had three matters to consider; Polkey, contributory conduct, and any uplift due to failures to comply with the ACAS Code.

98. We observed in passing that, having concluded that the reason for dismissal was some other substantial reason and not conduct, Section 86 ERA provides that such a dismissal would have to have been on notice. However, as we concluded that the Claimant had been wrongfully dismissed, nothing turns on that in terms of compensation.

Polkey

99. With regard to the question of whether dismissal would nevertheless have occurred, and occurred fairly at some point, and if so, when that would take place, or how likely it would be, i.e. the Polkey principle, we noted that the Claimant had, at the time of his appeal hearing, made it clear, albeit primarily due to his health at that stage, that he was not prepared to move to A380. We considered that had that been his unequivocal view, when on notice of the consequence of dismissal, then dismissal for that reason would, at that point, have been fair on the some other substantial reason ground. The question for us therefore was whether a fair dismissal on the some other substantial reason ground due to the Claimant's maintained refusal to move to A380 would have been likely to have happened.

100. As we have noted, we did not consider that the point had been put to the Claimant in stark terms, to which, having been given some time to consider the ramifications and take advice, he could have given an equivocal answer one way or the other. However, we concluded that had that happened, the Claimant would have been just as likely to maintain his stance as to accept the move. He had made his unwillingness to move very clear and may well therefore have restated that position, but equally, if the stark reality of losing his job had been made clear to him, he may well have decided that a job which he felt was less than desirable was better than no job at all.

101. Overall therefore we considered that the Claimant's compensatory award should be reduced by 50% to reflect the prospect that a fair dismissal would potentially have ensued.

Contributory conduct

102. Turning to the question of contributory conduct, we noted that this could apply both to the compensatory award, applying Section 123(6) ERA, and to the basic award, applying Section 122(2) ERA; two similar, albeit not identical, provisions. We noted that the Court of Appeal, in Nelson -v- BBC (2) [1979] IRLR 346, had set out three factors which must be present for the compensatory award to be reduced. These were; that the Claimant's conduct must be culpable or blameworthy, that it must actually have caused or contributed to the dismissal, and that the reduction must be just and equitable. We also noted that the EAT in Steen -v- ASP Packaging Limited (UK EAT/23/11) had outlined a very similar approach in relation to the basic award.

103. We considered that the outlined tests had been satisfied. We considered that the Claimant had been guilty of blameworthy conduct in the form of his initial behaviour in April and May 2017, but more significantly in the form of his indication in November 2017 that he would not move to A380. In our view, that conduct contributed to the Claimant's dismissal and we considered it would be just and equitable to reduce both awards as a result.

104. We noted the guidance of the Court of Appeal, in Rao -v- Civil Aviation Authority [1994] ICR 495, that it is permissible to make both a Polkey deduction and a contributory conduct deduction, but that in assessing the latter, the Tribunal should bear in mind the former.

105. We also noted the guidance outlined by the EAT, in Dee -v- Suffolk County Council (EAT 0180/18), that the two potential deductions should be assessed in turn, i.e. Polkey followed by contributory conduct, and then that the Tribunal should stand back and look at the matter as a whole to avoid

double counting and to ensure that the final result was overall just and equitable.

106. Overall, our conclusions were that both the basic award and the compensatory award should be reduced by 50% to reflect the Claimant's contributory conduct. In relation to the basic award that involved a straight forward halving of the award whatever it may be. In relation to the compensatory award however we made it clear that we were not talking about the deduction of the other half of the award, i.e. leaving the Claimant with nothing, but with a deduction of 50% from the remaining 50% of the compensatory award after the Polkey deduction has been made, effectively leaving the Claimant with 25% of his compensatory award.

ACAS uplift

107. Finally, with regard to any uplift for breach of the ACAS Code, we noted that Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that in claims falling within Schedule A2 of the Act, which this claim does, and where the employee has unreasonably failed to comply with provisions of the ACAS Code, any compensatory award can, if the Tribunal considers it just and equitable, be increased by up to 25%.

108. In that regard, the Claimant contended that there were breaches of the ACAS Code by the Respondent in the form of the failure to provide documents to the Claimant, the failure to make it clear to the Claimant that a refusal to transfer to A380 would lead to dismissal, and the failure to grant a further appeal once the final written warning with transfer was changed to dismissal.

109. However, having concluded that the reason for dismissal was some other substantial reason, we noted the EAT decision of Phoenix House Limited -v- Stockman [2017] ICR 84, which made it clear that the ACAS Code does not apply to some other substantial reason dismissals. In the circumstances there was therefore no question of Section 207A of the 1992 Act applying and therefore no uplift fell to be considered.

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Employment Judge S Jenkins
Dated: 25 June 2021

REASONS SENT TO THE PARTIES ON 28 June 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche