EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr S Rae **v** **Avid HiFi Ltd**

Heard at: Watford by CVP **On**: 2,3 and 7 December 2021

Before: Employment Judge Manley
Members: Mr B Smith
Mrs J Costley

Appearances:

For the Claimant: Mr L Bronze, Counsel
For the Respondent: Mr A MacPhail, Counsel

RESERVED JUDGMENT

1. The respondent did not breach a fundamental term of the employment contract and there was therefore no dismissal. The claim for unfair dismissal fails and is dismissed.

2. The claimant did not make a public interest disclosure that amounted to a protected disclosure.

3. Even if the claimant had made such a disclosure, there was no connection between that and the termination of his employment

4. Nor was there any connection between any such disclosure and any detriments relied upon.

5. The claims for public interest disclosure dismissal and detriment fails and are dismissed. The remedy date of 6 May 2022 is vacated.

REASONS

Introduction and issues

1. The claimant brought claims for constructive unfair dismissal, automatic unfair dismissal and detriments for making a public interest disclosure.

2. The parties had prepared a "*Statement of Issues*" although it was not entirely clear to the tribunal whether these had been fully agreed. After a section entitled "*Key factual issues*" which we set out below in our conclusions, the legal issues were recorded to be as follows:-

Unfair dismissal

1 Was the Claimant entitled to terminate his employment by reason of the Respondent's conduct and treat himself as being unfairly constructively dismissed? In particular:-

1.1 Had the Respondent committed any repudiatory breaches of the Claimant'scontract of employment as set out at paragraph 13 of the POC;

1.2 Did the Claimant terminate his employment in response to such breaches; and

1.3 Did the Claimant act without undue delay?

2 Was the sole or principal reason for the Claimant's constructive dismissal (if proven) the making of a protected disclosure, thus rendering the Claimant's dismissal automatically unfair?

Unlawful detriment

3 Was the Claimant subjected to an unlawful detriment contrary to Section 47(b)ERA 1996. In particular:-

3.1 Had the Claimant made a qualifying disclosure, was it a protected

disclosure?; The Claimant relies on a comment in the meeting on 13 July 2020 that "working during furlough leave was actually illegal and he was not comfortable working under those conditions" (POC 9 and 12) as the information he provided tended to show that a criminal offence had been committed.

3.2 Was the written warning a detriment which was a result of him making such disclosure; and,

3.3 Has the Respondent engaged in post-employment victimisation by exposing the Claimant to further detriments by letters written by its Solicitors on 4 November 2020 and 9 February 2021 (and, since an amendment was allowed, disclosure on 19 June 2021)?

3. As can be seen, those issues refer to the particulars of claim, particularly in relation to the constructive unfair dismissal and the alleged breaches of employment contract. These are set out in paragraphs 13.1 to 13.10 of the particulars of claim and read as follows:

"13.1 The Respondent had required the Claimant to work during a period of furlough leave while still making a claim to the Government pursuant to the Coronavirus Job Retention Scheme, thereby committing furlough fraud;

13.2 The Respondent reprimanding the Claimant for failing to work harder during his period of furlough leave;

13.3 The Respondent had given the Claimant a written warning about his alleged poor performance without any reasonable grounds to do so;

13.4 The Respondent had pre-determined the outcome of the disciplinary meeting by having a pre-prepared script that the outcome would be either a verbal warning, the Claimant's resignation or his dismissal by reason of redundancy;

13.5 The Respondent had made a pre-determined suggestion that the Claimant's employment may terminate without any reasonable reason for doing so;

13.6 The Respondent had failed to follow its own contractual disciplinary procedure before issuing the Claimant with a disciplinary sanction;

13.7 The Respondent had reprimanded and disciplined the Claimant in front of a fellow employee without reasonable grounds, which such conduct the Claimant found humiliating;

13.8 The Respondent provided the Claimant with a written warning without any reasonable grounds for doing so, particularly as Mr Mas had suggested that the Claimant would only receive a verbal warning;

13.9 The respondent increased the disciplinary sanction to tat of a written warning as a result of the Claimant's assertion that he was not comfortable about the Respondent's Illegal practices;

13.10 A combination of all the above factors represented a breach of the implied term of mutual trust and confidence."

The hearing

4. The hearing did not get off to a particularly smooth start as a three-day listing had been reduced to two days and there were some relatively significant preliminary issues to be determined. We agreed to press on and see if we could manage to hear the evidence in the time allowed. In the event, the tribunal was able to secure the following Tuesday 7 December 2021, to complete matters. The tribunal reserved its judgment on the substantive matters.

Preliminary issues

5. It was agreed that it was sensible for the employment judge alone to deal with the preliminary issues which are now summarised. A number of documents had been sent to the tribunal by email shortly before the hearing with respect to these preliminary matters and it was a little complicated to recognise which applied to which preliminary issue.

6. The first issue was, in short, an application to strike out the response on the grounds that the respondent's main witness and Managing Director, Mr Mas, had been responsible for viewing the claimant's private Facebook messages after the claimant's employment had terminated. This was said to be unlawful in a number of ways although we did not get into details of that alleged unlawfulness.

7. The other preliminary issue was whether the claimant should be able to amend his claim to add further acts of post-employment alleged detriment, these having occurred after the presentation of the claim form.

8. The employment judge read the application for a strike out, but had some difficulties finding the amendment application, and also considered the respondent's response to the claimant's applications. The employment judge also read an email from the claimant's representatives and amended particulars and looked at the matters complained about with respect to the Facebook messages. She then heard oral submissions from both representatives.

9. In summary, the claimant's representative argued that this was an application to strike out the response under Rule 37 Employment Tribunal Rules of Procedure 2013 on the grounds that a fair trial was not possible because the tribunal would not be able to trust the evidence of Mr Mas. We looked together at various Facebook messages involving the claimant which appeared to have been looked at by Mr Mas, which action was said to amount to an invasion of the claimant's private life and that I should take account of the effect on the claimant. I was asked to consider Chidzoy v BBC [1997] UKEAT/17 but the circumstances in that case were very different, involving a claimant's behaviour during a tribunal hearing.

10. As far as the request to amend is concerned, it was, again, slightly difficult to find in the paperwork available to the employment judge. In any event, the application comes down to two matters relating to what appears in the amended particulars of claim at 17.2 and 17.3. 17.2 is about a letter from the respondent's solicitors dated 9 February 2021 which alleged that the claimant had set up a competing business, that he had misused confidential information and intellectual property. 17.3 concerned the disclosure by the respondent to the claimant's solicitors on 19 June 2021 of the Facebook messages referred to above. These are said to be further detriments arising from the alleged public interest disclosure.

11. The respondent's representative replied that a strike out is a draconian sanction only to be used in extreme circumstances and that it is clear a fair hearing is still possible. Not least this is the case, argues the respondent, because the claimant himself wants the documents (the Facebook messages) which have been referred to, by whatever means they were sourced, to be in the bundle. They contain matters which may well go to credibility of either or both witnesses.

12. As far as the amendment application is concerned, this was objected to by the respondent. The respondent's representative submits that, although there was some reference to these proposed amendments at an earlier stage of the case, the application was not made until 14 September whereas the alleged detriments took place some time earlier. The employment judge was referred to the summary of the preliminary hearing which appeared to give the claimant an opportunity to make an amendment by 4pm on 1 July. The respondent argues the claimant is now out of time to

make any such application. The matters referred to occurred in February and June of 2021.

13. The employment judge then gave short oral judgment, having looked at the various documents with respect to the applications.

14. There is to be no strike out of the response. That is far too draconian an action to take in the circumstances of the documents being in the bundle and it cannot be said, at this stage, that this particular witness cannot be trusted because of actions he took before any legal advice on that matter was sought. Nor can it be said that a fair trial is not possible in the circumstances. It would be highly disproportionate to strike out the response. The BBC case is of no assistance to me as that is concerned with actions taken by a claimant after being told not to take those actions.

15. As far as the application to amend is concerned, the employment judge decided to allow the amendment. Although the application was made late, there had indeed been unexplained delays, and it might extend the time needed for this hearing, that is to a limited extent. In the circumstances of these being relatively short matters which the respondent was well aware of, it would make sense to allow these amendments which did not include a new head of claim but added only to the detriments relied upon. It could not be said that there was any real prejudice to the respondent and, on balance, the amendments should be allowed.

16. The hearing then continued with the following witnesses giving evidence. The claimant gave evidence as did his wife, Teresa Rae. For the respondent we heard from the Managing Director, Mr Mas, and a former colleague of the claimant, Mr Cooper. The bundle of document was almost 200 pages long and we did look at a significant number of those over the course of the hearing.

17. The representatives agreed to send written submissions which they did in time for the hearing to recommence on 7 December when they added to those orally. After discussion the tribunal decided it was necessary to reserve judgment.

Facts

18. The tribunal finds the following relevant facts for the determination of the issues. As is common, we heard considerable evidence which the tribunal feels does not touch directly nor help us with the issues to be determined.

19. The respondent company was started by the Managing Director, Mr Mas, as a partnership in 1995 and it became a company in 2005. It is a small company which manufactures HiFi equipment. There are currently eight

staff and Mr Mas and his wife work in the business, primarily in management.

20. The respondent provides employment contracts to its staff and this includes a disciplinary policy. Some detail of that will be quoted later. Suffice it to say that Mr Mas has not had cause to look at that policy as there have been no disciplinary matters before the matters we will come to with respect to the claimant. It is also clear to the tribunal that the claimant himself was not aware of the disciplinary policy and he did not look at it until after he resigned in mid-July of 2020.

21. The claimant moved from working for Tannoy to the respondent in 2015 to work on technical drawings. He resigned in 2017 to go to a new company but then asked to return later the same year. He remained with the respondent until his resignation on 15 July 2020. Latterly, it was agreed that he could work from home for three days a week.

22. The parties agree that Mr Mas raised issues about various mistakes that the claimant had made on the designs with him on an informal basis. Mr Mas' evidence was that this improved his performance, at least for a period of time. The claimant says there was an explanation for these mistakes which was that he was being asked to carry out work on a number of different projects.

23. The claimant considered and mentioned to Mr Mas on more than one occasion that he might leave and work elsewhere.

24. The UK was placed into lockdown in March 2020 and the respondent considered how to continue with the business continuing to function and to keep staff in employment. The claimant and the rest of the staff, apart from Mr and Mrs Mas, were placed on furlough. This needed the consent of the individuals and the form of consent appears at page 85 of the bundle and is signed by the claimant.

25. Mr Cooper's evidence was that staff were told clearly that they could not carry out any work. Mr Cooper was factory based and the factory was closed and therefore there was no chance of him carrying out any work. The situation was a little different for the claimant because of the amount of work that he carried out from home and the type of work that he was doing. All parties agree that there was regular contact during the period of furlough which began in April 2020, much of it was on a friendly level and was about people keeping in touch.

26. The difference relates to matters between the claimant and Mr Mas where work matters were raised. The tribunal have looked at various emails between them. These appear at various places in the bundle but primarily between pages 84 103. Mr Mas' evidence was that the claimant said that

he was bored and was offering or asking to do work. At least one email does support that where the claimant said "*happy to help out*". The claimant's evidence was that he felt pressured to carry out some work. The tribunal appreciates that the rules about furlough were unclear; this was a very new area for everyone involved in business during the pandemic.

27. For example, in one email there was mention about artwork for "Accent" which we understand to be for the website, where Mr Mas said, "*You could at some point make up the Accent model…"* and there are other instances where the claimant was asked to resend something. This related to him having sent artwork through before furlough and Mr Mas said he could not open it and asked for the claimant to resend it. There are also examples of the claimant not being asked to do anything by Mr Mas but dealing with one or two business type emails and customers. The tribunal finds that there was a very low level of communication about anything related to the respondent's business carried out by the claimant during this time.

28. Having looked at all the evidence, the tribunal is of the view that there was no firm request from the claimant to carry out work and nor was there any pressure on him to do so. The tribunal are satisfied that what was occasionally asked of the claimant was to enable the respondent's business to continue running. At no time did the claimant raise any objections to being asked to carry out any work during furlough.

29. We were also asked to look at some of the Facebook messages which were sent by the claimant between April and July 2020. These were to acquaintances outside the respondent's business. In one of them the claimant says that he is looking to find a new job and in others he makes reference to plans to start a new company with a friend (who was a customer or supplier of the respondent). The claimant mentioned that he was working on "*some development work (just for fun, not AVID)"* and that he was working on a "*design for our first (potential) product*". The tribunal finds that the claimant was considering options for work outside the respondent but that they were only in their very early stages when he returned to work in July.

30. The claimant returned to work after furlough on or around 7 July 2020. It seems that he worked two or three days in that week and was sick on one of those days. Mr Mas had taken the view that he needed to speak to the claimant about his performance in a slightly more formal way than he had previously.

31. This led to him preparing a "crib sheet" which appears at pages 115 to 116 of the bundle. After some general comments about the business, there appears a heading *"Simon;Issues*". Under this are some brief comments including one line which reads "*You'd do images – did little – obviously your prerogative (Team/Glenn)"*. There then appears the heading "*Simon;*

Moving Forward" with some comments such as "*Improvement in quality of work – less mistakes*; "*Nobody is going to get rid of you; but its only you that will get rid of yourself*". Finally, a heading "*Options*" under which appear 3 lines as follows-

"*Verbal warning lasting 6 months*

Hot headed resign

Redundancy"

32. Mr Mas asked Mr Cooper to attend a meeting with the claimant. Mr Cooper was a friend and colleague of the claimant. He told the tribunal that he agreed that the claimant had made a number of errors which impacted on his work but that they usually managed to resolve them without any animosity. The tribunal does not accept that the existence of the crib sheet indicates any pre-determined outcome. There are options suggested.

33. The claimant's contract of employment contained a disciplinary policy. The tribunal accepts that Mr Mas did not look at it before he met with the claimant and he was asked several questions about it during this hearing. It is a little out of date as it refers to statutory disciplinary and grievance procedures but it does state that it applies to situations of *"sub standard performance*". It also says this "*An informal warning may be given, which does not count as part of the formal (or statutory) disciplinary procedure. No formal record of this type of warning will be kept".* It goes on to state that, if there is no improvement, the employee will be invited to a meeting and that they will be allowed to bring a work colleague or trade union representative. There are said to be possible outcomes including an oral warning (said to be a "*formal oral warning*" where a note will be kept on file and disregarded after 6 months). There is also said to be a right of appeal. There are other options and later a standard procedure including providing the employee with a written statement before any meeting. Several of the steps were not followed in this case, including giving anything to the claimant in writing before the meeting and advising him he could be accompanied.

34. The claimant was called into the meeting on 13 July 2020 with Mr Cooper in attendance and there was a discussion about how the claimant carried out his work. The comment about "*You'd do images …"* seems to have related to correspondence between Mr Mas and the claimant with respect to work which might be carried out on the website during furlough. A number of other examples was given about team playing and other criticisms. It is clear to the tribunal that this is a criticism of what the claimant did not achieve whilst on furlough but it also recognises that it was "*your prerogative*". The tribunal finds that Mr Mas raised this as a recent example of concerns he had about the claimant and his performance.

35. Following on from this comment by Mr Mas, the claimant made a comment which appears at paragraph 17 of Mr Cooper's statement and also in the claimant's own statement. There is not a considerable difference between this but for completeness, the claimant's statement at paragraph 19 reads as follows:

> *"I stated that, as he knew, working during furlough was actually illegal and I was not comfortable working under those conditions. He said that that was my prerogative, but did not retract the allegation."*

36. Mr Cooper, at paragraph 17, says that the claimant said, "*However when he looked at rules and legal aspects thought it would make it uncomfortable for both him and Conrad" (Mr Mas).* Mr Mas' recollection of this comment is at his paragraph 25, "*The claimant did say something to the effect that it was not legal to work on furlough*".

37. The meeting continued after that point with further discussion and what the claimant in his own witness statement said were options given to him. These appear to include the suggestion that there might be a "*hot headed resignation*", given the claimant's threats to resign before, redundancy or a verbal or oral warning.

38. Mr Cooper and Mr Mas are quite clear that the claimant was told that he would receive a letter confirming that an oral warning had been given and the claimant could not remember whether that had been said or not. He took no issue with the evidence of Mr Cooper. It is agreed by all that the tone of the meeting was amicable and that the outcome was that the claimant would stay at work. Mr Cooper said that after the meeting the claimant had a discussion with him about what he should do and that Mr Cooper said that he should stay and they would work through the issues together.

39. The claimant's wife gave evidence that he contacted her and was very shocked at the discussion and he was concerned about the oral warning that he believed he had received.

40. The claimant then worked the whole of the next day, 14 July, and there was considerable interaction between the claimant and Mr Mas, all of which was amicable and, in Mr Mas' view, the claimant was improving in his performance.

41. The evidence from Mr Mas is that the respondent did not understand how to formulate a letter to confirm the oral warning. His evidence was that Mrs Mas found a template on the internet and amended it for the claimant's case. Unfortunately, this template reads that it is a "*first formal warning*" and the contents reflect that, and they also reflect the discussion about the

claimant's performance. Ms Mas takes responsibility for the fact that he signed that letter even though it did not record an oral warning as he had stated. The respondent's evidence is that that was an error.

42. The tribunal spent some time looking at that letter and it appears at page 117 of the bundle. There are several problems with the letter, apart from its heading. It is poorly worded and obviously comes from someone who is not experienced in providing information on a sanction for performance. In particular, there was no right of appeal mentioned. It also makes reference to a time period of 12 months for it to remain on file whereas the period of 6 months had been mentioned at the meeting. The letter does refer to concern about the claimant's performance which were also part of the discussion at the meeting, giving examples of "*continually making errors*" which are said to be "*recent, but there have been many others over the past year".*

43. The tribunal finds that, on the balance of probabilities, the letter was sent in error. It was a mistake which should not have been made by the respondent. The tribunal do not accept that Mr Mas deliberately increased the sanction that he imposed at the meeting on 13 July but he did not pay proper attention to what followed in writing.

44. The claimant decided to resign and he did so by letter of 15 July which the respondent received on 16 July. He said he was "*resigning with immediate effect*". The claimant said:-

"*The reason for my resignation is that I believe you have committed a repudiatory breach of contract due to reprimanding me for not engaging in work for you during my period of furlough leave. I also believe that your allegations of poor performance or misconduct are unfair and exaggerated and you have mishandled the situation.*

Due to your behaviour as outlined above and your issuing a formal written warning, I believe the employment relationship has irretrievably broken down and I resign as a result of the fundamental breach of the employment contract on your part"

45. Mr Mas did not immediately respond. His evidence was that he was concerned about the claimant not giving any notice and he looked at that aspect rather than noticing the claimant had used the phrase "*formal written warning*" as being of concern.

46. The claimant does not mention in the resignation letter that he believed there had been an increased sanction without his knowledge. When he was asked about this on cross examination, he said that being given a formal warning was a major part of his reason to resign and that he believed it was

an increase in sanction as the formal warning was more serious than what he had been told.

47. The claimant had asked for, and been given, a copy of the crib sheet and it is absolutely clear that everybody who attended that meeting on 13 July agreed that the claimant was told that it would be an oral or a verbal warning. The claimant was also asked why he did not follow up the letter stating "*formal warning*" by speaking to Mr Mas and he said that he was very stressed with the whole situation. The claimant also did not speak to Mr Cooper who might have been able to confirm that it should have been an oral warning. Given that the claimant had had an amicable meeting, even on his account, and that the whole of the next day had also been amicable, he has not really explained why he did not ask Mr Mas for an explanation in the apparent change of sanction. All the evidence points to the fact that, once Mr Mas realised that that was being said, he immediately said that it was a mistake. That is consistent with what everyone says and it was agreed to have been said at the meeting on 13 July.

48. The claimant looked at his contract, including the disciplinary policy, on 17 July and believed there were various breaches with respect to that.

49. At some point after the claimant's resignation, Mr Mas looked at the claimant's work computer. The claimant used a work computer when he was in the respondent's building but his own laptop for working at home. Mr Mas' evidence was that the Facebook tab was open on the work computer which was in the respondent's building, and he looked at it, probably to see whether there was anything that was of interest to the business. The tribunal accept that Mr Mas should not have looked at Facebook messages which were private, although the matter is somewhat complicated by the fact that it was on a work computer and left as an open tab by the claimant. Mr Mas found there references to a number of matters which concerned him and led him to believe that there might be a question of the claimant setting up in business and possibly questions about intellectual property.

50. By now, both parties had sought legal advice and there were letters written on behalf of the claimant which constituted a grievance and letters written by the respondent with respect to concerns about business and intellectual property as mentioned above.

The law

51. The law with respect to public interest disclosures is set out in part IVA of Employment Rights Act 1996 (ERA). Section 43A ERA 96 defines a 'protected disclosure' *as a qualifying disclosure (as defined by s43B) which is made by a worker in accordance with any of sections 43C to 43H".*

52. The relevant parts of section 43B of ERA 96 state:

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

53. Pursuant to s43C a qualifying disclosure is made if the worker makes the disclosure to his employer.

54. When considering whether there has been a disclosure within the meaning of s43(B)(1) the employee must disclose 'information'. It is not sufficient that the employee has made an 'allegation' (Cavendish Munro Professional Risks Management Ltd v. Mr. M Geduld [2010] ICR 325) as clarified by the Court of Appeal in Kilraine v London Borough of Wandsworth [2018] ICR 1850. The tribunal must consider whether the disclosures contain sufficient factual content and specificity to amount to a reasonable belief in the breach alleged.

55. The claimant must show that he reasonably believed the disclosure was in the public interest. There is no requirement to show that the breach actually occurred. Our task is to consider, in relation to the alleged disclosures, whether, in the claimant's reasonable belief, there was information which was in the public interest and tended to show one of the matters in s43B (1) a) or b), namely that there had been or was likely to be a crime or breach of a legal obligation. In this case, the claimant relies on the information tending to show a crime has been committed but we also considered the possibility that it may amount to a breach of a legal obligation.

56. Guidance is provided to tribunals hearing public interest disclosure cases in Blackbay Ventures Ltd T/A Chemistree v Gahir [2014] ICR 747. It is suggested that each disclosure should be separately identified; that each alleged crime or failure to comply with a legal obligation should be separately identified; that the issue of whether the claimant had a reasonable belief that it was in the public interest and, where detriment is alleged, that the detriment should be identified.

57. Section 103A ERA provides:

"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".

58. If we find that there were one or more public interest disclosures, we must then consider whether the dismissal was because the claimant made the disclosure(s). With respect to the burden of proof where the claimant claims automatically unfair dismissal under s103A ERA, the case of Kuzel v Roche Products Ltd [2008] IRLR 530 states that the claimant must challenge the employer's reason and produce some evidence of a different reason for dismissal.

59. Section 47B ERA provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure. Section 48(2) ERA provides that on a complaint under section 47B :- "*it is for the employer to show the ground upon which any act, or deliberate failure to act was done*". The tribunal must decide what caused the detriments (if any are found) and the dismissal. Helpful guidance in assessing causation is provided in the Court of Appeal's judgment in Fecitt v NHS Manchester [2012] ICR 372 where it was said:

   "*section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than trivial influence) the employer's treatment of the whistleblower".*

60. The tribunal is also concerned to decide whether there has been a dismissal in accordance with Section 95(1) Employment Rights Act 1996 which states:-

   "For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2)….only if)-

   a)-
   b)-
   c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of his employer's conduct"

61. This is what has become known as "constructive dismissal". The leading case of Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 remains good law and makes it clear that the employer's conduct has to amount to a repudiatory breach. The employee must show a fundamental breach of contract that caused them to resign and that they did so without delay.

62. In summary then, we are concerned to decide first, whether there was a disclosure, that is whether there was information which tends to show, in the reasonable belief of the claimant, either a crime or a breach of a legal

obligation. If there was such disclosure, we have to consider whether, in the claimant's reasonable belief, it was in the public interest.

63. Secondly, if there were disclosures, we consider whether there was any causal link between them and any detriment or dismissal. For the connection to the dismissal, it should be the reason (or a principal reason). For any connection to a detriment, it must be a materially influence on the treatment.

64. The claimant relies separately on the way in which the matter was handled as constituting a fundamental breach. If there is such a breach the tribunal must determine whether the claimant resigned because of it and without delay.

Submissions

65. The general legal principles as set out above are not in dispute. The claimant submits that the facts show a protected disclosure and detriments and dismissal connected to that disclosure. In particular, it is submitted that the respondent's case that the formal warning letter was a mistake should be rejected and referred the tribunal to Edinburgh Mela Limited v Purnell (UKEAT/41/19) to remind us that the issue should be determined in the employee's favour. The claimant also submits that there was a fundamental breach by the employer which led to his resignation, referring the tribunal to the case of Waltham Forest v Omilaju [2004] EWCA Civ 1493 for guidance with respect to a series of acts or omissions cumulatively amounting to a fundamental breach.

66. The respondent submits that there was no protected disclosure and, even if there was, there was no connection between that and the alleged detriments or the resignation. As for the constructive unfair dismissal claim, the respondent submits there was no fundamental breach. We were referred to Cantor Fitzgerald Int v Callaghan [1999] ICR 639 to help with the question of assessment of what action (or omission) could amount to a fundamental breach. In short, it is open to the tribunal to determine when a breach is or is not repudiatory.

Conclusions

67. The statement of issues is drawn up in a slightly unusual way but we thought it best to answer it in the same way but also taking into account the particulars of claim. Under the key factual issues, these questions are asked and we provide our answers having found the relevant facts:

    67.1 Did the respondent place pressure upon the claimant to undertake work during his furlough leave?

The tribunal does not accept that there was such pressure although he was asked to carry out a very minimal amount of work which was to respond to an email. Otherwise, the claimant was voluntarily and minimally involved in email exchanges.

67.2 Was the claimant reprimanded for only having completed a small amount of work during his furlough leave at a meeting on 13 July 2020 and did the claimant state that working during furlough leave was actually illegal and he was not comfortable working under those conditions?

The claimant was not reprimanded for only having carried out a small amount of work. The comment was in connection with the claimant having offered to do something which he did not fully deliver. The added comment about "*your prerogative*" indicated that the respondent accepted it was voluntary. As stated above, it is agreed that the claimant said words about the illegality of working during furlough and that he was not comfortable.

67.3 Did the respondent, through its Managing Director, make unjustified remarks about the claimant's performance at the meeting stating that the claimant had three options, namely he could receive a verbal warning lasting 6 months, he could resign or be made redundant?

The tribunal does not agree that the respondent made unjustified remarks but it is agreed that he did refer to the three options more or less as set out here.

67.4 Was the respondent's subsequent written warning, dated 13 July 2020 directly connected to the claimant making a disclosure about the respondent's alleged unlawful request to work during furlough or was it a "mistake" as alleged by the respondent?

As is clear from our findings of fact, we accept that the letter stating it was a formal warning was a mistake. The tribunal does not find that the sending of that letter had any connection to the claimant's mention of working in furlough and its alleged illegality.

67.5 This is a question about factual allegations contained within a solicitor's letter and does not require an answer.

68. We therefore turn to the more substantive issues between 1 and 3 of the statement of issues at paragraph 2 above. The first question for us is whether the respondent has committed a repudiatory breach as set out between paragraphs 13.1 and 13.10 (paragraph 3 above) and we deal with those now.

69. The tribunal will repeat some matters contained in our findings of fact. For paragraph 13.1, the claimant was not required to work during furlough but was requested to carry out some very minor tasks. He also offered to do some work on the website. There was no reprimand for failing to work harder as suggested by paragraph13.2.

70. Paragraph 13.3 is the allegation of giving the claimant a written warning without any reasonable grounds to do so. This is a difficult question to answer in light of the fact that the letter containing a formal warning was, the tribunal finds, a mistake. Whether there were reasonable grounds to give a first formal warning cannot be answered, given the evidence that Mr Mas only considered an oral warning. The tribunal finds that the respondent had reasonable grounds to give an oral warning to the claimant, given the evidence of performance related issues.

71. Paragraphs 13.4 and 13.5 can be taken together because they refer to predetermined outcomes and suggestions. The tribunal does not accept that there was any predetermined outcome. A crib sheet is a perfectly reasonable way for an employer to remind themselves of matters to be raised with the claimant and to give options.

72. Paragraph 13.6 is about the failure to follow the contractual policy. It is correct that several parts of the disciplinary policy were not followed in this instance, not least because Mr Mas did not read it and was not familiar with it. The failures to follow the policy were not known to the claimant at the time he resigned so could not have been part of his reason for resigning.

73. Paragraph 13.7 is about the presence of Mr Cooper at the meeting but there is no evidence that the claimant found it humiliating, given that he was a friend with whom he had discussion after the meeting of an entirely friendly nature.

74. Paragraphs 13.8 and 13.9 both relate to the written warning when the claimant had been told he was to be given a verbal warning. Our findings make it clear that the letter was a mistake and there was no increased sanction, nor do the tribunal accept that the claimant believed there was an increased sanction.

75. Paragraph 13.10 is the claim that a combination of all those are in breach of the implied term of mutual trust and confidence so the tribunal now addresses that question.

76. We therefore have to question whether there was either one repudiatory breach or a number of breaches of the claimant's contract of employment. This is a difficult question and it took the tribunal some time to come to a conclusion. We do accept that it was a significant error on the part of the respondent to provide a letter saying the claimant had a formal warning

when he had told it would be an oral warning. It was a bad mistake and one which should not have been made. However, we cannot come to the conclusion that that amounted to a repudiatory breach because we take into account all of the surrounding circumstances. These include the amicable nature of the 13 July meeting, the many discussions the next day and the failure of the claimant to query that matter either with Mr Mas or with Mr Cooper or indeed to refer directly to it in his letter of resignation. The question for the tribunal is whether the breach indicates an intention of the respondent to be no longer bound by the contract and there is no such intention here at all. The tribunal finds that the sending of that letter did not amount to a repudiatory breach.

77. We then consider the other matters as set out above. We have not found that the claimant was required to work during furlough and have not accepted that there was any pre-determination of the outcome of the 13 July meeting. Nor do we do find any issue with Mr Cooper's attendance at that meeting. The tribunal accepts that the disciplinary policy was not followed but do not accept that was any concern of the claimant, and he was unaware of it, at the point he resigned. Although some breaches of the disciplinary policy might be relatively serious in some circumstances, in this case, they do not amount to such a serious breach in the circumstances of this case. Neither singly nor cumulatively has there been a fundamental breach of the claimant's contract of employment. All the indications from the respondent were to the effect that it expected the employment to continue.

78. Turning then to whether the claimant terminated his employment in response to such breaches, we accept the claimant was upset about the warning being given to him, but we also think he was upset in more general terms about being spoken to about his performance. On balance, the tribunal finds that the claimant did terminate his employment because of the meeting on 13 July and not because he was about to set up in any business. However, there was no breach of his employment contract for him to resign in response to. There is no real question about any delay as the resigned very soon after the meeting.

79. The next question is whether his constructive dismissal was unfair because it was for the making of a protected disclosure.

80. First, we consider whether there was a protected public interest disclosure. This is a difficult question because what the claimant said does make reference to the illegality of working under the furlough scheme which, on the face of it, would appear to be the disclosure of information which tends to show either a crime or, possibly, a breach of a legal obligation.

81. However, the test also requires that the disclosure is, in the reasonable belief of the claimant, in the public interest and this is where the tribunal had some concerns. There is really no evidence that the claimant did believe

that this was a matter in the public interest. He did make reference to it being uncomfortable for himself and for the respondent but, when the tribunal considered the context of this remark, it was in relation to the comment about his work on images which was during furlough. It was not something he had made any reference to before that concern was raised and reads more as an explanation or excuse for what was being mentioned. There is no real evidence that what he said was, in his reasonable belief, in the public interest. Rather he was defending himself when the matter of something done in furlough was raised. The tribunal finds that there was no protected disclosure.

82. However, in case we are wrong about that, and there was such a public interest disclosure, we go on and deal with the allegations that follow.

83. The first question is whether the written warning was a detriment. The claimant himself accepted when he gave evidence, that he was not saying that the oral warning was because he had made reference to working during furlough. Given the tribunal's finding that the written warning was in fact a mistake, it cannot be said that it was a detriment for that reason and there is no evidence that it was in any way connected.

84. Next the tribunal considers the question of the post-employment detriments with respect to letters in November 2020, February and June 2021 (the last two being the subjects of the amendment). The tribunal cannot find any evidence whatsoever that there was any connection between concerns being raised by the respondent in relation to its business interests contained within those letters and the disclosure of Facebook messages and what the claimant said about working during furlough. Again, the claimant himself acknowledged that in his evidence. None of the claimant's evidence pointed to him believing that there was any connection between the matter he raised about working in furlough and any of these alleged detriments. What the claimant said had no material influence on any of the alleged detriments.

85. Finally, the tribunal must consider whether the principal reason for the dismissal, if there was one, was because he had raised a public interest disclosure. The tribunal has found no dismissal and, for completeness, adds that there was no connection between what the claimant said about working during furlough had any connection with what occurred after the 13 July meeting.

86. The claimant's claims must fail and are dismissed.

Employment Judge Manley

Date: 23/12/2021

Sent to the parties on: 6/1/2022

N Gotecha

For the Tribunal Office