EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4108052/2021

Hearing Held by Cloud Video Platform (CVP) on the 16 and 17 August 2021

Employment Judge L Wiseman

Mr S Graham	**Claimant** **Represented by:** **Ms A Bowman** **Solicitor**
C Hanlon All Trades Ltd	**Respondent** **Represented by:** **Ms S Harkins** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided:

(i) to dismiss the claims of unfair dismissal and right to be accompanied to a disciplinary hearing;

(ii) to order the respondent to pay to the claimant the sum of £448.24 (net) in respect of the payment of notice, and

(iii) to order the respondent to pay to the claimant the sum of £1129.61 (net) in respect of the payment of wages (including lying time).

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 5 March 2021 alleging he had been unfairly dismissed for making a protected disclosure; that he had been denied the right to have a representative present at a disciplinary hearing and that payments of notice and wages were outstanding.

2. The respondent entered a response denying the claims in their entirety. The respondent admitted the claimant had been dismissed for reasons of conduct.

3. The Tribunal heard evidence from Mr William Burley, Project Manager; Mr Andrew Ross, Operations Manager; Mr Ross Cooper, Managing Director and from the claimant.

4. The Tribunal was also referred to a number of jointly produced documents.

5. The Tribunal, on the basis of the evidence before it, made the following material findings of fact.

Findings of fact

6. The respondent is an all trades company consisting of specialised divisions serving domestic and commercial customers in Scotland.

7. The claimant commenced employment with the respondent on the 1 May 2019, until the termination of his employment on the 11 December 2020. The claimant was employed as a Tiler and he earned £571.67 gross per week, giving a net weekly take home pay of £448.24.

8. The division of the company in which the claimant worked carried out a lot of insurance work. The respondent would, in those circumstances, be paid by the insurance company to carry out like-for-like work, that is, to replace damaged areas to the same or similar standard.

9. The claimant attended a job in Perth on the 7 December 2020. The job involved fitting porcelain tiles in a domestic residence. The claimant noted the

wall to be tiled was made from grey Gyproc which was unskimmed (not plastered). The claimant was of the opinion the tiles would be too heavy to fit to the wall.

10. The claimant checked the Tile Association guidelines on his phone and noted the maximum weight of tiling per square metre for unskimmed gypsum plaster was 32 kg. The porcelain tiles, including adhesive and grouting, was marginally over this weight.

11. The claimant contacted the tile manufacturer for advice. The tile manufacturer told the claimant they would not guarantee the porcelain tiles on the Gyproc, and that a hardy backer should be fitted to the wall before tiling.

12. The claimant phoned Mr William Burley, Project Manager, to advise him that he could not do the job because the tiles were too heavy to fit to the wall and that it would be unsafe if they fell off. The claimant made reference to the Tile Association guidelines and to the job being illegal.

13. Mr Burley was “wound up” and did not hear everything the claimant may have said. Mr Burley told the claimant to return to the office to get other work.

14. Mr Burley visited the job in Perth. The job was a like-for-like job with the replacement tiles being the same tiles as those which had come off the wall following a flood. The previous tiles had been on the wall for four years without problem. Mr Burley did not consider there to be any risk that the tiles would fall off the wall because they were too heavy. Mr Burley instructed another operative to complete the job.

15. The claimant was “fussy” about his work and was known for being “unreliable” insofar as he would be sent to carry out work but would give various reasons why the work could not be done. These reasons usually related to the claimant’s opinion that other tradesmen needed to carry out work (or carry out work properly) before he could tile.

16. Mr Burley reported to Mr Ross Cooper, Managing Director, that the claimant had refused to do the job in Perth.

17. Mr Andrew Ross, Operations Manager, was informed on the 11 December that the claimant had refused to do the Perth job and that the company had incurred additional costs in having someone else cover the work. Mr Cooper informed Mr Ross that he should call the claimant in to dismiss him.

18. Mr Ross and the claimant met in the storeroom on the 11 December. The claimant covertly recorded part of the discussion and a transcript of the recording was produced at page 60. Mr Ross told the claimant that the claimant was going to be "let go" because there had been a few jobs that had not been done because the claimant had said he could not do the tiling for whatever reason, and that had meant the company had to get other tilers in to do the work.

19. The claimant told Mr Ross the tiles for the job in Perth had weighed too much. The claimant referred to the Tile Association guidelines and said it was "totally illegal", and that the tile manufacturer had said the same thing and that a hardy backer board had to be fitted to the wall. The claimant, when challenged about another job which he had refused to do, explained there had been a 25mm hole in the bathroom wall which had needed to be plastered or screeded before he could do the tiling.

20. The discussion went on to talk about a job in the Borders where the Tile Association had been commissioned to provide a technical report on work carried out by the claimant. The work consisted of natural slate flooring tiles which had been fitted in various parts of a house including a bathroom. The complaint from the customer had focussed on the fact there was a variation in lippage (that is, some tiles were raised/higher than others).

21. Mr Ross acknowledged the clients in question had been very difficult to deal with and had been advised by the respondent not to use natural slate tiles because of the natural variation in thickness of each tile. The client, contrary to the advice offered, insisted on using the tiles. The Insurance company confirmed the respondent should proceed with the work.

22. The report from the Tile Association confirmed there was an issue with lippage but that this resulted from the natural product.

23. Mr Ross decided it would be appropriate not to dismiss the claimant at the meeting on the 11 December, but to investigate his claims that the work he had been asked to carry out had been "illegal". Mr Ross told the claimant to wait in his van until he received word from the programming team about his next job. The claimant did this and was sent to another job.

24. The claimant later sent a text message to Mr Ross (page 134) asking if he was working his notice. Mr Ross responded to confirm the claimant was not working his notice and that Mr Ross was obtaining details of the jobs where he had refused to carry out work and once he had these details he would contact the claimant and take it from there. The claimant asked to be given notice of when meetings would take place because he would need to give his union representative time to make himself available for any meeting regarding dismissal.

25. The Tile Association tiling guide was produced at page 73. The Tile Association represents the entire UK wall and floor tile industry and is committed to promoting professionalism and raising standards in the tiling industry. The guide states it has been produced to "help support tilers in their day to day work". The guide contains recommendations.

26. Mr Ross noted the job in Perth was an insurance job and so the respondent get paid by the insurance company to reinstate the property. In these circumstances the client is given a choice of tiles which they are permitted to use. The clients in Perth chose the same tiles as had previously been used. The job was like-for-like and in those circumstances Mr Ross could see no reason for the claimant refusing to do the job.

27. Mr Ross also checked the Tile Association guidelines to confirm whether the claimant had been asked to do a job which was "illegal". He was satisfied the guidance sets out recommendations which are not legal requirements.

28. Mr Ross had no further involvement with the claimant because Mr Cooper decided to proceed to dismiss the claimant. Mr Cooper tried to contact the claimant later on the 11 December, but no contact was made until a message was sent by Chris Malone to the claimant regarding a meeting. The claimant sent Mr Cooper a text message at 12.23 (page 63) stating that in light of the meeting which had taken place with Mr Ross that morning, he wanted Mr Cooper to postpone any meeting until the following week to allow time for him to seek advice from his union representative.

29. Mr Cooper responded by sending an email to the claimant at 3.49pm on the 11 December (page 64) stating:

> "*I have attempted to contact yourself via telephone however you are not answering my calls following on from our earlier conversation where a direct instruction was issued requesting you to come into the office which you appear to be refusing.*
>
> *I regret to inform you that your position within the business will be terminated with immediate effect due to fact that you have not responded to a reasonable management instruction on a number of occasions which as per your contract of employment and company handbook is deemed to be gross misconduct.*
>
> *As your employment is less than 2 years then there is no requirement for a disciplinary or dismissal procedure…"*

30. The claimant responded by email at 16.30 (page 65) saying that he had not refused to attend a meeting and had in fact called Mr Cooper to ask whether it was a formal or informal meeting, and had been told that he would find out when he arrived. The claimant referred to being put under severe stress and, having consulted his doctor, he was putting in a sick line due to stress.

31. Mr Cooper responded to say that whilst he appreciated it was a stressful time for everyone, the claimant's employment had been terminated due to the

terms set out in the previous email and as the termination was with immediate effect, SSP would not be processed.

32. Mr Cooper described the reason for dismissal as being the claimant's unreliability and his inability to fulfil his role practically and in terms of process completion. This related to the jobs the claimant had attended and refused to do. Mr Ross confirmed the reason for dismissal had been the claimant's refusal to do two previous jobs and then the job in Perth.

33. The respondent's Disciplinary Procedure was produced at page 53. The procedure reserved the right not to follow the procedure, and a right to depart from the procedure, where an employee has less than 24 months continuous service.

34. The claimant commenced new employment on the 18 May 2021.

Credibility and notes on the evidence

35. I found the claimant to be, on the whole, a credible witness although I considered parts of his evidence were exaggerated. The claimant's case was that he had told Mr Burley the tiles were too heavy to be fitted to the wall and that it was unsafe to proceed because if the tiles fell off the wall someone could be hurt. The claimant was certain he had told Mr Burley about checking the Tile Association guidelines and speaking with the tile manufacturer. The claimant also insisted Mr Ross had phoned him after the call with Mr Burley, and that he had explained to Mr Ross that the tiles were too heavy for the wall and that hardy backer board would need to be put on the wall.

36. The claimant did not accept he had refused to do work: he explained that he took the view others had to complete their work/complete their work properly to allow him to then proceed with his work.

37. The claimant did accept he was "fussy" and did not dispute there had been other jobs where he had refused to proceed until other work was completed properly.

38. The claimant accepted in cross examination that (a) the respondent had already decided to dismiss him prior to the conversation/meeting he had with Mr Ross on the 11 December; (b) that he was told he was being let go because jobs were not getting done; (c) when Mr Malone called him to tell him about meeting Mr Cooper, Mr Malone did not say he was being invited to a disciplinary hearing; (d) the claimant is not a member of the Tile Association and (e) he has never been invited to a disciplinary hearing.

39. The claimant asserted that when he picked up the tiles from the respondent's office, Mr Malone made some remark about the tiles going on a wall. The claimant inferred from this that Mr Malone made the remark because he knew the tiles were too heavy for the wall. I did not accept this evidence because there was nothing to suggest Mr Malone knew the nature of the wall to be tiled or the weight of the tiles. I considered it much more likely that if a comment was made, it was made because of the claimant's reputation for not doing the work. I considered I was supported in that view by the fact the claimant's fussiness was well-known.

40. I preferred the evidence of Mr Ross to that of the claimant regarding the alleged phone call on the 7 December. I did so because I found Mr Ross to be a more reliable witness than the claimant and I accepted his evidence that he had not known of the incident until the 11 December.

41. Mr Burley clearly did not have a favourable view of the claimant's fussiness. He told the Tribunal he deals with approximately 100 phone calls a day relating to various jobs, and when he saw the claimant had been allocated to the job in Perth, he knew there would an issue because he had previous experience of the claimant refusing to do work. Mr Burley did not particularly listen to what the claimant told him during their phone conversation on the 7 December because in his opinion the claimant tried to find ways of not doing work, and this was just another instance of it. Furthermore, Mr Burley had had a heart attack and avoided confrontation. In his opinion, this was just another job the claimant would not do, and it fell to Mr Burley to travel to Perth to look at the job and get another operative to do the job.

42. The crucial aspect of Mr Burley's evidence was that he told Mr Cooper the claimant had refused to do the job in Perth: that was the extent of the information he provided and he did not provide any details regarding the tiles being too heavy or the Tile Association guidelines.

43. Mr Ross was a credible and reliable witness who gave his evidence in a straightforward manner. I accepted his evidence that he had not phoned the claimant on the 7 December, and only learned of the incident on the 11 December. It was also clear from Mr Ross' evidence that he was told by Mr Cooper to get the claimant in and dismiss him on the 11 December. Mr Ross however did not dismiss the claimant and instead took time to investigate the claimant's position that what he was being asked to do on the job in Perth was "illegal".

44. Mr Cooper was a difficult witness who sought to challenge the relevance of questions asked, rather than providing answers, and appeared not to have a good recollection of events, and this cast a shadow over his evidence. For example, Mr Cooper was not sure when he learned of the claimant's refusal to do the job in Perth; was not sure who had told him about it and denied that he had told Mr Ross to dismiss the claimant. I preferred Mr Ross' evidence to that of Mr Cooper.

45. The respondent's witnesses all rejected the suggestion the respondent was interested only in being paid and were prepared to carry out unsafe work. I accepted the evidence of the respondent's witnesses regarding this matter.

46. I considered the difference between the approach of the respondent and the claimant to the work to be carried out was down to the claimant being "fussy": in other words a perfectionist. Mr Ross, for example, described that the claimant wanted a surface to be "like a billiard table" before he would tile it, whereas the reality was that most surfaces were not up to that standard.

Claimant's submissions

47. Ms Bowman confirmed the claimant brought claims of automatically unfair dismissal for making a protected disclosure; payment of notice and holiday pay and the right to be accompanied. Ms Bowman referred to the agreed list of issues to be determined by the Tribunal (page 41).

48. Ms Bowman referred to the following cases: ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 IRLR 38; Kilraine v Wandsworth LBS 2018 EWCA Civ 1436; Eiger Securities LLP v Korshunova 2017 IRLR 115; Chesterton Global Ltd v Nurmohamed 2018 ICR 731; Kuzel v Roche Products Ltd 2008 IRLR 530*** and ***Royal Mail Group v Jhuti 2019 UKSC 55.***

49. Ms Bowman referred to the terms of section 103A Employment Rights Act and submitted there had been a disclosure of information by the claimant to Mr Burley during the phone call on the 7 December. Ms Bowman invited the Tribunal to prefer the evidence of the claimant regarding this phone call because Mr Burley had lacked both credibility and reliability. Mr Burley admitted he only partly listened to what the claimant said, whereas the claimant's evidence had been clear and detailed.

50. The claimant told Mr Burley the tiles were too heavy to fit to the wall; he cited the Tile Association guidelines; the tile manufacturer advice; the safe load limit; the name of the substrate and the tile material; the limit of the tiles themselves and that there was a risk of them falling to someone's injury.

51. Ms Bowman submitted the disclosure of information tended to show the employer was likely to fail to comply with a legal obligation (section 43(1)(b)), and that the health and safety of an individual was likely to be endangered (section 43 (1)(d)). The claimant reasonably believed the Tile Association guidelines were legal obligations with which all companies and individuals involved in tiling had to comply. Ms Bowman submitted this belief was reasonable given the guidelines say the Tile Association represents the entire UK wall and floor tile industry. The respondent's witnesses considered the

guidelines were not legal, but beyond that statement they were not prepared to answer any further questions regarding this matter.

52. Ms Bowman further submitted the health and safety of an individual was likely to be endangered in circumstances where the claimant considered the tiles were too heavy and this was confirmed by the Tile Association guidance and the tile manufacturer. The claimant believed the health and safety of the resident of the home was likely to be endangered. Mr Cooper and Mr Burley both agreed that if a porcelain tile fell on someone it would cause injury.

53. Mr Cooper accepted in cross examination that the weight of the tiles plus grout and adhesive was over the safe load limit. He appeared to suggest that because the guidelines were just that, and because the tiles were a like-for-like replacement, the safe load limit was not relevant. Ms Bowman invited the Tribunal not to place any weight on this evidence because the claimant was a skilled tradesman, and there was an onus on him and the respondent to carry out work safely. This was contrasted with the respondent's position which was to be paid for the work they carried out, with health and safety being of no interest to them.

54. The claimant reasonably believed the disclosure to be in the public interest. Ms Bowman referred to the respondent's wide customer base, present and future clients of the respondent, the fact of the wrongdoing being deliberate and the fact the Tile Association work in partnership with Trading Standards Scotland all of which, it was submitted, supported the claimant's reasonable belief the disclosure was in the public interest.

55. The disclosure was made in the proper manner. Ms Bowman invited the Tribunal to find the claimant had made a protected disclosure to Mr Burley during the phone call on the 7 December.

56. Ms Bowman acknowledged the claimant had less than 2 years' service and in those circumstances the onus was on him to show the reason for dismissal was that he made the protected disclosure. In support of the claimant's position Ms Bowman referred to the phone call made by the claimant to Mr

Burley on the 7 December, and the fact Mr Burley had informed Mr Cooper of the phone call, who in turn told Mr Ross to dismiss the claimant. No investigation was carried out and Mr Ross agreed the incident on the 7 December had "tipped it over the edge". Ms Bowman submitted that if the disclosure on the 7 December had not happened, the claimant would not have been dismissed.

57. The respondent's position was that the claimant had refused to carry out other jobs, but they had been unable to say in detail why the claimant had refused those jobs. This contrasted with the claimant's position that he had not refused to do work, but rather he needed other trades to do work before he could carry out his work. The claimant had been prepared to go through each job to explain his position.

58. Ms Bowman referred to the different reasons for dismissal put forward by the respondent in the ET3 and in their witness statements. The email dismissing the claimant referred to the reason being "due to the fact that you have not responded to a reasonable management instruction on a number of occasions"; the ET3 referred to "under performance, poor overall attitude, unsatisfactory levels of commitment and the claimant's frequent refusal to perform work without reasonable explanation, poor workmanship, his overall conduct, attitude and demeanour" and Mr Cooper's witness statement referred to the claimant not being a good fit for the business and his "unreliability, his inability to fulfil his role practically and in terms of process completion". Ms Bowman submitted the differing reasons could not be relied upon because they were advanced after dismissal and were designed to conceal the real reason for dismissing the claimant, which was because he made the protected disclosure.

59. Ms Bowman cast doubt on Mr Cooper's evidence regarding the reason for dismissal because he said he had, after the dismissal, asked for specifics of jobs the claimant had allegedly refused to do. This, it was submitted, could not have influenced the reason for dismissal because Mr Cooper only got that information after the event. Mr Cooper had become frustrated and evasive

when pushed regarding the reason for dismissal and could not provide specific information of jobs the claimant had refused to do .

60. Ms Bowman submitted the claimant's alleged failure to follow a management instruction on the 7 December could not be separated from the protected disclosure. The reason why the claimant did not complete the job in Perth was because he believed it contravened health and safety and was unsafe.

61. Ms Bowman invited the Tribunal to find the reason for the claimant's dismissal was because he made a protected disclosure to Mr Burley on the 7 December 2020.

62. Ms Bowman referred to section 10 Employment Relations Act which gives a worker the right to be accompanied where s/he is required or invited to attend a disciplinary hearing. The right to be accompanied applies to a disciplinary hearing which would result in a formal warning or the employer taking "some action" with regard to the worker. Mr Cooper admitted in cross examination that he intended to take some action regarding the claimant's employment. The claimant accepted that at no point did the respondent expressly say that it was a disciplinary meeting.

63. The claimant asked for the meeting with Mr Cooper to be delayed so he could consult his trade union representative (page 134) but this request was denied by Mr Cooper who then proceeded to dismiss the claimant prior to the meeting being rescheduled.

64. Ms Bowman referred to the schedule of loss at page 101 and to the claimant not have been paid the correct amount of wages in the last two weeks' of his employment, not being paid his week's lying time and not being paid notice.

Respondent's submissions

65. Ms Harkins noted the following facts did not appear to be in dispute: the claimant was employed by the respondent from May 2019 until his dismissal on the 11 December 2020. The claimant attended a job in Perth on the 7 December, as directed by the respondent. The claimant did not attempt to

start the job, and called Mr William Burley, Project Manager to explain why. The claimant left the site after his conversation with Mr Burley and the job was completed by another employee of the respondent.

66. There were two key areas of dispute. The first concerned the claimant's conduct prior to the events of the 7 December. The respondent maintained the claimant's work over the course of his employment was to a lower standard than that expected of someone in his position, which led to his dismissal, which was for conduct in terms of section 98(2)(b) Employment Rights Act. The second concerned whether there was a protected disclosure to Mr Burley during their phone call on the 7 December.

67. The respondent's primary case is that the claimant did not make a protected disclosure to Mr Burley on the 7 December. If the Tribunal found the claimant did make a protected disclosure to Mr Burley on that date, then the respondent's position was that the disclosure was not the reason for dismissal. The respondent was entitled to dismiss the claimant without a disciplinary hearing because he had less than 2 years' service. There was no disciplinary hearing and no appeal hearing and therefore there was no opportunity for the claimant to be accompanied at a disciplinary hearing.

68. The claimant's phone call to Mr Burley on the 7 December was not a disclosure of information. The claimant told Mr Burley the tiles were too heavy for the wall, but this was merely him voicing a concern or his opinion. This lacked the sufficient factual content and specificity required. The respondent's case was that the claimant said the tiles were too heavy. Mr Burley said the claimant made vague references to the Tile Association guidelines and illegality. The claimant may well have contacted the Tile Association and the tile manufacturer, but this was not relayed to Mr Burley.

69. The disclosure made by the claimant did not show the respondent was likely to fail to comply with a legal obligation. The Tile Association guidelines are not legally binding. The Tile Association Inspection Report regarding the property in the Borders, states clearly the guidelines act as "recommendations". Ms Harkins noted that whilst the claimant may have a

subjective belief that the respondent was in breach of a legal obligation, this must be weighed against the objective standard of whether or not this belief could be reasonably held (***Babula v Waltham Forest College 2007 IRLR 346).***

70. Ms Harkins submitted that it was not reasonable to believe that by slightly exceeding trade standards for wall tile installation, that the respondent had breached a legal obligation. If it was not reasonable to believe the respondent had breached a legal obligation, there could not be reasonable belief it was in the public interest.

71. The disclosure made by the claimant also did not tend to show that the health and safety of an individual was likely to be endangered. The job which the claimant was sent to undertake was a like-for-like tiling job. The tiles to be put on the wall were an exact replacement of the tiles which had been there for four years without issue. Ms Harkins submitted that whilst the claimant may have held a subjective belief that the wall tiles would cause a health and safety risk, that had to be weighed against the objective belief that wall tiles which have remained affixed for four years, would continue to do so. The claimant did not have a reasonable belief that the safety of himself, or others, was in danger.

72. Ms Harkins next turned to the reason for dismissal. She submitted that at the time of the initial decision to dismiss the claimant (prior to the claimant's conversation with Mr Ross on the 11 December), neither Mr Cooper nor Mr Ross were aware of a disclosure being made by the claimant. The information they had when the initial decision was made was that the claimant was an unsatisfactory employee.

73. The claimant admitted that when he commenced his conversation with Mr Ross, he believed the respondent had already decided to dismiss him and that is why he made a covert recording of the conversation. Mr Ross told the claimant that he was being "*let go, because of a few jobs that are not getting done*". There was no mention that this dismissal was in relation to the Perth job. The claimant questioned Mr Ross about the reason for letting him go, and

Mr Ross replied "*basically we are having some issues where you are going to jobs and it seems to be you are coming back with issues then other tilers are tiling. We only get paid from an insurance point of view we get paid to put it back to what it was previously."* The claimant tried to draw Mr Ross on the issue of illegality and the Perth job, but Mr Ross did not confirm the reason for dismissal was the Perth job.

74. Ms Harkins submitted the claimant's previous conduct, up to and including the 7 December, amounted to the reason for dismissal. The respondent dismissed him because he was an under-performing employee. The claimant accepted he was "fussy" and had arrived at a number of jobs and not done them, citing the need for other employees to do work before the claimant could tile. Mr Cooper echoed this and referred to the claimant frequently refusing to do jobs because of "aesthetic reasons". The claimant was known for looking for obstacles so as not to complete a job.

75. Ms Harkins invited the Tribunal to dismiss the claim because the claimant had not shown he made a protected disclosure: further, even if the claimant did make a protected disclosure, that was not the reason for dismissal. The reason for dismissal related to the claimant's conduct for not completing work which he had been reasonably asked to do.

76. Ms Harkins referred to the right reserved to the respondent to depart from the terms of the disciplinary procedure where an employee has less than 2 years' service. The respondent did not hold a disciplinary hearing on the 11 December, and at no time was it suggested to the claimant that he was being invited to attend a disciplinary hearing. Mr Cooper attempted to contact the claimant to inform him his employment had been terminated. The claimant would not respond to his calls and so an email was sent. Section 10 Employment Relations Act was not invoked and was not breached and accordingly this claim should be dismissed.

77. Ms Harkins confirmed the respondent accepted wages and notice were due to be paid to the claimant. The sums payable were agreed as being £1,129.61 net wages and £448.24 net in respect of the payment of notice.

Discussion and Decision

Unfair dismissal

78. I referred firstly to the terms of section 103A Employment Rights Act which provides that an employee who is dismissed shall be regarded 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.

79. Section 43 Employment Rights Act sets out various provisions relating to protected disclosures. Section 43A provides that a protected disclosure means a qualifying disclosure which is made by a worker in accordance with any of section 43C to H.

80. A qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making it, is made in the public interest and tends to show one or more of the following:-

- that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject and
- that the health and safety of any individual has been, is being or is likely to be endangered.

81 The qualifying disclosure must be made to the employer or other responsible person in terms of section 43C to H. The claimant made the alleged disclosure to his employer, and accordingly there was no dispute regarding this matter.

Did the claimant make a disclosure of information

82 The first issue to be determined is whether the claimant made a disclosure of information to Mr Burley during the phone call on the 7 December. The case of ***Kilraine v Wandsworth London Borough Council*** (above) provided guidance regarding what might qualify as a disclosure of information. It was said that *"The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it is one or the other when reality and experience*

suggest that very often information and allegation are intertwined." The key point is that any communication must have sufficient factual content capable of tending to show one of the matters listed in section 43B (above) and that a mere allegation is not sufficient.

83 I had regard to the evidence of the claimant and Mr Burley. Mr Burley told the Tribunal that he had "not really listened" to what the claimant told him during the phone call. Mr Burley understood the claimant was refusing to do the job and accepted the claimant had referred to the Tile Association guidelines and had probably referred to the job being "illegal".

84 I found as a matter of fact the claimant told Mr Burley that he could not tile the walls because the tiles were too heavy to fit to the wall and it would be unsafe if they fell off. The claimant referred to the Tile Association guidelines and broadly the issue of health and safety. I considered the claimant made a disclosure of information to Mr Burley.

Did the disclosure of information tend to show the employer had failed to comply with a legal obligation

85 The next issue to be determined is whether the disclosure of information tended to show the employer was likely to fail to comply with a legal obligation to which it was subject. The claimant's position was that he reasonably believed the Tiling Association guidelines were legal obligations. I had regard to the case of ***Eiger Securities LLP v Korshunova*** (above) where it was said that the term "legal" must be given its ordinary meaning, and that it may not be sufficient to argue the employer's actions were morally or professionally wrong. I also had regard to the case of ***Blackbay Ventures Ltd v Gahir*** (above) where it was held that save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference, for example, to stature or regulation.

86 I asked whether it was obvious the Tiling Association guidelines were a legal obligation. I answered that in the negative for two reasons. Firstly because the Tiling Guide produced by the Tile Association (page 73) makes clear it is

a guide. The Introduction makes clear the Guide has been produced to "support tilers in their day to day work"; that the Tile Association is a trade association; that it operates in partnership with Trading Standards and is dedicated to developing training courses with the aim of improving standards.

87 Secondly, and crucially, the section dealing with Weight Limits for Wall Tiling states: "*The following table offers general guidance for common types of backgrounds and the maximum recommended weights for tiling".* There is nothing in the Guide to state, or lead one to think, it imposed legal obligation. It is clearly stated the table in the Guide offered "general guidance".

88 I next asked whether it was reasonable for the claimant to believe the Guide was a legal obligation. The claimant sought to argue that he reasonably believed the Tile Association guide contained legal obligations, because the Guide made reference to representing the entire UK wall and floor tile industry. I did not consider the fact the Tile Association represented the whole of the UK wall and floor tile industry had any bearing on whether the guide contained legal obligations. This was particularly so when the Guide referred to being a trade association dedicated to improving the standards of tiling throughout the industry.

89 The claimant told the Tribunal he was familiar with the Guide and looked at it frequently. The claimant, on the 7 December, accessed the Guide on his phone to check the weight limits for wall tiling. I did not doubt the claimant did this, but if he did, he must have noted that the table he looked at offered "general guidance" and "maximum recommended weights for tiling" (my enphasis). There was nothing to suggest how the claimant got from this to believing it was a legal obligation, particularly in circumstances where the claimant was a skilled tradesman with many years of experience.

90 Ms Bowman was critical of the responses of the respondent's witnesses when asked about the Tile Association guide. I acknowledged that none of the respondent's witnesses had an in-depth knowledge of the Guide, and I formed the impression that it was not a document to which they often had regard, if at all. However, the witnesses were consistent regarding the fact they

understood/knew the Guide contained recommendations and not legal obligations.

91 I concluded for these reasons that the Tile Association Guide did not contain legal obligations. I further concluded that the claimant could not, given the wording of the Guide, have reasonably believed the Guide contained legal obligations.

Did the disclosure of information tend to show that the health and safety of an individual was likely to be endangered

92 The claimant believed the tiles were too heavy to be fitted to the wall and he considered he was supported in that view by the fact of the Tile Association guide (weight limits for wall tiling) and the tile manufacturer. The claimant was concerned that if the tiles fell off the wall, the resident of the home could be injured.

93 The Tile Association maximum recommended weight for unskimmed gypsum was 32kg per square metre. The tiles, adhesive and grout for the job weighed 33.88kg. The tiles to be used for the job were over the recommended maximum weight by a marginal amount.

94 The claimant's position was absolute: the tiles weighed more than the recommended maximum and therefore there was a risk to health and safety. The claimant did not take into account any other factors. I considered this was an example of the claimant's fussiness. In the same way the claimant wished surfaces to be "billiard table" flat, he wanted the weight to be absolutely correct.

95 The key factor which the claimant omitted to consider was the fact that the tiles to be put on the wall were the same tiles which had come off the wall. This was a like-for-like replacement and the previous tiles had been on the wall without issue for four years. The wall could clearly take the weight of the tiles, adhesive and grout. I accepted Ms Bowman's submission that simply

because it was a like-for-like job did not mean it was safe, but it was an important factor to consider.

96 The claimant was a skilled tradesman who had worked in the industry for over 30 years. The claimant must have been aware, based on his experience, that there are safe margins around the recommended weight limits for wall tiling. I concluded in those circumstances that the belief of the claimant that the health and safety of the resident of the home was endangered, was not reasonable.

Was the disclosure of information made in the reasonable belief of the worker that it was made in the public interest

97 There is a two stage test to determine this issue: did the worker believe, at the time they were making the disclosure, that the disclosure was in the public interest and if so, was that belief reasonable. I acknowledged that it would be in the public interest to know if unsafe tiling was being carried out.

Conclusion

98 I concluded the claimant made a disclosure of information to Mr Burley, but that disclosure of information did not tend to show the employer was likely to fail to comply with a legal obligation or that the health and safety of an individual was likely to be endangered. Accordingly, the disclosure of information was not a protected disclosure.

99 I should state that if I have erred above, and the claimant did make a protected disclosure, then I would have had to consider the reason for dismissal and whether the claimant was dismissed for making the protected disclosure. The protected disclosure (if one was made) was made to Mr Burley during the phone call on the 7 December. Mr Burley told Mr Cooper that the claimant had refused to carry out the job in Perth. Mr Burley did not tell Mr Cooper the claimant thought the tiles were too heavy for the wall, or that he had referred to the Tile Association or that he thought it was illegal. The only information Mr Cooper had was that the claimant had refused to do a job in Perth.

100 Mr Ross learned, on the 11 December, that the claimant had refused to do the job in Perth. Mr Ross was told by Mr Cooper to have the claimant in and to dismiss him. Mr Cooper and Mr Ross did not know, at the time the initial decision to dismiss was made, that any protected disclosure had been made to Mr Burley.

101 Mr Ross did not in fact dismiss the claimant on the 11 December. He instead decided to investigate details of whether the Tile Association guide contained recommendations (which was his understanding) or legal obligations (which was the claimant's position). Mr Ross also wanted to look into the details of the other jobs the claimant had refused to do.

102 Mr Ross satisfied himself the Tile Association contained recommendations and not legal obligations. Mr Ross did not have an opportunity to meet with the claimant again because Mr Cooper decided to proceed with the dismissal.

103 I accepted Mr Cooper tried to contact the claimant to invite him to attend a meeting that afternoon. The evidence was not entirely clear but there appeared to have been a conversation between Mr Cooper and the claimant, when the claimant asked why he was being called to a meeting and whether it was a formal or informal meeting. Mr Cooper simply told the claimant he would find out when he came to the meeting.

104 The claimant asked Mr Cooper to postpone the meeting to allow him time to take advice from his trade union representative. Mr Cooper's response to this was to issue an email informing the claimant that his employment had been terminated with immediate effect.

105 Mr Ross and Mr Cooper were both cross examined regarding the reason for dismissal. I concluded from their evidence that the reason for dismissal was because the claimant had refused to carry out previous jobs and the refusal to carry out the Perth job tipped the balance. The claimant was "fussy" and regarded as unreliable because he was sent to jobs which he would not undertake. This had a financial impact for the respondent who had to allocate another operative to undertake the work.

106 I was entirely satisfied the dismissal was not because the claimant made a protected disclosure to Mr Burley. I say that because Mr Cooper had no knowledge of the disclosure. His understanding was limited to the Perth job being another instance of the claimant not being prepared to carry out work.

107 I acknowledged the respondent framed the reasons for dismissal in various ways, but I was satisfied terms such as “underperformance”, “poor overall attitude”, “unsatisfactory levels of commitment” all related to the fact the claimant was sent to carry out work and on occasion refused to do so.

108 I also acknowledged the fact Mr Cooper was not able to give details of the previous jobs the claimant had refused to do. However there was not any dispute regarding the fact there had been previous instances where the claimant would not do the work which he had been sent to do. The claimant had an explanation of why he had adopted that position: the respondent had a contrary view. The issue was not who was right or wrong regarding these instances. The critical factor was that those instances had occurred and the respondent was faced with an operative who attended jobs and refused to do them, which had a financial impact when another operative had to attend to complete the work the claimant had refused to do.

109 I decided, for all of the above reasons, that even if the claimant did make a protected disclosure, he was not dismissed for that reason. I decided to dismiss this claim.

Right to be accompanied

110 I referred to section 10 Employment Relations Act which applies when a worker is required or invited by his employer to attend a disciplinary or grievance hearing. Where the section applies, the employer must permit the worker to be accompanied at the hearing by a companion.

111 The claimant accepted he had not ever been required or invited to attend a disciplinary hearing. Ms Bowman invited the Tribunal to find that Mr Cooper invited the claimant to attend a meeting with the express intention of taking

some action against him, which was likely dismissal. She submitted the meeting could have been no other than a disciplinary hearing.

112 I could not accept Ms Bowman's submission for three reasons: firstly, I accepted Mr Cooper's evidence that the meeting was to tell the claimant of his dismissal. The decision to dismiss had already been taken by Mr Cooper. Secondly, the claimant did not make any request of Mr Cooper to allow him to be accompanied at the meeting. His email to Mr Cooper (page 63) refers to having time to consult with his trade union representative. The claimant's email where he referred to being accompanied at a meeting was sent to Mr Ross. Thirdly, there was no refusal by Mr Cooper to allow the claimant to be accompanied. The request for the claimant to attend the meeting was overtaken by the fact Mr Cooper decided to inform the claimant of his decision by email.

113 I decided, for these reasons, to dismiss this claim.

Wages and Notice

114 The respondent accepted payment of wages and notice were to be made to the claimant. I decided, on that basis (and having agreed these sums with both parties at the hearing) that the respondent shall pay to the claimant the sum of £448.24 in respect of notice and the sum of £1,129.61 in respect of the payment of wages (including lying time).

Employment Judge: Lucy Wiseman
Date of Judgment: 07 September 2021
Entered in register: 14 September 2021
and copied to parties