Case Number: 2204630/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Maksimowicz	**v**	**Ueni Limited**

Heard at: London Central (by CVP) **On**: 5, 6, 7 October 2021

Before: Employment Judge A James

Representation

For the Claimant: Represented himself

For the Respondent: Mr W Lane, solicitor

JUDGMENT

(1) The claim for automatically unfair dismissal (s.103A Employment Rights Act 1996) is not upheld and is dismissed.

REASONS

The Issues

1 The claim form raises a claim of automatically unfair dismissal for whistleblowing. Mr Lane asked for clarification at the outset of the hearing that this was the sole claim raised by the claimant. The claimant confirmed that it was.

2 In order to succeed on that issue, the claimant has to show that he made a protected disclosure. That involves consideration as to whether:

2.1 The disclosure was to the respondent?

2.2 The disclosure was of information?

2.3 In relation to each set of information disclosed, did the claimant believe that the information disclosed tended to show one or more of the matters set out in s43B(1)(a)-(f) ERA 1996? (The claimant relies on (b), breach of a legal obligation, namely the obligations imposed by the GDPR.)

2.4 Was the claimant's belief in relation to the above matters reasonable?

2.5 Did the claimant have a reasonable belief that the disclosures of information were made in the public interest?

2.6 Was the claimant's belief that the disclosures were made in the public interest reasonable?

3 If the claimant succeeds in showing that he made a protected disclosure, the tribunal must then go onto consider whether the reason, or if more than the principal reason, for the claimant's dismissal, was that the claimant had made a protected disclosure.

The proceedings

4 Acas Early Conciliation took place between 29 June and 20 July 2020. The ET1 claim form was presented on 29 July 2020. The ET3 response form was presented on 22 October 2020.

5 A preliminary hearing took place on 7 April 2020 but a formal order had not been prepared by the time of today's hearing.

6 As the claimant is representing himself, the Judge informed the claimant that in dealing with the case in line with the overriding objective, one of the things employment tribunals try to do is to ensure that the parties are, as far as possible, on an equal footing. With that in mind, the Judge encouraged the claimant to ask questions if he did not understand what was happening at any stage. The claimant subsequently made a request when he was in the middle of cross examination. The Judge asked the claimant to make a note and the question was then answered after his cross examination had concluded.

7 Further, the Judge asked the claimant questions which then formed part of his witness evidence, in order to ensure that there was evidence before the tribunal in relation to the alleged protected disclosures. This was necessary because that issue had not been dealt with in sufficient detail in the claimant's witness evidence. In fairness to the respondent, Mr Lane was given the opportunity to take instructions on his answers overnight, between 5 and 6 October.

8 The Judge explained to the claimant how the case was going to proceed, with him giving evidence first; the process of cross-examination; that the respondent's witnesses would then give their evidence and he would be entitled to ask them questions. Finally, the parties would be able to sum up their case (what the tribunal calls 'submissions'). This was the claimant's opportunity to sum up briefly why he says his case should succeed; and in Mr Lane's case, why it should not. At the beginning and end of day two, the Judge reminded the claimant where we had got to, and how the hearing would proceed on the following day.

9 The Judge explained to the claimant that he should listen carefully to the questions, and even if the question was a closed one with a yes or no answer, answer that question. But that if there was another explanation, he was able to provide a brief explanation.

10 The Judge reminded the claimant to try and answer the question being put, on several occasions during cross examination, when he appeared to be

avoiding the question being put, or became argumentative, or started to ask Mr Lane questions. The Judge explained that Mr Lane was obliged to put the respondent's case to the claimant, and that he would be failing in his professional responsibility if he did not do so.

11 The Judge explained to the claimant about what his cross examination of the respondent's witnesses; explained the issues that were important in his case – see above; and stressed that if the claimant needed time to find his place again in his own list of questions or lost his train of thought, he should not feel under pressure, but just take the time required to find his place again.

12 Mr Lane sent his written submissions to the claimant after the hearing finished on the second day, to assist the claimant to give his own submissions. The claimant has helpfully provided his own written submissions, submitted just before the hearing started on 7 October.

13 The Judge did intervene on a number of occasions during the claimant's cross examination of the respondent's witnesses when it was concluded that too much time was being spent on issues that were not relevant to the issues in the case. For example, the 31 October 2019 issue, that there was no agreement that the claimant could move to the Graphic Design Department. That was before, on the claimant's case, he whistle-blew. It was not therefore something relevant to the issues before the tribunal. The Judge explained to the claimant that he needed to concentrate on the key issues in the case. It would not help the Judge to decide whether the dismissal was automatically unfair because of his whistle-blowing, to consider why a particular decision was made before the claimant ever made a protected disclosure. What was potentially relevant in terms of other work, were the jobs available at the time of furlough and at the time of the claimant's dismissal (which were both after the alleged protected disclosure).

14 As for whether the relevant version of the Employee Handbook was version 5 or 6, and whether one contained the Whistle-blowing policy or not, the Judge explained that was not relevant to facts and issues the Judge needed to decide he would not take that into account in his decision making. The Judge therefore asked the claimant to move on from that line of questioning. In so doing, the Judge acknowledged that the claimant thought it was important and explained to the claimant why it was not.

15 The Judge did guillotine the claimant's cross examination, but only after four hours, when the claimant had already put many questions in cross examination that were not relevant to the issues. By contrast, Mr Lane's cross examination of the claimant took the afternoon of the first day, less than 2.5 hours.

16 During the hearing, the tribunal heard evidence from the claimant. For the respondent, the tribunal heard evidence from Gaetano Antonucci (GA), former Customer Support Manager for the Respondent and Ana Oliveira (AO), Head of Talent. Three videos were played during the hearing and considered by the tribunal. A fourth video was introduced on the second day and was played during the hearing and considered.

17 The respondent provided a bundle of 95 pages; the claimant provided his own bundle which incorporated his witness evidence, of 81 pages. Pages 1 to 14,

parts of pages 15 to 20, and the annotations on pages 38 to 45 contained the claimant's witness evidence and those parts were accepted as such.

18 Three videos were provided by the claimant. The first related to the claimant's Ueni Limited google account. The second refers to the respondent's revamped website, which talks about their markets and their mission, and shows prices in GBP. The third video is for a job description for an Onboarding Customer Service Advisor, dated 25 September 2021.

19 Extra documents were introduced by the respondent on day one of the hearing by the respondent, in response to the claimant's video evidence about the job role and the work google account. This was not objected to by the claimant - but he argued that one of the documents had been 'skewed' by the respondent, by which he meant it had been deliberately altered. That was why he introduced a fourth video of a further search by him on the internet regarding the Onboarding Customer Service Advisor role. The admission of all of that further evidence was not objected to by Mr Lane and the tribunal was in any event, content to consider it.

Findings of fact

The claimant's role

20 The claimant commenced employment on 9 September 2019, on a three-month fixed term contract as a Junior Content Analyst for the respondent. The respondent is an online tech company offering a website builder service to its clients. The principal responsibility of a Content Analyst was to build websites for clients, usually SMEs, who signed up to the respondent's website building service.

21 The claimant's main role was to build websites for English speaking clients. Occasionally, he would work on Spanish/Portuguese language websites. When he did so, he would need assistance from a translator regarding the content of it.

22 The claimant's contract made reference at clause 14.1 to the company's grievance, disciplinary and dismissal procedures which were available from the company founders. The claimant did not ask for those during his employment.

23 On Thursday 31 October 2019 the claimant had a discussion with Pedro, the team leader of the Marketing Dept, about him joining that team as a Graphic Designer. On Wednesday 6 November 2019, Pedro confirmed that they would hire somebody else. The tribunal notes that this was before any alleged whistle-blowing and therefore cannot be linked to any alleged whistle-blowing. Therefore, no further findings of fact about that role are needed.

Backlog of customer deletion requests

24 At the time the claimant started work for the respondent company, it was struggling to deal with subscription cancellation requests from paying customers and account deletion requests from non-paying customers. These were dealt with by the Customer Service Department. This problem existed before GA joined the company in September 2019 as the Team leader of that

department. Two team members left shortly afterwards which further exacerbated the problem.

25 The founders of the business considered, as did GA, that there was an issue with customer retention which needed to be addressed, together with the backlog of deletion/cancellation requests. Due to the perceived problems with customer retention, it was agreed that only GA would have authority to cancel the accounts of paying customers. The claimant and other colleagues were therefore only given partial access to the system, which allowed them to cancel subscriptions for non-paying customers only.

26 The tribunal finds that there is nothing unusual, about there being different levels of permissions. The tribunal notes the contents of a screenshot of a conversation online between the claimant and GA on 13 December 2019, in which GA explained why there were different levels of permission.

27 The respondent has a Customer Service Handbook which contains a section on requests from customers for deletion of accounts and cancellation of subscriptions. Specific reference is made to the GDPR in that section of the handbook.

28 As a result of the continued backlog of deletion/cancellation requests, assistance was sought from colleagues in the Content department in November 2019. Mr Ngo, the manager of the Content department, discussed that with the team. The claimant was one of those who was asked to assist. He agreed to do so, as did other colleagues in that department.

29 It appears from the evidence seen that the claimant was one of the most efficient members of the team in helping to clear the backlog. He regularly exceeded his targets, and received a number of Amazon vouchers as a result. It is important to note that at no stage did the respondent question the claimant's competence. His subsequent dismissal had nothing to do with his competence to carry out his duties. His competence has not been in dispute at any time throughout this claim.

30 It was the practice of GA, when dealing with a cancellation request which had not been dealt with in a timely fashion, to process it immediately, apologise for the delay, and ensure payment of a refund if required. The tribunal accepts GA's evidence that the respondent did give refunds systematically and regularly.

Extension of claimant's contract

31 The claimant's contract as a Junior Content Analyst was extended on 20 November 2019 for a further three months, to end on 28 February 2020.

32 On 10 December 2019, the claimant raised with AO, a question as to whether or not he would be offered a permanent contract. He needed to know because his mother was moving house. Since he was staying in her house, he needed to find his own rented accommodation, if he stayed working for the respondent. The claimant wanted some reassurance that his job would continue, as he needed to enter into a tenancy agreement for his own accommodation.

33 A conversation took place that day between the claimant and AO. No guarantee was given by AO to the claimant that he would be offered a permanent contract in the near future. The claimant was told that his fixed

term contract had been extended, that it was due to end on 28 February 2020, but that no other guarantees could be given beyond that date.

34 The decision to extend the claimant's contract was not made by AO. It was made by his team leader at the time, Christopher Ngo, after consultation with the founders of the business. AO's role was to advise about HR issues. For example she drafted the contract that the claimant signed; and she advised about HR processes. However, decisions on the future employment of staff were not hers to take.

35 The claimant was not happy with the way that the respondent was dealing with deletion/cancellation requests. He had conversations with GA about that, from on or about 13 December 2019 onwards. The claimant claims that he alleged during those conversations that the respondent was in breach of its GDPR obligations. Specific findings are made below in relation to the content of those discussions, in the context of what the claimant referred to as the major whistleblowing incident which occurred in or around the beginning of March 2020.

36 During 2019, the number of content team employees, who had as their principal responsibility the building of websites, significantly reduced. Most website building was outsourced to an external team, made up of individuals who are not employees of the respondent. By the end of 2019, the claimant was the sole Content team employee, whose principal responsibility was building websites for clients.

37 On 3 January 2020 the claimant moved back to the Content team. He continued to work on both Content and Customer Support issues until the conflict with GA at the beginning of March 2020, referred to below.

38 On or about 10 January 2020, the respondent decided to offer the claimant a permanent contract as a Content Analyst. This reflected the high demand that the respondent was experiencing for its services at the time. The claimant was offered the role as a Content Analyst (instead of Junior Content Analyst), albeit on the same rate of pay.

39 On 2 March 2020 the claimant's third contract commenced, although the written contract was not issued and signed until 31 March 2020. See above regarding the issue as to whether or not this contract was a permanent contract.

40 It was apparent from what the claimant said during the hearing, that he did not consider that the contract which was signed by both parties on 31 March 2020 was a permanent contract, because it did not use the word permanent. There were other examples during the hearing, where the claimant took an unusually literal approach to certain things that were said. In noting that, the tribunal wishes to make it clear that no criticism of the claimant is intended.

41 In the context of employment law, the 2 March 2020 contract would be classed as a 'permanent' contract, because it was open-ended. Unlike the two previous fixed term contracts that had been offered to and accepted by the claimant, the 2 March 2020 contract did not have an end date. The tribunal notes in passing that employment contracts that are known as 'Permanent' contracts are not in fact intended to last forever. They are invariably terminable by notice by either party in line with the contractual provisions – in

the claimant's case, in clause 13. In that respect, they are no different to fixed term contracts.

The Handbook

42 The version of the Handbook provided by the respondent as part of these proceedings is version 6. It is the claimant's case that version 5 applied to him, but unfortunately, that does not appear to have been raised prior to the hearing commencing. Reference was made by Mr Lane in cross examination of the claimant to the whistleblowing section of the handbook. The claimant asked questions of AO in relation to that but after that questioning had continued for some time, the Judge asked the claimant to move on to his next line of questioning, as the matter was not going to assist him in his decision-making. No findings of fact are made therefore in relation to the contents of the Employee Handbook, since the contents of that have not assisted the tribunal in relation to the key issues before it.

43 Between 21 January and 9 March 2020, the claimant and colleagues were asked to create booklets for freelancers who were being recruited remotely. It is the claimant's case that shortly after the booklets were completed, the freelancers took over the work of the Content team and that was the real reason for him being furloughed, not the pandemic. The respondent does not dispute that much of the work of the Content team was subsequently done by freelancers, including website building.

Alleged whistle-blowing incident

44 On the claimant's case, a major whistle-blowing incident took place some time between 3 and 9 March 2020. It is the claimant's case that he again raised GDPR issues with GA, in the context of the ongoing issues concerning cancellation/deletion requests from paying and non-paying customers. The tribunal finds that GDPR issues were not raised by the claimant during his conversations with either GA or AO.

45 The reasons for that finding are as follows. Both GA and AO denied that the claimant mentioned GDPR. The tribunal finds their evidence more reliable on this point. The claimant stated that he sent a Google chat to GA on the day that the conversation took place. By that stage, the claimant had been taking screenshots of what he considered to be relevant conversations on a number of occasions. On the balance of probabilities, the concludes that had the claimant raised GDPR issues in a Google chat with GA on the day in question, he would have taken a screenshot of it.

46 The tribunal notes in this regard that in an email to HR dated 23 June 2020, the claimant stated:

> *Over the past 6 months I took the precaution to screenshot most of our conversations on Google Hangouts before you blocked me (without warning may I add). Those screenshots show exactly how Ueni management speaks to and treats their staff so this is something you won't be able to deny or say you don't recognise.*

47 The tribunal therefore finds that had the claimant sent a Google chat to GA on the day in question, as alleged, he would have taken a screenshot of it. It was clearly an important incident - there is no dispute between any of the witnesses that it was.

48 In saying that I prefer the evidence of GA and AO however, the tribunal points out that the tribunal is not finding that the claimant has tried to mislead the tribunal in that regard. The Judge accepts that the claimant genuinely believes that he did raise GDPR issues. The Judge finds however that his recollection in that regard is incorrect, and that he did not specifically raise GDPR issues at any stage with the respondent about the cancellation/deletion issue or anything else.

49 By this stage, GA was concerned that the working relationship between him and the claimant was becoming unworkable. He approached AO, as the first port of call in relation to HR issues. She subsequently spoke to the claimant, in order to get his side of the story. She asked the claimant if he was willing to enter into mediation with GA, in order to try and resolve the difficulties in their working relationship. The claimant declined to do so.

50 As a result, GA decided that he could no longer work with the claimant. His profile in customer support was deleted. It subsequently had to be opened again, as the claimant was continuing to work on some customer support issues, in the context of the website building work that he was carrying out in Content. However, GA did not have any further contact with the claimant following this incident. The tribunal accepts the claimant's evidence that he was relatively self-sufficient in relation to customer support issues, so he did not need to speak to GA again, in relation to any such issues, even though he continued to do some work which involved customer support matters, arising out of the website building work.

Furlough

51 On 9 March 2020 all employees were instructed to work from home as a result of the pandemic. Up until that time, the homeworking policy did not allow employees to work exclusively from home. That changed on 9 March 2020.

52 From about March 2020 onwards, the pandemic caused a significant downturn in the respondent's business, particularly in North America and the UK. The Latin American market seemed to the respondent to be less impacted at that time. The respondent's directors therefore decided to shift the company's business away from the UK and North American market and towards the Latin American market.

53 A video call took place on 30 March 2020 between the claimant, AO, Christopher Ngo the claimant's line manager and Ms Christine Telyan, one of the founders of the business. The claimant was told that he was to be placed on furlough, due to the downturn in business. He was warned that the business may need to make redundancies in due course.

54 The furlough decision was confirmed in writing later that day. The claimant signed the letter sent to him on 31 March 2020, confirming his agreement to being furloughed. Two other employees were also placed on furlough. These were an employee in the respondent's customer support function, whose main responsibility was to reply to English-language comments posted on social media sites; and an HR Assistant.

55 The letter sent to the claimant referred to the pandemic and to the:

[C]hallenges we face as a consequence in continuing to provide you with work for the foreseeable future.

During our discussion, I set out the impact that the current situation is having on our business, in particular the decrease in revenues and the loss of our customers, as small businesses. This situation has also affected several people within the company, as we don't have enough work for everyone.

We are therefore unable to offer work of the kind that you are employed to perform for the time being, and we have been unable to identify any other role in the business which you would be in a position to undertake.

56 As those placed on furlough were not allowed to continue doing any work for their employer, the claimant's work Google account was paused on 31 March 2020, following a request from AO to 'devops' the same day. Devops deals with such requests for the respondent.

57 GA did not take any part in the decisions regarding furlough (or the subsequent decision about the claimant's redundancy), nor was he asked for any input in relation to those decisions.

58 A further furlough agreement was sent to the claimant on 20 April 2020. The claimant did not sign this because, following a conversation with HMRC, he did not think it was necessary, as the furlough scheme was continuing. That appears to be the correct position and he was not chased for his signature.

59 On 16 June 2020, an email was sent to staff informing them that the respondent was planning to move out of the WeWork office. Staff were asked to return any borrowed equipment and security badges by 26 June 2020. The claimant asked what the address of the new office was, to which Ms Oliveira replied that they had not yet decided if they were moving to another office. The claimant relies on this email as further evidence that a decision had been made to get rid of him.

Redundancy situation

60 Due to the respondent's business decision to shift the focus of the business from English language markets to Latin American markets, the respondent needed more Spanish and Portuguese speaking Content Analysts but fewer English language speaking Content Analysts. That, combined with the respondent's decision to rely on freelancers to carry out that work, meant that the latter role was potentially redundant.

61 The claimant was informed of this on 22 June 2020 in an email sent to him by AO informing him that his role was at risk of redundancy, and inviting him to a consultation meeting by video call at 3pm on 23 June 2020, with Sean Weatherstone, the respondent's chief financial officer, and AO. The claimant replied, saying that the respondent would not have a valid reason to make him redundant. He indicated his unwillingness to attend a video call and requested that the consultation take place by email. He did so because he believed that this was the only way he would have 'written proof' of what was discussed. It was explained to the claimant that the purpose of the video call was to enable a dialogue to take place.

62 The claimant took a screen shot of AO's linked-in account on 23 June 2020. This states, in relation to her work for the respondent, that the respondent was

'currently hiring'. AO explained to the tribunal, and the tribunal accepts, that those words had been on there from the start of her employment with the respondent. Her Linked-in account was not updated on 23 June to include those words. The reality was that due to the downturn in work caused by the pandemic, there were no alternative roles for the claimant at that time.

63 The claimant did not attend the video conference call consultation meeting on 23 June 2020. Ms Oliveira subsequently wrote to the claimant by email and invited him to a rearranged meeting on 24 June 2020. On. 23 June 2020 at 14:21 the claimant emailed AO as follows:

> *May I kindly ask why such conversation needs to be via video chat? I understand that you already have suggestions, so all that needs to be done is for them to be emailed to me. I would feel more comfortable having a receipt of our conversation. I understand that Ueni is following the correct rules and regulations in regards to this matter so there wouldn't be a need to worry that I have this in writing?*

64 AO confirmed in reply that the respondent wanted a video call. The claimant replied at 17:09:

> *The reason that in your experience this is better conducted in a conversation is because it gives you the upper hand. This is why there are always 2-3 managers against 1 Ueni employee during such discussions.*
>
> *I already had a video call with You, Chris and Christine and every time I tried to ask Christine a question you would speak over her and change the topic (especially when I made a valid point)*
>
> *I understand that this is a huge leap to make but multiple employees have told me that during discussions with Ueni they were bullied into silence and/or not given an opportunity to express their concerns. They stated that they left the discussion "mentally exhausted" and that they were blamed for things out of their control.*
>
> *Therefore I will await an email with your suggestions, everything will be written down black on white so there is no confusion.*

65 AO responded at 18:49 as follows:

> *Hi Adrian*
>
> *We are sorry that you were not on the call at 3pm today. We waited over 20 minutes for you. We want to give you another chance to discuss the situation with regard to your furlough and potential notice.*
>
> *We propose a call at 10am tomorrow morning and would welcome the chance to speak to you. If that doesn't work for you, please feel free to suggest an alternative time.*
>
> *We do not recognise your description of the previous call with Christine but Sean and I will endeavour to give you the chance to explain your views without interruption.*
>
> *We are surprised and saddened to read the serious allegations that you made in your email, the company takes such allegations seriously, therefore, please find attached Employee handbook - if you feel that you wish to raise a formal complaint please follow the grievance procedure.*

I hope we will speak tomorrow at 10am.

66 The claimant's response sent at 19:58 stated:

Over the past 6 months I took the precaution to screenshot most of our conversations on Google Hangouts before you blocked me (without warning may I add) Those screenshots show exactly how Ueni management speaks to and treats their staff so this is something you won't be able to deny or say you don't recognise.

There are also screenshots of management confirming they blocked employees from Ueni systems instead of providing additional training when employees don't meet their targets. Just to name a few ways Ueni doesn't follow the correct employment procedures for which I have proof.

I don't see a point in playing office politics or pretending to be nice to me via email when the screenshots prove a different truth.

For 10 months I have been given false hope that I will be given a permanent contract and now Ueni has used government money to place their staff on Furlough while a cheaper workforce has been hired to do our job. I am sure that this is breaking the Furlough rules/regulations.

So given the circumstances that we are in I would like you to email me the suggestions that you mentioned in the first email and I will let you know my thoughts.

67 This was a somewhat combative approach for the claimant to take in relation to the proposed meeting.

68 The claimant again failed to attend the rearranged consultation meeting on 24 June 2020. Therefore the respondent wrote to the claimant on 26 June 2020 to inform him that he had been selected for redundancy, and he was being provided with one week's notice, his last day of employment being 6 July 2020. The reason given for the dismissal was the following:

As discussed at our meeting in March when you were put on furlough, UENI is having to address changes to its business arising out of the impact of Covid 19.

I am very sorry to confirm that you will not be asked to return from furlough and have been selected for redundancy.

69 The claimant did not consider that this letter gave him an adequate reason for his dismissal. He did not however submit an appeal against that decision.

Alternative employment

70 In July 2020 the respondent employed 38 employees. It currently employs 22 employees. Figures provided by the respondent show that it built approximately 90% fewer English language websites in September 2020, compared to February 2020; and approximately 85% fewer English language websites in September 2020 than it did in July 2020, when the claimant was made redundant. Since the claimant's redundancy, the respondent has not employed a Content Analyst to predominantly work for the UK and North American market.

71 The claimant's Google account was deleted following a request by AO to Devops on 3 July 2020. The tribunal notes that on 27 May 2021, following the

updating of the IT system, the claimant's account was auto-reopened. It was however re-closed the same day.

72 On 25 September 2021 the respondent put an advert for an Onboarding Customer Support Assistant on its website. The claimant raised questions about the authenticity of this document because on the claimant's version of that document, competence in Spanish/Portuguese was said to be desirable, whereas in the version submitted by the respondent, that was said to be required. That was not fully explored in cross examination by the claimant and therefore in fairness to the respondent, the tribunal makes no findings on that issue. In any event, that role is not relevant to the issues before the tribunal. The existence of a role over a year after the claimant was dismissed, does not change the fact that at the time of the claimant's dismissal, no suitable alternative employment was available for him.

73 The tribunal notes that the reason the claimant put forward the 25 September 2021 vacancy was because at 35b of AO's witness statement, she states: '*there was no alternative employment available within UENI that was potentially suitable for Adrian*'. The claimant appear to interpret that as meaning that there were no suitable alternative roles at the time that AO signed her witness statement on 21 July 2021. Again, that appears to be a very literal interpretation of what is said at paragraph 35b.

Relevant law

74 S.43B Employment Rights Act 1996 states:

> *"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—*
>
> *(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject*
>
> *(d) that the health and safety of any individual has been, is being or is likely to be endangered…*

75 The claimant must therefore establish each of the following: (i) that he made a disclosure to his employer (or other relevant person); and (ii) that the disclosure was of "*information*"; and (iii) that he believed that the information tended to show a s.43B factor; and (iv) that belief was reasonable; and (v) that he reasonably believed the disclosure to be "*in the public interest*"; and (vi) that belief was reasonable. It is not in dispute that the claimant was dismissed.

76 In relation to a disclosure of information, the Court of Appeal gave the following guidance on section 43B(1) in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850 per Sales LJ:

> *"[30] I agree with the fundamental point made by [counsel for the appellant], that the concept of "information" as used in section 43B(1) is capable of covering statements which might also be characterised as allegations. Langstaff J made the same point in the judgment below…and I would respectfully endorse what he says there. Section*

43B(1) should not be glossed to introduce into it a rigid dichotomy between "information" on the one hand and "allegations" on the other…

[31] On the other hand, although sometimes a statement which can be characterised as an allegation will also constitute "information" and amount to a qualifying disclosure within section 43B(1), not every statement involving an allegation will do so. Whether a particular allegation amounts to a qualifying disclosure under section 43B(1) will depend on whether it falls within the language used in that provision…

[35] The question in each case in relation to section 43B(1) (as it stood prior to the amendment in 2013) is whether a particular statement or disclosure is a "disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the [matters set out in sub-paragraphs (a) to (f)]. Grammatically, the word "information" has to be read with the qualifying phrase, "which tends to show [etc]" (as for example, in the present case, information which tends to show "that a person has failed or is likely to fail to comply with any legal obligation to which he is subject"). In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1)…

[36] Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief." (emphasis added)

77 In *Eiger Securities v Kurshunova* [*2017] IRLR 115*), the EAT held at §46 that:

"… in order to fall within section 43B(1)(b) , as explained in Blackbay Ventures Ltd v Gahir [2014] ICR 747 , the tribunal should have identified the source of the legal obligation to which the claimant believed Mr Ashton or the employer was subject and how they had failed to comply with it. The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgment the tribunal failed to decide whether and if so what legal obligation the claimant believed to have been breached."

78 As for what counts as a legal obligation, in the case of *Blackbay Ventures Limited t/a Chemistree v Gahir UKEAT/0449/12*, which concerned a pharmacist, the EAT held.

> *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 statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.*

79 As for public interest, in *Chesterton Global Limited (t/a Chestertons) v Nurmohamed [2017] EWCA Civ 979* the court stated:

> *(a) the numbers in the group whose interests the disclosure served—see above;*
>
> *(b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed—a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*
>
> *(c) the nature of the wrongdoing disclosed—disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*
>
> *(d) the identity of the alleged wrongdoer—as Mr Laddie put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i e staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest"—though he goes on to say that this should not be taken too far.*

80 S.103A Employment Rights Act 1996 states:

> *An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.*

81 In a section 103A ERA 1996 claim, where the claimant employee does not have the requisite service to take an unfair dismissal claim under section 98,

the burden of proof is on the claimant. The *IDS Handbook on Whistleblowing at Work* states at 6.38:

> *Employment tribunals often assert in protected disclosure cases that it is for the claimant to prove that the dismissal was by reason of having made a protected disclosure. However, this is not strictly accurate. So far as unfair dismissal is concerned, the position under S.103A is the same as that which applies to other automatically unfair reasons for dismissal. Technically, the burden is on the employer to show the reason for dismissal. In most cases, the employer seeks to discharge this by showing that, where dismissal is admitted, the reason for it was one of the potentially fair reasons under S.98(1) and (2) ERA. It will therefore normally be the employee who argues that the real reason for dismissal was an automatically unfair reason. In these circumstances, the employee acquires an evidential burden to show — without having to prove — that there is an issue which warrants investigation and which is capable of establishing the automatically unfair reason advanced. However, once the employee satisfies the tribunal that there is such an issue, the burden reverts to the employer, which must prove, on the balance of probabilities, which of the competing reasons was the principal reason for dismissal — Maund v Penwith District Council 1984 ICR 143, CA (a case of automatically unfair dismissal for trade union reasons).*
>
> ***There is one important qualification to the above. Where the employee lacks the requisite two years' continuous service to claim ordinary unfair dismissal, he or she will acquire the burden of showing, on the balance of probabilities, that the reason for dismissal was an automatically unfair reason*** *— Smith v Hayle Town Council 1978 ICR 996, CA (another trade union case), and Tedeschi v Hosiden Besson Ltd EAT 959/95 (automatically unfair dismissal for health and safety reasons). The EAT in Ross v Eddie Stobart Ltd EAT 0068/13 confirmed that the same approach applies in whistleblowing claims. (Emphasis added)*

Conclusions

82 The tribunal will deal with the issues in the following order. First, whether the claimant made a protected disclosure; second, was any protected disclosure that the tribunal finds was made, if any, the reason (or if more than one the principal reason) for the claimant's dismissal.

Protected Disclosure

83 As noted above, this involves six elements – (1) disclosure to the employer (or other prescribed person); (2) the disclosure of information; (3) tending to show a breach of one of the section 43B matters - in this case a breach of a legal obligation; (4) reasonable belief that it did so; (5) that the claimant believes that the disclosures were made in the public interest; and (6) that it was reasonable for the claimant to believe that. Each of these is dealt with in turn below.

84 Disclosure to employer – on the claimant's case, the disclosure was made to GA. The tribunal is satisfied that if that was the case, the disclosure would have been made to the claimant's employer.

85 Disclosure of information - it follows from the findings of fact above, that the information that the claimant disclosed, was that the respondent was breaching its obligations to customers in relation to deletion of accounts and/or cancelling of subscriptions by failing to close accounts/cancel subscriptions in good time. The tribunal has however rejected the claimant's claim that he alleged to AO or GA that such matters were breaches of the GDPR.

86 Breach of a legal obligation – in relation to the disclosure of information which the tribunal has found did occur, this does not tend to show the breach of a legal obligation. The claimant did not allege that in any event. His whistleblowing claim is founded on his allegation that he raised GDPR issues with GA and AO. The claimant therefore fails on this issue too, on the basis of the facts found.

87 Even if the tribunal had found that the claimant had alleged breaches of GDPR, then on the facts of this case, the tribunal would have found that the claimant has not been specific enough, as to the legal obligation which he considered had been breached. Whilst it is important, if whistleblowing law is to give employees the protection Parliament intended, that an overly technical approach should not be taken, in the tribunal's view it was incumbent on the claimant to provide by the time of the hearing more detail as to which GDPR obligations had been breached. Much publicity has been given to the relatively recent decision of the European Court in relation to the deletion of data by Facebook. The applicability of that case to the respondent situation is however not clear; the claimant did not refer to it or try and argue its relevance before the tribunal.

88 Reasonable belief that a legal obligation was being breached - in any event, even if the tribunal had been willing to give the claimant the benefit of the doubt in relation to the legal obligation in question, the tribunal would have concluded that he did not have a reasonable belief that any legal obligation was being breached in the particular circumstances.

89 The tribunal notes for example that at the hearing of this claim, the claimant has maintained that he should have been given permission to delete paying customers' accounts, and that GA was hiding figures from the founders of the business. The tribunal however accepts GA's evidence that the figures were all available to the founders, and that he was not deliberately failing to delete accounts, in order to suggest to his managers, and to potential investors, that the company had more customers than they actually did. The tribunal has accepted GA's evidence that he inherited a serious problem when he joined the company; and that he and his managers worked with other colleagues in the business, including the claimant and his colleagues in the Content department, in order to deal with the backlog as quickly as possible. The backlog was not caused by GA deliberately being unwilling to delete accounts, and it was not reasonable for the claimant to believe that was the case.

90 The tribunal also refers to the provisions of the Customer Service Handbook paragraphs 75 to 82, which specifically refer to the GDPR obligations and

what needs to be done to comply with them. What is said there reinforces the tribunal's conclusion that it was not reasonable for the claimant to conclude that GA or anyone else in the company was failing to delete accounts, in order to massage its figures.

91 The public interest issue - had the claimant succeeded in relation to the above three issues, the tribunal would have found that there was a public interest in the disclosures being made. There were thousands of accounts which needed to be deleted and/or where subscriptions needed to be cancelled and as noted above, that was why staff in another department were drafted in in November 2019 to help deal with that significant backlog. The issue clearly affected a large number of people. Further, deletion of data and or cancelling of subscriptions is a not insignificant issue, particularly for those with a sense of grievance that it has not been done in good time, after the request has been made. Further, the tribunal considers that there is a public interest in potential investors in the business making investment decisions on the basis of the correct data. The respondent holds out to the public that it has received over £30 million of investment, a very significant sum of money. The tribunal respectfully rejects Mr Lane's submission that potential investors are not part of 'the public'.

92 Reasonable belief that the disclosures are made in the public interest - bearing in mind the above, the tribunal would also have concluded, had the claimant succeeded on the first four issues, that he reasonably believed that the disclosures were made in the public interest.

93 In summary, the tribunal has concluded that the claimant has failed to succeed on the second, third and fourth issues and that he did not as a result make any protected disclosures.

Reason for dismissal

94 In any event, had I held that the claimant had made protected disclosures, the tribunal would have held that those disclosures were not the reason or the principal reason for the claimant's dismissal. The tribunal accepts the respondent's explanation that the reason for the claimant's dismissal was the downturn in business caused by the pandemic, together with their decision to carry out more of that work through the use of freelancers. This resulted in the respondent no longer requiring the claimant to carry out the role of Content Analyst which he was contractually employed to do. The fact that the claimant may have been carrying out Customer Support work, and as part of his Content Analyst role continued to do so (although to a more limited extent), does not change the position that the claimant's contractual role was no longer required.

95 The tribunal is satisfied that at the time of claimant's dismissal, there was no alternative employment which the respondent could reasonably have offered to the claimant. Whilst the tribunal accepts that the claimant had other skills, there was no requirement on the business to offer to the claimant the opportunity to carry out any such roles for the respondent at the time of his redundancy. The respondent already had sufficient people employed to carry out those roles as part of their contracts of employment. There were no vacancies elsewhere.

96 Whilst the tribunal has been able to make clear findings of fact and draw firm conclusions in relation to the reasons for the redundancy, the tribunal also takes account of the fact that the respondent had decided to offer the claimant a permanent role as a Content Analyst in January 2020. That position did not change, even after, on the claimant's case, the whistleblowing was alleged to have begun in December 2019. Further, the written contract was not signed until the end of March. Had the respondent been serious about wanting to remove the claimant from his role because of any alleged whistleblowing at the beginning of March, it could have moved to dismiss him much earlier.

97 The tribunal is also satisfied that the decision to place the claimant on furlough was because of the reasons set out in the letter sent to him on 30 March 2020, as quoted above. It was not a deliberate precursor to his subsequent dismissal.

98 The decision to replace the claimant may have been partly due to the fact that freelancers were employed instead to carry out much of the Content work. The decision of the respondent to carry out the work in that way is not one which the tribunal can interfere with or criticise. Further, it is not a reason that is linked in any way to the alleged whistleblowing. The tribunal also notes that during cross-examination the claimant accepted that the use of freelancers had nothing to do with whistleblowing because it was related to a different department, i.e. customer service, and not the content department that he worked in. Further, he accepted that that decision was made by the directors, not to those to whom he allegedly blew the whistle.

99 Yet further, in relation to the redundancy decision itself, the tribunal has found as a fact that neither AO nor AG had any input in relation to the decision to (1) place him on furlough, and (2) to dismiss him due to the downturn in business. That decision was made by the directors. On the claimant's case, he whistle blew to AO and GA. The claimant has not proved that they raised any whistleblowing issues with the directors, a conclusion which the tribunal rejects in any event, on the basis that the claimant did not complain about GDPR issues to either of them.

100 Finally, the tribunal notes that two other employees were placed on furlough and then made redundant at the same time as the claimant. It was not part of the claimant's case that they whistle-blew as well (although he did allege that one of his colleagues, 'V', did raise complaints). The tribunal is satisfied that those individuals were dismissed for reasons which had nothing to do with whistleblowing, or any complaints, just like the claimant. The reason for their dismissal was the downturn in business caused by the pandemic, the same as for the claimant.

101 For the above reasons, the claim of automatically unfair dismissal because of whistleblowing fails and is dismissed.

Employment Judge A James
London Central Region

Dated 24 November 2021

Sent to the parties on:

26 November 2021

For the Tribunals Office

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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