EMPLOYMENT TRIBUNALS

Claimant: **Mr J Whelan**

Respondent: **C Brown & Sons (Steel) Limited**

Heard at: **Birmingham**

On: **17 May 2021**

Before: **Employment Judge Flood**

Representation

Claimant: Dr Ahmad (Counsel)
Respondent: Mr Roberts (Solicitor)

JUDGMENT

The claimant's complaints of unfair dismissal contrary to section 100 and 103A of the Employment Rights Act 1996 are dismissed.

REASONS

The Complaints and preliminary matters

1. By a claim form presented on 4 December 2019, the claimant brought a complaint of (automatic) unfair dismissal contrary to section 100 of the Employment Rights Act 1996 ("ERA"). The claimant subsequently made an application to amend his claim to include a complaint that he was unfairly dismissed because he made a protected disclosure contrary to section 103A of the ERA and that he was subject to detriments because he made a protected disclosure contrary to sections 47B and 48 ERA. At an open preliminary hearing before Employment Judge Miller on 26 October 2020, that amendment application was considered and the claimant was permitted to add the complaint under section 103A but was not permitted to ad complaints under section 47B and 48 ERA. The claimant was also refused permission to add another respondent to the claim. The parties were also ordered to produce a list of issues to be agreed by 23 November 2020 and further directions were made.

2. The claimant produced on 17 March 2021 further details of his claim which

was shown at page 21A and 21B of the Bundle. The claimant then made an application to amend his claim on 10 May 2021 to add 2 further incidents (referred to in that document) which he says amounted to protected disclosures. This related to an alleged disclosure by e mail on 1 October 2019 regarding unstable gas bottles which was said to amount to a breach of the Dangerous Substances Regulations and Explosive Atmosphere Regulations 2002 and a further disclosure alleged to have been made to AC on 4 October 2019 moments before the claimant was dismissed relating to the respondent's Noise Assessment and a possible breach of daily and weekly exposure limits. The respondent objected to this application. My decision was that the claimant would not be permitted to amend his claim to add and rely upon these additional disclosures. The matters relied upon that were said to be protected disclosures were then clarified and they are now set out in the List of Issues below.

3. A bundle of documents running to 119 Pages (including witness statements) had been prepared and agreed by the parties ("the Bundle"). On the first day of the application the claimant made an application for an additional bundle prepared by him consisting of over 500 pages to be admitted ("Additional Bundle"). This application was resisted by the respondent complaining that the additional documents had come to light very late in the proceedings and dispute the relevance of much of the Additional Bundle. Having heard submissions by the parties, I determined that it was in the interests of justice to admit the Additional Bundle. I made it clear to the parties that the Tribunal would only read those parts of the Additional Bundle that were specifically referred to by them.

4. At the end of the claimant's evidence, Mr Roberts made an application for the claim to be dismissed on the basis that the respondent had no case to answer (the claimant having the burden of proof in this claim and the respondent contending he had not discharged it). This application was refused as the respondent's evidence had yet to be heard and some of what was said in evidence and cross examination would be relevant as to whether the claimant would be able to show that the reason for his dismissal was as he contended.

5. On the second day of the hearing (after the claimant's evidence had been completed) Mr Roberts applied to have an additional document admitted which related to a meeting the respondent says was held on 24 September 2019. He said this only came up from something the claimant said in evidence the day before namely that there had been a health and safety meeting on 1 October 2019 where had made a disclosure. He said that the respondent having checked its records was unable to find a note of any health and safety meeting on this date but had found some from a meeting held on 24 September 2019 where the issue of unsecured loads did come up. Dr Ahmad objected to this as it was so late and the claimant would have insufficient time to check the validity of any document and would need to be recalled. I decided to refuse to admit this document at this late stage of the proceedings as it was not in the interests of justice for a potentially prejudicial document to be considered at this late stage.

6. Unless otherwise stated, references to page numbers in this document are to page numbers in the Bundle or Additional Bundle.

7. Having concluded the evidence and submissions after lunch on the second day of the hearing, the claim was adjourned for a reserved decision to be made.

The Issues

8. The issues which needed to be determined were:

1. Protected disclosure (s43B ERA)

   1.1. Did the claimant make the following disclosure(s) to his employer (s43C), as per respondent's Bundle pages 21A and 21B, namely:

      1.1.1. On 30 September 2019 verbally to Mr G Holden ("GH") reporting an incident involving Steve which occurred on 23 September 2019 where steel loaded on to a tug in Bay 8 had not been secured and the tug had been driven on a public private road (images of incident shown at pages 309-335);

      1.1.2. On 1 October 2019 during a meeting to GH re an incident occurred on 1 September 2019 re grinding without the appropriate eye protection.

      1.1.3. On 2 October 2019 reporting verbally to GH and AC (and showing them CCTV images) of an incident which occurred on 2 October 2019 where C Danks had loaded steel on to a tug in Bay 8 which had not been secured and had then driven it on a public private road (images of incident shown at pages 335-338)

      1.1.4. On 3 October 2019 reporting by email to Mr C Platten and AC an incident which had been reported to him as occurring that day where a driver (C King) had not secured his load and not wearing safety footwear (images of incident shown at pages 339-344)

   1.2. Did such disclosures contain information which in the reasonable belief of the claimant tended to show that the respondent (through its employees) has:

      1.2.1. committed criminal offence(s) or that criminal offence(s) were being committed or were likely to be committed (s43B(1)(a))?

      1.2.2. failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (s43B(1)(b))?

      1.2.3. endangered the health and safety of any individual or that such health and safety was being or likely to occur (s43B(1)(d))?

      1.2.4. been or is likely to deliberately conceal information tending to show any matter falling with the above paragraphs (s43B(1)(f)?

   1.3. Did the claimant reasonably believe making such disclosure(s) was in the public interest (s43B(1))?

2. Health & Safety cases (s100 ERA)

2.1. If the claimant was dismissed by the respondent, was the reason (or, if more than one, the principle reason) for his dismissal that:

2.1.1. having been designated by the employer to carry out activities in connection with the preventing or reducing risks to health and safety at work, the claimant carried out (or proposed to carry out) any such activities, as per Respondent's Bundle pages 21A and 21B (s100 (1)(a))?

2.1.2. In the circumstances of danger which the claimant reasonably believed to be serious and imminent, as per respondent's Bundle pages 21A and 21B, the claimant took (or proposed to take) appropriate steps to protect himself or other persons from the danger (s100(1)(e))?

2.2. Notes: Pursuant to s100(2), for the purposes of s100(1)(e) appropriateness of the steps taken or proposed to be taken is to be judged by reference to all the circumstances including, in particular, the Claimant's knowledge and the facilities and advice available to him at that time. Also, pursuant to s100(3), for the purposes of s100(1)(e), the Claimant shall not be regarded as dismissed if the employer shows that it was (or would have been) s negligent for the Claimant to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.

3. Automatic unfair dismissal (s103A ERA)

3.1. If the claimant was dismissed by the respondent, was the reason (or, if more than one, the principal reason) for his dismissal that he had made all or any of the above protected disclosure or disclosures?

Findings of Fact

9. The claimant gave evidence by way of a witness statement and orally in response to cross examination, re-examination, and Tribunal questions. The respondent's witness Mr A Cheeseman ("AC") Operations Director of the respondent, gave evidence in the same manner. I have considered the relevant parts of the Bundle and the Additional Bundle.

10. On the relevant evidence raised, I make the following findings of fact:

10.1. The claimant was employed by the respondent as Health and Safety Advisor from 6 November 2017 until his dismissal with effect on 4 November 2019. He reported to AC.

10.2. The claimant's contract of employment was at page 31-32. A job description for his role was at pages 33-34 although this was not shared with the claimant at the start of his employment but was put together some weeks after he started. This referred to the claimant having the responsibility to "*Advise, manage, enforce and supervise Health and Safety Policy across all business streams, through both personal*

engagement and through the Management Team" and to "monitor dangers in the working environment." Dr Ahmad referred to various policies and procedures of the respondent that applied to the claimant's employment during his cross examination of AC pointing out that these policies were not in the Bundle as the respondent had not disclosed these but did appear in the Additional Bundle (as the claimant had provided copies). I noted that the respondent had a Whistleblowing Policy (page 2); Capability Policy and Procedure (pages 4-5); Disciplinary Rules and Procedure (pages 6-10); Capability and Disciplinary Appeals Procedure (page 11); Grievance Procedure (page 12); Induction Policy (pages 13-14) and Performance Management Policy (page 15-17). No further reference was made to these procedures by either party. The claimant had a clean disciplinary record.

10.3. AC was challenged by Dr Ahmad as to whether the respondent had an up to date Health and Safety policy as it had not been disclosed in the Bundle. AC confirmed that a policy was in place that he had created in 2011 from an existing policy and that it was reviewed regularly, being last updated and reviewed in January 2021 (and that this took place every January). He said that the Board of Directors had overall responsibility for health and safety at the respondent and he was aware this could bring individual criminal responsibility. I accepted that the respondent had a Health and Safety policy but was surprised that this had not been provided in the Bundle.

10.4. I was shown a note of a meeting held between AC and the claimant on 17 November 2017 shortly after the claimant started work. This meeting was to review the health and safety matters that the claimant would be working on. AC noted that he wanted the claimant to "*drive a continuous improvement*" in the claimant's health and safety culture including setting up regular operational health and safety meetings. A further meeting was held between AC and the claimant on 20 December 2017. Various matters were discussed and actions were confirmed in an email sent by AC to the claimant on 21 December 2017 (page 36-37). This e mail contained a detailed list of the health and safety matters that would be progressed with actions for the claimant in many areas. It flagged up firstly that AC was concerned that some check lists and forms were not being completed since the previous health and safety manager left. He instructed the claimant to become familiar with the current paperwork and to "*ensure that all is being completed and logged. If you find any potential gaps in our inspections, then could you please flag these to me and we can then look at putting them in place*". It went on to deal with arrangements for contractors coming on site and tasked the claimant with creating a document setting out the process for contractors and sending this to all employees. It went on to list actions on various other matters including compliance with Asbestos requirements, Fire risk assessments, cylinder storage, near miss reporting (and Toolbox talks on a new reporting cards systems), PPE adherence, and the requirements of Maintenance. AC instructed the claimant on the last point to create an Excel spreadsheet with information on tasks, priorities and dates for completion. This went on to state "*Please let me know if you need any assistance with Excel*". The claimant said that during this meeting he

raised with AC that he was not skilled in the use of Excel and this was a development need for which a course would help. He further says that he e mailed the respondent on 8 January 2018 with details of a course and provider but that he never received a reply to this. This e mail has not been provided and the claimant says he has requested this on various occasions since starting the claim but was told it was not relevant. AC stated that he does not recall receiving an e mail but does remember discussions about potentially going on a course but cannot recall the timing. The claimant admitted in cross examination that AC was very keen on improving the health and safety culture at that point.

10.5. The claimant's six month probationary period was due to expire in May 2018 but he did not have the time to hold a probationary review at that time and told the claimant this (note of the conversation held at page 38). AC said he then held a meeting with the claimant on 6 July 2018 and that at page 39 are the notes of that meeting. AC says at this meeting the claimant's employment was confirmed but that he did raise issues about where the claimant was focusing his time. AC says it was at this meeting that the claimant suggested that a course on excel might help. The claimant denies that this meeting ever took place (although he does acknowledge meeting with AC in his office on this day) and suggests that this note has been fabricated by AC. I find that a discussion did take place on this day, broadly as alleged by AC and I do not accept that the note of that meeting at page 38 was as the claimant suggests a fabrication. I was satisfied that the handwritten notes were a contemporaneous extract from a notebook kept by AC (with other non-relevant matters redacted).

Issues with unsecured loads

10.6. Three of the four issues relied upon as protected disclosures related to drivers of respondent vehicles loading steel on to those vehicles and then driving without securing the steel to the vehicle. The claimant described the process being carried out with reference to various CCTV images to illustrate the issue. He explained that to drive a vehicle on the highway (even if this was a private/public road as in the case of the respondent's employees who were driving between different buildings on the same industrial estate) without securing this load amounted to an offence under the Road Traffic Act 188 section 2a, namely dangerous driving. He also contended that offences under the Health and Safety at Work Act 1974 (sections 7 a and b) would also be committed.

10.7. The respondent conceded that incidents as described would amount to contraventions of the above health and safety legislation, albeit that they may not involve road traffic offences as the site did not come under the same jurisdiction as a public highway. AC admitted that the health and safety consequences and potential implications of breaches in this area were serious and if loads slip they could cause serious injury or death. He accepted that any issues raised by the claimant would be in the public interest as a result of this. AC described the matter of loads not being secured properly as a "*perennial problem*". He pointed to a memo at page 29 which was sent to drivers to remind them of the importance of

securing their loads in 2013. At this time the respondent put signs up on site reminding drivers that loads had to be secured. The claimant pointed out that the memo sent related to contract drivers i.e not employees of the respondent. Nonetheless I was satisfied that it was the same or a similar issue that was being raised. I was also shown an e mail sent by AC to a fellow manager and the claimant regarding an incident involving a slipped load on a customer site on 10 July 2018 (page 40). In this he asks the claimant to work with the manager to put a report together and put in place preventative measures to prevent a reoccurrence. This also asked for some "*follow up information to let me know we've addressed this"*.

Allegation that respondent was resistant to claimant's suggestion for health and safety improvements

10.8. The claimant alleges that during his employment he made various suggestions about improvements to health and safety but that the respondent was reluctant to implement any of these and that it had a lax health and safety culture. He mentions in particular PPE provision and storage and use of flammable gases. The claimant made reference to having sent e mails to the respondent on such matters which were not responded to but that having made requests for such e mails from the respondent was informed that they did not have them. The claimant points to extract from his notebooks and diaries which he has included within the Additional Bundle (see pages 247-297). I did not doubt the authenticity of any of the extracts provided but could not see how these showed that the claimant was raising matters and that the respondent was not addressing or dealing with them.

10.9. The respondent contends it was addressing health and safety issues arising. It points to the memo GH sent to employees in the Maintenance Department on 25 October 2018 (page 52) instructing all employees to ensure that they wear ear protection and stating that failure to do so will result in disciplinary action. Following this GH sent an email to the claimant (page 53) informing him that employees appeared to be flouting the "mandatory" requirement to wear PPE and asking him to ensure that the instruction regarding the wearing of visors and ear protection is complied with and to make him aware of any person not complying. AC insisted that the respondent was addressing health and safety breaches as they arose and were regularly taking disciplinary action against employees committing breaches. At page 32A I was shown a copy of a final written warning issued to an employee to a driver for failing to secure a load and at page 30 AC refers to a warning being issued to an employee who had allowed someone to operate a crane who was unauthorized. It also points to a disciplinary warning letter issued to one of its employees on 20 July 2018 for failing to abide by health and safety rules and procedures (page 50).

10.10. In the absence of the copies of the emails that the claimant says he sent which were not responded to, I am unable to make any findings that there was any resistance to any health and safety recommendations suggested by the claimant.

Allegation that the claimant was not performing his role and discussions around this

10.11. AC told the Tribunal that there were concerns with the claimant's performance during his employment. He said that the claimant was unable to produce the excel spreadsheet he had been instructed to resulting in AC himself having to undertake this task (see e mail of 8 August 2018 at page 51 where AC sends a spreadsheet he has created to the claimant). The claimant acknowledged that he had not completed this task.

10.12. AC said that the claimant's office was untidy and disorganised and that the claimant had not sorted out the health and safety drive on the respondent's computer system despite being asked to do so. AC also contended that the claimant was failing to complete induction tours for new employees despite this being part of his role. He also mentioned that the claimant failed to set up a meeting with the Transport Department Head and the Operations Director to discuss road site markings and pedestrian segregation despite being asked to do this on 7 occasions. The respondent produced a document at page 54-55 which it says sets out the task lists produced after monthly health and safety meetings which showed that this task remained outstanding between January and September 2019. He also contended that the claimant was too nervous and not assertive enough to chair the monthly Health and Safety meetings in his absence. AC also stated that the claimant was not willing to confront shop floor workers about health and safety issues preferring to raise these with management and that he was not spending enough time on the shopfloor dealing with concerns. He contended that he received informal complaints from staff and management about the claimant's communication skills and level of professionalism.

10.13. The claimant disputes the validity of all these complaints made against him. He asserts that his office was not untidy as a result of his actions as it was always unlocked and that much of the paper there had been left by his predecessor. He also contends that the pictures produced to support this by the respondent were taken after he had left and showed that items had been deliberately moved by the respondent to make the position worse). He contends that carrying out induction tours was not part of his role but he did carry these out on occasion. He also contends that the reason he was unable to complete the actions on road site markings were because there were actions outstanding from other employees on resurfacing. He disputes the contention that he was not confident enough to chair Health and Safety meetings (alleging that this only took place once and as he had so much to read out during these meetings it was impractical for him to chair as well). He also denies that he was not on the shop floor sufficiently. The claimant says that none of these matters were ever raised or discussed with him.

10.14. I find that the concerns about the claimant that were held by AC were genuinely were held by him. I also accept that the claimant disagreed with the validity of these concerns and in many cases, there is likely to have been some force in what he was saying. Whatever the position, I

find that the respondent did not discuss these with the claimant in any formal or structured manner or make it clear to the claimant that these were matters that caused serious concern to the respondent or that the claimant's employment was in jeopardy. It would have been better all round if the respondent and AC had addressed its concerns directly with the claimant and documented these in 1:1 discussions or similar.

10.15. On 25 September, the claimant informed CP and GH (copying AC) by e mail of an issue involving a contractor failing to secure a load whilst driving on site sending image of the incident. GH very shortly after forwarded the claimant's e mail to other managers in the respondent informing them that an issue had been brought to his attention and that they should contact the contractor to "*have a word*" with the transport division of the contractor, reminding them that the respondent's site in part was a public private road and could have members of the public present (page 65). Following this incident a memo was sent to staff (addressed to All Drivers/Shunters) on 25 September 2019 informing them that the respondent had received reports of material was being moved on site without the securing straps. It went on to state:

"*Due to the obvious disregard to Health and Safety this has always been and still in, classed as gross misconduct. As such, if you are found to be doing this it could result in the immediate termination of your contract.*
You are all aware that this dangerous practice is not permitted on C Browns premises, please ensure that this rule is adhered to at all times."

The claimant suggested that this memo had not in fact been sent and was not a genuine document, but created after the event. AC said that this memo was sent out with payslips that month to all drivers (as such employees did not have an e mail address). I was satisfied that this was a genuine document and was sent given the contemporaneous evidence of the matter being reported and addressed the same day referred to above.

Discussions with trade union

10.16. Around this time, AC told us that concerns had been raised with him by the trade union recognised by the respondent about the claimant's effectiveness in his role. I was shown a copy of minutes of a meeting held with Unite the Union on 13 August 2019. The respondent was in the midst of pay negotiations at the time and much of the discussion related to those matters. It is noted at page 57:

"There were also concerns about H&S. SB said there was a lack of communication from the H&S manager and members were not happy with his handling of various issues"

I was also shown a copy of an e mail sent on 21 October 2019 (after the claimant's employment had terminated) which raised the issue of health and safety leadership. It stated:

"On another matter, I know we have discussed this previously at our

meetings there appears to be a lack of Health and Safety leadership and general workplace communication across the workforce, I know you have a health and safety manager on site because I met him on one of my visits and tours, however, one of the common complaints Unite received from the membership is it appears Health and Safety issues & the reporting of these doesn't appear to be clear to all, I have absolutely no doubt your Health and Safety manager does a sterling job on the whole but alas the workforce continue to be reporting to me that clear communication & outcomes are not forthcoming to a point where they feel any reporting is pointless. I am fully aware that there can often be a false perception of what activities such as health and safety actually take place however this does appear to be a common issues brought to my attention, I would hope you would look into this for Unite please."

I accepted the evidence of AC that the Unite regional office would not have been aware of the claimant having left at this stage as he was not on site. I was unable to find any support for the claimant's suggestion that the Union were somehow involved in creating false documents to support the respondent's case after the event.

Events of 30 September to 4 October 2019

10.17. On 30 September 2019 the claimant observed on CCTV an incident which took place on 23 September where a driver (Steve) had driven a tug containing steel from Bay 8 which had not been secured and the tug had been driven on a public private road. The images of the incident in question were shown at pages 309-335 of the Additional Bundle. The claimant mentioned this to GH in the Operations office and showed him the images of the incident. The claimant had earlier in the day reported another incident he observed where an employee had jumped off a vehicle in Bay 8 (although this does not form part of this claim). The claimant and AC discussed the earlier incident and it was agreed that the employee in question would be re-inducted.

10.18. On 1 October 2019 during a meeting attended by the claimant AC and GH the claimant says he raised this issue again well as reporting an incident which occurred on 1 September 2019 re grinding without the appropriate eye protection. The respondent says that these matters were not raised at this time and says that the issue about grinding without eye protection was raised by the claimant earlier, on 2 September 2019, when he sent an e mail to AC (shown at page 58). AC said that following this e mail being sent on 2 September 2019 he discussed the matter with the claimant and agreed with him that there was insufficient evidence that the employee was not wearing eye protection as the images from the CCTV only showed him from the rear view. He said he asked the claimant to investigate the matter further with that, T Bradley ("TB"). The respondent pointed to a note of a meeting held on 2 September 2019 between AC, the claimant and a number of others where this was raised where it is noted "*JW to investigate TB eye protect findings. All Pictures are of back of TB"*. I prefer AC's evidence on this matter and find that the claimant raised this issue earlier on 2 September 2019 and not on 1 October 2019 as he recalls.

10.19. On 2 October 2019 the claimant spoke to to GH and AH (and showed them CCTV images) of an incident which occurred on 2 October 2019 where an employee, C Danks had loaded steel on to a tug in Bay 8 which had not been secured and had then driven it on a public private road. The images of this incident were shown at pages 335-338 of the Additional Bundle.

10.20. On 3 October 2019 the claimant sent email to CP and AC regarding an incident which had been reported to him as occurring that day where a driver (C King) had not secured his load and not wearing safety footwear (images of incident shown at pages 339-344 of the Additional Bundle). The claimant's diary entry for this day at page 250 of the Additional Bundle also reflects these events. The claimant said he reported that as a near miss and that he also reported in that same e mail that shortened inductions were being carried out by CP. The claimant told us that this was something that had been raised by GH to AC a day or so earlier and he was addressing this in the e mail as well (and in fact felt this contributed to the decision to dismiss him). The respondent could not trace a copy of that e mail although AC admitted during evidence that he recalls receiving that e mail from the claimant although cannot remember whether it raised anything about shortened inductions.

10.21. The claimant acknowledged that he had made similar reports of information to the respondent throughout his employment. AC told the Tribunal he was grateful to the claimant for making the reports set out above (as it was information he needed to be aware of) and was part of the claimant's job. As a result of these reports being made, the employees in question were subsequently disciplined for their actions. AC explained that the employee involved in the first incident the claimant had reported was not disciplined but just spoken to informally as this took place on 23 September 2019 which was before the memo referred to at para 10.15 above had been sent reminding employees of the issue and that disciplinary action would be taken if there was a failure to secure loads. However as the second two incidents took place after the memo was sent, the respondent believed disciplinary action was appropriate. I was shown a copy of a letter inviting Mr King to a disciplinary hearing at page 63 and a letter inviting Mr Danks to a disciplinary hearing on page 64 relating to the matters raised by the claimant on 2 and 3 October 2019. There was some dispute about those letters as the date of the letters was shown as 3 September 2019 and referred to a disciplinary hearing due to take place for both on 9 September with reference to the incidents having taken place again in September. The respondent checked the date for creation of such documents during the course of the hearing which confirmed that these had been created in fact on 3 October 2019 and suggests that the reference to September throughout the documents was in fact an error (suggesting that these were standard documents used regularly, so the dates shown must have been date from a previous letter sent). A disciplinary hearing took place for Mr Danks on 7 October 2019 and the minutes of this meeting were shown at page 74. Mr Danks was subsequently issued with a final written warning which was shown at page 88. A disciplinary hearing took place for Mr King on 24 October

2019 and the minutes of this meeting were shown at page 86. He was issued with a written warning which was shown at page 87.

10.22. The claimant suggested that the issue with the dates on the invite letters referred to above were proof that all these documents had been created after the event and had been fabricated to show that disciplinary action had been taken when it had not really taken place. I was unable to accept the claimant's suggestion that the respondent had been involved in wholesale fraud in respect of these matters and no disciplinary action had in fact ever taken place. I found it much more plausible that the initial issue with the dates was in fact an administrative error. I was satisfied that the respondent did take the disciplinary action as shown by the correspondence against Mr King and Mr Danks following reports being made by the claimant in early October.

10.23. The respondent issued a further memo to its drivers on 11 November 2019 (after the claimant had left employment) which was shown at page 89. This reminded employees that loads needed to be fully secured and that any failure to follow instructions in this regard would not be tolerated and would be classified as gross misconduct and would result in the "*instant termination*" of employment.

Decision to dismiss

10.24. AC said he had been considering terminating the claimant's employment for some time because of the issues and concerns he had as set out above and that he did not have full confidence in the claimant's abilities to manage health and safety within the steel industry. He referred to the claimant not being "*fit for purpose*" in the role he was employed to do as AC felt he was directing his energies in the wrong direction. He told the Tribunal that this decision was supported by reports being made by Unite that there was a lack of confidence in the claimant in August 2019. He said this was alarming and it was from this point on he decided that the claimant's employment would terminated. AC said he had discussed this with HR and was aware that the claimant was coming up to two year's continuous service with the respondent (having started his employment on 6 November 2017). He said that taking into account the claimant's notice, he was keen to ensure that the claimant did not acquire two year's continuous service which meant it would be more difficult to terminate his employment. AC admitted that the respondent had done this previously with employees as a way of avoiding the need for carrying out a full process.

10.25. The claimant was called to a meeting with AC on 4 October 2019 where AC informed the claimant that his employment would be terminated. The notes of that meeting were shown at page 69. AC started the meeting by stating it was not an easy meeting for either party but that that "*numerous senior managers and employees of the business have expressed a concern about JW's capabilities to perform the role*". AC went on to state that this "*was further confirmed when the Union Representative from Unite the Union had had remarks passed onto him from our employees about JW's ability to perform that role".* AC reiterated

that the claimant was an intelligent person who works well with consultation type work but "*lacks the ability to implement the solutions in the work environment"*. AC went on to inform the claimant that he would be paid a month in lieu of notice (although only 1 week was required contractually). The claimant disputes the authenticity of this note and suggests it was created after the event but I was satisfied that it was a genuine note of the conversation created contemporaneously by AC as it is consistent with the other documentation that existed and what AC says about his conclusions on the claimant's employment. It also is broadly consistent with what the claimant himself recalls AC saying about the meeting in his witness statement. We also saw a diary entry from the claimant for this day (page 250 Additional Bundle) which refers to the meeting and that he was being sacked for "*not fitting in"*.

10.26. AC sent an e mail on 4 October 2019 at 16.05 (although the recipients of this e mail have been redacted so it is unclear who this was sent to) confirming that the claimant's employment had terminated and that he trusted that the recipients "*would all join me in wishing him well for the future"*.

10.27. Following the claimant's dismissal the claimant attended the respondent on 7 October 2019 and it appears that an issue arose at this time as to whether the claimant was authorised to be on the premises and whether he had taken property said to be the respondent's. This matter was not fully explored by the parties and as it happened after the termination of the claimant's employment and so was not relevant to the reason for the claimant's dismissal (which is the issue of relevance in this claim) I have not explored this further.

Appeal

10.28. The claimant appealed against his dismissal in a letter dated 14 October 2019 (page 77) and sent a letter to Mr Brown the respondent's Managing Director (page 76). The claimant contended that his dismissal was automatically unfair and made reference to section 100 of the ERA and made reference to a breach of contract. The appeal letter mentioned that the reasons given by the respondent to the claimant at the time of his dismissal were that he "*didn't fit in*" and that a complaint had been made by a union representative. This letter raised the various issues regarding loading that had been mentioned by the claimant above and asked whether the drivers involved had been disciplined as result of the matters he raised. These letters were responded to in a letter from the respondent's HR adviser on 21 October 2019 (page 84 and 85) which confirmed that the claimant's allegations were disputed and that the claimant would not be offered a right of appeal as the claimant had *"less than 2 years' service*".

10.29. The claimant's dismissal was confirmed in a letter (which is shown as dated 17 October 2019, albeit the version of the letter in the Additional Bundle at page 231 is dated 7 October 2019) from AC (page 82) where it was stated that the claimant had not "*met the standards required to continue in the role*". It also referenced the incident on 7 October 2019.

The letter also provided a reference for the claimant to provide to future employers which was shown at page 232 of the Additional Bundle. This was a positive reference which stated that the claimant had an "*impeccable record in relation to time keeping and absenteeism*" and that he "*went above and beyond in his duties by additionally adopting environmental matters within the business*" . When challenged about this AC stated that he had no intention of stopping the claimant getting employment elsewhere and wanted to "*keep things amicable*" by supplying this reference.

10.30. Since the claimant's dismissal, the respondent has not recruited a health and safety officer but the claimant's responsibilities have been assumed by the existing management team.

10.31. The Tribunal was also shown pictorial evidence of what the claimant says were 11 further breaches of the kind highlighted by the claimant in respect of unsafe loading which were taken after the claimant's employment terminated and took place as late as 6 February 2020 (see page 506 Additional Bundle. The claimant said he came by such images anonymously. AC was taken through a number of those images by Dr Ahmad during cross examination and he acknowledged that a number of the images showed items loaded with no straps securing them, although he said that without further information about where the vehicles in question were moving to and from it was not conclusive that there were any matters of concern (as some movement took place on site that did not cause the risks highlighted by the claimant). He did not accept that this showed that the respondent was showing a blind eye to health and safety breaches. I was not in a position nor was I required to make a finding about whether breaches were shown, but accepted that they appeared to show vehicles with unsecured loads.

The Relevant Law

11. The following provisions of the ERA were relevant:

43A Meaning of "protected disclosure".

In this Act a " protected disclosure " means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B 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).

43C Disclosure to employer or other responsible person.

(1)A qualifying disclosure is made in accordance with this section if the worker makes the disclosure F3 ...—
(a)to his employer, or
(b)where the worker reasonably believes that the relevant failure relates solely or mainly to—
(i)the conduct of a person other than his employer, or
(ii)any other matter for which a person other than his employer has legal responsibility,to that other person.

(2)A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

100. Health and safety cases

(1) 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—
……
(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,
…

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect

himself or other persons from the danger.
…

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them.
…

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.

12. I was referred to a number of authorities on the above provisions by the parties including Chesterton Global Limited v Nurmohamed [2017] IRLR 837; Cavendish Munro Professional Risks Management Limited v Geduld [2010 ICR 325, Kilraine v Wandsworth London Borough Council; Royal Mail Group v Jhuti [2020] IRLR 129. I also considered the case of Oudahar v Esporta Group Ltd [2011] IRLR 739 where the EAT considered the application of s100(1)(e). As the respondent ultimately conceded that the claimant had made protected disclosures and had carried out the health and safety activities relied upon, further and detailed consideration of much of these authorities was not required.

13. The question of the burden of proof in claims under s103A was addressed by the Court of Appeal in Kuzel-v-Roche Products Ltd [2008] IRLR 530 CA.

> *"The employer knows better than anyone else in the world why he dismissed the complainant. Thus, it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.*
>
> *I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some*

evidence of a different reason.

Having heard the evidence of both sides … it will then be for the Employment Tribunal to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences …

The Employment Tribunal must then decide what was the reason or principal reason for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, it is open to the Tribunal to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the Tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.

As it is a matter of fact, the identification of the reason or principal reason turns on the direct evidence and permissible inferences from it. It may be open to the Tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side.

Conclusion

14. Mr Roberts confirmed that the respondent conceded that the claimant had made protected disclosures within the meaning of section 43B ERA when he made the four disclosures relied upon at paragraph 1.1 of the List of Issues above. Firstly it accepts that the disclosures regarding failure to secure loads were made as alleged by the claimant as set out at paragraphs 1.1.1; 1.1.3 and 1.1.4 of the List of Issues above albeit it says that the disclosure at 1.1.2 was made (but made on 2 September 2019, not 1 October 2019). It acknowledges that all such disclosures were qualifying disclosures within the meaning of section 43B because they amounted to a disclosure of information which, in the reasonable belief of the claimant, tended to show that either a criminal offence has been committed, is being committed or is likely to be committed or that the health or safety of any individual has been, is being or is likely to be endangered, within the meaning of s43B ((a) and (d). Other sections of s43B relied upon by the claimant were disputed but given the concessions it was not necessary to consider the matters further. The respondent also acknowledged that the claimant when making the disclosures was acting in the public interest (s 43B (1). As all disclosures were made to his employer, the claimant falls within s43C.

15. Mr Roberts also conceded that when he was making the disclosures above, the claimant was carrying out activities in connection with preventing or reducing risks to health and safety at work having been designated by it to do so and that such disclosures amounted to the claimant taking appropriate steps to protect himself or other persons from circumstances of danger which the employee reasonably believed to be serious and imminent. Therefore the circumstances described in s100 (1) (a) and (d) were made out .

16. The key question is whether the reason or principal reason for the claimant's dismissal was because the claimant had made the disclosures as so alleged (and so dismissal was automatically unfair under either s100 (1)(a) or (d) and/or under s103A of the ERA).

17. Mr Roberts submitted that the fact that the claimant raised the issues relied upon was not the reason for dismissal. He contended that it was the claimant's job to raise issues, and he had been raising similar issues throughout his employment with no evidence produced of any animosity being shown against him by the respondent. He says that the claimant cannot explain what changed with these particular reports that led to his dismissal. He in fact submits that other facts may have led to this including the matter he says was in his 3 October e mail, about shortened inductions (which is not one of the disclosures relied upon) or that he may have been dismissed for chasing AC to respond to e mails. He submits that there is ample evidence in the bundle that the respondent took health and safety seriously, in particular the issue of unsecured loads, which was an ongoing problem in the workplace dating back to 2013. Mr Roberts points out that when an issue of loading was raised by the claimant in July 2018, the claimant was asked to take action to prevent it reoccurring and when he raised in in September 2019, it again took action. He says that when the claimant made the specific disclosures he now relies upon, the respondent took disciplinary action against 2 of the employees involved. He says that the allegations that the respondent has been fraudulent and created documents is not supported by the credible evidence from AC. He submits that the respondent's reasons are entirely credible in that it was concerned that he spent too little time on the shop floor (asserting himself and building relations) and that what started alarm bells ringing, was the matter being raised by the union. He suggests that the contention that Unite were also part of a conspiracy to remove him is ridiculous.

18. He submits that the respondent chose to dismiss the claimant at this time because he was approaching two years' service and that the respondent wanted to "*bite the bullet*" and dismiss before he got to this. He suggests that if the claimant had been dismissed at any point prior to when he was, no doubt he could have found disclosures he had made in previous few days to point to and the reason was that this was his job.

19. Dr Ahmad submitted that the claimant was dismissed for making the disclosures and suggests that the respondent has failed to submit cogent evidence to show the reason for the dismissal was the alleged poor performance of the claimant (which was in fact a sham). He relies on the failure to carry out any investigations, to have mentioned any problems with performance until dismissal or give the claimant a right to appeal as supporting this. He suggests that the evidence given by AC on these matters does not stand up to scrutiny (as AC was evasive and contradictory) and the claimant's evidence that he was never questioned or challenged on his performance was honest, reliable and cogent and is supported by the reference provided by the respondent. It is submitted that the respondent has created a number of documents after the event to prop up its position and that it has failed to disclose key documents and e mails which should lead the

Tribunal to make adverse findings of fact against it.

20. He points out that the Tribunal may be hampered by what he says were the respondent's failure to disclose its health and safety policy and other relevant documents and also finds it surprising that one of the e mails relied upon was not able to be produced and that the respondent denied its existence until we heard from AC who says he did recall such an e mail. He points out that this amounts to concealment in any book is an example of the respondent trying to mislead the Tribunal.

21. He suggests that the respondent has a culture of ignoring serious health and safety issues which is ongoing even after the claimant left the business. He points to examples of clear post termination evidence of 11 occasions where breaches took place and invited me to draw adverse inferences of what he says was a large employer and a lack of action on these matters. He suggested that this showed as a matter of fact, that the respondent culture of non-compliance and turning a blind eye which is important in terms of the motivations of AC in dismissing the claimant.

22. I have considered carefully the submissions of the parties and on balance prefer the submissions of the respondent as to the reason for the claimant's dismissal. I was satisfied that the claimant had consistently raised matters of health and safety during his employment including possible breaches of obligations (see findings of fact at paras 10.4, 10.7, 10.15, 10.17-21) and indeed it was his role to do this (see findings of fact at paras 10.2). There was no evidence at all that the claimant was penalised by the respondent for highlighting issues as they arose. Moreover when the claimant highlighted the issues he relies on as protected disclosures in this particular claim the respondent addressed these (see 10.21). I can find no evidence that reports the claimant made somehow led to or caused adverse action.

23. I was not able to make a finding that the respondent operated a health and safety culture that was somehow lax or where a blind eye was turned to problems. My findings of fact at paras 10.3, 10.4, 10.7, 10.910.15, 10.16, 10.17, 10.18, 10.21 and 10.23 describe various examples of the respondent taking action to address and deal with health and safety risks and breaches that were arising. I was not able to make inferences of the kind suggested by Mr Ahmad by the failure of the respondent to provide a copy of its current health and safety policy or associated documents for these proceedings.

24. I was satisfied that the respondent had some concerns with the way that the claimant was carrying out his role (see paras 10.11 to 10.14). It is disappointing and unhelpful that such concerns were not discussed with the claimant earlier and drawn to his attention which may have assisted him to remain in his role. It was clearly far from ideal that the claimant was dismissed on 4 October 2019, without having the opportunity to have the concerns set out to him, have an opportunity to discuss these and to take steps to improve performance. Had this been a complaint of "ordinary" unfair dismissal under section 98 ERA, these matters would have been very serious matters which would have likely led to the claimant's dismissal being found to be unfair and a breach of the ACAS Code of Conduct.

25. Which leads me to the other matter which persuades me that the claimant was not dismissed for making the disclosures referred to and that is the clear evidence from AC that he dismissed the claimant to avoid him reaching two years' service and so acquiring additional rights and that so a formal process could be avoided. This is an unattractive argument to run in the Employment Tribunal, and does not show the respondent in a positive light. Nonetheless it does explain why the respondent was perhaps in a hurry to dismiss the claimant at the time it did.

26. I was also persuaded that AC's decision on this matter crystallised once concerns started to be shared with him by the respondent's recognised trade union (see para 10.16 above). This again explain why matters were coming to a head in September/October 2019 after these concerns had been shared.

27. There did seem to be errors in the documents provided by the respondent and it was puzzling that there were unable to find all the documents the claimant says were in existence. Ultimately these matters did not prove crucial as the issues behind these had already been conceded. I do not conclude as the claimant asks me to that there was some form of fraud or subterfuge in the creation of false documents and hiding relevant ones. Rather it appears that there various administrative errors that caused the confusion. All the disputed documents I found to be genuine on the basis that there were contemporaneous with other facts and evidence (see paras 10.5, 10.15, 10.16, 10.22 and 10.25).

28. I conclude that the respondent has shown the reason for dismissal was as it contended and that the claimant has not been able to challenge this sufficiently to show it was not genuine. The claimant was not dismissed for the reason (or if more than one the principal reason) that he made protected disclosures under section 43A of the ERA or for carrying out activities in connection with preventing or reducing risks to health and safety at work having been designated to do so and/or taking appropriate steps to protect himself or other persons from circumstances of danger which he reasonably believed to be serious and imminent under section 100 ERA. The claim is therefore dismissed.

Employment Judge Flood
16 July 2021