**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4113572/2019**

**Final Hearing held remotely on 6 – 10 September 2021**

**Employment Judge A Kemp**
**Tribunal Member N Elliot**
**Tribunal Member S Singh**

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| **Mr S Cusick** | **Claimant**<br>**In person** |
| **Alba Orbital Limited** | **Respondent**<br>**Represented by:**<br>**Mr W Lane**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**The unanimous Judgment of the Tribunal is that the Claim does not succeed and is dismissed.**

**REASONS**

**Introduction**

1. This Final Hearing took place remotely by Cloud Video Platform in accordance with the orders given at a Preliminary Hearing. It was conducted successfully.

2. There have been a number of previous Preliminary Hearings, with the most recent on 31 March 2021. After that a Final Hearing that had been fixed was discharged and the present Final Hearing arranged in its place.

3. The claim is one for automatically unfair dismissal under section 103A of the Employment Rights Act 1996, and for detriment under section 47B of that Act. At the commencement of the hearing the Judge proposed the following issues were those before the Tribunal, with which the parties agreed –

(i) Did the claimant make a qualifying disclosure to the respondent under section 43B of the Employment Rights Act 1996 and in particular did he have a reasonable belief that the information tended to show that (i) a relevant offence or failure had occurred and (ii) that the disclosure was made in the public interest?

(ii) Was the reason or principal reason for the claimant's dismissal the making of that disclosure under section 103A of the Employment Rights Act 1996?

(iii) Did the claimant suffer any detriment for having made such disclosures under section 47B of the Employment Rights Act 1996?

(iv) If the claimant succeeds to what remedy is he entitled, and in that regard

(a) What losses has he or will he suffer?

(b) Did he contribute to his dismissal?

(c) Would there have been a fair dismissal in any event?

(d) Should any award be reduced if it is held that the claimant did not make the disclosure in good faith?

(e) Has the claimant mitigated his losses?

(f) What is the appropriate award for injury to feelings?

4. Before the commencement of the evidence the Judge explained to the claimant, who represented himself and had not conducted a Tribunal hearing before, how that would take place. He explained the need to give all the evidence he wished to on the merits of the claim and on remedy, not leading in examination in chief of his own witnesses, about cross examination of witnesses on evidence that was challenged, or where they

knew or ought to have known of a matter that was relevant, and about re-examination. He also commented that any relevant document should be referred to in the evidence and would not be read unless it was. He then addressed the issue of submissions.

**The Evidence**

5. The claimant gave evidence himself and called three witnesses being Andrew Paliwoda, Ian Sheerer and Andrew Dunn. The witnesses for the respondent were Tom Walkinshaw, Irene Shanks and Constantine Constantinides.

6. There were directions given in the Preliminary Hearing Note of 31 March 2021, and there had been earlier comments in the Note following the hearing on 26 June 2020. Unfortunately although the respondent had prepared a single Inventory of documents the claimant had not kept to the timetable in the Note, and had prepared his own documents which were sent electronically on 1 September 2021. They were in a number of separate files. The two sets of documents were spoken to in evidence, but not all of the documents produced were referred to.

7. The Tribunal gave the claimant considerable latitude in his cross examination. Towards the end of the evidence of Mr Walkinshaw a time period was intimated to the claimant, which he exceeded, but the cross examination was concluded thereafter. The Tribunal was satisfied that the hearing had been conducted fairly and in accordance with the overriding objective.

**The Facts**

8. The Tribunal found the following facts, material to the issues, to have been established:

9. The claimant is Sean Cusick.

10. The respondent is Alba Orbital Limited. It is a company incorporated under the Companies Acts. It is a manufacturer of miniature satellites, also known as pico-satellites or “PocketQubes”, and devices designed to

deploy them in orbit after launch on a rocket known as a deployer, and related products and services. It manufactures satellites under the Unicorn brand name, and also provides facilities both for launch, and ground services involving the tracking of satellites. It has about 12 employees, and is generally reliant on grant income from governments and government agencies. It was incorporated in 2012 by Mr Tom Walkinshaw who is the shareholder of all its shares, and the sole director. It was his first venture after University.

11. The claimant commenced employment with the respondent as Head of Business Development on 25 August 2018. His role was to promote the company and its products, and to seek new sources of income.

12. There was no formal written contract of employment concluded between the claimant and respondent. The respondent had, through Mr Paliwoda, drafted a Handbook, which the claimant had reviewed. It had then been released to staff and was being used, although it had not fully been completed. It had provisions with regard to conflict of interest, and confidential information, inter alia.

13. In October 2018 Mr Andrew Dunn left the employment of the respondent. At the time he did so he was in a form of dispute with Mr Walkinshaw on matters related to the company, particularly in relation to the development of a deployer known as the Alba Pod 6P, which Mr Walkinshaw thought Mr Dunn was “cloning”, in the sense of creating a replica, in competition with the respondent.

14. After leaving the respondent Mr Dunn moved to the Netherlands for a new role. No formal legal action was taken against Mr Dunn in relation to Mr Walkinshaw’s belief.

15. In about February 2019 the respondent wished to apply for a grant for a certificate as to cyber security after the account of the managing director and major shareholder Tom Walkinshaw was compromised. That involved the instruction of an auditor to review the procedures and systems in place. If the required steps were then taken Scottish Enterprise would refund the cost of the auditor for that work, in a sum of about £550. An

auditor attended at the respondent and ascertained that its cloud based storage was on a standard Google platform such that firstly it was open to anyone to access and secondly the intellectual property rights (IPR) in its designs and other related elements were or could be retained by Google. It was possible to have an alternative platform called Google Enterprise which would provide security and retention of IPR for the respondent. It was necessary to obtain Google Enterprise to secure the certificate. Mr Walkinshaw told the claimant and a colleague Andrew Paliwoda to "fudge" that issue, which they took to be in effect to pretend that Google Enterprise had been acquired, to access the grant. Both of them refused to do so.

16. No application for that grant was latterly made by the respondent, which did not obtain Google Enterprise or a similar facility and did not therefore obtain the cyber security certificate. The claimant was unhappy about that situation as he considered it to be detrimental to the company, and that it may jeopardise any contracts with organisations which required that cyber security certificate.

17. At around the same period the respondent sought a grant from the European Space Agency (ESA) to develop a deployer for miniature satellites. The grant required a budget to be set out which set out to some extent how the sums would be utilised. The grant was for 550,000 euros, of which the respondent would provide 140,000 euros of its own funding. Of the ESA grant about 8,000 euros were to improve the IT hardware and software, with about 6,000 euros of that for laptops and similar devices for staff and the balance of 2,000 euros for software which included Google Enterprise. The cost of Google Enterprise for the staff of the respondent who would use it was very roughly £1,000 per annum.

18. The claimant did not know when the grant monies from ESA had been, or would be, received. In fact they were received in September 2019.

19. Google Enterprise was not acquired by the respondent during the period from about February 2019 onwards. The claimant was unhappy at that, and that he had not been provided with the facilities that he considered were needed to do his work, including laptops. He complained about that

to Mr Walkinshaw from time to time in the period between from about February 2019 to June 2019. Mr Walkinshaw did not consider that it was necessary to make such purchases.

20. The respondent was also in 2019 developing further the 6P deployer in a revised format, and another deployer called the Alba Pod 96P. Each deployer uses a unit of measurement known as a “p”, which equates to 5cm cubed, and the numbers 6 and 96 indicate the capacity of each deployer. Each can hold a single satellite of appropriate size or in the case of the P6 up to 6 which are 5cm cubed, and in the case of the P96 up to 96, or a combination of larger sizes up to their maximum capacity. It changed the construction of its 6P deployer from aluminium to a carbon composite.

21. The respondent considers its deployers to be trade secrets, and does not have patent protection for either of them. It released to social media during the first half of 2019 some images of part of the 96P deployer, being door mechanisms, but not of the whole deployer.

22. The claimant is a director of a company limited by guarantee called Space Up Glasgow Ltd. It was incorporated in June 2019. It was established to be operated not for profit. It is part of a global organisation called “Space Up” that encourages interest in space issues, and is run on a not for profit basis. At the time the other director was Mr Andrew Paliwoda, who was the respondent’s Head of Launch.

23. That company set up an event in Glasgow to be held on Saturday 6 July 2019 (“the event”) at which delegates were both invited to attend and make a presentation. The basis of the event, which was a standard for all Space Up events globally, was that all delegates made a presentation rather than having one made to them by a presenter there for that purpose. The claimant was materially involved in the preparations for that event. He used his email address at the respondents, in part, for doing so.

24. Mr Walkinshaw had been requested to sponsor the event by Mr Paliwoda, but did not wish to do so.

25. The claimant referred to the event at an all hands (meaning all staff) meeting of the respondent held towards the end of June 2019. Mr Walkinshaw said something to the effect of good luck with the event, but had not accepted an invitation to attend it.

26. One of those who had booked to attend the event was Mr Andrew Dunn, who had done so about two weeks beforehand, as the claimant was aware from about two weeks before the event was due to take place.

27. Mr Dunn was in the course of creating in his own time an open source deployer, which he called a Claymore, that could be used to launch miniature satellites into space. As open source, once completed it could be obtained free of charge by anyone and used for that purpose. As at July 2019 it was in the course of development by him. He did not consider it to be a clone of the Alba Pod 6P, as he was making modifications to the design which he had been instrumental in making when an employee of the respondent. It was very similar in size to the Alba Pod 6P.

28. Mr Dunn had come to Glasgow for a family funeral shortly before the event, and he attended a café near the respondent's premises on Friday 5 July 2019 where many staff of the respondent usually had lunch, to speak with any former colleagues who would be present. He knew that Mr Walkinshaw did not attend that café, and assumed that he would not meet him accordingly. His attendance had not been notified to anyone in advance and caused a degree of awkwardness for some of those present in light of the dispute with Mr Walkinshaw earlier. The claimant was present, as was Mr Paliwoda and some others. One of those present was Mr Constantine Constantinides of the respondent who was concerned at Mr Dunn's presence and what he said about attending the Space Up event the following day. He informed Ms Shanks of that, and then Mr Walkinshaw, on his return to the office. Mr Walkinshaw and Mr Constantinides conferred with Ms Shanks, the respondent's Head of Finance. They were all concerned that Mr Dunn had been speaking to staff, and understood from what Mr Constantinides reported that Mr Dunn was to make some form of presentation at the event to be held on 6 July 2019. They decided to await developments.

29. The event took place on 6 July 2019. Before it commenced that day, Mr Paliwoda took from the respondent's office the prototype Alba Pod 96P. He had not obtained Mr Walkinshaw's permission to do so, believing that that was not required. The claimant was aware by the time the event commenced that the respondent's deployer was to be present, and considered that to be helpful to the event. About twenty people attended the event.

30. During the event Mr Dunn made a presentation about his deployer. Mr Paliwoda also gave a presentation. The claimant did not do so as he stayed in a separate location to greet any late-comers. Whilst the Claymore device and Alba Pod 6P are similar in size, and have some similarities in design, the former is not an exact copy of the latter.

31. During the day Mr Walkinshaw was contacted by some of those present asking why he had not been at the event, as they had thought that it was an event run by the respondent. Mr Walkinshaw was concerned at learning that.

32. After the event images of it were released on social media. They showed Mr Dunn demonstrating his Claymore deployer, and a powerpoint or similar presentation he was giving shown on those images which indicated that he was intending to launch it in the six month period up to 31 March 2020. The images also showed the Alba Pod 96P, which had the respondent's logo on it. Mr Walkinshaw was very concerned at that. He found that the Alba Pod 96P deployer had been returned later on 6 July 2019 to the respondent's office, but was particularly concerned that he had not been asked to give permission for that. He was also particularly concerned that Mr Dunn had been making a presentation of his Claymore deployer, which he believed was or would be in competition with the respondent's Alba Pod 6P deployer, and had been cloned from it.

33. On 8 July 2019 the clamant was called to a meeting with Mr Walkinshaw, Mr Constantinides, Ms Shanks and Mr Paliwoda. Mr Walkinshaw told the clamant and Mr Paliwoda that they were suspended due to an investigation into activities they had carried out which were detrimental to the business of the respondent. Although not specified those activities

were related to the event. The claimant was handed a letter as to his suspension, which was not before the Tribunal. The decision to suspend the claimant was made by Mr Walkinshaw.

34. The respondent's staff were informed that the claimant and Mr Paliwoda had been suspended. They were told that there was to be an investigation. Mr Walkinshaw indicated something to the effect that he felt betrayed by them in what had happened.

35. The respondent instructed an external HR consultant to conduct an investigation. The claimant was required to attend a meeting by letter of 16 July 2019, and the meeting took place the following day. It was conducted by Ms Victoria Hart. A minute of that meeting is a reasonably accurate record of it. Ms Hart also interviewed Mr Walkinshaw and Mr Constantinides, and prepared a report with her findings, which included minutes of those meetings and some supporting documents. The minute of the meeting with Mr Walkinshaw indicated that he had lost trust and confidence in the claimant. She recommended that the claimant be called to a disciplinary hearing for a number of allegations which if upheld may amount to gross misconduct, leading to dismissal.

36. She also recommended that on the same date grievance issues the claimant had raised in her meeting with him be addressed at a hearing.

37. Ms Shanks was aware that payslips were sent to employees' email accounts at the respondent, and that as the claimant had been suspended he would not have access to his email account. She asked the payroll provider to send his payslip to her to pass on to him in late July 2019. When she received it, she noticed that there was no pension deduction for him. She called the payroll provider to ask about that, and was told that they had understood that the claimant was under 22. She informed them that that was not the case, and she believed that the respondent required to auto-enrol the claimant into pension. She instructed the payroll provider to do so. In late July 2019 the respondent's payroll provider, without the claimant's knowledge or consent, deducted sums for pension such that his salary was £438.62 less than it ought to have been. The claimant objected to that, and raised the issue with the Pensions Ombudsman. He

was told that what had happened was wrong, as an employee should not be placed in financial stress, and he informed the respondent which refunded the deduction in full in the August 2019 salary.

38. By letters dated 12 August 2019 the claimant was informed of a grievance hearing, then a disciplinary hearing, each to be held on 21 August 2019. The letter with regard to the disciplinary hearing set out five disciplinary charges, and attached the investigation report, emails and the respondent's disciplinary procedure. The letter was from Tom Walkinshaw, and stated that the meeting would be conducted by Irene Shanks.

39. A grievance meeting took place on 21 August 2019 at 10am before Ms Shanks, who had Mr Andrew Thomas present as a note taker. The claimant was accompanied by his colleague Ian Sheerer. A minute of that meeting is a reasonably accurate record of it.

40. A disciplinary meeting took place on 21 August 219 at 1.30pm with the same attendees. A minute of that meeting is a reasonably accurate record of it. During the course of the meeting the claimant denied any wrongdoing and produced documentation to seek to support his position.

41. Ms Shanks conferred with Mr Constantinides and an engineer named Mr Martin Dunn to ask them about the Claymore deployer. They informed her that in their view it was in effect a clone of the Alba Pod 6P.

42. Ms Shanks wrote to the claimant by letter dated 28 August 2019, dismissing him summarily. She had "decided that your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship…..". She did so as she did not accept his explanations in relation to the event. She considered that his involvement in it, the presentation made by Mr Dunn of his device, the involvement of two members of staff of the respondent being the claimant and Mr Paliwoda, and the circumstances overall meant that he had created risk of damage to the respondent, and that that merited summary dismissal. She took into account the evidence he had submitted to her,

but considered that there was other evidence that indicated that he had acted as alleged. She took into account what Mr Walkinshaw told her that some of those present believed it was a respondent's event, what she had been told about the Claymore deployer, the involvement of Mr Dunn in the event and her belief that he was or could be a competitor to the company, and she believed that there had been a conflict of interest between the claimant as an employee of the respondent, and in relation to the Space Up event. She considered that that amounted to gross misconduct and led to summary dismissal.

43. Mr Paliwoda was also dismissed on essentially the same basis.

44. The claimant appealed the decision to dismiss him by letter dated 30 August 2019. He did not receive a reply and sent a further letter of appeal on 9 September 2019.

45. The claimant commenced early conciliation on 15 September 2019.

46. On 26 September 2019 the respondent sent an acknowledgement of the appeal.

47. The Early Conciliation Certificate was issued on 28 October 2019.

48. The Claim Form by the claimant was presented to the Tribunal on 28 November 2019.

49. On 9 January 2020 the respondent posted a letter to the claimant purporting to be dated 20 December 2019 inviting him to an appeal hearing on 30 January 2020. A further letter was sent to the claimant on 17 January 2020. The claimant did not reply to either.

50. The claimant did not attend the appeal hearing on 30 January 2020.

51. The claimant had net income per month of £1,769.07 when employed by the respondent. He did not have pension provision as he objected to that as referred to above.

52. The claimant had not had mental health issues before his suspension, but consulted his General Practitioner after it because of what he considered

to be depression. The claimant was referred by his General Practitioner for cognitive behaviour therapy for depression after he was suspended. That therapy lasted about three months. The claimant was assessed on 27 September 2019 by his GP as unfit for work because of depression, and another assessment was made similarly for a period of two months in November 2019. The claimant attended his General Practitioner about every three months. He was offered medication for depression, but declined it (details of the medication offered were not given in evidence).

53. The claimant received Universal Credit for a period after his dismissal. He also worked in two consultancies on zero hours contracts, and earned from those consultancies a total of £2,264 net in the period from dismissal to September 2021. He further received two Covid grants in that period totalling £6,000. He continues to seek employment or work as a consultant. He last worked as a consultant in about July 2021.

**Claimant's submission**

54. The claimant helpfully produced a written submission, which he supplemented orally, and the following is a basic summary only. The claimant argued that he had made protected disclosures, with that having been witnessed, that he had suffered detriment for doing so firstly in relation to the suspension for which no reasons had been given to him, and secondly in relation to the pension arrangements. He also argued that he had been dismissed for having made those protected disclosures. He said that Ms Shanks had ignored his exonerating evidence. None of the allegations were valid, and it followed that the reason for the dismissal was his having made protected disclosures. His grievance had been heard before the disciplinary procedure, but was not followed up. There was no evidence of Ms Shanks considering it, and no evidence of any outcome of it. His appeals had been ignored for about a month, and only after the respondent became aware of the claim did it address the appeals. He said that the respondent had broken the law in relation to pension, and made deductions from his pay in circumstances where the Pensions Regulator had said that employees should not be put under financial stress. He said

that the detriments included a change of attitude by Mr Walkinshaw and being refused access to make a presentation to customers.

55. The respondent's evidence overall he argued had been inconsistent and contradictory and should not be accepted. His mental health had suffered from the dismissal, as he had no idea what was happening or why, and he had lost sums financially. He sought a finding in his favour.

**Respondent's submission**

56. Mr Lane for the respondent also helpfully produced a written submission, which he supplemented orally, and the following is a basic summary only. He argued that the claimant had not established that he had made protected disclosures. He argued that there was no reasonable belief that there had been any matter that fell within the statutory definition, or that there was a reasonable belief as to the public interest. As the statutory definition was not engaged, the disclosures alleged were not protected. He argued that the reason for dismissal or any detriment was not such disclosures, but the views held by the respondent that Mr Dunn was a competitor, with a product cloned from one created whilst at the respondent, and that the Limited Company which the claimant and Mr Paliwoda had incorporated was also capable of competing. The detriments pled were those related to suspension and the pension deduction. There was a reason for suspension related to the acts of the claimant. The pension matter had been explained by Ms Shanks, and had been remedied within a month. He sought the dismissal of the Claim. In so far as remedy was concerned he argued that there was a dearth of medical evidence, and the lack of evidence meant that the claimant had not mitigated his losses from January 2020 onwards. When asked by the Judge if he wished to comment about the failure to deal with the grievance, he argued that the respondent's position was that there was not disclosure and no merit behind the grievance. He argued that in an ideal world, or where the claimant had two years' service, the outcome would have been provided but the claimant with less than that service had limited recourse to the lack of grievance outcome, and that did not justify the inference that a disclosure had been made or was the principal reason for the dismissal.

**The law**

57. The relevant section of the Employment Rights Act 1996 are as follows**:**

> **"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.
> **Section 47B**
> **Section 103A Protected disclosures**
> 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 his dismissal is that the employee made a protected disclosure."

58. The words 'in the public interest' in s 43B(1) were introduced by amendment with effect from June 2013. In ***Chesterton Global Ltd v Nurmohamed [2018] ICR 731,*** the Court of Appeal held that the question for the tribunal was whether the worker believed, at the time he was

making it, that the disclosure was in the public interest; whether, if so, that belief was reasonable; and that, while the worker must have a genuine and reasonable belief that a disclosure is in the public interest, this does not have to be his or her predominant motivation in making it. Lord Justice Underhill in a later Court of Appeal case, ***Chesterton Global Ltd and another v Nurmohamed [2017] ICR 731*** commented on the issue of what was meant by "in the public interest" –

> "Parliament has chosen not to define it, and the intention must have been to leave it to employment tribunals to apply it as a matter of educated impression."

59. The issue of what amounts to a 'disclosure of information', was addressed in ***Kilraine v Wandsworth London Borough Council [2018] ICR 1850***, in which it was confirmed that there was no rigid distinction between information and allegations, and that the full context required to be considered. What was necessary was the disclosure of sufficient information.

60. The question of the reason or principal reason for dismissal in such a claim was addressed in ***Eiger Securities LLP V Korshunova 2017 IRLR 115.*** The test is not the same as for detriment, or in discrimination law, but to apply the statutory language and ascertain the reason or principal reason for the dismissal

61. In ***Abernethy v Mott Hay and Anderson [1974] ICR 323***, the following guidance on what the reason for a decision to dismiss means was given by Lord Justice Cairns:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

62. These words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins [1977] AC 931***. In ***Beatt v Croydon Health Services NHS Trust [2017] IRLR 748,*** Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated

that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision.

63. The law in this area was reviewed by the EAT in ***Watson v Hilary Meredith Solicitors UKEAT/0090/20.*** A Tribunal must be careful that arguments as to the reason or principal reason for dismissal being other than for making any protected disclosures are not abused.

64. The Tribunal must also be alive to the possibility of a procedure being manipulated so as to cause a dismissal by someone ignorant of all material facts***, Royal Mail Group v Jhuti [2020] IRLR 129***.

**Observations on the evidence**

65. The claimant gave detailed evidence on what he considered had happened. He described the allegations against him as “hogwash”. He could not believe that he had done anything wrong, and therefore that the reason for the dismissal was the earlier disclosures he claimed to have made. The Tribunal considered that there was a certain naivety on the part of both the claimant (and for other reasons, Mr Walkinshaw). For reasons we shall come to, the Tribunal considered that the claimant’s characterisation of the allegations against him and his complete failure to understand that he might have done anything wrong showed that he did not appreciate the context of a commercial organisation. His reference to the deployer as a “box with a hinge” was also unduly simplistic. It was clear that he had had a number of disagreements with Mr Walkinshaw on the day to day running of the company. There may have been a basis for the claimant to believe that wrong decisions were made, but they were for Mr Walkinshaw, whose company this was. The claimant had strong views on matters, but not all of them we considered to be reasonably based. More significantly however he did not see that there was any potential difficulty for his employer with the Space Up event. It was however obvious, to the Tribunal, that there were material difficulties.

66. The claimant did not appreciate that having Mr Dunn present at it was liable to be a problem for the respondent, but to that must be added the

facts firstly that he and Mr Paliwoda organised it, secondly that some emails about it were sent from the respondent's email account by the claimant, and thirdly, and most significantly, that Mr Paliwoda took to it with the claimant's knowledge and approval the 96P deployer, which was a product being developed by the respondent. This all meant that it was at least capable of being perceived as an event that created a conflict of interest between the Space Up Glasgow Ltd company the claimant and his colleague had incorporated, and the claimant's duties as an employee of the respondent. It was not an event at which the role of the respondent was entirely missing, as the claimant sought to argue in his evidence.

67. The claimant argued that the Alba Pod 96P had been shown by the respondent on social media, such that doing so at the event was not an issue. What had been earlier shown however from the evidence presented to us was not the completed deployer, but the door mechanism. That is only a part of it. That of itself is not the same as providing details of the full deployer. Whilst the respondent's understanding as to intellectual property rights and related matters may not be comprehensive, it was entitled to be concerned that their deployer had been shown at an event, and released on social media, as well as the involvement of Mr Dunn at it.

68. The claimant's witnesses gave evidence to support him, particularly Mr Paliwoda. He had also been dismissed. Mr Paliwoda did not consider that there had been anything done that was wrong, which we deal with below. Mr Andrew Dunn described why he thought his deployer was not the same as the Alba Pod 6P, and his point that if it was a clone it would have been completed very quickly was, we considered, a good one. But there were at least some similarities between them, and the issues we have focus on whether the respondent's purported belief that there had been gross misconduct by the claimant was genuine. Mr Sheerer gave evidence which included the disciplinary hearing he attended as a companion, and matters of background.

69. Mr Walkinshaw had founded the respondent, and managed its development thereafter. His knowledge of some commercial and employment law aspects was, the Tribunal considered, rather limited. He

appeared for example to consider that handing an employee a draft contract, with parts that were either missing or obviously required completion, let alone the possibility of more general revisal, was sufficient. He said in evidence that it had been emailed to the claimant but that email was not produced and the issue had not been put to the claimant in cross examination. Ms Shanks accepted that the contract produced was not valid. She was right to do so, and we did not accept Mr Walkinshaw's evidence on that point. We did require to take into account that the business of the respondent is at the cutting edge of the space industry in its own field, that Mr Walkinshaw established the respondent after graduating, and described himself as a self-taught engineer. The claimant's establishing of Space Up Glasgow Limited was not we considered what Mr Walkinshaw thought it was. It was not for profit, as was clear from the documentation on Companies House Mr Walkinshaw saw, but he did not appreciate that. Mr Walkinshaw's belief that Mr Dunn was cloning the Alba Pod 6P deployer was genuinely held. We consider that view simplistic. It was not a clone, in the sense of an exact copy, but it did have material similarities. It had largely been designed by Mr Dunn when an employee of the respondent, such that Mr Dunn knew exactly how it was worked. Mr Walkinshaw's view was, we considered, a genuine one, and he did have the view that Mr Dunn was a competitor, or potential competitor, with support in that from Mr Constantinides. He did feel betrayed when he learned what had happened at the event, the use of the 96P deployer without his permission, and the presentation by Mr Dunn. His word in evidence was that this was a "mutiny" by the claimant and Mr Paliwoda, which at least reveals the extent of his reaction to it.

70. We also have to consider that the respondent is owned entirely by Mr Walkinshaw, such that he is the sole director, CEO and 100% shareholder. In simple terms it is his company and he accepted that he was the controlling mind of it. We considered it clear that when he discovered the details of the event he did feel betrayed, was extremely annoyed to put it lightly, and considered that the claimant and Mr Paliwoda could not continue in employment. That was in effect made clear in the investigation meeting with Ms Hart when he said "It makes me feel that I

cannot trust Andrew and Sean [referring to the claimant] if they think that this is acceptable behaviour. I think if you are plotting with a rival to the company…..led me to take the decision to proceed with the investigat[ion]…" His views were reasonably clear, and we required to consider whether in reality he took the decision to dismiss or whether Ms Shanks did so.

71. That in turn required us to consider carefully the evidence of Ms Shanks. We were, subject to one qualification, impressed by her as a witness. She was clear and candid. She accepted matters where that was appropriate, such as that there was no written contract of employment for the claimant. She explained the basis on which she had decided that the claimant had acted as alleged. She came, we considered, to her own view on the position independently of that of Mr Walkinshaw. She has been in business for 25 years, and although not experienced in disciplinary or grievance matters has some knowledge of running businesses. She spoke about the claimant's attitude towards Mr Walkinshaw and how he was on occasion disparaging towards him, which she felt was unfair. What struck us in assessing her evidence is that she had a basis in the material before her to come to the conclusion she did. The claimant argued for example that there was nothing to base a decision that the Space Up event had been "masked" as one by the respondent. But there was a basis for that belief, including that Mr Walkinshaw had been contacted during the event to ask why he was not there, as there was a belief that it was a respondent event. That some of those attending could think that is understandable given that two of the respondent's staff had organised it, the Alba Pod 96P had been displayed at it, and some emails had come from the respondent's email account from the claimant himself. Whilst others clearly considered it not to be, as shown in two emails the claimant produced to Ms Shanks, those emails are not conclusive and she was at the very least able to consider all of the material and not just what the claimant provided. She did consider his evidence, but did not consider it sufficient and there was a proper basis in the evidence for her to do so.

72. The claimant also argued that the taking of the deployer to the event had not been anything to do with him. She did not believe him. Her evidence

to us was that he had said to her that he had met Mr Paliwoda outside the office on 6 July 2019 when Mr Paliwoda had the deployer with him. That did not appear to have been recorded in the minutes, but it was clear from those minutes that the claimant had told her that taking the deployer was in effect a good idea. It appeared to us that she was able to infer from that remark that he had at the least known of it being done at the time, and that he had therefore participated to an extent in it being used without consent. The claimant argued that consent was not required. The issue for us however is a different one, being whether Ms Shanks genuinely believed that it was, or whether the reason for dismissal is not genuine and seeks to mask the true reason which is the alleged protected disclosures. We considered that her evidence on that should generally be accepted.

73. We were also satisfied that she took her own decision independent of Mr Walkinshaw. That was exemplified by her asking Mr Constantinides and Mr Martin Dunn, being those with technical knowledge, whether the Claymore was a “clone” of the Alba Pod 6P. She said that they told her that it was, and Mr Constantinides confirmed that in his evidence to us, as noted below.

74. The qualification referred to is that although there was a grievance hearing before her held before the disciplinary hearing on 21 August 2019 there was no record before us of her having made any decision about it. No decision letter was produced by the respondent. The respondent had pled that there was a response sent, but the date of that given was 28 December 2019. Even if such a letter had been sent, Ms Shanks was not able to explain satisfactorily to us why it had taken four months after her decision letter on the dismissal to send it. This was a serious omission from normal practice, and a troubling omission. It gave the strong impression that the grievance he raised was largely if not wholly disregarded. We concluded however that it was not evidence from which we should infer that the real reason for dismissal was the making of any protected disclosures, as we shall come to.

75. Separately we considered that the explanation she gave for the pension deduction was credible and reliable. It was not a form of reaction to any

disclosures, but her view as to what needed to be done to correct a mistake by the payroll provider. It was not handled as it should have been, but it was a genuine error and not one from which the inference of unlawful conduct should be drawn.

76. Mr Constantinides was an impressively straightforward, candid, witness who the Tribunal considered to be credible and reliable entirely. He was asked very few questions in examination in chief, but many in cross examination. Unfortunately for the claimant nearly every answer he gave did not assist his claim. Mr Constantinides confirmed his belief that Mr Andrew Dunn was a competitor, indeed a serious one, that the Claymore was in his view a “clone” to all intents and purposes of the Alba Pod 6P, and that he was not at all surprised when the claimant was dismissed. He confirmed that Ms Shanks had asked his opinion on whether the Claymore was such a clone.

**Discussion**

77. The first issue is whether the claimant made protected disclosures. We concluded on balance that he had not. Whilst we concluded that there may well have been a comment to “fudge” matters in a grant application to Scottish Enterprise, and in relation to the failure as the claimant believed it to abide by the budget submitted to ESA, these were not sufficient matters to meet the statutory test. The claimant said that he believed those issues to be potentially fraudulent, but the basis on which he did so was at the least unclear, and we did not consider it reasonable in all the circumstances.

78. The respondent did not in fact apply for the grant from Scottish Enterprise as it did not carry out the changes suggested. The claimant disagreed with that, but that was not a decision for him. It could not be possibly within the statutory term that there may be IPR limitations or losses by not using Google Enterprise. The claimant also suggested that not all those who had been budgeted to work on the ESA contract did so, but no details were given, Mr Walkinshaw denied it, and the project was an ongoing one such that further work was to be done on it. We did not consider that the claimant had proved that aspect. On the ESA grant itself the claimant did

not know if, or when, the funds had been received by the respondent. The claimant's allegations could not have any potential merit unless the funds had been received. Mr Walkinshaw said that they were received in September 2019, which we accepted. We did not regard the claimant's evidence as adequate in this regard, or that he had proved that his belief, if he had such in this regard, was a reasonable one. He did not have full knowledge of the circumstances of the grant. The grant application itself, and related documentation including the award and payment of it, were not before us. The claimant thought that the application was for 550,000 euros, but we accepted Mr Walkinshaw's evidence that of that total the respondent itself required to contribute 140,000 euros. We considered that the claimant's knowledge was limited, and his evidence affected by the strength of his beliefs that he had been treated unlawfully.

79. In any event we did not accept his evidence, given very briefly, that it was in the public interest to raise them as they involved public funds. The level of the allegations he made was comparatively low, at £550 for the first matter and either about £2,000 or £8,000 for the second if fully engaged, which he had not proved. Whilst those levels may attract interest from the providers concerned, they are not such as to attract the general public interest, as the statute refers to. It is not defined, and is a matter for the Tribunal's educated impression. ESA is only partly funded by the UK taxpayer. These are, we concluded, private not public matters, the claimant did not have a reasonable belief that they were in public interest and we concluded that the claimant had not met the statutory test in this regard.

80. Lest however we be wrong in that, we addressed the second and third issues separately.

81. The second issue is what the making of those disclosures was the reason, or principal reason, for dismissal. It is not a question of the fairness of the decision, as the claimant does not have the service to claim under section 94 of the Act. It is also not a question of whether or not the claimant did commit an act of gross misconduct, or whether the allegations were proved on the balance of probabilities. The issue is rather whether the

respondent's alleged reason for dismissal was a genuine one, or was in effect a smokescreen to hide the true reason of the protected disclosure.

82. Matters therefore depended to a material extent on our assessment of the evidence of the decision maker Ms Shanks. Matters were not handled as effectively as they could have been, there was a lack of full understanding of the background for example that the claimant's company was one limited by guarantee, but we were satisfied that the decision was taken by her, that her views that there had been a conflict of interest were genuinely held, and that those views led her to dismiss. We did not consider that the protected disclosures earlier made played any part in her decision.

83. That conclusion was fortified by the fact that the claimant was suspended on the next working day after the event, that there was an investigation by an external person which recommended disciplinary proceedings, and that Ms Shanks stated in her dismissal letter that she did not accept the claimant's arguments. We consider it clear that she did engage with them, and consider them. We also consider it clear, and indeed important, that she conducted her own investigation, and spoke to Mr Constantinides as he confirmed to ask about the Claymore and its similarity (to use a neutral term) to the Alba Pod 6P. That she did so is we concluded clear evidence of her own investigation, and that that conversation with Mr Constantinides would not have happened had she just been doing Mr Walkinshaw's bidding to secure dismissal for the making of any protected disclosure.

84. What caused us the greatest difficulty in the assessment was the failures in relation to the grievance. That was the strongest of the claimant's points. It could be evidence that the process was a form of sham, and a cover for the true reason. We required to consider whether what happened about the grievance was in effect incompetence, or something more sinister. We have concluded that it was incompetence. Ms Shanks did not have experience in disciplinary and grievance matters, although she had some 25 years of experience in running a business. Some of the investigations were not documented properly, for example there was no record of her discussions with Mr Constantinides or Mr Martin Dunn. Her letter of decision does not deal in terms with each allegation, setting out why she

reached her views, and she added on to the allegations a further one. There was other evidence of incompetence. There was a draft contract of employment produced by the respondent with parts not completed, provisions missing such as a job description, and a date of signature for Mr Walkinshaw in 2014 that was obviously wrong. The Handbook was largely completed but not fully so, and it was not at all evident that it could have contractual effect. The evidence overall satisfied us that on the issue of the reason for the dismissal she should be accepted, and that where there were mistakes or other issues that was incompetence rather than some form of arrangement to dismiss the claimant because of the disclosures referred to.

85. Other matters caused us concern. There were a number of documents not produced by the respondent that would ordinarily have been expected. The two most obvious ones are the suspension letter and the decision letter said to have been sent in relation to the grievance. There were others, such as the full exchanges in relation to the appeal. The claimant produced a letter dated 20 December 2019 he said was sent in an envelope post marked 9 January 2020. There was a suspicion that the appeal was activated after the Claim Form had been received by the respondent. That suspicion was not alleviated by the respondent's failure to provide all material information. We considered however that that was because of a certain complacency on their part, not treating the allegations by the claimant as ones with any merit, although that was to prejudge them.

86. Mr Walkinshaw and Ms Shanks had also referred in evidence to material they said supported them which was not produced, such as tweets said to have been sent out during the Space Up event by those present which Mr Walkinshaw took to be indicating that some attending thought that it was a respondent's event. For such an obviously relevant matter it is surprising that that material was not both part of the investigation or disciplinary hearing, but also part of the documents before us. We again considered that to be because of complacency rather than any attempt to mislead us.

87. Despite these deficiencies however we concluded that the evidence overall was clear that Ms Shanks had a genuine belief that the claimant had committed acts of gross misconduct, and that was the sole reason for the dismissal. We rejected the claimant's argument that there was no basis in the allegations against him, and that the true reason for the decision must have been protected disclosures. The evidence was clear that there was a basis to criticise him, and Mr Paliwoda with whom he was associated through the Space Up Glasgow Ltd company, in a number of respects but most particularly for having Mr Andrew Dunn present at the event when he was or should have been recognised as a competitor, and taking and using the Alba Pod 96P at the event without knowledge or permissions. It is clear that had permission been sought to do so, at an event Mr Andrew Dunn was to attend, it would have been refused. For these reasons we did not consider that there was any attempt at manipulation by the respondent that would fall within the principles of the ***Jhuti*** authority.

88. The third issue is that of detriments. We did not consider that the claimant had established any detriments under the terms of the Act. He was suspended, but that was not because of the disclosures, some of which had been made several months before. It was solely because of the event and matters connected to it.

89. He argued that he had not been provided with necessary equipment, but that applied to all staff involved, and was part of his claim of a breach of contract with ESA by the respondent in any event. But it was not pled, and in any event was not anything that happened because of a disclosure.

90. The deduction of monies for pension we concluded happened because of an error by the respondent's payroll provider that Ms Shanks discovered after the claimant was suspended. It was very badly handled by the respondent, but their knowledge of basic human resources or employment law issues was very limited at best, and we did not consider that it was any form of response to his making the disclosure. It also came a material time after the first disclosure was made.

91. The claimant alleged that Mr Walkinshaw's attitude towards him changed after the disclosures, but there was no material evidence on that which would amount to a detriment under the Act in this regard. In any event essentially for the reasons given above we did not consider that the reason or principal reason for any change of attitude was the making of disclosures. It had not been pled, nor had an allegation that he had been kept away from customers.

**Conclusion**

92. We answer each of issues one, two and three in the negative. Issue four does not therefore arise.

93. In light of that, we must dismiss the Claim.

Employment Judge: Sandy Kemp
Date of Judgment: 21 September 2021
Entered in register: 28 September 2021
and copied to parties